9-2022

The Saudi Judge's Discretion in Liquidated Damage Clauses: An Applied Analytical Study in Light of Islamic Sharia Law

Salman Mufleh R. Al-Kahtani

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Salman Mufleh R. Al-Kahtani

Submitted to the faculty of the Indiana University Maurer School of Law
in partial fulfillment of the requirements for the degree
Doctor of Juridical Science
September 2022

Accepted by the faculty, Indian University, Maurer School of Law, in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

Doctoral committee

Donald H. Gjerdingen, Chairperson

Professor of Law, Indiana University Maurer School of Law

Jody Lyneé Madeira, Second Reader

Professor of Law and Louis F. Niezer Faculty Fellow, Co-Director, Center for Law, Society & Culture, Indiana University Maurer School of Law.

Gabrielle L. Goodwin, Third Reader

Professor of Law, Director of the Graduate Legal Studies, at Indiana University Maurer School of Law.

Date of Defense: September/2022

بِسْمِ ٱللَّهِ ٱلرَّحْمَٰنِ ٱلرَّحِيمِ

Allah said:

"**O you who have believed, fulfill all contracts.***"* (1)
Surah Al-Mā'idah

قال الله تعالي:

(يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ أَوۡفُواْ بِٱلۡعُقُودِۚ)
سورة المائدة (1)

The Prophet Muhammad ﷺ said:

"Muslims are bound by their conditions, except for a condition that forbids what is permissible or a condition that permits what is forbidden.*"*
Jami` Al-Tirmidhi

قال رسول الله ﷺ:

"المسلمون عند شروطهم إلا شرطًا حَرَّمَ حلالًا أو شرطًا أَحَلَّ حرامًا."

رواة الترمذي

Acknowledgments

I thank Allah first for giving me this opportunity to complete my graduate studies at a prestigious university such as Indiana University, which will have a positive impact on my academic and practical life in the future.

I also thank my country's government for supporting me to complete this scientific trip.

My sincere thanks and gratitude I extend to Professor Donald H. Gjerdingen, the Chairperson, for his support, and insightful guidance throughout the journey of overseeing my dissertation. I am proud that my dissertation was under his supervision.

My gratitude also extends to the committee's second reader, Professor Jody Lyneé Madeira, for her valuable guidance and advisement on the field study within my dissertation.

Also, my gratitude also extends to the committee's third reader, Professor Gabrielle L. Goodwin for her academic support from my first day at Maurer School of Law and her guidance during difficult times.

I want to express my sincere gratitude to Dean Lesley E. Davis for continually supporting me throughout my study journey.

Finally, I would like to thank the Office of Graduate Legal Studies and International Programs, and the Maurer School of Law at Indiana University, which was always a great help to me.

Dedication

I would like to dedicate this work to my loving mother and father. I also would like to dedicate this work to my beloved wife and my lovely children for their support and encouragement.

Contents

Salman Mufleh R. Al-Kahtani

THE SAUDI JUDGE'S DISCRETION IN LIQUIDATED DAMAGES CLAUSES: AN APPLIED ANALYTICAL STUDY IN LIGHT OF ISLAMIC SHARIA LAW

This dissertation studies the treatment by Saudi judges under Islamic Sharia law of liquidated damages clauses in contracts, a critical part of modern commercial transactions.

After introducing the basic and secondary sources of Islamic law and discussing the current treatment of the liquidated damages clause by Saudi judges according to general Islamic rules and the four jurisprudence schools, this dissertation demonstrates that Saudi judges have broad discretion in applying jurisprudence rules, particularly Hanbali jurisprudence, the applicable jurisprudence in the Saudi courts.

Numerous interpretations of the same jurisprudential rule exist, resulting in multiple judicial rulings for the same jurisprudential rule. Among factors affecting the judicial rulings are the impact of the judge's cultural and social background, the judge's tendency not to rule on moral compensation, and his strictness in scrutinizing and recognizing the evidence of damages when ruling on compensation in general and in cases of the liquidated damages clause in particular, and the scarcity of ruling compensation for future damages along with the role that the Saudi judge plays in selecting applicable legal rules.

This dissertation presents a survey and field study of Saudi judges' positions on the liquidated damages clause and contains it in contracts. The survey indicates that the Saudi judge has broad discretion when considering the liquidated damages clause. There are differences among the judges with regard to the liquidated damages clause depending on the type of contract included in it. The Saudi judge applies the theoretical aspects of legal texts and jurisprudence

rules to the facts and practical issues related to the liquidated damages clause influenced by fatwa.

In response, this dissertation considers several possible solutions. These include codifying jurisprudence provisions; notating judicial rulings; and requiring Saudi judges to apply them, particularly in cases of the liquidated damages clause; issuing judicial journals and notations to increase transparency; and documenting contracts that include the liquidated damages clause to make them binding without the need for a court ruling.

Finally, the dissertation propose recommendations that, if endorsed by the Kingdom's judicial authorities, will help limit the judge's discretionary authority and facilitate judgment in estimating the liquidated damages clause as agreed upon by the contracting parties. These include codifying the provisions of Islamic jurisprudence in the form of sequenced, arranged legal articles and provisions related to contracts and the conditions they contain, including the liquidated damages clause. The importance of establishing judicial principles or a legislative code becomes apparent in terms of the main mechanism for how a judge exercises his discretion when dealing with a vague legal text or rule that requires interpretation or contradicts another rule or principle. It is important to emphasize parties' responsibilities to state the functionality of the liquidated damages clause in the contract, to continue the notation of judicial rulings and publishing, and expand notarized contracts that include the liquidated damages clause as an executive document to limit the discretionary authority of judges when considering what the parties have agreed upon.

Keywords

liquidated damages clause – liquidated damages – sources of Islamic law – Sharia – Discretionary authority – Saudi judge – jurisprudential rules – judicial precedents – codification of jurisprudential rules – notation of judicial rulings

Introduction

With the recent expansion of international trade, provisions in contracts for liquidated damages have increased in importance. This is particularly true for Saudi Arabia. While liquidated damages clauses have traditionally been used in common law and civil law, they raise issues for Islamic law when applied in the Saudi courts. Parties always seek to reduce disputes regarding contractual obligations before the judge to avoid litigation drawbacks in terms of lengthy judicial procedures and intervention of a judge that may not reflect the contractual parties' intentions.

The legal system of the Kingdom of Saudi Arabia is based on Sharia law.[1] This provides the basis for all Saudi laws. However, it is an un-codified law system derived from Sharia sources, including basic sources and secondary sources.

In addition, there are four main schools of jurisprudence in Sharia: Hanbali, Hanafi, Maliki, and Shafi'i. Each school interprets Sharia's basic and secondary sources,[2] which influence Saudi laws, international contracts, and treaties that the Kingdom is a part of.[3]

Liquidated damages clauses have taken on increased use since a fatwa was issued by the Council of Senior Scholars in the Kingdom in 1974.[4] This allowed liquidated damages clauses under certain conditions.

In recent years, liquidated damages clauses have been increasingly used in Saudi Arabia. This has partly been because parties, particularly those in international contracts, want to increase

[1] International and Comparative Law at The Hague, 1932.
[2] Secondary sources of Sharia law include *Qiyas* [analogical reason], *Istihsan* [juristic discretion], *Al-Maslahah Al-Mursalah* [absolute interest], *Ijtihad* [inference], and *Urff* [local custom].
[3] The Basic Law of Saudi Arabia 1992 (also known as the Constitution), Chapter 2: Monarchy, Article 5 indicates the transition of power among the sons of the founder King, King Abdulaziz. It has been formulated based on tribal customs.
[4] Fatwa of the Council of Senior Scholars in Saudi Arabia No. 25 issued on August 27, 1974.

certainty in commercial agreements, reduce delay, and avoid litigation. As a result, each party wants to know the exact compensation due if contracts are delayed or breached.[5]

This dissertation addresses a critical feature of using liquidated damages clauses in Saudi Arabia: judges in Saudi courts, deciding cases, can use any of four Islamic schools of jurisprudence. As a result, rulings may differ in cases with similar facts.

Also, the dissertation highlights two aspects of this for liquidated damages: (1) the broad discretion given to judges by Sharia law allows them to rule on tort and contract cases without restrictions. Further, each judge has their own jurisprudence background and legal knowledge, which may lead to different interpretations; (2) judges can revise liquidated damages clauses and the compensation amount. Consequently, the judicial rulings might differ from court to court even if the cases have similar trends in their facts.

1. Significance of the Research

The liquidated damages clause in Saudi contracts is governed by Sharia. However, the most important principles in this law, as mentioned earlier, are in the Qur'an, for example, "O ye who believe! Fulfill all obligations."[6] Also, in the Sunnah, Prophet Muhammad ﷺ said: "Muslims stick to their conditions,"[7] and the agreements must be kept. The principle refers to contracts signed between private parties, which states that contained clauses in the contract are binding for both parties. Therefore, the terms of contract imply that a failure to comply with the respective obligations constitutes a breach of contract.

[5] 2 AL-ZARQA, MUSTAFA AHMED, ALMADKHAL ALFIQHIU ALAAM THE GENERAL JURISPRUDENTIAL INTRODUCTION 760 (Beirut, Dar Al-Fikr 1990).
[6] *Surah Al-Mâ'idah*:1.
[7] *Sunan Abi Dawud*: 3594.

In recent years, Saudi Arabia also has been going through a great economic transition, especially in the current King Salman era. He has undertaken significant economic transformations that deal with both domestic and foreign affairs of the Kingdom. Among his major pledges are the Saudi National Transformation Program 2020 and Saudi Vision 2030, both of which focus on economic empowerment.

These plans are essential to the future of Saudi Arabia and to other countries that are allied with the Saudi government. Significant economic changes have occurred since the visit of the Saudi king to the United States and his meeting with President Obama in September 2015. That meeting revealed a new economic plan, which includes a provision that foreign companies are allowed to invest their money in the Saudi markets without having a Saudi partnership. US companies were the first recipients of direct marketing licenses.[8]

This study focuses on ways to reform the Saudi legal system to accommodate the needs of new investors. Previously, investors have been reluctant because of ambiguity linked to the broad discretion given judges in Saudi courts.

This dissertation explores the relationships between liquidated damages and contractual liability under the Saudi judge's discretion. It highlights contractual liability where the injured party asks the court to enforce a liquidated damages clause. It also highlights the role of discretion by Saudi judges in assessing damages.

The Saudi Vision 2030 plan, which depicts the economic stability and effective governance of Saudi Arabia, emphasizes foreign investment policies.[9] Also, the US-Saudi Business Council reviewed this document and discussed several topics and issues, such as improving the investment environment. Nevertheless, the joint business council reviews the

[8] Such as Dow Chemical Company, Minnesota Mining and Manufacturing Company (3M), and Pfizer.
[9] "Saudi Vision 2030," http://vision2030.gov.sa/download/file/fid/417, Saudi Gov., 25 Apr. 2016, p. 45.

diversification of the Saudi national economy concerning the growth of the local sectors and privatization regarding increased private sector participation.[10]

Finally, the use of liquidated damages in contracts matters because it has rarely been researched by academics. As a result, there is an opportunity to offer solutions to help the Saudi legal system and support Saudi Vision 2030 and foreign investment. If we suppose parties can better anticipate how to enforce liquidated damages clauses in Saudi contracts. In that case, there will be a more consistent and dependable economic activity for all parties' benefit.

Despite the practical importance of the liquidated damages clause, resorting to it by parties to contracts in the Kingdom has encountered some difficulties. This is in part because of the discretionary authority of Saudi judges when considering the provisions of Sharia, which requires examining this issue from a theoretical and practical point of view and determining whether the compensation agreed upon in the contract should be increased or decreased.

The study lies in the need to include the liquidated damages clause in many contracts because of its advantages in implementing obligations, reducing disputes, and speeding up obtainment of compensation in case of breach of contracts. However, doubts arise about the legality of this condition before the Saudi judiciary and what the discretion of a Saudi judge is. This is particularly the case in his deciding compensatory amounts in cases of breach or delay in the execution of contract provisions. Given the great importance of this subject, the matter requires knowing the liquidated damages clause in Sharia and the legitimacy of its application in contracts because, again, Sharia is the general law in the Kingdom of Saudi Arabia.

Also, there is a need for those dealing with economic activities inside and outside of the Kingdom to know the extent of the mandatory financial compensation agreed upon by the parties

[10] *US-Saudi Business Council Reviews Kingdom's Vision 2030*, SAUDI PRESS AGENCY (25 June 25, 2016), https://www.spa.gov.sa/viewstory.php?newsid=1513697.

to contracts when the matter needs to be presented to the judiciary, especially when delays in implementing provisions occur, so that each party to the contract is aware of this matter.

2. Research Questions

The research aims to study the discretionary power of the Saudi judge in ruling on the liquidated damages clause by answering the following questions:

1- What are the sources on which the discretionary authority of the judge in Saudi courts depends?

2- What is the conditioning of the liquidated damages clause in Islamic jurisprudence and the Saudi judiciary?

3- What is the extent of the discretionary authority of the Saudi judge in responding to the contracting parties in the liquidated damages clause?

4- What is the extent of a Saudi judge's reliance on Islamic schools of jurisprudence when considering this clause?

5- What is the position of the Saudi judge regarding ruling on the value of the liquidated damages clause?

6- What recommendations can help judges determine the value of the liquidated damages clause?

3. Research Methodology

I utilize the descriptive, inductive, and analytical approach toward jurisprudential texts and a field study of judges to explain the concept of the liquated damages clause in Islamic law and the discretionary authority of the Saudi judge when ruling on it. I will also identify the positions of the four Islamic schools of jurisprudence with the legal rooting of the liquidated

damages clause, to show the extent of the link between what Islamic jurisprudence decrees and what the Saudi judge applies.

The Saudi judge, with regard analyzing the liquidated damages clause and drawing conclusions from it, has a duty to support the application of what is agreed upon between the parties of the contract in a manner that enhances the improvement of the judicial environment in the Kingdom and contributes to attracting foreign investments to it.

4. Research Roadmap

The thesis is divided into an introduction and five chapters, including the conclusion.

Chapter One presents an introduction that helps the reader to understand Islamic law and its basic and secondary sources, which the Saudi judge relies upon for issuing his rulings in cases that include the liquidated damages clause. Also, this chapter addresses an overview of the Saudi judicial system and the methods for appointing a judge in the Kingdom.

Chapter Two sheds light on the discretionary authority of the Saudi judge and the numerous interpretations of Islamic sources and jurisprudential rules on which the judge relies in adjudication disputes in Saudi courts, the impact of the judge's cultural and social background on a judicial ruling, compensation for moral and future damages cases, the strictness in accepting compensation requests, and the role of precedents and judicial principles in limiting the discretionary authority of the judge.

Chapter Three deals with field study conducted by the researcher on some judges in the Kingdom which aim at identifying their opinions in ruling liquidated damages clause cases.

Chapter Four presents some solutions to limit the broad discretionary authority of the Saudi judge when considering cases of the liquidated damages clause such as codifying

jurisprudence provisions, notating judicial rulings, issuing judicial journals, and documenting contracts that include the liquidated damages clause.

Chapter Five, the conclusion, contains the results and recommendations that have emerged from this research.

Chapter One: An Introduction to Islamic Law

The sources of legislation in Islamic Sharia include both sources agreed upon by the jurists and those that are not agreed upon, as the views of the four schools differed in their consideration and authority.

Therefore, we find that the sources in Islamic law are divided in terms of whether or not they are agreed upon into three categories:[11]

A. Agreed upon sources, which are the Qur'an and the Sunnah.

B. Sources where disagreement is weak, which is consensus and analogy.

C. Sources in which there is strong disagreement, which are the words of the Companions.

The juristic preference, public good, and Prior Legislation of Those Before Us, and Blocking Pretexts, and the Absolute Interest, and Custom.

These sources or evidence are divided into two parts:

A. Sources or transferable evidence that depends on the text or the transmitted words: the Qur'an, the Sunnah, the consensus, the sayings of the Companions, and previous Islamic laws and customs.

B. Mental sources or evidence that depends on the mind of the jurist, his knowledge and his opinion, based on a text or a transmitted writing. They are Analogies, Absolute Interest, Blocking Pretexts, juristic preference, and the public good.

These sources or legal evidence are also divided in terms of the strength of their evidence and divided into definitive evidence and presumptive evidence:

- *Definitive evidence* means everything that indicates a ruling on the facts of the incident or the issue without a possibility of contradicting it; for example, God's saying in the Qur'an:

[11] AL-SALAMI, IYAD, ASUL AL-IFQH AL-ADHI LAYASAE AL-FAQIH JAHLAH, DAR AL-TADMURIYA 20 and the pages thereafter (Riyadh, Saudi Arabia, 1st ed. 1426 AH-2005 AD).

"fasting for three days during the Hajj and seven when you have returned, making ten in all — The indication of the number here on the days to be fasted is a definitive indicator."

- *Presumptive evidence* is everything that supports a ruling on the incident or issue, although another interpretation is possible, but it is unlikely, because of, for example, the word of Allah in the Qur'an (e.g., "O you who believe! Do not render void your charities by [a show of] obligation and injury."[12] So the apparent meaning of this text indicates that both pain and harm invalidate charity alone. But there is another possibility of what is meant by this text, which is a likely possibility: that charity is invalidated only by combining the two things, pain and harm, and not just one of them.

1.1. The basic sources of Islamic law

The basic sources of Islamic law consists of the Holy Qur'an and the Sunnah and the consensus and analogy these sources as they were stated in the Qur'an in the verse "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger." The part "O ye who believe, Obey Allah" refers to the Qur'an, and "obey the Messenger" refers to (the Sunnah) and those in authority among you (the consensus). We will discuss these sources in some detail:

1.1.1. The Qur'an

The Qur'an is defined as the word of God, the Almighty, as revealed in the Arabic language to his Prophet Muhammad ﷺ through the angel Gabriel, the worshiper with its

[12] *Qur'an Al-Bagrah*:264.

recitation, transmitted by frequency, and combined between the two covers of the Holy Qur'an, beginning with Surah Al-Fatihah and ending with Surah Al-Nas.[13]

The revelations to the Prophet Muhammad ﷺ were recorded in a clear Arabic language, repeated and narrated over a period of twenty-three years, and the worshiper with its wording and meaning; And it is preserved from any change or alteration,[14] because of the Almighty's saying: "It is we who have sent down the Remembrance, and we will preserve it."[15] The Qur'an consists of 114 Surahs, and its verses are 6236 verses, and the number of its letters is 320,015 and the number of words about 77,439 words.

The authenticity of the Qur'an as a primary source of Islamic legislation is unanimously agreed upon by the Companions and those who followed after them and the diligent imams.[16]

Verses have shown the Qur'an itself a record of what the Almighty said: "And We have revealed to you this perfect Book comprising the truth and wisdom, fulfilling [the prophecies of the Scripture]. Which was present before it and stands as a guardian over it, then judge between them according to that which Allah has revealed in the Qur'an, and do not deviate from the truth that has come to you in order to follow their low desires. For each one of you did We prescribe a spiritual law and a well-defined way [a code in secular matters],[17] and it is the source of light and guidance." God Almighty said: "And We revealed the Book [the Qur'an] to you as an explanation of everything, as guidance, as mercy, and good news for the Muslims."[18]

[13] Al-Amidi Ali bin Muhammad, irshad alfuhul 'iilaa tahqiq alhaqi min eilm alasuli, Dar al-Kutub, p. 26.
[14] Al-Ghazali, Muhammad, Al-Mustafa fi 'Ilm Usul, Dar al-Kutub al-Ilmiyya, vol. 1, p. 65, Beirut, 1st ed., 1993.
[15] *Surah Al-Hijr*:9.
[16] AL-ZUHAILI, WAHBA, THE FUNDAMENTALS OF ISLAMIC JURISPRUDENCE 422 (Dar Al-Fikr, Damascus 1996).
[17] *Surah Al-Ma'idah*:48.
[18] *Surah Al Nahl*:89.

All jurists and other diligent imams refer to the Qur'an to derive legal rulings, and they do not resort to other sources, except when there is no ruling for the issue they are looking for in the texts of the Qur'an.

The Qur'an is the first reference for Islamic jurisprudence. If a matter is presented to a judge, he will first of all refer to the Qur'an to search for its ruling in it. If its ruling is found, he applies it and does not refer to anything else. What the Qur'an deems permissible is permissible, and what it forbids is forbidden. And if he did not find the rule on the issue in the Qur'an, he moves to other sources in light of what was mentioned in the Qur'an from the general rules.

The Qur'an contains two types of rulings: definitive texts and presumptive texts related to ruling on the issue at hand. A definitive text denotes a specific meaning that can be plainly understood and does not need interpretation and there is no room for understanding another meaning. A presumptive text has a specific meaning but may be interpreted and one may be diverted from this meaning and something else is intended from it.[19] So, the connotation may have assumed more than one ruling, and one of the two possibilities may outweigh other meanings to the same jurist or judge.[20]

This presumptive section is often found in subsidiary issues, and it has a great impact on *Ijtihad*, so that we often find differences of opinion among scholars, because of their disagreement in understanding the texts and the hadith, and the jurists' different understanding of issues before them, and the ability to derive their rulings, and this is a mercy for people and ease for them.[21]

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[19] KHALIFA, IBRAHIM ABDEL RAHMAN, THE SCIENCE OF FUNDAMENTALS OF ISLAMIC JURISPRUDENCE 32 (House of Culture for Publishing and Distribution, Amman, 1, 1995).
[20] Al-Amidi, Ali, Al-Hakam, I.D., p. 11 and p. 30.
[21] KHALIFA, IBRAHIM ABDUL RAHMAN, IHSAN IN INVESTIGATIONS FROM THE SCIENCES OF THE QUR'AN 301-305, 1, 2002.

The texts of the Qur'an are divided in terms of generality and detail into four sections. The first section includes general legislation, most of which is concerned with worship. The second section includes detailed legislation in a limited way, such as provisions related to self-defense and international relations The third section includes detailed legislation, such as provisions related to retribution and limits, personal status and inheritance. The fourth section includes legislation or provisions such related to transactions and contracts.

Legislation in the Qur'an is built on gradualness, facilitation, and removal of embarrassment. Muslims view the Qur'an as a book of legislation and of how to live one's life, in the past, present and future; The past consists of the stories of the ancients since the beginning of creation, through the conflicts between the prophets and their peoples, and includes legislation regulating life today and in the future in terms of our ability to organize and treat the human situation on earth.[22]

The legal rulings in the Qur'an concerns commanding an action or refraining from it, or the choice between doing and leaving,[23] and it is divided into five sections: obligation, which is what a legislator is asked to do on the basis of a divine command or instruction,[24] as when the Almighty says "be constant in prayer"[25] and the person is obligated according to preponderance and priority, not in terms of compulsion,[26] such as the Almighty's saying: "O you who believe! when you transact a loan for a stipulated term, then write it down."[27] The command to write

[22] HUSSEIN, MUHAMMAD KHADER, SUMMARY OF ISLAMIC LEGISLATION 2 (Dar al-Qalam, Kuwait, 4th ed., 1404 AH.)
[23]Al-Tabari, Abu Jaafar Muhammad bin Jarir, Jami' Al-Bayan and Tafseer Al- Qur'an, Amman, Dar Al-Alam, Beirut, Dar Ibn Hazm, 1, 2002 AD, p. 317
[24] Al-Samarqandi, Alaa al-Din Muhammad bin Ahmed, Mezan Al-Usoul fe Nataeg AlOkol fe Usul al-Fiqh, I 1, 1987 AD, Vol. 1, p. 124
[25] *Surah Al-Baqarah*:83
[26] Samarkandi, Mezan AlUsul, previous reference, part 1, p. 26
[27] *Surah Al-Baqarah*:282

down the debt is according to the Almighty's words, "Write it," indicating the obligation to write down the debt.

They found a presumption that transforms this matter from obligation to recommendation, which is Allah's saying: "If one of you entrusts something to another let him who is entrusted deliver his trust," [28] and "[s]o he delegates to the creditor and debtor to write the debt to preserve their rights, and if they trust each other then there is no sin if they do not write the debt."[29] And the forbidden: which is what God asked to refrain from doing in the face of obligation,[30] as the Almighty said: "Allah hath permitted trade and forbidden Usury".[31]

And what is *Makruh*: which is what Allah asks a person to leave on a priority and preponderance basis, not as a matter of obligation.[32]

Permissible: This is when God gives the responsible person the choice between doing and not doing something,[33] as Allah says, "Who has made unlawful Allah's beautiful things of adornment and elegance which He has produced for His servants and the delicious and pure things of (His) providing."[34]

There are three divisions of rulings in the Qur'an:[35]

1. Faith provisions: related to the obligatory belief in Allah, His angels, books, and messengers, as well as the Last Day.

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[28] *Surah Al-Baqarah*:283
[29] 3 AL-QURTUBI, MUHAMMAD BIN AHMED AL-ANSARI, AL-JAMEA LAHKAM AL QUR'AN 103 (Manahil Al-Irfan Foundation, Beirut).
[30] Ibn Hazm, Al-Hakam, previous reference, vol. 3, p. 321. Khalifa, Ibrahim Abdul Rahman, The Science of Fundamentals of Islamic Jurisprudence, previous reference, p. 276. Al-Zarkashi, Abu Abdullah Badr al-Din, Al-Burhan fi Ulum al-Qur'an, i. 1, Dar Revival of Arabic Books 1957 AD, vol. 2, p. 134.
[31] *Surah Al-Baghdadi*:275.
[32] Khalifa, Ibrahim Abdul Rahman, The Science of Islamic Jurisprudence, previous reference, p. 280.
[33] Al-Baghdadi, Abu Al-Wafa Ali bin Aqeel, Al-Mawadi fi Usul Al-Fiqh, Al-Risala Foundation, 1, 1999 AD, vol. 1, p. 28.
[34] *Surah Al-A'raf*:32.
[35] Al-Qurtubi, The Collector of the Provisions of the Qur'an, previous reference, part 1, p. 110. Al-Douri, Qahtan Abdul Rahman, Islamic Creed and its Doctrines, Amman, Dar Al-Ulum for Publishing and Distribution, 1, 2007 AD, p. 415. Disagreement, Aelm Usul al-Fiqh, previous reference, p. 32.

2. Moral provisions: relating to the virtues a person strives for and the virtues he must give up as vices.[36] God also proclaimed: *"*Allah commands justice, goodness, and generosity towards relatives. And He forbids immorality, injustice, and oppression. He instructs you so that you may remember."[37]

Practical provisions: related to a person's words, deeds, contracts and other actions done.[38] The Qur'an is considered the first source of Sharia, and the ultimate reference to which all sources refer. The Qur'an contains many and varied provisions[39] which are necessary for humanity; to regulate man's relationship with his Creator, his relationship with others, and with himself, and his relationship with all areas of life, and any neglect of these relationships will reflect negatively on individuals and groups.

The legal practical rulings in the Qur'an are divided into:[40]

Worship provisions the Qur'an commands, such as establishing prayers, giving alms, performing the pilgrimage to Mecca, and fasting.[41] The religious and personal order of the Qur'an is comprehensive; it contains commandments about such matters as, prayer and the other pillars of Islam, as in *Hajj*,[42] *Zakat*,[43], and Fasting during *Ramadan*. Details were left to the

[36] AL-MAIDANI, ABDUL RAHMAN HASSAN, ISLAMIC ETHICS AND ITS FOUNDATIONS, PT. 1 35 (Damascus, Dar Al-Qalam, 4th ed. 1996).
[37] *Surah An-Nahl*:90.
[38] Al-Shawkani, Muhammad bin Ali, Ershad AlTefat Ela Etefak Al-sharae Ala Al-Tawheed wa AlMoaad Wa AlNobaawat , Beirut, Dar Al-Kutub Al-Ilmiyya, i 1, 1984 AD, vol. 1, p. 4.
[39] Al-Baydawi, Tafsir Al-Baydawi, Beirut, Dar Al-Fikr, 1996 AD, part 5, p. 549.
[40] Al-Suyuti, Abu Al-Fadl Jalal Al-Din, Proficiency in the Sciences of the Qur'an, Beirut, Dar Al-Kutub Al-Ilmiyya, Volume 2, p. 278. Ibn al-Arabi, Ahkam al-Qur'an, Dar al-Fikr for printing, vol. 1, p. 17. Al-Zuhaili, and Heba, AlTafseer AlMunir Fe Alakida wa AlSharia Wa Al-Manhag, Damascus, Dar al-Fikr, vol. 17, p. 159.
[41] Al-Qurtubi, previous reference, vol. 4, p. 142
[42] Pilgrimage to Mecca.
[43] Charity.

purified Sunnah of the Prophet. The Messenger of God ﷺ said: “Pray as you have seen me praying.”[44] And he ﷺ, said: “Take your rituals from me.”[45]

1. Family rulings: The rulings the Qur’an state that an individual is a member of a family, from the time he is a fetus until his death. The Qur’an has detailed these provisions in a manner unlike others due to the importance of the family as the nucleus of society. It clarifies an individual’s rights and obligations: from the right to be breastfed, and extending to matters like, custody, guardianship, upbringing, education, marriage, divorce, alimony, wills, and other issues related to family and personal status.[46]
2. Financial Transactions: These are the rulings that show the process for acquiring property, and the transfer of rights between individuals. The Qur’an contains a statement of principles and provisions that do not change over time and place, including compromise in trade-offs contracts: “O you who believe! Do not consume each other’s wealth illicitly, but trade by mutual consent. And do not kill yourselves, for Allah is Merciful towards you.”[47] Also included are charitable donations, and the fulfillment of related obligations and actions, Allah Almighty said: “O you who have believed, fulfill all contracts”[48] and documentation of contracts in order to prevent discounts. The Almighty said: “O you who believe! when you transact a loan for a stipulated term, then write it down. Let a scribe write (it) in your presence in (term of) equity and fairness. The scribe shall not refuse to write down.”[49] As for the debtor’s performance of trusts, the

[44] Al-Bukhari, Muhammad bin Ismail Abu Abdullah, AlJamea Al-Sahih, Beirut, Dar Ibn Kathir, 3rd edition, 1987, vol. 5, p. 2278, Hadith No. 5662.
[45] Al-Bayhaqi, Ahmad Bin Al-Hussein, Sunan Al-Bayhaqi Al-Kubra. Makkah Al-Mukarramah, Dar Al-Baz Library, 1994 AD. C5, p. 225. Hadith No. 9307.
[46] Al-Zalami, Usul alfiqh al'iislamii fi nasijih aljadida, Baghdad, 1991 AD, Part 1, p. 28 and more.
[47] *Al Nisa'*:29.
[48] *Al Ma'idah*:1.
[49] *Al Baqara*:282.

Almighty said: “God commands you to render trusts to those who are entitled to them.”[50] The Qur’an left the rest of the details of contracts, their provisions and foundations, and what is related to the development of economic relations for the Prophet’s Sunnah and the writings and rulings of jurists.[51]

3. Constitutional Provisions: The Qur’an mentions constitutional law in general, including the relationship of the ruler with the ruled, and with other people of power and influence. In these relations, the Qur’an commanded that there should be four main foundations of rule:[52]

1) To work with the principle of consultation in every decision for the public interest. The Almighty said, “and consult them in the conduct of affairs,[53] and the Almighty said, “and conduct their affairs by mutual consultation.”[54]

2) To pursue justice in every judicial ruling, which promotes dignity for the individual. The Almighty said, “Allah commands justice, goodness, and generosity.[55]”

3) To strive for equality in rights and duties; the Almighty said: “O, people! We created you from a male and a female, and We made you races and tribes, so that you may come to know one another. The best among you before Allah is the most righteous. Allah is Knowing and Aware.”[56]

[50] *Al Nisa*:58.
[51] Khallaf, Aelm Usul al-Fiqh, previous reference, p. 23.
[52] Al-Zalami, Mustafa Ibrahim, Usul alfiqh al'iislamii fi nasijih aljadida, previous reference, Part 1, p. 30
[53] *Al Imran*:159.
[54] *Al Shura*:38.
[55] *Al Nahl*:90.
[56] *Al Hujurat*:13.

4) To obey the governor in matters where there can be no disobedience; the Almighty said: “You who believe! Obey Allah, and obey the Messenger, and those in authority among you.”[57]

5) To promote peace between nations. [58] The Qur’an clarifies the relations of states with each other and considers the basis for relations to be peace; the Almighty said: “O you who believe! Enter into submission, wholeheartedly, and do not follow Satan’s footsteps. He is your sworn enemy.”[59] There may be no resorting to war except in defense of the faith, faith, symptoms and money, mind, and life. The Almighty said “Whoever commits aggression against you, retaliate against him in the same measure as he has committed against you. And be mindful of Allah and know that Allah is with the righteous.”[60]

In the event of defense against an attack, he ordered us to turn to peace, the Almighty said: “But if they incline towards peace, then incline towards it, and put your trust in Allah. He is the Hearer, the Knower.” [61]

6) Public financial provisions,[62] meaning provisions related to the regulation of financial issues between the rich and the poor and between the state and individuals, such as property rights.

7) Provisions for crimes and penalties:[63] they are divided into three sections.

(A) *Hudud* crimes are those in which the interests necessary for human life are violated, and the Qur’an has defined crimes and specified punishments for them. The judge

[57] *Al Nisa*:59.
[58] Al-Zalami, Usul alfiqh al'iislamii previous reference, Part 1, p. 31.
[59] *Al Baqarah*:208.
[60] *Al Baqarah*:194.
[61] *Al Anfal*:61.
[62] Khallaf, Aelm Usul al-Fiqh, previous reference, page 33.
[63] Odeh, Abdel Qader, Alltashrie Aljinayiyu Al'iislamiu mqarnaan bi Alqanun Alwadei, Beirut, Al-Resala Foundation, 13th ed., 1994 AD, p. 345. Al-Zalami, The Fundamentals of Islamic Jurisprudence, previous reference, Part 1, p. 25.

does not accept mitigation or stress for such crimes as adultery, slander, enmity, prostitution, and theft. The role of the judge is limited to making sure that there is evidence of the occurrence of the crime.

(B) Retribution crimes, in which a person's life or safety is infringed, and the punishment may be retribution or parental retribution because it is a common right between the state and the victim or his heirs; or obtaining blood money (financial compensation), or pardoning someone, which is something that is encouraged by Islamic law.

(C) Punishment crimes that are regulated by the legislative or judicial authority and judicial authority, including the following types:

- *Hudud* crimes are associated with suspicion, meaning every crime in which there is suspicion concerning lack of real evidence, in that case, the criminal charge will mutate into a disciplinary crime punishable by a penalty determined by the legislative authority, or the competent judge, such as the crime of adultery, if it is not proven by four witnesses, and the corruption of theft between spouses or between parents and offspring or in case of need and poverty.
- Crimes that are proven in the text and whose punishment is left to the legislative and judicial authorities, such as espionage, rape, bribery, and breach of trust.
- New Crimes: Sharia has permitted the ruler, in cooperation with others in power, the legislative and the judicial authorities to declare a crime every act that harms the people's interests, which is a crime punishable by a penalty commensurate with its scope and gravity.

The Qur'an follows three methods for explaining the rulings:[64]

[64] Khasawneh, Imad Abdul Karim, The Qur'an's Approach in Exposing Verses of Judgments, The Jordanian Journal of Islamic Studies, Volume Five, Issue (2/A), 1430 AH / 2009 AD.

1. The Qur'anic text mentions general rules and main principles of legislation: such as consultation; the Almighty said: "They should conduct their affairs by mutual consultation,"[65] and the fulfillment of obligations and contracts; the Almighty said: "O you who believe! Fulfill your obligations."[66] Given that the realities in society are always changing, there is room to apply the universal Qur'anic rule in a way that meets the needs of the people, as determined by jurists and judges in light of the primary and secondary sources of Islamic law.[67]
2. The Qur'anic text is detailed and clearly states specific rules, and the Prophet's Sunnah confirms this, such as the provisions of inheritance, the degree of punishment within the Sharia boundaries, process of divorcing a spouse, and the types of women barred from marrying.
3. The origin of the ruling in the Qur'an has been mentioned by means of a reference or phrase, and the Sunnah of the Prophet complements the rest of its rulings.[68]

The context of the Qur'anic text in referring to the rulings is done in a holistic manner in most cases, leaving the details to the Prophetic Sunnah and other sources of Sharia. If the meaning of the Qur'anic text is definitive, then there is no dispute about the application of that text. If the meaning of the Qur'anic text is in debated, jurists and judges might debate their understanding of that text. Textual interpretation is required to support or oppose a certain view is a good knowledge of the words of the Arabic language, and what was mentioned in the Sunnah and other sources of Sharia concerning evidence.

[65] *Surah Al-Shura*:38.
[66] *Surah Al-Ma'idah*:1.
[67] AZMY, TAHA EL-SAYED AHMED, ISLAMIC CULTURE 119 (2006).
[68] Al-Razi, AlTafseer Alkabeer vol. 4, p. 165.

1.1.2. The Sunnah

Jurists unanimously agree that the Prophet's Sunnah ﷺ constitutes the second source of Islamic law, and they cited the Qur'an itself as evidence for that, where Allah says, "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best and most suitable for final determination."[69]

And Allah also proclaimed: "It is not for any believer, man or woman, when Allah and His Messenger have decided on an issue, to have the liberty of choice in their decision."[70]

The Sunnah is defined as everything that was issued by the Prophet Muhammad ﷺ from saying, deed, acknowledgment, or attribute, other than what is found in the Qur'an.[71]

Types of Sunnah:[72]

Anecdotal Sunnah are found in the hadiths that the Messenger said in various purposes and occasions, such as his saying: "There should be neither harming nor reciprocating harm."[73]Another example is his saying, "The reward of deeds depends upon intentions and every person will get his reward according to what he has intended."[74]

The number of distinct hadiths of the Prophet in *Sahih al-Bukhari* and *Muslim*[75] amounts to four thousand, and these hadiths contain many provisions that regulate people's transactions.[76]

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[69] *Surah Al-Nisa*:59
[70] *Surah Al-Ahzab*:36.
[71] AL-BOUTI, MUHAMMAD, JURISPRUDENCE OF THE PROPHET'S BIOGRAPHY 350 and beyond, (Beirut, Dar Al-Fikr, 1991).
[72] MUHAMMAD AL-OTAIBI, THE ACTIONS OF THE MESSENGER, AND THE EVIDENCE FOR LEGAL RULINGS 21 and beyond (Beirut, Al-Resala Foundation, 6th ed. 2003).
[73] Narrated by Ibn Ibn Majah, *Hadith* No. 1909.
[74] Narrated by Al-Bukhari, Hadith No. 2529 and Muslim, *Hadith* No. 155.
[75] Two of the most famous hadith books.
[76] IBN AL-SALAH, INTRODUCTION TO IBN AL-SALAH 29 (Dar al-Fikr, Syria 1986).

Actual Sunnah are the actions that the Messenger did in his life after the revelation, such as praying five times daily, performing the ritual of *Hajj,* and insisting on at least one witness and the oath of the plaintiff in some disputes.

Declarative Sunnah is what the Prophet explicitly approved or kept silent about after something happened to his knowledge and in his time, or what he expressed indicating his approval and satisfaction, such as the Messenger's acknowledgment that physiognomy is a way to prove lineage.[77]

The relationship of the *Sunnah* with the Qur'an is one of complementarity. It reveals ambiguous rulings mentioned in the Qur'an, clarifies their meanings, and explains some of their words and phrases, or clarifies, or complements and confirms it. So, it interprets the general and its specialization and restricts and clarifies the absolute. The Qur'an lays down the general rules and foundations of legislation. The Sunnah clarifies, explains, completes, and confirms that. Therefore, the Sunnah has clarified many of the provisions of worship and transactions that are mentioned in the Qur'an but not detailed, such as how to pray, *zakat*, fasting, pilgrimage, and types of usury. Thus it circumscribes the absolute application of the Qur'an in, for example, the execution of legal punishments, or specifies the general Qur'anic text as a hadith: "The killer does not inherit anything," here specifying general information in the verses of inheritance.

The established prophetic *Sunnah* is an argument[78] that must be followed, as the Qur'an is, in deriving legal rulings. Many verses have been mentioned in the Qur'an that command obedience to the Prophet and the following of his Sunnah, just as the nation and all Islamic jurisprudence schools have unanimously agreed to prove the authenticity of the Prophet's

[77] MUHAMMAD ABU SHUHBA, AL-WASIT FI EULUM WA MUSTALAH AL-HADITHI 25 (Egypt, Dar al-Fikr al-Arabi).
[78] MUHAMMAD BIN ABDULLAH BAJAMAN, THE SUNNAH OF THE PROPHET, THE SECOND SOURCE OF ISLAMIC LEGISLATION AND ITS POSITION IN TERMS OF PROTEST AND ACTION 25-50 (Medina: King Fahd Complex for the Printing of the Noble Qur'an).

Sunnah and the obligation to act upon it as a second source of Islamic Sharia. Because Allah enjoined Muslims to obey the Prophet and his followers, and made obedience to the Messenger obedience to him, He commanded Muslims to return any matter in dispute to Allah and His Messenger in the clear Qur'an verse: "He who obeys the Messenger, obeys Allah."[79]

1.1.3. Ijma (Consensus)

In this section, we will address what is meant by "consensus" as well as its origin, conditions, types, and authority:

A- Definition: According to Sharia jurists, consensus arose from an agreement of scholars in the era following the death of the Prophet ﷺ, on a legal ruling toward an issue in which there is no text from the Qur'an and the prophetic Sunnah.[80] An example is the agreement of the Companions[81] to give a grandmother one-sixth of an inheritance, and to prevent the sale of fruits before they are ripe.

The consensus is the third source of Islamic legislation after the Qur'an and the Sunnah and was based on emerging issues that arose after the death of the Prophet. The consensus must be anchored on a foundation from the Qur'an and the Sunnah, which are the two main sources of Islamic legislation. Examples are the validity of the Murabaha sale[82] and the prohibition of cannabis and other drugs.[83]

B- The emergence of consensus in Islamic jurisprudence:

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[79] *Surah An-Nisa*:80.
[80] Al-Zarkashi, Abu Abdullah Badr Al-Din, Al-Bahr Al-Mohit fi Usul Al-Fiqh, Dar Al-Kitbi, 1, 1994 AD, vol. 6, p. 397
[81] In Islam, the Prophet's Companions are the followers of Muhammad who had personal contact with him.
[82] Murabaha is an Islamic financing structure that works as a sales contract, fixing the price of goods or items as required by a customer, inclusive of a pre-agreed profit margin.
[83] Al-Jizani, Muhammad bin Hussein, Maalem Usul al-Fiqh eind Ahl al-Sunnah wal-Jama`ah, Edition 1, 1427 AH, p. 159

There was no need for unanimity in the era of the Prophet but, afterwards, a consensus began to be needed and evolved.

The Era of the Companions[84]

The role of the Companions emerged after the death of the Messenger as they were looking at the texts and deduced from them by virtue of their knowledge of the Messenger, the reasons for revelation and the purposes of Sharia. This stage is considered important for the emergence of consensus.

If a matter was presented that had no ruling in the Qur'an or Sunnah, the senior jurists of the Companions would gather and consult with each other until they agreed among themselves, then agree on its ruling.

1- The era of the followers[85]

Because of the distribution of jurists and scholars from among the followers in many regions of the Islamic state after its expansion, the era of the followers often was not characterized by consensus on emerging issues, so the opinions of some jurists were disseminated. These jurists became interested in looking closely at hadith and science without focusing on asking for the consensus of followers on new developments and issues that did not exist in the eras of the Messenger or the Companions. Often there was no text that pertained to these issues , so the need was to find a rule or guidelines for jurists.

2- The stage of emergence of jurisprudence schools.

The beginning of arriving at a consensus appeared in the *Maliki* school, with Imam Malik's interest in the consensus of the people of Medina and in the Hanafi school with the

[84] By the Companions, it means everyone who met the Messenger of the people believing in him, followed him for a period of time, and died on his conversion to Islam.
[85] A follower is a person who meets a Companion without meeting the Messenger.

commitment of Imam Abu Hanifa and his desire for consensus among the people of Kufa. This was followed by the desire of each imam to adhere to the consensus of those who preceded him, and after that the circle of consensus began to expand little by little until it included all regions of the Islamic state.

In the second century AH, the desire to formulate legal rulings based on firm principles emerged, so the science of jurisprudence originated at the hands of Imam Muhammad bin Idris al-Shafi'i[86] in his book, the fundamentalist message, and he was relying on the four original sources, one of which the consensus to derive legal rulings.

The authoritative and mature consensus of the various schools of jurisprudence has been established as a source of Islamic legislation,[87] and it is not permissible for anyone from the late scholars to deviate from the unanimous consensus of the ancient jurists.[88] There was a gradual progression in reaching consensus. Each student of the imams of the legal schools followed and supported his sayings until the circle of consensus was gradually completed, and it became the third source of Islamic jurisprudence in formulating rulings, in addition to the Qur'an and the Sunnah. Yet jurists differ about how consensus occurred, according to three opinions:

The first, and majority, opinion believes that consensus was always possible during the era of the Companions generation and others.

The second opinion believes that the consensus is limited to the era of the Companions time only and not in other times.

[86] The founder of the Shafi'i School.
[87] Al-Ghazali, Al-Mustafa, previous reference, p. 1/112.
[88] KHALLAF, ABD AL-WAHHAB, TEALM ASUL ALFIQH 40 (Islamic Daawah Library, 8th ed.).

The third opinion believes that consensus is not possible because of the vastness of the Islamic realm and the divergence of qualified jurists, and therefore it was and is not possible to present all emerging issues that require jurisprudential solutions to all jurists.

I believe that the first opinion is the closest to the truth, especially given the existence of Islamic jurisprudence councils that consider emerging issues and develop solutions for them. Also, new means of communication have facilitated the meeting of competent jurists to consider emerging issues, where the consensus is held by the unanimity of the competent jurists at the time of the case, regardless of their age, country, or class.

C- Conditions of Consensus

Jurists require the fulfillment of some conditions for consensus on a legal matter to be taken as a legislative source:[89]

1. The consensus must be based on a valid document from the Qur'an or the Sunnah.

2. All jurists from among the jurists agree, explicitly or implicitly, on the ruling at a specific time, explicitly or implicitly.

3. The agreement is reached by the people of *Ijtihad* from jurists who are fair and trustworthy.

4. To prove to the diligent jurists the quality of *Ijtihad* from knowledge of the legal sciences.

D- Types of Consensuses:

There are many types of consensuses according to how they are achieved and the strength of their significance. They can be divided into two main types:[90]

[89] IBN HUBAYRAH, AL-WAZIR, AL'IIFSAH LIMAEANI ALSAHAHI 97 (Dar Al-Nawader, Damascus 2013).
[90] Al-Amidi, Al-Hakam, previous reference, vol. 1, p. 144.

1- *Explicit Consensus*: is unanimous or overwhelming among scholars of jurisprudence through their words or actions on a specific fact or issue, and each scholar expresses his opinion explicitly regarding the specific Sharia ruling.

2- *Silent Consensus*: results when some scholar jurists express their opinion explicitly in a certain era on a specific issue, and others remain silent.

In terms of its significance, the consensus is divided into:

1- *Definitive consensus:* is an explicit consensus that should be applied to the rule of jurisprudence.

2- *Presumptive consensus*: is a silent consensus, which means it is somewhat speculative because it is the opinion of a group of diligent jurists, not all of them.

E- Authenticity of consensus:

The majority of jurists, past and present, have agreed that clear consensus is an argument and is supported by conclusive evidence. They cite texts from the Qur'an and the Sunnah[91] where there are many indications that consensus is a basic source of legislation when there is no ruling on the issue in the first or second sources of Sharia. Among these sources of evidence are:

1- From the Qur'an

- The saying of God Almighty: "Hold firmly to the rope of Allah, all together, and be not divided"[92] is a prooftext for the inference is that Allah commanded people to gather and forbade them from separating.
- The saying of God Almighty: *"*Had they referred it to the Messenger, and to those in authority among them, those who can draw conclusions from it would have understood

[91] Ibn Taymiyyah, Ahmad, Al-Fatawa Al-Kubra, 3d ed. , vol. 19, p. 177, 2005.
[92] *Surah Al-Imran*:103.

it".[93] What is meant by those who deduce it are the jurists and scholars who are diligent, which indicates that their consensus is a guide and a source from the sources of Islamic law.

- Allah Almighty says: "And so, We made you a moderate nation, that you may be witnesses over humanity, and that the Messenger may be a witness over you."[94]

2- From the Sunnah of the Prophet ﷺ

- The saying of the Messenger ﷺ "Indeed Allah will not gather my Ummah upon deviation, and Allah's Hand is over the Jama'ah and the evidence is that Allah saved the nation from falling into error and error."[95]
- The saying of the Messenger ﷺ "What the Muslims saw as good, so it is good with Allah.*"*[96] The Messenger ﷺ commanded the group of Muslims to be bound by what is invoked, and the consensus of the jurists on a specific ruling for a specific issue is necessary.[97]

As for evidence of a *silent consensus,* the majority of jurists, including the Hanafi and Hanbali jurists, maintain that it is an argument and reliable evidence, and they inferred that the silence of the jurist about a fatwa or about a statement of other jurists indicates his approval of them, and that they are right in what they went to regarding the ruling on the issue under consideration. He also quoted the Prophet ﷺ saying, "A group of people from my Umma will always remain triumphant on the right path and continue to be triumphant [against their opponents]. He who deserts them shall not be able to do them any harm. They will remain in this

[93] *Surah Al-Nisa*:83.
[94] *Qur'an Al-Baqarah*:143.
[95] Sunan Al-Tirmidhi, Al-Fitan, *Hadith* No.: 2167, and authenticated by Al-Albani.
[96] It was narrated by Imam Ahmad on the authority of Ibn Masoud in the book Sunnah.
[97] Al-Shafi'i, Abu Abdullah Muhammad bin Idris, the message, his book al-Halabi, Egypt, vol. 1, p. 403, 1940.

position until Allah's Command is executed (i.e., Qiyamah is established).”[98] The significance of this hadith is that a nation cannot be devoid of a sect that upholds the law of God, and some jurists went on to say that a silent consensus is considered an argument and presumptive evidence, and this is what most of the jurists favored.[99]

1.1.4. Qiyas (Analogy)

A- Analogy is defined as appending a secondary fact whose ruling is not stipulated with an original fact whose ruling is so as to equate one of the two incidents as the basis for ruling on a new incident.[100] Alternatively, it is the affirmation of a ruling in which there is no legal evidence based on a ruling in which there is legal evidence for the sourcing of these two matters with one cause.

Analogy in this sense is the compromise of jurists between two issues, one of which is proven by the text in the Qur’an or the Sunnah or through explicit consensus, while the other of which has no evidence on which to base its ruling. Thus, a jurist appends the ruling of the second incident to the ruling of the first incident given so that they share the reason for the ruling, whether it is prohibitive or permissive.

Examples of analogy include the law of that deprives the murderer of any inheritance; to hurrying something before its time, and thus he shall be punished by deprivation. Another example is the analogy of the prohibition of drugs with the ruling on the prohibition of drinking alcohol stipulated in the Qur’an because there is the commonality for intoxication or a loss of right mind between them.

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[98] Narrated by Al-Bukhari *Hadith* No. 3641, and Muslim *Hadith* No. 1037.
[99] Al-Nadawi, Muhammad, Al-ijmae Al-Sukutiu Dirasat wa Tatbiqa (1991) (PhD thesis, Umm Al-Qura University) p. 78 and beyond.
[100] AL-JUDAYA, ABDULLAH, TYSYR EALAM USUL AL-FIQH 172 (Comprehensive Library, 1st ed. 1997).

The jurist works to clarify the ruling for the issue under discussion by assessing the fact that has no ruling on an issue that has a stipulated ruling. Therefore, analogy is an *Ijtihad* course that is allowed within the limits of the texts of the Qur'an and the Sunnah, with certain rules.[101]

B- Pillars of Analogy:

Analogy has four essential basic pillars:

The origin, which is the subject of the ruling that was established by the text or the consensus, and with which the analogy is measured. Like wine, for example, it is a base against which every intoxicant that is not mentioned in the Qur'an and Sunnah is analogized.

The branch is a new matter in which there is neither text nor consensus, and which is the analogized object. It takes its judgment: like illegal drugs (narcotics), which were analogized against alcohol.

The common cause is the description that links the origin and the branch, which necessitates the application of the rule of the origin to the branch, such as intoxication, which is the common description between different types of wine or between wine and beer. Because of their similarities, the rule of forbiddance of alcohol was transferred to it; thus, wine is forbidden, by analogy, with alcohol.

The original rule, which is the legal ruling on which the text[102] was originally based, that is, prohibition, which is the legal ruling prohibiting drinking or selling alcohol.

Analogy is used in transactions but not in acts of worship, because Allah has the exclusive knowledge of them.[103] One example of analogy in transactions according to the saying of the Messenger is: "A believer is the brother of the believer, so it is not permissible

[101] Al-Judaya, I.D., p 173.
[102] Al-Ghazali, Al-Mustafa, 2/54.
[103] Al-Judaya, I.D., p. 175 and beyond.

for the believer to rival by outbidding his brother's sale, and he is prohibited from rivaling his brother's betroth until he resigns." The text came with the prohibition of a Muslim's engagement over his brother's engagement or outbidding his brother. A diligent jurist can analogize the ruling on renting, in which there is no rule on the rule on selling.

So, we find that the origin to be analogized in this example is: it is not permissible to sell or betroth a Muslim before he decides to resign, and the analogized branch, which is renting a Muslim over renting his brother. The rule of origin is the prohibition. The reason for the ruling is the violation of the rights of others and the ensuing enmity between people.

Another example, the Prophet ﷺ saying: "The killer does not inherit." The text states that a killer is deprived of an inheritance in order to prohibit the use of murder as a means to rush inheriting before its time, so he is punished by depriving him of family money he seeks. But if the benefactor kills the testator, what is his ruling? There is no text to rule, so that in this case we use the analogy.

So, we specify that the origin of the analogy is the killing of an heir, which involves, of course, deprivation of his inheritance. And the measured branch is the killing of the testator, and the rule of origin is deprivation of inheritance, and the reason for the ruling between them is to rush the thing before its time in a way that violates Sharia or the law, so the perpetrator is punished by depriving him of the right to inherit.

C- Divisions of Analogy:

There are many classifications of analogy, including:

1- Dividing the analogy in terms of whether its ruling is speculative or not

The Shafi'i school divides analogies into three types on this basis:

- *More eligible analogies*, where the branch is more eligible for the ruling than the original because of the strength of its cause in it, such as: analogizing the beating of the parents on the prohibition of expression *Uff* to them stipulated in the Qur'an for the cause of harm.

- *Equivalent analogies* is where the branch is equal to the original in the judgment, such as the analogy of taking an orphan's money to appropriate it, which is forbidden in the Qur'an for the cause of spoilage of each of them.

-*Minimum analogies* is where the branch is weaker in terms of the reason for the ruling than the original, i.e., less related to the ruling than the original, such as attaching wine or beer to other alcohol, in the prohibition stipulated in the Qur'an.

2- Clarity of the analogy: two possibilities:

- A clear analogy is one where the cause is stated or not but is clear.
- A hidden analogy is one where unless the effect of the difference between the original and the branch is negated, the reason for it is deduced from the rule of the original, such as: measuring killing with a heavy machine over killing with a sharp instrument in general, because both of them cause unlawful intentional death.[104]

D- The argument of analogy:

Arabic jurists have unanimously agreed on the importance of analogy as a source of legislation, citing the words of God: "So take a lesson, O you who have insight! "[105] There is no disagreement among the jurists in the era of the Companions, and the followers and their followers, concerning the permission of *Ijtihad* and analogy over analogies in the rulings of

[104] Ibn Qudamah, Al-Maqdisi Awdat Al-Naazir wa Jnat Al-Manaziri, Al-Rayyan, 2d ed., Vol. 2, p. 210, 2002.
[105] *Surah Al-Hashr*:2.

accidents.[106] But the jurists differ on the analogy itself, whether it is the work of a diligent jurist or independent evidence.[107]

The first opinion expresses that it would only have been formulated by a diligent jurist, and it is the opinion of the jurist majority, and there is evidence for that:

The first confirming evidence is the Almighty's saying: *"*Then consider O people of sight*."* It is inferred from this verse that consideration is looking carefully at the evidence, which is what the diligent jurist does.

The second evidence is the hadith of Mu'adh, where the Prophet ﷺ, said to him: *"*If you are offered to make up for it, then how do you make it up?" He said: "By the Book of God." He said: "If you do not find it?" He said: "According to the Sunnah of the Messenger of God, may God's prayers and peace be upon him." He said: "If you do not find it?" He said: "I strive for my opinion." Thus, the Prophet corrected it and the evidence is that he added diligence to his own opinion, and analogy is from opinion, so analogy then is part of the work of the diligent jurist.

The third evidence is in the book of Omar Ibn Al-Khattab, the second caliph of the Messenger ﷺ , to Abu Musa Al-Ash'ari: "Understanding what has come to you that is not in the Qur'an or the Sunnah, then measure things at that*."* This is an explicit command to analogize what is not in the ruling of a text with the things that are similar and stipulated, and this analogy can only be undertaken by a scholar.

The fourth confirming evidence is that of analogizing the branch to the original. Proving such as the rule of the original of the branch is not an easy matter, as it is not permissible for the scholar to add this to that except after knowing that the two matters are similar, knowing the

[106] 2 AL-JASSAS, ABU BAKR, OSOUL AL-JASSAS 206 (Dar Al-Kutub Al-Ilmiyya, Beirut, 3d ed. 2000).
[107] Al-Shawkani, Muhammad bin Ali, Irshad Al-Foul, previous reference, p. 176.

reason for the origin, verifying its presence in the branch, and other matters that require analogy, and all of this too is the work of the scholar

The second opinion sees that analogy is independent legal evidence, such as the Qur'an and the Sunnah, which was established by Allah to make known his rulings, whether the scholar looked at it or not.[108] They cited this as follows:

1- That analogy is based on the existence of things whose knowledge will lead to the knowledge of something else, and the scholars' outcomes does not have to be the same.
2- The analogy was established by a legislator so that the scholar can know the rule of Allah by looking at it.

The Prophet ﷺ used analogy in many issues, such as prioritizing the obligations of Islam, including the pilgrimage, over the obligation to pay people's material debts. The Companions analogized the caliphate on leading the prayer in order to pledge allegiance to Abu Bakr because of the similarity between the origin and the branch in the common meaning, which is the cause.[109]

From the foregoing it is clear that the role of the jurist is to rule on the issue from the existing legal sources and is not on the basis of the original ruling. Therefore, the role of the jurist or judge, using analogy, is to attach a secondary circumstance fact whose ruling is not stipulated to the ruling in an original circumstance so as equate the two, whether this is a judgment of prohibition or permissibility. The judge's or jurist's discretionary power with regard to analogy is an authority that is restricted by Islam's fundamental texts. This is because Islamic law bases its rulings on sound rational logic, which appears to those who have the most

[108] This is the opinion of jurists Ibn al-Hajib, Al-Kamal Ibn Al-Hamam, Ibn Abd al-Shakur, and al-Ansari.
[109] 4 AL-NAMLA, ABDUL KARIM, AL-MUHADHDHAB FI EILM USUL ALFIQH AL-MUQARAN 1809 and beyond (Al-Rushd Library, Riyadh 1st ed. 1999).

thoughtful and lucid perspectives, including jurists, judges, and scholars. This is useful in refuting the suspicion of incompatibility between the mind and the text, which some may claim without evidence.

We conclude from the above that the original sources of Islamic law are, respectively, the Qur'an, the Prophet's Sunnah, Consensus and Analogy, for each of which the judge's discretionary authority varies; it is restricted in the first three sources and expands with regard to analogy.

1.2. Secondary sources of Islamic law

There are a number of secondary sources in Islamic law that a jurist or judge can resort to in basing his opinion or judgment. Reliance on these sources varies from one school of jurisprudence to another.

1.2.1. Istiḥsan (Juristic Discretion)

A- Definition

Istihsan, juristic preference, involves citing the stronger of two pieces of evidence when the matter at hand is unclear between two pieces of evidence, and one is more appropriate to the issue raised, so the analogy is left from the near evidence, and the distant evidence is taken for approval.[110]

It is an exception to a partial rule from a general rule based on special evidence that requires it, such as ruling on the validity of *Salam* contracts (selling something deferred in a timely manner), *Istisna* contracts (manufacturing ships, planes, furniture, etc.), leasing, and

[110] *Ijtihad* in what is not stipulated by DR. AL-TAYYIB KHODARI AL-SAYED 9 and beyond) (Al-Haramain Library in Riyadh, 1st ed. 1983.

contracts for agricultural land (for cultivation, watering, and planting) as an exception from the rule on the invalidity of the contract of the non-existent (made to order).[111]And some defined it as "abandoning analogy and adopting what is best for people."[112]

B- Types of Istihsan

The *Istihsan* of the jurists is divided into several categories,[113] some of which depend oninterest, some on custom, some on the consensus of the people of Medina, and some that depend on the preference of expansion of Islam over new peoples and lifting hardship for them.[114]

The Hanafi school has taken *Istihsan* as a source of Islamic legislation, stipulating six appropriate types of *Istihsan*:

- Juristic preference based on a text

This is to avoid a ruling that requires analogy or a general text and works with a specific text. An example of this is the impermissibility of selling what a person does not have, in accordance with the saying of the Messenger, "Do not sell what you do not have."[115] By analogy, selling what a person does not have is such as selling what a female animal is bearing before its offspring is born. Taking *Istihsan* as a source requires abandoning previous texts and analogies for a specific text that permits the sale of what a person does not yet have *Salam* contract,[116] such as sale if the farmer was selling one hundred *Saa*'.[117] Of the indicated dates, that would be

[111] SHAABAN, MUHAMMAD ISMAIL, ALIASTIHSAN BAYN ALNAZARIAT WALTATBIQI 51 (House of Culture, 1st ed. 1988.
[112] 10 AL-SARAKHSI, MUHAMMAD BIN AHMED AL-SARKHI, AL-MABSOUT 145 (Dar Al-Maarifa - Beirut, 1993).
[113] AL-BADAKHSHANI, MUHAMMAD ANWAR, FTAYSIR 'USUL ALFIQH 153 (Karachi Edition, 1990).
[114] 2 AL-ZUHAILI, WEHBEH, USUL AL-FIQH 739 (Dar al-Fikr, Damascus, 1st ed. 1986).
[115] Narrated by Al-Tirmidhi, kitab albuyue, bab karahiat albaye ma lays eindaka.
[116] This would be a deferred sale at a special price.
[117] A measurement tool for grain.

delivered after two months or more with two hundred dirhams in advance, so the farmer has received the price in advance and delivers the goods later.

- *Istihsan* based on Consensus

This involves an abandonment of the requirement of analogy or generality in a partial issue for the sake of consensus, and its example is the consensus on the permissibility of *Istisna* contracts in Islamic law.[118]

- *Istihsan* based on necessity

An example is the ruling that requires the purification of basins and wells and pouring water into them until any trace of an impurity is removed. This is because it is not possible to wash the well and the basin as you wash the pots.

- *Istihsan* based on a hidden Analogy

An example of this is a ruling on the purity of drinking after birds like falcons, even though analogy requires its prohibition, such as the prohibition of drinking after wild animals such as the wolf.

The reason for approving the purity of drinking after birds is that the apparent analogy with carnivores is contradicted by a hidden analogy, which is that the bodies of the carnivores come into contact with water and their saliva is unclean, while birds drink with their beaks, and there is no moisture in them, so they did not contaminate water.[119]

- *Istihsan* based on Absolute Interest

An example of this is the ruling to include a joint wage-earner, who does not work for a specific person but many individuals in return for a wage, such as a laundry attendant and tailor.

[118] *Istisna'* is a contract with a manufacturer to do a specific thing for an immediate or deferred price, JOURNAL OF JUDICIAL PROVISIONS, Article 124.
[119] Al-Shawkani, 'iirshad alfuhul 'iilaa tahqiq alhaqi min eilm al'usuli, previous reference, vol. 2, p. 184.

The basic principle in Sharia is that if a tailor is given a garment to sew and it is damaged by him without negligence on his part, he is not liable. However, this analogy was abandoned, and it was said that the owner must be compensated unless it is proven that the damages to the garment was due to force majeure, such as fire and floods. The basis for this ruling is the desirability of the interest, in order to preserve people's money from loss.[120]

- *Istihsan* based on Custom

This involves the abandonment of the requirement of analogy to another ruling that contradicts it due to the longstanding custom that indicates otherwise.

For example: whoever swears not to eat meat breaks an oath when he eats fish because it is also meat, but they said: He does not break such juristic preference because the custom differentiates between meat and fish.[121]

C- Argument of *Istihsan*

The majority of jurists from the Maliki, Hanafi, and Hanbali schools agreed to work[122] by inference with different types of *Istihsan*. As for Imam Al-Shafi'i, it was narrated that he chose not to use *Istihsan* while some maintain that he did not deny *Istihsan*, but rather rejected *Istihsan* interpretations that were based on the personal desire of the jurist.[123]

Those who took the approval of the jurists as a source of legislation, including the Hanafi School and the Hanbali School, inferred from the Almighty saying in the Qur'an, "Follow the best of what was revealed to you from your Lord,"[124] along with "And follow the best of what

[120] 4 AL-SHATIBI, IBRAHIM BIN MUSA, AL-MUWAFAQAT 208 (Dar Ibn Affan, 1, 1997).
[121] 2 AL-SHATBY, IBRAHIM BIN MUSA, AL-ISTISAM 638 (Dar Ibn Affan, Saudi Arabia, 1, 1992). Ibn al-Arabi, Al-Majsul, previous reference, p. 131. Al-Shawkani, G'iirshad alfuhul 'iilaa tahqiq alhaqi min eilm al'usuli, previous reference, vol. 2, p. 184.
[122] 4 IBN RUSHD, THE GRANDSON, ABU AL-WALID MUHAMMAD IBN AHMAD AL-QURTUBI, BIDAYAT AAMUJTAHID WANIHAYAT ALMUQTASAD 60 (Dar al-Hadith - Cairo, 2004).
[123] 7 AL-SHAFI'I, ABU ABDULLAH MUHAMMAD BIN IDRIS, AL'UMU 273 (Dar Al-Maarifa - Beirut 1990).
[124] *Surah Az-Zumar*:18.

was revealed to you from your Lord,"[125] and in the Sunnah, The Prophet ﷺ saying "Whatever the Muslims see as good, it is good with God."[126]

Istihsan for them is an argument that relies on a text, consensus, necessity, analogy, custom, or absolute interest, and for its consistency with the principles of Sharia in taking ease and leaving hardship.[127]

The Maliki School has taken *Istihsan* as a legislative source and used it as an establishment for many of Maliki's books and chapters. The founder of the Maliki school, Imam Malik, said: "Nine-tenths of knowledge is Istihsan." The *Istihsan* that Imam Malik adopted in jurisprudence and fatwa means: to decide with the stronger of two pieces of evidences. In short, say an event lies between two original circumstances, and one is more similar and the other origin is further away. However, there might be an apparent analogy, current custom, some kind of special interest, fear of corruption, or some kind of hurt or damage. In these circumstances, the jurist changes from ruling by analogy with the near origin, to analogy with that more distant origin. This requires presenting the inference sent on the analogy based on what is understood as the intent of the Qur'an and Sunnah, and not just a personal opinion.[128]

While the Shafi'i school does not see the adoption of *Istihsan* as a legislative source because it depends on the personal opinion of the jurist, Imam *Shafi'i* said: "He who commends has legislated," meaning whoever takes *Istihsan* has created a ruling. He devoted a chapter in his famous author *Al-Umm* to invalidate *Istihsan*.[129]

[125] *Surah Az-Zumar*:55.
[126] Narrated by Imam Ahmad Hadith No. 3600.
[127] Ibn Qudamah, previous reference, vol. 2, p. 211 and the pages after.
[128] Shatby, Al-Awafaq, previous reference, part 4, pg. 209.
[129] Al-Shafi'i, Al-Umm, previous reference, vol. 8, p. 315.

To conclude: there is a difference between the schools of jurisprudence about taking *Istihsan* as a secondary source of Islamic law, but the majority accepts it.

1.2.2. Istishab (Presumption)

A- Definition

Presumption means affirming what was proven or negating what was denied. In short, the legal perspective remains as it was, as a legal ruling established by texts in the past and with continuing relevance in the present, until there is evidence of a need for modification.[130] Such is the ruling with regard to the livelihood of a missing person until there is proof of his death.

B- Types of Presumption:

First type: Presumption of the original innocence, which is to remain in the non-judgment until the evidence indicates it, because acquittance is the rule.

Second type: Presumption of what the Sharia indicates to prove the existence of its cause, and from this comes the saying of the jurists: This principle remains valid until the evidence indicates otherwise.

C- Forms of Presumption:

1. Presumption of innocence, i.e., ruling with acquitting those charged with legal or financial offenses, until there is evidence to the contrary.
2. Presumption of the ruling that is evidenced to be proven and there is evidence to change it. An example is a ruling on confirming marital status. If the wife wants a divorce, with a

[130] ABU ZAHRA, MUHAMMAD, IBN HAZM, HIS LIFE AND AGE, HIS OPINIONS AND JURISPRUDENCE 373 (Dar al-Fikr al-Arabi, Cairo 1978).

marriage contract in hand, the principle is that it is not proof, and she must have proof that she is legally married.

3. Presumption of the general until the specification is received, and the presumption of text until the cancellation.
4. Presumption of a firm consensual ruling in a matter of dispute among scholars.[131]

D- Some jurisprudence rules based on presumption:

1. Antecedent judgment is supposed to stay as it was, until the need for change it is proven.
2. Certainty is not overruled by doubt.
3. Origin is clearance, i.e., a person should not be preoccupied with an obligation without evidence.
4. Any new events are regarded as happening nearest to the present. An example: when two parties dispute about a recent defect, whether it occurred before or after a sale, it is presumed that it occurred recently.

E- The argument of presumption:

Presumption is an absolute argument according to the majority of jurists, who cite the Qur'an and the Sunnah as evidence to establish a firm ruling until there is evidence to modify it. It is valid in proving or disproving individual rights.[132]

For the Hanafi school, presumption is an argument for defense and denial, not for proof and entitlement, and that is why it maintains: presumption is an argument to maintain what was, not to prove what was not. This difference among jurists has resulted in various interpretations on issues on which the source of presumption is based, including on the provisions of the missing person and whether positive rights, such as inheritances that have been designated for

[131] Al-Zuhaili, Wahba, The Fundamentals of Islamic Jurisprudence, previous reference, p. 867
[132] Abdel Ghaffar, Mohammed, Fiqh Facilitation Book for Beginners, p. 3.

someone. However, it might be asked: is the presumption of his being alive, only benefitting him in stopping the consequences of his death, such as dividing money intended for him among other, his inheritors?

The majority of jurists maintained that the rights of the missing person remain before his loss and also decree that claims resulting from his death should be stopped before ruling on their occurrence. The Hanafi ruled that his life should remain as a rule for the period of his loss in relation to his money and his wife only, until evidence of his death or the judge decides that."[133]

1.2.3. Predecessors Laws

The fundamental Islamic jurists have addressed the pre-Sharia predecessor's laws definition, division, conditions, and the extent to which it is invoked as a secondary source of Islamic law.

A- Definition

The predecessors' laws are the firm rulings established in the laws of the preceding prophets and messengers that have been mentioned in the Qur'an or Prophet's Sunnah, and for which Sharia has not established their abolition or their approval.

The rulings that Allah legislated for non-Islamic nations, through his prophets, such as Abraham, Moses, David, and Jesus, were transmitted to Muslims in a correct way, such as the Qur'an and the Sunnah, and they are one of the sources of Islamic law, according to the opinion of the majority of jurists. What is true from the law of our predecessors is legal for us unless it is canceled in accordance with the provisions of Sharia.

Sections of rulings in the divine laws:

[133] Ibn al-Hamam, Kamal Al-Din, Al-Fath al-Qadir, Dar Al-Fikr, 4/446.

1. Origins: It is submission to God alone and no one else and singling him out with belief in and service to Him, His Names, His Attributes, and the Last Day. This is a part of what all the heavenly laws have agreed upon, including the Islamic Sharia.
2. The branches are where the previous heavenly laws differed, which is one of the purposes of my research here.

B- Conditions for adopting a law from our predecessors

1. The previous laws should not be distorted laws.
2. These laws should be transmitted in a correct manner, such as the Holy Qur'an and the Sunnah of the Prophet.
3. Their provisions are not to be repealed by Sharia.

C- The argument for the adoption of the laws of our predecessors:

What was mentioned in the laws of previous nations is divided into three sections, and the extent of their invocation varies accordingly:[134]

1. What God and His Messenger ﷺ have narrated about these nations, and what Sharia has negated: These rulings are not to be taken by the agreement of the jurists, who cite the Almighty saying: "For the Jews, We forbade everything with undivided hoofs. As of cattle and sheep: We forbade them their fat, except what adheres to their backs, or the entrails, or what is mixed with bone. Thus, we penalized them for their iniquity. And surely, we are truthful."[135] What was stated in this verse about the prohibition on the Jews Sharia has invalidated.

[134] Al-Zarkashi, Abu Abdullah Badr Al-Din Muhammad, Al-Bahr Al-Mohit fi Usul Al-Fiqh, previous reference, I 1, C5, p. 114.

[135] Al-Kasani, Aladdin, Badaa' Al-Sana'i in the tartib Alsharayiea, Dar Al-Kitab Al-Arabi, p. 555. See also Ibn Abidin, Muhammad Amin, Al-Muhtar's response to Al-Durr Al-Mukhtar, Dar Al-Fikr - Beirut Edition: Second, 1992. Al-Qurtubi, Muhammad bin Ahmed bin Abi Bakr, Interpretation of Al-Qurtubi, Egyptian Book House - Cairo, vol. 4, p. 154. Ibn Hanbal, Abu Abdullah Ahmed bin Muhammad, Musnad of Imam Ahmad bin Hanbal, AlResala Foundation, vol. 4, p. 58. Al-Ghazali, Al-Mustafa, previous reference, vol. 1, p. 282.

2. Rulings that are mentioned in the Qur'an or the Sunnah that, according to legal evidence, are commanded of us, as they were commanded to the previous nations.

   These rulings are unanimously agreed to by jurists as applicable to Muslims, and the evidence lies in Sharia and not what was mentioned in the previous laws, and from that His saying, *"*O you who believe! Fasting is prescribed for you, as it was prescribed for those before you, so that you may become righteous.*"*[136] This verse shows that because fasting was obligatory on the nations that came before Muslims, then it was obligatory for Muslims.

3. Provisions legislated by our predecessors that are not mentioned in the Qur'an or the Sunnah; and this type is not binding for us according to the Consensus of the jurists.[137]

4. Rulings that came to us through the Qur'an and the Sunnah of the Prophet and were not accompanied by evidence of their abrogation or the legality of their adoption; such rulings are a matter of dispute among the jurists whether it is necessary to be applicable or not.

The majority of jurists from Hanafi, Maliki, Hanbali and some Shafi'i schools [138] hold the view that it is permissible to adopt a law from our predecessors as a legislative source if the conditions referred to above are fulfilled, as evidenced by the following:

1. The saying of Allah Almighty, *"*They are those whom Allah has guided, so follow their guidance. Say, 'I ask of you no compensation for it—it is only a reminder for all

[136] *Surah Al-An'am*:146
[137] Qaraqish, Najwa, Applications of laws of our predecessors through the provisions of the verses of Surah Yusuf, Department of Jurisprudence and its Fundamentals, College of Sharia, Zarqa University / Jordan, p. 6.
[138] Al-Shawkani, Muhammad bin Ali bin Muhammad, G'iirshad alfuhul 'iilaa tahqiq alhaqi min eilm alasul, part 5, p. 111, Al-Suyuti, Mustafa, the demands of the first prohibitions in the Sharia of Ghayat Al-Muntaha, Al-Salmi Library, part 5, p. 881

humankind.*"*[139] This verse infers that Allah Almighty commanded the Prophet Muhammad ﷺ to follow the path of the prophets who preceded him.

2. Allah Almighty said, addressing the people of Moses: "And We wrote for them in it: 'a life for a life, an eye for an eye…"[140] It was inferred from this verse that what was legislated for Islam's predecessors is legislated to Muslims, because the Prophet ﷺ commanded retribution on the murderer, except in the case of pardon from the relatives of the murdered.
3. The legality of taking the temporal division; taking into account the words of Allah in the law of the Prophet Saleh: "And inform them that the water is to be divided among them—each share of drink equitably proportioned."[141]

This verse included Allah addressing the Prophet Saleh to tell his people Thamud[142] that the water will be divided, and it is permissible to divide the supply of water, even though the command was addressed to a previous nation.[143]

4. The application of the Messenger, as cited in the Sunnah, of a ruling in the Torah that originally was applicable to Jews.
5. Allah Almighty's saying: "He has appointed for you the same religion He enjoined upon Noah."[144] The point of inference is that Allah legislated for the Muslims the same as what he legislated for Noah, so it is clear that his law is a law for Muslims.

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[139] *Surah Al-An'am*:90
[140] *Surah Al-Ma'idah*:45.
[141] *Surah Al-Qamar*:28.
[142] Thamud are the people of the Prophet Saleh and an ancient Arabian tribe that settled in the northwestern of the Arabian Peninsula.
[143] Imam Al-Tabari, Jami' al-Bayan fi Ta'wil Al-Qur'an, Vol. 22, p. 592.
[144] *Surah Al-Shura*:13.

1.2.4. The words of the Companions

A- Definition

The companions are known to the majority of jurists as everyone who met the Messenger Muhammad ﷺ and believed in him. According to the majority of jurists from among the people of hadith, it is everyone who met the Messenger ﷺ as a Muslim and died as a Muslim, regardless of whether the time of his companionship with the Messenger ﷺ was protracted or not.[145] The period of his companionship extended for a long time.

The fundamentalist jurists talk about the longstanding Companion who had knowledge in the Qur'an and the Sunnah so that it is possible to build on his sayings, while modernist jurists for example, those who are interested in the hadith of the Messenger ﷺ, talk about the Companion who was a contemporary of the Messenger ﷺ even for a short period. The Companions had a prominent role in the fatwa after the death of the Messenger ﷺ, especially with the emergence of many new issues for which no rulings were determined during his time, such as the amount of a grandmother's share of an inheritance.

What is meant by the words of the Companion: is his doctrine that he said or did and did not attribute it to, or narrate it from, the Prophet. It is the sum of the jurisprudential opinions and the established legal fatwas from the Companions.[146]

B - Sections of the words of the Companions

The words of the Companions are divided into four sections:

[145] Al-Zuhaili, Wahba, The Fundamentals of Islamic Jurisprudence, previous reference, p. 850.
[146] Al-Bahari, Muhib Allah Abdul Shakoor, Muslim Al-Thabet, Kurdistan Scientific Press, 1326 AH, vol. 2, p. 120.

The first contains sayings of the Companion in matters where there is no room for differences, such as worship, etc., and this section is an argument for the four jurists, because the Companion must have heard it from the Prophet ﷺ.[147]

The second consists of words of the Companion that were generally known, and no one disagreed with him, and thus this section is used as evidence. The third: the word of a Companion that other Companions disagreed with and this is not invoked.[148] The fourth is the word of a Companion, which was not well-known and includes room for interpretation. There was no known opposition to it. Thus, it is the subject of dispute.

C- The argument of the word of the Companion:

The jurists differed about the authenticity of a Companion's saying if there was no opposition to it from the other Companions:

Hanifa, Malik, and Hanbali believed that in these circumstances, the saying of the Companion should be taken into account. They cited the Almighty's saying in the Qur'an: "You are the best community that ever emerged for humanity: you advocate what is moral, and forbid what is immoral,"[149] and the Prophet's words ﷺ in the Sunnah, "The people of my generation are the best, then those who follow them, and then whose who follow the latter."[150] Just as the Companions lived through the revelation of the Qur'an and were more knowledgeable about the Book of God and the Sunnah of His Messenger ﷺ, so their sayings take precedence over the sayings of others. And it is possible that the saying of a Companion which was not opposed is from what he transmitted or heard from the Prophet.

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[147] Of this type, the Companions' judgment regarding the ostrich is measured if the forbidden person hunts it with a camel: "So Omar, Othman, Ali bin Abi Talib, Zaid bin Thabit, Ibn Abbas and Muawiyah—may God be pleased with them—said about the ostrich: it is killed by a camel, and the gazelle by a goat." *See also* Al-Bayhaqi, Al-Sunan Al-Kubra, part 5.
[148] Al-Zuhaili, Wahba, Usul al-Fiqh, previous reference, p. 851 and beyond.
[149] *Surah Al Imran*:110.
[150] Sahih Al-Bukhari, *Hadith* No. 6695.

The second group consists of Shafi'i in his new school, along with other jurists, who maintain that the word of a Companion is not an argument, citing the Qur'an as evidence in the Almighty's saying: "So take a lesson, O you who have insight."[151] This is an order from Allah, to strive instead of to imitate. The Companions are human beings and are not infallible. Whoever is not proven to be infallible is not a subject of argument. The Companions themselves unanimously agreed on the permissibility of each of them opposing the other if it was not possible to agree on a ruling on a specific issue, as the Companions also supported some of the followers on their *Ijtihad*, and these followers had opinions that were contrary to a companion's saying. If the saying of a Companion was an argument against someone else, then it would not be permissible for the follower, by his *Ijtihad* to contradict that saying of the Companion.[152]

From the foregoing it is clear that there is a jurisprudential disagreement about considering the word of the Companion to be an independent and valid secondary source of legislation in Islamic Sharia, which expands the authority of the Saudi judge in deducing rulings for the issues and issues he considers.

1.2.5. Blocking pretexts

A- Definition

Pretext is defined by jurists as the prevention of permissible means and methods that may lead to evil or the order that is forbidden by Sharia. They prevent what is permissible lest a person extend the permissible to what is not permissible.[153] This is because the means take the ruling of what they lead to; just as the means of the obligation is obligatory, so the means of the

[151] *Surah Al-Hashr*:2.
[152] Al-Zuhaili, Wahba, The Fundamentals of Islamic Jurisprudence, previous reference, p. 854.
[153] 3 IBN AL-QAYYIM, MUHAMMAD IBN ABI BAKR, FLAGS OF THE SIGNATORIES 147 (Dar al-Kutub al-Ilmiyya, Beirut, 1st ed. 1991).

forbidden is prohibited. The matter that appears to be permissible, but which leads to corruption or falling into something forbidden, is impermissible in Sharia.[154] Blocking pretext is aimed at helping someone not reach the forbidden matter. This legislative source is based on the principle that the means take the rule of what they lead to; just as the means of the obligation is obligatory, so the means of the forbidden is prohibited. that the four schools of jurisprudence have taken this legislative source in one way or another. However, the Maliki School has expanded in taking this legislative source.[155]

B- Means of Blocking Pretexts

The means of Blocking Pretexts are:

1- A means that leads to a definite evil, which jurists unanimously agree is prohibited because of its harmful consequences both immediately and eventually. For example, there is a prohibition of digging wells on roads because of the possibility of people falling into them.

2- A means by which Sharia law came into its legitimacy, either as a matter of necessity or desirability, according to its degree of interest, and this type is not disputed regarding its permissibility.

3- A means that leads to a permissible thing, but is intended to lead to a corrupting one, e.g., a marriage contract with the intent of making the wife permissible for marriage to her first husband.[156]

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[154] Ibn Taymiyyah, The Great Fatwas, I.D., Vol. 6, p. 172.
Al-Qarafi, Ahmed bin Idris, Al-Farouq, Saudi Ministry of Awqaf, Vol. 2, p. 33, 2010.
[155] Al-Shatby, Al-Muwafaqat, I.D., Vol. 5, p. 183.
[156] In Islamic law, if a man divorces his wife three times, she may not return to him except after she inters into a new marriage of another man, and then the latter divorces her. Sometimes it happens that the ex-husband or the wife herself or her family agree with a man to play the role of the Mohalel, and he marries the woman and then divorces her so that she returns to her ex-husband, and this is not permissible in Sharia.

4- A means that leads to permissible action and which was not intended to reach a corrupt one, but often leads to it, and its corruption is more likely than its benefit, and that includes insulting idolaters in public if it would lead to insulting Allah.

The jurists differed about the third and fourth section, and whether the Sharia came to prevent it.[157] Some schools of Islamic jurisprudence, including the Malikis and the Hanbalis, see that Blocking Pretexts as legal evidence for e rulings are based. Thus, when the means lead to corruption, they must be prevented. Others from the Shafi'is and Hanafis schools do not infer this evidence, unless it is supported with text, consensus or analogy.

The jurists who say that this legislative source should work have inferred this by citing the Qur'an and the Sunnah, including:

1. Allah almighty said: "And do not insult those they call upon besides Allah, lest they insult Allah out of hostility and ignorance."[158]The significance of the text is that God forbade believers from insulting the gods of the polytheists, although they deserve to be insulted, so that they do not curse Allah. This example is included in the first section of the pretexts as an example that leads to corruption.
2. The Almighty said: "And they should not strike their feet, drawing attention to their hidden beauty."[159] The implication of the verse is that Almighty forbade women from hitting their feet, even though it is permissible in and of itself lest men hear the sound of anklets, and that would provoke their desire.
3. A wise legislator prevented the judge from accepting a gift in order to block the pretext of taking a bribe,[160] and also prevented a judge from ruling on a matter about which he had

[157] Al-Qarafi, Differences, previous reference, vol. 2, p. 32.
[158] *Surah Al-An'am*:108.
[159] *Surah Al-Nur*:31.
[160] The Prophet said: "A Ruler accepting a gift is a type of thievery." Narrated by Al-Tabarani Hadith:11486.

personal knowledge so as to eliminate falsehood by this and other judges. Also, there is a prohibition of selling weapons in civil war because it facilitates aggression.

C- The argument to block pretexts

The jurists in most Islamic jurisprudence schools agreed to work with the source that counsel "block/obstruct the pretexts." In general, disagreement occurred in some of its types, and in some jurisprudence branches in which the reasons why corruption emerges, and its strength vary.[161]

Blocking Pretexts is an absolute necessity in the Maliki and Hanbali schools, and they have inferred the presence of legal texts in the Qur'an and Sunnah that forbid things that were originally authorized but should be forbidden because they often lead to harm or evil.[162]

1.2.6. Masalih Mursala (Absolute Interest)

A- Definition

Interests that are absolute are defined as those for which there is no legal evidence mandating them and there is no legal evidence to forbid them. But the legislators were silent about it. They are matters that are not mentioned in the Qur'an or the Sunnah, neither in terms of an obligation to follow them or to avoid them; the main sources in Sharia simply are silent with regard to interests.

The classical jurists also call adopting absolute interests "advancing the public good." This is defined as the arrangement of the legal ruling in an incident where there is no text or consensus based on taking into account an absolute interest. The absolute interest itself is defined

[161] MAKHDOOM, MUSTAFA, QAWAEID ALWASAYIL FI ALSHARIEAT AL'IISLAMIATI 363 and beyond (Dar Ishbilia for Publishing and Distribution, Riyadh, 1419 AH).
[162] AL-SHANQITI, MUHAMMAD AL-AMIN, THE APPROACH AND WISDOM OF ISLAMIC LEGISLATION 27 (The Islamic University, Medina, 2d ed.).

as a benefit, whether it is mundane or eschatological. Public good is the construction of jurisprudential rulings on the requirements of the absolute interests, which considers every interest that is not mentioned in the Sharia; also, there is no text on its abolition.[163]

B – Divisions of absolute interests

Interests are divided in terms of Sharia into:

1- Significant interests that must be observed in a specific basis. They can be compared to similar interests, an example being an interest in preserving one's right mind, which is one of the pretexts for the prohibition against drinking alcohol. All other intoxicants, such as narcotics, are measured against wine, and they interfere with another legislation source, which is the source of the analogy.[164]

2- Invalid interests, which consist of every benefit that the Sharia indicates which is not considered and taken into account in its rulings. This is because invalid interests bring greater harm or evil, and the control by which they are known as invalid is their violation of the text, consensus, and clear analogy. An example is sexual pleasure in adultery, which is forbidden because it contradicts Qur'anic laws and the Sunnah, and because of the evils and damages that it entails for the entire family.

3- Interests where the legislator considers gender and does not bear witness to a specific origin in consideration. An example is the Diwan establishment during the era of Caliph Omar ibn Al-Khattab to control the salaries and livelihoods of soldiers and the duration of their service and the creation of prisons.

There are many practical examples in the modern era whose enforcement is based on the absolute interests as a legislative source, including:

[163] Ibn al-Qayyim, Aelam Almuqiein, I.D., Vol. 3, p. 14.
[164] Al-Ghazali, Abu Hamid Muhammad, Al-Mustafa, I.D., Vol. 1, p. 139 and beyond.

1- Donating, transferring, and transplanting human organs.
2- Recording people's major life events, such as marriage, divorce, birth, and death.
3- Obligating the issuance of identity cards and drivers' licenses for owners of autos and other vehicles.
4- Circulating coins.
5- Regulating traffic and placing traffic lights to facilitate the movement of people so as to help preserve their lives.

These examples were not mentioned in the Qur'an or the Sunnah, but they are needed for people to organize their lives and fulfill their needs. Everything that is beneficial in Sharia and achieves the purposes of Sharia is supported and confirmed by legal textual support. A commandment is obligatory or recommended, and everything that proved harmful has texts in Sharia forbidding it.

C-The factors that call the jurist to adopt the Absolute Interests are the following:

Sharia exists to advance the general interests of the people, who are encouraged to gain benefits and to avoid harm. The texts and principles indicate the necessity of taking into account these matters in organizing all aspects of life.

1- Advancing interests that individuals and society need to establish people's lives on a just basis.
2- Warding off evil, including things that harm people, individuals or groups, whether the harm is material or moral.[165]

[165] Al-Shatby, Al-I'tisam, I.D., Vol. 2, p. 111.

3- Blocking Pretexts, that is, preventing methods that lead to neglecting or violating the commands of Sharia, or that lead to committing legal prohibitions, even if unintentionally.
4- Change of the times and circumstances, that is, responding to different conditions facing the general public from what they were before.

D- Conditions of working with the absolute interests

Some schools of Islamic jurisprudence in Islamic law, such as the Maliki school, legislated according to absolute interests, when conditions and criteria had been set for them, so that the interests emitted can be considered a secondary legislative source of Sharia. Among these conditions were:

1- That the interest is real and not illusory such as the fantasy that there is a benefit from using illegal drugs.
2- The interest should not conflict with the legal text or the consensus of Islamic jurists.
3- Jurists should not oppose an interest equal to it or greater than it. If a conflict occurs, the stronger one would prevail, and if the public interest conflicted with individual's interest, the former would prevail.
4- The absolute interest is exclusively used in transactions, and legal matters, and cannot be used in beliefs and the principles of worship.
5- The interest should fit the purposes of Sharia rather than contradict them, including through its prooftexts.
6- That the interest is reasonable, so that the public will accept it.
7- That the interest aims to preserve a necessary matter and/or remove a critical embarrassment in the religion.

8- The interest should be for public matters not private ones.

9- The jurist or judge looking into the interest should be knowledgeable of and diligent about the provisions of Sharia.

Among the practical cases that are considered evidence of the permissibility of taking absolute interests as a secondary legislative source:

1- What happened during the era of the Companions when they collected the Qur'anic verses in one *Mushaf*.[166]

2- Having traffic lights and signs to regulate traffic on the roads. Not having them leads to traffic accidents, which may cause loss of life.

3- Registering life-cycle events, such as registering births and marriages.

4- Civic authorities should withdraw the identity cards of those who are legally charged with a crime, as well as the drivers' licenses, and punish those who fail to do so.

5- Coins must be minted and struck. Although this action has no basis in the Qur'an and Sunnah, the need for it is urgent so that people purchase the necessities of life. Therefore, the state had to coin a common currency and put in place strict laws to punish forgers, so that it will retain its value.

D- The argument for taking into account absolute interests

Scholars of Islamic jurisprudence differed about taking absolute interests as a source of Islamic law.[167] Although the Maliki and Hanbali schools are famous for adopting this secondary legislative source because they were the first to set the conditions and criteria necessary for its use, the other schools, such as the Hanafi and Shafi'i schools have had reservations about

[166] Mushaf is an Arabic word referring to the holy Qur'an.
[167] Al-Shawkani, Irshad Al-Foul, previous reference, p. 212.

invoking and applying this source it in the face of other legislative sources.[168] These schools are based on taking the source of Absolute Interests on the grounds that Sharia was developed as a mercy to the worlds; where the Almighty said: "We did not send you except as a mercy for humankind."[169] The Almighty also said: "Allah intends for you ease, and He does not want to make things difficult for you."[170] These texts, which were included in Qur'an, prove that Sharia exists to advance the public interest; taking of Absolute Interests achieves this goal.

Those among the jurists who said that it is permissible to work with Absolute Interest have inferred this from:

1- The Qur'an, where the Almighty said: "Allah intends to lighten your burden."[171] and "He has chosen you, and He has not burdened you in religion."[172] Adopting Absolute Interests to settle issues, and issues that have not been directly stipulated in the original sources of Islamic law, achieves these verses' objective.

2- The Companions acted in accordance with Absolute Interests on many issues. By following their interpretations and those who came after them, one finds that they issued fatwas on many matters as soon as an incident contained a clear public interest, without necessarily resorting to the source of analogy. When they were considered without anyone denying it, their actions were considered unanimous. The Companions introduced rulings for issues that occurred in their time, despite the absence of specific legal evidence for them in the original sources of Sharia, with the aim of advancing the

[168]Al-Shafi'i, Abu Abdullah Muhammad bin Idris, Al-Resala, I.D., p. 122
[169] *Surah Al-Anbiya*:107.
[170] *Surah Al-Baqarah*:175.
[171] *Surah Al-Nisa*:28.
[172] *Surah Al-Hajj*:78.

public interest. This confirms the consideration of the sent interests as a secondary source of legislation.[173]

3- The criterion of reasonableness: society is constantly evolving, and people's dealings and interests change with time and place, even when rulings are grounded in the original sources of Islamic law. Thus, when many people's lives have been disrupted by new circumstances, some Islamic legislation has stopped keeping pace with them. This is in violation of the purposes of Sharia and harms individuals and societies, which is something that Sharia forbids. Therefore, it is necessary to take into account the absolute interests as a factor in issuing new rulings that are compatible with the purposes and overall objectives of Sharia.[174]

To summarize: the jurists differed in the extent to which Absolute Interests are taken into consideration as a secondary and independent legislative source. Most considered Absolute Interests, such as those of the Maliki school, followed by the Hanbali school, then the Hanafi school, then the Shafi'i school.[175] But they also supported the view of other jurists regarding the need to be careful in taking this source too extensively because expanding on it requires accurate understanding, and depth in deduction from jurist or judge, which may not be available in some,[176] who may make judgments that depend more on personal rather than objective criteria.

1.2.7. Urff (Custom)

A- Definition

[173] Al-Amidi, Al-Hakam, previous reference, part 4, p. 140.
[174] Al-Zuhaili, Wahba, The Fundamentals of Islamic Jurisprudence, previous reference, p. 763.
[175] Ibn Qudamah, Ruwdat Al-Naazir wa Jnat Al-Manaziri, I.D., p. 87.
[176] Such as: Al-Faqih Al-Ghazali, Al-Zuhaili, and Heba, Usul Al-Fiqh Al-Islami, p. 767.

Custom is everything that people are familiar with in their lives, including actions or words, provided they are stable and that they are accepted by reason and instinct. It is what has settled on the soul and is accepted by the right natures.[177] Custom types include:

1- *Practical custom* is what people used to do without adhering to a specific verbal formula, as is the case in a hand sale, i.e., taking the commodity and paying its price without an offer and the acceptance of an exchange between the seller and the buyer.

2- *Verbal custom* is what people used to say. i.e., in the Arabic language, the word "ولد" meaning "boy" is used to refer to both male and female children, while it is customary among people to refer to male children only.

3- *General or specific custom* means behavioral or verbal custom that may be general or special in custom. General custom means everything that the majority of people have known at one time, while special custom means what the people of a particular place, region, or sect have known.

4- *The right custom* and an *invalid custom.* The right custom meant what people are familiar with it, without forbidding what is permissible or legalizing what is forbidden such as the requirement of a deposit in an *Istisna* contract. An invalid custom means what people are accustomed to but one that forbids what is permitted or permits what is forbidden, such as taking interest or drinking wine.[178]

B- Terms of Customs

1- It is required for the adoption of a custom not contradicted by a legal text of the Qur'an or the Sunnah, or that it contradicts the consensus of the jurists.

[177] Al-Zuhaili, Wehbeh, The Fundamentals of Islamic Jurisprudence, previous reference, p. 828.
[178] Al-Zuhaili, Wahba, I.D., p. 830.

It must be everything that people have come to know without making permissible what is forbidden or forbidding what is permissible, such as dividing the dowry into immediate and deferred payments, according to what people are familiar with, and providing a deposit in an *Istisna* contract.

2- One must verify the existence of custom in a matter that is commonly observed among the people in the place in which it is current or often so that most of the people of this place or country see its necessity and act upon it. When there is not widespread habit, it is an individual act or a habit rather than a custom.

3- The custom should be present at the time of the act, and not an old custom that has been abandoned.

4- The custom should not contradict an agreement or declaration that contradicts it between the parties. Therefore, custom that is known as conditional entails two aspects of condition. If the contracting parties declare something that is contrary to custom, what they contracted still must be adhered to.[179]

C- The argument for custom

The prevalence of custom is an argument in Islamic legislation for its suitability to people's needs, lifting embarrassment and hardship, and achieving their interests, as long as it does not contradict Sharia. The Hanafis, the Malikis, and Ibn al-Qayyim from the Hanbali school viewed custom as an independent source of Islamic law and cited the saying of God: "Be tolerant, and command decency, and avoid the ignorant."[180] On the other hand, the Shafi'i school does not consider custom as an independent source of legislation.

[179] Al-Sarakhsi, Al-Mabsout, Vol. 12, p. 45.
[180] Al-Suyuti, Abdul Rahman, Al-Shabah wa Al-Nazaer, I.D., p. 283.

According to the Malikis, custom is one of the principles of deduction. Just as it responds to man-made laws, Sharia considers custom as one of the sources of legislation. Islamic It must find appropriate provisions for facts and issues in which there is no text in order to legislate rights and obligations among people in their daily lives so as to help them meet their needs and advance their interests.

Most jurists consider jurisprudential custom in constructing legal rulings with an effect that was expressed by the Messenger: "What Muslims see as good is good with God."[181] Thus, Islamic jurisprudence considers custom as a legislative source when it does not conflict with explicit texts and established principles.[182]

There is a discrepancy among the schools of jurisprudence regarding Custom, such as the Hanafi school, depend on the correct custom to a great extent, of in establishing and ending rights between people in different areas of behavior and transactions.

1.2.8. The work of the people of Medina

A- Definition

The work of the people of *Medina*[183]: most of the jurists agreed upon considering some issues in the time of the Companions or their followers.[184]

B- Types of work of the people of Medina

The work of the people of the city can be transferable or deductive. Transferable work is achieved by transferring of certain provisions by the people of *Medina* on how

[181] *Surah Al-A'raf*:199.
[182] Imam Ahmad, Al-Musnad, Hadith No. 3600.
[183] Madinah is an Arabic word referring to the city of the Prophet Muhammad ﷺ were he moved, lived, and died.
[184] Al-Sarakhsi, I.D., p. 45.

work was carried out, such as the *Saa*', the tide, the call to prayer, and the abandonment of taking zakat from vegetables.

Deductive work is reached by means of *Ijtihad*, and the Maliki jurists differed about the arguments of the deductive action.[185]

C- The argument concerning the work of the people of Medina:

The Maliki School is the only one that took this argument as a legislative source.[186] It inferred that Medina,[187] in which the Prophet Muhammad ﷺ resided until his death witnessed the revelation of the Qur'an, especially the verses related to rulings and where the practical application of these verses took place. Also, the Companions had memorized the revelation and worked on writing it and acting on what it stipulated and therefore their work will be the closest to the truth.[188]

From the foregoing, it is clear that there is a doctrinal dispute among the four schools of jurisprudence regarding the consideration of secondary or dependent sources as an independent source in Islamic law.

But this difference did not rule out the invocation of these secondary sources to find appropriate solutions to the new issues in people's lives that are not mentioned in the original sources of Islamic law.

Rather, this disagreement in most cases does not focus on not invoking these sources, but rather that the ruling on the issue under discussion may be found in another source of Sharia, original or secondary, where these other sources differ from one school of jurisprudence to another. Such discrepancy between schools of jurisprudence is necessarily transmitted to Saudi

[185] Ibn Abd al-Barr, Yusuf bin Abdullah, Al-Tamhid Limafi Al-Muataa Min Al-Maeani wa Al-Asanidi. p. 222.
[186] Al-Zarkashi, Abu Abdullah Badr Al-Din, Al-Bahr Al-Mohit fi Usul al-Fiqh, I.D., Vol. 4, p. 485.
[187] Malik, Anas, Al-Muwatta', Al-Jami', chapter on what came about living in and leaving Al-Madinah, p. 886.
[188] Ibn al-Arabi, Abu Bakr Muhammad bin Abdullah, Provisions of the Qur'an, I.D., p. 111.

judges who rely on Islamic jurisprudence, especially the Hanbali school, in establishing their rulings. We find that a judge may adopt a statement that he deems is closer to the issue or case presented to him, and then justifies his ruling on this basis.

In all cases, any source of Islamic law, basis or secondary, must be based on the two primary sources, the Qur'an and the Sunnah. Because the only source of legislation in Islam is God, through the revelation expressed in the Qur'an, or through the Sunnah, so none of the old or new diligent jurists should rely solely on his personal opinion, as some of the authors of man-made laws do. The task of Sharia jurists is to uncover God's judgment in a matter or issue through *Ijtihad*, deduction, and interpreting the texts of the Qur'an and Sunnah. [189]

[189] Al-Zahili, Wehba, Al-Osoul, I.D., p. 487

1.3. Review of the liquidated damages clause in Islamic law

1.3.1. The nature of the liquidated damages clause in Sharia

The liquidated damages clause is subject to the general rules in the Qur'an that contracts must be fulfilled. The Almighty Allah said: "O ye who believe! Fulfill all obligations."[190]

In the Qur'an, Allah also forbids taking people's money unjustly, and declares: *"*Do not appropriate one another's property with inequity and by false means.*"* Delaying the performance of an obligation beyond its due date or failure to fulfill a contractual obligation is considered to be taking people's money unjustly.

In accordance with the Almighty's saying, "When you judge between the people you should judge justly," and the Almighty's saying, "Do not let the enmity of a people move you at all to act otherwise than equitably. Be equitable always."[191]

A hadith reports the Prophet Muhammad ﷺ, stressing the importance of respecting contracts and fulfilling their conditions, where he, may Allah's prayers and peace be upon him, said: "Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful.*"* Prophet Muhammad ﷺ said, "There should be neither harming nor reciprocating harm."[192]

The liquidated damages clause is a modern terminology trend, and it is considered one of the new cases to the Islamic financial transactions and jurisprudence. The terminology was formed and devolved in comparative laws filed and conveyed it is way to several Islamic countries' legislations.[193] The liquidated damages clause was not known to the ancient jurists of

[190] *Surah Al Mâ'idah* 5:1.
[191] *Surah Al Baqarah* 2:188.
[192] Supra ____what?
[193] Article 224 of the Egyptian Civil Code.

Sharia, although the concept was known to them and their discussion of it was reflected in the chapters of the liquidated damages clause in Islamic jurisprudence books.[194]

This kind of clause was not much needed before modern times due to the simplicity of economic life in Islamic societies. Given contemporary economic life, with its complexities, intertwined relationships, and the negative effects resulting from the failure or delay of one of the parties to the contract to fulfill its obligations toward the other becoming widespread, the need for this type of condition arose.[195]

The liquidated damages clause has many names due to differences in the concept and the realities to which it was applied. Those who think it is compensation for damages call it "liquidated damages," and those who think it is a penalty call it the "penalty clause" or "delay fine." Since it was often placed as a condition in a contract within the terms of the contract on compensation due, or an appendix thereto, the most popular term has become "liquidated damages clause."[196]

The liquidated damages clause is defined as an arbitrary compensation agreement for the expected damages and thus compensation estimated in advance by the contracting parties that the creditor is entitled to in the event the debtor does not fulfill his obligation or delays it. This condition may be included in the original contract and may be in a later contract, but it is required that the compensation to be agreed upon before the breach occurs it. It constitutes an additional obligation, according to which the two contracting parties agree to determine the legal

[194] HAMMAD, NAZIH, A DICTIONARY OF FINANCIAL AND ECONOMIC TERMS IN THE LANGUAGE OF JURISTS 257.
[195] Al-Dair, Al-Siddiq, the penalty clause, research presented in session No.12, the Islamic Fiqh Academy, Vol. 2, p.50, 1999.
[196]Al-Sanhoury, Abdel-Razzaq, Al-Waseet fe sharh Al Kanoon AlMadany, Reviving the Arab Heritage House, Beirut, vol. 2, p. 851. Muhammad, Atef Saadi, Administrative Supply Contract, University Culture House, Alexandria, 2001, p. 456.

compensation to be due in case of voluntary breach of the prejudicial party to the stipulated party.[197]

By analyzing this definition of the liquidated damages clause, it becomes clear that:

It is an obligation, a binding condition that usually is an addition of the original contract. This is legitimate compensation stipulated to avoid what would be an invalid liquidated damages clause that leads to usury, the charge that its amount is in excess of the damages incurred, or an unfair financial loss of the injured party.

If unfairness appears in the estimation of compensation when the damages occurs, it must be adjusted by a judge to match the damages. And (harmful): a precaution against the state of non-harm, which leads to the non-entitlement of the liquidated damages clause unless harm is assumed as it is in the liquidated damages clause in the marriage contract in the Kingdom, as discussed below.

Islamic jurists have determined that the liquidated damages clause includes characteristics making it permissible according to:[198]

- An additional characteristic is that it is a subordinate obligation to the original obligation and cannot be independent of it, and thus follows the original obligation in its existence and nonexistence.
- It is compensation for the damages arising from a breach of an obligation, not a penalty.
- The agreement between the creditor and the debtor has taken place before the occurrence of the breach or damages, so that the amount of compensation is determined in the original contract or in a subsequent agreement, before the damages occur, and it is due

[197] Al-Yamani, Muhammad, The Penalty Clause and Its Impact on Contemporary Contracts 65 (2004) (Ph.D. dissertation, College of Education, King Saud University).
[198] Al-Yamani, Muhammad, I.D., p. 68

upon the occurrence of the damages or breach, whether this breach is a result of non-performance of the obligation, or of partial or defective execution.

- It is related to concrete, measurable damages and is not due without actual or assumed damages.
- There are two opinions on whether traditional Muslim jurists spoke about these liquidated damages clause or mentioned some of its forms and issues under other names:

In the first opinion, Islamic jurisprudence did not define the liquidated damages clause at all, and there was no talk about any of its types. What was mentioned in the jurisprudence concerned similar issues, such as the deposit. They are similar to, but hardly identical, to penalty clauses.[199]

In the second opinion, while traditional Islamic jurisprudence did not know the liquidated damages clause by that name, nor did it know all its forms, types, and conditions, it did know a number of its forms.[200] The most prominent of these was in the Sahih book when a man said to another man: postpone your travel journey by sheltering and tying up your traveling camels in my stalls, and if I do not join you on your journey, I will pay you hundred dirhams. And when the time came, he did not travel with him. So, the traveler man complained to a judge named Shuraih. After confirming the validity of the complaint, the judge ordered the other man to pay the conditioned amount and said: "Whoever optionally, and without duress, stipulates a certain condition on himself, must fulfill the condition."[201] The basis for contracts and transactions in Islamic law is validity until evidence is established to the contrary.

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[199] Al-Darir, I.D., p. 10

[200] Al-Farfour, Muhammad, *The Impact of Istisna'*, JOURNAL OF THE ISLAMIC FIQH ACADEMY, Issue Seven, Part Two, 1412 AH, p. 513, research by the Standing Committee for Fatwas. Kingdom of Saudi Arabia, 1394 AH, JOURNAL OF ISLAMIC RESEARCH, Second Issue 1395, p. 61)

[201] Sahih al-Bukhari and with him Fath Al-Bari by Ibn Hajar, Book of Conditions, Chapter on What Permissible Conditions by which People Know Each Other, Vol. 5, Pg. 707.

1.3.2. Sharia distinguishes between the liquidated damages clause and other similar terms

A. Liquidated damages clause and sales on deposit

A deposit and a liquidated damages clause are similar in that both are conditions that require the person who breaches them to pay financial compensation, and that both are intended to urge the contracting party to implement it. Also, selling the deposit may be interpreted as a penalty clause for estimating compensation in the event of reversal of the contract (the price of reversal). However, they differ in that the deposit exists prior to the contract and the liquidated damages clause is attached to it. The deposit is also intended to enable one of the contracting parties to rescind the contract, while the liquidated damages clause is intended to urge the contracting party to implement on time and to compensate the creditor in case of breach.

The deposit is the equivalent of the right to rescind the contract. The obligation to pay the deposit is valid even if the rescission of the contract did not result in any damages. As for the liquidated damages clause, it is an estimate of compensation for damages that has occurred. It is not worth pursuing the compensation unless the damages have occurred, and the deposit may not be reduced. And the amount specified in the liquidated damages clause may be reduced in proportion to the damages. In the sale of the down payment, the buyer has the right to abandon the purchase in order to pay the deposit, in contrast to the liquidated damages clause. The obligated person is not obligated to required his commitment to the contract by paying the compensation resulting from the agreed condition.[202]

B. Liquidated damages clause and financial threat (penalty payment)

[202] Al-Shehri, Abdullah Muhammad, The Penal Clause and Its Application in the Great Court and the Board of Grievances in Riyadh (1418 AH) (Master's thesis, Higher Judicial Institute, Imam Muhammad bin Saud Islamic University, Riyadh, Department of Comparative Jurisprudence).

There are similarities and differences between the liquidated damages clause and the financial threat clause in Islamic jurisprudence:

Among the similarities is that each of them is a sum of money paid due to a breach of contract, and that each is intended to urge the other party to expedite the execution of what it has committed to. One difference is that the existence and extent of financial threat is determined by a judge. By contrast, in the liquidated damages clause, the two contracting parties agree in advance. Also, it is possible that the fine in the financial threat may exceed the amount of damages, so the judge can increase the fine the longer the obstinacy of the debtor pertains, to force him to carry out his obligation, unlike the liquidated damages clause. In addition, the financial threat is a threatening temporary ruling that is not enforceable unless it is converted into a final compensation. As for the liquidated damages clause, it is usually implemented as it is without any increase or decrease unless the judge deems that there is a need to amend its amount.

The amount specified in the financial threat clause is usually reduced upon execution, because it is much more than the actual damages. As for the liquidated damages clause, it is usually implemented as it is without an increase or decrease unless parties have agreed differently.

C. The liquidated damages clause and the late fine in administrative contracts

The late fine is an amount of money estimated by the public administration in advance and is included in the provisions of the administrative contract, as a penalty imposed on a contractor with the administration if he is delayed in executing the contract. It is a privilege that the administration enjoys even if it has not suffered any damages as a result of the contractor's delay in execution because the damages is presumed to be related to the operation of a public utility.

The administration has the right to impose a late fine without the need of a warning or resort to legal proceedings to issue a judgment to implement it because it is based on a legal text that authorizes the administration to impose it. However, the administration adheres to the value stipulated in the contract, so it cannot demand an adjustment of the amount on the basis that the damages exceed the amount of the fine, and the contractor cannot prove that the administration did not suffer any damages as a result of the delay in execution.

Saudi jurisprudence and the judiciary administrators have established that the administration has wide discretionary powers in imposing the late fine. It is not entitled to impose a late fine if the reason for the delay is because of the administration itself or if there was force majeure, or the contractor proved that the delay was due to an extension requested by the contract party and approved by the administration, or that the delay was caused by someone else.[203]

1.4. Methods of appointing a judge in the Saudi **l**egal system

We will discuss the conditions for appointing a Saudi judge; the range of the judiciary in the Kingdom; the composition of the judiciary; the mandatory provisions of Sharia law for judges and the independence they enjoy; the judge's duties; the termination of his service; and some of the problems that the Saudi judiciary suffers from.

A- Conditions for appointing judges in the Kingdom

According to Article 31 of the Saudi Judicial Code, issued in 2007, a judge must be a Saudi citizen; a non-Saudi should not assume the judiciary. He must be of good conduct and behavior and have the full capacity to judge according to the provisions of Sharia. Also, a judge

[203] Freijeh, Hisham Muhammad, *Late Fine in Administrative Contracts* 16 UNIVERSITY OF SHARJAH JOURNAL OF LEGAL SCIENCES 411 Issue 2, December 2019).

must be knowledgeable of legal precedents and be able to derive these rulings from the Holy Qur'an and the Sunnah through *Ijtihad* (interpretations of matters not covered by the Qur'an). Also, he should judge between people by only what Allah and His Messenger have revealed, and he should not be ignorant of the rulings in Sharia.[204]

The Prophet ﷺ said, "There are three types of judges: one of will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and judges accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell too."[205]

Sharia also requires justice in the judge, so he is outwardly honest, refrains from the forbidden, keeping away from sins and doubts, living in contentment and not prone to anger.[206]

The law also stipulates that a judge must hold a certificate from one of the Sharia colleges in the Kingdom or a college equivalent to it, provided that in the latter case passes a special examination prepared by the Supreme Judicial Council. The judge must be at least forty years old if appointed to the rank of an appeal judge, and twenty-two if appointed to another rank. Finally, he must not have been convicted of a crime against religion or honor, or had a disciplinary decision issued against him to dismiss him from a public position, even if he has been rehabilitated.

And whoever holds the rank of judicial lieutenant (the first level in the judicial career ladder), which is the first degree in the is required to have obtained a university degree with an

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[204] AL-MAWARDI, ABU AL-HASAN ALI BIN HABIB, ROYAL RULINGS AND RELIGIOUS STATES 84 (Dar Al-Kutub Al-Ilmiyya Beirut, 1st ed. 1985).
[205] Abu Dawud, Sunan Abu Dawood, Hadith No. 3573. 3 AL-KASANI, ALAA AL-DIN ABU BAKR, BADAA' AL-SANA'I, THE ORDER OF LAWS 7 (Dar Al-Kitab Al-Arabi, 2nd ed. 1982).
[206] 2 ABU JEEB, SAADI, ENCYCLOPEDIA OF CONSENSUS IN ISLAMIC JURISPRUDENCE 821 (Dar Al-Fikr Al-moaser, 3d ed. 1997.

overall grade of no less than "good" and a grade of no less than "very good" in jurisprudence.[207] A 2020 amendment to Article 35 of the Judicial Law reads:[208]

> A person who occupies the rank of Judge is required to have spent at least one year at the rank of Judge or worked in comparable judicial positions for at least four years, or taught jurisprudence or its principles in one of the colleges in the Kingdom for at least four years. Or he shall have a master's degree from the Higher Institute of the Judiciary, or from one of the Sharia colleges in the Kingdom in the field of jurisprudence or its origins, or he shall have a diploma from the Institute of Management in the field of law, with a study period of no less than two years, from those who hold a degree from one of the Sharia colleges in the Kingdom with an overall grade of no less than "good" and a grade of no less than "very good" in jurisprudence and its principles.

It is clear from this text that there is a concern with qualifying judges in the field of Islamic law, whether by teaching Sharia subjects or studying them at the master's level. However, graduates of schools of law and law at the bachelor's level are still not allowed to be appointed as judges, even if they are able to hold a master's degree in law but can attain this position only on condition that they hold a bachelor's degree in Islamic law.

Accordingly, new judges can be appointed to courts in the Kingdom from those who hold a doctorate or master's degree from the Higher Judicial Institute, teachers of jurisprudence in university colleges, and those who hold a diploma in legal studies from the Institute of Administration, and those who hold a bachelor's degree in Sharia.

[207] Article 33 of the Saudi Judicial law.
[208] Royal Decree No.: M 141, 10/19/1441 AH.

The probation period for a judicial lieutenant is two years from the starting date of his work after a decision is issued by the Supreme Judicial Council appointing him to this position. If, during this period, he is deemed incompetent, the Supreme Judicial Council issues a decision to dismiss him from the judiciary. Those appointed from among the judges other than the judicial lieutenant shall initially be on probation for one year, and if their eligibility is not established during this period, their service shall be terminated by royal order.[209]

B- Degrees of the judiciary in the Kingdom

The ranks of the judiciary in the Kingdom, as specified in Article 23 of the law, consist, is ascending order, of a judicial lieutenant, a judge (C), a judge (B), a judge (A), a court attorney (B), a court attorney (A), the president of a court (B), Chief of Court (A), Judge of Appeal, Chief of Court of Appeal, or Chief of the Supreme Court. Appointment and promotion in the ranks of the judiciary are carried out by royal order, based on a decision of the Supreme Judicial Council. In promotions, the council takes into account the order of absolute seniority, and in case of equal qualifications or performance indicator reports, the oldest candidate is promoted.

C- Composition of the judiciary in the Kingdom

The judiciary in the Kingdom of Saudi Arabia operates as a dual judiciary, with an administrative judiciary that considers all cases in which the administration is a party. This is in accordance with the text of Article 13 of the Board of Grievances law, which states that the Board of Grievances is an independent administrative judiciary body, directly linked to the king, and the judiciary and its judges joined with the guarantees stipulated in the judicial law, and they abide by the duties stipulated therein. The Board of Grievances administratively supervises the

[209] Article 44 of the Saudi Judicial Law.

administrative judiciary, and the Administrative Judiciary Council technically supervises the work of administrative judges.

The administrative judiciary consists of:

- the Supreme Administrative Court
- the Administrative Courts of Appeal
- the Administrative Courts

The general judiciary considers all other cases. The Ministry of Justice administratively supervises the general judicial law in the Kingdom, and the Supreme Judicial Council technically supervises the work of judges and functional affairs.

The public judiciary, according to Article 9 of the judicial law is composed of:

- The Supreme Court.
- The Courts of Appeal.
- The courts of first instance, which are:

    A - General Courts

    B - Criminal courts

    C - Personal status courts

    D - Commercial courts

    E - Labor courts.

The courts of the general judiciary are competent to consider issues that are referred to them in accordance with the judicial law, the Saudi civil procedures law, and the law of Consensual Procedures. The Supreme Judicial Council may establish other specialized courts after the approval of the King.

D- The provisions of Islamic Sharia are mandatory for the judge in the Kingdom

According to Article 7 of the Basic Law of Governance in the Kingdom Constitutional Rules,[210] the king and the leaders of the Kingdom of Saudi Arabia derive their authority from the Qur'an and the Sunnah. These people are the rulers of this law and all the laws of the state. Article 46 of the same law states that the judiciary is an independent authority, and there is no authority over judges in their judgments other than the authority of Sharia.

Article 48 of this law states "the courts shall apply to cases brought before them the provisions of Sharia, as indicated by the Qur'an and the Sunna, and whatever laws not in conflict with the Qur'an and the Sunna which the State may enact." It is apparent from these texts how important it is that the judge be aware of the provisions of Sharia, as he is bound by its provisions in adjudicating all the cases presented to him.

E- The independence of judges

Article 1 of the Saudi Judicial Law issued in 2007[211] states that Saudi judges are independent, and there is no authority over them for the provisions of Sharia and applicable laws, and no one has the right to interfere with the judiciary's functioning.

Article 2 stipulates that judges are not subject to dismissal except in certain cases, such as violating laws and not showing up for work. It is not permissible to transfer them to other positions, except with their consent or because of their promotion,[212] and it is not permissible to quarrel with judges because of the nature of their position, except in accordance with the conditions and rules related to their discipline.[213]

F- The duties of judges

[210] Issued by Royal Order No.: A/90, 03/01/1992.
[211] Royal Decree No.: M/78, 10/1/2007.
[212] Article 3 of the Saudi Judicial law.
[213] Article 4 of the Saudi Judicial law.

Judges may not combine their judicial position with the practice of commerce, or any other work that is inconsistent with the independence and dignity of the judiciary. The Supreme Judicial Council prevents any judge from undertaking work that conflicts with the duties and proper performance of the judicial position.[214]

Judges also may not divulge the content of their deliberations. Their work of judges is monitored once or twice annually by the Judicial Inspection Department of the Supreme Judicial Council. The Council looks at a number of criteria, including the judge's ability to adapt the case, his proper conduct, application of regulations and instructions, good wording, reasoning in his rulings, the validity of judgments, and accuracy of coverage of requests, and completion and mastery work and other performance of job duties. The judge's adequacy is assessed as excellent, above average, average, or below average.

G- End of service for judges

In accordance with Article 69 of the Judicial Law, the service of a member of the judiciary ends when he reaches the age of seventy, or upon his death, acceptance of his resignation, acceptance of his request for retirement, his inability to serve the judiciary, or his inability to perform his work after the expiration of the sick leave or obtaining a rating of below average in the adequacy report three times in a row, or termination of his services for disciplinary reasons.

Saudi laws have granted judges complete independence and wide discretion in considering the cases before them, as the Saudi Courts Law differ from the common law and civil law, as it follows a model of legal systems that does not depend solely on judicial

[214] Article 51 of the Saudi Judicial Law.

precedents (general law) or on the national code (civil law), but on legal texts and jurisprudential rulings that represent the opinions of scholars of jurisprudence schools in Islamic law.

The Saudi judge adjudicates the cases before him on the basis of his understanding and analysis of the legitimate texts and opinions of jurisprudence as guided by his conscience that he is closest to God's judgment in the case, regardless of any other influence. While judges have a duty to implement approved laws, their duty to implement the provisions of Sharia represents their ultimate goal. Therefore, the judge may refrain from applying some national laws if he believes that they contradict the provisions of Sharia, taking into account the hadith of the Prophet Muhammad, which states that there should be "[n]o obedience to a creature in disobedience to the Creator."[215]

[215] Narrated by Imran Ben Al-Husayn and corrected by Al-Albanians, Saheeh Al-Jamea, *Hadith* No.: 7520.

Chapter Two: The Authority of the Saudi Judge to Assess the Liquidated Damages Clause During the Consideration of the Case in Court

A Saudi judge enjoys wide discretionary authority with regard to liquidated damages clause compensation while looking into the dispute. He derives this broad authority from Sharia, which allows the judge the freedom to resolve the dispute before him within the framework of Sharia and in a manner that does not conflict with the Qur'an and Sunnah; and with the help of jurisprudence rules in Islamic law and the various schools of jurisprudence.

2.1. The approach of Islamic law in court

A Saudi judge, when deciding a dispute, works within the scope of a broad approach that allows him to research the legal and jurisprudential texts in Islamic law and to select the appropriate solutions to the dispute before him, including issues around the liquidated damages clause.

2.1.1. The broad approach to the work of the judge during the consideration of the dispute

The judiciary in Saudi Arabia relies on the provisions of Sharia that are derived from the Qur'an and the Prophet's Sunnah in settling contract disputes and the provisions they contain, including the liquidation damages clause.

The Saudi judiciary adopts the provisions of Sharia, which is stipulated in the Basic Law of Governance in the Kingdom, as the supreme law in the country. Thus, the judge refrains from applying any texts that contradict it.

The Kingdom is unique not only when compared to other Arab countries, but also to other Islamic countries. This makes it closer to the legal system applied in Islamic countries in

the early Islamic era, which combines the characteristics of the Anglo and the Latin legal schools.

However, the lack of codification of Sharia provisions has led to significant differences in interpretation and application by some judges, who must refer to the jurisprudential references codified in the four schools of jurisprudence to search for solutions for the issues before them. They also must base their rulings on clear texts and jurisprudential rules related to the subject of the dispute.

King Abdul-Aziz, the founder of the Kingdom, issued many instructions with the aim of regulating judicial work and limiting the broad discretion approach practiced by the judge during trials. In 1925, King Abdul-Aziz issued "Temporary Reform Articles for the Sharia courts," aimed at identifying the sources of judicial rulings.[216] In 1926, King Abdul-Aziz ordered the courts to continue implementing Ottoman law in the Hejaz, which primarily used the Al-Hanafi School, before the issuance of the law of "The Status and Formations of *Sharia* Courts" in 1927. This is the first administrative law for the judiciary in the Hejaz and involves an abolition of the Ottoman law.

Nevertheless, the King wanted the courts to abide by the provisions of Sharia without being restricted to a specific school of Islamic jurisprudence; rather, they must rule according to what appears to them relevant from any school, and there is no difference between one school and another.[217] However, his desire was not easy to implement since a good number of scholars wanted to stick to the Hanbali school.

[216] The text of the royal speech was published in the official newspaper in the Kingdom, Umm Al-Qura Newspaper No. 32, 16/1/1344 AH.
[217] Royal speech on 7/2/1346 AH.

In order to avoid this broad approach to settling disputes a Saudi judge might take in searching for jurisprudential texts among the four schools, King Abdul-Aziz attempted to codify the provisions of Sharia by selecting those laws and regulations that most derived from the texts of the Qur'an and Sunnah and were most appropriate for advancing people's interests. But this approach was rejected by scholars, which forced the King to specify the Hanbali school and its jurisprudential books as the basic reference point for the judiciary in the Kingdom. However, this did not prevent judges from referring to other schools of jurisprudence if they did not find the appropriate solution to the issue presented to them in the Hanbali School.

The king drew up a general rule for judicial rulings so that they are generally carried out in accordance with the provisions of the Hanbali school. In the event a judge bases his ruling on another school, should delineate the basis for this ruling.

The king also identified the sources approved in the Hanbali school to which the judge refers when issuing any rulings, namely:

- *Al-Mughni* book by the jurist Al-Muwafaq Ibn Qudamah (620 AH).
- *Al-Sharh Al-Kabir* book by the jurist Ibn Qudamah (682 AH).
- *Muntaha Al-Iraadat* book by the jurist Al-Futuhi (972 AH), and the commentary by the jurist Al-Bahooti (1051 AH).
- *Al-Ikna'* by the jurist Al-Hijjawi (948 AH) and the commentary by Al-Bahouti. Whatever the two books agree on, or mention about the other, that point should be applied. In the event that the two books disagree, what is mentioned in the book of Muntaha Al-Iraadat book is to be applied.
- *Zad al-Mustaqni'* book called (Al-Rawd Al-Murba') by the jurist Al-Hijjawi and the commentary by the jurist AlBahooti.

- *Dalil Al-Talib* book called (Manar Al-Sabeel) by the jurist Mar'i Al-Hanbali (1032 AH) and the commentary by the jurist Ibn Dwayan (1353 AH).

King Abdul-Aziz adopted these references from Hanbali jurisprudence due to the spread and influence of this school in the Kingdom, the ease of reviewing its books, and the clarity of the inferences in them. He intended to limit the broad approach that allows judges to search for solutions to cases presented to them in other schools and the resulting difference in judgments of similar cases.

The Hanbali school is the broadest of the four schools of jurisprudence in approving the conditions of contracts according to the principle that conditions are meant to be permissible unless there is evidence that something is to be prohibited. However, there are multiple opinions within the Hanbali school itself. If a judge does not find the appropriate solution to the issue in the texts of the Hanbali school, he may search for a solution in another school of jurisprudence.

Given that a Saudi judge has a wide discretionary authority, he is not obligated to abide by judicial precedents, whether issued by him or other judges, and can apply his personal interpretation of Sharia to any specific case. Therefore, different rulings arise even in similar cases.

The role of informed reasoning or *Ijtihad* by some judges and the difference in their rulings in similar cases has led to calls for the codification of Sharia rules. The aim would be to reduce difference between judges' rulings and to increase the predictability of rulings and remove doubts about their nature. As a result, the king announced at that time the formation of a committee whose mission was to codify the provisions of Islamic Sharia by selecting the most likely evidence from the four schools. In 2007, a new law on the judiciary was

issued,[218] which included a number of key amendments, including the restructuring of the judicial law and the establishment of the Supreme Court and Courts of Appeal in addition to the specialized first instance courts.

The work of the Sharia Codification Committee developed, as it was entrusted with codifying these provisions in detail, and judges were also obligated to abide by the general principles issued by the Supreme Court in many cases.

In addition, judges in the Kingdom are bound to abide by the laws that are issued by royal decrees after being approved by the Council of Ministers and the Shura Council, which are called "regulations" instead of legislation. The texts of these laws texts must not contradict the provisions of Sharia and regulate many topics, such as commercial law, as well as labor law, company law, and intellectual property law.

These attempts aim at limiting the broad approach in Islamic law to elicit rulings, that gives the Saudi judge wide discretion in basing his judgment on a particular issue on what is prevalent in the various schools of jurisprudence. The contracts and the conditions included in the liquidated damages clause still are directly subject to the provisions of Sharia and to the judge's wide discretionary authority within the scope of its provisions.

2.1.2. The movement of the jurisprudence in Sharia rules

There appeared in Islamic jurisprudence a movement of scientific reasoning in the provisions of Islamic law to confront the developments and issues that emerge in society based on the sources of Islamic law that were referred to previously. These sources permitted the jurists to use reason in proposing solutions to societal issues when there was no definitive evidence to

[218] According to Royal Decree No. M/78 dated 9/19/1428 AH.

support their reasoning or only what was regarded as a speculative text. This includes authorship in the jurisprudence, which means in the Arabic language the basis and is defined as laying down a general rule in brief texts that include general legal rulings on accidents or issues that fall under a particular subject. It includes the general rulings on incidents or issues that are not stipulated in the Qur'an, Sunnah, or by Consensus[219]

Jurisprudence maxims are derived from various sources of Islamic law, some of which are directly based on the first source of legislation, the Qur'an. Examples are:

- The rules "Hardship begets ease" and the rule "Harm must be eliminated." Some are directly based on the Sunnah, such as the principle of "Certainty is not overruled by doubt" and the rule "Yield is guaranteed."

Moreover, it involves what is based on other sources of Islamic law, such as consensus, analogy, the sayings of the Companions, and other principles of jurisprudence, such as the rules "Rights decisively lean on provisions" and "Whoever voluntarily, and without coercion, stipulates a certain condition on himself, must fulfill this condition."

These rules are of paramount importance to the Saudi judiciary, as judges often rely on initial jurisprudential rules to justify their rulings. Many benefits have been achieved from the application and citing of these rules, including:

- Controlling the widespread, multiple issues in jurisprudence and working to organize them in brief and specific rules.[220]

[219] Dr. Yaqoub bin Abdul-Wahhab Al-Bahahussain, presented by Prof. Abd al-Rahman ibn Abd al-Aziz al-Sudais, Al-Muffasal fe AlKawaed Al-Fikheya, Dar al-Tadmuriyyah, Riyadh, 2nd Edition, 1432 AH / 2011 AD.
[220] Zain al-Din Abd al-Rahman ibn Ahmad Ibn Rajab al-Hanbali (died: 795 AH) proofed by: Abu Ubaidah Mashhour Ibn Hasan al-Salman (Takreer Al-Kawaed wa Tahreer Al-Fawaed [famously known as "The Rules of Ibn Rajab"] Publisher: Dar Ibn Affan for Publishing and Distribution, Saudi Arabia Edition: First, 1419 A.H., 1st Edition.

- Facilitating the memorization of the branches and details of jurisprudence for the jurists and judges.
- Helping the jurists and judges to understand the fatwa methods and enable them to derive the branches in a sound manner of the principles, and facilitate deriving the branches based on the normative jurisprudence maxims to avoid the contradiction that may arise owing to deriving from partial matters.

These jurisprudence maxims, in terms of their breadth and comprehensiveness, fall into two parts:

1- Rules that include many issues and from various jurisprudential sections that are applicable to the four schools of jurisprudence.

2- Rules that include issues related to specific sections of jurisprudence, and some jurists have called them “special rules.”

Examples of the first are rules that include all chapters on which jurisprudence is largely based. They are called the five Normative Maxims of Islamic law, namely:

- Acts are judged by the intention behind them.
- Certainty is not overruled by doubt.
- Hardship begets ease.
- Harm must be eliminated
- Custom is the basis of judgment.

There are rules that are less comprehensive than these five major rules, which are partial maxims under which many issues fall, of which there are forty, including:

- *Ijtihad* is not abrogated by Its like, other *Ijtihad*.
- If the Halal and the forbidden are combined, the forbidden will prevail.

- Altruism in relatives is detestable, and in non-relatives, it is desirable.
- Punishments of boundaries drop when there is doubt of culpability.
- The significance of a person's words takes priority over negligence.
- The guarantor has the right to hold earnings since he is guaranteed.
- Silent cannot be interpreted as saying.
- What is forbidden to take is forbidden to give away.
- When someone rushes into something before its due time, he is punished by depriving him of it.
- An Imam's disposition toward people is contingent upon interest.
- A wrongful conjecture cannot be considered.
- In matters that are not divisible, selecting some of it is like selecting all of it, and dropping some of it is like dropping all of it.
- When a perpetrator and a "causer" coincide, the judgment shall fall on the perpetrator.
- The settlement of discord is desirable.
- Avoiding harm is better than fixing the damages.
- Contentment with something is satisfaction with what derives from it.
- Duty is left only to duty.
- What is proven by Sharia takes precedence over what is proven by conditions.
- What is forbidden to use is forbidden to take.
- An infeasible phase cannot entirely overwhelm a feasible one.

Judges in the Kingdom often rely on these jurisprudential rules in formulating their judicial ruling, such as in these examples:

1- A plaintiff filed a lawsuit demanding that the decision of the defendant, a government agency, to cancel his practice accounting license on the basis that he did not reside in the Kingdom for the required statutory period be rescinded. He had suffered a heart attack, which required him to rest completely in his home country and which prevented him from traveling and returning to the Kingdom until the doctors authorized him to do so. This constitutes a compelling legitimate excuse that the authority did not examine before issuing its decision. The court ruled to annul the defendant's decision and, in support of its ruling, cited the Sharia rules: "Hardship begets ease," "When a matter tightens, it will widen, and vice versa," and "Necessities render prohibited things permissible." The court stated in the reasons for its ruling that: "What is included in the aforementioned report constitutes a compelling legal excuse. Because, according to the Basic Law of Governance, the laws in force in the Kingdom are governed and restricted by the generalities, principles and rules of Sharia, which discourage a person's embarrassment, and the legitimacy of licenses and unanimity not to be assigned to hard work, in addition to not being assigned something unbearable, as ability is a condition for assignment in accordance to the Almighty's sayings, "God does not burden a soul beyond its capacity," and "God does not want to place you in hardship." The jurists from the branches of Sharia laid down a comprehensive rule that "Hardship begets ease" and includd rules under it such as "When a matter tightens, it will widen and vice versa," and "Necessity renders prohibited things permissible." Since the defendant did not provide evidence that it examined the plaintiff's excuse before issuing its decision, subject to his grievance and

based on what was mentioned, the court has ruled the invalidity of the decision, the subject of the grievance, which necessitated its cancellation. [221]

2- A plaintiff filed a lawsuit that claimed the defendant was obligated to compensate him for the damages resulting from her granting building permits for four floors of real estate opposite the plot of his house, while he was only licensed for two floors, as he was unable to benefit from the yard of his house because it became exposed because of the property opposite to him. The defendant argued that the licenses were granted in accordance with legal requirements, and requested the lawsuit be rejected. However, the court ruled to obligate the defendant to pay the plaintiff an amount of compensation for the damages and based its ruling on the following Sharia rules: "Permissibility excludes liability for compensation," and "Harm must be eliminated." The court stated in the reasons for the ruling that it is necessary to redress the damages arising from the actions of the administration's actions, based on the principle of equality of individuals before public burdens and costs. This confirms that the plaintiff was harmed by a decrease of the value of his house before and after the corresponding construction. Therefore, the defendant had to redress the damages incurred by the plaintiffs, and since jurisprudence and judgment is established that there is to be no harm, that damages must be eliminated, i.e., the damages must be removed by compensating the plaintiff for the current deficiency in the value of his home. This does not affect the statement that the defendant bears the guarantee, as she is the owner of the real estate opposite the plaintiff's house.

[221] Case No.: 664/1/s for the year 1417 AH, preliminary ruling number: 4/d/f/12 for the year 1423 AH, judgment number of the Audit Board of the Board of Grievances: 65/t/5 for the year 1424 AH, see also Dr. Yahya Al-Sharif, Naima Al-Amin, A set of jurisprudential rules applied in the causation of judicial rulings issued by Saudi courts, pp. 12-13, 2021 AD.

Since there is no aggression in his conduct, and the lack of aggression from the owner of the building opposite the plaintiff's house, seeing as she did what she was authorized to do. Thus, she is not considered a trespasser, because decided on the basis of "what is the consequence of an authorization is not guaranteed," and legal permissibility contradicts guarantee." The court, in order to estimate the compensation, decided to take the average estimate of the expert, and ruled to obligate the Ministry of Municipal and Rural Affairs to pay that amount of compensation to the plaintiff for the damages incurred by him.[222]

3- A plaintiff submitted a lawsuit that claimed the defendant was obligated to return the capital that he handed over to him for the purchase and sale of electrical appliances, based on the contract concluded between them, due to the non-delivery of any profits. This lack of profit, he claimed, resulted from the negligence of the defendant in failing to demand payment from customers who were very late in their payments. The court ruled to obligate the defendant to pay the plaintiff a specified amount, relying on the maxims, "What is commonly practiced is deemed as a stipulated condition," and the rule "What has been taken shall be handed back."[223]

4- A plaintiff filed a lawsuit demanding the termination of a contract concluded with the defendant because of the latter's late payment of the sum agreed upon in the contract. However, the defendant pleaded that there was an agreement between him and the contractor to deliver payments that was in violation of the contract by dividing the first payment stipulated in the contract. The plaintiff demanded that the contract be rescinded, and that the defendant be obligated to pay what was left of his debt after reinstalment the

[222] Case No.: 3/1/10798 / s for the year 1436 AH, the Administrative Court
[223] Case No.: 10/5418/S for the year 1437 AH, Administrative Court, Case No.: 3404/2/S for the year 1438 AH, in the Administrative Court of Appeal.

engineering office and evaluating the entire work. The court ruled that the contract concluded between the two parties should be rescinded due to the defendant's failure to provide the payments at the time agreed upon in the contract, and cited in support of it ruling, "Rights decisively lean on provisions"[224]

The fatwa of the Council of Senior Jurists in the Kingdom, which affects the judges, also is based on jurisprudential rules. In its fatwa related to the liquidated damages clause, it stated that this clause is one of the conditions that are considered in the furtherance of the contract, as it is an incentive to complete the stipulations of the contract on time, citing the jurisprudential rule "There should be neither harming nor reciprocating harm,[225] because failure to implement or actual delay leads to missing an opportunity or expected gain, which is a damage that requires compensation.

2.2. The four schools of Islamic jurisprudence

Jurisprudence maxims appeared in Islam from the beginning, at the hands of the Messenger Muhammad ﷺ, when the Qur'an was revealed with its legal rulings. The Prophet ﷺ made these rulings clear to people, detailing their conditions, and indicating how they should be implemented through words, actions, approvals, or disapprovals.

The schools of jurisprudence began to emerge because of changing life circumstances and the need to clarify emerging issues.

Islamic jurisprudential schools appeared in later ages; they were not known at the time of the Companions or the followers, and a number of the followers had followed the approach of

[224] Case No.: 3527617, for the year 1435 AH, the General Court of Sakaka, validated by the Court of Appeal in Al-Jawf Region, No. 353369, date: 07/30/1435 AH).
[225] Supra.

some Companions who were known for their knowledge of Islam. The actual emergence of the schools of jurisprudence that are known today came after the dispersal of the followers' scholars in countries after the expansion of the area of the Islamic state and the decisions of a number of jurists to be the authoritative voices of their sects through their teachings. Others focused on their origins and developing rules for them, until the rulings of each sect were known separately.[226]

The schools of jurisprudence in Sharia are based on deriving legal rulings from the evidence contained in the Qur'an and Sunnah according to specific jurisprudential rules and principles. The adherents of school of jurisprudence agreed on doctrine, principles and Sharia, but might differ in the detailed deduced rulings.

The term *Maddhab*, or school of jurisprudence, appeared in Islamic jurisprudence during the tenth century AD. It means an approach to understanding the provisions of Islamic law and the method that a scholar or a number of scholars, school of jurists, will use in legal deduction and inference, and the branches that are added to the "trunk" of the law, given the fundamentals on which the doctrine is based.

The schools are distinguished from each other due to differences among their leading expositors in terms of the methods of *Ijtihad* and logical deduction, and not in total evidence. The special *Ijtihad* method and the choices of each imam of a school in what he takes from the accessory evidence is what distinguishes between "the principles of the doctrine" and "the principles of jurisprudence."

The schools of jurisprudence in Islamic jurisprudence passed through three stages:[227]

[226] Muhammad Mustafa Shalabi, Al-Madkhal fi Al-fikh Al-Islami (10th Edition), Egypt: Al Jamia House, (1985), p. 195-197.)
[227] Abdul-Wahhab Khallaf, kholasat tareekh Al-Tashrea Al-Islami, Egypt: Dar Al-Qalam for Printing, Publishing and Distribution, pg 87.

- The creation and formation stage: This phase, which extended over three centuries, until about the year 1259 AD, was marked by the organization and arrangement of doctrinal jurisprudence. It also saw the authorship of a number of works that dealt with controversial issues with other sects.
- The imitation stage. The *Ijtihad* at mothed were frozen at the beginning of the thirteenth century AD when jurisprudential scholarship and interpretation was limited to following the jurisprudential heritage of the ancients by explaining, abbreviating, or organizing it, without new additions, despite those decisions often being far from the realities of everyday life.
- The stage of renewal at the beginning of the nineteenth century AD, when Islamic jurisprudence started making its way toward new developments to keep up with the times and examine emerging issues given the progress of human knowledge and contact with other civilizations. A group of jurists emerged who led the renewal movement and warned against stagnation.

As we have seen, four major schools of jurisprudence have appeared in Islamic law and have received attention, codification, research, and study. They have won wide acceptance among the people since their establishment to the present time. Each school includes rulings related to worship and others related to transactions[228].

Each school expresses the way the imam who led it understood legal texts, and his method of deriving the rulings, which are used by the followers of the school.

[228] Khaled bin Abdel Moneim Al-Rifai, "The reason for adopting the four schools of thought and not others." www.alukah.net.

Doctrine is defined in Islamic jurisprudence, as the totality of legal rulings and issues that were issued by an imam or scholar of Islamic jurisprudence, in addition to the issues attached to it from the followers of the doctrine based on the rules and principles established by the imam.[229]

It should be noted that the schools of jurisprudence agreed among themselves on the peremptory provisions of the Sharia. The disagreements were limited to the details involved. In addition, numerous followers took it upon themselves to spread the knowledge of the four schools, unlike what happened with other scholars and imams, whose influence waned.[230]

Among the reasons that led to the difference between the Islamic schools are:

- Language-related reasons: as in other languages, the Arabic language contains words that share several meanings, which contribute to multiple interpretations.
- Standards for methods of narration of hadith differ from jurists school to another. A scholar might not have had access to a particular hadith of the Messenger and thus issued a fatwa based on a verse or another hadith, or he may have adopted an analogy. Alternatively, he might have had access to it and rejected it because of a defect in it, such as interruption or poor memorization of the account of the narrator. Differences may also arise between scholars because of their differences in understanding the meaning of a hadith.
- Concerning reasons related to the controls adopted in reasoning, and the fundamental rules laid down for *Ijtihad*; the jurists of the four schools could differ in the fundamental rules from which legal sub-rulings are deduced from detailed evidence because they viewed the authority of those rules differently.

[229] Abdul Karim Zidan, Al-Madkhal Lederasat Al-Sharia Al-Islamia, 1st Edition, The Message Foundation, p. 147-161, Beirut 2005.
[230] Mustafa Ahmad Al-Zarqa (Al-Madkhal Al-Fokhy Al-Aam (first edition), Dar Al-Qalam, Part 1, p. 269-276, Damascus 1998.

The difference among the leaders of jurisprudential schools has contributed to some support of Sharia with more practical rulings and legislation that removes societal distress and hardship by providing solutions to personal and societal problems, no matter how circumstances and conditions change, and the dispute does not indicate a contradiction in Sharia sources, but rather shows legal flexibility and breadth.[231]

A. **The Hanafi School,** attributed to Imam Abu Hanifa Al-Numan ibn Thabit (699-767 AD), is based on six sources: the Qur'an, Sunnah, Consensus, Analogy, Approval, Custom , the Words of the Companions, and the laws of those who came before us. This doctrine leaned toward the adoption of rational principles, i.e., reasoning to deduce an opinion when the text does not provide clear direction. It also tightened the guidelines for adopting hadith due to the growing complexity of life, the development of Islamic civilization and the fear of incorrect transmission of hadith from the Prophet. Also, concerning the companion's doctrine, if it is contrary to the generality, then it is privatized. By this, he intends to allocate some general evidence because of the work of the Companion, because they believed that the Companion would not have done an act contrary to the generality of the evidence, except because of his knowledge of what he singled out for what he had learned from Prophet Muhammad, Peace and Blessings of Allah be upon him.

The doctrine takes after *Istihsan*, as it is intended to relinquish the ruling on an issue, if it is judged similar to it to another ruling due to a reason that requires mitigation of that issue. And if a jurist narrator contradicts what he narrated, such that in his actions he contradicts what he narrated, then his actions matter more than his narration.

[231] Taha Jaber Fayyad al-Alwani, Al-Ummah book (Adab Al-Ikhtelaf Fe Al-Islam) 1405 AH (First Edition), Presidency of Sharia Courts and Religious Affairs, p. 93-95).

Among the most famous Hanafi scholars are Al-Tahawi, Shams Al-Imaam Al-Halawani, Fakhr Al-Islam Al-Bazdawi, Abu Al-Hasan Al-Karkhi, Al-Hassaf, Shams Al-Imam Al-Sarkhi, Fakhr Al-Din Qazi Khan, and the scholar Abu Bakr Al-Razi.[232]

Among the jurists of this doctrine is Abu Yusuf Yaqoub bin Ibrahim Al-Ansari, who was the first to be codified in Hanafi jurisprudence. Some of his most famous books are those about Kitab Al-Kharaj and Muhammad bin Al-Hasan Al-Shaybani, and he deserves much credit for codifying the doctrine of Imam Abu Hanifa, Al-Sagheer, Al-Mabsout, Ziyadat and Zafar, and Al-Hasan bin Ziyad. Among the most important books of this sect are *Al-Mabsout*, *Al-Zayyat*, *Al-Jami Al-Saghir*, *Al-Jami Al-Kabeer*, *Al-Sir Al-Saghir*, *Al-Sir Al-Kabeer*, and An-Nawadir by Imam Muhammad bin Al-Hassan, the book *Al-Kafi* by Hakim Al-Shahid, *Al-Mabsout* book by Sarkhasi, the book *Bada'I Al-Sana'i* by Al-Kasani, and the book by Hashiyat Ibn Abidin, called *Rad Al-Muhtar ala Al-Durr Al-Mukhtar*, and others.[233]

B. **The Maliki School** is attributed to Imam Malik bin Anas Al-Asbahi (711-795 AD). The *Maliki* school depends on the following sources: the Qur'an, the Sunnah, and the consensus of the Companions and their work, even when not mentioned in the Qur'an and Sunnah.

Considering that their *Ijtihad* and what they agree upon is a consensus. The work of the people of Medina was considered a source that Medina witnessed from the revelation of the Qur'an, especially the verses related to rulings and their practical application, in addition to the narratives that the Companions had of memorizing revelation, writing it down, and acting on what it stipulated as well as analogy.

[232] Muhammad, Abu Hanifa, Hayaatih Waeasruh Araoh wa Fiqahu, 2ed Edition, , Al-Fikr Al-Arabi House, pg. 497-503, 292. Egypt.
[233] Ibn Abidin, Hasheyat Rad al-Mukhtar Ali al-Durr al-Mukhtar, Sharh Tanweer al-Absar, (Dar al-Fikr for printing, publishing and distribution 1415 AH/1995 CE) 1/74.

Verdicts and judgments given by Islamic religious scholars. Analogy, Imam Malik had a method of analogy that distinguished him from the imams of other schools of jurisprudence. He saw the permissibility of measurement from the details, which becomes a source that can be measured within guidelines, and its measurement is not limited to the stipulated provisions.

Unspecified public interests, for all they are achieved by the provisions of Sharia, and everything else that advances Sharia, the evidence came to support and confirm it, and the command to do it is obligatory or recommended, and everything that was proven harmful, the evidence came to prohibit it. *Istihsan*, which is intended by Malik to exclude a license from the original and the total evidence, that is, it is not a rule in itself, and custom, which is what Muslims are accustomed to in their lives, assured that the matter is stable in the soul and accepted by reason and instinct.

Prohibition of evasive legal maneuvers: the reasons that lead to action. If it is permissible, the means to achieve it are also permissible, and if it is forbidden, the means are prohibited too.

Istishab is intended to prove what was proven or to negate what was denied, that is, the matter remains as it was. Imam Malik's doctrine is considered a moderate way between the people of opinion and the people of hadith, due to its reliance on hadith.

Imam Malik's students who wrote down his knowledge and fatwas. Among his most famous students were Abdullah bin Wahb and Abdul Rahman bin Al-Qasim Al-Masry, and Abul-Hasan Al-Qurtuby.

The most famous scholars of the Maliki School are Abdullah bin Wahb, Ziyad bin Abd al-Rahman, Abd al-Malik Ibn Al-Majshon, Abdullah Ibn Abd Al-Hakam, Asbagh Ibn Al-Faraj,

Othman Ibn Al-Hakam, Abd Al-Malik Ibn Habib, Abd Al-Salam Ibn Habib, and Muhammad Ibn Abd Al-Aziz Ibn Utbah, and Ibrahim bin Salamah.[234]

The origins of deduction according to Imam Malik are of one of two types: textual origins of transmission, or intellectual origins of jurisprudence. Consequently, the Maliki school includes deriving opinions through the adoption of Public Interests, Approval, Analogy, Prohibition of Evasive Legal Devices, and *Istisihab*.[235]

Among the jurists of this doctrine are Abu Saeed Abdul Salam bin Saeed, bin Habib bin Hassan bin Hilal, bin Bakar, bin Rabia, Al-Tanoukhi, bin Abi Zaid, Abu Abdullah Al-Qayrawani, and Asad bin Al-Furat bin Sinan.[236]

C. **The Shafi'i school**

It is attributed to Imam Muhammad bin Idris al-Shafi'i (767-820AD) and charts a middle ground between the doctrine of Hanifa, which used opinion, and the doctrine of Maliki, which tended stick close to the hadith. In its deductions and methods of inference, the Shafi'i school relies on the principles laid down by Imam Al-Shafi'i in his famous book *Al Risala* and *Al Aum*, which is considered the first integrated book on the science of Islamic jurisprudence. Among the most famous other books of his are the book *Fath Al-Aziz fi Sharh Al-Wajeez* by Al-Rafi'i, *Rawdat Al-Talibeen* and *Al-Majmoo* by Al-Nawawi, *Al-Muhadhd* and *Al-Tanbah* by Shirazi, and *Tuhfat Al-Muhtaaj* by Ibn Hajar Al-Haythami.

Al-Shafi'i has two sub-schools of thought, an older one in Iraq and a newer one in Egypt. Among his Iraqi students were Al-Hassan, known as Al-Zafarani, and Al-Hussein, known as Al-

[234] (Abd al-Ghani al-Daqer, Imam Malik bin Anas, the imam of Dar al-Hijrah (third edition), Damascus: (1998) Dar al-Qalam, p. 153-254, 205-276).
[235] Jasser Odeh, Arabization: Abdul Latif Al-Khayat, Maqasid Alsharieat Ka Falsafat Lil Tashrie Al-Islamii Dr., Publisher: The International Institute of Islamic Thought, first edition: 2012, p. 393).
[236] (Muhammad bin Alawi Al-Maliki, Imam of Dar Al-Hijrah - Malik bin Anas (Second Edition), Beirut: Dar Al-Kutub Al-Ilmiyya, (2010) page: 54.) Ibn Farhoun Al-Maliki, Al-Dabaj Al-Madhab in Knowing the Notable Scholars of the Doctrine, and it is one of the most famous books written in Translations of notables of the Maliki jurists.

Karabisi. Among his Egyptian disciples were Ismail bin Yahya Al-Muzni, Youssef bin Yahya Al-Bwaiti, and Al-Rabi` bin Suleiman Al-Muradi.

The Shafi'i school of thought is based on the Qur'an, the Sunnah and the general Consensus of what is known of the religion by necessity, and not only the Consensus of a particular country. Also included are the sayings of the Companions that were transmitted by one of them without disagreement from the others. Analogy is also adopted, which is to measure a judgment on a matter stipulated in the Qur'an or the Sunnah, or what was transmitted from the Companions without disagreement, or where Consensus was achieved.

The most famous scholars of the school of thought among the scholars of the Shafi'i school of thought are Ibrahim bin Khalid Al-Kalbi, Al-Rabi' bin Suleiman Al-Jayzi, Abu Zara'a Al-Qadi, Abu Bakr Muhammad bin Ali bin Ismail Al-Shashi, Al-Rabi` bin Suleiman Al-Muradi, and Al-Bouti.

D. The Hanbali school

This school is attributed to Imam Ahmad bin Hanbal (780-855 AD) and is the last of the four schools historically. Ibn Hanbal believed that jurisprudence should be based on the Qur'anic text, the Sunnah, the general principles or sources of the Hanbali School of jurisprudence, and the Companions' numerous fatwas when there are no other supporting texts, and there is no dispute. If the closest statement does not appear to be true, the difference between the sayings is mentioned without giving preference to one. Also, the transmitted or weak hadith is taken into consideration, while giving preference to analogy in the event that there is no evidence, consensus, or the saying of a Companion that contradicts it. Analogy is considered in the absence

of previous sources, and the prohibition of evasive legal devices, so as to prevent providing the means that lead to the commission of an evil deed.[237]

Among his most famous books is Al-Musnad, who compiled an encyclopedia of the hadiths of the Messenger. One of the most famous Hanbali jurists who spread this school of thought was Ibn Taymiyyah and his student Ibn Al-Qayyim Al-Jawziyya. The most important of his disciples are Salih Ibn Imam Ahmad, his other son Abdullah, Abu Bakr Al-Athram, Al-Marwadhi, Ahmad Ibn Muhammad Ibn Al-Hajjaj, and Ibrahim war.

The most important books of this doctrine are *Mukhtasar Al-Kharqi*, which was explained by Ibn Qudamah in his book *Al-Mughni* and *Kashaf Al-Qinaa* by Al-Bahouti; *Al-Furoo* by Ibn Muflih, and *Al-Rawd Al-Murabba* by Al-Hijjawi. The most famous scholars of the Hanbali school are Ibrahim bin Ishaq Al-Harbi, Ishaq bin Ibrahim bin Hani Al-Nisaburi, Ahmed bin Humaid Al-Mashkani, Ahmed bin Muhammad bin Al-Hajjaj Al-Marwadhi, and Ahmed bin Muhammad bin Hani Al-Athram Al-Ta'I.[238]

From the foregoing, we can see that the differences among jurisprudential schools in many rulings and branches have scientific and objective reasons necessitated by the practical needs and circumstances surrounding each sect. These differences in legal jurisprudence rulings are an advantage. The resolution of a legal issue is not limited to the application of one school of jurisprudence, but rather a judge may borrow from any school for the sake of capacity and flexibility, especially when applying his rulings and insights when considering cases before him, especially those related to the complex conditions of contracts.

[237] Al-Hafiz Ibn Rajab Al-Hanbali, The Response to Those Who Followed Other than the Four Schools of Thought (1st Edition), Makkah Al-Mukarramah: Dar Alam Al-Fawa'id Publishing 1418 AH, p. 27-28.
[238] Dr. Abdullah bin Abdul Mohsen Al-Turki, The Hanbali School (Dirasat Fi Tarikhih Wasimatih Wa 'ashhar 'Aelamih Wamualafatih) (First Edition), Beirut: The Message Foundation, (2002 AD) Part 1, Page: 13-18.

2.3. The judge's discretionary power in the four schools of Islamic jurisprudence

Discretionary authority is defined in Islamic jurisprudence as a space in which there is no legal text or evidence that empowers the judge to choose an appropriate ruling for the matter before him.[239] It is feasible to imagine a judicial work devoid of his discretionary authority. The judge's discretion is the judge's continuous intellectual interpretation carried out with his assessment of the facts of the dispute in question to verify through the evidence presented, describing, and coherently analyzing them in accordance with the legal rule that he feels must be applied. He concludes his mental activity by ruling on his basis of his assessment of the effects contained in those texts.

Sharia focuses the judge's discretionary power. As the Prophet said, "When a judge utilizes his skill of judgment and comes to a right decision, he will have a double reward, but when he uses his judgment and commits a mistake, he will have a single reward" for his effort to seek justice.[240]

2.3.1. Multiple interpretations by judges of the same jurisprudence rule

A Saudi judge has wide discretion when he considers a case before him, whether in terms of choosing the texts or jurisprudential rules that he deems most suitable for application or in linking it to the text or rule that he deems to be relevant and applicable.

A judge usually cites many texts from Islamic law, including the Qur'an, which has established his authority in Surah Al-Anbiya, where the Almighty said, "And David and Solomon they passed judgment upon the tilled land on which the people's sheep had strayed. We

[239] Nazir Wahab, alsultat altaqdiriat mafhumuha watasiluha , almajalat alearabiat lildirasat al'amniat waltadrib,, Vol. 13, No. 25, p. 8).

[240] (Al-Bukhari included it in his sahihih fi kitab aliaetisam bialkitaab walsunati, chapter on the reward of the ruler if he strives, No. 6805, and Muslim included it in his Sahih, Book of Walsunati Al-Adaa', chapter on explaining the reward of the ruler if he strives, No. 3240.

bore witness to their judgment, and We made Solomon to understand it, and to both gave judgment and knowledge."[241] The subject of that case was a request for compensation in a lawsuit of tortious liability resulting from what the sheep had destroyed from the plaintiff's crops. The Prophet David, worked hard to estimate the amount of compensation, just as the Prophet Solomon worked to estimate it too. Allah Almighty praised Solomon for agreeing to David's judgment of justice, and the Almighty said in them "and to both We gave judgment and knowledge." This noble verse has established the principle that the basis for the right to judge is an understanding of the facts and the legal texts appropriate to them and application of the text to the matter at hand.

In another incident that confirms the discretionary power of the judge, some companions of Mu'adh Ibn Jabal said: "When the Messenger of Allah (ﷺ) intended to send Mu'adh ibn Jabal to the Yemen, he asked: 'How will you judge when the occasion of deciding a case arises?' He replied: 'I shall judge in accordance with Allah's Book.' He asked: 'What will you do if you do not find any guidance in Allah's Book?' He replied: 'I shall act in accordance with the Sunnah of the Messenger ﷺ .' He asked: 'What will you do if you do not find any guidance in the Sunnah of the Messenger of Allah ﷺ and in Allah's Book?' He replied: 'I shall do my best to form an opinion and I shall spare no effort.' The Messenger of Allah ﷺ then patted him on the breast and said: 'Praise be to Allah Who has helped the messenger of the Messenger of Allah to find something which pleases the Messenger of Allah.' "[242]

[241] *Surah Al-Anbiya*:78.
[242] See: The book Sharh Sunnah Abi Dawood for the servants - Explanation of the Hadith of Mu'adh bin Jabal in Ijtihad of opinion in the judiciary - Modern Comprehensive Library, p.13.

In light of these texts, the Saudi judge can exercise discretionary authority within the scope of jurisprudence in the four schools of thought and the Hanbali school in particular, by balancing among texts, jurisprudence, and discernible facts.

The four schools have permitted the discretionary authority of the judge, as they recognize that there is a possibility of facts and actions that are in dispute without texts to provide a clear way to rule. This requires the judge to search for appropriate solutions by investigating the facts in dispute and issuing a ruling that is compatible with it within the framework of the purposes of Islamic law. How the judge will rule will vary according to case nature and his knowledge of the rulings of Sharia jurists in similar cases.

The jurists of the four schools inferred the legitimacy of the discretionary authority of the judge in Islamic jurisprudence with a such evidence as:

1- In the Qur'an, where the Almighty said, "And David and Solomon they passed judgment upon the tilled land on which the people's sheep had strayed. We bore witness to their judgment, and We made Solomon to understand it, and to both we gave judgment and knowledge."[243]

2- The Sunnah, where the Messenger ﷺ, said: " 'When a judge utilizes his skill of judgment and comes to a right decision, he will have a double reward, but when he uses his judgment and commits a mistake, he will have a single reward, for his effort to seek justice.' Likewise, When the Messenger of Allah ﷺ intended to send Mu'adh ibn Jabal to Yemen, he asked: 'How will you judge when the occasion of deciding a case arises?' He replied: 'I shall judge in accordance with Allah's Book.' He asked: '(What will you do) if you do not find any guidance in Allah's Book?' He replied: '(I shall act) in accordance with the Sunnah of the

[243] Supra.

Messenger of Allah ﷺ .' He asked: '(What will you do) if you do not find any guidance in the Sunnah of the Messenger of Allah ﷺ and in Allah's Book?' He replied: 'I shall do my best to form an opinion and I shall spare no effort.' The Messenger of Allah ﷺ then patted him on the breast and said: 'Praise be to Allah Who has helped the messenger of the Messenger of Allah to find something which pleases the Messenger of Allah.' " The hadith is explicit in the legitimacy of the judge's discretionary authority in what there is no text for. Al-Sarkhasi said it contains evidence for the permissibility of opinion and to work by analogy in what there is no text for guidance.[244]

3- What was narrated on behalf of Umm Salamah, she said: Two men came to the Messenger of Allah, Peace and Blessings of Allah be upon him, arguing over inheritances for them, and they had nothing except their claim. Umm Salamah reported the Messenger ﷺ as saying: " 'I am only a human being, and you bring your disputes to me, some perhaps being more eloquent in their plea than others, so that I give judgment on their behalf according to what I hear from them. Therefore, whatever I decide for anyone that by right belongs to his brother, he must not take anything, for I am granting him only a portion of Hell.' So, the two men cried and said each of them to his companion, 'My right is yours.' The Prophet ﷺ, said, 'As for if you did what you did, then divide and pursue the truth.' "[245]

The point of evidence in the hadith is that he stated explicitly that he judges by his *Ijtihad* on what was not shown to him through revelation; *Ijtihad* is a source of legislation in the absence of a text. Thus, the judge has the discretion to rule according to what is not mentioned in a text.

[244] Al-Sarakhsi, Osul Al- Sarkhasi, Volume 2, p. 163.
[245] Narrated by Al-Bukhari *Hadith* No. 7169 and 7185.

The judge's discretionary authority includes considering the liquidated damages clause that is defined in Islamic jurisprudence as one of the restricted conditions of a contract.[246] To achieve a legitimate interest, it obligates one of the contracting parties to give to the other something of value.[247]

The liquidated damages clause associated with the contract in Islamic Sharia appears in detailing provisions and effects the provisions of the contract. The purpose of this condition is to restrict the provisions and effects after the contracting party is free to choose his contractual obligations. Some examples are: if a seller stipulated that a buyer reside in the sold house for a month, or to ride an animal to a known place, or to confirm and document what the contract requires to fulfill it. For example, if the seller stipulated the deferred price as a mortgage, or a guarantor, or stipulated some things that are not required by the contract, such as buying firewood on the condition that it is broken.[248]

A Saudi judge has wide discretion in the judicial process, especially in contracts and financial transactions, because the legal texts and codified legal rules are limited and the unfortunate facts and mishaps in practical life are many, varied, and recurrent. The Saudi judge also has the duty to apply the provisions of Sharia in an appropriate and fair manner so that everyone who has rights takes his right from his opponents, relying on the judge's discretionary authority in interpreting the legal text; then the judge should apply it. If none exists, or if one possibly exists but its application is speculative and not definitive, the judge must look into the sources and regulations of Sharia. He also must examine not only the Sharia sources that have already been referred to, but also relevant others in order to reach an appropriate verdict.

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[246] Al-Rawd Al-Murabba' by Al-Bahouti and his entourage by Ibn Qasim 4/392.
[247] Kashshaf al-Qana' by Al-Bahooti 3/188-189, Al-Rawd Al-Mabba' by Al-Bahooti and his entourage by Ibn Qasim 392/4 and an explanation of 3 Muntaha Al-Iraat by Al-Bahooti 2/27 and al-Mubdi' by Ibn Muflih 51/4.
[248] (The Theory of Conditions by El-Shazly, p. 55-56) (Al-Wasat / Al-Sanhoury / 2/874).

The judiciary, including the Saudi judiciary, has agreed on the principle of the binding force of a contract as a law that is applicable by its parties, a principle based on the religious and moral considerations to abide by a covenant.

This was emphasized in the Qur'an, where the Almighty said: "Fulfill contracts."[249] However, there may be some problems in implementing a contract and the conditions it contains. What occurs then is that a dispute arises between its parties due to the failure by one or more, or the interpretation of some clauses, and they turn to a judge to resolve the matter. The judge's role is to discern and interpret what the parties to the contract were unable to express properly and clearly, or what they agreed upon, but which violates the provisions of Sharia, or requires reference to the rules of justice and fairness.

When the Saudi judge intervenes to try to resolve the contractual dispute, he balances what the parties to the contract have agreed upon with his understanding of the legal texts and rules governing the subject of the dispute. He broadly interprets these texts and rules in most cases, and their interpretation may differ from one judge to another depending on his understanding of their content and also the context in which the contract was negotiated. In the event of parity between the two wills, one or both parties to the contract possibly will not understand their common will. Thus, the judge works to restore the balance between the disputed parties is on the basis of the jurisprudence rule: "In contracts, intentions and meanings, not words and sentences, shall be taken into consideration."

This rule indicates that even if contracts are made with words and phrasing, what is considered in these contracts is the intent of the contracting parties, not just their words.[250]

[249] Surah Al-Ma'idah Verse No. 1.
[250] AlQawaeid Alfiqhia, Muhammad Bakr Ismail, Dar Al-Manar, 1997 AD, p. 39.

However, another judge may interpret this jurisprudential rule differently, and the question arises: Are the words used by the contracting parties considered reliable, or do the intentions and intended meanings outweigh what they wanted to reach? Does the inner will of the people, or one party, take precedence over his stated will, or vice versa? What are the objective and personal factors on which the Saudi judge relies to determine the common intention of the parties to the contract at the time of contracting? How should he approve the amount of the liquidated damages, so that it can be judged without an increase or decrease in amount, liquidated damages, or change in determining his responsibility or increasing them, a penalty. Therefore, the Saudi judge uses his discretionary authority to look into the dispute by saying that the will of the parties to the contract has been affected by ambiguity or doubt that led one of them to request that the matter be referred to the judiciary for a ruling. Consequently, the judge is obliged to do everything possible to find a solution to the dispute according to his understanding of the contract and of the legal texts and rules on which he can make a ruling.

For example, a ruling was issued in a Saudi court, where the plaintiff submitted her claim, requesting that the defendant be obligated to return the amount stipulated by the liquidated damages clause that was deducted from her dues based on the supply contract concluded between them. The defendant argued that the clause was applied in violation of the plaintiff's reservation mentioned in her offer on a clause of the contract, and the defendant accepted the offer without opposing the reservation made by the plaintiff. In spite of this, she signed the liquidated damages clause, adhering to the terms of the contract submitted by the plaintiff. The court ruled that the defendant was obligated to pay the amount of the condition that was deducted from the plaintiff’s dues. In support of his conclusion, the judge cited in his ruling a number of

jurisprudential maxims, including what is proven by Sharia is preceded by what has been proven with a condition and what is proven with certainty does not rise except with certainty[251].

In the context of the judge's endeavor to obligate the parties to what they agreed on in the contract of the penalty clause, he, using his discretionary authority, examined the parties' demands, the amount of the condition, the amount of damages, and the extent of extenuating circumstances or force majeure circumstances that prevented the execution of the obligation.

All of these factors are governed by legal texts and rules whose interpretation may differ from one judge to another, depending on the legal text or the rule that he chose to apply to the case before him. Nevertheless, the judge, as he seeks to identify the true will of the parties regarding the liquidated damages clause to the joint contract, which should respect their common will at the time of contracting and not at the time of a demand for implementation.

When the will of one party changes so that this common will prevails over the rest of the other jurisprudential maxims, unless their agreement initially violates a definitive legal text, this entails respect for the contract that constitutes a source of commitment as is the case with the law. Hence, it is important for Saudi jurisprudence to adopt specific and clear rules to apply to the liquidated damages clause, even though that limits the judge's broad authority in selecting and interpreting the jurisprudential rules that can be relied upon when ruling on the liquidated damages clause.[252]

[251] Case No.: 2279/1/S for the year 1409 AH, Primary Judgment No.: 28/D/I/2 for the year 1413 AH, Judgment No. of the Audit Authority (currently the Court of Appeal at the Board of Grievances): 168/T/2 for the year 1414 AH.
[252] Al-Sarakhsi Muhammad bin Ahmed, Sharh Al-Sair Al-kabir Publisher: Eastern Advertising Company, without edition, publication date: 1971 AD. Al-Sarakhsi Muhammad bin Ahmed, Al-Mabsout, publisher: Dar Al-Maarifa - Beirut, without edition, publication date: 1414 AH - 1993 AD.

2.3.2. Different judicial rulings for the same jurisprudence maxim

The position of the four legal schools of jurisprudence may differ concerning the adaptation of the incident or the issue at hand, or the liquidated damages clause in particular. Therefore, the discretionary authority of the Saudi judge in this regard varies according to the school of jurisprudence that he considers or applies as the most relevant given the evidence, and also the one closest to the sources of Islamic law.

The Hanafi School permitted a number of types of conditions in contracts and obligated their fulfillment, including particular conditions that a contract requires, such as if he buys clothes on the condition that he wears them, or buys an animal with the condition that he rides it. Also, the condition's purpose has to suit the contract's purpose, meaning the condition is not required by the contract itself; however, it does confirm and establish something as obligatory. For example, a seller adds a condition that the buyer has to give a guarantee.[253]

The conditions allowed textually by Sharia, even if they are not required by the contract and are not suitable for it, such as a condition of fixed price, and the condition under which custom took priority, which is every condition that people deal with and are accustomed to, and under which there is a benefit for one of the contracting parties. If it is not required by the contract, does not suit it, or there is no text about it, then it is a valid condition that must be fulfilled, for example, having to buy leather to make shoes.[254]

[253] Al-Kasani, Badaa' al-Sana'i 5/171, al-Sarakhsi, al-Mabsout 13/14, Ibn Hammam, Fath al-Qadir 6/442, al-Samarqandi, Tuhfat al-Fuqaha 2/, 61, Ibn Abdeen, footnote 178/4, al-Zayla'i, Tabining Al-Hakaeik 57/4 Al-Shazly, Nazariyat AlShart, p. 173, Zaki al-Din Shaaban, Nazariyat AlShorot AlMouktarina BlAkd p. 103.See: Al-Kasani, Badaa' Al-Sana'i 5/171-172, Al-Samarqandi, Tuhfat Al-Fuqaha' 62/2, Al-Sarakhsi, Al-Mabsout 13/18.

[254] See: Ibn al-Hamam, Fath al-Qadeer, Sharh al-Hedaya, 6/443. Al-Zaylai, Sharh AlHakaeik 4/57. Al-Kasani, Badaa' Al-Sana'i, 5/174. Al-Mosili, Al-Ekhteyar 2/12. Al-Samarqandi, Tuhfat al-Fuqaha 61/2. Ibn Najim, Al-Bahr Al-Ra'iq, 6/92. Al-Thumairy, AlShorot AlMouktarina BlAkd, p. 23.

The Hanafi school also specifies a number of rescinding clauses,[255] including those that concern the corruption of financial exchange contracts, such as the condition that leads to deception and dispute; that the condition, for example, in the sale at the time of the contract is something whose existence can be determined at once, such is the case where a person buys olives on the grounds that they will contain a specific amount of oil. As for contracts that are not intended for financial exchange, such as marriage, gift, trust and others, the condition is invalid, but the contract is valid.[256]

In the Maliki school of thought, conditions are divided into valid and invalid terms because they lead to misleading information and much deception, including:

A condition that contradicts the intent of the contract, and is completely unacceptable, such as a person who sold a car on the condition that the buyer does not ride it. [257] The condition that violates the price, such as if a person sold it and stipulated that the price be loaned to him, or a legally prohibited condition, such as a condition that leads to a forbidden person, as if he sold a house, and stipulated that the buyer not occupy it.

The prohibited condition, which is a condition that leads to a forbidden act, such as the one who sold a house and stipulated that the buyer occupy it as a place for illegal activity, as well as the condition that leads to ignorance, and ambiguity, such as the condition of postponing a price indefinitely.[258]

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[255] The jurists of the Hanafi School set specific controls for the corrupt condition, which is all: what is not required by the contract, is not appropriate, is not mentioned in the text, is not practiced by custom and has a benefit to one of the contracting parties or to others who are eligible. These jurists have decided that this type of condition affects the contract by corruption, and its conclusion does not have any effect unless arrest occurs.

[256] Ibn Njeim, Al-Ashabah and Al-Nazaer, p. 318. Al-Mirghani, Al-Hidaya with Fath Al-Qadeer by Ibn Al-Hamam, 6/457. Al-Bayrty, Inaya 6/457, Al-Zaila'i, Tafsir al-Faqat 131/4. Al-Shazly, Nazariyat AlShart, p. 188. Abu Zahra, Al-Milkeya wa Nazareyet Al-Akd, p. 277).

[257] Ibn Juzy, Al-Kawaneen Al-Fikheya l Ibn Juzzi, p. 258.

[258] Ibn Mayara Al-Fassi, Al-Itqan wa Al-Ahkam, Sharh Tuhfat Al-Hakam, 452-453. Ibn Rushd, Bidayat al-Mujtahid 166/2, al-Desouki, AlHasheyah 3/66. Al-Dardeer, Al-Sharh Al-Kabeer 3/66. Al-Hattab, Mawaheb Al-Galilee 4/373.

We find that the Shafi'i school divides the valid conditions into four types:

A- A condition required by the contract, which is a valid provision of the contract, and thus does not prove anything new. Rather, it confirms what is required in the contract without any stipulation, such as the buyer's requirement, for example, that the seller should use the purchased asset as he wants.

B- The requirement of specific performance regarding the contract during the time of contracting, such as the condition that the horse is fast.

C- A condition that is in the interest of the contract, for example, the requirement of a mortgage, a guarantor, and attestation.

D- An invalid condition of the contract, one that contradicts the contract requirement, or is contrary to it and is not in its interest; alternatively, one that Sharia did not intend to permit, and which has a purpose intended to benefit unfairly one of the contracting parties.[259]

In the Hanbali school, the proper conditions include the following:

A- Conditions required by the contract, such as the condition of exchange in the sale, and the payment of the designated price.

B- Conditions that are in the interest of the contract, even if not required, such as the seller's requirement that the buyer provide a mortgage or a specific guarantor for the deferred price.

[259] Al-Ramli, Nihat Al-Muhtaaj 3/459. Al-Shirazi, Al-Muhadhab, 446-447-9, Al-Shazly, Nazareyat Al-Shoot by Al-Shazly, pp. 173-174. Al-Thumairi, AlShorot AlMouktarina Bl-Akd, p. 26.

C- Conditions in which there is a permissible benefit that is not contrary to the requirement of the contract, and conditions that are not in the interest of the contract, as when the seller stipulated that he reside in the sold house for a month.

The jurist Ibn Taymiyyah and the jurist Ibn Al-Qayyim have stated that the origin of the conditions is validity and permissibility, and conditions are not forbidden or invalidated unless evidence indicates their prohibition and corruption. [260]

It is instructive to review the conditions associated with contracts, including the liquidated damages clause in the four schools of jurisprudence, on which the extent of the judge's discretionary power expansion or narrowing derives from while considering the incident at hand. We find that most of them went on to say that the origin of the conditions is valid, except for what is indicated by the evidence of prevention. Some jurists said that the condition principle is not permissible unless the evidence suggests its permissibility, including Azzaherriya, a minority doctrine in Islamic jurisprudence.

There were also differences of opinion among some researchers regarding the attribution of sayings to the four schools. Some attributed the saying that origin in the conditions is validity to all four schools of thought, while some attributed the saying to them or to some of them that it is forbidden. This matter is reflected in the judge's discretionary authority when considering cases related to liquidated damages clause. The ruling may differ from one judge to another when confronted by similar facts according to his interpretation of the applicable jurisprudence rule.

[260] Al-Mawardi, Al-Insaaf, 11/214. Al-Hajjawi, Al-Iqnaa, 2/190-191. Al-Bahouti, Al-Rawd Al-Morabae 395-396. Ibn Muflih AlMubdie, 7/80-81. Al-Haybani, Mataleb Oula AlNahy 3/70. Ibn Qudamah, al-Kafi 60/3. Al-Fotohi, Muntaha Al-Iraadaat, 2/288-289. Al-Hijjawi, Zad Al-Mustaqna', p. 57. Ibn Taymiyyah, Majmou Al- fatawa 132/29. Ibn al-Qayyim, Ealam AlMowakaeen1/424-425. Ibn Qudamah, Abd al-Rahman, al-Sharh al-Kabeer 11/216).

By having an overview of the four Islamic schools of thought, it becomes clear that the Hanbali School, the applicable school in Saudi, is the broadest of the four schools regarding fixing and correcting corrupt conditions and clauses instead of completely voiding the contract. Adding to that, jurists of the Hanbali school, such as Sheikh Al-Islam Ibn Taymiyyah and Ibn Al-Qayyim, have enunciated a rule with which they create a new method of thinking to correct those conditions and clauses. Also, Hanbali jurists made the origin of the conditions and clauses permissibility except what evidence indicates that it is forbidden. And this rule is the baseline for origin in the conditions. Thus, the invalid condition in their view is one of two things. Either it is contrary to the purpose of the contract, because in its permissibility it combines two contradictory matters: the affirmation of the intended action and its negation, so nothing happens; or it is that is contrary to the texts of the Sharia.[261]

The Maliki school comes after the Hanbali school in fixing and correcting corrupt conditions and clauses, followed by the Hanafi school, and finally the Shafi'i school. Among the most prominent evidence that quoted by scholars who said that the conditions were valid are:

A- The Qur'an says: "O you who believe! abide by all your contracts."[262]

B- From Sunnah, the hadith, "Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful or makes lawful something which is unlawful."[263]

C- Also, the Hadith, "The most important conditions to be fulfilled by you are the ones indicated in the marriage contract."[264]

[261] Ibn Taymiyyah, Majmou Al- fatawa 132/29. Ibn al-Qayyim, Ielam Al-Mowakeien 1/424.
[262] Qur'an Al-Ma'idah:1.
[263] Sunan Al-Tirmidhi, Hadith No.: 1352. See, Ibn Taymiyyah, Majmou Al- fatawa 29/147-148.
[264] Sahih al-Bukhari and with him Fath al-Bari 5/667, Sahih Muslim with an explanation of al-Nawawi. 9/201

The conditions are a matter of custom, not of worship, and the origin in transactions is permissibility and validity until the evidence indicates the prohibition, and that is based on the Almighty's saying, "while He has explained to you what is forbidden to you."[265]

Therefore, many of the later jurists in these schools say that the liquidated damages clause is permissible based on the principle that the conditions are permissible except when evidence indicates that it is forbidden, and there is no evidence to indicate the prohibition of the liquidated damages clause by text, so it is permissible. Moreover, people have become acquainted with setting liquidated damages clause in many contemporary contracts, such as contracting and supply contracts, and this transaction is known by the liquidated damages clause. Thus, the matter constitutes a legally valid custom because it does not contradict legal evidence, invalidate an obligation, or allow what is forbidden.

The Islamic Fiqh Academy of the Organization of the Islamic Conference has decided[266] it is permissible to stipulate the liquidated damages clause in all financial contracts, except for those in which the obligation is a debt, because in this case it is considered explicit usury, which is prohibited in Sharia. Therefore, we find that the liquidated damages clause is permissible for one of the parties to the contract and not for the other, for example in contracting contracts, this condition is permissible for the contractor, the supply contract for the supplier, and the *Istisna'* contract for factories if the debtor does not fulfill what he has committed to or delays its fulfillment. However, it is not permissible in an installment sale because of the delay in the debtor paying the remaining installments,

[265] *Surah Al-An'am*:119.
[266] Decision of the Islamic Fiqh Academy No. 109 in its twelfth session in 1421 AH.

whether due to insolvency or procrastination, which is in accordance with the decision of the Council of Senior Scholars in the Kingdom of Saudi Arabia.[267]

Therefore, the discretionary power of a Saudi judge expands and narrows according to his view of the rule of the liquidated damages clause, which is divided into two parts. The first is a penalty clause in debt contracts, if one of the contracting parties stipulated a certain increase on the principal of the debt upon non-payment, or delay in repaying the debt on time, for example, an increase in the loan contract or the amount in the sale contract with a deferred price or the *Salam* contract.[268]

In this case, the judge should rule that this condition is not permissible because it represents an increase in the principal debt in exchange for deferment, and this is clearly usury in Islamic Sharia.[269]

The second part relates to the provision of the liquidated damages clause in areas other than debt contracts, for example, if one of the contracting parties stipulated that in the event of the contractor delaying the completion of the work, he must pay the clause's amount. According to the opinion of the majority of contemporary jurists and members of the Council of Senior Scholars in the Kingdom of Saudi Arabia, a liquidated damages clause will be judged by the judge as permissible, because it is a valid condition that must be fulfilled.[270]

[267] Decision of the Council of Senior Scholars in Saudi Arabia, Fifth Session held on 08/22/1394 AH.
[268] Al-Yamani, Muhammad Abdulaziz, the penalty clause and its impact on contemporary contracts, PhD thesis, King Saud University, Kingdom of Saudi Arabia, year 1425/1426 AH (p. 224).
[269] Ibn Qudamah, Al-Mughni (6/436). Ibn Rushd, Bedayat Al-Mujtahid 2/28. Ibn Al-Mundhir, Al-Ijma`, p. 95. Al-Siddiq Al-Darrier, the penalty clause, research published in the Journal of the Islamic Fiqh Council, Twelfth Session (2/49-90).
[270] Researches of the Council of Senior Scholars in Saudi Arabia (1/295).

This is what was also decided by the International Islamic Fiqh Academy of the Organization of the Islamic Conference, [271] and it is the view of the Fiqh Council of the Muslim World League [272] and the decision of the Egyptian *Dar Al Iftaa*.[273]

What Saudi judges infer to justify their rulings are what they inferred from the four schools of thought and from those citations:

1- Ruling on the liquidated damages clause is one of the reasons for urging the fulfillment of covenants and contracts in fulfillment of the words of Allah, "O you who have believed, fulfill all contracts."[274]

2- The origin of the conditions is validity and permissibility, so it is not prohibited from them except when the Sharia indicates that it is forbidden, and there is nothing in the Sharia that indicates the prohibition of the liquidated damages clause, so it remains permissible.[275]

3- What was narrated on behalf of Al-Bukhari [276] when a man said to another man: postpone your travel journey by sheltering and tying up your traveling camels in my stalls, and if I did not join you on your journey, I will pay you hundred dirhams. And when the time came, he did not travel with him. So, the traveler man complained to a judge named Shuraih. After confirming the validity of the complaint, the judge ordered him to pay the condition amount and said: "Whoever optionally, and without duress, stipulates a certain condition on himself, must fulfill the condition."[277]

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[271] Islamic Fiqh Council, Journal of Islamic Fiqh Council, Resolution No. (109), Twelfth Session (2/305).
[272] Journal of the Fiqh Council of the Muslim World League, Resolution No. (8), eleventh session.
[273] Shabeer, Seyanat Al-Mayoneyat, "Within Jurisprudence Research", (1/859).
[274] Surah Al-Māʾidah:1.
[275] Al-Yamani, Muhammad, Al-Shart Al-Jazaey, (p. 231).
[276] Al-Kari: He is the one who rents animals, see: Al-Fayrouzabadi, Al- Kamoos Al-Muheet 1712. Al-Zamakhshari, Asas Al-Balaghah, p. 391.
[277] Al-Bukhari included it as a commentary, Book: Al-shorot, Chapter: Mayajouz mn Al-Ishterat (2/981). Ibn Hajar, Fath al-Bari, (3/415) (5/354).

4- The ruling on the liquidated damages clause by the judge closes the doors to chaos and manipulation of the rights of individuals.[278]

5- The clause is one of the conditions that is considered in the interest of the contract because it serves as an incentive to complete the contract at the specified time.[279]

6- Custom permits it, as people have become acquainted with setting penalty conditions in many of their contracts, and it is a permissible and legally valid custom because it does not contradict legal provisions, does not invalidate an obligation and does not enact what is forbidden.[280]

7- Failure to implement or delay the terms of the contract and what it leads to in terms of real loss, missing expected earnings, and other missed opportunities represents damages that require compensation. The Prophet ﷺ said "There should be neither harming nor reciprocating harm."[281]

8- The Islamic Jurisprudence Academy considered the subject of the "penalty clause," which includes that the liquidated damages clause in the law is an agreement between the contracting parties to estimate the compensation for the damages he incurs if the other party does not fulfill what he is committed to or delays in its fulfillment. The Council confirmed its previous decisions regarding the penalty clause contained in its decision in *Salam* No. (85) (2/9): "The agreement on the delay in delivering the object of the contract is not permissible because it is a debt, and it is not permissible to stipulate an increase in debts upon delay [in repaying them]." Also, it reaffirmed its decision regarding *Istisna'*

[278] See: Researches of the Council of Senior Scholars in Saudi Arabia (1/295).
[279] See: Researches of the Council of Senior Scholars in Saudi Arabia (1/95).
[280] (Al-Shart AlJazaey, Al-Hamwi (p. 177), and tAl-Shart AlJazaey, Al-Shahri (p. 163).
[281] (Narrated by Malik, Kitab Al-Akdeya, Chapter: Al-Kadaa fe Merfak(4/40) and authenticated by Al-Albani in Irwa Al-Ghalil (3/413). Research by the Council of Senior Scholars (1/295-296. Al-Yamani, Al-Shart Al-Jazaey, p. 232).

contracts (65) (3/7): It ruled then that the *Istisna'* contract may include a penalty clause in accordance with what the two contracting parties had agreed upon, unless there are force majeure circumstances and its decision regarding installment sale No. (51) (2/6): "If the indebted purchaser delays paying installments after the specified date, it is not permissible to obligate him to any increase over the debt with a previous condition or without a condition, because that is usury that is forbidden. It is permissible for the agreed condition to be associated with the original contract, as it may be in a subsequent agreement before the damages occurs. The liquidated damages clause may be stipulated in all financial contracts, except for contracts in which the original obligation is a debt, seeing as this is outright usury. The decisions of the Fiqh Council have made it clear that the harm that may be compensated for may include actual financial harm, real loss incurred by the aggrieved party, and missed earnings. However, it does not include moral damages. Also, the liquidated damages clause is not implemented if it is proven that this breach of contract was due to a reason beyond the party's control, or if it proves that that no harm befell the other party due to the breach of contract. The court may, at the request of one of the parties, amend the amount of compensation if it finds a justification for that or if the damages was exaggerated."[282]

Accordingly, the discretionary authority of the judge in the four schools differs according to how expansive this school is in its interpretation of the classic text of Islamic law or the narrowness in its interpretation and the extent to which this school takes its opinion or *Ijtihad* from them.

[282] Islamic Fiqh Council Resolution, Journal of the Islamic Fiqh Council, Twelfth Session, Riyadh, Kingdom of Saudi Arabia, Resolution No. 109 - 2/305, September 23-28, 2000.

Therefore, we find that the four schools, in terms of correcting the conditions associated with the contract, are divided into two factions:

- A faction comprised of the Hanafi and the Shafi'i schools that narrows the conditions and adheres to the principle of the unity of the transaction, so it only permits a condition required by or befitting the contract.
- A faction comprised of Maliki and the Hanbali schools that expands on correcting the conditions, and does not adhere to the principle of preserving the unity of the deal, so the conditions are permitted unless they are contrary to the requirement of the contract or contradict Sharia.

There are detailed differences between the Hanafi and the Shafi'i schools as well as between the Maliki school and the Hanbali school. The Hanafi and Shafi'i schools both allow a condition that is required by the contract, and they also allow the condition that fits the contract. But the Hanafi school only allows it to be an exception, and the Shafi'i school of law permits it originally without exception. Thus, the Hanafi school is distinguished from the Shafi'i school by giving way to the condition in which it became a normal route of conduct, and permitting it with approval as well. The Shafi'i school speaks about the condition that the need calls for. It is a condition for the benefit of the contract, and Shafi'i school mixes it with the condition that fits the contract. This school corrects conditions that the Hanafi school cannot correct. As for the Maliki and Hanbali schools, they take the principle that the origin in conditions is validity, and invalidity is the exception. Further, the Hanbali school is more inclined to correct the conditions than the Maliki school.[283]

[283] See: The General Presidency for Scholarly Research and Ifta in the Kingdom, Researches of the Council of Senior Scholars, Volume I, Year 1425 AH, 2004 AD, A comparison between the four schools of thought in correcting the conditions associated with the contract.

Also, this discretionary authority may differ within one school, so it expands on the subject of contracts and conditions in the Hanbali school and sometimes narrows in other subjects. All this affects the rulings of the Saudi judiciary, which may differ from one judge to another in similar cases according to his interpretation of the same jurisprudential maxim.

2.4. The discretionary power of the Saudi judge to rule on the liquidated damages clause

It is helpful to look at comparative laws on the discretionary authority of the judge in ruling on the liquidated damages clause before examining the discretionary power of the Saudi judge on the penalty conditions in other countries. For example, French law allows the judge to reduce the stipulated compensation if it is excessive or increase it if it is too small.[284]

Belgian law, before a recent law amendment, prevented a judge from increasing or decreasing the value of the agreed clause between the parties to the contract, except in the event of partial non-performance by one party of his obligation. [285]

However, after criticism of this provision, the law was amended in 1999, and Article 1231 of the amended Belgian Civil Code allows the judge, on his own or at the request of the debtor, to reduce the value stipulated in the liquidated damages clause when it clearly exceeds the amount that the parties expect is needed to repair the resulting damages in case of failure of fulfillment and in case of review by the judge. However, it is not permissible for the judge to order the debtor to pay an amount less than the amount due in the absence of the liquidated damages clause, though he may reduce the value of the condition upon partial fulfillment of the basic obligation.[286]

[284] Article 1152 Paragraph 2 of the French Law issued in July 1975.
[285] Articles of the Belgian Civil Code from 1226 to 1233. Article No. 1231.
[286] Article. 1231. L 1998-11-23/36, art. 4, 005; En vigueur : 23-01-1999.

German law has allowed the value stipulated in the clause to be reduced to a reasonable amount [287] as does Swiss law, which gives the judge the discretion to reduce the value of what he feels is an exaggerated liquidated damages amount.[288] Italian law similarly allows the judge to reduce the exaggerated amount in the condition of the agreement.[289]

In Egyptian law, the judge is permitted to reduce the value set by the liquidated damages clause, as it stipulates that the creditor is not entitled to the agreed-upon compensation if the debtor proves that the creditor was not harmed. The judge may reduce this compensation if he proves that the estimate has been greatly exaggerated or that the original obligation has been partially implemented.[290] The law also gives the judge discretionary power to amend the agreed compensation by increase, but this power is restricted to the creditor proving that the debtor has committed fraud or a grave mistake. If the damages exceed the value of the agreed compensation, the creditor may not claim more than the value of the condition unless it is proven that the debtor has committed fraud or a grave mistake.[291]

In American and English laws, a distinction is made between liquidated compensation, which may not be reduced or increased, as it is binding on the parties to the contract, and the penalty clause. In the United States, many contracts such as those in construction and supply, include the liquidated damages clause, because it is difficult to estimate and prove some damages in a fair manner. The purpose of choosing the liquidated damages clause is to assess the damages that are difficult to estimate or prove if there is a breach of contract or non-performance by either party of its obligations. Some U.S. courts believe that the value of the liquidated damages clause

[287] Article 343.
[288] Article 163 of the Federal Obligations Law.
[289] Article 1384 of the Italian Civil Code.
[290] Article 224 of the Egyptian Civil Code.
[291] Article 225 of the Egyptian Civil Code.

should be proportional to the actual or anticipated damages. If the value of the liquidated damages clause is exaggerated, the court nullifies this clause, declares it as a penalty clause, and limits the amount of recovery to the actual damages.

This leaves a great deal of discretion to the judge, on a case-by-case basis, to determine what compensation is permissible, and what would be "manifestly excessive" or "manifestly excessive."[292]

The same applies to the English courts. We find that they rule that if the arbitrary agreement compensation is significantly in excess of the value of the damages and is not based on a reasonable assessment, it is considered a penalty condition and not a liquidated damages clause and therefore it can be modified. In particular, in international contracts and the English judiciary, it is well established that the judge has a right to monitor the assessment of the liquidated damages clause's amount. The judge's assessment must be based on a faithful expectation of the amount of damages that may occur to the plaintiff from the defendant's breaching the contractual obligation. Most European courts have adopted this approach. It gives the judge discretionary power to review the liquidated damages clause when its amount seems excessive.

The Saudi judiciary, which derives its perspective from the four schools of Islamic jurisprudence, combines the two prevailing trends in comparative laws. A judge may increase the amount of the liquidated damages clause if the plaintiff proves that the incurred damages exceed the liquidated damages clause's amount and vice versa; the liquidated damages clause's amount may decrease if the defendant proves that the plaintiff did not suffer harm or damages that is equivalent to the described amount of the liquidated damages clause in the raised case. Thus, the

[292] Frank McKenna, The Critical Path, P. 6, Reed Smith Spring 2008.

liquidated damages clause is switched to a penalty clause, as it is in English law. On the other hand, the agreed amount may be judged without an increase or decrease, as in American law. If none of the parties to the contract pleads the unfairness of the clause or the judge finds, after a plea by one of them, that the amount of the clause is fair and not exaggerated. This judicial approach is in accordance with the Saudi Council of Senior Scholars' fatwa, which authorized the use of the liquidated damages clause and gave the Saudi judge the discretionary authority to monitor its implementation in the event of a complaint by one of the parties to the contract.

The Saudi judiciary differentiates between agreed-upon compensation, driven by civil law, and a delay fine, in administrative law. The latter represents a penalty condition for the contractor's breach of contract that is related to the punctuality of the execution of the actions subject of the contract.

Damages are required in order for the liquidated damages clause to come into play in civil law; however, it does not require the creditor to prove those damages. Rather, whoever claims that the damages occurred, must prove it, or the judge shall rule the value of the clause without increasing or decreasing it.

While the occurrence of the damages is not required for the creditor to be entitled to the fine for lateness, the penalty represents a guarantee for the execution of the administrative contract on the agreed dates in order to ensure the proper functioning and regularity of the public facility. The Saudi Government Procurement and Competition Law, stipulates in Article 72: "If a contractor delays in executing the contract beyond the specified date, a delay fine shall be imposed on him that does not exceed (6%) of the value of the supply contract, and does not exceed (20%) of the value of other contracts, and those percentages may be increased with the

prior approval of the Minister, provided that this increase shall be made clear to the competitors before submitting their bids."

Article 73 of the same law states that "If the contractor, in the service contracts of continuous execution, fails to fulfill his obligations; a fine not exceeding (20%) of the contract value shall be imposed on him, with deduction of the value of the unimplemented works, and this percentage may be increased with the prior approval of the minister, provided that this increase is explained to the bidders before submitting their bids."[293]

This fine is applied in administrative contracts as soon as the delay occurs, even if this delay does not result in any damages and without the need for warning or taking any other judicial procedures. The administration shall sign it without the need for a judicial judgment if the contractor breaches his obligation, and the contractor is not expected to prove that no harm has occurred from his delay in fulfillment of the contract; that is because the fine is only dependent on the administration's discretion.

Based what has just been provided, it is noted that most legislation allows the judiciary to monitor the amount of the liquidated damages clause and adjust the compensation to be appropriate for the damages that occurs as a result of breaching the obligations contained in the contract.

That is the case too with some laws in other countries that prevent the judge from reviewing the amount of the liquidated damages clause, as in Belgian law before its amendment. That law did not give the judge discretion with regard to the liquidated damages clause; the Belgian Court of Cassation succeeded in circumventing the ban imposed on the judge to estimate the amount of penalty clauses by according to him the power to exclude unfair clauses. On the

[293] Articles 72 and 73 of the Government Procurement and Competition Law issued by Royal Decree No. (M/128) dated July 16, 2019.

day of the conclusion of the contract, and on the basis of an exclusively compensatory concept of penalty clauses, the Belgium judge, can determine that the clause containing an excess amount is not compensation and cancel it for damages to public order.[294]

Hence, it is clear that most laws give the judge discretionary authority to consider the amount of the agreement and to determine due compensation if one of the parties demands to restore the balance to the amount in the agreement. That party can do so by proving that the other party did not inflict harm or inflicted less harm that the condition allows, or that the other party proves that he incurred more damages than the amount of the clause that was agreed upon. However, some comparable laws consider that it is not possible to increase the amount of the liquidated damages clause because it is an agreement to exempt from liability, unless there is fraud or gross error on the part of the debtor, in this case, the burden of proving the damages is on the party claiming it.

In the Saudi judiciary, it is difficult to rely on the rule of "Agreements must be kept"[295] to restrict the judge's authority to control the value of the liquidated damages clause. That is because the concept of compensation agreed upon between the parties must take into account the rules of justice in Islamic Sharia. If the amount of the liquidated damages clause is exaggerated and the injured party proves this, then the judge rules to rebalance the contract to avoid giving one of the parties gains he does not deserve. This is in accordance with the principle of the inadmissibility of enrichment without reason, and the principle of abuse of the right by the stronger party to the contract, and in application of the saying of The Prophet ﷺ said "There should be neither harming nor reciprocating harm."[296]

[294] Cass. April 17, 1970, RCJB, 1972, 454; November 24, 1972, RCJB, 1973, 302.
[295] Supra.
[296] Supra.

Therefore, the Saudi judge has the power to amend the amount of the agreement by increasing or decreasing the figure according to legal and regulatory guidance. But the judge's discretionary authority to amend the condition is not absolute, as it requires the occurrence of specific cases that are subject to amendment. If it is proven to the judge that the debtor has implemented his obligation partially or fully, but in a way different from what was agreed upon in the contract, the judge can intervene and use his discretionary authority to reduce the amount of the liquidated damages clause. This reduction undoubtedly must be consistent with the intention of the joint will of the parties to the contract, as it is fair and just that the judge does not bestow upon the creditor with the full value of the liquidated damages clause if the debtor has fulfilled part of his obligation. Thus, here part of the liquidated damages clause is applied in a way that corresponds to the amount of what the debtor has breached.

The judge who oversees the matter also has the discretionary authority to reduce the sum of the liquidated damages clause if he deems it was exaggerated, as the compensation sum must be equal to the damages actually incurred. The judge also has the discretion to increase the amount stipulated in of the clause if he deems that the value of the condition stipulated in the contract is not equal to the actual damages. Finally, he has the power to nullify the agreement if it is proven to him that the breach of obligation was the result of fraud or grave mistake on the part of the creditor.

However, a question arises about the extent of the judge's authority in reviewing the value of the condition. Does he intervene only when one or both of the parties to the contract so request, and the amount is "manifestly exaggerated, or little compared to the damages" or when fairness clearly requires it. Or does he only intervene when the law states that he can intervene

when it finds that there is an imbalance in the obligations of the parties with regard to the liquidated damages clause?

There appears to be some agreement on granting the judge's discretion in reviewing the amount of the unfair clause, but there is disagreement about determining the framework within which a judge can carry out this review. Thus, the question arises about the extent of the judge's authority to reduce the amount of the liquidated damages clause to the level of damages that was expected when the parties agreed on its (i.e., compensating the damages actually incurred by the creditor), or whether he should take into account that the penalty clause has another function, which is to urge the debtor to carry out his obligation in the specified time, and thus the judge might raise the value of the judgment a little more than the amount of damages incurred.

2.5. The cultural and social background of the Saudi judge and its impact on his judicial rulings and discretionary authority

The personality of the Saudi judge is affected by the cultural framework of the society in which he lives, where he acquires impact and knowledge and behavioral patterns that affect his approach to the issues he considers, including his grounding in the provisions of Islamic Sharia. All these will affect the rigor of the scrutiny he exercises when examining the evidence presented by the plaintiff to prove the damages he has sustained, his strictness in estimating the amount of damages, the scarcity of his judgment to compensate for future damages, the absence of compensation for missed opportunity, and his role in choosing the jurisprudential and legal rules that he applies on the subject of the dispute.

2.5.1. The impact of the cultural, social, religious, and scientific character of the judge on the judicial judgment and the judge's discretion

The laws of the Kingdom have established the concept of the independence of the judiciary. Article 46 of the Basic Law of Governance stipulates that "the judiciary is an independent authority, and there is no authority over judges in their judgments other than the authority of Islamic law." The first article of the judicial code states that: "Judges are independent and there is no authority over them in their judiciary except for the provisions of Islamic Sharia and the applicable laws, and no one has the right to interfere in the judiciary." These texts gave judges in the Kingdom a strong sense of independence in the cases they consider. This expanded the scope of their interpretation of the provisions of Islamic Sharia when applied to the facts and cases presented to them in the courts when there is no definitive text that can be applied.

Article 31 of the judicial law stipulates the following requirements for becoming a judge:

A. Be of Saudi nationality by origin.
B. Have engaged in good conduct.
C. Have the knowledge and training to judge as stipulated by Sharia.
D. Have obtained a certificate from one of the Sharia colleges in the Kingdom or another equivalent certificate, provided that in the latter case he passed a special examination prepared by the Supreme Judicial Council.
E. Be at least forty years old if his appointment is in the rank of an appellate judge, and twenty-two years old if his appointment is in one of the other ranks of the judiciary.
F. Not have been convicted of a crime against religion or honor, or had a disciplinary decision issued against him to dismiss him from a public position, even if he had been rehabilitated.

These requirements aim at filling the judiciary only with people who have the character of seriousness, integrity, strong religious conviction, and other good qualifications. In the past, some people who were nominated as judges refused to work in that capacity for fear of being unfair to anyone because of their rulings. Therefore, the internal religious conviction of the Saudi judge and fear of Allah plays a major role in seeking justice in the rulings he issues.

Noteworthy too is the requirement of a certificate or special examination. This condition excludes those who have graduated law school only from working as judges, although there is a need to allow them to work in this sector due to the presence of many laws issued by the legislative authority in the Kingdom in such fields such as corporate, labor, traffic, and commercial laws. Applying these laws requires study and knowledge, and it is not enough to study their legal origins, which the students at Sharia colleges do learn about. However, some Sharia colleges in the Kingdom have recently introduced some regular law subjects into their curricula with the aim of raising the qualification of judge and increasing their legal knowledge.

The *Shura* Council recently approved a proposal[297] to amend Paragraph (D) of Article 31 of the Judicial Law regarding the conditions a person in charge of the judiciary to read: "He must have a certificate from one of the *Sharia* colleges in the Kingdom or another equivalent certificate, or a certificate in the discipline of regulations, law or rights from one of the colleges in the Kingdom, or another equivalent certificate, provided that he passes a two year qualification program in jurisprudence and its principles and *Sharia* rulings at the higher judicial institute. With the exception of those holding a bachelor's degree *in Sharia*, the qualification is required to pass a special exam prepared by the Supreme Judicial Council." This amendment aims to contribute to providing qualified judges in both Sharia and law in all areas of disputes,

[297] The Saudi Shura Council session held on 5-6-2020.

including commercial, labor, banking, insurance, and intellectual property law. It does so by providing graduates of law schools the opportunity to apply to work in the judiciary after obtaining sufficient legal qualification to occupy judicial positions.

Currently, to be appointed as judge, a person is being selected from among those who hold a degree from one of the Sharia colleges in the Kingdom with a general grade of no less than good, and with a grade of no less than very good in jurisprudence and its principles, and those who hold a doctorate or a master's degree from the Higher Institute of the Judiciary. Those nominated for higher judgeships must be holders of a doctorate or a master's degree from one of the Sharia colleges in the field of jurisprudence or its origins, and teachers of jurisprudence or its origins in one of the colleges in the Kingdom.

This focus on the qualification of the judge is reflected in his ability to settle disputes before him and his interpretation of texts and the applicable rules. Given the judge's independence in his work, it requires that his work be governed by his conscience and his fear of Allah, with no external influence. However, leaving judges unsupervised and without verifying the integrity of their procedures and the rulings they issue may open the door to the occurrence of issues and contribute to the failure to achieve justice. Therefore, Article 6 of the judicial code states that the Supreme Judicial Council looks into the functional affairs of judges, such as appointment, promotion, discipline, delegation, secondment, training, transfer, leave, and termination of service.

In accordance with the established rules and procedures, in order to guarantee the independence of judges and at the same time oversee them broadly, Article 6 authorizes the Council to issue a regulation for judicial inspection that allows the Council to monitor the work of judges.

Saudi judges rely on Sharia as a source of judicial rulings and draw on what these texts contain of jurisprudential material that is rich in provisions and rules that are flexible in application and subject to modification according to changes of time, place, conditions, and customs. They are bound in their rulings by the controls mentioned by the jurists of the four schools in light of the social, cultural, and religious circumstances surrounding the judge, which prompt some potential candidates for judges to decline to work in the judiciary or to resign for fear that someone will be wronged in their judgments or because they feel unable to derive judgments from the rules of Sharia in an appropriate manner.

We find that these factors affect a judge's ruling, especially one who is able to understand the legal texts broadly and comprehensively; such judges benefit from this jurisprudential abundance of sources and interpretations of them. They are able to expand the application of texts to many new cases and facts that were not known in previous eras of the jurists, including the liquidated damages clause. That is the case because some texts carry many provisions and rules whose application vary from one judge to another.

The judge chooses what he deems is the most just course according to his legal perspective. His ruling reflects the judge's culture, his religious and scientific qualification, and the social circumstances surrounding him.

2.5.2. Compensated damages and the tendency against moral compensation in the Saudi judiciary

The Saudi judge has wide discretion in estimating the amount of damages that may accrue to the aggrieved party as a result of non-performance of the contract or non-execution of one of its clauses by the debtor, including the damages that occur as a result of non-fulfillment of the penalty condition. The damages that the judge may set is divided into material damages, which are those

damages that directly affect a person financially, and moral or moral damages, which affect a person in his reputation, honor, affection, financial, social, and/or commercial position.[298]

There is disagreement in Islamic jurisprudence about the permissibility of compensation for moral damages, although there is an agreement on the permissibility of compensation for material harm. Those jurists who see the inadmissibility of compensation for moral damages have noted that Sharia does not take the principle of financial compensation for moral damages, but rather the principle of punishing the perpetrator for material loss. Others view the permissibility of compensation for moral damages in Islamic jurisprudence because the hadith of the Prophet ﷺ which said "There should be neither harming nor reciprocating harm."[299] This approach also used general terms stating that damages should not be limited to material harm, as the jurisprudential rules stipulate that "there is no specification without provision," and "the general rule remains the same as long as there is no restriction."[300]

Those who said that compensation for moral damages is permissible cited the following:

1. In the Qur'an, the Almighty said, "if you fear that they will maintain the limits set by Allah, then there is no sin on them for what she ransoms with..."[301] In this verse it is permissible to take a financial penalty from a wife who has caused moral damages to her husband. Therefore, he must be financially compensated when she is required to do so.[302]

From Sunnah, the Prophet ﷺ said: "There should be neither harming nor reciprocating harm,"[303] and "Everything of a Muslim is sacred to a Muslim: his property, honor and blood. It is

[298] Al-Zarqa, Mustafa, Al-Madkhal Al-Fikhy Al-Aam Damascus: Dar Al-Qalam, 2004, p. 586.
[299] Al-Nawawi, Yahya bin Sharaf Al-Hazami, Al-Jawahir Al-Lu'lu'i, Sharh AlArbaeen Al-Nawawya (302) Narrated by Shuaib Al-Arna'oot, in Takhreej Al-Musnad, on the authority of Ubadah bin Al-Samit, No.: 22778.
[300] Al-Zuhaili, Muhammad, Al-Wajeez in the Fundamentals of Islamic Jurisprudence, 2nd Edition, 2006, 1/205
[301] Al-Baqarah : 229.
[302] Al-Zuhaili, Wahba, Nazzariyat Al-Daman, Dar Al-Fikr, Damascus, Syria, second edition, 1998.
[303] Supra.

enough evil for any man to despise his brother Muslim."[304] Moral damages is one of the types of damages that is forbidden by Sharia and falls within the scope of the prohibition indicated by the hadith. And honor is the place of dignity in the human being and all that is related to his moral stature. The prohibition of display in the honorable hadith came in conjunction with two things that do not contradict a jurist in determining the principle of compensation in them in general, namely compensation for crimes against the human body and property. Moral damages are no less painful than physical damages, in fact, they may be more so in some cases.[305] Therefore, the introduction of compensation for moral damages is a deterrent to those who transgress the rights and moral interests of others, especially today with the spread of social media, which may be amongst the most used tools to distort a person's character and dignity. As for the jurists who said that it is not permissible to compensate for moral damages with money, they quote the saying in the Qur'an as evidence that moral damages do not involve financial and imperceptible loss, and that compensation in Islamic jurisprudence is only for financial damages that have actually occurred. Islamic law has established separate punitive penalties for moral damages, and it is up to the judge to determine the appropriate penalty to prevent such damages in order to achieve justice.[306]

Furthermore, the penalties established by the Islamic Sharia laws against those who commit acts that cause moral damages are sufficient to redress the harm and redress the assault on a person's dignity. Sharia established penalties for the transgressors of people's honor and reputation for such offenses as slander and dealt with procrastination in the execution of contracts or obligations with imprisonment, selling the financial assets of the procrastinator, and

[304] Sahih Muslim, kitab Al-Berr Wa Al-Selah Wa Al-Adab, Chapter 13, Hadith No. 6541.
[305] Faydullah, Muhammad, Nazzariyat Al-Dhaman Fi Al-Fiqh Al-Islami, Al-Turath Library, 1st edition, Kuwait. Al-Khafif, Ali, Al-Dhaman Fi Al-Fiqh Al-Islam, Institute of Arab Research and Studies.
[306] Al-Khafif, Nazzariyat Al-Dhaman, Part 1, pp. 48-56. Al-Zarqa, Al-Feal Al-Daar, p. 124.

other means that preclude the judgment of financial compensation in moral damages. This is the case given to more imperceptible things that cannot be easily estimated because they do not leave tangible traces unlike compensation, which is approved by Islamic jurisprudence and acts to compensate tangible material harm.

Nevertheless, some jurists, when discussing the evidence and sayings of those who favor compensation for moral harm, pointing to such jurisprudential examples as pain, shame, and hair loss, which also are subject to financial compensation for moral damages, do not negate the need for compensation for material damages as well. In fact, some of what has been described as moral damages is in fact material harm that can be compensated according to existing laws, including the infliction of pain by beating or slapping, even if it does not leave a trace visibly mars the part of the body.[307]

This dispute in Islamic jurisprudence about compensation for moral damages is reflected in Saudi courts, with some judges allowing such compensation and others not.

Nevertheless, judges in the kingdom base their rulings on precedents that are widespread in the books of jurists of all schools of Islamic jurisprudence, although they rely more on the sayings of the Hanbali school. However, a judge is allowed to make diligence in this, and the judiciary has begun to adopt financial compensation for moral damages. This is despite the fact that the Islamic Fiqh Academy of the Organization of the Conference has decided that the damages that may be compensated under the liquidated damages clause are material damages, real loss, and lost earnings without including psychological or moral damages.[308]

There are some late Islamic jurists who think that compensation for moral damages is not permissible because the basis of compensation is reparation, replacing lost money with current

[307] Al-Zarqa, Al-Fael Al-Dar Wa Al-Daman Feeh, Dar Al-Qalam, Damascus, 1st edition, p. 123.
[308] Decision of the Islamic Fiqh Council in its twelfth session 1421 AH No.: 109 / (3/12), fifth paragraph.

money, the equivalent to restoring the situation to what it was. However, pain, honor, and reputation have no price, so the courts are satisfied with a symbolic compensation. Viewing them is irreplaceable, and some of them permitted it on the grounds that it is a disciplinary punishment for a violation of personal dignity, a punishment that protects society.[309]

If the conditions referred to previously for compensation for damages are met, then the Saudi courts rule for financial compensation. Some courts have recently begun to rule for such compensation for moral damages. Among the most important of these rulings is what the Administrative Court of Appeal held, that one of the major rules in Sharia is the rule: there can be no damages, whether material or moral, so compensation for moral damages is found in Islamic jurisprudence, especially if it is a consequence of material damages.[310]

The Administrative Court of Appeal also affirmed this same principle when it stated in a ruling that moral compensation is for all harm that affects a person in a non-material interest such as honor and intimidation, and that the generality in the jurisprudence rule that "Harm must be eliminated" is not limited to material damages.[311]

In this regard, one ruling obligated a medical authority to compensate a person for receiving the wrong test results where the plaintiff agreed to undergo a prenuptial examination and then was surprised by the reports issued by the authority stating that he had AIDS. He did not, although this only was discerned after he went through numerous tests in several labs and private and governmental hospitals, which showed that he was healthy and HIV-free. This proved the defendant's mistake, and it has been proven that the plaintiff sustained moral

[309] Al-Derini, Fathi,Al-Nazareyat Al-Fekhya, Damascus University Publications, 1993. Al-Zuhaili, Nazareyyat Al-Daman, Dar Al-Fikr, Damascus 1998. Al-Sanhoury, Abdel-Razzaq, Masader Al-Hakk Fe AlFiqh Al-Islami, A Comparative Study with Western Jurisprudence, Dar Al-Nahda Al-Arabiya, Cairo.
[310] Judgment of the Court of Appeal No. 519/4 1435 AH.
[311] Judgment of the Court of Appeal No. 5271/2/S 1436 AH.

damages as a result of the defendant's error; the wrong reports had negative effects on the plaintiff and his family, and this demonstrated the three pillars of responsibility, including fault and damages. Since the courts of the Board of Grievances have adopted the principle of compensation for moral offense in Judgment No.: (282/2/2/1432AH) Case No.: (4961/2/S/1431AH) and corroborated by the Court of Appeal No.: (2/44) for the year 1433 AH, the matter resulted in the Chamber ordering the defendant to compensate the plaintiff for moral damages.

The court judges worked hard to estimate the value of the compensation due to the plaintiff for the moral damages he had sustained, as this was measured by the amount of his monthly salary that he was receiving during the period in which he lived in turmoil and did not know what his condition would be, from the moment he was informed of the result of the wrong medical evaluation until the date of his being informed of the correct results.[312] But when the debtor does not clearly prove the moral damages that he sustained, the Saudi judge does not award him compensation. In execution of that, the Saudi Board of Grievances decided to reject the request for compensation for the moral damages suffered by the plaintiff, because he was unable to provide evidence that he received real and specific damages, as the judgment stated: "As for the plaintiff's request, compensation for moral damages in the amount of four hundred thousand riyals, the court held that the compensation must be for real tangible damages. The plaintiff did not submit anything to rely on it except for his statement to the court, which caused the court to reject his request."[313]

[312] Collection of Administrative Rulings and Principles, issued by the Saudi Board of Grievances, p. 3076.
[313] Decision of the Board of Grievances Audit Board No. (218/T/1) 1427AH, Case No.: 902/2/s 1420AH, Majmoat AlAhkam Wa AlMabade Al-Edaraya, vol. IV.

With regard to moral damages, the Saudi Court of issued its ruling issued on 8/8/1434 AH, rejecting the plaintiff's request for compensation, and halting the financial penalty for the defendant, because the defendant falsely accused him of burning his car in front of the Okaz Organization for Press and Publishing, without any evidence or evidence, which led to a tarnishing of his reputation at his workplace, and among his colleagues and his family. The court rejected the plaintiff's request due to lack of any evidence.[314]

Therefore, the Saudi judge may rule for compensation for moral damages resulting from breach of the liquidated damages clause, in accordance with legal perspectives he adopts from these two opinions. Some Saudi judges have decided to award compensation for moral damages according to what they deem necessary and appropriate. They have taken into account what the Board of Grievances, the administrative judiciary in the Kingdom, informed the heads of the administrative courts about the permissibility of material compensation for moral damages in cases and matters not related to material damages, provided that it is subject to the assessment of the court according to the circumstances of the incident, while the ruling for compensation for moral damages is based on moral damages. Therefore, the judge in the Kingdom, when estimating the amount, in the event that moral damages are proven, will take into account the material and social and situation for the victim, the size, type, and nature of the damages, whether it is personal or familial, and whether the damages have been caused at the workplace of the injured person or his commercial or social activity.

In application of this approach, Article 164 of the executive regulations of the commercial court law in the Kingdom stipulates that the court must decide on the request for compensation for material and moral damages, and estimate compensation, including litigation

[314] Al-Sarhan, Adnan and Khater, Nouri Hamad,Sharh Al-Kanoon AL-Madany, Masader Al-Hokok Al-Shakhseya, Comparative Study, House of Culture for Publishing and Distribution, Amman, Jordan, 1st edition, 2005, p. 313.

expenses. Thus, the judge is obligated to hear the case for moral damages, and to assess the damages arising from it.

From the aforementioned, it can be said that there are some conditions that must be met in order to be able to compensate for moral damages in the Saudi judiciary. Moral damages are not estimated by and of themselves, but rather are linked to the material damages incurred by the plaintiff.

2.5.3. Rigor, severity, and scrutiny in recognizing evidence of damages

The Saudi judge is strict in ruling compensation for the damages incurred to the injured person. In order to award compensation, the following conditions must be met:

- There is a breach of the right or interest of the injured party.
- That interest must be legitimate. If the interest is illegal or in violation of public order or morals, then there can be no compensation.
- The damages are direct and certain to occur, so it has actually occurred.
- Proving the occurrence of the damages, as the Saudi judiciary requires the clear presence or prospect of the damages for the debtor to be liable for the breach of an obligation. However, it can be assumed that the damages will occur in some cases, especially in the liquidated damages clause in administrative contracts.
- The debtor does not have a legitimate excuse for not fulfilling his obligation, such as force majeure, the fault of a third party, or the fault of the victim himself.

Therefore, the Saudi judge may rule for compensation on the liquidated damages clause, provided that there is a valid contract that includes specific obligations to which each of the parties to the contract is bound. The judge establishes the responsibility of the breaching party in

the event of non-performance or violation of his commitment and examines the plaintiff's claim that there is a default or breach on the part of the defendant. The judge also establishes the type of this breach, whether it is total or partial, or the defective execution or delay in execution, through a discussion of the parties to the dispute before awarding compensation.

Proving a contractual error depends on whether the debtor's obligation is to achieve a result, to exercise care. The former requires the creditor to achieve the result that he contracted for. If he does not achieve this, the debtor's contractual responsibility is being held.

All that the creditor in this case has to prove is that the result has not been achieved; he is not obligated or required to prove the debtor's mistake, or that non-performance of the obligation was due to force majeure, or the fault of the creditor, or third parties.[315]

The Saudi judge also monitors the extent to which the damages have been achieved, as damages are considered the main pillar of liability in Islamic jurisprudence. If evidence of the damages claimed by the plaintiff is not available, the judge does not rule for compensation. In application of this, the Saudi Court of Appeal concluded, in its ruling issued in 1434 AH, that a tenant of the property was not liable for the damages that occurred to the rented property due to force majeure. The property owner had stipulated to the defendant that she was not responsible for any emergency circumstances, and that she received the property after the contract's expiration in a sound and good condition. It was stated in the ruling that: "This defense's stipulation in the contract that it was not responsible for any emergency circumstances has no effect, because according to *Sharia* requires a guarantee that is not changed by the conditions and vice versa." The court cited what was mentioned in some books of Islamic jurisprudence (Al-Rawd al-Murabba' 5/366), because what is not required to be guaranteed does not make it a

[315] Supra.

condition guaranteed, and what must be guaranteed does not negate the guarantee provided that it is negated.[316]

Because the Prophet arose and glorified Allah as He deserved and then said, "Why do some people impose conditions which are not present in Allah's Book of Laws? Whoever imposes such a condition that is not in Allah's Laws, that condition is invalid even if he imposes one hundred conditions, for Allah's conditions are more binding and reliable."[317]

With regard to establishing damages, although it may be proven by all means of proof, including testimony, presumptions, inspection, and experience, the judge requires the injured party to clearly prove the damages inflicted on him. This is what the Saudi Board of Grievances decided in its ruling issued in 1427 AH when it said: "[T]he compensation is based on three pillars without which it cannot be established: the error, the damages, and the causal relationship between the defendant's mistake and the damages caused to the plaintiff. The plaintiff must prove the damages."[318]

The subject of the liquidated damages clause should also be legally permissible, as the court ruled that the requested agreement corresponds to delaying the payment of the debt, and this is not legally permissible and is an invalid condition, The court thus decided to dismiss the plaintiff's request. The judge based his judgment on:

1. The saying of the jurist Ibn Abd Al-Bar from the Maliki school: "[E]very addition of an asset or a benefit that the lender (creditor) requires over the borrower (debtor) is *Usury*, with no dispute on this matter."[319]

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[316] Ibn Qudamah, the singer 8/115. Al-Bahooti, Qinae Al-Kishafa, 4/70.
[317] Judgment of the Saudi Court of Appeal 3/8/1434 AH, No.: 3457251, No.: 301581109, 1/1/1434 AH, Case No.: 3414350, Collection of Judicial Judgments, vol. 7, 1434 AH, p. 368.
[318] Decision of the Board of Grievances Audit Board No.: 770/T/6 1427AH, Case No.: 2109/1/S 1432 AH, a set of administrative provisions and principles, vol. 1, p. 171.
[319] Al-Dubyan, Dubyan, Al-Mueamalat Al-Maliat A'salat wa Mueasara p. 69.

2. The decision of the Islamic Fiqh Academy No. 85 which included: "It is not permissible to agree to a condition for delaying a Muslim's delivery of the sum stipulated in the contract."[320]

The plaintiff objected to the judgment, but the court of appeals decided to ratify it.[321] This is in accordance with the Saudi Enforcement law and its executive regulations.[322]

In another case, which involved a contracting contract limited to a specific period, the breach of this period entailed a liquidated damages clause that "if the defendant, the 'contractor' delays delivery on the specified date, an amount of one thousand riyals shall be deducted from his entitlements for each day of delay." The court has confirmed the entitlement of the liquidated damages from the existence of the error represented in the debtor's delay in execution and that this resulted in the occurrence of the damages, even if it was a future damages, but it is considered because it is a direct damages. Therefore, the causal relationship between the error and the damages was found, and the debtor was warned of the necessity of execution, but the clause was not implemented. The court also held that the amount of the agreed-upon condition was greatly exaggerated, and thus felt it necessary to reduce it. Noting this, the judge assigned the assessment of this penalty clause to an expert committee, which came out with three options regarding the amount of compensation to be awarded to the plaintiff:

Option one: The judge would decide what was agreed upon between the two parties, that is, the amount of the agreed condition.

Option two: The judge would order a compensation of 10% of the contract value based on the value of the delay fine estimated in the administrative contracts of government projects.

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[320] Supra.
[321] Case No.: 34259694, 4/7/1434AH, Court of Appeal No.:34329301, 10/13/1434AH. See: Collection of Judicial Judgments - Research Center - Ministry of Justice -1434 H, 3rd edition, p. 25.
[322] Article No. 95 Paragraph 1 and Paragraph 2 of the Saudi Enforcement law.

Option three: The judge would fix the amount of the actual damages caused to the plaintiff as a result of his failure to benefit from the rents of these villas for the duration of the delay.

The judge chose the second option and confirmed his ruling by the Court of Cassation.

Another case involved a contract for the supply and installation of a stone. The contract between the marble factory and the villa owner included a liquidated damages clause stipulating a fine of two hundred riyals [323] for each day of delay, and the defendant was late in implementing this contract. The two parties had agreed that the delay period would start from the end of the contract, i.e., about five months, and the plaintiff had demanded the imposition of a fine in the event of a delay. However, the defendant stated that the reason for the delay was due to an extraneous reason beyond his control, represented in much rainfall over twenty days. This was in addition to the plaintiff's delay in paying the defendant's fee, and the increase in the work that the plaintiff requested from the defendant, which were outside the work stipulated in the contract. Since the judge found that some of the delay period was due to a reason outside the defendant's control, he deducted from the claimed compensation what corresponds to the liquidated damages sum involved this period.[324]

2.5.4. Not accepting the plaintiff's requests

The plaintiff often finds it very difficult to get his claims accepted by a Saudi judge regarding compensation for damages in general and with regard to the liquidated damages clause in particular. The judge often asks the plaintiff to detail his case in writing and to delineate it precisely before entering into the discussion of the subject. That is because of a difference in

[323] Saudi currency.
[324] See: Judicial Judgments Collection - Research Center - Ministry of Justice - 1434 AH.

views between the plaintiff and the judge regarding the benefit of the liquidated damages clause. The plaintiff sees that its main benefit is to exempt him from proving the damages he has suffered, as it is assumed that the debtor's failure to implement the contract includes damages to the plaintiff. That in turn is because the original execution of the liquidated damages condition as agreed upon by its parties and breaching that execution itself constitutes the harm by the plaintiff. Therefore, the damages, and then the judgment of the amount of the liquidated damages clause, is proven as soon as the debtor fails to implement his obligation. If the defendant claims otherwise, he must prove his case, because damages are assumed from the plaintiff's point of view.

In some other legal systems, the harm resulting from non-performance of the obligation is equal to what was agreed upon in the liquidated damages between the two parties. But the judge does not necessarily see the validity of what the plaintiff is claiming. Rather, the plaintiff is required to prove the damages he claims to have suffered due to the debtor's failure to fulfill his obligation.

Here the question arises about the forms of compensation for damages in the liquidated damages clause, the conditions for its entitlement, and the extent to which the Saudi judge accepts what the plaintiff claims about it.

There are three possible scenarios regarding the liquidated damages clause:[325]

A- The compensation agreed upon in the liquidated damages is much greater than the value of the damages resulting from negligence or error in execution the contract, so it amounts to a financial threat. Here, the Saudi judge will not accept the plaintiff's claim for the total

[325] Al-Sanhouri, Al-Wasit, 2/851. Al-Tamawi, The General Foundations of Administrative Contracts, p. 512. Zarqa, General Fiqh Entry, 2/717-718. Nazih Hammad, A Dictionary of Financial and Economic Terms in the Language of Jurists, Dar Al-Qalam, 2008, p. 257.

amount but will reduce it to equal the amount of damages due the plaintiff, taking into account the fatwa of the Council of Senior Scholars. This indicated that the judge has the right to reduce the value of the liquidated damages clause if it is intended as a financial threat.

This move by the Saudi judge is consistent with the opinion that the threatening function of the penalty clause is beginning to diminish in the face of the judge's compensatory function, as his penalty role appears only casually, and this is done through his ability to award compensation for breach of contractual terms. This is how the penalty function is achieved only when the condition is agreed upon, with an amount greater than the legally due compensation, so the condition works to the extent agreed upon. Then, within the limits of the amount in excess of the due compensation, it becomes for the defendant a kind of contractual penalty. As for the compensatory function of the liquidation damages clause, it is achieved when this clause is estimated at an amount equal to the amount of damages expected to occur as a result of breaching the execution of the original agreement.

B- The agreed compensation is equal to the expected damages. Here, the judge will respond to the plaintiff's request by ruling for awarding him the amount of the liquidated damages clause, but after he uses the experts opinions on the extent of the damages, finds it equal to the amount of the liquidated damages clause.

C- The compensation agreed upon in the condition is less than the expected damages. Here, this is despite the fact that the liquidated damages clause is considered as mitigating the plaintiff liability in the event of his failure to implement his obligation. However, the Saudi judge may accept that the plaintiff has proved that the damages he sustained are more than the amount of the liquidated damages clause. If the plaintiff does not demand

more than the amount of the clause, then the judge might decide to compensate him for the amount of damages he actually sustained. Alternatively, the judge may rule only the value of the liquidated damages clause, even though it is proven that it is not equal to the damages inflicted on the creditor/plaintiff. In this regard, the General Court in Makkah Al Mukarramah issued a ruling obligating the defendant to pay only the specified amount in the liquidated damages clause, despite the fact that it was proven this sum was less than the damages caused to the plaintiff. Where the court used experts to decide this, and after it was proven that the damages was higher than the amount of the clause, it still ruled for the value of the penalty clause only.[326]

The doctrinal disagreement about the principle of free will to contract and that the contract is the law of the contracting parties affects the Saudi judge when he considers the dispute. Those who say that the principle of the contract must be fully respected will rule for compensation specified in the liquidated damages clause, as soon as the breach takes place, even if the damages had not occurred. Considering the condition is a consensual estimation of the amount of compensation that is due for the damages resulting from a contracting party's breach of his obligations, what will pertain is the liquidated damages clause or condition that was made at the will and desire of its parties. Hence, it must be enforced as it is and may not be modified, in execution. This is because of the binding force of contracts, which prevents them from being modified except with the agreement of the two parties or the text of the law.

Those judges who think that this principle should not automatically go into effect because it might lead to injustice by the stronger contracting party against the weaker one will require the occurrence of the damages in order to judge the value of the liquidated damages. However,

[326] Collection of Judicial Judgments issued by the Ministry of Justice, vol. 3, General Court in Makkah, Case No.: 3313032, 1433 AH, Court of Appeals in Makkah Region, Resolution No.: 35323652, 21/07/1435 AH.

judges will differ on the amount of compensation and whether it is necessary to equal the damages or not.

The judge who thinks that the agreed-upon clause is compensation for damages and suspends his authority to amend it to equal the damages. The judge who considers that the compensation will have some of the effects of a penalty has the power to amend the amount, but at a lower rate, so it is not necessary to be equal between the actual damages with the amount of the liquidated damages clause. As for a judge who saw that it was a binding agreement that had nothing to do with the damages, he saw that the judge had no authority in the amendment of the specified damages. Therefore, it cannot be said that the judge will respond to the plaintiff's requests and simply affirm the amount of the liquidated damages clause without modifying it, there are cases where which the judge can intervene to increase or decreased this value, including:

1. The case of partial execution of the obligation by the debtor, where the judge has the power to reduce the value of the agreement from the agreed-upon amount. The judge considers it is his duty to intervene to harmonize the value of the condition and make it commensurate with the amount of the obligation that has not been implemented and the resulting damages incurred by the creditor.

2. Sometimes, the judge finds the liquidated damages clause's amount is exaggerated, as it falls within his discretionary power to respond to the plaintiff's requests to pass judgment on the full amount of the liquidated damages clause. If this occurs, the judge might reduce the amount of the liquidated damages clause, which is exaggerated, compared to what is deemed fair and adequate compensation for the plaintiff. The excessive amount of the liquidated

damages clause requires the judge to go outside the scope of his compensatory function to impose a penalty and to amend it limit it to his compensatory function.

3. In the event that the plaintiff requests an increase in the amount of the liquidated damages clause, if it is found that the damages incurred by the plaintiff exceed the amount of the liquidated damages clause and the plaintiff proves these damages, the judge will rule in his favor and increase the amount of the liquidated damages clause, making it equivalent to the proven damages. But if the plaintiff does not prove these damages or does not request an increase in the amount of the liquidated damages clause, the judge will not rule in his favor. Even if it is proven to the judge through experience that the damages inflicted on the plaintiff are higher than the stated amount of the agreed-upon clause between the parties, the judge will take into account the rule that the plaintiff shall not be awarded more than what he claims.[327]

4. In the event that the liquidated damages clause is void due to its violation of the provisions of Sharia, then the judge will not respond to the plaintiff's request that he rule on the liquidated damages clause. The plaintiff must prove the damages incurred by him, without adhering to the liquidated damages clause, to be considered by the judge according to his discretionary authority and according to the evidence presented to him, and the loss suffered by the plaintiff and the loss of gain.[328]

Here the question arises about the nature of the agreement. Some consider it a proper liquidated damages clause for the damages incurred by the creditor, while others view it as a threatening condition aimed at urging the debtor to carry out this obligation on time, and still

[327] Article No. 200 of the Saudi civil procedures law.
[328] Atef, Saadi, Administrative Supply between Theory and Practice, Dar Al-Nahda Al-Arabiya, 2005, pp. 461-462. Al-Siddiq, the blind man, the penalty clause, research published in the Journal of the Islamic Fiqh Council, Twelfth Session (2/49-90) Al-Sanhoury, Al-Wasit, 2/856. Al-Yamani, the penalty clause, p. 191.

others view it as both an incentive to the debtor to execute his commitment on time and compensate for the damages incurred if he does not.

To answer these questions, we should go back to knowing the common will of the parties at the time of contracting. Some set the liquidated damages clause to determine the amount of compensation due only in the event that the contract is breached. In this case, the judge is to determine by the amount of the liquidated damages clause without increasing or decreasing this amount, unless this condition is in violation of the provisions of Sharia.

That was the case when a Saudi court heard a dispute regarding a marriage contract. Where the wife stipulated an amount of one million riyals in the event that the husband divorced her, and although the value of this was exaggerated, the judge estimated that it is compensation for the wife in return for the damages she incurred as a result of her divorce, and not as a penalty where the amount can be reduced. Ultimately, the Court of Appeal returned the case to the Court of First Instance to review the ruling on the possibility that the purpose of the condition was to threaten the husband and thus to deter him from initiating a divorce. Hence, the option to decrease its amount because it is exaggerated existed, but the Court of first instance clarified that the figure was meant as compensation for the wife in the event of her divorce, citing the hadith of the Messenger ﷺ said:

"Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful or makes lawful something which is unlawful."[329]

The condition is like reconciliation and the woman did not accept marriage except after stipulating such a condition. He inferred from what the Bahouti jurist mentioned from the

[329] Sunan Al-Tirmidhi, Hadith No.: 1352.

Hanbali school of thought that the condition that the woman benefits from that does not contradict the marriage contract, but rather is a valid and necessary condition.[330]

Also, the ruling in this condition comes in application of the jurisprudence rule "Fulfillment of rights by enforcing conditions,"[331] but if it turns out that the purpose of the contracting parties in setting the condition is to threaten the debtor and urge him to carry out his obligation at the specified time, then the judge may reduce its value to the extent that he deems necessary to achieve justice and equity, as indicated by the fatwa of the Council of Senior Scholars in the Kingdom.[332]

In the event that the objective of the contracting parties in setting the condition is to combine compensation and a financial threat to push the debtor to carry out his obligation, the matter is be returned to the authority of the judge to assess the appropriateness of reducing this requirement in light of the circumstances of each case. The judge should set the amount according to the damages suffered by the creditor and the loss of gain due to the debtor's breach of his obligations, despite some difficulties that he may encounter in distinguishing between the condition's compensatory and threatening functions.

So far, the Saudi judge has met the plaintiff's requests for compensation for breach of the liquidated damages clause, provided that the following conditions are met, so that his request can be considered, and compensation awarded:

1) Actual financial damages have occurred, resulting from non-performance or delay in implementing what the debtor had committed to. This does not include moral damages in most

[330] Ibn Qudamah, Al-Mughni (7/448), Al-Mardawi, Aladdin, Al-Insaaf (8/154), Al-Bahooti, Kashaf Al-Qinaa (5/90).
[331] Al-Bayhaqi, Al-Sunan Al-Kabeer, No.: 13524.
[332] Supra.

cases, although there has been a kind of development in the Saudi judge's view of compensation for moral damages, as we mentioned earlier.

2) The cause of the damages is due to a breach of the obligation, and there is no legitimate excuse that prevented the debtor from carrying out his obligation, such as emergency or force majeure circumstances or the fault of the creditor himself or others.

In general, the judge does not respond to the plaintiff's requests for compensation when the damages is not evident or is only probable, and this is what was included in the ruling of the Audit Board of the Board of Grievances in the Kingdom Whereas, the lower court ruling was upheld by rejecting the plaintiff's request for compensation for the decrease in his sales because the court had not considered whether those damages actually had occurred to him due to the violation attributed to the defendant. The audit committee confirmed that the defendant did not import the counterfeit goods that the plaintiff claims affected his sale of his goods until after a period of reduced sales by the plaintiff had occurred. This indicates that the violation attributed to the defendant had no direct impact on reducing the plaintiff's sales and causing damages to him.[333]

The judge in Saudi Arabia also focuses on achieving fair and equal compensation for damages, regardless of the plaintiff's requests. In this regard, the Audit Committee of the Board of Grievances confirmed that when the purpose of compensation is to be equivalent to the damages and not exceed it, the authority assesses the damages incurred at 20 percent of the value of the contract and considers that this is sufficient to redress the damages suffered by the plaintiff.[334]

[333] Judgment of the Audit Board of the Board of Grievances No.: 43/T/4, 1409 AH.
[334] Judgment of the Audit Board of the Board of Grievances No.: 53/4/, 1415 AH.

2.5.5. The judge's scrutiny in estimating the amount of damages claimed by the plaintiff

The Saudi judge needs to be strict in assessing compensation for the damages amount claimed by the plaintiff. In this regard, the General Court in Makkah Al-Mukarramah issued a ruling obligating the defendant to pay the amount of the liquidated damages clause, after the court had ascertained that the clause was just to give the verdict. The plaintiff instituted a lawsuit against the defendant, requesting to fulfill the contractual obligation by doubling the property rent rate. This obligation comes into effect after the lease expires due to this clause mentioned in the lease agreement dealing with late vacating of the rental property. The defendant had delayed leaving after he was notified of the increase in rent and the existence of a penalty clause in the contract obligating him to pay double rent if he was late in leaving the rental property.

By submitting the case to the defendant, he acknowledged its validity. He pleaded the nullification of the condition because his delay was due to a dispute between the two parties over an increase in rent. The judge ordered the defendant to pay the amount of the condition, twice the daily rent mentioned in the rental contract, from the date of the lease expiration until the rental property was vacated. Support for the judge's ruling is found in the Almighty's saying in the Qur'an: "O you who have believed, fulfill all contracts,"[335] and "Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful, or makes lawful something which is unlawful. "[336]

Though the defendant's statement regarding recognition of the lease agreement and the increase in rent clause, the clause was based rightfully, also because property experts stated in their estimation that the rate rent asked by the plaintiff is less than comparable rental properties.

[335] Supra.
[336] Supra.

Therefore, the judge ruled, obligating the defendant to pay the penalty clause. When the defendant contested the verdict, the appeals court upheld the verdict.[337]

The judge was strict in ruling the amount of the liquidated damages clause and did not just follow what had been agreed to the parties to the contract. Rather, he asked for an expert opinion so as to make sure that the value of the liquidated damages clause was not exaggerated. But when he learned, through the opinion of experts, that the value of the daily rent for the property exceeded the value of the agreement, he did not increase the amount stipulated by the agreement, but rather specified the contractual sum that the two parties agreed upon.

In another case, the plaintiff sued the defendant because he breached the land lease contract by not paying for the three years. The plaintiff requested the court to have the defendant be obligated to pay the agreed amount in the liquidated damages clause due to the contractual breach. By presenting the case to the defendant, he acknowledged the validity of the land lease contract and requested some time to respond to the plaintiff's claim. However, the defendant did not respond to the plaintiff's claim in the next court session. Thus, the court decided that the liquidated damages clause from the land lease contract was unlawful. The court reasoned that the original obligation for which the liquidated damages clause existed was, in fact, a debt for not fulfilling the obligation. Thus, the liquidated damages clause when it comes to debts is not legally permissible in Sharia due to the Prophet saying, "Muslims must keep to the conditions they have made, except for a condition which makes a forbidden matter permissible or makes a permissible matter prohibited." and Islamic Fiqh Council Resolution No.: 12/3/109. Therefore,

[337] Collection of Judicial Judgments issued by the Ministry of Justice, vol. 3, General Court in Makkah, Case No.: 3313032, 1433 AH, Court of Appeals in Makkah, Decision No.: 35323652, 1435 AH.

the judge ruled to reject the plaintiff's claim of the liquidated damages clause. The plaintiff objected, but the court's decision was reaffirmed the Court of Appeal.[338]

This ruling is consistent with the opinion of Sharia jurists, which was previously referred to, and which does not allow the liquidated damages clause to act as debt because it is a type of usury that Sharia prohibits.

In another case, the judge decided to reduce the value of the liquidated damages clause, as the plaintiff filed a lawsuit against the defendant's company, requesting the termination of a contract for the supply and installation of doors concluded between the two parties, and the payment of the price paid, and obligating the defendant to pay the amount of the agreed-upon clause for each day of delay. The defendant was late in executing the work within the agreed period, and the company failed to assign someone to represent it before the court while informing its representative of the case, so it was decided to consider it in absentia. When evidence was requested from the plaintiff, he submitted the contract of agreement and a receipt deed consistent with what was stated in his claim. When requested to do so, he also took an oath to attest to the validity of the case. The judge quoted the Almighty saying: "O you who have believed, fulfill all contracts,"[339] and the Prophet ﷺ as saying, "Muslims must keep to the conditions they have made, except for a condition which makes a forbidden matter permissible or makes a permissible matter prohibited."[340]

What is meant by the liquidated damages clause is to urge the one who is bound by it to fulfill his commitment. The judge decided to adjust its amount in a way that did not harm the defendant. The judge decided to obligate the defendant company to pay the value of the agreed-

[338] Collection of Judicial Judgments issued by the Ministry of Justice - Volume Three, General Court in Jeddah Case No.: 34456558 Date: 1434 Court of Appeal in Makkah Al Mukarramah Decision No.: 35341877: 08/05/1435.
[339] Supra.
[340] Supra.

upon condition estimated by the experts, and not the higher figure set between the parties, because he thought that the agreed-upon value was exaggerated. The plaintiff objected, but the judgment of the Court of Appeal was upheld.[341]

From this case, it is clear that the Saudi judiciary imposes strict control over the amount that can be awarded to a person claiming compensation, especially with regard to compensation for moral damages. For a long time, Saudi judges had been reluctant to compensate for this kind of damages in the first place. This is despite the guideline of the Saudi judiciary on the principle that the contract is the law for the contracting parties and the Islamic dictum that "Muslims must keep to the conditions they have made."[342]

However, in practice, we find that the Saudi judge is strict in responding to requests for compensation submitted by the parties to the conflict. Compensation in contractual matters is limited to the expected direct damages at the time of contracting without considering future damages, unless the damages is due to fraud by the debtor or that occurred as a result of a serious error from him, and the creditor was able to prove that. Here, the judge can consider requests for compensation for those unexpected damages the plaintiff has suffered. The Saudi judge relies on what is prevalent in Islamic jurisprudence and what he believes will bring a just result.

If the Saudi judiciary recognizes in principle that compensation must cover all damages incurred by the injured person, including the loss that he incurred and what he missed in terms of legitimate profit. However, the possibility of compensation for simply missing the opportunity is still under discussion.

[341] Collection of Judicial Judgments issued by the Ministry of Justice - Volume Three, Hail General Court Case No.: 34405195, 1434AH Court of Appeal in Hail Region Decision No.: 35321776, 1435AH.
[342] Judgment of the Saudi Court of Appeal No.: 34349104, 1434AH, Collection of Judicial Judgments of 1434AH, vol. 7, p.153.

2.5.6. The scarcity of rulings for compensation for future damages

Future damages is defined as the actual loss suffered by the plaintiff at a later time due to the breach of the contract; it has also been called the expected loss.[343] Others defined it as the harm whose consequences are delayed until a later time due to breach of contract, or it might be seen as the harm whose causes were realized at the time of the contract, and whose consequences were delayed until after then.[344]

Compensation for future damages falls within the scope of the contract in some comparative laws, including the English law, Future Compensation Legislation in 1996. Three conditions are required:

1. The causation condition. This means that the future damages is within the scope of the contract and has arisen due to breach of contract, i.e., the breach by the defendant being the direct cause of the damages. If the plaintiff himself has caused the damages, of course there is no need or justification for compensation.[345]
2. Certainty, i.e., that future damages within the scope of the contract are definitely fixed, i.e., neither hypothetical, nor just probable. The description of certainty here includes both present damages and future damages. For this last type of damages, the causes must inevitably lead to its occurrence in the future. Thus, potential damages are excluded from the scope of compensation, as well as possible distant damages.

The creditor must avoid or mitigate future damages. This condition is one of the basic conditions included in English law for compensation for future damages within the scope of

[343] Aubrey L. Diamond and others, Law of contract, 17th, London, 1970, P,402. Treitel, An outline of the law of contract, 2ed edition, London, P,325.
[344] A. G. Guest, Anson's law of contract, 24th edition, Oxford, 1975, P, 532. See: William R. Anson and others, Principles of the English law of contract and of Agency in its relation to contract, 18th - edition, Oxford, 1973, P, 376.
[345] ID, p.531.

the contract and is considered a duty of the creditor so that the creditor takes all reasonable means that reduce the damages that arose due to breach of contract by the debtor in order to obtain compensation. Also, the creditor is obligated not to do any unreasonable act that would lead to an increase in the damages.[346]

In order for the Saudi judge to rule on the plaintiff's claim for compensation for future damages, a number of conditions must be met:

1. The damages caused to the plaintiff must be real (having caused the plaintiff a loss), certain, and in the present, as well as in the immediate future.

2. The Saudi judiciary requires that the damages be certain, whether they have actually occurred or the possibility of their occurrence in the future is inevitable. These damages are present, in contrast to potential damages, for which there is no confirmation of their inevitable occurrence, and the Saudi judiciary does not compensate for. The damages that may be compensated in the liquidated damages clause include the financial damages, the real loss suffered by the aggrieved party, and the sure profit he missed. However, the compensation is to be equivalent to the damages suffered by the plaintiff and not in excess of it. Therefore, the Board of Grievances' Audit Board ruled that the plaintiff should be compensated for the damages incurred by an amount representing 20 percent of the contract value and considers that this is sufficient to redress the damages he suffered.[347]

3. The compensated damages should be direct and foreseeable damages, which is that damages that are a natural result of breach of contract, which is considered the same in any case unless the creditor or the injured party could have avoided them by exerting a reasonable effort.

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[346] Treitel, An outline of the law of contract, 2ed edition, London, p, 346 – 444. A. G. Guest, Anson' s and others, law of contract, p, 370 -530. Chitty, On Contract, vol. 1, 26 edition, London, 1989, p, 1160-1161. Cheshire, Op, Cit, P, 574.

[347] Judgment of the Audit Board of the Board of Grievances No.: 1415 AH.

Direct, unforeseen damages is not a normal and natural result of a breach of contract and is considered as such if the creditor or injured party cannot avoid it by exerting a reasonable effort. For example, compensation paid by airlines and postal companies for the total or partial loss of baggage or parcels. Postal companies pay the usual value of such parcels. If, after the loss of these parcels, it turns out that they contain valuable jewelry, and the owner of the jewelry did not notify the carrier of the presence of such jewelry in the parcel, the carrier is only responsible for the reasonable value of the parcel. Since the carrier does not expect any valuables to be included in the packages, such valuables are not usually transported in this way.

There are types of damages that may overlap, such as future damages, aggravated damages, and damages resulting from missing an opportunity, and the Saudi judge's assessment of compensation claims may differ for each of these. Future damages fall within the scope of the contract whose causes are all realized at once, but whose consequences and effects have been delayed, all or in part, until after the breach of the contract. This means that the future damages within the scope of the contract are subject to increase in itself, a snowballing effect, with the extent of the future period unknown; it may be long or short, depending on the circumstances.

As for the aggravated damages, it is damaging whose causes, results, and effects are all realized at once, but it is liable to increase after the issuance of the judicial ruling for compensation. Thus, the idea of aggravating damages within the scope of the contract takes one of the following two forms:

1. That the damages will likely increase after the issuance of the judicial ruling on the claim of compensation because the elements constituting the damages will be more pronounced.

2. The damages will not increase except after the issuance of the judicial ruling in the claim of compensation, so the damages in terms of its constituent elements remain as they were at the

time of its occurrence. But there is an increase in its monetary amount, which thus differ from what it was at the time of its occurrence, due to the change in the value of money as a result of certain economic conditions.[348] This means the overlap of the aggravated damages with future damages within the scope of the contract, in that both of them are subject to change during a period of time.

The Saudi judiciary may compensate for future damages within the scope of the contract, as they constitute an actual damages. But it does not compensate for the aggravated damages as a result of the difference in the monetary amount of the damages from what it was at the time of its occurrence on the basis that that is like usury, which is prohibited by Sharia.

A- The damages must also be proven with certainty in order for the Saudi judge to award compensation for future damages; this must be achievable, and quantifiable, whether it results from a present or subsequent loss.

B- The judge does not accept the consideration of the compensation claim for the possibility or expectation that the damages will occur... Nevertheless, the Saudi judge may consider the request for compensation for the aggravated damages in and of itself by accepting the plaintiff's new damages claim in a specific and clarifying reasoning before issuing the judgment. However, if the judge refuses to accept the plaintiff's new claim, the Saudi judge will refer the plaintiff to file a new lawsuit regarding his new damages claim.

In this direction, the Board of Grievances Audit Board rejected the lower court's ruling to compensate the plaintiff for a decrease in sales of his merchandise due to the defendant promoting counterfeit merchandise similar to the plaintiff's. The lower court has not been able to ascertain that damages had actually occurred to the plaintiff due to the violation attributed to the defendant.

[348] Treitel, An outline of the law of contract, 2ed edition, London, p, 346.

It was proven that the plaintiff's sales had decreased before the defendant imported the goods in question and continued thereafter, which indicates that the violation attributed to the defendant had no direct impact on reducing the plaintiff's sales and on causing damages to him.[349] The audit body ruling came after perusal of the lower court's ruling and the objection submitted by the defendant and its study of the case documents. It did not agree with the lower court in its ruling for the plaintiff to compensate for the lost gains in the manner mentioned in the judgment under review.

It already had been proven that the plaintiff could not verify his claim of loss due to non-performance of the contract, whether concerning the material objects the plaintiff claimed to have supplied or the amounts said to have been paid to others. Based on this, if the plaintiff did not inflict material damages or loss due to due to defendant's act, the plaintiff does not have the right to compensation. The case is the same as saying that she should be compensated for what she missed from the profits, which is a probabilistic because there is no way of knowing whether she in fact would have realized profits and, if so, how much. Realizing legitimate profit in terms of origin—even if it is something that is unknown not only in terms of its amount but also in its realization and its attainment, as is well known—can only happen with work and effort. In light of the risk and what God ordains of success as a result of these and other factors, there is inconsistency in the ruling to compensate the plaintiff for what she missed from the expected profit. This is especially the case because the judge cannot know the causes and thus cannot ascertain the material loss as a result of her work or effort.

In view of the violation of the judgment under review of this consideration, the Commission found that it had to be overturned.[350] It is usual for harm to occur all at once, except

[349] Judgment of the Board of Grievances Audit Board No.: 43/T/4/1409 AH.
[350] Judgment of the Board of Grievances Audit Board No.: 26/T/4/1417 AH.

for a few cases in which harm occurs in stages, even though its real cause arose from the beginning. This may result in a series of damages that follow each other, and the plaintiff will claim compensation for those damages until the judgment is issued.

The Saudi judge usually responds to the plaintiff's requests in this kind of case, provided that the amount of compensation awarded is determined. But if the plaintiff is unable to prove the extent of the damages inflicted on him because some of it is future, then the judge does not rule for him. But he may reserve for him the right to file an independent lawsuit to claim compensation for the damages after he is able to prove the amount of damages incurred by him and thus determine the amount of compensation claimed.

The Saudi judiciary accords the judge a wide discretionary authority in estimating compensation for the damages claimed by the plaintiff in a way that helps ensure fair reparations. When the judge decides to redress that harm and determine the appropriate amount of compensation to achieve this goal and restore balance to the parties to the contract, the first manifestation of that power is the freedom to choose the appropriate method for awarding compensation, taking into consideration the real loss suffered by the creditor and the loss of profit, which were directly caused by the failure to fulfill the obligation.

The judge also must take into consideration the circumstances specific to each dispute. He must estimate the compensation on a case-by-case basis according to the debtor's default and the damages caused to the creditor. This was confirmed by the ruling of the Audit Board of the Board of Grievances, which indicated that the compensation includes the missed profit, the loss that occurred, and the incurred or realized loss.[351] This means the amount of the shortfall

[351] Judgment of the Audit Board of the Board of Grievances No. 197/T/4, 1409 AH.

incurred by the victim's money or body as a result of the debtor's action. Loss of profit or loss means everything the injured party hoped for, with proper reasons, to obtain profit or profit, but this does not amount to the right to claim compensation for potential damages. The judge may use expertise in determining how much compensation is needed to settle the case and is not obligated to respond to the litigants' requests that include the recommendations set by experts, as long as the judge is satisfied with the report submitted by them. In practice, the Saudi judge usually rules with what the experts reached in their estimation of the compensation due, and this is one of the examples of the judge's discretion.

The assessment of compensation goes back to the trial judge, who decides each case according to its own circumstances and an assessment of the damages caused or expected from the debtor, while determining the importance and amount of the alleged future damages The trial judge must determine the elements of damages in estimating compensation because they are among the issues of law that are subject to the control of the higher court. However, assessing the damages and determining the compensation is one of the issues that the trial court is independent of.

Sometimes, the plaintiff submits a claim for compensation for specific damages, but during the consideration of the case, the assessment of these future damages increases. In response, the plaintiff may try to add to the existing claim for compensation for these new damages to the previously existing damages. But the Saudi judge may not respond to him and ask him to file an independent lawsuit to claim compensation for those damages later.

Therefore, the considerations affecting the judge's conviction while determining compensation for damages may differ from one judge to another. Each judge has a discretionary authority to form his conviction, based on the documents, evidence, and circumstances that were

submitted regarding the subject of the dispute to determine the compensation necessary to redress the damages suffered by the plaintiff. However, this conviction is not always based on its release. In addition to the necessity of justifying the judicial ruling and the judge's statement of the elements on which he relied in determining the amount of compensation, there are some legal and objective considerations that play a prominent role in his viewpoint and have a great impact on the amount and size of the compensation awarded.

The judge must also decide on the limits of the parties' requests, that is, not to exceed the specified ceiling for compensation from any of the parties to the dispute. This is a limitation on the judge's discretionary authority in estimating compensation.

Compensation includes the creditor's loss and profit, provided that these damages are a natural result of non-fulfillment of the defendant's obligation, his delay in fulfilling it or it is a defective execution. But if the damages are a result of the creditor's failure to implement his obligations, then there is no compensation, as per the order of the Dammam Commercial Court, which decided that the plaintiff was not entitled to the value of the liquidated damages clause and the damages due him as a result of his claim because he himself did not fulfill his contractual obligations stipulated in the contract. This ruling was upheld by the Court of Appeals.[352]

The Saudi judiciary, according to the original ruling, does not compensate for projected future damages that are not achieved, but the matter ultimately is subject to the discretion of the judge adjudicating the dispute. It works on estimating the compensation for the claimed damages by determining the legal components of the damages. Then, the judge estimates what the injured party has missed in terms of earnings and the elements included in this earnings, some of which may be about future damages that might occur, and then determines the value of the

[352] Dammam Commercial Court NO.: 3302, 1441AH, Court of Appeal Resolution No.: 312, 1442 AH.

compensation awarded. Estimating compensation for damages by specifying its constituent elements is one of the legal issues that are subject to the supervision of the highest court in the Kingdom. If the plaintiff does not prove the damages incurred by him, the court will not award him compensation.

In this regard, the Dammam Commercial Court rejected a judgment for the plaintiff, who had demanded compensation for the damages he sustained as a result of the defendant's failure to implement his obligations on time. Indicating that compensation for damages requires the availability of the three pillars of liability: error, damages, and the causal relationship between them. The plaintiff did not provide evidence that there were actual damages inflicted on him.[353]

Potential damages is assessed through future harm based on assumptions, predictions, and expectations that are not inevitable and changing. Therefore, the Saudi judiciary does not compensate for potential damages since the potential harm has not been realized. It is not possible to determine a commensurate compensation. On the contrary, the contractual party can expect the actual damages and the compensation amount under the same circumstances.

Some future damages might be realized immediately, though all or some of its effects will be delayed until the future, such as the permanent disability of a person who is unable to earn a living. The injury itself is real, but the financial loss that will result from it is in the future and requires appropriate compensation.

While the possible damages are not immediately realized, the Saudi judiciary is strict in the issue of compensation for future damages. Some jurists have inferred the permissibility of such compensation by the Sharia rule "there are no damages nor return of damages" as encompassing future damages whose causes are complex.

[353] Judgment of the Commercial Court in Dammam No.: 2687, 1441AH, Case No.: 2687, 1440 AH.

The significance of this legal and jurisprudential rule is general. It includes all the damages incurred due to the loss of benefits, compensation which stems from the damages resulting from the delay in the payment of financial fees. There are two directions in the Saudi judiciary regarding rulings on compensation:

(1) It allows compensation for the delay in disbursing government funds when the damages are proven judicially. Compensation is not for late payment, which is not allowed because it is a kind of usury that is forbidden by Sharia. It is about the damages caused to the plaintiff as a result of this behavior by the governmental administration.

A number of rulings on this matter have been issued by the Board of Grievances, including one to compensate the plaintiffs. As stated in some of these rulings,[354] compensation for the delay in paying the entitlement and stopping it usually requires tangible evidence of some damages, as jurisprudence rules that "there is no injury nor return of injury." So, it is necessary to mandate the defendant to compensate the plaintiff for this expected harm and to derive this from Sharia.

The delay in disbursing or suspending the financial obligations, without having a basis for this in the contract or the law, constitutes a breach of the obligation. Both the Qur'an and the Sunnah emphasize the fulfillment of contracts and obligations is a legal duty. Also, violating contractual terms is prohibited by the text of the Qur'an and the Sunnah.

If this is proven, then in this situation it is necessary to recompense whoever violates the terms of a contract with a punishment for what has been established in Sharia. For Sharia holds that every forbidden matter for which there is no specific worldly punishment, a punitive

[354] Judgment No.: 126/T/1, 1416 AH, Judgments No.: 674/T/1, 1411 AH, No.: 141/T/1, 1412 AH), and No.: 152/T/1, 1412 AH.

punishment must be determined by a judge, guided by the circumstances of the case, and what is customary in Islamic law. Thus, punishment can be either physical or financial.

Since the punishment parallels the action that compelled it, the preferred choice is a financial penalty. This is because the plaintiff expected to be harmed financially due to the aforementioned negligence on the defendant's part.

If this is proven, then the defendant is usually obligated to pay a fine estimated as the size of the expected damages for the breach of his contracted financial obligations, represented by its delay in paying financial obligation to the plaintiff and then stopping it for a long period before withdrawing the government project.

In this regard, the hearing panel charged with estimating this fine was briefed on the circumstances of the case, as well as provided with all relevant papers and documents. After a thorough investigation and diligence, it estimated the extent of the damages at 10 percent of the total value of the period during which the claimant institution worked, as an appropriate compensation for the delay in disbursing and suspending dues.[355]

(2) The second judicial approach adopts non-compensation for these expected damages for the delay in disbursing government extracts under the premise that this penalty would constitute usury, which is prohibited by Islamic law. A number of rulings have been issued by the Board of Grievances in support of this approach.[356]

This a judicial principle from the Board of Grievances that also denied compensation for the expected damages for compensation for the delay in disbursing government extracts because

[355] The provisions of the Audit Board of the Board of Grievances in the Kingdom No.: 141/T/1, 1412 AH and No. 152/T/1, 1412 AH.

[356] See the following rulings:
• Judgment No.: 253/T/1, 1420AH, Case No.: 386/1/s, 1417 AH.
• Judgment No.: 105/T/1, 1422 AH, Case No.: 178/S, 1413 AH.
• Judgment No.: 223/T/1, 1421AH, Case No.: 1/215/s, 1420 AH.
• Judgment No.: 15/T/1, 1422AH, Case No.: 3/68/s, 1421 AH.

the principles that should be adhered to by the lower courts must be issued by the Supreme Administrative Court. In addition, we find that some judgments were issued to compensate for this damages during the issuance of judgments that refuse compensation. Therefore, this matter of jurisprudence depends on the circumstances of each case and the judge's discretionary power

2.5.7. Compensation for Damages of Missed Opportunity

The damages of missing an opportunity are defined as an action or non-action that may cause the plaintiff to lose an opportunity to achieve a likely gain or to avoid an expected loss. Thus, the plaintiff was hoping for a benefit to be gained or to avoid a loss that threatened him, and he was counting on an opportunity that would allow him to achieve what he hoped for if things went their natural course.[357] The damages caused by missing this opportunity itself overlaps with the potential damages caused by missing an opportunity. For example, the lost profit means that the injured party missed an opportunity to gain profit due to a breach of obligation.

The Sharia jurist's opinions are varied in regard to whether the damages caused by missing opportunity is entitled to compensation. Some jurists believe that the missed opportunity does not merit compensation. And the reasoning is that the compensation for missed opportunities is based on possibility and expectation, not on certainty.[358] Furthermore, other jurists believe that the missing an opportunity is entitled to compensation since this still represents actual damages.

[357] Zahra, Mohamed, Involuntary Sources of Obligation, UAE University, University Press, 1st edition, p.160, 2002.
[358] Al-Desouki, Ibrahim, Compensation for Damages in Civil Liability, Kuwait University Press, p. 388, 1995.

The Saudi judiciary has a different stance in regard to how to use and understand the missed opportunity term. Missed opportunity as a term is used in some Saudi court rulings due to the plaintiff seeking compensation. However, the Saudi judiciary is in favor of the strict opinion, where no compensation for a missed opportunity exists, since the damages have to be actual damages and not possible damages such as possible gain or avoiding an expected loss claim.

However, a Saudi judge may rule in favor of the injured party, which seeks compensation if he proves the actual profit loss or actual damages occurred via the missed opportunity. Moreover, a Saudi judge's discretion goes further than accepting the missed opportunity term or the compensation for it by determining the compensation amount itself. For example, when a lawyer breaches his professional responsibility and neglects the opportunity for his client to file an appeal within the legal period specified, this causes his client to lose his likely chance to gain from an appeal. Another example would be when a lawyer fails to attend court hearings despite being properly informed of the hearing date, which caused his client a lost opportunity to win the dispute.

In the previous examples, the Saudi judiciary would likely compensate for the harm of missing an opportunity when it overlaps with the consequences of other damages.[359] The compensation depends on what type of missed opportunity the plaintiff is seeking compensation for. This is what the Saudi Board of Grievances decided by saying that the court considers the damages the plaintiff suffered and the actual gain or profit he missed, regardless of probable or presumed cause. It is crucial to note that the compensation amount must match the damages.

[359] Judgment of the Jordanian Court of Cassation Rights 480/1986, Journal of the Jordanian Bar Association, No. 6, Amman, 1989.

Based on the proven damages, not based on assuming hypothetical conditions that may or may not occur.[360]

Thus, it is difficult to establish a legal merit on which a Saudi judge can rely to compensate the aggrieved party for the damages caused by missing the opportunity, whether of a likely profit or resulting in a loss that the plaintiff was possible to avoid. Therefore, a Saudi judge has a discretionary authority to assess the extent of the possibility in ruling to compensate the plaintiff for the claimed damages resulting from the missed opportunity. A Saudi judge may do so according to the unique circumstances related to each case.

A Saudi judge will decide whether the case concerns future damages, potential damages, aggravated harm, or direct or indirect damages. For example, if a person was charged with delivering a race horse to the racetrack and failed the task. As a result, the opportunity of winning the race was lost. The value of this opportunity is difficult to estimate unless it is related to the damages arising from the lost opportunity. Therefore, it will cause the aggrieved party to miss a clear actual gain.[361]

The Saudi Board of Grievances affirmed that compensation is for delaying the benefit or losing it. However, the court must verify and consider all relevant documents, and the court has to be certain that the damages have occurred as a result of the missed opportunity.

Thus, during the examination of the plaintiff's claim for compensation, the court has the authority to determine the compensation amount based on the case facts and other matters, such as restricting his freedom, paralyzing his movement, and preventing him from carrying out his and his family's affairs, or depriving him of his legal role and rights. This is based on the

[360] Appeal Judgment No.: 893/S/6, 1430 AH, Case No.: 1/1654/L, 1428 AH, a Set of Administrative Provisions of 1430 AH, vol. 1, Civil Service, p.617.
[361] Sultan, Anwar, Sources of Obligation in the Jordanian Civil Law, A Comparative Study of Islamic Jurisprudence, House of Culture, p. 33, 331. 2005.

jurisprudence rule, “the damages must be removed,” and its removal is only possible by ordering the infringing party to pay compensation.[362]

In another legal case, the defendant, a real estate owner, prevented the plaintiff from entering his enterprise by closing the place of business. The defendant’s action caused a financial loss, including a loss of wages for his employees and a loss of the daily recognized profits for himself. The plaintiff asked to be compensated for damages he suffered due to closing his place of business. Since the Saudi court does not rule in favor of missing the compensation for opportunity, there was no possibility of reparation for closing the business. However, the court could rule regarding gain or loss in the plaintiff's favor.

And the Saudi judge has the discretion in compensation assessment which is why he is independent within the limits of his discretionary power.[363] Thus, the distinction between the lost profit that the Saudi judiciary compensates for and a missed opportunity is clear. Lost profit is considered an element of compensation. As estimated by a judge, it must include two elements: the damages incurred by the plaintiff and his loss of missed profits, to the extent it can be compensated for on the basis of missing the opportunity, which is a realization, unlike the opportunity itself, which is possible.[364]

For a judge to rule for compensation for lost profit, there must be a documented breach of obligation and that this breach causes damages to the other party. This was confirmed by the Saudi Board of Grievances when it stated the plaintiff should be compensated for the damages

[362] Appeal Judgment No.: 33/S/8, 1430 AH, Case No.: 2/3747/L, 1428 AH, a Set of Administrative Provisions of 1430 AH, vol. 6, p. 3008.
[363] Judgment of the Auditing Authority of Board of Grievances No.: 481/t/5, 1427 AH, issued in Case no. 425/1/k, 1425 AH, A Set of Administrative Provisions of 1430AH, vol. 6, p. 1329 AH.
[364] Al-Desouki, Ibrahim, Compensation for Damages in Civil Liability, Kuwait University Press, Kuwait, p. 340, 1416AH. And, Al-Ashmawi, Ayman, Missing the Opportunity, A Comparative Study, Part Two, Dar Al-Nahda Al-Arabiya, Cairo, p. 63.

that were caused by the breacher's doing. And the court must indicate in its ruling there is a causation relationship between the breacher's doing and the damages.[365]

To compensate for a missed profit opportunity, it must be proved by the aggrieved party that the opportunity of gaining the profit was definitively missed, meaning the aggrieved party was deprived of the profit that he expected to achieve. The Saudi Board of Grievances confirmed this by stating that the compensation was for the disruption of the benefits or its forfeiting, as long as this was verified. The court carefully considered the case and ascertained the occurrence of damages resulting from the missed opportunity. If the missed profit is based on mere expectation and speculation, it is uncontrolled and constitutes possible deception, which Sharia forbids. Therefore, since the damages amount is probable and not definite, the plaintiff cannot be compensated for it.[366]

For the Saudi judiciary to rule in general for compensation, the compensation claim must not be prohibited in Sharia, which means the Saudi court requires the legitimation of the benefit to compensate for it. Examples of forbidden benefits are the loss of apartment rent used for prostitution, liquor store profits, bank claims for interest payments, or late fee claims for late payments. And this is why the Saudi Board of Grievances in one instance decided to reject a plaintiff's request obligating an administrative authority to pay interest resulting from the authority's seizure of the final guarantee submitted by her because bank interest is an instance of usurious interest that Sharia prohibits.[367]

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[365] Judgment of the Court of Appeal No.: 759/S/8, 1430 AH, Case No.: 1/4439/L, 1429 AH, Set of Administrative Rulings and Principles, vol. 1.
[366] Appeal Judgment No. 33/S/8, 1430 AH, Case No.: 2/3747/L, 1428 AH, Set of Administrative provisions of 1430 AH, vol. 6, p.3008.
[367] Judgment of the Board of Grievances issued on 1432 AH No.: 260/S/4, 1432AH, Case No.: 1/1975/L, 1429 AH, Set of Administrative Rulings and Principles, 1432 AH, vol. 4, p.1004.

In all cases, the aggrieved party must prove that the opportunity to achieve a potential profit or gain was real and significant. Therefore, it incurred tangible damages resulting from another party. The aggrieved party may prove this by all means available, including testimony, logical presumptions, and experts reports, i.e., he is not necessarily required to present specific evidence or witnesses to prove the occurrence of the damages as a result of the loss of the benefit for which compensation must be made. For example, when a claim was based on financial gain conjecture, without true evidence. this is a potential profit that is not compensated by Sharia since there are too many unknowns about the possible damages.[368]

The Sharia jurisprudence statements and the Saudi judicial rulings reveal that compensation for lost profit or lost opportunity requires that the damages be real, not probable, be proven, and that the benefit is legitimate.

For example, suppose the creditor stipulates a condition for the debtor that includes paying him a specified sum of money in the event of late payment. In that case, this is an invalid condition. The Saudi judge does not rule in the creditor's favor, regardless of the creditor's identity or the contractual obligation type, especially in the case of financing contracts. The reason for not ruling in the creditor's favor is that those practices lead to usury, prohibited by Sharia. Thus, according to Sharia, it is not permissible to compensate with a late fee for repaying the debt, regardless of the conditional obligation commitment period. However, this does not preclude the creditor from claiming any other compensation for the debtor's failure to pay.[369]

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[368] Judgment of the Audit Board of the Board of Grievances issued on1427 AH, No.: 218/T/1, 1427 AH, Case No.: 2/902/L, 1426 AH, Set of Administrative Rulings and Principles, vol. 4, p.1923-1924. See also, Al-Khafeef, Ali, The Guarantee in Islamic Jurisprudence, Institute of Islamic Research, Cairo, p.54 and beyond. See also appeal judgment issued on 14/2/1430 AH, No.: 208/S/8, 1430 AH, Case No.: 1/3430 L, 1429 AH, Set of Provisions and Principles of 1430 AH, vol. 6, p. 3052.

[369] The decision of the Islamic Fiqh Council of the Organization of the Islamic Conference in its sixth session in Jeddah, and the decision of the Fiqh Council of the Muslim World League in its eleventh session in 1409 AH. Shari'a standards of the Accounting and Auditing Organization for Islamic Financial Institutions, p. 34; Al-Dakhil, Salman bin Saleh, Compensation for damages resulting from procrastination in debts, (1/2).

The Saudi judiciary has emphasized the lack of compensation for unreal or uncertain damages, since the calculation of lost profit is based on mere guesswork. This case falls into the ambiguity that Sharia forbids, because its cannot be accurately determined. Thus, the Saudi court ruled no compensation due to lack of causation, and the damages amount is ambiguous and undeterminable.[370]

In the same context, the Saudi Board of Grievances' judgment allowed compensation to the plaintiff for the damages incurred due to his imprisonment, such as forfeiting his chances of obtaining earnings, physical and health decline, and emotional distress. Thus, the Saudi court ruled that the defendant pay the plaintiff a sum as compensation for the damages he suffered.[371]

As illustrated in previous cases, the Saudi judiciary has not settled on the issue of compensation for lost profit. However, several rulings include compensation for losses when the causation and loss relationship has been established, the damages are real, not probable, can be proven, and the benefit is legitimate.[372]

It is necessary to mention that the plaintiff sometimes could not prove the exact compensation amount due to a lack of experience availably or because the case documents file were missing. In this incident, the Saudi judge may determine the compensation amount by himself, since the compensation assessment amount difficulty shall not prevent the case's admissibility. In this regard, the Saudi Board of Grievances ruled to compensate the plaintiff for closing his shop by using the judiciary discretion power to determine the proper compensation amount. The judge asked the plaintiff to submit his monthly earnings reports, so they were

[370] Judgment of the Board of Grievances issued on 4/6/1429AH, No.: 279/T/6, 1429AH, Case No.: 1/1495/L, 1426AH, Set of Administrative Provisions and Principles of 1429AH, vol. 6, p. 3076.
[371] Appeal Judgment No.: 33/S/8, 1430AH, 14/1/1430AH, Case No.: 2/3747/L, 1428AH, a set of administrative provisions of 1430 AH, sixth volume, p. 3008.
[372] Judgment of the Audit Board of the Board of Grievances No. (2/21/F/12) for the year 1414 AH, confirming the judgment of the Audit Committee No. (89/T/2) for the year 1415 AH, and judgment No. (65/D/TG/2) for the year 1420 AH, confirming the judgment of the Audit Committee No. (202/T/3 (for the year 1420 AH).

utilized as a guideline for his rulings. In this ruling, the judge concluded that the plaintiff's missing investment opportunity was considered real and not possible damages. Therefore, the court obligated the defendant to compensate the plaintiff for the damages he had suffered.[373]

By looking at the previous rulings, we find that the Saudi judiciary confirms the compensation conditions to rule for the compensation for the missed opportunity. The lost profit should be real and not probable. The missed opportunity should be recognized as a legitimate benefit. The compensation awarded by the judge should be equivalent to the damages. This concludes that the Saudi judiciary compensates for the damages driven by the missed opportunity if the aggrieved party meets the compensation conditions. And the judge estimates the gain or profit the aggrieved party missed to determine the totally lost to rule for the correct compensation amount.

The Saudi judiciary rulings for the compensation for the missed opportunity are based on Sharia primary sources, the Qur'an and Sunnah, and other secondary sources. For example, the judiciary applies the Saudi Council of Senior Scholars' fatwa as a jurisprudential rule in the compensation case, which concluded the legitimacy of the liquidated damages clause.[374]

Contrary to previous rulings, where the judge ruled in the plaintiff's favor, there are several judicial rulings in which the judiciary refused compensation for the lost profit for multiple reasons, including:

If the lost profit is based on mere guesswork and expectation, or if the loss occurred on a prohibited benefit, or the lack of a causal relationship between the error attributed to the

[373]The ruling of the Board of Grievances issued on 10/11/1436 No. (2/4760/S) for the year 1436 AH, in Case No. 14/216/L, 1435AH, Set of Administrative Provisions and Principles of 1436AH, vol. 6, p. 2940.

[374] Senior Scholars Council Decision No.: 25, 1394AH, Book of Senior Scholars Council Research - Penal Condition - Modern Comprehensive Library, p. 293. Al-Sharqawi, Abdel-Fattah, Compensation for Lost Profit in the Saudi Administrative law and its Judicial Applications, College of Sharia and Islamic Studies, Qassim University, p. 168 and beyond.

defendant and the damages incurred by the plaintiff, the judge did not rule in the plaintiff's favor. Other reasons for denying a compensation claim include that the damages are probable and not real, the profits are probable and not real;, the plaintiff's inability to prove the harm incurred by him as a result of missing the opportunity, or because the plaintiff himself contributed to the occurrence of the damages.[375]

2.6. The role of the Saudi judge in choosing the jurisprudential rule

The role of the Saudi judge in choosing a jurisprudential rule applicable to the dispute, including the cases of claiming the liquidated damages clause, is pivotal when the judge has broad discretion in choosing an applicable rule to the disputed case from any jurisprudence Islamic schools. Since the Saudi judge has broad judiciary discretion, he thus faces some difficulties in knowing all the jurisprudence rulings from the Islamic schools.

But the question arises: from where does the Saudi judge draw upon the applicable jurisprudencial rule? And is the judge or the plaintiff charged with proving the content of the jurisprudential rule that is applicable to the dispute that includes a liquidated damages clause? Finally, what are the means of proving the content of this rule? To answer these questions, it should be noted again that the Saudi judge derives his rulings from the Qur'an, the Sunnah and other sources of Sharia that were previously mentioned. However, due to the generality of the texts compared to the multiplicity and specificity of the facts contained in the cases presented to the judge, including the claims related to the liquidated damages clause, he must resort to the books of the four schools of jurisprudence to search for appropriate jurisprudential rules to apply

[375] Judgment of the Board of Grievances issued on 4/6/1429 AH, No. (279/T/6 (for the year 1429 AH), in Case No. (1/1495/L) for the year 1426 AH, a set of administrative provisions and principles for the year 1429 AH, Volume VI, Compensation, p. 3076).

to the dispute before him. He must not, however, apply a jurisprudential rule if there is a clear Qur'anic text or prophetic hadith that applies to the subject of the dispute. But the judge has the discretion to search for the appropriate jurisprudential rule to resolve the dispute in the absence of such a text.

The parties can also assist the judge in suggesting an appropriate jurisprudential rule for the matter at hand. The judge may respond to all or some of the parties' suggested, or he may not respond, though in that case the judge is required to explain why he excused these proposed jurisprudential rules.

If the judge errs in applying the jurisprudence rules or in their interpretation, then his rule is subject to be reviewed by the Supreme Court,[376] and the Saudi judiciary relies on the Hanbali school as a general principle. Therefore, when choosing applicable jurisprudential rules, the judge usually resorts to the books, publications, and journals of this doctrine. But if he does not find the suitable rule or finds something better in another school, then he applies his finding because he is not obligated to apply only the rules of the Hanbali school of jurisprudence.

The judge, at the beginning of his consideration of the dispute, verifies the facts, then moves to the stage of understanding the nature of the dispute, and then, in the absence of a text from the Qur'an, the Sunnah, or precedent law issued by the legislative authority, the Council of Ministers and the Shura Council, choose and apply the jurisprudential rule applicable to the dispute.

The choosing of the jurisprudential rule is one of the most important judicial duties, for it is where the judge uses his discretionary power in applying it to the facts of the dispute. This

[376] Al-Marghani, Reda and Abbouda, Abdul Majid, Judicial Interpretation in Civil Law, Institute of Public Administration, Riyadh, p. 213, 1983.

raises the question about the scope of the judge's exercise of his discretionary power and the extent to which this power is subject to the supervision of the Saudi Supreme Court.

1- The authority of the Saudi judge includes choosing the legal and jurisprudential rules for resolving the dispute.

The dispute is resolved by the judge through his application of the appropriate legal rules, so that he first begins by looking for a solution to the dispute in the Qur'an, the Sunnah of the Prophet ﷺ , and other sources of Sharia. If he does not find it, he will resort to the jurisprudential rules and the sayings of the jurists in the legal schools, and in particular the Hanbali school. The authority of the Saudi judge is graded according to the source of the applicable legal or jurisprudential rule, as this authority exists on three levels:

- The judge's authority is restricted, often to the application of a clear legal rule that comes from the Qur'an or the hadith. Given the presence of a clear definitive text, he has no freedom of interpretation, and the Supreme Court reviews his application of the rule. If he does not comply with these rules, his ruling will be overturned.
- In cases in which the legal or jurisprudential rule that is applicable is not clear and is subject to interpretation, he has more authority. Here, the judge interprets the most relevant jurisprudential rule before applying it, and the Supreme Court reviews the correctness of his ruling including the nature to rule on the penalty clause.
- The judge's authority is wide, leaving him the freedom to choose the applicable jurisprudential rule in the absence of a clear text or a possible text that necessarily would limit the judge's discretionary authority in choosing the jurisprudential rules. [377]

[377] Al-Saadi, Muhammad, Interpretation of Texts in Law and Islamic Law, D M G, Wahran, p. 28, 1984.

In order to limit the judge's discretionary authority in choosing the jurisprudential rules applicable to the dispute before him, the following could be adopted by the Saudi legal system:

A. Codifying the jurisprudence rules in a clear and orderly manner so that it is easier for a judge to pass his judgment on the issue in dispute. This rule would put the solution before the judge clearly and would not leave in front of him any room for assessment or interpretation. When he violates this solution or interprets it in an unjustified manner, his judgment should be overturned by the Supreme Court.[378] For example, sometimes, a jurisprudential or legal rule specifies cases of invalidity of the penalty clause, cases that obligate the judge to affirm its amount without an increase or decrease, cases of permissibility of amendment, or the method on which the compensation due to the plaintiff is calculated. In such instances, the judge should refrain from his *Ijtihad* and must abide by the adjustment stipulated in the jurisprudential rule or the legal text drawn up by the Saudi legislator.
B. Developing a mechanism for how the judge exercises his discretionary authority in the event that he deals with a vague jurisprudential rule that requires interpretation or finds a solution to its contradiction with another rule in order to reach an appropriate solution to the dispute. In such cases, the judge's broad authority when dealing with these jurisprudential rules should be limited because the Supreme Court will review the judge's commitment to follow the mechanism established by the legislator to interpret the jurisprudential rule, not the extent of the judge's commitment to apply its judgment to the alleged facts.

[378] Zine El-Din, Zargoun, The Authority of the Subject Judge in Choosing the Appropriate Legal Rule for Conflict Resolution, Al-Fikr Magazine, Algeria, p. 148.

Among the duties of the judge is that of interpreting the jurisprudential rule and assessing the facts of the case before him even if the opponents did not ask him to do so. The Supreme Court's should review the judge's use of his discretionary authority in choosing the appropriate jurisprudential rule to resolve the dispute. This involves a gradual monitoring that varies according to the chosen Sharia or legal solution, and according to the degree to which the judge exercises his authority. When there is a clear legal text or rule suitable for application to the dispute, the Supreme Court should insist on the strict application of this clear text or rule. Otherwise, due to the ambiguity surrounding the alleged facts, resolving the dispute would require diligence on the judge's part in choosing the appropriate jurisprudential rule from his point of view, and the control of the Supreme Court over the authority of the judge would be less strict. In all cases, the Supreme Court would seek and exercise its oversight function to ensure that the judge has established the facts that are the basis for his ruling on a legal and jurisprudential basis. The Supreme Court also wants to ensure that the subject judge has given these proven facts the correct legal interpretation, and that the subject judge has chosen the appropriate jurisprudential rule to apply those to those facts.[379]

C. Asking the judge to give reasons for his choice of the jurisprudential rule, as this will help his arbitral authority in choosing the legal solution to the dispute. The judge is required to exercise his authority within the framework of the law, and therefore if he departs from this framework, that would be considered a violation of the law subject to the supervision by the Supreme Court. Through the Supreme Court's oversight of the

[379] Zain Al-Din, Zarqun, I.D., p. 150 and beyond.

ruling, it could determine the limits of the trial judge's exercise of his discretionary power.

It should be noted that the type of review by the Supreme Court differs, so there could be broad oversight if it comes to the application of a clear jurisprudential rule, and we find limited oversight if it comes to ambiguous jurisprudential rule. In this case, the judge would be asked to indicate in the reasons for his ruling, and why he refrained from using his discretionary power or why he used it. The trial judge must also show that he did not deviate in his use of power.[380]

The Saudi judiciary attaches great importance to the reasoning of judicial rulings because effective reasoning is vital to the outcome of the judge's ruling. The Supreme Court takes note of the soundness of the reasons that the judge considered in making his ruling; if they are thought to be unsound, the ruling might be subject to nullification.

The judge's reasoning differs from his conditioning of the dispute submitted to him, which gives the dispute a legal description that allows the execution of the appropriate legal rule that is applied to the dispute. Adaptation precedes causation, as it gives the facts of the dispute their legal description, and therefore it precedes causation including conditioning. Adaptation is a mental act carried out by the judge for linking the facts of the dispute to the provisions or jurisprudential rules that are compatible with them. The judge grounds the material facts in the provisions of Sharia by applying the appropriate rules to the evidence of

[380] Omar, Nabil Ismail, The Judge's Discretionary Authority in Civil and Commercial Matters, 1st edition, Mansha Al-Maaref, Alexandria, p.186, 1989. Al-Saadi, Muhammad Sabri, Interpretation of Texts in Law and Islamic Law, I.D., p. 28.

the facts of the case before him. The judge's reasoning of the ruling reveals the adaptation he has chosen by the judge, hence the close link between them.[381]

[381] Al-Qarni, Abdul Latif, Adaptation of Judicial Judgment, Economic Paper, May/15, 2010. Al-Sanhoury, Abdel Razzaq, Al-Waseet in explaining the civil law, part 1, Dar Ihya Al-Turath Al-Arabi, Beirut, p. 36, 1964. Saad, Ahmed Mahmoud, the concept of the discretionary power of the civil judge, 01, Dar Al-Nahda Al-Arabiya, Cairo, p. 247, 1988.

Chapter Three: Field Study

Introduction

A field study was conducted to learn more about the position of the Saudi judges in dealing with cases that include the liquidated damages clause for which a questionnaire was used for data collection. The language used to write the questions is in Arabic, as it is the formal language in the Kingdom of Saudi Arabia and the legal system.

Several important steps were taken to get the best from the questionnaire to increase the quality and validity of the questionnaire and collect data. First, the Saudi judges' sample was selected from the two Saudi judiciary branches, the public and administrative judiciary in the Kingdom. Second, open-ended questions were used to allow the participating judges to answer questions related to the liquidated damages clause without any limitations. Third, the back translation technique was used to ensure the quality and accuracy of translation from English to Arabic. Conducting this questionnaire occurred after obtaining the Institutional Review Board necessary approvals stipulated by Indiana University.

To recruit participants and increase the chances of high participation rates, I followed several communication techniques. These techniques included sending emails, direct phone-calling, and utilizing professional networks.

The questionnaire was distributed to the participants electronically via Google Forms as an alternative method. The Google Form private and secure link was shared with the respondents via private emails and SMS. [382]

[382] Google Form link for the questionnaire used in the field study chapter: https://forms.gle/Dh9uvNLiFm8KNPgQ7.

The questionnaire was distributed to judges from different regions of the Kingdom to increase diversity and include the various prevailing jurisprudential opinions.

The researcher faced some difficulties while conducting the field study, most notably the judges' preoccupation with their work and their failure to respond promptly to the survey. Therefore, it took some time to convince a sufficient number of judges to participate in the study.

3.1. Survey questions

The questionnaire contained ten questions aimed at investigating the judge's opinion regarding the liquidated damages clause aspects. The questions were designed to reflect the topic of liquidated damages clause. The somewhat open-ended questions were selected to allow the participants to give detailed answers, and there was space for them to express their opinion to ensure that the answers helped readers understand the position of the Saudi judiciary on the liquidated damages clause. The questions were:

1. In your opinion, do you support the inclusion of a liquidated damages clause in all contracts?
2. In your opinion, will the inclusion of a liquidated damages clause in contracts contribute to reducing disputes and speeding up litigation?
3. If there is a notarized contract that includes a liquidated damages clause, will the execution judge rule on the compensation clause agreed upon in the contract, or will he refer it to the subject judge to decide on it?
4. Do you think judges prefer to codify the views of Islamic jurisprudence or prefer to retain broad discretion?
5. In your opinion, should the provisions of Islamic jurisprudence related to the liquidated damages clause be codified?

6. Is the contract indemnity provision automatically ruled out once the contract is breached, or must one of the parties incur an actual loss?
7. Does the Saudi judge rule by what is written in the liquidated damages clause agreed upon in the contract between the parties (without increase or decrease), or can he reconsider the amount of compensation based on the amount of damages that occurred?
8. What is the impact of the fatwa on the ruling of the Saudi judge on the subject of the case in question? And if the fatwa is issued by the Council of Senior Scholars in Saudi Arabia, will the fatwa's impact on the ruling's pronouncement be greater?
9. Does Islamic jurisprudence affect how a Saudi judge rules in a case that includes a contract that contains a liquidated damages clause? If so, how does this affect judgment?
10. In general, does the Saudi judiciary rule or not rule on the liquidated damages clause?

3.2. Results

3.2.1. Sample size

For the purposes of this study, the questionnaire was sent to several judiciaries in different regions of the Kingdom and various degrees of Saudi courts. The questionnaire invitation was to thirty Saudi judges, and fourteen judges did respond by completing the questionnaire. Its circulation was limited to individuals who occupy the rank of the judge (C) or higher in the Saudi judiciary to ensure that the answers obtained reflect the judge's experience in judicial work. The sample size was limited due to the type of participants and the nature of their work.

3.2.2. Statistical processing methods

The descriptive statistical methods were used to analyze the data collected from the study sample based on frequency and percentages to identify the characteristics of the sample's answers and to determine its participants' responses to the questions included in the questionnaire.

3.2.3. Participants' data

The characteristics of the study sample participants looked at years of experience as a judge and the type of judiciary.

Years of experience	Frequency
Between 5 to 10 years of experience	50% of the participants
More than 10 years of experience	50% of the participants

Type of judiciary	Frequency
Administrative Judiciary	25% of the participants
General Judiciary	75% of the participants

3.2.4. Basic Information of the Survey

1. From your perspective, do you support the inclusion of liquidated damages clause in all contracts?

Answer	Frequency

Yes, but it is compensation to the extent of the actual or expected loss without exaggeration.	1
Yes, I prefer it, because it may bring the judge a lot closer to the amount of compensation.	1
There are some contracts in which the liquidated damages clause may not be included, such as the loan contract.	4
No, but according to the contract.	1
No.	2
Yes, in order to preserve the rights of both parties.	1
No, because some contracts do not need that.	1
No, because it is specific to *Ististna* contracts and the like, unlike debt contracts such as regarding a loan, where its inclusion is undoubtedly not permissible because it is usury, and this is what is stipulated in the Enforcement law in Article 95 and its regulations.	1
No. Rather, it can be included in cases where it can have a desired benefit, such as urging achievement and mastery	1
Strongly agree	1

2. From your standpoint, will the inclusion of a liquidated damages clause in contracts contribute to reducing disputes and speeding up litigation?

Answer	Frequency
Often it will contribute to reducing disputes in the execution of contracts. There is no relationship between this and the speed of litigation. Perhaps the researcher means the lack of litigation.	1
Yes, the inclusion of the agreed-on liquidated damages clause in contracts will contribute to reducing disputes and speeding up litigation because then it will be considered an executive document.	3
Yes, it will contribute if it is utilized correctly.	1
No.	2
Maybe.	1
Yes.	4
Not necessarily, rather it may be a cause of conflict.	1
Yes, if is guided set with clear and unambiguous judicial controls.	1

3. If there is a notarized contract that includes a liquidated damages clause, will the executive judge rule on the compensation clause agreed upon in the contract, or will he refer the matter to the subject judge to decide?

Answer	Frequency
It is referred to the subject judge to study the contract, its subject matter and the validity of the entitlement, seeing as this is only done by the subject judge.	5
It should l be referred to the executive court if it is agreed upon and properly documented, and it is within the jurisdiction of the executive court as an executive document. It should be referred to the subject judge in case there is a dispute over the origin of the right.	3
If he does not find a legal or legal impediment to implementing it, he will implement it	1
The principle rules directly, except in cases excluded by the law, which will be referred to the subject judge.	1
It has not been presented yet, and this depends on the procedures, terms of reference, etc.…	1
If the contract does not include a violation of the provisions of Sharia or a problem in compensation and its estimation, it is dealt with before the execution judge, but if it includes a problem, it is referred to the subject court.	1
The jurisdiction of the executive judge does not appear in this case.	1

If this condition is in an executive document, it is obligatory according to the jurisdiction, but if it is not in an executive document, it is referred to the subject judge for consideration.	1

4. Do you think judges prefer to codify the views of Islamic jurisprudence or prefer to retain broad discretion?

Answer	Frequency
Both directions have pros and cons.	1
They prefer to be given wide discretion.	1
Most judges prefer to retain wide discretion in order to handle all the cases they face, but legalization may limit this.	4
As far as I know, most people prefer codification.	1
They prefer codification for cases of dispute and not the areas of agreement.	1
I see a preference for codification.	2
It is necessary to agree on the meaning of codification in order to answer.	1
In general, the judges with more experience prefer obtaining more discretion power than the other less experienced judges.	1
Most likely with codification.	1
Discretion.	1

5. From your standpoint, should the provisions of Islamic jurisprudence related to the liquidated damages clause be codified?

Answer	Frequency
Maybe.	1
It is better to be from scholars who have experience and expertise.	1
The matter differs from one judge to another. Some judges may prefer to search for solutions in the different schools of Islamic jurisprudence or the various books of the same doctrine due to the diversity of opinions and the difficulty of applying one particular opinion to all the cases.	3
Yes.	4
It is necessary to agree on the meaning of codification in order to answer.	1
Yes, it is preferable to regulate the provisions of the liquidated damages clause for several reasons, including expediting the issuance of court rulings and the ease of access to legal information for the legal profession. Also, it is reassuring the foreign investment in the Kingdom.	1
There is no need for codification because the provisions related to the liquidated damages clause are applied according to the fatwa of the Saudi Council of Senior Scholars and the provisions of Islamic jurisprudence.	1
Yes, according to one of the legal rules and regulations so that there is no discrepancy, even though codification will only limit the discrepancy in rulings and not eliminate it.	1
I do not see that, but it is left to the discretion of the judge and the experts.	1

6. Is the contract indemnity automatically ruled out once the contract is breached, or must one of the parties incur an actual loss?

Answer	Frequency
The ruling is based on the contract terms and its clauses.	1
He must incur a real loss.	2
It is not sufficient merely to violate or delay the execution of the contract. Rather, the damages must be realized in order to judge for the agreed compensation clause amount. However, the matter may differ from one case to another, so the damages are assumed to be achieved by simply breaching the contract in some cases.	2
Yes, the judge will rule in favor of the injured unless he has given up his right.	1
This is depending on the status and location of the case.	1
Yes, automatically, as soon as the breach of contract is proven.	1
There must be proven damages.	1
The provisions differ in compensation by mere breach or not, because some of them cause harm by mere breach, while in other types of cases the harm may not be realized by mere breach, but rather there is no realization of the harm that necessitates compensation. Therefore, resorting to the judiciary to obtain a judgment for compensation is financially costly, as this can only be done under the care of a lawyer.	1
It is possible.	1

It is necessary to verify the actual damages and not pay attention to the moral damages.	1
The damages must be real and cannot be probable.	1

7. Does the Saudi judge rule by what is written in the liquidated damages clause agreed upon in the contract between the parties (without increase or decrease), or can he reconsider the amount of compensation based on the amount of damages that occurred?

Answer	Frequency
The principal is to execute what was agreed upon in the contract with all its clauses.	1
Reconsider and check the agreement.	1
It may be judged by the amount of the compensation clause agreed upon in the contract in the event of a breach, and once the occurrence of the damages and the absence of a legitimate excuse is ascertained. This is according to the Sharia principle: “There should be neither harming nor reciprocal harm.”	2
The liquidated damages clause does not apply if a legitimate excuse for breaching the contractual obligations occurred, and if the liquidated damages clause was used as a penalty clause. The judge assesses the fairness of this condition.	1
He can reconsider what makes the execution of the condition legally acceptable.	1
No, the reconsideration is to achieve a balance in the interests of both parties in the contract concluded between them.	1
It is possible to reconsider the compensation based on its amount and to consider what will achieve justice for both parties.	1

There are two directions.	1
If the conditions are fulfilled and the impediments are removed, the judge bases his ruling on the amount of the agreed liquidated damages clause, and he may also rule on part of it if the condition is exaggerated and is not commensurate with the size of the violation, so that he decrees compensation for the actual damages.	1
He may send it back to the experts for consideration.	1
He may rule according to what is stipulated in the contract if the contract does not violate the law, and he may deduct from the amount stipulated in the contract, according to the circumstances.	1
In all cases, the damages are considered and assessed according to the facts of the case.	1
Rather, he reconsiders the amount of compensation; compensation is reparation for damages, not for enrichment.	1
The principle is that the clause is binding for both parties, so long as the clause is not violating Sharia rules, and the clause amount is not excessive.	1

8. What is the impact of the fatwa on the ruling of the Saudi judge on the subject of the case in question? And if the fatwa is issued by the Council of Senior Scholars in Saudi Arabia, will the fatwa's impact on the ruling's pronouncement be greater?

Answer	**Frequency**
No.	1

may affect.	
The judge benefits from the fatwa and the fatwa approved is the fatwa of the Council of Senior Scholars.	1
Yes.	2
The judge is affected by the fatwa, especially if it is issued by the Council of Senior Scholars, but it is not binding.	1
Fatwa has a limited effect on a judge's ruling due to many reasons.	1
The Saudi Council of Senior Scholars fatwa's impact is relative unlike the Supreme Court's principles and decisions, which it are binding.	1
The fatwa of the scholar has consideration in the judgment of the judiciary, as both the scholar and the judge apply Allah's law.	1
Judges are affected by fatwas on the subject of the case, and the effect is significant if they are issued by the Council of Senior Scholars, given that judges know that these fatwas are not binding on them.	4
Undoubtedly, in the event of a legal dispute in a case, the judge has to search for probable legal approaches, including fatwas issued by Sharia boards, and violating them is not justified without documentation because one has done so.	1

9. Does Islamic jurisprudence affect how a Saudi judge rules in a case that includes a contract that contains a liquidated damages clause? If so, how does this affect judgment?

Answer	Frequency
Yes, if the contract contains what is prohibited by Sharia or the law.	1
Yes, it has an effect.	1
Yes, Islamic jurisprudence has an impact on the Saudi judge's consideration of the liquidated damages clause by making sure that there is no violation of the provisions of Islamic Sharia, such as the presence of usury or risk, or a legitimate excuse that justifies non-execution or delay in it, or exaggeration in the amount of the liquidated damages clause.	4
Yes, and Islamic jurisprudence permits the liquidated damages clause, unless there is a valid reason for the breach of the obligation that compels it to be considered legal. The valid reason constitutes a forfeiture of its obligation until it is removed, or it was intended to be a financial threat, and it is far from the requirements of the legal rules. In that case, it must be referred back to justice and fairness, according to the missed benefit or harm caused.	1
Yes, the effect is through limiting the condition with its legal limits.	1
Since the texts of Sharia in the Kingdom receive constitutional protection, they cannot be violated. Sharia rules govern the liquidated damages clause.	1
Yes, it must not violate Islamic Sharia.	2

Yes, in *Ististna* contracts and the like, according to the decision of the Council of Senior Scholars.	1
Yes, it affects when it contradicts the legal principles and rules. The judiciary is legitimate and derives its rulings from its evidence, and Islamic jurisprudence does not contradict the principle of compensation in the form of liquidated damages clause when the conditions are fulfilled and the obstacles are removed.	1
It affects the ruling if the reasoning for it is based on Islamic jurisprudence.	1

10. In general, does the Saudi judiciary rule or not rule on the liquidated damages clause?

Answer	**Frequency**
Yes, mostly.	1
They rule.	4
Yes, the liquidated damages clause is ruled in some contracts according to specific conditions.	5
The condition of the liquidated damages clause is not invoked unless its conditions are met, including that it does not exceed the value of the actual damages.	1
It is judged in some contracts but not others, and in the event of a ruling, it is stipulated that it does not exceed 10 percent of the total contract value.	1
They rule when the conditions and reasons for it are fulfilled.	1
He rules unless there is a legal violation, such as usury or the clause is excessive.	1

3.3. Discussion

The survey questions were developed with the aim of identifying the judges' attitudes toward the liquidated damages clause. The first question focused on the polled judges' opinions about their support for including the clause for agreed-upon compensation in all contracts. This is because Islamic jurisprudence permits the inclusion of a liquidated damages clause in some contracts, as was previously indicated.

The second question addressed the extent to which, from the judge's point of view, the inclusion of the compensation clause in contracts contributes to reducing disputes and speeding up litigation to identify the applicable practices in the courts and what judges believe in this regard.

The third question discussed cases when a documented contract includes a liquidated damages clause. What is the judge's position? Will he rule to implement the liquidated damages clause agreed upon or refer the matter to the subject judge to decide? This question aims to identify the Saudi judge's position toward the clause when it is a part of a notarized contract and becomes an executive contract. Thus, the notarized contract obtains legal protection by relying on the Saudi Execution Law, which subjects the executive judge to apply it to the disputed matter without referring it to the subject judge.

The fourth and fifth questions are aimed at identifying the judge's viewpoint about codifying Islamic jurisprudence opinions and whether codification could limit the judge's wide discretionary authority relating to the liquidated damages clause in particular.

The sixth question explored judges' opinions about the possibility of automatically ruling in favor of the agreed-upon compensation once the contract was breached. Alternatively, does

the matter require that the party benefiting from the compensation incur an actual loss in order for the Saudi judge to award him the amount of the liquidated damages clause?

The seventh question investigated the judge's opinion of the about the extent to which it is possible to assess the amount of the liquidated damages clause and, if so, might the judge adjust the amount of compensation based on the amount of damages sustained by the plaintiff?

The eighth question involves an attempt to identify the extent of the fatwa's impact on the Saudi judge's ruling on the subject of the case before him, which included a liquidated damages clause; it also looks at whether this would have a greater impact if the fatwa were issued by the Council of Senior Scholars in Saudi Arabia. My goal in asking this question was to identify how much the fatwa affects judges' rulings in Saudi Arabia.

This overlaps with the ninth question, which asks about the extent to which Islamic jurisprudence rulings affect how the Saudi judge rules in a case that includes a contract with the liquidated damages clause. Thus, the Saudi judge when he is using the fatwa in his rulings, takes into consideration that the fatwa is based on various schools of Islamic jurisprudence.

The tenth question inquires about the general trend in the Saudi judiciary regarding rulings on the liquidated damages clause.

3.4. Analysis

After reviewing the judges' answers to the questions in the questionnaires, it became evident that:

1. From the general Saudi judiciary, 75 percent of judges participated in the survey, and from the administrative judiciary, and 25 percent participated.

   It is noted that the largest proportion was from the general judiciary because it is the judicial branch that considers disputes in commercial and civil contracts in the

Kingdom, which include the liquidated damages clause. In contrast, the administrative judiciary is concerned with administrative contracts that are concluded between government agencies and the private sector. Its mandate was specified after the transfer of jurisdiction over commercial cases from the administrative to the general judiciary in 2014.

2. There exists a discrepancy in the judges' attitude toward answering the questions posed, as the judge's discretion appeared regarding the choice of appropriate solutions to the questions posed, and this matter confirms that what was observed in the theoretical study corresponds to what was reached in the field study.
3. The initial judge's answers are often different from the final answers. Sometimes, the judge adds limitations or exceptions to his answer rather than having a definitive answer. The judges' answers are noted as follows:

The majority of the answers to the first question about the extent to which the judges support the inclusion of the agreed-upon compensation clause in all contracts were yes, even if some of them started with the word "no," as follows:

"Yes, but it is compensation to the extent of the actual or expected loss without exaggeration."

"Yes I prefer, it because it may bring the judge a fair assessment of the compensation amount."

"There are some contracts in which the liquidated damages clause may not be included, such as the loan contract."

"No, this shall be according to the contract. Yes, in order to preserve the rights of both parties."

"No, because some contracts do not need that."

"No, because it is specific to *Ististna* contracts and the like, unlike debt contracts such as loan where its inclusion is undoubtedly not permissible because it is ssury, and this is what is stipulated in the Executive Law in Article 95 and its regulations."

"No, rather, it can be included in cases where it can have a desired benefit, such as urging achievement and mastery. I strongly agree."

From the judges' answers to these questions, one can conclude that there is a tendency in the Saudi judiciary to support the inclusion of the conditional compensation clause in contracts, with the exception of contracts related to debt, such as the loan contract, because that is considered usury, forbidden by Sharia. This response is consistent with the provisions of Islamic jurisprudence that have been discussed above.

We find that most of the answers to the second question, about the extent to which the liquidated damages clause contributes to reducing disputes and speeding up litigation was yes. However, there are some answers that express that this is not necessarily the case, but rather it may be the *cause* of the dispute.

The third question asked whether a judge would directly rule on the implementation of the liquidated damages clause in a notarized contract, or whether he would refer the matter to the subject judge for a ruling. Most respondents felt that the matter should be referred to the subject judge to study the contract and the validity of the liquidated damages clause before ordering its implementation. Some judges believe that the matter should be referred to the executive court that was specified in the contract, which was properly certified as an executive document and was part of the jurisdiction of the executive judiciary. Also, if there is no legal or statutory

impediment to its execution, it shall be referred to the subject judge in the event there is a dispute over the origin of the obligation.

Looking at the judges' answers to the fourth question about whether they prefer to codify the provisions of Islamic jurisprudence or maintain broad discretionary authority, the answers were different. Some respondents said that each option has advantages and disadvantages, and some maintained that codification is better, especially in issues where there are jurisprudential differences. But most of the answers indicated that judges prefer to retain wide discretion in order to address all the cases they face and that are concerned that codification may limit this.

When the question was limited to the extent to which it is necessary to codify the provisions of Islamic jurisprudence related to the condition of the liquidated damages clause in the fifth question, the answers were split. The majority said that codification is better, though some stipulated that it should be done by jurists who have experience and expertise. Others preferred regulating the provisions of the liquidated damages clause for several reasons, including the speed of completion in issuing judicial rulings, as well as the ease of access to knowledge of such rulings by the general public, which contributes to awareness. Also, it reassures the businessmen by having more of a guarantee in their future business dealings and opens new business opportunities for foreign investment. Also, its benefits those countries with a business relationship with the Kingdom that already have laws recognizing the liquidated damages clause and its applications.

The matter differs from one judge to another. Some judges prefer to search for solutions in the different schools of Islamic jurisprudence or in different books concerning the same doctrine, due to the multiplicity of facts and the inability to apply one school's approach to all the facts. Then there is the possibility of the Saudi judge ruling the agreed-upon compensation

when one party has simple breached the contract and without stipulating the occurrence of damages.

Concerning the sixth question, the judges' answers again varied concerning what the liquidated damages should be when there a breaching or delay in the execution of the contract. The damages must have occurred for the judge to assess the value and whether it matches that of the agreed-upon compensation clause. In some cases, judges assume that the damages are achieved by simply breaching the contract. But the provisions differ in compensation by simply breaching or not, because some defendants commit harm just by breaching the contract. In other types of cases, the harm may not be achieved by the mere fact of committing the violation, but rather the damages that justifies the compensation must first be realized.

One group of judges maintained that the amount of the liquidated damages clause is automatically judged as soon as the breach of contract is proven and the condition is fulfilled, with those who have an interest in it demanding its execution, and the condition does not include a violation of Sharia. Other judges maintain that there must be harm and that it must be real and material, not just moral, imaginary, or expected.

The seventh question asks whether the judge should invoke the liquidated damages clause in the contract between the parties without an increase or decrease, or should econsider the amount of the liquidated damages clause based on the amount of damages that actually occurred. Some respondents said that he should rule according to a principle or implement what was agreed upon in the contract between the parties with all its clauses. Others argued that the judge should reexamine the clause and the agreement, and may judge the amount of the compensation clause agreed upon in the contract when the breach occurs. This is to ensure that the damages have occurred and that there is no legitimate excuse for the defendant's obligation breach,

preventing the plaintiff from seeking compensation. The liquidation damages clause's sum may be reduced if it was excessive, given the damages incurred to the plaintiff, and according to the jurisprudential rule "[t]here should be neither harming nor reciprocating harm." If there is a legitimate excuse for the breach of the obligation, then this excuse is forfeited by the necessity of imposing the clause until it is removed. If the liquidation damages clause is intended to be a financial threat, its sum is far from being just. Therefore, decreasing the liquidation damages clause amount promotes justice and fairness, based on the missing benefit, or the degree of the inflicted damages, to achieve a balance between the contractual parties' interests.

Some judges added that if the conditions are fulfilled and the impediments are removed, the judge bases his judgment on the amount of the agreed-upon compensation clause, and he may also rule for only part of it if the condition is exaggerated and not proportional to the extent of the damages done, considering the jurisprudential rule "[t]here should be neither harming nor reciprocating harm."[383] Since the judge has the right to reduce the amount stated in the clause, he is also entitled to grant the plaintiff more than what was agreed upon between the parties as compensation for the actual damages. As one of the respondent's judges said, "Compensation is for reparation, not for enrichment."

In answering the eighth question about the impact of fatwas on the rulings of Saudi judges on the liquidated damages clause, the respondents considered how it would affect them and other judges if the fatwa were issued by the Council of Senior Scholars in Saudi Arabia. Would such a fatwa's impact on the ruling's pronouncement be greater? Most judges answered that the fatwa would have has an impact on their ruling, especially if the fatwa were issued by

[383] Supra.

the Council of Senior Scholars. Still, they would not necessarily consider such a fatwa as binding if it went against the principles and decisions of Saudi's Supreme Court.

Others maintained that the judge's ruling is not binding by the fatwa. However, when the judge solves a disputed case, he will use and search for all legal tools at his disposal to solve the case, including fatwas. Thus, if he finds an applicable fatwa to the disputed case, the judge cannot justify not applying it without providing reasoning and substantial evidence for not using the fatwa.

The ninth question asked about the extent to which the provisions of Islamic jurisprudence affect how the Saudi judge rules in a case that includes a contract with an agreed-upon compensation clause. How do precedents and perspectives from Islamic jurisprudence affect his judgment? All respondents felt that Islamic jurisprudence has an impact on the Saudi judge's consideration of the liquidated damages clause, though there were minor differences in how they perceived its influence. They added that Islamic jurisprudence helps ensure that there is no violation of Sharia, such as the presence of usury or ambiguity, or that there is a legitimate reason that justifies the non-execution or delay of the contract terms before increasing the amount specified in the liquidated damages clause. If the liquidated damages clause was intended to be a financial threat, so that it is far from the requirements of the legal rules, it must be considered in light of the interests of justice and fairness, and the obligation to prevent harm, as stated in the fatwa of the Council of Senior Scholars in Saudi Arabia.

The tenth and final question concerns whether the Saudi judiciary should rule or not rule on the liquidated damages clause. Most of the judges answered yes, it should, and stated that the liquidated damages clause is hedged in some contracts by specific conditions, including that its

value does not exceed the amount of the actual damages, that it does not include any illegitimate provisions, such as usury and risk, or that it be excessive or involve an excessive sum.

3.5. Conclusion

The answers obtained from the selected sample of judges confirmed that the Saudi judge has broad discretionary power when considering the liquidated damages clause.

This is evidenced by the varying answers of the judges to the questions of the questionnaire

- The field study enabled me to identify the positions of the Saudi judiciary with regard to dealing with the applications of the penal clause in various contracts.

- The field study also helped me understand the intellectual processes that Saudi judges use when applying the theoretical aspects of legal texts and jurisprudence rules to the facts and practical issues related to the liquidated damages clause.

- The field study confirmed that the Saudi judge, in exercising his discretionary authority when ruling on the liquidated damages clause, is affected by the provisions of Islamic jurisprudence.

Chapter Four: Practical Solutions

I have provided a review of the Saudi judge's discretionary authority when dealing with predefined liquidated damages under the provisions of Sharia, which is the Kingdom's general law. In addition, I have examined the opinions of a group of Saudi judges obtained through a field study, and I have taken into account the Kingdom's judge shortage in comparison to the number of cases examined annually. This may cause delays in deciding some cases and otherwise contribute to a slowdown in the Saudi judicial environment and its lack of transparency, and thus cause the country to lose foreign investment, creating a need to develop some solutions and propose practical solutions that can contribute to limiting the discretionary power of the Saudi judge.

Given all of the aforementioned research and the field study, I have conceived of a number of proposals that might help to curb the Saudi judge's broad discretionary power when examining liquidated damages cases.

4.1. Codification of Islamic jurisprudential rulings and obliga**tion on** the **part of the** Saudi judge to apply them in cases of the liquidated damages clause

It is crucial to codify jurisprudential rulings adopted in Saudi Arabia to help judges promptly reach accurate rulings and restrict their extensive jurisdiction power when considering dispute cases involving liquidated damages clauses.

Jurisprudential rulings are those that are referenced in Sharia texts or that have been deduced by jurists using commonly accepted methods of deductive reasoning[384] from main or secondary Sharia sources. The demand to codify Islamic jurisprudence provisions in a manner

[384] Mahmasani, Subhi, Al-Awdae Al-Tashrieiat fi Al-Duwal Al-earabiat Madiaha wa Hadiruha, Dar Al-Eilm lilmalayini, 4th Edition, Beirut, p.1 70, 1981.

similar to that of Western laws (the Latin school) arose long ago, but there was a disagreement among jurists about it over its legality, appropriateness of codification for the judge, or whether it met the interests of society and people's needs.

4.1.1. Definition

The process of codifying the provisions of Islamic jurisprudential precepts is still in its infancy. As a result, jurists did not address its definition; nonetheless, several recent jurists have provided such definitions as:

- Codification of the provisions of Islamic jurisprudence entails the formulation of legal rulings in the form of articles arranged and numbered similarly to what is done in current laws, including civil, criminal, commercial, international, and other laws, with the goal of providing a particular and easy-to-use reference that judges can follow in their rulings.[385]

- Some scholars have defined codification as the compilation of transaction rulings, other contracts, and theories in the form of easily accessible legal articles in many volumes of jurisprudence.[386]

- Others defined it as the formulation of jurisprudential rulings transcribed in peremptory terms, using sequential numbers and arranged in a logical order to avoid duplication and inconsistency.[387]

I believe that the best definition is organizing and numbering Islamic jurisprudential provisions in the form of legal articles (compulsory or supplementary) by competent authorities with the goal of obligating judges and others in the judiciary to be guided by them.[388]

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[385] Al-Ahdal, Darwish, Madkhal Al-Ffiqh Al-islami, Al-Nahda Press - Sana', p. 273, 1990.
[386] Alzuhayli, wahibatun, juhud taqnin alfiqh al'iislamii , Al-Resala Foundation - Beirut, 1st edition, p. 26, 1987.
[387] Almuhamid, shawish, masirat alfiqh al'iislamii almueasiru, Dar Ammar, pg. 437.
[388] Albayuwmi, Ibrahim taqnin alsharieat bayn almujtamae waldawlat; Previous reference.

4.1.2. **Previous a**ttempts to codify jurisprudence

Many attempts have been made to codify Islamic jurisprudence provisions in the form of legal articles, such as is done with civil law through the formulation of legal articles arranged and numbered in the manner of modern civil, criminal, commercial, and other laws.[389]

This is intended to be a simple reference that judges, attorneys,[390] and everyone else may use in their work, particularly with foreign investors and international enterprises.

Throughout history, several jurists, individually or collectively, have attempted to record the decisions of Islamic jurisprudence in the form of legal articles particularly within the framework of the Hanafi school, including.[391] Their works include *Murshid Al-Hiran Ilaa Maerifat Ahwal AlInsan* by Muhammad Qadri Pasha Abu Al-Layth Al-Samarqandi's[392] and Madat Wakhizanat Alfiqh, and the *Hindi Fatwas* by a group of jurists as per a directive issued by the Mughal Sultan Bahadur Alem Ker.[393] There is also a summary of legal rulings based on the Maliki school by Muhammad bin Amer and many other interpretations of the provisions of Sharia jurisprudence that lack the element of obligating the judge to follow, which is the distinguishing characteristic of codification. In other words, this involves an official body with the power to mandate what is codified, such as the state's legislative authority. Sharia jurists do not disagree about collecting jurisprudence rules in volumes or codifying the Sharia provisions in

[389] Alzuhayli, wahibatun, juhud taqnin alfiqh al'iislamii; I.D.
[390] Al-Ahdal, Darwish, madkhal alfiqh al'iislamii; Previous reference, p. 273.
[391] Muhammad Qadri Pasha (1821-1886 AD), an Egyptian jurist of Turkish origin, is a judge in Egypt. He has books on Islamic jurisprudence, especially Hanafi jurisprudence. The book "Morshid Al-Hiran" is one of the famous books, and its first edition was published in 2011 AD, Dar al-Salaam, Cairo, and the book Summary of Sharia Laws by Sheikh bin Amer, issued in its first edition in 1938 AD, and another edition was issued in 1996 AD by Dar al-Minhaj, Jeddah, commentary by: Muhammad Al-Amin.
[392] khizanat alfiqah: A jurisprudential codification of the Hanafi school of thought by its author Nasr bin Muhammad bin Ibrahim Abu Al-Layth Al-Samarkandi, died 373 AH.
[393]The Indian Fatwas are a jurisprudential notation on the Hanafi School, which was written by a group of scholars at the request of the Mughal Sultan Abu Al-Muzaffar Muhyiddin Muhammad Bahader Alem Kerr, who died in 1111 AH, and it became a reference for the muftis.

article forms. However, the jurists' disagreement arises over the extent to which the judge may be obligated to rule based on the codified articles.[394]

The first formal attempt to codify the rulings of Islamic jurisprudence began during the era of the Ottoman Empire, in 1876, when a committee of Sharia jurists was created to compile the jurisprudential rules in one place, under the name *Journal of Judicial Judgments*,[395] which contained a set of jurisprudence rules derived from Hanafi school jurisprudence. It included rulings on commercial transactions, lawsuits, personal status, and evidence, and it was formulated in the form of legal articles with serial numbers on the pattern of modern law. It contained during its lifetime 1,851 articles and its overall goal was to provide an easy reference for judges and lawyers. Another objective was to cope with the economic and social developments that the Ottoman Empire experienced in its relations with other countries and peoples, which prompted this journal-based codification in order to prompt better legal environment.

This journal played a substantial role in the development of the Ottoman Empire's judicial system, but as some Hanafi jurists began to insist more on limiting rulings to those mentioned only in the Hanafi school rather than other schools, the state was forced to apply laws derived from other European countries.[396]

In subsequent years, the *Journal of Sharia Judgments* was issued, in accordance with the Hanbali school, by Judge Ahmed bin Abdullah Al-Qari,[397] former Chief of the General Court in

[394] Al-Ferjani, Abdul Ghaffar, Codification of Islamic Jurisprudence: Its Foundations and Controls. Journal of Sharia Sciences, Al-Asmariya University, Faculty of Sharia Sciences, Maslatah, Issue 5, April 21, 2018, Libya, p. 128.
[395] Journal of Judicial Provisions, Al-Adabya Press, Beirut, 1302 AH.
[396] Alzuhayli, wahibatun, juhud taqnin alfiqh al'iislamii; Previous reference, page 25.
[397] Study by Dr. Abd al-Wahhab Abu Suleiman, and Dr. Muhammad Ibrahim Muhammad Ali, Tihama Publications, first edition 1981.

Mecca. This journal contained only the rulings of the Hanbali school through his own books and contained 2,382 articles in a format similar to that of the *Journal of Judicial Judgments*.[398]

The editor of this *Journal* is regarded as one of the prominent figures of jurisprudence in the history of the modern Saudi state. With this work, he made a significant contribution to codifying jurisprudence and formulating rules of the Hanbali school in the form of legal articles, including discussing many jurisprudential issues and rules. For contemporary jurists, judges, and legalists in the Kingdom, this publication serves as a key reference,[399] yet it is not binding for the Saudi judiciary.

This *Journal* was the first work to codify Hanbali jurisprudence, despite the fact that its author was a follower of the Hanafi School, and his jurisprudential composition was not according to the Hanbali school. Nevertheless, he benefited from the style adopted in the *Journal of Legal Provisions*. Also, it shares some similarities with the *Journal of Sharia Rulings*. The *Journal of Sharia Rulings* remained in the possession of its author and was not published until his death due to the opposition to codification in the Kingdom. After the author's death, two jurists worked on editing and updating this *Journal*, until it was published as a book in 1981.[400]

4.1.3. The permissibility of codifying the provisions of Islamic jurisprudence

Ancient Islamic Sharia jurists addressed the issue of codification,[401] which in fact represents the judge's obligation to issue certain rulings that do not supercede other Sharia provisions that are not written, even if the judge fulfills the conditions of independent reasoning. There has been much controversy among Islamic Sharia jurists since ancient times about the

[398] Alqarii: Ahmed bin Abdullah, Journal of Sharia Law, p. 30.
[399] Almahamid, Shwish , masirat alfiqh alaslamii, previous reference page 460.
[400] The two sheikhs: Abd al-Wahhab Abu Suleiman and Muhammad Ibrahim Ahmad Ali collected, arranged and verified it, and it was issued in a book by the Tuhama Library.
[401] Al-Zuhaili, Wahibatun, juhud tiqnin alfiqh al'iislamii, previous reference, p. 32.

extent to which it is permissible to codify the provisions of Islamic jurisprudence and to oblige the judge to rule on them. Two trends have emerged.[402]

A. The first trend believes in the permissibility of codification

The proponents of this perspective believe that it is permissible to compel a ruling with a particular jurisprudential school, and thus the ruler can ask the judge to adopt a particular school.[403] This is the view Hanafi, Maliki,[404] and some members of the Shafi'i schools take.[405]

This trend sees that codifying Islamic jurisprudence has several advantages and that it is a necessary step for the Kingdom's economic and social development.[406] However, this is to be achieved within an Islamic framework based on the following foundations:

- Observing the established texts in the Qur'an and the peremptory and presumptive Sunnah.
- Utilizing the ancient jurists' jurisprudence to make decisions on new topics that they did not address.
- Taking into account what serves the interests of the individual and society in the modern era based on an Islamic perspective, where no conflict exists between what may be seen as a public interest and the principles and general spirit of Sharia.

The proponents of codification believe that if these principles are observed, the codification of Sharia will yield several benefits for society, including:

- Realizing the principle of equality before the law.

[402] Abdul-Barr, Zaki Muhammad, taqnin alfiqh alaslamii Heritage Revival Department, 2nd Edition, 1986, p. 35 and beyond, Abu al-Basal, Abdel Nasser Musa, nazariat alhukm alqadayiyi fi alsharieat walqanun, Dar Al-Nafaes, Amman, Jordan, 1, p. 273 and the following pages.
[403] Al-Tantawi: Ali, Fatwas, compiled by Mujahid Diranah, Dar Al-Manara, Jeddah.
[404] Al-Hattab, Mawahib Aljilil, Vol. 6, p. 98, Al-Desouki, footnote to Al-Sharh Al-Kabeer, Vol. 4, p. 130. Al-Hajwi: Muhammad bin Al-Hassan, alfikr alsaami fi tarikh alfiqh alaslamii, Dar Al-Turath - Cairo.
[405] Ibn Hajar Al-Haythami, Al-Fatwa Al-Kubra, Vol. 2, p. 212, Dar Sader, Beirut.
[406] Al-Mayman, Nasser bin Abdullah, Alnawazil Altashrieiat, Dar Ibn Al-Jawzi, Dammam, Saudi Arabia, 1, 1430 AH, p. 89.

- Restricting judges' broad discretion and contributing to the uniformity of court verdicts for comparable situations, rather than leaving it to the judges' whims and individual opinions.[407]
- Rigorously evaluating some unclear texts by judges, monitored by the highest court, in light of their roots in the books of the jurisprudence schools.
- Achieving the goal of knowledge of legislation and knowledge of Islamic jurisprudence rulings that can be adapted according to people's cases and disputes, which will help standardize the type of judicial rulings that can be issued.
- Limiting applicable texts on which judges base their rulings rather than searching through various jurisprudence books to assess the incident presented to the judge, especially in this era when most judges lack the capacity of diligence in eliciting Sharia rulings from Islamic jurisprudence.[408]
- Resolving some issues in practice, as the application of Sharia provisions is excluded by some international arbitrators when one party chooses them as an applicable law. This might be due to the lack of clarity of its rules, or the arbitrators' inability to know the ruling on the issue owing due to the different provisions in the Islamic schools' jurisprudence.[409]
- In an Islamic state, the application of the provisions of Sharia is compulsory. If the non-codification of its provisions becomes a justification for its non- implementation, then codification itself becomes an obligatory matter.[410]

[407] Al-Ferjani, I.D., p. 130.
[408] Al-Ferjani, I.D., p. 130.
[409] See Ibn Qayyim al-Jawziyya, Muhammad ibn Abi Bakr, iielam almuqiein ean rabi alealamin, Dar al-Hadith, Cairo, vol. 4, p. 309
[410] Abdel-Bar, Muhammad Zaki, previous reference, p. 62.

- One benefit from obligating judges to rule according to one particular doctrine is that if the ruler determines that this is in the public interest, he may compel the judge to act upon it,[411] as Islamic Sharia always supports the public interest.
- If the judge is empowered to decide using a particular school of thought, he cannot go beyond it, even if it contradicts his view,[412] since the judge is deputizing the state ruler in the judiciary. Thus, he is obligated to implement the laws issued by the state's ruler unless they are contrary to the provisions of Sharia.[413]
- The judge is obligated to obey the ruler unless he commands disobedience according to the text of the Qur'an. The Almighty said: "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you."[414] The Prophet ﷺ said, "It is obligatory upon a Muslim to listen [to the ruler] and obey whether he likes it or not, except when he is ordered to do a sinful thing; in such case, there is no obligation to listen or to obey."[415] Consequently, the ruler may enact and issue laws, as well as bind judges to rule on them.[416]
- It is almost unanimously acknowledged that a judge who fulfills the conditions of independent reasoning is not compelled to rule in accordance with a particular doctrine. However, suppose the judge has not reached the level of *Ijtihad*, meaning the ability to be diligent in eliciting Sharia rulings from Islamic jurisprudence. In that case, he is obligated

[411] Al-Hattab, mawahib aljilil, vol. 6, p. 98.
[412] Al-Jara'i, Abdul Rahman bin Ahmed, taqnin al'ahkam alshareiat bayn almumaniein walmujizin, Yearbook of Teachers College in Abha, Saudi Arabia, 2005, p. 4 and the pages after.
[413] Mahamid, Shweish, masirat alfiqh al'iislamii, previous reference, p. 441.
[414] *Qur'an Al-Nisa*:59.
[415] Narrated by Al-Bukhari in the Book o al'ahkami, bab alsame waltaaeat lil'iimam ma lam takun maesiat 6/2612 (6725).
[416] Rida, Muhammad Rashid: Fatwas, compiled by Salah Al-Din Al-Munajjid, and Youssef Khoury, The New Book House – Beirut, C2 p. 625.

according to the rulings of Sharia to follow the rulings mentioned in one of the Islamic schools of jurisprudence.[417]

- There is a clear need for stipulating the legal rulings that should be applied to new developments through codification, [418] because leaving rulings to a judge's discretion serves no interest due to the heavy workload of judges and their lack of time to research and investigate every emerging issue. The liquidated damages clause is an example of this.[419]
- Codification will be in the disputing parties' favor because it combines the Sharia rules with ease of application.
- Codification will serve as a summary of the evidence and rulings selected in an appropriate manner that can be applied from Islamic jurisprudence, thus facilitating for judges and their assistant lawyers and others to know what rulings from disputed facts they should make and thus saving them time and effort.
- Defining public rights and duties beforehand, so that everyone will be aware of what he has and what he owes, leaves no room for other possibilities given the wide discretion of the judges.
- Unifying judicial rulings and making it difficult to find any sort of conflicting rulings, which will promote a sense of reassurance among the public, whose rights and interests will be well maintained.

[417] See the statement of the point of view of the violators of the decision of the Council of Senior Scholars, research on codification of the most correct, Journal of Research, Issue 33, p. 46.
[418] Hamdi: Muhammad bin Muhammad, almutun alfiqhiat wasalatha bitaqnin alfiqh, Dar Al-Bilad for printing and publishing. pg 475 et seq.
[419] Al-Mahamid, Shwish, previous reference, p. 442.

- Supporting the idea of codification in general, including the codification of most commercial issues in the Kingdom of Saudi Arabia in the form of regulations and by-laws that do not violate the provisions of Sharia. Thus, work in these legal areas will become more stable. This may not happen if the important legal teachings and rulings of the past are left scattered in the books of Islamic jurisprudence. Furthermore, there was a project to codify the provisions of Sharia issued by the Ministers of Justice of the Gulf Cooperation Council countries under the name Muscat Document of the Unified Law for the Personal Status of the Gulf Cooperation Council Countries in 2001. It is a guiding law yet not binding on the GCC countries, and it was issued in conformity with the principles of Sharia. Moreover, a large number of guiding laws have been issued by the GCC in accordance with this document; some of them have become mandatory in all the six Gulf countries.[420]

B- The second trend believes in the inadmissibility of codification

According to this trend, there exist flaws in codifying Islamic jurisprudence, and therefore it is not permissible to obligate the judge to rule under a specific doctrine. This is what the Malikis[421] believe in and the Shafi'i [422] and the Hanbali schools [423] do as well. They make the following points in support of their point of views:

- Allah's saying states: "So judge between the people in truth,"[424] and the truth here does not necessarily lie in a specific jurisprudence school, as the truth may appear to the judge in another school, and if the truth appears to him, he must act upon it.

[420] The GCC countries are: Saudi Arabia, Oman, Kuwait, Qatar, Bahrain, and UAE.
[421] Al-Khattab, mawahib aljalil, Dar Al-Fikr, Beirut. C 6 p. 93.
[422] Al-Shirazi, Al-Muhadhab, Issa Al-Halabi Press, Egypt, Volume 2, p. 291.
[423] Al-Mardawi, Al-Ansaf, Arab Heritage Revival House, Beirut. C 11 p. 169.
[424] *Surah sad*:26.

- There is a Consensus among jurists not to link people to one opinion or one school of jurisprudence.[425]
- It is not permissible for a person in charge of any of the affairs of Muslims to prevent them from using their independent reasoning. For this reason, when Caliph Harun Al-Rashid consulted Imam Malik, the founder of the Maliki school, to compel all Muslims of that time to follow what was recorded in his book *Al-Muwatta*, Imam Malik's response was to refuse such notion, saying he did not want to allow obligating Muslims to follow his jurisprudential opinion.[426]
- It was mentioned in the hadith that judges are of three types, one of which will go to paradise and two to hell. The one who will go to paradise is a man who knows what is right and gives judgment accordingly, but a man who knows what is right and acts tyrannically in his judgment will go to hell, and a man who gives judgment for people out of ignorance also will go to hell.[427]

The reasoning behind this hadith is that the ruling that prevents sin is what the judge considers to be the truth. The preponderant, codified opinion may not necessarily be that of what is right and just in the eyes of the judge. If the judge ruled other than what he knew to be right, this is considered to be a sin, and therefore one cannot obligate him in accordance with what is codified.

4.1.4. The position of codifying the provisions of Islamic jurisprudence in the Kingdom of Saudi Arabia

[425] Ibn Taymiyyah, Majmoo' al-Fatawa, vol. 3, p. 239 and beyond.
[426] Al-Hasfaki, Al-Durr Al-Mukhtar with Al-Tahtawi's footnote, Dar Al-Marefa for Printing and Publishing, Beirut, vol. 3, p. 198, Ibn Abdeen, Rad Al-Muhtar, Dar Al-Fikr Beirut, vol. 5, p. 408.
[427] It was included by Abu Dawood with No. (3573) and Al-Tirmidhi No. (1322), and Al-Albani deemed it authentic.

King Abdul-Aziz Al Saud, the founder of the Kingdom, was eager to create a jurisprudential code that would govern the branches of jurisprudence and the rulings of the judiciary, making it easier for judges and the litigants, and the general public to refer to and benefit from clearly organized legal statutes. With such codification, people could easily manage judicial personnel affairs and learn about jurisprudential rulings.

This was to be achieved via issuing a journal for legal rulings by a committee of senior Islamic jurisprudents from Saudi Arabia and elsewhere, representing all four schools of jurisprudence, and who would consider the interests of Muslims and draw rulings from the Qur'an and Sunnah. Through this initiative, the king hoped to oblige judges to adopt selected rulings from the different schools of jurisprudence, rulings that were to be written down and circulated among judges. In the same context, the editorial of the State Gazette read:[428] His Majesty the King is considering developing a code of Sharia rulings entrusted to a committee of high-caliber Muslim scholars and culled from the books of the four respected schools of thought. This journal will be very much like the Journal of Al-Ahkam that the Ottoman government issued in 1876, yet it is different in some respects, namely the lack of adherence to one doctrine over than another. Instead, it adopts what serves the interests of Muslims as per the best doctrine in question coupled with an argument and evidence from the Qur'an and Sunnah. In the same vein, he instructed the Judicial Monitoring Board to proceed with its work as follows:

Should the four schools of thought agree on one of the rulings, then it becomes binding to all courts and judges. The four schools often agree in the basic rulings and in many subsidiary rulings. As for the disputed issues, they shall be noted down as of today, and every week the Judicial Monitoring Board convenes with a panel of expert scholars to consider the controversial

[428] Umm Al-Qura newspaper (the official newspaper in Saudi Arabia in which laws are published), dated August 26, 1927.

issues found by the Board with regard to the ruling as seen by each school of thought. They shall look into the strongest argument and evidence from the Quran and the Sunnah of His Messenger ﷺ and issue a decision to approve and adopt it. In this manner, the Board collects most of the disputed issues from which conflicting views of different schools arise, so as to issue a decision about them. This decision shall be binding to all the Sharia courts and judges and shall serve as a key foundation for the unification and composition of rulings.

However, this royal call to codify the rulings of Islamic jurisprudence was not well received by a sufficient number of jurists; some objected to codifying the rulings of jurisprudence. Accordingly, the king had to instruct the judiciary to specify the jurisprudential references approved in the Hanbali school, which judges should adopt, so that both litigants could be aware of the jurisprudence rulings that can be applied to the issues presented, as well as the specific approved references that can be consulted and adopted by the Saudi judiciary.[429] The decision also included that the fatwas from Imam Ahmad bin Hanbal should be applied in the Saudi courts because it is most convenient to review his books and the numerous citations they include when addressing issues. The courts thus are to apply Hanbali school concepts, and if the judges encounter hardship, difficulty, or violation to the public interest in applying it to some issues, they have the right to consider and research a ruling for it in other schools of jurisprudence as needed.

Adopting what was stipulated in the Hanbali school of thought was not initiated by the ruler but was advised by a scholarly body of the judiciary. The judges affiliated with the Judicial

[429] Judicial Authority Decision No. (3) on 17-1-1347 AH associated with the high ratification dated 03-24-1347 AH. These references are Al-Iqna' by Al-Hijjawi, Kashaf Al-Qena' by Al-Bahouti, Muntaha Al-Irsat by Al-Futuhi, Sharh Muntaha Al-Iradat by Al-Bahooti, Al-Mughni by Shams Al-Din Ibn Qudamah, and Al-Sharh Al-Kabeer Abdul Rahman bin Qudamah.

Council have committed themselves to it so far; it is rare that a judge deviates from the specific doctrine of the Hanbali school in their rulings. If this ever happens, their ruling is overturned.[430]

This decision does not include an obligation to codify because the jurists rejected it at that time, but it does include an obligation for judges to work according to a specific school of Islamic jurisprudence, the Hanbali school, and to not contradict its doctrine except when there is hardship and a violation of the public interest.

The justification provided for choosing the Hanbali school was that reviewing Hanbali jurisprudence books is more accessible. Moreover, it is simpler to formulate its provisions in the form of legal articles that make reviewing judgments easier than referring judges to law books.[431]

The use of independent reasoning and the varied rulings by Saudi judges in similar cases has led to the continuation of calls for codifying Sharia rulings in the Kingdom to mitigate these discrepant between rulings, facilitating the anticipation of the type of rulings that may be issued and removing doubts about their nature.

The Saudi king has noticed the issuance of rulings by some judges that some people may deem contradictory, given that the cases seem similar, even though, in fact, they may not be so. This made certain people believe that judges follow their whims or fail to apply the Sharia provisions. Thus, the Saudi king thought that it might be due to the lack of a codification reference that judges can use while issuing rulings. Also, it can benefit the *Sharia* and law students during their studies. Moreover, it may push foreign investors to call for different applicable laws instead of using Saudi laws, because investors may have no recourse in the Saudi

[430] As was the case with the ruling issued by the President and Judges of the Riyadh Court No. 1/57 and dated 8/2/86 AH in the Qasama case, it was overturned by the Court of Cassation in Riyadh in No. 3/6 and dated 6/10/87 AH for several reasons, including deviation from the doctrine The same applies to the judgment issued by the Riyadh Court in No. 1/86 and dated 6/9/88 AH in the Qasama case, it was overturned by the Cassation Commission in No. 3/7 and dated 3/26/90 AH.

[431] Al-Jara'i, Abd al-Rahman bin Ahmed, tiqnin al'ahkam alshareiat bayn almaniein walmujizayn, previous reference, p. 7 and beyond.

courts due to the lack of codification, especially when the dispute relates to compensation for the liquidated damages clause.

For the above reasons, the king presented the issue of codification to the Council of Senior Scholars to request the issuance of a fatwa on codifying the provisions of Islamic jurisprudence and obligating judges to rule on it. It is noteworthy that the idea of having a codification reference that judges can use is not new since the late King Faisal requested the Council of Senior Scholars in Saudi Arabia to consider the issue of the permissibility of transcribing the suitable opinions of the jurists to compel judges to rule accordingly.[432]

The Council of Senior Scholars examined the codification suggestions and decided by a majority that it is not permissible to write rulings that obligate judges to rule according to codification.[433] The council justified its decision stating that codification is not the best reform to solve the problems since it will not end the contradictions between various judges' rulings. Also, the Council illustrated that codification will lead to unfortunate consequences due to the following:

- Obligating the judges to rule according to what was chosen from what is considered correct opinion according to the one who chose it might require the judge to rule differently from what he believes, and on some issues, this is not permissible. It contradicts what was done during the era of the Prophet and his caliphs, and, after them, the predecessors. When this idea was previously presented by Abu Jaafar Al-Mansur to Imam Malik during the caliphate of Banu Al-Abbas, the iman rejected it and explained it

[432] The third king of Saudi Arabia.
[433] The General Presidency for Scholarly Research and Ifta, Research of the Council of Senior Scholars, Decision of the Council of Senior Scholars No. (8), 1973, vol.3 2001, codifying the most correct of the sayings of jurists in transactions and obligating judges to rule with it.

was not suitable. Hence, it is an idea rejected by the predecessors, and there is no good in anything that was considered in the era of the predecessors as newly invented.

- Obligating the judges to follow a specific code will restrict their judiciary power to find the best ruling on the disputed case. Moreover, codification will prevent the judges from using the Quran, the *Sunnah*, and the Islamic jurisprudential schools, which hinders the benefit of the knowledge of Islamic jurisprudence. This also clearly contradicts primary Sharia sources, which are obligated to refer back to the Qur'an and the Sunnah regarding rulings on which they differ. Allah said: "[I]f ye have a dispute concerning any matter, refer it to Allah and the Messenger if ye are in truth believers in Allah and the Last Day."[434]
- Obligating judges to follow what is codified leads to the same results reached by those who instituted codification in the developing Islamic countries. They tried codification, obligating judges to rule in accordance with it. However, it did not bring them any goodness, and it did not remove the differences in rulings. Rather, it led them to rule by man-made laws, except for personal-status matters, and some penalties. To stop the pretext of corruption, to preserve the judgment of Allah's law, and to stay in line with the spirit of an Islamic nation we must think of another path of reform, one that will be free of grave consequences.
- Finding an inclusive book that comprises what is considered to be the most accurate opinion of those decisions that are numbered and serialized will not necessarily resolve the dispute, even if there is consistency in the rulings of all the cases. This is because judges differ in their perceptions and understanding of scholarly materials, the extent to

[434] *Surah Al-Nisa*:59.

which they apply them to the case they consider, and the particular circumstances of the cases, including people's differences about the meaning of some legal texts from the Qur'an and Sunnah, despite their clarity and the knowledge their source came from he who is "All-Knowing."[435]

- The civil courts in countries ruled by man-made laws have written down their laws in the form of unified and serialized articles. However, their judges' rulings differ, and in some rulings, there were contradictions and errors. These rulings' mistakes are often appealed and rescinded in the courts of appeal. Thus, obligating the use of codification did not prevent errors and contradictions in the judicial rulings. Therefore, accusing judges and calling for their judgments to be overturned will continue as long as judges differ in opinions, ideas, understandings, capacity, and ability to apply judgments to disputed cases.
- It is inappropriate to avoid the ill effects that result from obligating judges to rule in accordance with what is codified: to give them the right to dismiss what is contrary to their beliefs from what has been codified. This is due to dependence, caseloads, evading responsibility, obstructing transactions, and accumulating them, which will open the door to fraudulent behavior to get rid of some cases. Moreover, in cases where the judge disagrees with what has been codified, he will simply dismiss it, seeing as how the preponderance of evidence is a relative matter, and each saying has its application.
- Real-life application confirms that the litigants' knowledge of what the judge refers to in detail is not necessary nor is it a condition for accepting the judge's ruling or its enforcement, not from the point of view of Sharia or that of Saudi law. The Prophet ﷺ

[435] One of God's attributes and names in Islam.

and his companions used to judge between people in disputes, and their jurisprudence was not recorded. Many of the parties had not memorized the entire Qur'an nor much of the Sunnah. Rather, they generally knew that the judge would rule on cases brought to him from what he comprehended from these primary Islamic texts, just as the cases in the countries that rule with man-made laws and where the litigants have little knowledge of the majority of the laws to which judges refer; therefore, they hire lawyers to plead on their behalf. Hence, it was not necessary to write down the rulings according to the codification proposed so that the litigants follow them. Yet even when the legal rulings are codified and whoever wants them has access to them, it does not guarantee that the judge will agree with him in understanding and applying it to his case. That is the situation concerning both those who refer to Sharia in their trial and those who refer to man-made law. For even if the rulings are written down, all the details of the cases might not be mentioned, and each judge would strive to apply differently the ruling to the case brought before him.

Based on the above, it is clear that another way must be sought to remedy the situation. The Council of Senior Scholars believes that the solution to the problem is as follows:

- Qualifying and training the judges for judicial work.
- Better recruitment standards, such as testing their knowledge, reasoning, honesty, and trustworthiness, which supports raising the level of quality of the judicial rulings.
- Forming a committee of scholars to discuss critical judicial matters that are causing differences among the judges, which reflect on their judicial rulings. The committee should strive to clarify with evidence what its members view as the correct ruling. The

committee work is not to obligate the judges with what the research has concluded but rather to assist them in carrying out their work.

- Differences in rulings existed during the era of the Four Caliphs and the Righteous Predecessors, even by a single judge in two similar cases, where what became clear to him in the second did not appear so to him in the first. Despite this, he did not rescind his previous ruling. However, this is not enough reason to consider such codification nor obligating the judges to rule in accordance with one saying. Although earlier Muslim religious leaders and thinkers were more intent on presenting the practice and reputation of Islam, this difference should not be a cause of suspicion and accusation of the judge, seeing as how the basic trait to be present in those who are chosen to judge is being an honest and responsible scholar.
- Therefore, many legal scholars and teachers believe that the best way forward is other than codification, for its outcome is not guaranteed, and it leads to the separation of people from the sources of their Sharia and the wealth of their forebears in jurisprudence.
- It is evident from this fatwa that codifying the provisions of Islamic Sharia is one an issue that has been in dispute since the beginning of the Islamic era until the present time.[436] However, this dispute did not prevent the existence of several individual or collective codification attempts. Yet the interest of Saudi society at the present time, and the multiplicity of its relations, dealings, and partnerships with other countries, require that there be a codification of the provisions of Islamic jurisprudence in the form of written, clear, and stable laws that are not subject to the absolute discretion of the judge. This is

[436] Al-Jara'i, Abd al-Rahman bin Ahmed, tiqnin al'ahkam alshareiat bayn almaniein walmujizayn, previous reference, p. 4 and beyond.

what prompted King Abdullah bin Abdul-Aziz in 2014 AD[437] to revive the idea of codification, based on the four schools, after it remained for decades with the Council of Senior Scholars, and it is the same idea that was advocated by the previous king.

King Abdullah suggested a scientific jurisprudence body, and after obtaining the approval of the Council of Senior Scholars in the Kingdom on the idea of preparing a "judicial code,"[438] a royal decree[439] was issued to form a Sharia committee from the Council of Senior Scholars in the Kingdom, which was to prepare a draft "Code of Judicial Provisions." The code was to include legal issues that are commonly faced by the judiciary and present them according to Islamic jurisprudence and classified in the form of articles. The committee would choose the strongest evidence from the four schools of jurisprudence, and the royal decree obligated it to fully adhere to the provisions of Sharia and follow the scientific method in weighing between the options of the jurists. Further, no article was to be mentioned in this code except if its approach was supported by the texts of the Sharia or the statements of the scholars. The committee had to submit its work to the king within 180 days. However, the committee faced some difficulties in completing its work during this period, and its work continued until the date of preparing this research.

Recently, the work of this committee has been assisted by some jurists in codifying the provisions of Sharia. Some preliminary drafts of its work have begun to come out, but completion of all that is required of it and the subsequent procedures necessary to issue such a jurisprudential code will take additional time. It is expected that the outcome of this project will

[437] King Abdullah Al Saud, is the sixth king of the Kingdom of Saudi Arabia, born in 1924 and died in 2015.
[438] Council of Senior Scholars Resolution No.: 236, 1431 AH.
[439] Royal Decree No.: A/20, 1436 AH.

be in the form of several codes, one devoted to civil and commercial transactions, a second to evidence, a third to criminal laws and penalties, and a fourth to personal-status issues.

These jurisprudential codes will transform the texts of Sharia to rigid legal texts, as some claim.[440] Rather, they will work to find the appropriate mechanism for executing its provisions by placing them in legal articles that are easy for judges to apply to the disputes before them, while limiting the judges' extensive discretionary powers that sometimes lead to incorrect judgments. This is especially the case since a large percentage of judges do not have the qualifications for independent reasoning and thus derive rulings from primary or secondary sources of Sharia. Such judges in particular would benefit from a codification of Sharia law to reach the appropriate rulings. Therefore, codifying the rulings of Islamic jurisprudence on the basis of the strongest evidence from all Islamic schools of jurisprudence is a necessity in assisting judges in the performance of their work and limiting his sometimes poorly exercised independent reasoning in often controversial matters, such as the liquidated damages clause.

Judges in the Kingdom are bound to abide by the laws that are issued by royal decrees, after approval by the Council of Ministers and the Shura Council, which are called regulations instead of legislation and laws. Their rulings should not violate Sharia and they regulate many topics such as commercial law, labor law, corporate law, and intellectual property law. Therefore, codifying the provisions of Islamic jurisprudence in the form of legal articles in various branches of law and issuing it in the form of laws will make judges abide by Sharia law and apply it to the issues presented to them.

[440] Mahamid, Shweish, masirat alfiqh al'iislamii, I.D., p. 454.

4.1.5. Codification limits the judge's discretion when considering the liquidated damages clause

Obligating a Saudi judge to apply codified jurisprudential texts, especially in contract cases and disputes about the liquidated damages clause, limits his discretionary power because he will not be able to deviate from the text and apply any jurisprudence that he sees fit. If he does, he is required to provide the reasoning behind his ruling.

The Higher Court will not support what he rules in opposition of the codified text, unless it is proven to the court's satisfaction that the judge's opinion is consistent with a definitive text in the Qur'an and Sunnah, and not consistent only with the non-definitive text. This is based on the notion that the codification of Islamic jurisprudence has removed the confusion regarding the possibility of a presumptive text and the appropriateness of its application to the presented incident.

Codification makes it easier for jurists to explain articles and compare rulings with previous ones dealing with the same or an analogous situation, and thus helps judges, lawyers, and students to understand the rulings. It also makes it easier for the courts to apply the provisions of Sharia now contained in codified articles and reduces the possibility of difference in judicial rulings. Finally, it can guide the judge to the legal rule applicable to the dispute with ease, instead of his having to search among the many opinions found in books on Islamic jurisprudence, which require great effort.

A judge cannot argue that the codification prevents him from making decisions to justify his wide discretionary authority, because the articles of codification have been prepared by highly qualified jurists and scholars, which makes their work more aligned with Sharia rules and the public interest. Moreover, codification does not mean he has to abandon independent

reasoning, as he still needs to consider one or more articles of the codification in light of the changing conditions, interests, and needs of society.

Through this scientific mechanism that has been adopted, the most correct opinion is chosen for controversial issues, based on weighing rules adopted by the jurists of the science of jurisprudence. The codification also provides an opportunity for jurists to influence the judges' applications of the codified texts on the presented cases and disputes, including those related to the liquidated damages clause, instead of referring to the plethora of sources in various books and references of Islamic jurisprudence. This will prompt judges to properly limit their discretionary authority, while encouraging proper reasoning in formulating their rulings in a way that contributes to achieving justice between the disputants and increase confidence in the Saudi legal system. Doing so is especially important for foreign investors who fear the wide discretionary power of the Saudi judge in the absence of clearly written legal texts.

4.2. Notation and publishing of final court rulings

Judicial codes are not a recent idea in Islamic jurisprudence. We can find in some Islamic jurisprudence schools, such as the Maliki school, a codification, of what was called "what was followed" that included records of the judicial ruling abstracted from the incident and its circumstances, while sometimes it noted the facts of the case and the ruling.

The follower of Islamic jurisprudence will find many incidents in which the rulings were written, starting from the era of the Prophet ﷺ. The companions transmitted many facts in which the Prophet ruled according to certain reasons he had articulated.

The codification of precedents and judicial rulings differs from what is called "codification of jurisprudential rulings." In the latter, jurisprudential texts are selected and codified, and the judiciary is obliged to enact, which is similar to the "Latin" legal school. In

contrast, the notation of precedents and judicial rulings is achieved by collecting judicial rulings that meet the required conditions and publishing them to those interested in the legal affairs. If these precedents constitute a judicial principle, it is issued by the Supreme Court in accordance with the provisions of the Judicial Law, and judges, in many cases, are obligated to abide by the general principles issued by the Kingdom's Supreme Court.

4.2.1. Contents of the notated rulings

Notation of judicial rulings means writing about the facts behind the case, the ruling, and the reasons for it. The ruling may include the evidence from the texts of the Qur'an, Sunnah, Consensus, Analogy, other secondary Sharia sources, or the sayings of jurists from the Islamic jurisprudence schools. The rulings are classified according to their type such as legal, labor, personal, commercial, or criminal. Judicial rulings are not written in the form of numbered and serialized articles, as is the case in codification. Final judicial rulings that have been issued by courts and quasi-judicial committees at their various levels are collected, arranged, classified, and published for those interested in them.

In the Saudi judicial community of the Kingdom, the term "notation of judicial rulings" generally is used to mean references to writing the rulings of Islamic jurisprudence, but there is a difference between the term "notation" and the term "codification." The two terms have in common attempts to collect, arrange, detail, and classify legal rulings. However, notation also may include jurisprudential sayings and their evidence in a single issue, without obligating the judge to rule guided by one. It may also include the collection of court rulings only. Notation does not require listing its topics in the form of numbered legal articles. On the other hand, codification is the formulation of the sayings of jurists in the form of numbered, arranged, and classified legal articles that oblige judges to follow their guidance and apply it to disputes as is

the case in the laws of other countries.[441] The notation of judicial rulings issued by the courts falls under the term notation and not the term codification.

Despite the interest in the notation and publication of judicial rulings in the Kingdom, this matter was not raised regularly for some time. The Judiciary Law and the Law of the Board of Grievances included a stipulation that judicial rulings must be written and published as per article Twenty-one of the Law of the Board of Grievances, Administrative Judiciary, issued by royal decree No. M/78 dated 9/19/1428 AH, which established an office for technical affairs in the board consisting of a president and several judges, experts, and researchers. It is concerned with issuing jurisprudence opinion, providing research and studies, and other matters requested by the Chief of the Court. At the end of each year, the Office organizes judgments issued by the circuits of the Court, after which it prints and publishes them and submits a copy of it to the king.

The Board of Grievances long notated and published a set of judicial principles approved by the audit bodies in the Board of Grievances, the Appeals Judiciary, which showed adherence to applying the principles of Sharia and the regulations that are compatible with it to achieve its purposes and objectives. To that effect, several groups concerned with principles and judicial rulings in administrative, commercial, and criminal cases were issued.[442] The Ministry of Commerce, in cooperation with the Chambers of Commerce in the Kingdom, published selections from the decisions of the Appeals Committee for the Settlement of Commercial Paper Disputes, which considers cases of checks, bills of exchange, and promissory notes. These notations and published documents interested a large number of people. But the issuance of these

[441] Al-Ferjani, Abdul Ghaffar, altiqnin min alfiqh al'iislamii assuh wadawabitihu. I.D., p. 128.
[442] The Courts of the board issued codes of judicial rulings on issues that fell within its jurisdiction at that time and before transferring jurisdiction in commercial and criminal cases to the general judiciary. These codes were for the years: (1427-1428-1429-1430-1431-1432) AH. Also, there was a special edition distinct from the principles approved by the commercial departments from the year 1408 until 1423 AH.

notations stopped for a while,[443] until it began to reappear recently, where the notations and published rulings received much attention from the administrative judiciary for their contribution to serving the judiciary by limiting the duration of cases and the discretionary power of judges.

Notations contribute to clarifying what the ruling has resolved in the cases, in addition to shortening the time and reducing the effort on the case examiner, and contributing to spreading legal knowledge, achieving transparency, and deepening knowledge of the applied aspects of law among judicial, academic, and other interested individuals related to legal aspects, especially among the employees of the judicial, legal, academic, and other bodies.

Copies of these judicial groups and principles have also been published on paper and electronically, with the aim of contributing to the enhancement of awareness of judicial and legal aspects and knowledge about the way judges adjudicate cases, and generating the persuasiveness and consistency of judicial rulings.

In the field of public (non-administrative) judiciary, the third paragraph of Article 71 of the Judicial Law issued by Royal Decree No. M/78 dated 9/19/1428 stipulates that a research center shall be established in the Ministry of Justice and composed of a sufficient number of specialized members, each of whom must have a university degree.

This center is tasked with publishing selected judicial rulings with the approval of the Supreme Judicial Council[444] after a decision issued by the Saudi Council of Ministers which obligates the Ministry of Justice to publish these court-issued rulings after classifying them and deleting names from them for the sake of confidentiality.[445]

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[443] The offices for adjudication of commercial paper disputes were working under the supervision of the Ministry of Commerce before transferring their full jurisdiction to the commercial courts of the General Court.
[444] Previously, Article 89 of the old judicial law issued by Royal Decree No. M/64 dated 7/23/1975. Included the formation of a department in the Ministry of Justice, whose tasks would be to prepare selected sets of judgments for publication.
[445] Cabinet Resolution No. 162 dated August 26, 2002.

This was also followed by the issuance of a decision by the Minister of Justice[446] to form a committee of judges with experience and broad interest to carry out the tasks required by the various stages of notation and publication, from reviewing judgments, classifying them and preparing them for publication.[447]

In implementation of this trend in notation, the Research Center at the Ministry of Justice issued a guide to judicial rulings in 2017, which includes judicial principles derived from rulings and decisions issued by jurists issued principles and decisions in the stages of development of the Saudi judicial system. These principles are entirely derived from decisions and judgments of cases reviewed by the highest judicial authorities in the Kingdom, the Supreme Judicial Authority, the General Authority of the Supreme Judicial Council, the permanent body of the Supreme Judicial Council, and then the Supreme Court with its general assembly and its various judicial departments.

This code included a set of principles and decisions issued by these authorities between 1971 and 2016 that are characterized by comprehensiveness, accuracy of arrangement, ease, and preciseness of attribution and documentation of sources.

Among the key issues that those who are responsible, at the highest judicial authority, seek to ensure are attention to the highest quality of rulings that are published, how they are classified, ensuring the continuity of their publication and issuance, and the degree of judges' commitment to them in their rulings. The Ministry of Justice has worked on administrative and scientific readiness, through the formation of a permanent scientific committee consisting of

[446] Minister of Justice Decision No. 10964, dated November 15, 1426 AH
[447] Collection of Judicial Judgments for the year 2013, Ministry of Justice, Research Center, Riyadh, 2015.

three judges to set guidelines and rules on the nature and quality of the provisions to be codified, and to ensure the suitability of the provisions presented for notation and publication.[448]

A large number of final and final judicial decisions issued by the courts of the general judiciary have been selected, classified, and published through paper and electronic media.[449]

For its part, the administrative judiciary worked to activate the text of Article 21 of the Law of the Board of Grievances by classifying, printing, and publishing judicial rulings, indicating that the assignment of this task had been made by the Technical Affairs Office, which is composed of several judges and experts supported by researchers and technical professionals.

As a result, the Board of Grievances, through its courts, issued sixteen volumes concerned with its principles and rulings issued by the Board of Grievances' Courts until 2018. The Office of Technical Affairs continues to publish groups of judgments and principles. The volumes dealt with principles and rulings related to administrative, commercial, and criminal cases until the transfer of the jurisdictions to the general judiciary. Those volumes were published in paper and electronic form.[450]

Thus, an opportunity to see judicial rulings and contribute to restricting the discretionary power of judges through the difficulty of ruling otherwise, unless acceptable justifications and reasons are provided.[451] It is expected that this effort will continue to codify and publish rulings of Saudi courts in the general judiciary, that of the Board of Grievances, and quasi-judicial

[448] Decision of the Minister of Justice No.: 10964, 16/12/2005.
[449] See: Saudi Ministry of Justice website: www.moj.gov.sa.
[450] See: The Saudi Ministry of Justice website: https://www.moj.gov.sa/ar/pages/default.aspx.
And the website of the Board of Grievances: https://www.bog.gov.sa/Pages/default.aspx.
And the website of the Capital Market Authority: https://cma.org.sa/Pages/default.aspx.
And the Supreme Court website: https://www.moj.gov.sa/ar/Ministry/Courts/Pages/HighCourt.aspx.
[451] The quasi-judicial committees are competent to consider cases that fall outside the jurisdiction of the general judiciary and the judiciary of the Board of Grievances, even if some of these committees accept appeals against their decisions before the Board of Grievances.

committees, in light of the Saudi government's interest in developing the judiciary and the Saudi legislative environment to attract foreign investment to the Kingdom.

4.2.2. The benefits of publishing judicial rulings

Notation and publishing of judicial rulings contributes to serving those interested in the judicial field, and with human rights issues in particular, by showing what has been ruled by judges in the past, thus allowing litigants and others interested in judicial affairs to know the likely direction that cases before the court will follow. Even though some facts differ from each other, the legal grounds set forth in the published final rulings can be relied upon in predicting the judge's perspective on facts and cases before him. Likewise, a judge will find it difficult to go beyond what is included in cases similar to those before him. These guidelines thus become a limitation on his discretion unless he can persuasively justify his deviation from the resolution of past cases. If so, the case will be monitored by the Supreme Court, which will overturn his ruling if it is not convinced of his justifications for deviating from the provisions published in the similar incident.

Published rulings that contain evidence and reasoning are beneficial for the judges themselves as they contribute to saving time and effort, and limit the judges' discretionary power, particularly in terms of rulings that might be reversed by the Supreme Court. Such codification also makes for a certain degree of predictability when it comes to rulings for similar cases, which will benefit all those interested in legal issues, including judges, lawyers, business owners, and foreign investors.

A number of benefits can be summarized for the notation of judicial rulings in the Kingdom, including:

- Notation contributes to clarifying what has been ruled in the past, which helps promotes foreign investment because investors are more aware of what the judiciary is in general, including the commercial judiciary, which, together, are seen as proper legal processes and standards.
- Notation contributes to shortening the time and reducing the effort of the case examiner, and helps spread doctrinal awareness among the judicial community; it achieves the principle of transparency, and incorporates academic research in applied aspects.
- Judicial notations enrich jurisprudence and marry theory and practice on the ground.
- Publishing judicial codes contributes to deepening the expertise and knowledge of judges in a way that guides their rulings and limits their use of discretionary power that is not based on strong legal foundations.
- Notation contributes to examining the codified provisions, studying them, and comparing them with other legal systems, which results in the development and strengthening of provisions and the creation of ideal models for judgments in many issues from which judges in general and new judges in particular benefit.
- Writing and publishing judicial rulings creates a kind of self-discipline over the judge's work, so the judge is eager to review his rulings and to possibly revise them so as not to violate previously published rulings. This is in part because he knows that his own ruling will be published and read, so he works on cases more deliberately and carefully.
- Writing and publishing judicial rulings enhances internal control in the judiciary that is carried out through different levels of litigation such as the appeal and the Supreme Court, and therefore the published rulings, precedents, and judicial principles will limit a

lower judge's discretionary authority. This in turn will ensure that he is guided by judicial precedents when considering the cases before him.

- Judicial notations help lawyers in the performance of their work by providing legal guidance to their clients more accurately and clearly.
- Published notations and past judicial rulings help judges to settle disputes more easily and accurately and to clarify the demands of and advocacy for the litigants throughout their cases.
- Writing and publishing judicial rulings serve Islamic jurisprudence by clarifying the correct applications of Sharia and standardizing jurisprudence in similar circumstances. Further, it simplifies and presents its findings to the public, which contributes to educating the public on opinions and legal principles on which judges based their judgments.
- This approach thus bolsters confidence in the Saudi judiciary and identifies ways to apply the texts of Sharia, and to explain this to those interested from inside and outside the Kingdom.
- It contributes to the dissemination of awareness and a culture of human rights among members of society, which leads to the reduction of resorting to the courts, because knowing the judicial position on any issue before resorting to the courts will lead to the reluctance of some to file lawsuits that they are not guaranteed to win.

Despite the many benefits that result from writing and publishing judicial rulings, as it provides more transparency to those interested in the Saudi judicial affairs, but because the circumstances of the parties to the cases differ, a judge is still not compelled to rule with this judicial precedent in a similar case a

4.2.3. The concept of judicial precedents

Judicial precedents are defined as rulings in a case issued by a competent court that are taken as examples or references for a similar case that arises later. These rulings have been affirmed by a higher court, such as a court of appeal or the Supreme Court, so that those rulings become guidelines for the judge in lower courts when they consider issues identical or similar to those in which the rulings were issued.[452] They are the judicial rulings issued on specific cases for which an affirmed verdict has not been previously issued.[453] It is clear from this last definition that a judicial precedent is a judicial ruling on a specific disputed case. This judicial ruling issued in this particular incident has no precedent, as it is the first ruling issued for this matter.

A precedent in Anglo-Saxon legal systems is a prior legal case that establishes a principle or a rule that a court has the right to use and apply when there is a case before it with similar circumstances and facts.[454] The precedent is stated in the judicial ruling.

4.2.3.1. Distinguishing judicial precedent from other terms

Judicial precedent differs from some other related terms such as the terms "customary practices" and "judicial principles."

A. Judicial precedents and customary practice

Customary practice refers to judicial rulings which rely on what is contrary to the most correct or well-known in the jurisprudential school. The reason for the judge's choice of

[452] Al-Khanin, Abdullah bin Muhammad bin Saad, Judicial precedents, Center for Research Excellence in the Jurisprudence of Contemporary Issues, a research seminar entitled "Judicial precedents and Reliance on them in the Judiciary" Imam Muhammad bin Saud Islamic University, dated 20/11/1434 AH, p. 12 and beyond.
[453] Al Khanin, Abdullah bin Muhammad bin Saad, tawsif al'aqdiat fi alsharieat al'iislamiati, Dar Ibn Farhoun, vol. 1, p. 441, 2013.
[454] Black's Law Dictionary, 5th ed, p.1059, 1979.

customary practice is because benefits to the public-interest view or Blocking Pretext or applying a Custom.

This term became popular in the Maliki school of jurisprudence, which collected customary practices in some volumes.[455]

In the Saudi judiciary, this term refers to a jurisprudential statement that contradicts the approved Hanbali school of jurisprudence, which judges are obligated to rule by, and the work of the competent court was to check if the judgment followed this opinion for a significant reason.[456] It is "the adoption of a weak or abnormal statement in the jurisprudence school instead of the most correct or well-known in the doctrine, for a benefit, necessity, custom, or otherwise."[457]

Therefore, an unpopular jurisprudential opinion might be applied to the disputed case, despite the presence of another well-known opinion due to the significant public interest outcome.[458]

Contrary to what is required of the judge is to apply the most supported and powerful jurisprudential opinions to the dispute cases, the judge might rule on the basis of a weak saying that is corrected if that is necessary, and this is a matter that is permissible according to some jurists in all Islamic schools of jurisprudence.[459] Customary practice is considered a way of giving preference to statements in the jurisprudence schools, as stated by the Hanafi school, and

[455] Al-Nasser, Faisal bin Ibrahim, ma jaraa ealayh aleamal fi mahakim altamyiz ealaa khilaf almadhhab alhanbalii, issued by the Saudi Judicial Scientific Society, 2020 AD, p. 140 and beyond.
[456] Al-Nasser, Faisal bin Ibrahim, ma jaraa ealayh aleamal fi mahakim altamyiz ealaa khilaf almadhhab alhanbalii, issued by the Saudi Judicial Scientific Society, 2020 AD, p. 140 and beyond.
[457] Al-Hajwi, Muhammad bin Al-Hassan bin Al-Arabi alfikr alsaami fi tarikh alfiqh al'iislamii, 1st Edition, Dar Al-Kutub Al-Ilmiyya - Beirut - Lebanon, 1995 AD, vol. 2, pg. 464.
[458] See in the Hanafi school: sharh euqud rasm almufti 26, 28, hashiat abn eabidin 4/ 339, 1/ 108, 192, wafi almadhhab almalikii : almuafaqat 4/ 203,205, wafi almadhhab alshaafieii : alfawayid almadaniat 236, wafi almadhhab alhanbalii : mutalib 'uwli alnahy 6/ 446, 447, aleuqud alyaqutiat 143, fatawaa warasayil alshaykh muhamad bin 'iibrahim 2/ 16, 19, 21.
[459] Sharh euqud rasm almufti 38, alfawakih albadariat 61.

the Maliki school, which designated it with the term "customary practice."[460] The Maliki jurists stipulated the following conditions for considering the customary practice:[461]

1- Proving the action by a decree or a fatwa.

2- Including a legitimate source of Sharia principles and rules.

3- Issuing a ruling or fatwa that is supported by scholars whose independent reasoning is respected.

Many of the Maliki jurists tend to overturn a ruling if it contradicts the customary practice.[462] Also, some applications of the customary practice in Saudi courts contradict the approved Hanbali school that is usually applied by the Saudi judiciary.[463]

Thus, "customary practice" is closely related to judicial precedents, particularly given that judicial precedents are part of customary practices in courts, where the judgments that are customary in the courts are part of what is considered "customary practice."

However, there is a fundamental difference between the two terms. Customary practice is more general and comprehensive than judicial precedents, as it includes judgments and other details such as the method of keeping records and determining the procedures to be followed when litigating. Judicial precedents are limited to the rulings applied by the judiciary to cases or disputed issues that are presented to it frequently.[464]

Consequently, while judicial precedent and customary practices both involve a ruling regarding a specific fact, they differ in the following:[465]

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[460] Al-Asri, Abd al-Salam, nazariat al'akhdh bima jaraa bih aleamal bialmaghrib fi 'iitar almadhhab almaliki, 1st Edition, Ministry of Endowments and Islamic Affairs, Rabat, Morocco, 1996 AD, p. 66.
[461] Al-Asri, Abd al-Salam, nzariat ma jaraa bih aleamla, previous reference, p. 147.
[462] Al-Jidi, Omar, Custom and Action in the Maliki School, Rabat, Morocco, p. 365 and beyond, 1984.
[463] It reached about eighty questions.
[464] Al-Khanin, Judicial Case Law, I.D., p. 13.
[465] Al-Khanin, Judicial Case Law, I.D., p. 12.

1. While judicial precedent occurs when a ruling is decided in a disputed matter that has not previously been decided with a definitive verdict, the judiciary customary practice is the application of a jurisprudential opinion, unlike the opinion of the majority in the school of jurisprudence.
2. A judicial precedent is specific to the dispute that the courts decide, while for customary practice, it acts like a fatwa regarding the obligation scope to the judge to follow or not.
3. Customary practice must be respected and acted upon unless an exception is applied. As for the precedent, it is to be applied if it takes the form of a judicial principle and final judgment of the courts of appeal, and it is generally preferred to customary actions.

B. Judicial precedents and judicial principles

Judicial principles mean those all-encompassing guidelines and the overall rules that the Supreme Court decides in the field of litigation. It is a complete and binding judicial decision that is issued by a competent authority within the limits of its jurisdiction and that applies to varied circumstances.

The Supreme Court is authorized to issue judicial principles by law.[466] In its general assembly, it defined the judicial principle as the general objective and procedural judicial rule decided by that Court, which is taken into account when considering cases and issuing judgments and decisions. Its more general definition includes what can be derived from judgments and decisions that can be generalized and applied to other facts, without these rules being necessarily issued by the Supreme Court.[467]

[466] Principles and decisions issued by the Supreme Judicial Commission, the Permanent and General Commission of the Supreme Judicial Council and the Supreme Court from 1391 AH to 1437 AH, Research Center at the Ministry of Justice, Kingdom of Saudi Arabia, Edition 1 in 2017, pp. 6 and beyond.
[467] See the decision of the Supreme Court of the Kingdom of Saudi Arabia No. (2/A) dated 29/8/1434 AH.

The judicial principle is what the Supreme Court initially decided upon in accordance with what was stated in Article 13 of the Judicial Law issued in 1428 AH, or what is derived from the work of the courts and their functioning on a specific basis when deciding on a dispute, affirmed by the higher courts. This is similar to customary practices in some schools of jurisprudence in terms of reliance on it and not violating it by the lower courts.[468]

A judicial ruling may be one of the sources of the formation of the judicial principle, when there is a judicial ruling and it is cited after its publication and reflecting urges' knowledge of it. Confirmed in this way, it becomes a judicial precedent, and then it can be a judicial principle that must be followed when the Supreme Court decides that it is such.

Judicial precedents are not limited to substantive articles that focus on the operative part of judicial ruling, but also include the procedural processes in the presence of a procedural void that helps lead to a judicial ruling. Whenever a legislative text is found, the Saudi judge is bound by its presence. In its absence, the judge is required to use independent reasoning, and sometimes judicial precedents and principles are formed as a result.

Judicial principles are a more accurate description and more compelling than judicial precedent in a dispute between jurists. Some jurists believe that a precedent represents a principle, while others believe that a principle must be included in the text of a ruling or decision issued by the Supreme Court.

Judicial principles differ from judicial precedents in that the binding precedent deals with a special event, and the subsequent judicial rulings issued in similar facts or issues must be guided by its content unless there is a contrary reason which is deemed sufficient to override the precedent. In contrast, the judicial principle represents a general rule that includes several facts

[468] Al-Asri, Abd al-Salam nzariat al'akhdh bima jaraa bih aleimla; a previous reference, p. 135.

related to this rule which eventually will be an integral part of a law. The principle can only the abrogated by following the process that the law stipulates.

Therefore, the principle limits the judge's discretionary power. Some jurists believe that the judicial principle is included in the term "binding precedent"; where both are issued by the judiciary and are related to the determination of the facts, a judicial precedent does not require judicial repetition.[469]

Here, the difference between judicial precedents and judicial principles is that precedents are partial judgments that are enunciated in actual cases, while judicial principles are comprehensive to the entire judicial process: they are the rules and processes of judicial decisions and apply to all subsequent judicial decisions.[470]

C. The legal basis for judicial principles in Saudi legislation

The issuance of judicial principles by the Supreme Court in the Kingdom is based on Article 13, Paragraph (A) of the Saudi Judicial Law, which states that the Court undertakes, within the scope of its work, the determination of general principles in matters related to the judiciary. Article 14 of the Judicial Law stipulates what happens if one of the circuits of the Supreme Court decides, in connection with a case it is hearing, to abandon a principle that it had previously adopted, or another circuit court has taken in previous cases, or if one of the circuits of the Court of Appeal decides to abandon a principle that it had previously adopted, the matter is then referred to the President of the Supreme Court to refer it to the General Assembly of the Supreme Court for adjudication.

[469] Introduction of the former Saudi Minister of Justice, Dr. Muhammad Al-Issa, chair of the Supreme Judicial Council and Head of the Judicial Supervision Authority of the Judicial Judgments Group. *See*: https://sjp.moj.gov.sa/WorkApproach.
[470] Al-Khanin, Judicial precedents, I.D., p. 14.

In 2012, the General Assembly of the Supreme Court began deciding about general judicial principles. Thus, the judicial principles approved by the Supreme Court are binding on all judges, and the judge has no discretionary authority to deviate from them in his rulings.[471]

Article 13 of the General Judicial Law stipulates that the Supreme Court should have a general body headed by the president of the court and the membership of all its judges, which undertakes a number of tasks, including a report of general principles in matters relating to the judiciary. The meeting of the general assembly is not valid unless attended by at least two-thirds of its members, including the president or his representative, and its decisions are made by a majority of members present. If the vote is even, the side with which the president voted prevails, and its decisions are considered final.

4.2.3.2. The influence of the judicial precedents

A. The influence of the judicial precedents upon the Saudi judge

A judicial ruling is limited in its effect on the parties and their successors. But when this ruling is confirmed by the higher court and becomes final, it applies to similar cases. Thus, it can be relied on as a judicial precedent in similar cases that have not been decided.[472]

Rulings of the (righteous) (judges), as they were narrated by the following Ibn Masoud saying[473] set precedents in Islamic jurisprudence: “Whoever among you is presented with a decree after today; if a matter comes that is not in the Book of Allah, then let him judge according to what his Prophet ﷺ, decreed. If a matter comes that is not in the Book of Allah, nor in what his Prophet ﷺ decreed, let him judge according to what the righteous have decreed, and

[471] According to the telegram of His Majesty No.51370, 10-15-2012.
[472] Ibn Taymiyyah, Ahmad Ibn Abd al-Halim Ibn Abd al-Salam, The Great Fatwas, Dar al-Ma’rifa, Beirut, 1966 AD, vol. 5, p. 556.
[473] a jurist and one of the companions of the Prophet Muhammad ﷺ.

if a matter comes that is not in the Book of Allah, nor in what his Prophet ﷺ decreed, nor did the righteous judge it, so let him strive to arrive at his opinion."[474] This indicates the permissibility of following the predecessors' opinions after scrutinizing all the evidence, verification, and reasoning.[475]

Suppose the judicial precedent becomes a judicial principle issued by the Supreme Court. In that case, a judge cannot rule opposing the judicial principle unless he provides significant causation for his decision. And in this case, the judge's rule is subject to judicial review. This judiciary practicality is attributed to some scholars of Maliki doctrine.[476]

The question arises about the extent of the judge's commitment to judicial precedents. Saudi judges do generally adhere to what is customary in Islamic jurisprudence with two caveats:

1. The judgment was issued by higher court, or the previous judgement was based on texts from the Qur'an, the Sunnah, Consensus or Analogy, in which there is no dispute among the jurists. In such cases, the successor judge is bound by what the court or the previous judge ruled. But the obligation here derives from the text, not from the judicial precedent itself.
2. If the judgment rendered by the previous judge is in a matter in which there is no text from the Book, the Sunnah, consensus, or analogy. In this case, the matter is not without two subcases.[477]

[474] Al-Nasa'i in Al-Mujtaba (8/230), and Al-Tabarani in Al-Kabeer (9/210).
[475] Ibn Abd al-Bar, Youssef bin Abdullah al-Nimri, jamie bayan aleilm wafadluhu, Dar Ibn al-Jawzi, 1st Edition, Dammam, 1994 AD, vol. 2, p. 787.
[476] Al-Jidi, Omar bin Abdul-Karim, previous reference, p. 365.
[477] Abdali, Sheikhin bin Muhammad Kardam, Judicial precedents, supplementary research for a master's degree in Comparative Jurisprudence, Imam University, Higher Judicial Institute in 2006 AD, Judicial Research Summaries, Saudi Judicial Scientific Journal, first issue in 1434 AH, pp. 121 to 130.

The first subcase is that this issue is the subject of a dispute between jurists, and the judgment of the previous judge is likely to lend weight to one of those opinions, though here the previous judicial judgment is not binding on the two judges.

The second subcase is that this is an emerging issue and cannot be measured on those issues that have already been examined in Islamic jurisprudence. So, the judge renders a verdict purely out of independent reasoning. Also, the judicial ruling is not binding to other cases. And the explanation for the judge's behavior is that the judge has reasoning that is independent. Thus, it is not an adequate opinion for other cases since it is based on conjecture and not a deduction. Therefore, the judge who used the independent reasoning adheres to it as long as his opinion of it does not change. This means the judge is not permitted to change his independent reasoning and imitate another judge's reasoning."[478]

It was narrated on the behalf of Caliph Omar, that he said: "Do not prevent youself from fulfilling his cause today, so you reviewed your mind, and you were guided in your senses, to return to the truth, for the truth is old, and reviewing the truth is better than persisting in falsehood."[479]

Therefore, the judicial ruling is partial in effect, that is, it is "concerned with the incident in which it was issued and the parties to the dispute only." This means that a judicial ruling issued in an incident is specific and limited, and does not extend to similar issues.

The rules of independent reasoning in Sharia require that the judge's work is carried out in light of the texts of the Quran and the Sunnah, as the role of the judge when considering a case

[478] Madkour Muhammad Salam, independent reasoning in Islamic Legislation, Dar Al-Nahda Al-Arabiya for Publishing and Distribution, 1998, p. 150 and beyond
[479] Wakee, Muhammad, News of the Judges, Al-Istiqama Press, Cairo, Egypt, vol.1, p.70, 1947.

or issue lies in applying the various sources of Islamic law in accordance with the established evidence.

Judicial precedent ensures the stability of judicial rulings, and each ruling should continue a general trend that all judges are committed to follow and rule in accordance with whenever a dispute is presented to them.

Some have argued that there is no legal precedent in Islamic law that would make it so strong that the subsequent judge cannot rule differently than another judge in a similar situation. However, the trend in the Saudi judiciary is that judicial precedent has an impact on a judge's subsequent ruling so that it is difficult for him to deviate from the precedent unless he justifies his deviation with convincing justifications is sustained by the highest court.

B. Types of precedents in the Saudi judiciary

Judicial precedents are divided into binding judicial precedents and indicative judicial precedents.

1. Binding precedents

These are the judicial precedents issued by the Supreme Court based on judicial principles, and they must be applied and adhered to by lower-court judges in all similar cases, facts, and issues presented to them. That is the case unless there is a strong reason for not taking them, in which case, the judge must indicate the reason for not taking precedent into account or his judgment might be subject to cassation. For the precedent to be binding, the issues resolved in the binding judicial precedent must be identical, or nearly so, with the issues to be resolved in the current case before the judge.

The Supreme Court in the Kingdom may reconsider the judicial principle that was previously approved as a binding judicial precedent and change the direction in its subject for

justified reasons or circumstances necessitated by the public interest, especially if it receives a request from the king to study it. It is also permissible for a judge to establish a new judicial principle without having a case before him. All judicial principles must be adhered to, and the judge is not allowed to rule in a way that contradicts the precedent.

The judicial principles issued by the Supreme Court in the Kingdom are similar to the judicial precedents issued by the Supreme Court in the United States except that the Saudi judicial is a non-federal one. Rather, there are two Supreme Courts, one for the general and one for the administrative judiciary that specializes in cases in which the state is a party. All courts affiliated with each Supreme Court adhere to the precedents of its Supreme Court. In contrast, judicial law follows a certain hierarchy of courts, headed at the federal level by the Supreme Court, followed by the lower federal courts. At the state level, there is a similar judicial law. The judges of the lower courts are obliged to apply the precedents of the higher court until it later modifies its precedents, which is similar to the judicial situation in the Kingdom.

Some consider the rulings published in the volumes are binding as a judicial precedent, because they have acquired definitive ruling status since they have fulfilled all the litigation processes. However, some jurists have distinguished more precisely in the published judicial precedent between precedents that end with the non-appeal of the initial judgment or the failure to object to the cassation of the appealed decision. Therefore, the jurists believe these judicial rulings are not considered judicial precedents since the judge can take comfort in them because their verdict came out of the disputed parties' conviction, not obligated by the higher court.[480]

The obligation that judicial precedents confer on a judge also is found in Islamic jurisprudence, as effects of such precedents, including judges' reliance on them, in rulings in

[480] The previous reference.

similar cases, according to the rulings of the righteous predecessors[481] was widely reported. This is a matter that one judges should assess by what righteous predecessors stated in their principles and precedents, and the validity of the judge's jurisprudence in what is not a ruling, to establish new principles and precedents.

It is clear that the judicial precedent has a place in Saudi jurisprudence, and the Saudi legislator has intervened to support such precedents. The old Saudi Judicial Law, issued in 1975, states: "If one of the court's circuits decides in a case it is considering, to reverse the jurisprudence that it or another circuit had previously adopted in previous rulings, it shall refer the case to the General Assembly of the Court of Cassation, and the General Assembly shall issue its decision by a majority not less than two-thirds of its members to authorize revocation [of the decision]. If the decision is not issued in an aforementioned manner, the case is referred to the Supreme Judicial Council to issue its decision in accordance with Article 84, paragraph 1 of Article 8."[482] This article was replaced in the new Saudi Judicial Law issued in 2007, Article 14, which states: "If one of the circuits of the Supreme Court decides, concerning a case it is hearing, to abandon a principle that it has previously adopted, or if another circuit in the same court has adopted it in previous cases, or if one of the circuits of the Court of Appeal decides to abandon a principle previously adopted by one of the circuits of the Supreme Court in previous cases, the matter is referred to the president of the Supreme Court to refer it to the General Authority of the Supreme Court for adjudication."

The new Saudi Judicial Law emphasized judges' tendency to adopt judicial principles and judicial precedents issued by the Supreme Court and make them mandatory, so these

[481] Al-Zuhaili, Muhammad, History of the Judiciary in Islam, Dar Al-Fikr, I 1, Damascus, 1415 AH, p. 119. Ibn Hajar Al-Asqalani, Fath Al-Bari, vol. 13, p. 301.
[482] See: 2007 Saudi Judicial Law.

principles and precedents are not modified except by a decision of one of the Supreme Court circuits, whether the reversal of such a principle is from the Supreme Court itself or one of the appeals circuits.

Judicial principles represent stable judicial diligence in dealing with cases in the absence or ambiguity of one or more regulatory texts, either substantive or procedural, based on the provisions of Sharia and its detailed evidence in such cases. The importance of principles and judicial precedents increases as the scope of jurisprudence and the discretionary power of the Saudi judge expands, especially with regard to provisions for liquidated damages in the Kingdom. This makes judicial principles a decisive factor in determining how the judge decides to settle the disputes before him. The Saudi legislator emphasized the importance of the stability of judicial principles when he elucidated the procedures for reversing them, which provides an implicit indication of the permissibility of invoking them if the incident presented applies to the rule established by the stable judicial principle. Judicial principles are characterized by their ability to develop and change continuously and smoothly, according to the latest societal developments, due to their real nature in that their approval aims to settle disputes before the judiciary.[483]

Judicial principles constitute general guidelines for detailed issues in doctrinal and procedural issues that are currently issued by the General Authority of the Saudi Supreme Court, according to the scope of its jurisdiction indicated in Article 11 of the Judicial Law, as well as Article 13. The latter states that among the tasks of the General Assembly of the Supreme Court, reporting general principles in the Judicial issue, and from the judicial principles that may be issued by the higher courts, are choosing a specific jurisprudential opinion; approving a judicial

[483] Al-Obaid, Abdulaziz Muhammad, A Glimpse of Judicial Principles, Mal newspaper, March 11, 2018.

Analogy creating a new principle that does not exist in Islamic jurisprudence; weighing the conflict between two texts; interpreting an ambiguous text or choosing one of the possible interpretations for the text; determining a general text, general statement, or restriction of a general term; and specifying the scope of application of a legal opinion or a legal text.[484]

Examples of judicial principles that were issued in the Kingdom by higher courts and became binding on lower courts are:

- The fine due to the penalty clause, if its justification is proven, is not forfeited except by waiving it.[485]
- The agreement to arbitrate does not forfeit the fine fixed by the penal clause unless its forfeiture is stipulated in the agreement of arbitration.[486]
- The conditions is valid unless it violates a legal text or rule.[487]
- Conditions between the two parties, if they do not contradict Sharia, are respected, and no one has the right to invalidate them or allocate them except the parties.[488]
- If there is a condition between the two parties that does not contradict Sharia, then it is respected and no one can invalidate or limit it, except the parties.[489]
- The penalty clause is valid if it is within the reasonable limits of custom.[490]

These judicial principles are based on detailed jurisprudence opinions, including contracts and compensation. And for the precedent to be considered binding, the disputed case in the courtroom must mimic the judicial precedent and share the same facts.[491]

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[484] Al-Obaid, Abdulaziz, A Glimpse of Judicial Principles, Mal News Paper, 3-11-2018.
[485] Principle No. 51, Supreme Judicial Council, Standing Committee, 6/529, 10/26/1418 AH.
[486] Principle No. 52 Supreme Judicial Council, Standing Committee, 6/529, 10/26/1418 AH.
[487] Principle No. 53 Supreme Judicial Council Standing Committee, 442/4, 7/13/1419 AH.
[488] Principle No. 54, Supreme Judicial Council Standing Committee, 63/3, 1/19/1420 AH.
[489] Principle No. 55, Supreme Judicial Council Standing Committee, 256/3, 3/1420 AH.
[490] Principle No. 59, Supreme Judicial Council Standing Committee, 4/320, 5/8/1421 AH.
[491] Marjorie D. Rombauer, Legal Problem Solving: Analysis, Research, and Writing, pp. 22-23, West Publishing Co., 3d edition. 1978.

The preponderance of the preceding is only in the text of the judgment, which is directly focused on the facts on which the judgment is about, and as for the accidental judgments contained in the context of the decision, they are only additional.

In short, the Saudi judiciary accepts precedents, both in the courts of the general judiciary and the judiciary of the Board of Grievances, and there are recent rulings in the judiciary of the latter where the judges invoked judicial precedents and recorded them as the primary reasons for their rulings.[492]

2. Indicative or exemplary precedents

Indicative precedents occur when non-binding judgments are issued in cases decided by lower courts or when judgments issued in them were finalized without appeal due to the lapse of the legal period, or ended in conciliation, or ended by not appealing the first-instance judgment. Also, they occur when there is no objection to the appealed judgment or issued by parallel courts such as the administrative courts for the general judiciary or the courts of the general judiciary for the judiciary of the Board of Grievances.

These precedents are used by a judge, although he is not obligated by them, because their judgment came out of conviction, and the judge did not utilize it as a binding procedure. At the same time, the binding judicial precedents represent judgments that acquired their definitive status.[493]

3. The authority of judicial precedents in comparative legal schools

Legal schools vary in their adoption of judicial precedents/ Followers of the Anglo-Saxon school adheres to judicial precedents, and American, British, Australian, and Indian laws reflect

[492] See: Ruling of the Board of Grievances No. 63/d/1a/4,1427AH, corroborated by the Audit Department of Judgment No. 431/t/6, 1428 AH.
[493] See: Introduction of the Saudi Minister of Justice, previous reference.

this, while the Latin school for the most part does not adhere to judicial precedents, and so French, Belgian, Italian, and Egyptian law do not reflect a concern for judicial precedents.[494]

The task of the judge in the Latin legal school is limited to applying the law in the cases presented to him; he simply searches for the appropriate legal text and applies it to the issue in dispute. If he does not find an appropriate text in the law, he strives to find a solution. The effect of his judgment is limited to the case at hand and does not extend to any other case, even one similar to it, and his judgment does not bind any other court, even if it is inferior to the court from which the judgment was issued.

French law stipulated this principle where it prohibited judges from setting a general principle to be applied in similar cases. This tendency was justified by the necessity of preserving the principle of separation of powers so that the judiciary is not allowed to interfere in the jurisdiction of the legislative authority. However, the Latin school does not completely neglect judicial precedents, which it considers an explanatory source for the rules of law so that a judge must be familiar with previous rulings and is guided by them when he does not find an applicable legal base in considering the cases before him.

The judiciary in the Anglo-Saxon school, such as English law, and those who follow it is the source of the judicial precedent; this judgment is binding within certain limits for all courts of the same rank as the court that issued it, as well as for all courts of lower rank.

Judgments issued by the Court of Appeal, for example, are considered legal precedents that are binding on all English courts of appeal, including the Court of Appeal that issued it and also the courts of a lower degree thereof. But this judgment does not bind the higher court such as the House of Lords, the supreme judicial body in United Kingdom, and therefore the judge is

[494] See: Al-Khanin, Abdullah bin Muhammad bin Saad, Tasif Al-Qadis, I.D., p. 441 and beyond.

bound when he decides any dispute before him to search for precedents issued for such cases; thus, the judge can derive legal rules to be applied in the case before him.[495]

Judicial precedents are considered in all legal schools throughout in the world, Latin, Anglo-Saxon, Islamic, but these schools differ on the extent of authoritativeness or obligation these precedents have. Some judges consider them for reference and guidance but view them as non-obligatory, such as the Latin school. Others consider them binding and an official source for judges' rulings, such as the Anglo-Saxon school. The Islamic school and its applications in Saudi Arabia can be considered moderate in taking and obligating judicial precedents

When these precedents comprise a judicial principle or are issued by the Supreme Court, they are considered binding on the judges, who have to follow them, unless the Supreme Court amends its jurisprudence in this regard, in which case it is sufficient for judges to consult them. If the rulings of the Saudi Courts of Appeal began to constitute a series of restrictions on judges in courts of the lowest degree, it is difficult, in this case as well, for them to ignore its content when issuing judgments in similar cases, for fear of having their rulings reversed unless they justify the reasons for not following these judicial precedents with acceptable justifications.

However, jurisprudence and legislation have both developed, so that the Anglo-Saxon school has begun to use some written legislation in addition to judicial precedents, and the Latin school has begun to rely to some extent on judicial precedents.[496]

Thus, judicial precedents in the Anglo-Saxon legal school constitute a kind of legal argument that must be acted upon, and all lower courts are obliged to follow their judgments in

[495] Atallah, Barham Muhammad, a mandatory rule of judicial precedent and its decline in modern English law, Journal of Law for Legal and Economic Research, Faculty of Law, University of Alexandria, p.139, 1970.
[496] As is the case in the British Companies Law of 1985 and its amendments for the year 1989 AD and the Bankruptcy Law of 1986 AD, and also some laws of countries belonging to the Latin family began to be strict in allowing judges to deviate from precedents or judicial principles, stipulating that this be done with the approval of the Supreme Court or something equivalent to it.

similar cases. In the Latin legal school, judicial precedents do not have the same authority. The judicial precedents and principles and the customary practices in the Saudi application of the provisions of Sharia constitute a middle position between the Anglo-Saxon and Latin legal schools, where judicial principles are followed and adhered to, along with other judicial precedents issued by the courts of appeal, and it is difficult for the judge to neglect its content.

Therefore, from a practical point of view, the lower courts respect the judicial precedents of the higher courts and do not want to contradict them, for two reasons:

1. The role of the higher courts is to monitor the courts' application of legal rules, so the courts are keen on seeing that their rulings conform to what has been established from previous court districts in order to avoid reversal of their rulings.

The judges of the higher courts are usually those with a higher level of education and more experience in rulings and applying them to the facts; thus, it is most likely their rulings are correct.[497]

4.2.3.3. The importance and benefits of judicial precedents

The importance of judicial precedents is that it enables judges to benefit from the rulings of their predecessors, to be educated by them, to base their rulings on them,[498] to use them in the performance of their duties. The function of judicial precedents is as follows:

A. Judges base their rulings upon judicial precedents

When the judge issues a ruling for a new matter about which no one else has issued a ruling before, his new ruling will become a judicial precedent, thus, future cases dealing with the

[497] Al-Asri, Abd al-Salam, nazariat al'akhdh bima jaraa bih aleimla, previous reference, p. 135, 136, Al-Deghaither, Abdulaziz, authoritative case law, research published in the Journal of Justice No. (34) for the year 2017, pp. 178-180.
[498] Al-Sheik, Muhammad bin Ibrahim, Fatwas and Letters of the Sheikh, 12/333.

same matter will rely on this judicial precedent, as long as it is reasonable.[499] The jurisprudence is based on this precedent, which has priority over independent reasoning according to personal opinion.

B. Gain procedural guidance through judicial precedents

There are certain procedures that the judge follows while resolving the disputes before him, according to which decisions are made in procedural law. In some cases, procedural issues have not been addressed by the jurists or the law, in which case the judge strives to establish some procedures during his consideration and conduct of the case. These procedural precedents will act as guides in subsequent similar cases and judicial procedures, given that the original judge used a procedure that proved effective.[500] Judicial precedents have many benefits, including:

- Facilitating the judge's work: the procedural precedents help him process emerging issues, making it easier for him to settle the dispute before him because he finds that the judges who preceded him had found an effective way to solve the case, which saves the judge time and effort.
- Enriching judicial jurisprudence: judicial precedents show the way for jurists and judges with regard to the handling of issues for which there is no direct legal text. Precedents provide mutual jurisprudential and judicial enrichment. The judge and others interested in judicial affairs (e.g., law students and law professors) benefit from the jurists' analysis of these rulings, just as all those interested in the judicial affairs, such as students of Sharia and law colleges, lawyers, and parties to cases, benefit from it.

[499]Al-Khanin, tawsif al'aqdiati; I.D., p. 442.
[500] Al-Khenin, Judicial Cases, I.D., p. 11.

- Judicial precedents contribute to unifying the standardization of rulings in similar cases and limiting the wide discretionary power of judges.
- They contribute to the stability of the work of the courts and their regularity in following a certain rule in some cases.
- Applying the same precedent in similar cases will achieve equality between the parties in all comparable cases before the courts, so the rulings on similar cases will be the same.
- Commitment to following judicial precedents contributes to knowing how to resolve future disputes in advance and helps litigants and their lawyers know the probable direction of the case from the outset.
- The use of stable rules and processes for adjudicating cases saves time and effort for those concerned with judicial affairs.
- Benefiting from the experiences and expertise of former judges who have reached a high level in jurisprudential knowledge inspires confidence among the parties to the case and the general public. It leads to respect of judges in lower courts from the more experienced judges in higher courts, so that their rulings are less subject to cassation.

4.2.3.4. The role of notation of judgments and judicial precedents in limiting the discretionary power of the Saudi judge

Recording and publishing judicial precedents and rulings contribute to limiting the discretionary authority of Saudi judges in the Kingdom, as these judicial precedents and principles represent parameters for judges when ruling in similar cases. Whether the judge searches for these precedents himself, or the litigants or their lawyers do, they necessarily influence the judge's conviction and rulings and therefore significantly influence him. The judge

cannot issue a ruling in an incident in violation of the judicial principles previously issued by the Supreme Court, because such a ruling would be overturned by the higher court.

The highest judicial bodies in the Saudi Arabia, which have now been replaced by the Supreme Court, have over the years enunciated many principles regarding the penalty and the liquidated damages clauses, including that the contractual conditions are valid unless they violate a legal text or rule.[501] This applies to conditions between the two parties; if they do not contradict Sharia, then they are respected, and no one has the right to invalidate or specify them except for the parties who concluded them.[502] Thus, if there is a liquidated damages clause between the two parties that does not contradict the law, it is respected, and no one can refuse or specify it except for the one who concluded it.[503] The principles represent limitations on the judge's discretionary authority, so a judge must affirm that his handling of cases, including a liquidated damages clause, is consistent with these judicial precedents.

4.3. Issuing scientific jurisprudence and court journals to enrich jurisprudence and enhance transparency

Developing judges' knowledge of jurisprudence issues involves being informed about research and comparative rulings in various legal schools through what is published in journals that deal with legal and judicial affairs. This helps them avoid the kind of broad discretion that is not based on legal grounds. Also, looking at the comparative judicial and jurisprudence trends regarding the provisions of the liquidated damages clause contributes to the Saudi judges adopting approaches put forward by legal schools that comply with the provisions of Sharia.

[501] Principle No. 53, I.D.
[502] Principle No. 54, I.D.
[503] Principle No. 55, I.D.

Many refereed scientific journals have been issued in the Kingdom that are concerned with jurisprudence and judicial matters.[504] Among them are:

4.3.1. *Al-Adl Journal* (*The Justice Journal*)

This is a refereed scientific quarterly journal issued by the Saudi Ministry of Justice and concerned with jurisprudence and judicial affairs.[505] It aims to:

- Disseminate Islamic jurisprudence and contribute to the revitalization of jurisprudence in the field of jurisprudence and the judiciary.
- Enrich judicial work with research, studies, and information that helps judges in performing his work, raises their awareness, and increase scientific output.
- Develop the documentation tools in courts and notaries and have legal template forms drove from Sharia.
- Enhance the judiciary's methods and procedures.
- Strengthen relations with judicial authorities in the Arab and Islamic countries by publishing research and studies for the members of the judiciary in those countries in the fields of general and Islamic jurisprudence.
- Promote the level of jurisprudence and judicial awareness among Saudi society through media communication and answering inquiries of a public nature.

4.3.2. *Journal of the Board of Grievances*

[504] *See*: Judicial Principle No. 59 of the Supreme Judicial Council Permanent Committee (4/320) 5/8/1421 AH.
[505] *See*: https://adlm.moj.gov.sa.

This is a semiannual scientific journal concerned with jurisprudence, law, and administrative judiciary that is issued by the Board of Grievances.[506] This journal aims at:

- Encouraging scientific, jurisprudence, and legal research dedicated to solving problems related to judicial issues.
- Making significant contributions to enriching jurisprudence and legal thought through the dissemination of legal rules, jurisprudential opinions, and distinguished judicial jurisprudence.
- Contributing to the development of laws through distinguished scholarship by legal specialists who study and analyze judicial rulings.
- Establishing legal communication and dialogue between lawyers, juries, and judges interested in judicial affairs, which creates a positive interaction that enriches the judicial field.
- Creating a sound practical environment for the dissemination of scholars' research and ideas in jurisprudence.
- Nurturing scientific and legal ideas that are based on comparison and originality.
- Supporting national loyalty and preserving national values by finding legal and practical ideas that serve this purpose.
- Disseminating awareness of human rights and upholding the values of justice that Islamic Sharia is based on.
- Addressing contemporary humanitarian issues within the framework of Sharia and Saudi and international law.

[506] *See*: https://www.bog.gov.sa/BogMagazine/Pages/default.aspx.

- Reporting and analyzing new developments and publications in the field of law, human rights, and related studies through introducing books, recent theses, and other research presented at conferences and in scientific symposiums.
- Working to strengthen relations with international judicial and human rights authorities by publishing the research of specialists from throughout the world.
- Publishing significant judicial rulings locally and internationally in accordance with the jurisdictions of the Board of Grievances.

4.3.3. *Judicial Journal*[507]

This is a refereed scientific journal that publishes contemporary judicial research and studies issued by the Saudi Ministry of Justice. This journal aims to:

- Enrich the judicial content and benefit from its applied aspects.
- Provide judicial practitioners with knowledge that helps in upgrading their professional performance to face practical challenges and modern topics.
- Strengthen the relationship between judges and the academic study of law.
- Present topics, theses, and unique judicial experiences that will enhance the developing field of administrative law.

4.3.4. *The Judiciary Journal*[508]

This is a refereed journal issued by the Judicial Scientific Society at Imam Muhammad bin Saud Islamic University and located at the Higher Judicial Institute. It strives to achieve

[507] See: https://adlm.moj.gov.sa/alqadaeya
[508] See: https://qadha.org.sa/ar/books

excellence in providing applied scientific research in the judicial fields through its various activities and projects, including:

- Following emerging issues and publishing original research in Saudi jurisprudence.
- Working on developing jurisprudence by publishing research in jurisprudence and the law so as to benefit judges, lawyers, and other judicial professionals and others interested in law.
- Presenting studies in the field of Islamic principles and rules, as well as their applications.
- Studying contemporary tort law.
- Facilitating communication and coordination among judges, lawyers, and researchers interested in jurisprudence so as to deepen their knowledge of Saudi jurisprudence.

Thus, authorities concerned with the judiciary in the Kingdom have issued a number of journals concerned with raising awareness of the importance of the judiciary, jurisprudence, and its role in achieving sustainable development in society. In addition, these journals have linked the legal system with Islamic law, and with local and international judicial trends on many issues, including the discretionary power of judges in general and with regard to the consideration of the liquidated damages agreement in particular.

I believe that the publication of scholarly legal journals indirectly contributes to limiting judges' wide discretionary authority when considering cases of the liquidated damages clause. This is because it will be difficult for the judge to ignore the published research, opinions, and commentary in these journals related to the clause, especially when the authors have long experience in the judicial and legal fields. This affects the judge's conviction and view on legal matters, and raises his legal knowledge and awareness.

It might also be appropriate to oblige the Saudi judge, upon appointment and promotion, to take professional tests that include questions whose answers reflect the judge's knowledge and follow up on what is published in refereed scientific journals related to Sharia law, and the workings of the judiciary, as this deepens his knowledge about appropriate responses to emerging issues in practice that are the subject of jurisprudential and judicial dispute. A key example is the subject of the liquidated damages clause. In addition to the current state where Saudi precedents are more widely known abroad, along with the spread of its applications and judicial precedents from other countries in the Kingdom, studies of comparative legal systems take on increasing importance through comparative.

4.4. Documenting contracts that contain the liquidated damages clause to make them enforceable without the need for a court ruling

Relying on documented contracts contributes to the avoidance of resorting to substantive justice and allows a direct line to the enforcement judiciary in the event of a dispute. This raises the question of how to deal with the liquidated damages clause in these contracts.

There are many kinds of civil, commercial, labor, and administrative contracts, including the contract of sale, lease, contracting, work, supply, subsistence, and insurance, and others, some of which include a liquidated damages clause or what is called the penalty condition. This condition can be noted in different formulations; however, its parties may neglect documenting it according to what is stipulated in the laws of execution or authentication in the Kingdom.

Saudi law singles out an executive judge with the power of the judicial forced execution, but this execution is conditioned on the existence of a document that enables the executive judge to issue an executive order for the agreed contractual obligations. This is called an execution document; it was limited in previous Saudi laws to rulings and decisions issued by judicial and

quasi-judicial authorities. However, the Saudi Executive Law of 2012[509] expanded the approval of executive judges authority to include, in addition to judgments and rulings, documents such as contractual agreements involving commercial paper, reconciliation minutes, contracts, and even ordinary documents recognized by a debtor or notarized, which makes the parties dispense with resorting to substantive litigation.

They can directly resort to the executive judiciary to demand the execution of what they agreed upon and documented,[510] and this opens a wide scope for the liquidated damages clause in contracts, which provides appropriate compensation if any of the parties breaches his contractual obligation. Thus, the judge's discretion is limited or non-existent, which bars him from interfering in a reassessing of the amount of the compensation agreed upon again; his role is limited to verifying the existence of the necessary conditions required in the executive bond stipulated by law, as long as it does not violate the provisions of Sharia or a Saudi laws, together with ensuring that the right is established as part of the debtor's liability and that this right is limited in amount and is due.

Thus, the parties do not need substantive judicial pleading, and the value of the liquidated damages clause in the contract is not subject to examination by the judge, except within a narrow scope.

Article 3 of the Saudi Executive law stipulates the competence of the executive judge to adjudicate execution disputes, regardless of their value. Following the provisions of the summary judiciary, and Article 3 paragraph 1 of the Executive Regulations of the Saudi Executive law

[509] Issued by Royal Decree No. M/53 dated 8/13/1433 AH.

[510] In the implementation of the execution law and its executive regulations, the Ministry of Justice announced that the lease contracts registered in the "Ejar" network are considered an executive bond; this enables the beneficiary to submit a request for payment of a due payment or a request to vacate the property, based on the statutory conditions, directly with the Execution Court, without the need to file a case in the General Court. About 87,000 contracts have been documented.

indicates that every dispute is related to the verification of the validity of the executive document and is within the jurisdiction of the executive judge, such as the claim of forging a bond or its invalidity due to a defect in consent or that the person that the case is filed against is not a party to it, or he denies signing it. Another instance would entail disputes that are related to the payment of the debt or its fulfillment. Article 3 paragraph 3 stipulates that if the enforcer pays against him with payment, release, reconciliation, set-off, assignment, or postponement, the executive document's issuance lies within the executive judge's jurisdiction. The burden of proof falls on whoever claims that the executive document is invalid.

On the other hand, substantive disputes that arise due to the subject matter of the rights contained in the executive document are within the jurisdiction of the subject judge, per Article 3 paragraph 6 of the Executive Regulations of the Saudi Execution Law. This states that every dispute related to the subject matter of the rights is within the jurisdiction of the subject judge, such as the dispute related to a breach of the two parties to the contract, or of one of them, of their obligations contained in the contract, such as contracting and supply contracts.

However, the substantive dispute that arises because of the relationship under which the executive document was issued, or because of the origin of the rights, does not stop executive documents unless a decision is issued by a court that is considering the case to stop the executive action. This reinforces the importance of documenting contracts that include the liquidated damages clause. That is because disputes related to the subject matter of the rights such as a breach by one of the contracting parties of their contractual obligations does not entail a stay of execution except based on a decision issued by the subject judge to stop the execution procedures.

This ensures that rights holders have their rights fulfilled promptly at the same time it limits the discretionary power of the judge in examining contractual terms, including the liquidated damages agreement.

The Saudi Ministry of Justice has created an electronic platform, named "Nafith System"[511]" that enables stakeholders to issue and manage electronic executive bonds and organize them with high efficiency, so that the parties' rights to commercial transactions are safeguarded. Another goal is to keep them aligned with the digital transformation plan of the Kingdom's Vision to enable e-government and improve the quality of electronic contracts and commercial transactions along with enhancing transparency and electronic judicial execution.[512]

This direct electronic link between the executive courts and the Ministry of Justice facilitates the executive procedures within the administrative courts and links the electronic executive bonds through the unified national access law. Such a step increases reliability in the creation of electronic executive bonds issued in accordance with Saudi laws and limits the discretionary power of judges if a dispute is presented before them.

This constitutes a qualitative leap in facilitating access to justice and speedy settlement of disputes, in order to achieve the main objective of developing the judiciary, so that it is a "fair and efficient judiciary," in a way that ensures an effective contribution to enhancing the competitiveness of the Saudi judiciary on the international level. This system supports efforts to provide an attractive environment for foreign investment in the Kingdom, by enhancing the confidence of foreign investors in an effective litigation mechanism that ensures simplified procedures and a speedy settlement of disputes as well as anticipation of the nature of judgments issued in cases in dispute.

[511] See: https://nafith.sa
[512] The platform supports notarization.

The contracts that are documented and include the liquidated damages clause, other clauses, and accompanying information become fixed and not subject to denial or challenge in their essential clauses. The documentation of the contract also entails it being an agreement for its parties and others, as it shows the elements of every agreement concluded between two or more persons and guarantees its validity before the law. Also, the dispute between the contracting parties is settled in a way that explains to each person his rights and his duties toward the other. The documented contract becomes an "executive document," and none of the parties can deny his signature on it nor his lack of knowledge of its content.

Many individuals, companies, and institutions conclude some contracts in the civil or commercial fields, and they are included in the terms of liquidated damages. But they can be ignorant or neglectful of the importance of documenting such conditions so that they are considered executive bonds, enabling the creditor to demand their execution directly and without being subject to the discretion of a subject judge.

Those concerned can document their contracts themselves or via lawyers. To that effect, the Saudi Ministry of Justice has initiated the notary service project, which aims to facilitate documentation procedures for companies and individuals. Toward that end, a number of lawyers have been licensed as accredited notaries; contracts and declarations issued by notaries are considered executive bonds that can be submitted by their owners directly to the Executive Court to request their carrying out according to Article 9 of the Saudi Execution Law,[513] which stipulated that compulsory execution may not be permitted except with an executive deed of a right with a specified and due amount. Among the executive bonds are contracts, notarized papers, accredited papers issued in a foreign country, and regular papers whose content is

[513] Issued by Royal Decree No. M/53 dated 8/13/1433 AH.

acknowledged in whole or in part; its parties, contracts, and other papers have the force of a deed of execution under the law.

In order for the notarized contract to gain the force of judicial rulings, in terms of recognizing and executing its content, the existence of the contract agreed upon between the parties must be undisputed. If the contract is dependent on a conditioned clause that has not yet been fulfilled, if it is a temporary obligation that is not final, if it is a contingent clause, then it is not certain, and it is not permissible to execute based on it. However, the mere existence of the executive document or the documented contract is a presumption of the realization of the value of the contractual condition; that it includes the creditor is not required to prove that his fixed clause in the documented contract is realized. Rather, the one who is charged with proof is the other part who refused to apply, and the latter will not be able to prove that except by filing another lawsuit before a trial judge and not before the executive judge.

However, a documented contract that includes a right that is dependent on a condition may not be executed unless the condition is fulfilled. Therefore, before documenting it, the parties to the contract must ensure that the amount of the clause of the liquidated damages is fixed in amount and performance at the time of its claim. Also, the breach that results in requesting compensation is clear and specific so that the executive judge can mandate the execution of the contract without having to resort to the subject judge to decide on the dispute that may arise due to non-performance of the contractual obligation.

The significance of documenting contracts that include the liquidated damages clause entails that documenting gives them the status of an executive bond, which they are executed directly and promptly. It also encourages the parties to the contract to resort to them and raises confidence in execution without going through the stages of a substantive court. In this regard,

Article 15 of the Saudi Authentication Law states[514] that it is the responsibility of the notary to document actions and contracts on trademarks, patents, copyrights, and contracts on movable assets. Article 41 of the same law emphasized that documents issued in accordance with the provisions of this law are considered proof and executive documents in the commitment they contain. Their content must be acted upon before the courts without additional evidence and may not be challenged.

Moreover, documents issued in accordance with the law should not be canceled except by a judicial ruling and based on their violation of the requirements of Sharia or legal principles, or their falsification, after a pleading that completed its legal procedures. These legal texts support the possibility of agreeing on the liquidated damages agreement in contracts and documenting it, and then demanding its execution in the event of nonfulfillment of the obligation. This demand is made through the execution judiciary and without the need to file a case before the substantive judiciary, where all decisions of the executive judge are final, and all his provisions are subject to executive disputes. When the plaintiff claimed for liquidated damages clause amount in the Saudi Execution Court trial, the defendant responded with an insolvency declaration request. Hence, if the execution judge accepted the defendant's request, the execution court decision will be subject to review by the court of appeal.[515]

The importance of documenting the contract is highlighted in preserving the rights and obligations between the contracting parties to the contract and reducing conflict between them. Furthermore, they must be bound by what they agreed upon in the event of resorting to the executive judiciary. Therefore, it is important that the contract be written carefully and precisely

[514] Issued by Royal Decree No. (M/164) dated 11/19/1441 AH.
[515] See: Article 6 of the Saudi Execution Law.

so that it exactly reflects the expressed desires of the parties, especially concerning the condition of liquidated damages resulting from a breach of the contract by any party.

Documented contracts are considered an executive document, on the basis of which an executive order is issued by the execution judge to be executed immediately, in accordance with the procedures of the executive law and executive regulations. This procedure saves the parties from being subject to the discretionary authority of the subject judge in examining the value of the liquidated damages clause.[516]

Within the scope of the documented work contract subject to the Saudi Labor Law,[517] the law stipulates the possibility of predetermining the agreed compensation between the parties for an indefinite period. If one of them decides not to abide by the period specified for notifying the other party, Article 76 stipulates that "[i]f the party who terminated the contract for an indefinite period does not observe the period specified for the notice in accordance with Article 75 of this law, he shall pay the other party for the notice period an amount equal to the wages of the worker for the same period, unless the two parties agree on more than that."[518] Therefore, the two parties can agree in advance on a compensation to be applied in the event that either of them decides not to continue executing the contract, as stipulated in Article 77 of the same law.[519] This article stipulates that unless the contract includes specific compensation in return for its termination by one of the parties for an unlawful reason, the party affected by the termination of the contract is entitled to the compensation specified by law.

[516] The Ministry of Justice, Municipal Affairs and Housing, in cooperation with a number of other government agencies, launched the "e-rent network", which provides many electronic services to the parties to the leasing process, such as documenting contracts and electronic payment, while obligating all real estate brokers in all cities of the Kingdom to document a unified lease contract in the network -Electronic Rental Services, which is the approved contract as an executive document.
[517] Labor Law issued by Royal Decree No. M/51, 8/23/1426 AH.
[518] Amended by Royal Decree No. M/46, 6/5/1436 AH.
[519] Amended by Royal Decree No. M/46, 6/5/1436 AH.

This text allows the parties of the contract to determine the amount of compensation in disagreement to what is stipulated in the law, so that this liquidated damages clause will not be subject to the judge's discretionary authority to amend or increase it or to verify the existence of the damages. Rather, the executive judge will order its execution, considering that work contracts are documented contracts and constitute an executive document that does not fall within the authority of the subject judge.

In the field of administrative contracts, those to which the government or the administration is a party, such as contracting and supply contracts and service contracts with ongoing execution, like maintenance, cleaning, operation, and catering contracts, the government[520] competition and procurement law regulating them imposes delay-of-service fines on the contractor or contractor who delays in the execution of works and services and their delivery by the agreed-upon date. Article 72 of this law stipulates that if the contractor delays in executing the contract beyond the specified date, he will be subject to a delay fine that will not exceed 6 percent of the value of the supply contract and shall not exceed 20 percent of the amount of other contracts. These percentages may be increased with the prior approval of the relevant Minister, provided that this increase is explained to the competitors before submitting their offers. Article 73 also stipulates that if the contractor in the service contracts of ongoing execution fails to execute his obligation, a fine not exceeding 20 percent of the contract value will be imposed, together with deduction of the value of the unexecuted works. This percentage may be increased with the prior approval of the relevant minister, provided that this increase is explained to the competitors before submitting their bids. Article 74 states that it is possible to be exempt from the fine in some cases specified by the law and its executive regulations.

[520] The Governmental Competition and Procurement Law promulgated by Royal Decree No.: M/128, 11/13/1440 AH and the Executive Regulations issued by Ministry of Finance Resolution No. (3479) 11/8/1441 AH.

The penalty for the delay is imposed by the administration after the completion of the contract execution date when there is a delay in the delivery of works beyond the date specified for delivery or the date specified for the supply. Therefore, the administrative body automatically has the right to impose a delay fine on the contractor, even if it did not suffer any damages. Therefore, the delay fine is not a compensatory fine imposed to compensate for damages incurred, but rather is a punitive fine imposed on the contractor because he breached his contractual obligations and did not deliver the works or deliver the goods on time.[521].The presence and absence of the works to be delivered on the date specified in the contract.

The mere delay, even if it was slight, from the specified date for delivery or the termination of work justifies imposing the fine. For this reason, one of the administrative authorities imposed a fine on a company, because it was two days late in delivering the work specified in the contract,[522] and the judiciary supported it in that. One of the objectives of delay fines in administrative contracts is to fulfill the public interest of the administrative facility, by forcing the contractor to fulfill his commitment on the specified date more than it intends to compensate for the damages incurred by said delay.

Therefore, there are many exemptions on the part of the administration from the application of this fine, given compensation in its general sense is not its main purpose. Furthermore, administrative contracts in the Kingdom are considered to be compliance contracts where the contractor's freedom is restricted by the provisions of the law, and he cannot negotiate or discuss with the administrative authority to modify the percentage of the fine in public works

[521] Al-Hadithi, Ibrahim, Fines in the Saudi Government Competition and Procurement Law, Journal of the College of Law and Political Science, King Saud University, p. 3 and beyond, 2011.
[522] Judgment No. 72/T//1 of 1408 in Case No. 1/1464/S of 1404 AH.

contracts, for example, from 10 to 5 percent, but rather must accept this percentage as it is in the contract.[523]

The Board of Grievances, the administrative judiciary in the Kingdom, differentiated between the delay fine and the penalty clause and concluded that the delay fine is not considered compensation.[524] The board refused the request of the administrative authority to rule in imposing a delay fine on one of its contractors, seeing as the administration can do so by itself. The Board of Grievances, in the lawsuit filed by a contractor against the administration claiming some sum, refused to respond to the administration's request to impose a delay fine on the contractor because the administration had the right to impose penalties, including the imposition of delay fines on the contractor without the need to resort to the judiciary and therefore its request deserved to be rejected,[525] At the same time, the contractor may not demand a decrease in the value of the fine stipulated in the contract because it exceeds the value of the damages resulting from his delay.

The Executive Law was issued by the Board of Grievances recently in 2019[526] and regulates how to execute judgments, decisions, and contracts to which the administration is a party. Article 4 stipulates that an imposition of a fine or other penalty may only be made with an executive document for a specified due amount. It also identified the executive bonds covered by the provisions of the law and mentioned the contracts to which the administration is a party and the documents it issues if they are documented.

[523] Al-Hadithi, Ibrahim, I.D., p. 12.
[524] See: Resolution No. 24/D/2, Set of Shariah and Regulatory Principles that were decided by the Bureau's commissions and committees in the period from, p. 235, 1399 AH.
[525] Judgment No.: 87\T\1, 1409AH in Case No. 54\1\s, 1404 AH.
[526] the execution law was issued before the Board of Grievances by virtue of Royal Decree No. M/15, 27/1/1443 AH.

In summary, codifying Islamic jurisprudence, writing and publishing judicial rulings, expanding the issuance of scholarly journals concerned with jurisprudence, and working on documenting and verifying contracts that contain the liquidated damages clause all contribute directly or indirectly to limiting Saudi judges' discretionary authority. They also further executing the liquidated damages clause as agreed upon by the parties in the contract.

Chapter Five: Conclusion

Throughout this research, I have reviewed the discretionary authority of the Saudi judge when deciding on the matter of the liquidated damages clause in light of the provisions of Sharia, which is the applicable law in the Kingdom of Saudi Arabia. The sources of Sharia are divided in terms of their applicability into primary sources, the Qur'an, Sunnah, Consensus, and Analogy, and secondary sources. On the latter, which include the words of the Companion of Mohammad, *Istiṣhāb*, *Istihsan,* Prior Legislation of Those Before Us, Blocking Pretexts, Absolute Interests, and Customs, there is disagreement on their applicability,

These sources of evidence are also divided into two types, of which the first is: transmitted sources or evidence that depend on the text or the transmitted action: namely, the Qur'an, the Sunnah, the Consensus, the words of the Companion, Previous Legislation, and Custom. The second type is mental sources or evidence that depends on the mindset of the jurist, his knowledge and opinion based on a text or a transmitted action from the prophet or his companions; they include Analogy, Absolute Interest, Blocking Pretexts, *Istiṣhāb,* and *Istihsan*. Furthermore, they can also be divided in terms of the strength of the evidence and their invocation into definitive evidence and presumptive evidence.

The judiciary in Saudi Arabia relies on the provisions of Sharia that are derived from the Qur'an, and the Sunnah in settling disputes, especially those related to contracts and their terms, including the liquidated damages clause.

The diversity and multiplicity of the sources of Sharia have led to differences in comprehending and interpreting their texts and meanings among the four schools of Islamic jurisprudence. This discrepancy was reflected in rulings by the Saudi judiciary, which is entrusted with applying the teachings of the different schools, causing judges to enjoy wide discretionary authority in assessing and ruling on the value of the liquidated damages clause.

Through the completion of these chapters, the study delivered several results and recommendations, as outlined below:

5.1. Results

1. The liquidated damages clause falls under the penalty clause in Islamic and Saudi jurisprudence. It is a clause that the International Islamic Fiqh Academy of the Organization of Islamic Cooperation has permitted to be applied in all financial contracts, except for those in which the obligation is debt, because, in this case, it is considered usury, which Sharia prohibits. The Council of Senior Scholars in Saudi Arabia issued a fatwa authorizing the liquidated damages clause when stipulated in contracts as a valid measure that must be taken into account unless there is a solid reason for breaching the contractual obligation, in which case the clause is suspended until the cause of the breach is lifted. Given how the liquidated damages clause may be used as a form of penalty clause, which is far from the requirements set by the Sharia, it must be judged based on justice and fairness between the parties and have a balance of a benefit that was missed and the damages that were caused. In this case, the judge rules based on the agreed

amount of the liquidated damages clause and according to the rules of just and equity derived from Islamic law, according to the suffered damages by the plaintiff and the gain he missed. The judge may seek experts' assistance to determine the actual damages amount.

2. The Saudi judiciary enforces the liquidated damages clause through a set of standards that are subject to the discretionary authority of the Saudi judge in cases where the debtor fails to fulfill his contractual duty and the second party demands its implementation. In civil and commercial contracts, the liquidated damages clause requires the issuance of a judicial ruling to go into effect in the event of a dispute between the parties of the contract. A late fine is applied in administrative arrangements, and the administration applies it to the contracting party without needing a court ruling.
3. The purpose of the liquidated damages clause in the contract is to limit the dispute regarding determination of the compensation that may arise from breaching the contractual obligations. It also gives the judge a baseline for compensation ruling. In the event of its contract documentation, the liquidated damages clause reduces recourse for the subject judge and spares the contracting parties from being subject to the judge's discretion when assessing the compensation sum. During the dispute procedure, it spares the stipulating party the burden of proving the damages sustained due to the breach of contractual obligation.
4. The field study conducted by this researcher on a sample of Saudi judges shows that there is a discrepancy in the rulings of the Saudi courts and in the position of the Saudi judges on the matter of the liquidated damages clause due to jurisprudential disagreements among Sharia jurists in this regard.

5. The judges' responses in this study confirmed that judges enjoy wide discretion when considering cases related to the liquidated damages clause. This study helps us understand the behavior of the Saudi judge and the methods of his work when applying the theoretical aspects of legal texts and jurisprudence rules to facts and practical issues related to the liquidated damages clause.
6. Sharia generally grants the judge wide discretionary authority in the judicial process, acceptable in past eras when most judges were diligent jurists in the provisions of Sharia and knowledgeable about even its smallest details. However, today the public interest requires restricting this authority with clear and specific guidelines that prevent the judge from ruling unjustly or following whims.
7. The issue of codifying the provisions of Islamic jurisprudence has been the subject of great controversy among Islamic jurisprudents since ancient times, both with regard to its permissibility and the obligation of the judge to rule on it. The current consensus is that codifying the provisions of Islamic jurisprudence in the form of legal articles makes it easier for judges to rule on the facts in dispute, and to limit judges' discretionary authority when considering issues like the liquidated damages clause. This is achieved through obligating the judge to apply the codified jurisprudential texts, thus removing confusion regarding the presumption of the text or the appropriateness of applying it to the issue in question. The codification of Islamic jurisprudence does not prevent the Saudi judge from using independent reasoning to derive rulings for the issues for which there is no text in the codified jurisprudence or when the codified texts are unclear or ambiguous about what the ruling should be. Additionally, codification prevents the judge from refusing to apply the relevant texts on the pretext that he has the right to

independent reasoning. This is because the codified articles that all judges have access to have been supervised by a group of highly qualified jurists, scholars, and specialized judges, which makes their work more compatible with legal rules and the public interests, as compared to the subjective reasoning of a single judge. Furthermore, the codification of Islamic jurisprudence makes it easier for the courts to apply the provisions of Sharia contained in these articles and reduces the possibility of too many variances in judicial rulings. It also helps the judge to find the legal rule applicable to the dispute easily. This provides an opportunity for stakeholders, lawyers, and others interested in judicial affairs to practice a kind of oversight of judges' applications of codified texts cases before them, including those matters related to the liquidated damages clause. They can do so instead of referring to the sources of various textbooks and references of Islamic jurisprudence. Therefore, codification prompts judges to limit their discretionary authority and to derive their judgments in a way that contributes to achieving justice among the disputants. This increases confidence in the Saudi judicial system, especially from foreign investors, who often fear the broad discretionary power of the Saudi judge in the absence of clearly written legal texts.

8. Failure to codify the provisions of Sharia leads to significant discrepancies in interpretation and application by some judges. As a result, judges have to refer to the references of the four schools of jurisprudence to search for rulings to be applied to the issues before them. This is because they are required to base their rulings on clear texts and jurisprudential rules that relate to the subject of the dispute.
9. There are two directions in the matter of the necessity of the existence of damages to entitle the amount of the liquidated damages clause. The first direction sees that the

clause amount is not justified if there are no damages to the plaintiff. However, the burden of proving this falls on the defendant because the existence of the clause means that damages are assumed, meaning the plaintiff is not required to prove them; thus, if the defendant claims that the plaintiff did not suffer any damages, the defendant has to prove that he did. The second direction sees that the liquidated damages clause is due, even if there are no damages. The mere agreement of the two directions on the clause and its amount in case of breach means that they recognize that the defendant's breach of his obligation causes damages that require the agreed-upon compensation, and the judge must rule accordingly.

10. Judicial precedents are recognized in all worldwide legal systems, Latin, Anglo-Saxon, and Islamic, among others. However, these legal systems differ on the extent to which these precedents are authoritative or obligatory for judges when issuing their rulings. Some consider precedents for reference and guidance, which are not obligatory, such as the Latin school, while others consider it obligatory and an official source for judges' rulings, such as the Anglo-Saxon legal system. The Islamic legal system, applied in the Kingdom of Saudi Arabia, takes an in-between position in obligating judicial precedents. The precedents that form a judicial principle or are issued by the Saudi Supreme Court are considered binding on judges who have to rule according to them unless the Supreme Court amends its jurisprudence in this regard. If the precedent is issued by a lower-degree court, then it is sufficient for a judge to review them only and there is no obligation to follow them. Also, the rulings of the Saudi Courts of Appeal constitute a kind of restrictions on judges in first-instance courts so that it is difficult for them to ignore its content when issuing rulings in similar cases. If they do so, they will fear having their

rulings repealed, which is why they have to justify the reasons for not following these judicial precedents.

11. The judicial principles issued by the Supreme Court in the Kingdom of Saudi Arabia are similar to those issued by the United States Supreme Court. However, the Saudi judicial law is a non-federal law, and it has a dual nature because there are two Supreme Courts, one for the general judiciary, and the other for the administrative judiciary, which specializes in cases where the state is a party, and all court circuits of each Supreme Court are bound by the precedents of their Supreme Court.
12. The Saudi judiciary follows precedents, whether in the courts of the general judiciary, or the judiciary of the Board of Grievances. There are recent rulings of the judiciary of the Board of Grievances where the judges invoked judicial precedents and pointed to them as the main reason for their rulings. The new Saudi Judicial Law emphasized the tendency to adopt the principles and judicial precedents issued by the Supreme Court and made them mandatory, so they are not amended, except by a decision of one of the circuit courts, whether the reversal of the principle is from the Supreme Court itself or from one of the appeals courts.
13. Among the benefits of judicial precedents is their contribution to the unification of reasoning in judicial rulings in similar cases and the limitation of the wide discretionary authority of judges. Also, there is more stability in the work of the courts and their regularity in following a certain rule in similar cases or issues. This helps ensure equality of treatment before the courts between litigants in the judgments issued. Moreover, judicial precedents help judges know how to resolve future disputes in advance, while guiding litigants and lawyers to know what the ruling is likely heading toward from the

beginning of the case. This in turn saves time and effort for those concerned with judicial affairs, facilitating the work of the judge and enriching jurisprudence in general.

14. Notation of judicial rulings contributes to clarifying what has been settled on in previous rulings in a manner that inspires confidence in the Saudi judiciary and clarifies to interested parties inside and outside the Kingdom, especially foreign investors, the way it builds on the texts of Sharia. The notation of judgments creates a form of self-regulation over the judge's work, which usually makes him eager to review his judgments before issuing, revising, and mentioning the proper reasoning for them, knowing that his ruling will be read by many others, and not contradicting previous published rulings. The notation and publication of judicial rulings also enhances the internal control in the judicial system, which is carried out through the various levels of litigation, such as appeals and the Supreme Court. Consequently, published judgments, precedents, and judicial principles from higher courts serve to limit lower-court judge's discretionary authority, which ensures that he is guided by rulings and other judicial precedents when considering the cases before him. Furthermore, there is a kind of oversight about written and published rulings when many jurists study them and compare them with others, which results in benefitting judges through the creation of models for future rulings, including on the liquidated damages clause. In addition, notation of judicial rulings helps to spread doctrinal and judicial awareness among judicial circles and helps achieve the principle of judicial transparency. It also supports applied academic research while deepening the experience and knowledge of judges.
15. The Saudi judge has a broad discretionary authority in estimating the sum of the liquidated damages clause during his consideration of a dispute, authority he derives from

Sharia, which allows the judge considerable discretion in resolving the dispute before him, as long as his doing so does not conflict with the texts of the Qur'an and the Sunnah. Judges' rulings should also be guided by the jurisprudence rules in Sharia and the various schools of jurisprudence. So, the Saudi judge, when considering the dispute before him, uses a broad approach that allows him to search in the legal and jurisprudential texts to choose the appropriate solutions to a dispute, including liquidated damages clause.

16. Saudi Judges rely on jurisprudence rules in addition to other sources of Islamic law to provide reasons for their judicial rulings. This means that the Saudi judge has wide discretion in choosing the jurisprudential rule that is applicable to the dispute before him, despite the sometimes overwhelming challenge of being informed of all the jurisprudence rules spread in Islamic jurisprudence books, the presence of some codes of Islamic jurisprudence as compiled and annotated by some schools in one or more printed or online works, as is the case in the *Journal of Judicial Rulings* based on the Hanafi school and the *Journal of Legal Rulings* based on the Hanbali school.
17. Schools of jurisprudence in Sharia depend on deriving legal rulings from the Qur'an and the Sunnah in accordance with specific jurisprudential rules and principles. There are a number of reasons that led to differences among these schools, including semantic ones. There are words in Arabic that have several meanings, so they can be interpreted differently. Other reasons are related to whether or not the narration of the Sunnah transmitted from the Prophet Muhammad ﷺ have been verified and differences exist in understanding their meaning. Besides, there are reasons related to the deductive guidelines adopted by the jurists and the fundamental rules established for independent reasoning, The jurists differed in the fundamental sources from which subsidiary legal

rulings are derived from detailed evidence because of their difference in the dependency of those rules.

18. There are multiple interpretations of the jurisprudence rule by Saudi judges and sometimes different rulings for the same or similar facts. The Saudi judge enjoys wide discretion when considering the case before him in choosing the relevant texts or jurisprudential rules that he deems most suitable. Additionally, the position of the four Islamic schools of jurisprudence may differ regarding the adaptation of the incident or the issue at hand, such as in the case of the liquidated damages clause, and therefore the discretionary authority of the Saudi judge in this regard varies according to the school of jurisprudence that he applies or considers to be the most compelling evidence.
19. The liquidated damages clause is legally characterized in Islamic jurisprudence as a restricted condition associated with the contract, one which one of the contracting parties sets a legitimate interest.
20. It is well established in Islamic jurisprudence and the Saudi judiciary that the contract is binding and that its conditions are enforceable by its parties. However, some conditions, such as the liquidated damages clause, may initiate some problems during their execution. This requires resorting to the judiciary. Hence the judge's authority begins in assessing and interpreting what the parties to the contract were unable to express or define clearly. This means that it is difficult to rely on the rule of *pacta sunt servanda* (agreements must be kept) alone before the Saudi judiciary to restrict the judge's authority to control the amount of the agreement. That is because of the concept of predefined compensation. In this case, the liquidated damages between the parties should consider the rules of justice in Sharia. This means that if the clause amount is exaggerated

and the requested party proves it, the judge should rule to restore the contract balance. The purpose of his doing so is to avoid granting one of the parties gains that he does not deserve in accordance with the Islamic principle of the inadmissibility of enrichment without a legitimate reason and the principle of eliminating abuse of the right by the stronger party to the contract. Moreover, this is an application of the saying of the Prophet: "No damages shall be inflicted or reciprocated."

21. The Hanbali school of jurisprudence—the most applied by the Saudi judiciary—is considered the broadest of the four schools in correcting the contracts and their conditions, as it adopts the jurisprudential rule that "the basis of the contract is validity and permissibility unless it is forbidden in Sharia."
22. In the Saudi judicial application, the liquidated damages clause is valid in some contracts for one of the parties without the other, such as the case of contract construction. The condition is valid against the contractor not the employer. The same is true in a supply contract, where it is valid against the supplier and not the importer. This means that if the contractor or supplier does not fulfill what he is committed to, or delays in its execution, the other party may obligate him to pay what is stipulated in the liquidated damages clause; however, it is not permissible for the other party to the contract to demand that because that is considered usury, prohibited by Sharia.
23. The discretionary power of the Saudi judge with regard to judging the sum of the liquidated damages expands and narrows according to his view of the nature of the contract and the extent to which there are damages to the plaintiff. The Saudi judiciary monitors the sum of the liquidated damages clause; its amount may increase if the creditor proves that the damages incurred by him exceed its value, and the sum of the

clause may decrease if the debtor proves that the creditor did not suffer damages equivalent to that specified in the liquidated damages clause. The sum of the clause may be ruled as is, without an increase or decrease, if none of the parties to the contract dispute the fairness of the specified amount or if the judge finds that the value of the clause is fair and not excessive. This judicial approach is in line with the fatwa of the Council of Senior Scholars in Saudi Arabia, which authorizes the application of the liquidated damages clause and gives the judge the discretion to monitor its application in the event of a complaint by any of the parties to the contract.

24. Islamic jurisprudence and the Saudi judiciary subsume the liquidated damages clause within the scope of the penalty clause, unlike the situation in US and UK law, where a distinction is made between liquidated damages compensation, which may not be reduced or increased, as it is binding on the parties to the contract, and the penalty clause that can be modified.

25. The Saudi judiciary distinguishes between the liquidated damages clause in civil and commercial contracts and the delay fine in administrative contracts. It requires the verification of the incurred damages to rule with the clause in civil and commercial contracts, whereas damages are not required in relation to the entitlement of the specified delay fine.

26. Most comparative legislations allow the judiciary to monitor the amount of the liquidated damages and reestimate the compensation to be appropriate to the damages actual suffered by the plaintiff due to the breach of contractual obligations.

27. The cultural, social, religious, and scientific nature of each Saudi judge affects the nature of his judicial ruling when considering the liquidated damages clause. The lack of

codification of the provisions of Islamic jurisprudence, the weak notation of past judicial rulings, coupled with the limited number of validated contracts that have the status of an executive document have contributed to the expansion of the discretionary authority of the Saudi judge and have affected foreign investors' choice of Saudi law as applicable to their contracts with Saudi merchants. This latter fact is because of the lack of clarity in their provisions regarding the nature of the applicable Saudi law and the extent of the discretionary authority of the judge in its application.

28. It can be observed that many in the Saudi judiciary are hesitant about ruling for compensation for moral damages. The Saudi judge has a wide discretionary authority in estimating the amount of compensation for moral damages in the event that an agreement is not fulfilled. In the Kingdom, it is necessary to achieve fair and equal compensation for damages, regardless of the plaintiff's claim. That is why we can observe a scarcity of judgments for compensation for future damages in the Saudi judiciary.
29. The penalty clause has a threatening function, a compensatory function, and a third function that combines the two; it is noted that the Saudi judiciary agrees with the opinion that the threatening function of the liquidated damages clause has begun to diminish in comparison to the compensatory function. The clause's penalty function is achieved only when the value of the condition agreed is greater than the due compensation. In such cases, the clause serves its penalty function when the party has to pay in excess of the damages that were incurred as a result of breaching the original agreement. As for the compensatory function of the penalty clause, it is achieved when this clause is estimated at an amount equal to the amount of damages expected to occur because of such breaching.

5.2. Recommendations

1. Codifying the provisions of Islamic jurisprudence in the form of sequenced and arranged legal articles in general, and the provisions related to contracts and the conditions they contain, including the liquidated damages clause in particular, ensures that judges will apply them when considering disputes. It also and allows them to benefit from the legal wealth contained in the major schools of jurisprudence in Sharia while helping judges to select legal texts that are relevant to the present time and do not conflict with the peremptory provisions of Islamic law. Moreover, codification helps limit the wide authority of Saudi judges when considering contract issues, especially those related to the liquidated damages clause. To ensure the benefits of such codification, a group of highly qualified jurists, scholars, and specialized judges must supervise the preparation and review of this code, which guarantees the computability of their work more with Sharia rules and the public interest.
2. The importance of establishing a judicial principle or a legislative code becomes apparent when it comes to the main mechanism for how a judge exercises his discretion when dealing with a vague legal text or rule that requires interpretation or contradicts another rule or principle. The code helps him reach an appropriate solution to a conflict. Moreover, it allows the Supreme Court to monitor the extent of the judge's commitment to follow the guidelines that have been established to interpret a text or jurisprudential rule. This guarantees the highest degree of court supervision of the judge's use of his discretion in choosing appropriate jurisprudential rules for resolving the dispute. This involves gradual monitoring that varies according to the Sharia or selected legal solutions according to the degree to which the subject judge exercises his discretion. When there is

a clear text or a jurisprudential rule that is appropriate to apply to the dispute in question, the supervision of the highest court is strict on the necessity of applying the text. That contrasts with a case where the dispute resolution requires the judge's independent reasoning to choose an appropriate jurisprudential rule due to the ambiguity surrounding the alleged facts. In this case, the supervision of the higher court over the authority of the subject judge is less strict.

3. The parties to the contract should clearly formulate the function of the liquidated damages clause. Clearly stating its function, such as considering it a conciliatory agreement between the parties to the contract on the amount of compensation in the event of a breach of contractual obligations, limits the judge's authority to contemplate amending its value in a judicial dispute.
4. The obligation of a nominated the Saudi judge to pass a test upon his appointment or promotion means that he must be knowledgeable about what is published in specialized scientific journals on jurisprudence in Saudi laws and comparative law. He must know their positions on the judge's discretionary authority in general and when considering the terms of contracts, including the liquidated damages clause, in particular. This contributes to the judge's adoption of more just provisions, consistent with the international reality in which economic interests are intertwined. Among other things, this includes contracts that feature terms of an agreement between individuals and entities belonging to different countries.
5. Notating the judicial rulings and continuing to record and publish them, or posting on a website existing ones in judicial notations issued annually or on another regular basis and distributed to judges, ensures the deepening of their knowledge and limits their wide

discretionary authority when considering cases, including cases of the liquidated damages clause.

6. It is important to adhere to judicial precedents issued by higher courts, and that there be careful overview by the Saudi Supreme Court of judges who do not abide by judicial precedents by obligating judges to provide sufficient reasons to their rulings that are contrary to what was previously issued in judicial precedents.
7. There is a need for validated electronic contracts that are recognized as executive documents because they represent effective ways to limit the discretionary authority of judges when considering what the parties have agreed upon, including the liquidated damages clause.

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