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Editorial Board

Editor's Note

Welcome to the second issue of the Journal of Law in the Middle East by LexisNexis!

The Journal of Law in the Middle East by LexisNexis is an open-access and peer-reviewed academic journal dedicated to discussing the multitude of legal systems present in the Middle East, including Islamic Law, Common Law, and Civil Law. Our first issue was published in September 2021, and we are delighted to be continuing with the Journal this year.

We are very grateful for the numerous authors submitted their research for consideration in this year's edition of the Journal. After reviewing each of the submissions carefully, LexisNexis, along with our Editorial Board and Peer Reviewers, have selected the most compelling pieces for publication.

In this issue, we begin with an analysis of the interactions between modern arbitration laws and Islamic Sharia in Saudi Arabia. Then, a poignant overview is provided of the legal landscape of family businesses in the UAE, along with a creative suggested solution to resolve executive family succession.

The essays included in this issue span across a number of topics and jurisdictions. A discussion of National Human Rights Institutions in the UAE is followed by a critical review of the intentions of Saudi Arabian legislators in the drafting of subarticle 3(5) of the Saudi Arabian Anti-Cybercrime Law.

Lastly, we are proud to present the winning submission of the inaugural LexisNexis Middle East Student Essay Competition in partnership with Middlesex University Dubai. The submission evaluates the legal and ethical considerations of the application of artificial intelligence, with a focus on the Middle East.

At LexisNexis, we know that by providing free and unrestricted access to our Journal, we can contribute to the flourishment of the academic community in the Middle East and the creation of a more equitable knowledge system that is accessible to all.

We would like to extend our deepest gratitude to our Editorial Board, our authors, and our peer reviewers for their time and expertise, without which publication of this Journal would not be possible. We would also like to thank our thousands of readers for their interest and commitment to the scholarship presented by the Journal of Law in the Middle East.

As always, please do not hesitate to contact me should you have any questions about the Journal. Whether you would like to discuss an opportunity with the Editorial Board, a piece you would like to submit, or even the content of one of our published articles, I would be happy to connect with you.

Ellen McClure, Editor-in-Chief of the Journal of Law in the Middle East by LexisNexis

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Preserving the Local Culture While Modernising Arbitration in Saudi Arabia: A Blessing or a Curse?

Dr. Amer Tabbara, FCIArb

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Abstract

One of the cornerstones of the Saudi Arabia 2030 vision is to facilitate the flow of private investments in the Middle East. It is against this background that the Saudi Regulator has enacted new regulations with the principal aim to drive confidence in investment by providing investors with a modern framework for an out-court resolution of their disputes.

Even though the New Regulations are considered to be a great achievement for arbitration in Saudi Arabia, reference to Sharia within the New Regulations may constitute a barrier to the achievement of the proposed underlined goals and may raise some concerns for investors as to the predictability of the set of rules, both procedural and substantive that may apply to their dispute and the enforceability of the ensuing arbitral awards.

The purpose of this paper is to study the interaction between Sharia and arbitration in the Kingdom of Saudi Arabia, by analysing whether and to what extent of compliance with the local culture, may undermine the development of arbitration. If so, what may be the solutions that could be taken into account by the Saudi Regulator and Saudi Courts to transform Saudi Arabia into an arbitration-friendly jurisdiction and an attractive seat of arbitration.

Keywords

Arbitration; dispute resolution; Sharia law; Saudi Arabia; investment

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Introduction

One of the cornerstones of the Saudi Arabia 2030[1] vision is to facilitate the flow of private investments and improve Saudi Arabia's *competitiveness* as a prospective hub for foreign investments in the Middle East. It is against this background that the Saudi Regulator has enacted new regulations with the principal aim to drive confidence in investment by providing investors, among other things, with a modern framework for an out-court resolution of their disputes. These new regulations consist mainly of (i) an Arbitration Law dated 2012[2], "supposedly" based on international arbitration standards and inspired by the UNCITRAL Model Law and which was complemented five years later by its long awaited Implementing Regulation[3] (altogether designated by the "New Arbitration Law"), a New Enforcement Law dated March 2013 establishing for the first time in Saudi Arabia specific enforcement courts and providing a more lenient scheme in respect of the recognition and enforcement of foreign arbitral awards (the "New Enforcement Law"),[4] and a Cabinet Decision dated 2014 ("Cabinet Decision") establishing the Saudi Centre for Commercial Arbitration[5] (altogether designed by "New Regulations").

Even though the New Regulations constitute a great achievement for arbitration in Saudi Arabia, their application in practice may not achieve the proposed underlined goals. It may raise some concerns for local and foreign investors alike as to the predictability of the set of rules, both procedural and substantive, that may apply to their dispute and the enforceability of the ensuing arbitral award.

Indeed, the Saudi Basic Law of Governance[6], which is considered to be the Constitution of Saudi Arabia[7] ("Basic Law"), provides in its Article 1 that the "*religion of Saudi Arabia shall be the Book of God and the Sunnah (Traditions) of his Messenger*". This means that from a theoretical point of view, all regulations in the Kingdom shall be compliant with the "Quran" and "Sunnah", which both constitute the first two formal components of what is commonly known or designed by "Sharia" or "Islamic Law"[8]. In the absence of a Constitutional Court that controls the conformity of the newly enacted regulations to Sharia, courts in Saudi Arabia may disqualify non-compliant Sharia provisions. In other terms, even if modern regulations have been enacted, their enforcement by Saudi Courts is not necessarily fully guaranteed. It is conditional upon passing a Sharia conformity test, which may be deployed *ab initio* by the competent court hearing the dispute. Needless to mention that such post-dispute Sharia test is a source of legal uncertainty for disputed parties, all the more that Sharia does not constitute a set of pre-determined rules which are applied in a consistent way by Saudi courts. It consists of general principles where application may substantively differ from one judge to another based on several factors and circumstances.

[1] Saudi Arabian's 2030 Vision available at https://www.vision2030.gov.sa/en#

[2] Royal Decree No M/34, dated 24/5/1433H (corresponding to 16/4/2012 Gregorian) concerning the approval of the Law of Arbitration, available at: https://www.idc.gov.sa/en-us/RulesandRegulations1/Arbitration%20Law.pdf. For a general overview about the New Arbitration Law, *see*: Salah Al Hejailan, *The New Saudi Arbitration Act: A Comprehensive and Article-by-Article Review*, 4(3) Int'l J. Arab Arb.15 (2012).

[3] Implementing Rules of Arbitration Regulations of Saudi Arabia, in effect 9 June 2017 in 4 ICCA International Handbook on Commercial Arbitration 1 (ICCA & Kluwer Law International 2020). For a general overview about the implanting Rules of Arbitration Regulations, *see* Mohamad Mahayni & Zaid Mahayni *Saudi Arabia: An Overview of The New Implementing Regulations To The Saudi Arbitration Law 13 June 2017*, https://www.mondaq.com/saudiarabia/arbitration-dispute-resolution/601494/an-overview-of-the-new-implementing-regulations-to-the-saudi-arbitration-law.

[4] Royal Decree No. M/53 dated 13/8/1433 H (corresponding to 3/7/2012 Gregorian) concerning the approval the Enforcement Law, available at: https://www.moj.gov.sa/Documents/Regulations/pdf/En/76.pdf.

[5] Hamel Alsulamy, *The Saudi Center for Commercial Arbitration: The Catalyst Most Needed*, in Matthias Scherer (ed), 37 (3) ASA Bulletin, 585, 591 (2019).

[6] Basic Law of Governance, Royal Order No. (A/91), 27 Sha'ban 1412H – 1 March 1992, Published in Umm al-Qura Gazette No. 3397, 2 Ramadan 1412H - 5 March 1992, available at : https://www.wipo.int/edocs/lexdocs/laws/en/sa/sa016en.pdf.

[7] Mohammed Aleissa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems*? (PhD Thesis, University of Essex, 2016), http://repository.essex.ac.uk/17245/, at p.17.

[8] In this paper, "Sharia" and "Islamic Law" will be used interchangeably. Article 48 of the Basic Law of Governance provides: "*The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur'an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur'an and the Sunna*".

Whilst the Saudi Regulator has subtracted a certain number of industries from the grips of the local culture[9] (i.e., Sharia and the Saudi Public Policy[10]) by - for instance – allocating jurisdiction to specialised courts instead of the normally competent courts to hear disputes involving non-Sharia compliant laws such as in the banking sector[11], the same approach has not been embraced in the context of arbitration. Indeed, the Saudi regulator seems to prevail the application of Sharia over the legal certainty which is one of the cornerstones on which (international) arbitration lies on. Indeed, Article 2 of the New Arbitration Law which states that "*without prejudice to the provisions of Islamic law the provisions of this regulation are applied to every arbitration*", insists on the prominence of the principles of Islamic law and its prevalence over any provisions that may entail the application of New Arbitration Law.

Maintaining the local practice by insisting on the observance of the principles of Sharia and the Saudi Public Policy while at the same time adopting modern regulations for arbitration and enforcement of arbitral awards would result in creating a "*hybrid set of rules that simultaneously deviate from and converge with the international arbitration practice*"[12]. As we shall see details, such approach may constitute a great source of uncertainty, especially for business actors from both procedural and substantive standpoints.

This paper aims is to study the interaction between Sharia and arbitration in the Kingdom of Saudi Arabia. It aims to analyse whether and to what extent compliance with the local culture may undermine the development of arbitration in Saudi Arabia.

This paper is divided as follows: the first part consists of a brief description of the current Saudi Legal System with a focus on the current place of Sharia within the Saudi Legal Order. After analysing the main provisions of the New Regulations and providing a brief comparison with the previous arbitration regime, Part two will shed light on the paradigm shift operated by the enactment of the New Regulations in the context of arbitration. Part three will argue that references to Sharia within the New Regulations may render the paradigm shift aforementioned more theoretical than practical as it may hinder the legal certainty and the adherence of the Arbitration Regulations to the international arbitration standards. Against this background, Part four will provide some insights and recommendations that may be taken into account by the Saudi regulator and Saudi Courts so that Saudi Arabia can be placed on the list of modern and arbitration-friendly jurisdictions.

1. A brief description of the KSA legal system and the current place of Sharia within the KSA legal order

Sharia has exercised a great influence in shaping the current Saudi Legal System[13]. Disputes of all types were essentially adjudicated before Sharia courts by judges having received their education in Islamic studies [14] . However, the past ten years have witnessed a real "law revolution" having as a principal aim the enhancement, among other things, of the legal certainty that has been comprised by the previous regime according to which the outcome of disputes would be essentially left to the judges' own interpretation of Sharia principles. Although such reforms may be interpreted as lessening the grip of Sharia over the Saudi legal system and enhancing legal certainty, one should be careful before jumping to such a conclusion. Indeed, the enforcement of any law is subject to a Sharia conformity test that may be deployed *ab initio* by the court hearing the dispute. The New Regulations with arbitration are not an exception to such principle**.**

[9] In this Paper, local culture refers to Sharia and to Saudi Public Policy.

[10] While the observance of Public Policy is admitted by most of the countries, however the specificity of the Saudi Public Policy, which is essentially steeped in Sharia, makes the reference to it within the New Regulations a source of uncertainty for parties in the context of arbitration. Unless specified otherwise, reference to Sharia in this Paper is also a reference to the Saudi Public Policy

[11] Royal Order No. 8/729 dated 10/7/1407H corresponding to 3/10/1987 (Gregorian) established the Committee for Settlement of Banking Disputes. The Royal Order No. 37441 dated 11/8/1433H corresponding to 7/1/2012 (Gregorian) changed the "Committee for the Settlement of Banking Disputes" to the "Committee for Banking Disputes", available at: http://www.aljadaan.com/files/file/SAMA%20Committee%20Restructuring%20Briefing%20Note.pdf.

[12] Faris Nesheiwat and Ali Al-Khasawneh, *The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia*, 13 Santa Clara J. Int'l L. 443,445 (2015).

[13] Al Ghaydan, *The judiciary in Saudi Arabia*, 13 (3) Arab Law Q. 235 (1998).

[14] Abdullah F. Ansary, A *Brief Overview of the Saudi Arabian Legal System*, http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894573.

1.1 The original Saudi legal model: Sharia law enforced by Sharia courts

After briefly introducing the notion of Sharia and its main sources, this part will address the place of Sharia within the Saudi legal Order.

1.1.1 Sharia: definition and sources

In Islamic literature, Sharia or Islamic law referred to the set of principles and rules prescribed by Allah in the Quran or dedicated by his almighty to the Prophet Mohamed. The materialised through the Prophet's practices[15], actions and sayings, also referred to as the "Sunnah"[16]. The Quran and the Sunnah constitute the two essential components of Sharia with the prevalence of the Quran over the Sunna in case of contradiction[17].

Sharia encompasses principles and rules that can be divided into two main components: a spiritual component which relates to the Islamic faith and beliefs and contains rituals that should be followed by Muslims in their daily life in respect of the cult[18]; and a legislative component which contains principles and rules that aim at providing a regulatory framework to the society from every perspective be it political, social, economic or legal[19]. In this paper, reference to Sharia or Islamic Law only concerns the regulatory component and refers more precisely to the law that deals with issues arising from contractual transactions[20].

Despite the abundance and sophistication of Sharia, the latter is far from containing a comprehensive set of rules that purport to address all the aspects of human transactions or all the legal questions that have been encountered during the Islamic era or throughout the new millennium. Indeed, the different analysis and interpretations of the two primary sources of Sharia – the Quran and the Sunnah – by Islamic scholars have resulted in the emergence of three secondary sources of Islamic Law - the *Ijma'a*, the *Ijtihad* and the *Qiyas* – as well as the apparition of different schools of jurisprudence[21].

Ijma'a[22], which may be associated with the civil law concept of "*Doctrine Majoritaire*", constitutes the consensus of the majority of Islamic scholars on a particular issue. When such common consensus is reached, it becomes a source of law and may be considered a basis to reach a particular decision[23].

Ijtihad, which is similar to the civil law concept of "jurisprudence", is the recourse of Islamic scholars to reasoning in their interpretation of the Quran and Sunna in order to find solutions to unprecedented situations as long as such solutions are in line with the general principles contained in the Quran and the Sunna[24].

Qiyas (reasoning by analogy)[25] can be categorised under the umbrella of *Ijtihad*. It refers to a methodology embraced by Islamic scholars consisting of drawing analogies between similar or comparable situations in

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[15] Maria Bhatti, *The Role of Sharia in International Commercial Arbitration*, 36(1) Wis. Int. Law J. 46, 49 (2019).
[16] The Sunnah has been compiled into a written collection designated by Hadeeth. *See* Wael Hallaq , *A History of Islamic Legal Theories*, Cambridge University Press (2004).
[17] Samir Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt* 10-13 (Hart Publishing 2 ed. 2006).
[18] Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 133 (2015).
[19] Md. Shahadat Hossain, *Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, Journal of Philosophy, Culture and Religion*", https://iiste.org/Journals/index.php/JPCR/article/viewFile/9231/9449.
[20] In this article, criminal and family law are excluded from the scope of Sharia /Islamic Law definition.
[21] Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 134 (2015). For a general presentation of the sources of Sharia, *see*: Faisal Kutty: *The Sharia Factor in International Commercial Arbitration*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704, at p. 22.
[22] David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 Geo. Wash. J. Int'l L. & Econ.131, 139 (1991-1992).
[23] Jean-Pierre Harb & A. G. Leventhal, *The New Saudi Arbitration Law: Modernization to the Tune of Sharia*, 30 (2) J. Int. Arbitr. 113, 115 (2013).
[24] Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 134 (2015); Abdulrahman Baamir & Ilias Bantekas, Saudi *Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice*, 25 (2) Arbitr. Int. 239, 256 (2009).
[25] *See* Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/article/opr/t125/e1936.

order to reach a position for a situation that has not been addressed by the Quran and Sunnah, based on consecrated solutions for a similar and comparable situation[26].

The different interpretations developed by Islamic scholars with regards to situations and instances where the Quran and Sunnah were not explicitly clear, have resulted in the emergence of several schools of thoughts which are the Hanafi school, Maliki school, Shafi school, and Hanbali schools[27]. Several differences among the schools arose on a variety of jurisprudential matters relating to, among other things, civil and commercial transactions.

1.1.2 The place of Sharia in the KSA legal system

Place of birth of Islam and home for the two most important Islamic shrines (Mecca and Medina); it is not surprising that Sharia has exercised a great role in shaping the Saudi legal system. However, this could not have been possible without a political will from the founders to establish a State that embraces people's aspirations to be ruled and governed in accordance with the will of Allah, which can only be made through establishing Sharia as the ultimate and superior source of law[28].

Indeed, the primacy of Sharia has been recognised by the Saudi Basic Law of Governance which plays the role of the Constitution in Saudi Arabia[29]. Its Article 1 clearly states that the religion of the State shall be Islam and its Constitution shall be the Book of God and the Sunna.

The consecration of Sharia as the Constitution of Saudi Arabia has been clearly reflected in the Saudi Legal system, in terms both the regulatory framework and the organisation of the judiciary.

In terms of the regulatory framework, despite the founder's Abdul Aziz[30] determination to create a modern society and his plan to liberalise and codify the sources of Sharia[31] – which have been vividly resisted by Muslim scholars - the early years of the Kingdom were characterised by a shortage in regulations and disputes of all nature – be it commercial, civil, or in the construction arena - were adjudicated by judges in accordance with Sharia principles[32].

Even though the *Hanbali* School – which is the most conservative school of teaching - constitutes the dominant source of interpretation of Sharia in the Kingdom of Saudi Arabia[33], solutions to disputes would essentially depend on judges' own interpretation of Sharia, which makes judges' determination "very *extensive, even imprecise, and hence casuistic*"[34]. Therefore, there is no guarantee whatsoever that a matter that has been decided on a certain issue will be decided the same way by the same or another judge. In other terms, the principle of *stare decisis* is not recognised by the Saudi legal system[35]. Needless to mention,

[26] A. Alkhamees, *International Arbitration and Sharia Law: Context, Scope, and Intersections*, 28(3) J. Int. Arbitr. 255, 256 (2011).
[27] Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 134 (2005).
[28] Abdullah F. Ansary, A Brief Overview of the Saudi Arabian Legal System, http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894573.
[29] Basic Law of Governance, Royal Order No. (A/91), 27 Sha'ban 1412H – 1 March 1992, Published in Umm al-Qura Gazette No. 3397, 2 Ramadan 1412H - 5 March 1992, available at : https://www.wipo.int/edocs/lexdocs/laws/en/sa/sa016en.pdf.
[30] The Modern Saudi Arabia was founded in 1932 by King Abdulaziz who united all the provinces of Arabia. He ruled from 1932 until 1953. For more information, *see* Abdullah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*, http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894573.
[31] Nathalie Najjar, *Sharia Applicable to the Merits in International Commercial Arbitration* in Liber Amicorum Samir Saleh: *Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215 (Kluwer Law International 2009).
[32] Article 48 of the Basic Law of Governance obliges the courts to "*…apply the rules of Sharia'a in the cases that are brought before them, in accordance with the precepts contained in the Quran and the Sunnah, and regulations decreed by the ruler which do not contradict the Quran and the Sunnah…*".
[33] Ahmed Alsirhani, *The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice* (January 2019), http://vuir.vu.edu.au/39482/1/ALSIRHANI%20Ahmed-thesis.pdf, at p. 81.
[34] Nathalie Najjar, *Sharia Applicable to the Merits in International Commercial Arbitration* in Liber Amicorum Samir Saleh: *Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215 (Kluwer Law International 2009).
[35] Van Eijk, Sharia *and national law in Saudi Arabia* , In J. M. Otto (Ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* 139, 161-162 (Leiden University Press 2010).

leaving the dispute's determination to the judge's own interpretation of Sharia principles constitutes a source of legal uncertainty, especially for foreign investors that may not be able to envisage clearly the set of rules that would apply to their dispute.

Legal reforms in Saudi Arabia were principally underpinned by economical rather than social considerations and were carried out on account of supporting the Kingdom's social and economic development specially after the emergence of Saudi Arabia as the most important oil exporter in the world[36]. Although the legal reforms that took place in the Kingdom have extended for several years, three marketable eras may be taken as a reference.

The first wave of reform was initiated between 1970 and 1995. Following the country's establishment of the Central Planning Organisation and the launching of its economic development[37], the need to modernise the laws and the court system becomes very pressing. In fact, such developments were highly dependent on foreign know-how and technology. Integration into the Kingdom couldn't have been possible without the existence of modern regulations at least in the commercial field[38]. Such period has witnessed a review of the different rules regulating foreign investments, government procurements, business associations, agency arrangements and labour relations[39].

Concerning the organisation of the judiciary, the reforms mentioned above have not constituted a revolution *per see* to the prevailing system. Indeed, Sharia courts have been granted general jurisdiction to settle all disputes except those excluded by specific regulations[40]. These exceptions concerned essentially disputes of administrative nature involving either government or governmental entities or disputes of commercial nature which adjudication was assigned to the Board of Grievance - a court body operating outside the Sharia court system [41] and which was subsequently vested with the power to entertain applications for the enforcement and execution of foreign judgments.

In 2007 after King Abdullah's approval of a plan for a new judicial system, a new Decree including the Law of the Judiciary and the Law of the Board of Grievances[42] was enacted, shaping the new judicial system and bringing Saudi Arabia closer to other civil law jurisdictions. The New Decree[43] institutes a Supreme Court (Court of Cassation), operates the replacement of the existing courts of appeal by new courts of appeal seated in different provinces in the Kingdom and more importantly replaces the general Sharia courts by first instance courts in various provinces with specialised circuits dealing with civil, labour, criminal, commercial[44] and other specialised areas of law[45]. In addition to that, the Board of Grievance was restructured and returned to exercise its original role as an administrative court,[46] with its jurisdiction extending to deal with matters related to the execution and enforcement of foreign judgments and arbitral awards.

Finally, the last wave of reforms concerns the last decade which has witnessed a regulatory and legislative frenzy specially after 2017, the date of Mohamed Ben Salman appointment as the Crown Prince of Saudi Arabia who has led (and still leading) successful reforms aiming essentially at modernising the Kingdom and diversifying its economy through promoting foreign investments as part of his 2030 Vision Plan. Recent years have witnessed the enactment of, among other things, a very modern Bankruptcy Law[47], a new E-

[36] Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at https://elibrary.law.psu.edu/sjd/9, at p.36
[37] George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 733 (1988).
[38] George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 733 (1988).
[39] George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 733 (1988.
[40] George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 741 (1988).
[41] Decree No. 2/13/8759 of 1374/1995, https://www.saudiembassy.net/board-grievances-law.
[42] Royal Decree No. M/78 of 1428 H corresponding to 1/10 2007 (Gregorian)
[43] For a general presentation of the current court system in the KSA, Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), https://elibrary.law.psu.edu/sjd/9, at p.42.
[44] Commercial disputes have been removed from the jurisdiction of the Board of Grievance and were assigned to specialized commercial courts within the realm of the specialized Sharia courts.
[45] Practically speaking, commercial courts were finally established and started their official mission in 2017.
[46] Nicholas Gould &Fenwick Elliott, *The Saudi Board of Grievances*, available at : https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/11/saudi-board-grievances.
[47] Royal Decree No. M/05 dated 28/05/1439H, corresponding to 13/02/2018 Gregorian.

commerce Law[48], a new Competition Law[49], a new Government and Tenders Law[50], a new Franchise Law[51], a new Commercial Law Courts Law[52] and the instauration of class actions procedures in financial and commercial disputes[53].

Several comments can be made with respect to all the legal reforms that have been carried out by Saudi Arabia in the past three decades.

First, with the enactment of a wide variety of regulations, the legal system in the Kingdom has shifted from a divine non-codified system to a man-made legal system where enacted regulations occupy an important part of the legal system and cover a wide array of industries. Indeed, Saudi Arabia, one of the latest Muslim countries to resist codification, becomes more or less similar to other Muslim countries where Sharia also plays an important role in their legal system, such as Dubai, Qatar and Egypt.

However, this is not to say that each and every aspect of the law is codified in Saudi Arabia. Indeed, reforms and codifications touch upon specific areas of law, leaving the general law regulating the relations of individuals with one another in a state of flux. Indeed, despite all the reforms that took and are still taking place, the civil law which is the branch of law applying by nature to all transactions except for those excluded by specific regulations – is still subject to the non-codified principles of Sharia and therefore to the arbitrary determination of the judge. This means that all issues associated with contracts and torts - which constitute the bulk of disputes submitted to arbitration - are not subject to a predefined set of rules. The unpredictability of Sharia is such that even in the context of Islamic financing transactions, it has been stated that investors are generally reluctant to choose Sharia as the governing law as they prefer to have a degree of legal certainty and to avoid any immutable system that would be subject to divergent opinions among scholars[54].

All of this may render unattractive the legal system in Saudi Arabia, more that the resolution of disputes by way of arbitration and the choice of foreign law to govern the transaction would not dissipate all such difficulties, as we shall see in further detail.

Another observation is that even though all regulations, particularly those enacted in the last decade, are in line with international standards and present great similarities with the most advanced regulations in the West. Sharia still however exercises a great influence over the content and the validity of any newly enacted regulation. In fact, all Royal Decrees by virtue of which laws are enacted start with a statement of faith in God. More importantly, enacted laws contain provisions insisting on the prevalence of Sharia over any provision to the contrary contained in the statute. In other words, as rightly pointed out by a commentator, even though these regulations have forged an existence of their own parallel to Sharia; they cannot be considered independent from it[55]. Not only does Sharia constitute the common law to which one would turn to complement statutory provisions when such provisions do not fully comprehend the concerned transactions but also, in the event of a discrepancy between the statute and the Sharia, the latter supersedes the former. Against this background, the legitimacy of any statute may become uncertain since Sharia has a "veto power"[56] over provisions considered to sit at odds with its principles. Such may put at stake the autonomy of the legislative process as a whole. Also, the predictability of the solutions that a particular regulation tries to achieve becomes questionable. Indeed, the conformity of the statue to Sharia would depend on a twofold test: the judge's own interpretation of Sharia, which may differ from one judge to another and the judge's determination as to whether or not a discrepancy exists between Sharia and any of the provisions contained in the statue. It is true that the Court of cassation's oversight power over the proper application of the provisions of Sharia Law[57] may establish a certain harmonisation with regards to what is considered

[48] Royal Decree No. M/126, dated 7/11/1440 H, corresponding to 10/7/2019 Gregorian.
[49] Royal Decree No. M/75, dated 29/6/1440 H, corresponding to 6/3/2019 Gregorian.
[50] Royal Decree No. M/128, dated 9/2/1440 H, corresponding to 16 /7/ 2019 Gregorian.
[51] Royal Decree No. M/22, dated 9/2/1441 H, corresponding to 8/10 2019 Gregorian.
[52] Amer Tabbara, *Group actions in the Middle East*, Mena Business Law Review, 31 (April 2019).
[53] George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 734 (1988).
[54] Umar A. Oseni & Kabir Hassan, Regulating *the governing law clauses in Sukuk transactions*, 16 (3) JBR 220, 241 (2014).
[55] George N. Sfeir, *The Saudi Approach to the Law Reform*, 36 (4) Am J Comp Law 729, 731 (1988).
[56] George N. Sfeir, The Saudi Approach to the Law Reform, 36 (4) Am J Comp Law 729, 751 (1988).
[57] Royal Decree No. M/21, 20 Jumada I, 1421 corresponding to 19 August 2000 Gregorian, Article 193. http://hrlibrary.umn.edu/research/saudiarabia/law_of_proceedure.html;

against or in line with Sharia; however, such control can only be exercised by the Supreme Court upon an application filed to that effect by any dissatisfied party from a decision rendered by a Court of appeal.

On a different note, the establishment of specialised judiciary machinery since 2007 reform has resulted in the suppression of general Sharia courts in favour of more specialised circuits within both the courts of first instance and courts of appeal[58]. However, despite the above, appointed judges are not required to have a specialisation in law but should hold a degree from one of the Sharia Colleges in the Kingdom as a prerequisite to their appointment[59]. When having an equivalent degree (i.e., in law), the judge's appointment is conditional upon sitting for a special examination prepared by the Supreme Judicial Council. Only a training of two months is required for judges sitting in specialised courts[60].

Education diversity among judges sitting in the same districts is specific to the Saudi Legal System. It may undermine the certainty of the judgment-making process as judges may embrace different approaches depending on their background and education. For instance, a Sharia qualified judge may show reluctance in applying the statutes and its determination may be based on his Sharia background to the determinant of the applicable regulation.

2. The paradigm shift in the Saudi Arabian landscape following the enactment of the New Regulations

Even though the New Arbitration Law has been considered by the majority of arbitration scholars and professionals as bringing Saudi Arabia into the realm of arbitration-friendly jurisdictions[61], the relationship between arbitration and the Saudi Legal System remains somehow conflictual. The scepticism of the Saudi Regulator *Vis ă Vis* arbitration may be understandable and could be justified by historical considerations which made arbitration to be perceived by Saudi Arabia as a weapon used against its economic and social interests.

Contrary to what one may think, arbitration regulations have existed since 1930 within the Saudi legal system and early disputes in connection with Oil and Gas have been settled through arbitration. From an environment receptive to arbitration and backed by a welcoming position of Sharia to dispute adjudication by means of arbitration (A) to an environment hostile and sceptical *vis à vis* this out court dispute resolution mechanism consecrated by the Arbitration Law of 1983 (B), a friendly yet a cautious environment seems to dominate today the arbitration scene following the enactment of the New Regulations (C).

2.1 An environment receptive to arbitration and backed by a welcoming position of Sharia to out courts dispute resolution

Provisions with respect to arbitration in Saudi Arabia are as old as the law of the Commercial Court enacted in 1931. Such law contained concise provisions with respect to arbitration reflected in five articles. The provisions address the formalities that should be followed by the parties when deciding to submit their disputes to arbitration, arbitrators' duties to examine parties' allegations according to Sharia provisions and the enforceability of arbitration awards upon its validation by the commercial court[62].

The early consecration of arbitration in the KSA is not surprising, as Sharia, the principal source of law in Saudi Arabia has been considered as embracing and even favouring arbitration as a means for dispute resolution, whether through the holy Quran or the Sunna[63]; whilst interest in arbitration at the global level has only been on the rise in the last decades. In this regard, Islamic scholars consider that the Prophet accepted

[58] Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at https://elibrary.law.psu.edu/sjd/9, at p. 42.
[59] Royal Decree No. M/78 of 1428 H corresponding to 1/10 2007 (Gregorian), Article 31.
[60]Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at https://elibrary.law.psu.edu/sjd/9, at p.55.
[61] *See* for instance, Khalid Alnowaiser, *The New Arbitration Law and Its Impact on Investment in Saudi Arabia*, 29 (6) J. Int. Arbitr. 723 (2012).
[62] Law of the Commercial Code of 1930, issued by virtue of Decree Law No 32, dated 15/1/1350 H corresponding to June 2, 1931 Gregorian, Article 493 to 497.
[63] Saud Al-Ammari and A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf, at p. 388.

and enforced arbitration decisions and advised others to arbitrate. His closed companions have also followed such pro-arbitration approach[64].

However, it should be mentioned that the "Islamic" version of arbitration does not really look like the Western version, as we know it today. In fact, the Islamic arbitration practiced by the Prophet is closer to mediation than arbitration. Resort to arbitration was essentially made in order to settle family disputes – which are not arbitral according to the Western version of arbitration - or disputes having a political connotation between the tribes[65]. In addition, it is important to mention that the Islamic version of arbitration practiced by the Prophet and his companions did not provide a procedural or substantive framework for carrying out the arbitration proceedings. This is due to the fact that there is not any set of procedural rules in the Quran or Sunna governing the conduct of arbitration and references to such mechanism are essentially made in the form of themes and moral values, preaching arbitration as a Sharia preferred method of dispute resolution[66].

2.2 The Arbitration Law of 1983: A justified hostility towards (international) arbitration

Even though the arbitration provisions contained in the Commercial Law of 1931 represented an embryonic form of arbitration, it however portrayed a pioneering reception of arbitration by the Saudi legal system at a point of time where such an out-court dispute resolution mechanism was overlooked in today's most arbitration-friendly jurisdictions. In this regard, it has been considered that until 1950, arbitration was the preferred method for resolving disputes in the context of oil concession agreements[67].

However, this receptive environment was repudiated following the Aramco arbitration case[68] which was held in accordance with the provisions of the Commercial Law of 1931. The dispute involved a disagreement between the Government of Saudi Arabia and Aramco with regards to the Aramco's exclusive right of oil transport as defined in the concession agreement. The parties referred the dispute to arbitration in accordance with the contractual provisions. Despite being the law applicable to the merits of the dispute, the arbitration tribunal disqualified Saudi Law[69] under the pretext that Sharia is too simplistic and unsophisticated to be applied to commercial matters. The arbitral panel went on to consider that Sharia should be supplemented by the general principles of law, custom and practice in the oil business, and notions of pure jurisprudence[70].

In his award, the arbitral tribunal ruled against the Government. Saudi Arabia has interpreted the disqualification of Sharia as a tool used by the panel to uphold Aramco wrongful allegations, on the account that if Sharia has been applied to the dispute, the outcome of the award would have been in the Government's favour[71]. Whatever the case may be, a feeling of distrust has been developed by the Saudi Government against international arbitration, the latter has been perceived as a tool favouring Western international oil companies as the determinant of Saudi Arabia's economic and social interests[72]. This sentiment may be justifiable, especially since other Western legal experts have acknowledged the maturity and sophistication of Sharia to

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[64] Faisal Kutty : *The Sharia Factor in International Commercial Arbitration*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704, at p. 31; Saud Al-Ammari and A. Timothy Martin, Arbitration in the Kingdom of Saudi Arabia, available at http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf.

[65] Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), available at: https://elibrary.law.psu.edu/sjd/9, at p. 70.

[66] Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices*, 26 (1) ARIA 131, 135 (2005).

[67] Samir Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt* 50 (Hart Publishing 2 ed. 2006).

[68] 27 I.L.R. 117 (1963).

[69] The same approach has been embraced in other international arbitration with the UAE and Qatari Governments (respectively, *Petroleum Development Ltd v. Sheikh of Abu Dhab* and *Ruler of Qatar v. International Marine Oil Co)* where Sharia was also the law applicable to the merits of the dispute. For more details about the two cases above-mentioned *see* Faisal Kutty : *The Sharia Factor in International Commercial Arbitration*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704, at p.33.

[70] Stephen M. Schwebel , *The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement*, http://jwelb.oxfordjournals.org/content/early/2010/09/28/jwelb.jwq012.

[71] Yahya Al-Samaan, *The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi. Arabia*, 9 (3) Arab. Law Q. Arab Law Quarterly, 217, 222 (1994).

[72] Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Award*, 18 (3) Fordham Int. Law J. 920, 958 (1994).

address modern commercial transactions, rendering suspicious the real reasons behind the disqualification of Saudi law by the arbitral panel in this case[73].

In retaliation to the award, the Council of Ministers passed a resolution, which placed a prohibition on all governmental entities from entering into arbitration agreements or the use of foreign law as the law applicable to the merits of the dispute[74]. Any dispute involving a Governmental entity should therefore be referred to the Board of Grievance and should be subject to Saudi Arabian law.

The Arbitration Law of 1983[75] and its implementing Regulations, which superseded the provisions of the Commercial Law Court, reflected the Government's scepticism towards arbitration. Its unfriendly arbitration provisions have been described as being contrary to Sharia. Yet, it has been considered as an important evolution for arbitration[76] as it contained and, for the first time in Saudi Arabia, a set of provisions specifically dealing with arbitration.

The Law of 1983 departed from the international arbitration standards as we know it today. Indeed, it instituted – among other things, a judicial control over the arbitration proceedings and the outcome of the arbitral awards, imposed a specific language for the carrying out the proceedings and failed to address a certain number of procedural issues.

The control vested by state courts by virtue of the Law of 1983 over the arbitration proceedings applies throughout the whole arbitration process. Indeed, Article 5 of the abovementioned Law required that the arbitration agreement be approved by the relevant authority having jurisdiction over the dispute[77]. Furthermore, state courts have been vested with oversight authority over the conduct of the proceedings and, more precisely, in respect of announcements, notifications and control of correspondence[78]. Upon completion of the proceedings and the handing down of the award, it would be possible for the competent authority to revisit the substance of the dispute in the event an objection is filed by any dissatisfied party[79].

The relevant authority interference with the arbitration proceedings as described above has been criticised as being contrary to Sharia which gives arbitration the same status as court litigation and therefore does not require any control to be exerted by the competent authority over the proceedings or the arbitral award[80].

Another requirement that has been described as having no foundation in Sharia is that the arbitration should be conducted in Arabic Language[81]. This requirement constituted a big burden for foreign entities, especially when the documents relating to the dispute were drafted in foreign languages.

Finally, the law of 1983 is deficient regarding a certain number of procedural issues such as the rules relating to the delivery of arbitral awards, communication between the parties and the arbitral tribunal and/or between

[73] According to professor John Makdisi: "The Islamic legal system was far superior to the primitive legal system of England before the birth of the common law. It was natural for the more primitive system to look to the more sophisticated one as it developed three institutions that played a major role in creating the common law. The action of debt, the assize of novel disseisin, and trial by jury introduced mechanisms for a more rational, sophisticated legal process that existed only in Islamic law at that time. Furthermore, the study of the characteristics of the function and structure of Islamic law demonstrates its remarkable kinship with the common law in contrast to the civil law. Finally, one cannot forget the opportunity for the transplant of these mechanisms from Islam through Sicily to Norman England in the twelfth century" in John Makdisi, The Islamic Origins of the Common Law, 77 (5) NCLR 1637, 1738 (1999).

[74] Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf, at p. 388.

[75] Arbitration Law, enacted by Royal Decree No. M/46 of 12/07/1403H corresponding to 4/24/1983 Gregorian.
An English version of the law can be found at http://www.wipo.int/wipolex/en/details.jsp?id=8502.
(accessed May 2017). Council of Ministers Resolution 7/2021/M dated 8/9/1405H corresponding to
27/5/1985Gregorian issued the Implementing regulations of the Law; *See* Abdulrahman Baamir & Ilias Bantekas, Saudi *Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice*, 25 (2) Arbitr. Int. 239, 263 (2009).

[76] Abdul Hamid El-Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries* 612 (Kluwer Law International 2013).

[77] Article 5 of the New Arbitration Law.

[78] Article 8 of the New Arbitration Law.

[79] Article 18 of the New Arbitration Law.

[80] Shaheer Train, *An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices,* 26 (1) ARIA 131, 146 (2015).

[81] Article 15 of the Implementation Rules of the Saudi Arabian Arbitration Regulations 1983, available at: http://www.trac.ir/law.aspx?id=45.

the arbitral tribunal and third parties, and the seat of the arbitration. It also failed to address the procedure to be followed to enforce foreign awards that the New York Convention of 1958 has left to the law of the contracting State.

2.3 The New Regulations: An alignment of Saudi Arabia to international arbitration standards?

The enactment of the New Arbitration Law cannot be separated from the economic changes that have occurred (and still occurring) in Saudi Arabia. Since the joining of the World Trade Organisation in 2005, a lot of pressure has been exerted onto the Saudi legal system – as part of the conditions of accession - to attract foreign investments[82], which is believed to be enhanced by among other things, the possibility to solve disputes through a modern arbitration framework. As a reminder, the New Arbitration Law was followed by the enactment of the Enforcement Law which moved the process in respect of the enforcement of arbitral awards from the jurisdiction of the Board of grievance to the Execution Court making therefore the enforcement of arbitral awards faster and more efficient.

The New Arbitration Law which is believed to be drawn upon the provisions of the UNICTRAL Model Law on International Commercial Arbitration has been positively received within the arbitration *milieu* in Saudi Arabia and has been described as providing a clearer and more comprehensive regime than the one previously in place[83]. It has also been considered as giving effect to arbitration-friendly principles prevalent in modern arbitration laws around the world.

A basic analysis of its provisions reflects a clear liberation of the arbitration proceedings from the grips of state courts (1) and a consecration of a certain number of well-established principles enshrined in modern arbitration practice (2). All of these provisions, which will be explored succinctly undoubtedly bring Saudi Arabia closer to the international arbitration community.

2.3.1 Liberation of the arbitration proceedings from the grips of State courts

One of the most important achievements of the New Arbitration Law is the consecration of the independence of the arbitration proceedings. In fact, contrary to the previous regime established by the Law of 1983, there is no requirement whatsoever for any kind of validation of the arbitration agreement by State courts before the commencement of the proceedings. In order to be valid, the arbitration agreement should be in writing[84], whether it takes the form of an arbitration clause or a submission agreement[85]. Furthermore, the arbitration award is elevated to the same stance as a judicial ruling and therefore competent courts are not in a position to review or reassess the merits of the dispute.

Another manifestation of the independence of the arbitration process is the consecration of the principle competence – competence[86] according to which the arbitral tribunal is vested with the power to rule upon its own jurisdiction and to hear, once the arbitration has commenced - if certain conditions are satisfied - applications for precautionary measures[87].

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[82] Ahmed Alsirhan, *The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice*, A Thesis Submitted to the School of Law, Victoria University for the Degree of Doctor of Philosophy (PhD) Melbourne, Australia (2019), http://vuir.vu.edu.au/39482/1/ALSIRHANI%20Ahmed-thesis.pdf, at p. 6.

[84] Article 9 .2 of the New Arbitration Law which provides that: "*The arbitration agreement shall be written, or it is null and void"*.

[85] Article 9.1 of the New Arbitration Law which provides that: "*The arbitration agreement may be earlier to the dispute, whether it is independent, self-contained, or contained in a particular contract. Also, the arbitration agreement may be later to the dispute, even if there is a suit concerning it before the competent court. In this case, the agreement shall specify the issues covered by the arbitration, or the agreement is null and void*".

[86] Article 20.1 of the New Arbitration Law which provides: "*The arbitral tribunal shall judge the defenses of its non-competence, including the defenses based on the absence of an arbitration agreement, or its fall, or its annulment, or its lack of coverage of the subject of the dispute."*

[87] Article 23.1 of the New Arbitration Law which provides: "*It is permissible for the parties of the arbitration to agree that the arbitral tribunal may - at the request of one of them - command either of them to take what he sees of provisional or conservatory measures required by the nature of the dispute. The arbitral tribunal may obligate the party that requires taking such measures to provide an appropriate financial guarantee for the execution of this procedure*".

2.3.2 Parties' autonomy in respect to the applicable procedure and the substantive law

When the arbitration is international according to the test instituted by the New Arbitration Law [88]and whether the arbitration is seated in Saudi Arabia or elsewhere, the parties can choose the law applicable to the procedure, including the rules of any arbitration Centre, whether such Centre is located in the Kingdom or elsewhere[89]. Parties' autonomy also extends to the choice of the law applicable to the merits of the dispute[90].

The recognition of parties' autonomy in respect of the choice of procedural rules resulted in the establishment of the Saudi Arbitration Centre, the first independent arbitration institution in the Kingdom, which paved the way and laid the foundation of institutional arbitration. The Centre administers both civil and commercial disputes and works in collaboration with well-established arbitration institutions. In addition to the arbitration rules, the SCCA adopted in 2018 the Rules for Conciliation, Expedited Arbitration and Code of Ethics[91].

Parties' autonomy with respect to the law applicable to the merits of the dispute embraced by the New Arbitration Law constitutes a great achievement, as it is the first provision in the Saudi legal system that admits the possibility for the parties to choose a foreign law to govern their disputes. What is more, the New Arbitration Law contains a conflict of law rule allowing the arbitrator to determine the law applicable in the absence of any agreement by the parties[92]. Such provision constitutes an innovation in Saudi Arabia as the Saudi legal system does not contain provisions in respect of conflicts of law nor has the Saudi Courts filled such gap by developing a jurisprudential arsenal dealing with conflicts of law issues. As we will see in further detail, the absence of private international law regulations and principles is a weakness of the Saudi legal system that may negatively affect the development of international arbitration in Saudi Arabia.

2.3.3 The enforcement of arbitration awards

A reading of the New Arbitration Law and the New Execution Law suggests that the procedure for the enforcement of arbitral awards would depend on whether the arbitration takes place in Saudi Arabia or abroad, irrespective of the domestic or international nature of the arbitration.

The enforcement of local awards or awards issued in the context of an international arbitration seated in the Kingdom of Saudi Arabia, is subject to a two-stage process: the ratification of the arbitral award by the Competent Court[93] and the submission of such ratification, which confers the arbitral award the status of an enforcement writ for immediate execution before the Execution Court[94].

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[88] Article 3 of the New Arbitration Law states: "*According to this law, the arbitration shall be international if its dispute is related to the international trade, and this occurs in the following matters:*
1- If the headquarter of both parties of the arbitration lies on more than one country at the time of the arbitration agreement; if one party has more than a business center, it depends mainly on the most relevant center to the subject of the dispute, and if one or both parties do not have a certain business center, it depends mainly on their normal residence address.
2- If the headquarter of both parties of the arbitration lies on the same country at the time of the arbitration agreement, and one of the following places lies outside that country:
A- The place of the arbitration procedures as assigned in the arbitration agreement, or referred to its way of assignation.
B- The place of executing an essential side of the obligations arising from the trading affairs between both parties.
C- The most relevant place to the subject of the dispute.
3- If both parties agree to resort to an organization or a permanent arbitration authority, or an arbitration center lies outside the Kingdom.
4- If the arbitration subject included in the arbitration agreement is related to more than one country".

[89] Article 25.1 of the New Arbitration Law which provides: "*The parties of the arbitration may agree on the actions adopted by the arbitral tribunal, including their right to subject these actions to the valid rules in any organization, or authority, or arbitration center in the Kingdom or abroad, provided they do not violate the provisions of the Islamic Sharia*".

[90] Article 38.1. A of the New Arbitration Law which provides: " *Taking into account the non-violation of the provisions of the Islamic Sharia and public order in the Kingdom, the arbitral tribunal, during the hearing of the dispute, shall: Apply the rules agreed upon by the parties of the arbitration on the subject of the dispute, and if they agree on the application of a law of a particular state, the substantive rules shall be followed without those of dispute-of-laws, unless agreed otherwise*".

[91] *See* : https://sadr.org/arbitrators-code-of-conduct?lang=en.

[92] *See* Article 38.1.B of the New Arbitration Law which provides: "*If the parties of the arbitration do not agree on the statutory rules applicable to the subject of the dispute, the tribunal shall apply the substantive rules in the law that it considers the most relevant to the subject of the dispute*".

[93] Article 53 of the New Arbitration Law which provides: "The *competent court or its representative issues an order with the execution of the arbitrators' award (….)*".

[94] Article 9 of the Enforcement Law which provides: " *Compulsory execution may not be carried out except with an enforcement document for a due and specified right. Enforcement documents are : (…) 2- arbitral awards which include the enforcement order in accordance with the Law of Arbitration*".

In what pertains to international awards rendered in different jurisdictions, they only face a one-stage process as they are not required to go to the Competent for ratification purposes and can be enforced immediately before the Enforcement Court.

Whether the arbitration is of a domestic or international nature, the grounds for a refusal to ratify a domestic arbitral[95] award by the Competent Court or to enforce an international arbitral award by the Enforcement Court[96] are very limited, which makes Saudi Arabia in appearance close to the international arbitration community. The same conclusion may be drawn with regard to the grounds for setting aside an arbitral award.[97] What is more is that Saudi Arabia is a party to a certain number of regional and international conventions with respect to the recognition and enforcement of foreign arbitral awards such as the 1952 Convention of the Arab League in respect of the Enforcement of Judgments and Arbitral Awards, the Convention on Judicial Cooperation between States of the Arab League (the "Riyadh Convention") signed in 1983; and more importantly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). All these conventions aim at facilitating the execution and enforcement of regional and foreign awards in Saudi Arabia.

As bright as the picture may appear, the reality is somehow different. Despite the limited grounds for the refusal of ratification / recognition and enforcement/ setting aside arbitral awards, the circulation of arbitral awards in Saudi Arabia is not without challenges and may encounter several barriers such as the Sharia and Public Policy conformity test that would apply indistinctively to any award be it domestic or international.

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[95] Article 55 of the New Arbitration Law provides the following : " *The order to execute the arbitration award under this Law shall not be issued except upon verification of the following:*

a- The award is not in conflict with a judgment or decision issued by a court, committee or commission having jurisdiction to decide the dispute in the Kingdom of Saudi Arabia;

b- The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued.

c- *The award is properly notified to the party against whom it is rendered*".

[96] In accordance with Article 12 of the New Enforcement Law, the conditions for enforcement of foreign awards apply *mutatis mutandis* to foreign arbitral awards. These conditions have been provided for by Article 11 of the Enforcement Law which provides: " *Without prejudice to treaties and agreements, the enforcement judge may not execute a foreign judgment or order except on the basis of reciprocity and upon ascertaining that :*

1- The courts of the Kingdom have not jurisdiction to review a dispute regarding which a judgment or order issued, and that the foreign courts issuing such judgment or order have jurisdiction over it in accordance with rules of international jurisdictions stated in their laws;

2- The litigants of a lawsuit in which a judgment is rendered are summoned to appear, are duly represented and are given the right to defend themselves ;

3- The judgment or order becomes final in accordance with the law of the court issuing it

4- The order or the judgment is not in conflict with any other order of judgment issued on the same case by a competent judicial body in the Kingdom; and

5- *The judgment or the order is not in conflict with public order in Saudi Arabia*".

[97] *Article 50 of the New Arbitration Law* provides *: " An action to nullify an arbitration award shall not be admitted except in the following cases:*

a- If no arbitration agreement exists, or if such agreement is void, voidable, or terminated due to expiry of its term

b- If either party, at the time of concluding the arbitration agreement, lacks legal capacity, pursuant to the law governing his capacity;

c- If either arbitration party fails to present his defense due to lack of proper notification of the appointment of an arbitrator or of the arbitration proceedings or for any other reason beyond his control;

d- If the arbitration award excludes the application of any rules which the parties to arbitration agree to apply to the subject matter of the dispute;

e- If the composition of the arbitration tribunal or the appointment of the arbitrators is carried out in a manner violating this Law or the agreement of the parties;

f- If the arbitration award rules on matters not included in the arbitration agreement. Nevertheless, if parts of the award relating to matters subject to arbitration can be separated from those not subject thereto, then nullification shall apply only to parts not subject to arbitration".

3. The preservation of local traditions: a neutralisation of the New Regulations?

While the enactment of a New Arbitration Law inspired by the UNICTRAL Model Law is undoubtedly a positive development of arbitration in Saudi Arabia, if one would draw a comparison with the ancient arbitration regime, the author is of the opinion that one should not jump to the conclusion that Saudi Arabia is, more than eight years after the enactment of the New Regulations, on the list of arbitration-friendly jurisdictions or an active seat of arbitration. Indeed, despite all the legislative changes, it is the author's view that the New Regulations do not provide business actors with the required degree of certainty whether in respect of the carrying out of the arbitration proceedings, the outcome of the dispute, and the enforceability of the award. This may put at stake the quest for legal certainty lying behind business actors' choice of (international) arbitration as a means for dispute resolution. Such uncertainly is created by the Saudi regulator's insistence on preserving the local culture through instituting a Sharia and Public Policy "compatibility test" under both the New Arbitration and the New Enforcement Law in respect of the conduct of the proceeding, the merits of the dispute and the arbitral award alike. In light of the above, it becomes questionable whether the purported alignment of Saudi Arabia to the international arbitration community is more a fiction than a concrete reality.

Indeed, the Saudi Regulator has referred to Sharia within the New Arbitration Law more than he ever did in previous arbitration regulations[98]. In addition to Sharia, the New Regulations refer to Public Policy as a condition for the validity of an arbitral award and as a pre-requisite for the enforcement of domestic or international arbitral awards. While the exception of Public Policy is also embraced by most arbitration laws around the world and by international and regional conventions alike, the blurring nature of Saudi Public Policy raises ambiguities about its content and nature.

3.1 The interaction between Sharia and arbitration in Saudi Arabia

The interaction between Sharia and arbitration may concern procedural and substantive issues, the validity of an arbitral award and issues relating to the recognition and enforcement of arbitral awards.

3.1.1 Sharia and procedural issues

Despite the consecration by the New Arbitration Law of the parties' procedural autonomy with regards to the conduct of the arbitral proceedings, such autonomy should be however compliant with the provisions of the Islamic Sharia[99]. Among the questions that may raise Sharia conformity issues are those related to the gender and faith of arbitrators and witnesses.

While the adjudicator's gender and faith, be it a state judge or an arbitrator, are not issues that would normally raise any problem in secular countries, things are completely different when it comes to theological States such as Saudi Arabia. Indeed, it is a matter of Sharia law that only Muslims be vested with judiciary functions[100].

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[98] *See* for instance Article 2 of the New Arbitration Law which provides : *" Without prejudice to the rules of the Islamic Sharia and the rules of the international conventions in which the Kingdom is included as one of its parties, the provisions of this law are valid for any arbitration…*"; Article 5 : " *If the parties of the arbitration agree to subject their relationship to the provisions of any document (a model contract, or an international convention or others), they shall act under the provisions of this document, for including special provisions of arbitration and that shall not be contrary to the provisions of the Islamic Sharia";* Article 25: " 1- *The parties of the arbitration may agree on the actions adopted by the arbitral tribunal, including their right to subject these actions to the valid rules in any organization, or authority, or arbitration center in the Kingdom or abroad, provided they do not violate the provisions of the Islamic Sharia ; 2- If there is no such agreement, the arbitral tribunal may - taking into account the provisions of Islamic Sharia, and the provisions of this law - choose the arbitration proceedings as it deems appropriate*"; Article 38.1 " 1- *Taking into account the non-violation of the provisions of the Islamic Sharia and public order in the Kingdom, the arbitral tribunal, during the hearing of the dispute, shall:*
A- Apply the rules agreed upon by the parties of the arbitration on the subject of the dispute, and if they agree on the application of a law of a particular state, the substantive rules shall be followed without those of dispute-of-laws, unless agreed otherwise.
B- If the parties of the arbitration do not agree on the statutory rules applicable to the subject of the dispute, the tribunal shall apply the substantive rules in the law that it considers the most relevant to the subject of the dispute (….)"; Article 50: 2 *"The competent court that hears the claim of invalidity delivers an award of its own with the invalidity of the arbitration award if it contains what is contrary to the provisions of the Islamic Sharia and public order in the kingdom, or what is agreed upon by the parties of the arbitration, or it finds that the subject of the dispute is of the matters that may not be arbitrated under this law*".

[99] Article 5 of the New Arbitration Law

[100] Most Islamic Schools do not allow non- Muslims to be appointed as Arbitrators. *See* Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law*

On a different note, although from the Islamic faith, women are prohibited for exerting any adjudicative function within the jurisdiction of Saudi Arabia and such position is held by the majority of Muslim scholars and consecrated by the law[101]. The question remains whether gender and religious discriminations embedded in the Saudi Legal system are extended to the arbitration arena.

The New Arbitration Law is silent in respect of the requirements related to the selected arbitrator's gender or religious background. Indeed, article 14, which sets the requirements that selected arbitrators should satisfy, does not mention any condition in respect of the arbitrator's gender, religion or nationality. It only requires that the selected arbitrator be full of legal capacity, have a good reputation, be of good conduct and hold a degree in Sharia or in Law. When the arbitration tribunal is a three-panel tribunal, only the chair is required to hold a degree in Sharia or in law[102].

While the New Arbitration Law's silence as to the gender and faith requirements for selected arbitrators has been received positively by the legal community and interpreted in the sense of circumventing the gender and religious discriminations enshrined in the Saudi legal system,[103] it is the author's view that such issue is far from being conclusively established. Indeed, from a Sharia law perspective, the requirements of qualifications of an arbitrator are associated with the same qualifications as those of a judge[104] and such requirement has been also consecrated by the Saudi jurisprudence[105] and insisted on by some scholars[106]. With the silence of the New Arbitration Law, there is nothing to prevent future recurrence of such opinions which may most likely put the parties involved in the arbitration process, in a legal uncertainty as to the possibility to appoint – without enduring the risk of having the award set aside before Saudi courts on the account of Sharia violation - women and/or non-Muslims as arbitrators. Also, doubts may be raised as the enforceability in Saudi Arabia of an award rendered by a panel of non-Muslims or women arbitrators on the ground of Sharia violation.

Even if the Court of Appeal of Dammam in the Eastern Province has not objected in a recent decision dated 2016 to the appointment of the first woman arbitrator in Saudi Arabia,[107] such decision is far from being sufficient to dissipate doubts concerning arbitrators' gender requirements under the current legal regime. First, the Court of Appeal is not vested with the power to approve or disapprove the appointment of arbitrators. Still its role consists only in supporting the arbitration process by completing the constitution of the arbitral tribunal in the event any of the difficulties enounced in Article 15 arise. In the case at hand, both parties appointed their arbitrators - including a woman arbitrator- after the Court of Appeal set a hearing for such purpose. Subsequently, the Court of Appeal confirmed and approved the constitution of the arbitral tribunal and found that the case was ended upon the appointment of the chair. It did not make any

(2012) Resolve the Main Legal Problems? (2016), http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf, at p.170.

[101] Abdul Hamid El-Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries* 40 (Kluwer Law International 2013).

[102] The New Arbitration Law, Article 14.

[103] Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf, at p. 393.

[104] Samir Saleh, *Commercial Arbitration in the Arab Middle East: Sharia, Syria, Lebanon and Egypt* 28 (Hart Publishing 2 ed. 2006). For a different opinion with regards to the gender and faith requirements of an arbitrator from a Sharia perspective, *see* Mohammed Al Jarba, *Commercial Arbitration in Islamic Jurisprudence: A study of its role in the Saudi Arabian Context* (2001), https://pure.aber.ac.uk/portal/en/theses/commercial-arbitration-in-islamic-jurisprudence(d8d3926d-724f-442c-89bc-4a576605aee8).html, at p.73.

[105] Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, available at http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf, at p. 392. For instance, in its decision dated 1998, the Board of Grievance – commercial department - stressed on the fact that the requirements of judges in terms of faith shall be extended to apply to the arbitrator and that if the parties have appointed a non-Muslim arbitrator, the award shall not be enforced (Case No. 159/1416 in 1995 of the Board of Grievance, p.16), cited in Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law* (2012) *Resolve the Main Legal Problems*? (2016), http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf, p.166.

[106] Abdulrahman Yahya Baamir, *Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* 28 (Routledge 2016): "*In accordance with Sharia ruling women cannot be appointed as judges or arbitrators. This is not a matter for discussion in Saudi Arabia*; Cyril Chern , Chern on Dispute Boards: Practice and Procedure 54 (2008): "*It should also be taken into consideration that Saudi Arbitration Law does not allow non-Muslims to act as arbitrators in domestic arbitrations or even international ones. Neither does it allow women to act as arbitrators*".

[107] Mulhim Hamad Almulhim, *The First Female Arbitrator in Saudi Arabia*, http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/.

determination whatsoever as to whether or not gender discrimination applies in the context of arbitration. Also, nothing would guarantee that the appointment of a woman arbitrator would not be challenged at the enforcement stage, all the more true that the enforcement or annulment court and more generally any court in the Kingdom of Saudi Arabia is not bound by the decision of any other court as mentioned elsewhere.

Given the sensitivity of the topic it would have been wiser for the Saudi Regulator and in light of the specificity of the Saudi legal system, to eliminate any doubts in respect of the abovementioned issue by expressly embracing under the New Arbitration Law, the principle of non-discrimination with regards to arbitrators' gender and faith, in a similar manner as other regulators have proceeded in other Muslim jurisdictions. For instance, the Egyptian and Emirati regulators have both lifted within their arbitration laws any gender or faith requirement with regards to appointed arbitrators[108]. However, the Saudi Regulator has elected not to settle the debate and to leave this question open with all the ensuing legal uncertainties for the parties. In contrast, it has been expected that such a matter would be finally settled after the enactment of the long-awaited Implementing Arbitration Regulation, but not at all. Unexpectedly, the Implementing Regulation did not address, whether directly or indirectly, the debatable topic of the selected arbitrator's gender and faith.

Even if the principle of non-discrimination has been embraced under the New Arbitration Law, it is questionable whether or not the appointment of women or non-Muslims as arbitrators would pass the Sharia conformity test and whether or not a dissatisfying party may successfully invoke the violation of Sharia in order to set aside or to resist the recognition and enforcement of arbitral awards rendered by an arbitral tribunal which composition is in contradiction with the Sharia provisions abovementioned. Such uncertainties would undoubtedly make parties to arbitration reluctant to choose Saudi Arabia as a seat of arbitration or to take any risk that may involve the appointment of non-Muslims and women as arbitrators in the context of a Saudi seated arbitration or any other international arbitration having connections with the Saudi legal system.

Another procedural issue that may raise a question of Sharia conformity is that of the gender and faith of witnesses. According to Article 28 of the New Arbitration Law, witnesses are means of evidence that may be used throughout the arbitration proceedings[109]. While the New Arbitration Law is completely silent about the conditions that witnesses should satisfy, the principles of Sharia law would eventually apply to complement such gap. Such requirement has been explicitly consecrated under the old arbitration law where it has been stipulated that the admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to Sharia rules[110].

In this respect, Sharia does not allow an unbeliever (i.e., a non-muslin) to testify against a Muslim[111] . The interaction between such prohibitive rule and arbitration is far from being clear. If one would recourse to Sharia principles, the outcome of such rule may be drastically negative for arbitration in Saudi Arabia. In fact, a party could be deprived of presenting its case in the event the success of such case is based, whether partially or completely, on witnesses who are not from the Islamic faith. Even if the arbitral tribunal decides not to apply such prohibitive rule, it is not clear whether the arbitration award may be immune from annulment or denial of enforcement before Saudi courts. All these ambiguities created by the infiltration of Sharia to a so-called modern arbitration law would not make Saudi Arabia attractive for arbitration.

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[108] Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg020en.pdf; Federal Law No. 11 of 1992 Issuing the Law of Civil Procedure, Amended by Federal Law No. (30) of 2005 dated 30/11/2005 and Federal Law No. (10) of 2014 dated 20/11/2014, https://legaladviceme.com/legislation/143/uae-federal-law-11-of-1992-concerning-issuance-of-civil-procedures-code.

[109] Article 28 of the New Arbitration Law states: "The *two parties to arbitration may agree on the venue of arbitration within the Kingdom or abroad. In the absence of such an agreement, the venue of arbitration shall be determined by the arbitration tribunal, having regard to the circumstances of the case, including the convenience of the venue to both parties. This shall not prejudice the power of the arbitration tribunal to convene at any venue it deems appropriate for deliberation;hearing of witnesses, experts or the parties to the dispute; inspection of the subject matter of the dispute; and examination of documents or review thereof* " (emphasis added).

[110] The Implementation Rules (1985) of the Saudi Arabia Law (1983), Decree of Council of Ministers, No (7/2021/M), corresponding to 28/5/1985 (Gregorian), Article 33. An English translation of these rules is available in 8 International Handbook on Commercial Arbitration 1-8 (Kluwer Law International 1984).

[111] Abdul Hamid El-Ahdab & Jalal El-Ahdab, *Arbitration with the Arab Countries* 40 (Kluwer Law International 2013).

In what pertains to witness's gender, Sharia does not give equal treatments for women and men testimonies[112] and considers the evidence of two women equivalent of that of one man on account of women's alleged lack of memory, incompetence, and general weakness in character which may render their testimony less credible In addition to this, women are considered to be unable to give testimony in business transactions as they are not involved in the commerce and therefore are not apt to understand its complexities[113].

It is not clear whether such rule would apply in the context of an arbitration-taking place in the Kingdom. The New Arbitration Law is silent on this matter; however, the Sharia conformity test may suggest that both the parties and the arbitral tribunal should deal with this matter carefully.

Several legal consequences may transpire from the above. First, it is most likely that the parties and/or the arbitral tribunal due to its inferior legal status as a means of proof versus men's testimonies would avoid women's testimonies. It also means that two women witness statements should be submitted in order to rebut a witness statement made by a man witness. Such discrimination in treating men and women witnesses could raise a problem in respect of the enforceability of the award in other jurisdictions as the principle of non-discrimination is considered as part of the Public Policy in most Western. In the same vein, if the parties or the arbitral tribunal decide not to take into account the discrepancy between the legal status of men and women testimonies, such may give a room for a dissatisfied party to challenge the award on the basis of Sharia violation.

Another concern that may be raised in Saudi Arabia, which has been actually raised in many Muslim countries in the Middle East, is related to witnesses' requirement to swear an oath while presenting their oral testimony before the tribunal during the hearing. Such matter has not been addressed by the New Arbitration Law despite having raised several problems in other middle eastern jurisdictions such as in Dubai, where for instance the Supreme Court of Dubai has refused to enforce a $25 million award on the account of Public Policy due to the fact that the arbitral tribunal has not requested from the witness to swear using the formula prescribed for hearings in Dubai courts[114].

3.1.2 Sharia and substantive law issues

On the substantive level, the interaction between Sharia and arbitration revolves essentially around the question of the law applicable to the merits of the dispute. As mentioned earlier, the New Arbitration Law embraced the principle of parties' autonomy as to the law applicable to the substance of the dispute provided that such choice does not violate Sharia and the Saudi Public Policy. In the absence of a choice of law made by the parties and taking into account the provisions of Sharia law and the Saudi Public Policy, the arbitral tribunal should apply the substantive rules of the law he considers the most relevant to the subject of the dispute[115].

When it comes to the law applicable on the merits of the dispute, one should envisage several scenarios. First, when the arbitration is domestic, the Saudi Law – based on Sharia - would apply to the merits of the dispute. In such event, and despite the legal uncertainty that may entail the application of Sharia which outcome would depend on the arbitral tribunal's interpretation, it could be argued that it has been completely foreseeable for

[112] Najib Ghadbian, *Islamists and Women in the Arab World: From Reaction to Reform?*" 12 AJISA 19, 29(1995).

[113] Faisal Kutty : The Sharia Factor in International Commercial Arbitration, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704, at p.53.

[114] *Bechtel vs. the Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Petition No. 503/2003, (May 15 2005) as cited in Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law* (2012) *Resolve the Main Legal Problems*? (2016), http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf, p.148.

[115] Article 27 of the New Arbitration Law provides that : " *Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following*:

a. Apply to the subject matter of the dispute rules agreed upon by the arbitration parties If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise.

b. If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute".

the parties, which transaction took place within the Saudi borders to have Sharia, with all its unpredictability, as the corpus of law according to which their dispute would be adjudicated.

However, such unpredictability would largely affect the investment environment in Saudi Arabia and may certainly make foreign investors reluctant to incorporate their business in Saudi Arabia by preferring to keep their place of business outside the Kingdom so that their transaction qualifies as international – and therefore the arbitration arising out of it - which would make it possible for them to choose a different law to be applied to the merits of their dispute even if the transaction is strictly and exclusively connected to Saudi Arabia.

Even if the transaction[116] giving rise to arbitration qualifies as international, the author has some doubts as to the effectiveness of the parties' choice of law, since any law chosen by the parties should be compliant with Sharia and with the Saudi Public Policy[117].

At the first glance, it may appear that such provision is not uncommon and may refer to the notion of mandatory rules ("*lois de police*") which are recognised by most arbitration-friendly jurisdictions to be automatically applied to the dispute despite any choice of law made by the parties. By definition, mandatory rules are "laws *that purport to apply irrespective of a contract's proper law or the procedural regime selected by the parties*"[118] and "*can reflect states internal or international public policy, and generally protect economic, social or political interests"*[119]. While it may be legitimate for any legal order which has connections with the transaction (i.e., the legal order of the seat of arbitration or the legal order where the arbitral award will be enforced) to have its mandatory rules applied despite any choice of law made by the parties[120], the specificity of Saudi law which is Sharia based calls upon the following comments.

First, the identification of mandatory rules that may apply to international transactions having connection with the forum irrespective of any choice of law made by the parties or the applicable conflict of law rule, is the result of a tremendous intellectual work deployed essentially by the jurisprudence[121] and the doctrine in most of the developed jurisdictions where private international law is considered a well-established branch of law[122]. As mentioned earlier in this article, the notion of private international law is unknown by the Saudi legal system[123] and therefore there are not any jurisprudential or doctrinal foundations on which one could rely upon in order to identify Saudi mandatory rules that may apply to international transactions having connection with the Saudi forum.

More importantly, being a Sharia-based legal system, it would be hard to identify mandatory rules as there is no such distinction between mandatory and not mandatory rules when it comes to provisions dictated by God. As rightly pointed out, Sharia is by definition "personal and absolute"[124]. As a result and despite the theoretical possibility for the parties to choose the law applicable to the contract, the conformity to Sharia which is all mandatory may render such option practically obsolete[125] - specially that the principles of Sharia contract law differ largely from contract principles embraced by other legal systems - and the arbitrator - who is " under the duty to render an arbitral award which is capable of enforcement under the New York

[116] Article 3 of the New Arbitration Law.
[117] Article 27 of the New Arbitration Law.
[118] Andrew Barraclough & Jeff Waincymer, *Mandatory rules of law in international of commercial arbitration*, 6 Melb. J. Int. Law, 205 (2005).
[119] Andrew Barraclough & Jeff Waincymer, *Mandatory rules of law in international of commercial arbitration*, 6 Melb. J. Int. Law, 208 (2005).

[121] G. Radicati di Brozolo, Luca, *Arbitrage commercial international et lois de police : considérations sur les conflits de juridictions dans le commerce international*, 315 RCADI 265, 308 (2005).
[122] For doctrinal work, *see* for instance: Pierre Mayer, *Mandatory Rules of Law in International Arbitration* 2 (4) Arbitr. Int. 274(1986); M. Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 (4) J. Int. Arbitr. 23 (1997).
[123] *See* A. Alobud, *Developing Saudi Private International Law to accommodate Ecommerce transactions growth*, https://www.researchgate.net/publication/336230121_DEVELOPING_SAUDI_PRIVATE_INTERNATIONAL_LAW_TO_ACCOMMODATE_E-COMMERCE_TRANSACTIONS_GROWTH.
[124] Nathalie Najjar, *Sharia Applicable to the Merits in International Commercial Arbitration* in Liber Amicorum Samir Saleh: *Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215, 227 (Kluwer Law International 2009).
[125] Fadi Nammour, *De l'applicabilité de la charia islamiya dans l'arbitrage international*, https://www.academia.edu/6698880/De_l_applicabilit%C3%A9_de_la_charia_islamiya_dans_l_arbitrage_international.

Convention"[126], may apply the Sharia Law automatically without any consideration to the choice of law made by the parties particularly in events when the arbitration is seated in Saudi Arabia or when Saudi Arabia is a potential place for the enforcement of the award.

In this regard, it has been considered that the mere application of a foreign law would be *ipso facto* considered by a Saudi judge to be contrary to Sharia[127]. As pointed out, a divinely inspired system of laws precludes parties' the choice of any other law [128]. This explains why Saudi courts and regulations do not recognise Western conflicts of law principles. Indeed, Saudi courts have incessantly ruled that non-Islamic laws are not permitted to be applied, especially when the parties to the conflict are Muslims[129]. While it is true that such decisions have been made under the old arbitration regime and before the enactment of the New Arbitration Law; however, it is the author's view that the enactment of the New Arbitration Law which enforces the choice of law clauses does not operate a change in what pertains to the legality of the application of a foreign law under Sharia principles and nothing would guarantee that such choice of law would be considered as Sharia compliant by Saudi courts.

Another important question that should be taken into consideration is the method of Sharia interpretation deployed by arbitrators when deciding the dispute. In fact, the arbitrator should adapt its school of thought to the one prevailing in Saudi Arabia in order to reduce the risk of non-circulation of the award in the Kingdom as the Saudi judge may assert his own school of thought and therefore deny the enforcement of the arbitral award[130].

3.1.3 Sharia, Saudi Public Policy and the enforceability of arbitral awards in Saudi Arabia

Sharia role emerges once again in the context of the enforceability of arbitral awards. According to Article 55 of the New Arbitration Law, the order to execute an arbitral award shall only be made if the arbitral award does not include what is contrary to the provisions of Islamic Sharia and Public Policy in the Kingdom of Saudi Arabia[131]. Such provision applies to domestic and international awards when the arbitration is seated in the Kingdom. The order rendered by the Competent Court amounts to an enforcement deed[132] that could be automatically enforced by the interested party before the enforcement courts. Furthermore, in order to be immunised from annulment, any arbitral award rendered in the Kingdom shall be among other things, Sharia compliant. The scrutiny of the conformity of the arbitral award to Sharia and to the Saudi Public Policy could be made *ex officio* by the judge hearing an action for setting aside arbitral award[133].

In what pertains to international awards rendered outside the Kingdom, the New York Convention on the recognition and enforcement of foreign awards applies as Saudi Arabia joined this convention on April 19, 1994, with the reservation of reciprocity. However, as rightly pointed out, the effect of the reservation clause is reduced since most of the countries have joined the New York Convention[134].

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[126] Nathalie Najjar, Sharia Applicable to the Merits in International Commercial Arbitration in Liber Amicorum Samir Saleh: Reflections on Dispute Resolution with Particular Emphasis on the Arab World 215, 235 (Kluwer Law International 2009).

[127] A. Alobud, *Developing Saudi Private International Law to accommodate Ecommerce transactions growth* 53, https://www.researchgate.net/publication/336230121_DEVELOPING_SAUDI_PRIVATE_INTERNATIONAL_LAW_TO_ACCOMMODATE_E-COMMERCE_TRANSACTIONS_GROWTH; . A lkhamees, *International Arbitration and Sharia Law: Context, Scope, and Intersections*, 28(3) J. Int. Arbitr. 255, 264 (2011).

[129] *See* courts decisions cited by Mohammed I. Aleisa , *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems*? (2016), http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf, at p. 166.

[130] Aisha Nadar, *Islamic Finance and Dispute Resolution*, 23 Arab Law Q. 1, 24 (2009).

[131] Article 55 of the New Arbitration Law.

[132] Article 9 of the New Execution Law states: "*Compulsory execution may not be carried out except with an enforcement document for a due a specified right. Enforcement documents are :*

1- …

2- arbitral awards which include the enforcement order in accordance with the Law of Arbitration".

[133] Article 50.2 of the New Arbitration Law states : "*The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law* ".

[134] Mohammed I. Aleisa, *A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?* (2016), available at: http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf, at p. 85.

When the arbitral awards are rendered in a jurisdiction which is not a signatory of the New York Convention, the provisions of the Enforcement Law apply. According to Article 12 of the New Enforcement Law, the enforcement of foreign judgments applies *mutandis mutatis* to arbitral awards issued in a foreign country. Article 11 sets forth the conditions for the enforcement of foreign judgments and arbitral awards and provides that such enforcement should be refused by the enforcement court if the judgment /the award is among other things, in conflict with Saudi Public Policy. It is interesting to mention in this regard, that Article 11 does not refer to Sharia but only to Public Policy; however, as we shall see, the Enforcement Law considers that Sharia constitutes the main component of Saudi Public Policy which means any arbitral award subject to the provisions of the Enforcement law should also pass a Sharia conformity test.

The conformity of foreign arbitral awards to Sharia as a condition for their enforcement and recognition raises a certain number of issues which, according to the author's view, may neutralise the quest of modernity and alignment to the international arbitration standards that the New Regulations seek to achieve.

First, as previously pointed out in this article, Sharia is far from being a set of rules that apply consistently by judges; therefore, the conformity of an arbitral award to Sharia may essentially depend on the judges of the Competent Court or the judges of the enforcement court own interpretation of the principles of Sharia and its determination as to whether a given award is Sharia - compliant or not[135]. In addition, the principle of *stare decisis* is not recognised by courts in Saudi Arabia[136], making it difficult to predict the outcome of the Sharia conformity test even when the cases are similar. Such would most probably result in a certain inconsistency in respect of what may be considered Sharia - compliant and what may not be, specially that Saudi judges do not necessarily come from the same legal background and that two different courts (i.e., Competent Court and Enforcement Court) depending on whether the arbitration is seated in Saudi Arabia or not may be asked to initiate the Sharia - conformity test.

Such uncertainty may be dissipated with codification which unfortunately has not as of yet taken place for the branch of civil law which obeys as of the date of the draft of this article to Sharia principles. Needless to mention that civil law issues such as the principle of contract interpretation, compensation, penalty clauses, interests etc. are issues that would most likely arise in every arbitration irrespective of the nature of the dispute and that the uncertainty surrounding these notions due to the absence of codification would make it difficult for the parties to envisage the approach that Saudi courts would embrace in this regard.

Second, the principles of Sharia contract law differ largely from those existing in other jurisdictions and, more generally, from the modern commercial practice[137]. For instance, parties are prohibited under Sharia to enter into aleatory contracts or to agree on contractual clauses that may depend on the happening of an unsure event[138] ; therefore, transactions such as insurance, asset recovery, and forex are considered null under the principles of Sharia and by the same logic any arbitral award rendered in connection with a dispute arising from the above, could be denied enforcement by Saudi Arabia courts or annulled at the seat of arbitration. This may also be the case for entertainment contracts such as those related to artists' performance based on the fact that singing and dancing are prohibited under Sharia principles[139].

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[135] Mohammad Motlg Althabity, *Enforceability of Arbitral Awards Containing Interest – A Comparative Study between Sharia Law and Positive Laws*, A Thesis submitted for the degree of Doctor of Philosophy in law (PhD), School of Law University of Stirling (2016), https://dspace.stir.ac.uk/handle/1893/23090#.X5aSQ9AzaMo, at p. 82.

[136]Saud Al-Ammari & A. Timothy Martin, *Arbitration in the Kingdom of Saudi Arabia*, http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf, at p.405.

[137] As pointed out by an author: "*The Sharia is one of the greatest system of laws but it is not in my view appropriate in many aspects to what the world has made of commerce* " in W.M. Ballantyne, *Arbitration in the Gulf States : Delocalization: A short Comparative Study*, 1 Arab Law Q. 205, 215 (1985).

[138]Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defenseto Refuse Enforcement of Non-Domestic Arbitral Awards*?, 18 (3) Fordham Int. Law J. 920, 947 (1994).

[139] For instance, in case 3375/1, an arbitral award was denied recognition on the account that it was rendered in the context of a dispute arising out of an entertainment contract (singing and dancing) which consist of activities prohibited by the Quran and the teaching of the Prophet Mohammed (as cited *in* : Ahmed Altawyan, *Arbitral Awards Under the Saudi Laws: Challenges and Possible Improvements* (2017),
https://www.researchgate.net/publication/316598002_Arbitral_Awards_Under_the_Saudi_Laws_Challenges_and_Possible_Improvements, p. 23.

Also, the principles of Sharia consider void and null any contract that charges interest rates or builds profit margin on account of "*Riba*", the term refers to the obtainment of something from nothing, which is considered immoral and wrong[140]. In this regards, Saudi courts have constantly refused to enforce arbitral awards awarding interests[141].

In the same vein, the principles of damage compensation, whether in contract or tort lies under Sharia on different dynamics than the ones prevailing in the West[142]. In this regard, penalty clauses, delayed damages, lost profits, loss of use, emotional stress and pain and suffering[143] are, among other things, considered contrary to the principles of Sharia[144].

Against this background and in the context of an international arbitration seated in Saudi Arabia or having connections with the Kingdom, the arbitral tribunal when confronted with such contractual provisions, may disqualify any law chosen by the parties that is not Sharia - compliant by applying Sharia law as a mandatory law or the Arbitral tribunal may apply the law chosen by the parties' despite being non – Sharia - compliant. In either situation, the results may not be really desirable. In the first situation, the choice of law made by the party would become obsolete which goes against the principle of party autonomy in international arbitration. In the second situation, the arbitral award may be set aside or denied recognition in Saudi Arabia. In this respect, it has been considered that "refusals to enforce foreign arbitral awards have been the norm, because public policy in Saudi Arabia covers a vast area of practice that might be unknown to foreign arbitrators sitting abroad and applying non-Saudi *lex arbitri*. Establishing whether or not the award complies with Sharia law may result in the enforcement court examining the case on its merit"[145].

In addition to Sharia, arbitral awards should pass the test of Saudi Public Policy, whether as a condition precedent for the competent court to issue an order for the execution of the arbitral award[146] or the enforcement of foreign awards[147]. The Public policy test applies as well in the context of an action for setting aside an arbitral award[148]. While the conformity of an arbitral award to Public Policy is a condition precedent for the enforcement of arbitral awards elsewhere and is consecrated by the New York Convention[149] to which Saudi Arabia is a party, it is not clear under Saudi Law what kind of tests should an arbitral award be subject to recognition and enforcement as the boundaries of Public Policy – similarly to those of Sharia - are far from being clearly defined. As rightly pointed out by a scholar, the fact that Saudi Arabia is a signatory to the New York Convention provides no guarantee to foreign entities, which have entered into contracts with Saudi Arabian entities, in terms of enforceability of arbitral awards[150].

Indeed, the notion of Public Policy in Saudi Arabia is far from being clear,[151] and no consensus has been reached among scholars and judges on what the notion of Public Policy stands for. Whatever the case may

[140] Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defenseto Refuse Enforcement of Non-Domestic Arbitral Awards*?, 18 (3) Fordham Int. Law J. 920, 947 (1994).
[141] *See* for instance: Marubeni Corporation v. Abdullah Saeed Bugshan & Brothers (Case No. 37163202/1437H); Sumitomo Corporation v. Abdullah Saeed Bugshan & Brothers (no case reference available) as cited by Jean-Benoît Zegers, *National Report for Saudi Arabia (2019 through 2020)* 1, 36 in ICCA International Handbook on Commercial Arbitration (ICCA & Kluwer Law International 2019, Supplement No. 109, March 2020).
[142] Mohammad Motlg Althabity, *Enforceability of Arbitral Awards Containing Interest – A Comparative Study between Sharia Law and Positive Laws*, A Thesis submitted for the degree of Doctor of Philosophy in law (PhD), School of Law University of Stirling (2016), https://dspace.stir.ac.uk/handle/1893/23090#.X5aSQ9AzaMo, p. 83.
[143] *See* Saud Al-Ammari and A. Timothy Martin, Arbitration in the Kingdom of Saudi Arabia, available at http://timmartin.ca/wp-content/uploads/2016/02/Arbitration-in-KSA-Arbitration-Int-V30-2-2014.pdf, at p.406.
[144] For a detailed analysis in respect of the discrepancy between sharia contract law and other civil law systems. *See*: Mohammed I. Aleisa, A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems? (2016), http://repository.essex.ac.uk/17245/1/ALEisa-PhDThesis-May2016-Final-2.pdf, at p.184 et seq.
[145] Jean-Benoît Zegers, *National Report for Saudi Arabia (2019 through 2020)* 1, 29 in ICCA International Handbook on Commercial Arbitration (ICCA & Kluwer Law International 2019, Supplement No. 109, March 2020).
[146] Article 55 of the New Arbitration Law.
[147] Article 11 of the New Enforcement Law.
[148] Article 50.2 of the New Arbitration Law.
[149] Article V (2) (b) of the New York Convention.
[150] Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defenseto Refuse Enforcement of Non-Domestic Arbitral Awards*?, 18 (3) Fordham Int. Law J. 920, 954 (1994).
[151] M. WAKIM, *Public Policy concerns regarding enforcement of foreign international arbitral award in the Middle East* (2008), available at:

be, Public Policy in a religious state such as Saudi Arabia would encompass a large area of practices that may often be unknown to foreign investors and commercial partners which transactions take place outside Saudi Arabia.

The New Arbitration refers simultaneity to Public Policy and Sharia[152]. Hence, it is not clear whether Sharia and Public Policy are same or separate. It seems, however, that the two notions are confused[153]. For instance, in its definition of Saudi Public Policy, the Implementing Regulation of the New Execution Law considers that the latter refers to Sharia[154].

This has also been confirmed by the answer of the Kingdom of Saudi Arabia by virtue of a Royal Decree[155] to an inquiry filed by the Supreme Judicial Council regarding the notion of Public Policy[156] stating that Public policy in Saudi Arabia encompasses the provisions of Islamic Sharia based on the interpretation of the Holy Book and the traditions of his messenger[157]. Such a position seems to be upheld by a certain number of authors who claim that in the gulf region, Public Order, Public Policy, morality and Sharia law, collectively refer to the same thing as they are based on the same paramount values that are fundamental to these countries[158].

Despite the confusion between Public Policy and Sharia in Saudi Arabia, it is the author's view that the notion of Public Policy is wider and encompasses other mandatory regulations which may not be necessarily related to Sharia such as regulations which aim at protecting the economic and political interests of Saudi Arabia, and which are not necessarily matters that are dealt with by Sharia. Hence, it can be placed under the auspices of Public Policy, mandatory regulations that deal with anti-competitive practices or security regulations. Such areas of Public Policy remain, however largely unexplored in Saudi Arabia.

Another important thing is that there is no distinction within the New Regulations between domestic Public Policy and International Public Policy. Indeed, despite the distinction between domestic arbitration and international arbitration, the New Arbitration law does not draw any concrete consequences, particularly as to whether the exception of Public Policy could be applied with a different intensity depending on whether the arbitration is domestic or international or as to whether the dispute has a strong connection with Saudi Arabia or not. Such a legislative gap may not be easily filled by the Saudi jurisprudence, similarly, to what the case has been in other jurisdictions. This may be due to the fact that the notion of private international law is quite unfamiliar within the Saudi Legal system which makes Saudi courts unlikely to recourse to theories and methods of private international law similarly to Western courts in order to draw a distinction between domestic and international Public Policy[159]. Should Saudi Courts apply the exception of Public Policy indifferently and without consideration as to the domestic or international nature of the arbitration, this would impede the circulation of foreign awards in Saudi Arabia rendered in accordance with non-Sharia applicable substantive laws.

file:///C:/Users/atabbara/Documents/Personel%20information/Research/Arbitration%20Project/PP_Concerns_re_Arbitral_Awards_in_the_ME%20(2).pdf, at p.27. According to this author: "Other *countries, such as Saudi Arabia, remain unclear about public policy standards that will be invoked upon review during the enforcement proceedings*".

[152] Article 38.1 of the New Arbitration Law : " *Subject to provisions of Sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following …..*"; Article 50.2 : " *The competent court considering the nullification action shall, on its own initiative, nullify the award if it violates the provisions of Sharia and public policy in the Kingdom or the agreement of the arbitration parties, or if the subject matter of the dispute cannot be referred to arbitration under this Law*"; Article 55.2 (b) : "*The award does not violate the provisions of Sharia and public policy in the Kingdom. If the award is divisible, an order for execution of the part not containing the violation may be issued".*

[153] Ahmed Alsirhan, The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice, A Thesis Submitted to the School of Law, Victoria University for the Degree of Doctor of Philosophy (PhD) Melbourne, Australia (2019), http://vuir.vu.edu.au/39482/1, at p. 27.

[154] Article 11.3 of the New Execution Law Implementing Regulation.

[155] Inquiry number 8898 dated 27/5/2012.

[156] Inquiry number 8898 dated 27/5/2012.

[157] Royal Order Telegraph No. 4498 dated 22/8/2012.

[158] Mohamed Saud Al-Enazi, G*rounds for Refusal of Enforcement of Foreign Commercial Arbitral Awards in GCC States Law* (2013), available at: https://bura.brunel.ac.uk/bitstream/2438/11079/1/FulltextThesis.pdf, at p. 117.

[159] Gary Born, *International commercial arbitration* 3655 (2ed Wolters Kluwer 2014).

Ambiguities and uncertainties revolving around the two notions of Sharia and Public Policy and the application of these two notions indifferently, irrespective of the domestic or international nature of the arbitration would have a drastic negative impact on the development of arbitration, in Saudi Arabia as well as on Saudi Arabia's ability to access the club of arbitration-friendly jurisdictions. Furthermore, there are important concerns that Saudi courts may take advantage of the blurring boundaries of both Sharia and Public Policy to refuse the enforcement of foreign arbitral awards, especially those which are considered to be against its economic interests (arbitral awards rendered against Saudi governmental entities for instance).

In this respect, several private entities which have been involved in arbitration resulting in arbitral awards subsequently sought to be enforced before Saudi Arabia have expressed their dissatisfaction as to Saudi Court's recourse to Public Policy to resist the enforcement of arbitral awards considering that the reasons given relating to Public Policy were weak or not enough substantiated[160].

Even practitioners in Saudi Arabia, be they lawyers or judges do not agree on what may constitute a violation of Public Policy in Saudi Arabia[161]. In his PhD dissertation entitled "Arbitration in Saudi Arabia: The Reform of Law and Practice", Mr Bin Abbadi concluded after interviewing several judges regarding what may constitute a violation of Public Policy, that every judge defines Public Policy differently and applies it the way he sees it[162].

Also, it should be noted that it is quite hard in Saudi Arabia to apprehend Saudi Court's approach to public policy as Saudi Law does not require the courts to publish their cases making accessing court records very challenging[163].

All the above issues demonstrate that a party attempting to enforce a foreign arbitral award in Saudi Arabia still faces considerable challenges and that an arbitral award rendered in a seated Saudi Arabia faces great risks of being set aside.

4. Suggested solutions

Although more than eight years have lapsed following the enactment of the New Arbitration Law, many issues remain unclear in Saudi Arabia as demonstrated throughout this paper. This may explain why Saudi Arabia is not today an attractive seat for arbitration in the Middle East. As rightly pointed out by a commentator, unless a foreign company is specifically required to enter into an agreement containing an arbitration clause which specifies Riyadh or another city in the Kingdom as the seat of the arbitration, arbitration using a foreign seat will remain the preferred dispute resolution method[164]. It is against this background, that the author would propose some suggestions that may be taken into account by the Saudi Regulator and courts in order to provide business actors and, more specifically, foreign entities a more attractive environment for arbitration in Saudi Arabia.

As incessantly mentioned in this paper, the lack of legal certainty is one of the most challenging issues that business actors may face in Saudi Arabia, whether in the context of a Saudi seated arbitration or in the context of a foreign arbitration which award may be subsequently solicited for recognition and enforcement before Saudi Courts.

From a procedural point of view, the consecration of express legal provisions through the enactment of a new implementing regulation would be very important to dissipate doubts about a certain number of procedural issues, such as gender and faith arbitrators and the witnesses.

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[160] Ahmed Alsirhan, *The Refusal of Foreign Arbitral Awards in Saudi Arabia on the Grounds of Public Policy – An Issue of Fairness and Justice*, A Thesis Submitted to the School of Law, Victoria University for the Degree of Doctor of Philosophy (PhD) Melbourne, Australia (2019) available at available at http://vuir.vu.edu.au/39482/1, p. 199.

[161] Saleh Mubarak Bin Abbadi, *Arbitration in Saudi Arabia: The Reform of Law and Practice*, SJD Dissertations, Penn State Law e Library (2018), https://elibrary.law.psu.edu/sjd/9, at p.138.

[162] *Ibid.*

[163] Saleh Mubarak Bin Abbadi, Arbitration in Saudi Arabia: The Reform of Law and Practice, SJD Dissertations, Penn State Law e Library (2018), https://elibrary.law.psu.edu/sjd/9, at p.148.

[164] Shearman and Sterling, *Arbitration in the Kingdom of Saudi Arabia*, https://www.al-maarifa.shearman.com/siteFiles/15472/Arbitration-in-the-Kingdom-of-Saudi-Arabia-IA-012017.

From a substantive standpoint, the codification of civil law principles may allow the parties to have a clear vision of the Saudi Civil law, by making it possible for them to envisage which choice of law may be enforceable by the arbitrator and which choice may be disqualified for violating Saudi mandatory rules. It would also be possible for the arbitral tribunal to assess whether the application of foreign law could raise problems at the stage of recognising and enforcing the arbitral award before Saudi Courts.

Even if the codified civil law would be based on Sharia principles, the legal certainty that may entail the enactment of such law would help the parties to design their transaction to be conform to Saudi Arabian regulations and may provide a guideline for the arbitral tribunal to render an arbitral award that may not be subsequently challenged by the parties.

The codification of Sharia principles may also help transform Saudi Arabia into an arbitration hub for arbitration dealing with Islamic transactions. In this regard, it is interesting to mention that because of the legal uncertainty which is a characteristic of the Saudi law of civil transactions, even business actors which follow the Islamic model of doing business have always avoided choosing Saudi Arabia as a seat of arbitration and other countries which have codified the Sharia principles have emerged as a preferred seat of arbitration[165].

While codifying Sharia principles is an important step that may positively impact the development of arbitration in Saudi Arabia, other issues also need particular attention. Indeed, due to the fact that Sharia law principles – whether codified or not - differ largely from the principles of contract law as embraced in the West, and in order to practically enforce parties' choice of law or protect arbitration awards from annulment or denial of recognition, the Saudi legal system needs to embrace a more tolerant position in respect to what may be considered as contrary to Sharia/Saudi Public Policy. Hence, the intensity of the Sharia/Public Policy test should not be applied the same way in the context of purely domestic arbitration versus when the arbitration is international. A more lenient approach to Sharia and Public Policy should be adopted when the arbitration is of an international nature.

Despite the fact that the New Arbitration Law has distinguished between domestic and international arbitration, it has not however drawn any practical legal consequences from such distinction. This is why it may be relevant to take such a distinction as a basis to draw some legal consequences notably in respect of the intensity of the Sharia /Public Policy test that would apply to arbitral awards either before the courts of annulment or the courts of enforcement. The intensity of such a test should depend on the domestic or international nature of arbitration, and a more lenient approach in respect of Sharia/Public Policy compatibility test should be embraced by the courts with regards to arbitral awards resulting from international arbitration. This could be achieved through a New Implementing Regulation requesting the courts to lower the intensity of the Sharia/Public policy conformity test – over both substantive and procedural matters - when the arbitration is international[166] or through a jurisprudential movement operated by Saudi courts in a fashion similar to certain Western courts which set the basis of the notion of the "International Public Policy"[167]. By varying the intensity of the Sharia/Public Policy exception depending on the domestic or international nature of arbitration, Saudi Arabia would achieve a certain balance between the preservation of its local culture and the adherence to the international arbitration standards.

Even more, the author is of the view that international arbitration should be completely liberated from the grips of Sharia and Saudi Public Policy alike. While such a suggestion may seem awkward at first glance, it is not, however without any legal foundation. Indeed, the Saudi Regulator has created a whole system completely separate from Sharia, in a certain number of industries. For instance, in the banking sector, despite the illegality of interests, most banking transactions are identical to the banking model in the West and

[166] In order jurisdictions, national arbitration laws provide expressly for the application of "international public policy" in the context of recognition proceedings under Article V(2)(b) of the New York Convention . To take an example from the Middle East, Lebanon, has expressly consecrated an exclusively "international public policy" exception in its arbitration laws which means that the public policy defense would only be successful if enforcement of the award is contrary to the notions of morality and justice as imbedded within the international community .

[167] Gary Born, International *Commercial Arbitration* 3478 (Wolters Kluwer 2014).

involve interests. If such transactions are brought before the competent courts in case of a dispute, the courts would most likely invalidate such transactions for being Sharia non-compliant. This is why, a dispute resolution committee for banking disputes called the "Banking Disputes Settlement Committee"[168] has been established and operates independently from the Saud judicial system and has been attributed the competence to decide on cases involving banking transactions that do not comply with Sharia. The reason behind the creation of a separate system is the need for Saudi Arabia to modernise its banking practices in order to be in line with the international banking business model and to have contemporary banking matters aggregated in a specialised forum in a more experienced and flexible manner than when disputes are brought before the normal competent courts.

If the Saudi Regulator and for the purpose of modernising its domestic business model, has already liberated a certain number of domestic transactions from the grips of Sharia by creating a separate aggregative system, then nothing should prevent the adoption of the same logic when it comes to international arbitration where it makes more sense to lessen the grips of Sharia and Saudi Public Policy or even to exclude it when controlling international arbitral awards. Hence, it may be completely foreseeable to establish within the realm of the Competent court and the Enforcement court a judicial committee that deals exclusively with applications in respect of the annulment or recognition and enforcement of foreign arbitral awards and which reduces the Sharia/ Saudi Public Policy conformity test in favour of a more flexible and pragmatic approach that would be in line with the international arbitration practice.

Conclusion

To answer the question raised in this paper, "Preserving the local culture while modernising arbitration: A blessing or a curse?", the author has tried to demonstrate throughout the previous developments that it is not enough to modernise arbitration laws in order to promote the development of arbitration, but such effort should be completed by providing a legal environment that would allow the regulations to operate efficiently.

[168] *See* Royal Decree No 8/729 on 10/07/1407 HA.

Resolving Executive Succession in UAE Family Businesses: The Board of Directors Solution

Dr. David Chekroun, PhD, Megha Bansal and **Tanya Bansal**

Abstract

Family businesses, which are uniquely important to the United Arab Emirates (UAE), face the challenges of transitioning to the second or third generation. Conflicts around ownership and/or management of the business can result in destructive family disputes and even disintegration of the businesses. Proactive succession planning is the key to eliminating such conflicts.

Both internationally and regionally, there is a growing push to promote good corporate governance, through regulatory intervention and policy initiatives, as a means of ensuring smooth succession. This article assesses the rules, regulations, and guidelines, including those in relation to corporate governance, as applicable to family businesses in the UAE. A review of UAE legislation and insights from comparative law suggests that the Board of Directors, through a well-defined Nomination Committee, adequate female representation, and independent directors, is the effective solution to resolve executive succession in family businesses.

Keywords

Board of directors; corporate governance; executive succession; intergenerational transfer; family business; succession planning; United Arab Emirates

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Introduction

Family-owned businesses (family businesses) in the UAE are the driving engines of the regional economy, believed to contribute in excess of 80% of non-oil gross domestic product, 90% of the private sector and generate over 70% employment in the Gulf Cooperation Council (GCC).[1] Historically, cultural preferences prevalent among Arab tribes and strong political connections vital for success in the relatively closed economies (that is, prior to the broad economic reforms and liberalisation which demarcated the 2000s[2]) led to family businesses to grow in scale and power.[3] Most family businesses in the GCC started out as small trading companies and over time, expanded into large diversified conglomerates, spanning diverse industries including real estate, construction, retail, manufacturing, and travel and leisure.[4] Against this context, it is noted that GCC family businesses are now entering the second or third generations, with an estimated USD 1 trillion of assets set to be handed over to the next generation in the next five to ten years[5].

At the brink of intergenerational transitions, unique family dynamics inherent to the Arabian Gulf shape succession.[6] GCC family businesses are mostly private companies and double in size compared to their peers in the United Kingdom (UK) and the United States (US).[7] Arguably, GCC family businesses are facing complexities typical of families in their third and fourth generation cycles with a large number of family shareholders, resulting in a higher likelihood for conflict. The relatively large size of the family places pressure on GCC family businesses to grow rapidly; specialised research has concluded that in order to maintain the same level of wealth, the average GCC family business must expand by 18% a year.[8] Therefore, it is possible that decisions which should be solely linked to business management are focused on competing goals such as personal wealth impacts, emotional attachment to companies and properties, or personal prospects for jobs.[9] Add to that, divergent views about the management of the family business in the absence of formalised family governance structures such as the family council and the family constitution, and lack of corporate governance mechanisms such as a functional and well-structured Board of Directors, and you end up with shareholding conflicts.[10]

Similar to their GCC counterparts, UAE family businesses represent roughly 90% of the private sector.[11] A UAE-specific study of the family business ecosystem identified these family businesses to be relatively young, with an average age of thirty-three years, and over half of the sample of firms surveyed, to be in the first generation, a factor attributed to the foundation of the country in 1971.[12] As these family businesses mature

[1] S. Kohli, "UAE: Experts share insights on why some family businesses fail, yet some survive*",* Khaleej Times, 17th October 2021, https://www.khaleejtimes.com/business/uae-experts-share-insights-on-why-some-family-businesses-fail-yet-some-survive.

[2] S. Darwish, A. Gomes & V. Bunagan, "Family Businesses (FBS) in Gulf Cooperation Council (GCC): Review and Strategic Insights", Academy of Strategic Management Journal, 2020, vol. 19, issue 3, p. 6, https://www.researchgate.net/publication/343224258_FAMILY_BUSINESSES_FBS_IN_GULF_COOPERATION_COUNCIL_GCC_REVIEW_AND_STRATEGIC_INSIGHTS.

[3] W. Al Awadi & H. Koster, "Corporate Governance and Sustainability of Family Businesses in the UAE*",* 2017, p. 2, SSRN*:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084378.

[4] Family Business Council Gulf and McKinsey & Company, "Family businesses in the Gulf Cooperation Council: The journey to long-term Sustainability, Findings from the Inaugural GCC Family-Owned Business Survey*",* 2015, https://www.fbc-gulf.org/mediafiles/articles/doc-1362-20171117034009.pdf.

[5] PwC, "Understanding family dynamics and family conflicts", 2020, p. 5, https://www.pwc.com/m1/en/publications/documents/understanding-family-dynamics-conflicts.pdf.

[6] B. Augustine, "Middle East's family businesses get serious on sustainability: Governance and empowering generations key to business continuity and success", Gulf News, 7th November 2015, https://gulfnews.com/how-to/your-money/middle-easts-family-businesses-get-serious-on-sustainability-1.161450.

[7] PwC, "Middle East Family Business Survey 2019, Future-proofing Middle East family businesses, Achieving sustainable growth during disruptive times" 2019, p. 10, https://www.pwc.com/m1/en/publications/documents/family-business-survey-2019.pdf.

[8] R. Bakar, S. Ahmad & R. Buchanan, "Trans-generational success of family businesses*",* Journal for International Business and Entrepreneurship Development, 2015, p. 4, https://www.researchgate.net/publication/282239326_Trans-generational_success_of_family_businesses.

[9] S. Darwish, A. Gomes & V. Bunagan, "Family Businesses (FBS) in Gulf Cooperation Council (GCC): Review and Strategic Insights", Academy of Strategic Management Journal, 2020, vol. 19, issue 3, p. 9.

[10] In addition, less than a quarter of GCC family businesses disclose their financial records and fewer than 10% have any formal forum that is responsible for oversight of governance matters. Please see W. Awadhi and H. Koster, "Corporate Governance and Sustainability of Family Businesses in the UAE", 2017, p. 3, SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084378.

[11] Abdel & Katsioloudes, "SMEs Capital Structure Decisions and Success Determinants: Empirical Evidence from the UAE", Journal of Accounting, Ethics and Public Policy, 2017, Vol. 18, No. 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997348.

[12] R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020, https://www.researchgate.net/publication/339172085_Family_Business_Ecosystem_in_UAE.

into the next stage, succession becomes one of the dominant issues.[13] (Annex, Figure 1 for more details around key issues faced by the family business at each life cycle stage.) Several studies have established the lack of robust governance in family businesses, and where such systems do exist, they are not well implemented in practice. In a survey of family firms across the UAE, the Arab region and the rest of the world, published in 2020 via the Successful Transformation Entrepreneurship Project (STEP Project),[14] UAE family businesses were found to have rudimentary family governance structures and a low adoption of Board of Directors.[15] 32% of family firms surveyed in the UAE were found to have a formal family council (similar to Arab peers and the rest of the world), only 17% implemented a family constitution in their firms (lower than Arab peers at 22%), and only 43% had a formal Board of Directors.[16]

Similarly, in the collaborative survey conducted by McKinsey & Company and Family Business Council Gulf (FBCG), two-thirds of the participants reported having started to put the building blocks of governance in place but only one-third reported that the practices were fully adopted and working effectively[17]. The survey further noted that one of the most challenging tasks for families was managing family dynamics, particularly in relation to preparing the next generation and managing conflict.[18] Given the importance of family businesses to the UAE's economy, ensuring their sustainability has been recognised as a crucial component of national policy directives.

Section 1 of this article highlights the key laws governing the organisation of family businesses in the UAE, extracting from the commercial law, trust and foundations laws and more recent regulations for ownership among family businesses. Section 2 details the challenges around succession and introduces the different solutions to potentially remedy these issues. Section 3 identifies corporate governance as the legal solution, and drills down on the UAE's corporate governance requirements, including both hard and soft law initiatives promulgating corporate governance, and how these might apply to bolster succession planning. Next, Section 4 makes a case for strengthening a critical aspect of corporate governance, namely the Board of Directors. It does so by investigating the extent to which the UAE's laws support a robust Board of Directors structure and compares the legal requirements of the Board of Directors with those of international benchmarks. Finally, the conclusion puts forth recommendations that the UAE could take into account when it revises its legislative framework to regulate succession planning among family businesses. While such a development may seem obvious from a legal perspective, it may be perceived as less optimal from a business perspective, as it may lead family businesses to change their values around privacy by appointing more independent directors or incur higher costs in recruiting, maintaining and monitoring Boards. Here, the authors recommend an optimal Board structure and argue for the merits of more independent directors and more women, through hard law intervention similar to the hard statutory mandates of European examples such as France[19].

1. Family businesses in the UAE

This section highlights the key laws governing the organisation of family businesses in the UAE, extracting from the commercial law, trust and foundations laws and more recent regulations for ownership among family businesses.

[13] Governance Handbook, International Finance Corporation Family Business (IFC), 2018, p.16, https://www.ifc.org/wps/wcm/connect/2c93b2cb-dec6-4819-9ffb-60335069cbac/Family_Business_Governance_Handbook.pdf?MOD=AJPERES&CVID=mskqtDE.

[14] STEP Project Global Consortium is a global applied research initiative that explores family and business practices within business families and generates solutions that have immediate application for family business leaders.

[15] Please see R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020.

[16] *Id.*

[17] FBCG and McKinsey & Company, "Family businesses in the Gulf Cooperation Council: The journey to long-term Sustainability, Findings from the Inaugural GCC Family-Owned Business Survey", 2015, https://www.fbc-gulf.org/mediafiles/articles/doc-1362-20171117034009.pdf.

[18] *Id.*

[19] Law n°2011-103 of 27 January 2011 on balanced representation of men and women on boards of directors and supervisory boards and on gender equality in the workplace "law Copé-Zimmermann", https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000023487662.

1.1 Organisation of family businesses

Family businesses in the UAE were often incorporated as sole proprietorships and as they grew in scale and sophistication, increasingly as mainland Limited Liability Companies (LLCs).[20] Family businesses in the UAE are therefore, organised in accordance with Federal Decree-Law No. 32/2021 on Commercial Companies (New Commercial Companies Law) that entered into force on 2 January 2022.[21] Under the New Commercial Companies Law, a family business could structure in any of the permitted legal forms for a company, viz. Joint Liability Companies, Limited Partnership Companies, LLCs, Public Joint Stock Companies (Public JSC), and Private Joint Stock Companies (Private JSC). Paragraph 3 of Article 8 provides that any company incorporated in the UAE shall hold the nationality thereof, although this shall not necessarily entail that said company enjoys rights limited to UAE nationals.

Given the significance of free zones in the UAE[22], it is noted under Article 5 that the provisions of the New Commercial Companies Law do not apply to companies incorporated in the free zones where a special provision is stipulated to this effect in the laws or regulations of the relevant free zone and to the extent, the free zone companies do not conduct their activities outside the free zone in mainland. The undertaking of commercial activities in the UAE is conditional on a business obtaining an appropriate licence, and the nature of the economic activity defines the legal form of the company and the type of licence required[23]. Family businesses in the UAE would therefore have an array of licences and entities within their corporate structure, and by virtue of carrying out activities in free zones, be governed by the relevant free zone regulations. The implementation of an appropriate corporate structure is a necessary precursor to the success and continuity of family businesses.

In the UAE, notwithstanding the unique requirements of each family business and the influence of varying factors such as the complexity of family arrangements, geographical scope and the nature of assets, businesses are typically recommended to have a holding company in the form of an LLC which consolidates the collective family assets and business under a holding structure which facilitates management, accountability and reporting.[24] Holding companies incorporated in the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Markets (ADGM) financial free zones are identified as vehicles of choice in structuring the family businesses in the UAE.[25] In DIFC, a family holding structure[26] also qualifies to take the form of a "Prescribed Company", which is categorised as a Private Company under the DIFC Companies Law No. 5 of 2018 (DIFC Companies Law), but is exempted from certain requirements such as to audit or file its accounts

[20] This insight is based on expert interviews conducted with leading law firms, members of family offices, and family business advisors in the UAE. LLCs continue to be the most common structure for family businesses.

[21] The New Commercial Companies Law was published in the Official Gazette of the United Arab Emirates, issue no. 712 on 26th September 2021, and replaced, in its entirety, the Federal Law No. 2 of 2015 on Commercial Companies in the UAE, as amended by Federal Decree Law No. 26 of 2020. The provisions of the New Commercial Companies Law apply to commercial companies established in the UAE, as well as to branches and representative offices in mainland UAE, notwithstanding certain exceptions mentioned under Articles 4 and 5 of the decree. Please see LexisNexis translation, https://www.lexismiddleeast.com/law/UnitedArabEmirates/DecreeLaw_32_2021.

[22] Deloitte LLP, "Doing Business Guide, Understanding the UAE's tax position", 2022, https://www2.deloitte.com/xe/en/pages/tax/articles/doing-business-guide-uae.html. The UAE offers two types of locations for establishing business presence, viz. mainland including the seven Emirates, and any of the over fifty free zones across the UAE. The Emirates have passed decrees to establish free zones, typically designed for specific industries (e.g. there are dedicated free zones in Dubai for companies in the technology, media, finance, and trade industries), are largely self-regulated, and their authorities responsible for licensing and registration matters for entities established in the given free zone.

[23] In order to carry out business activities in either mainland or a free zone location, a company is required to be appropriately licensed. For details on licensing aspects, please see the Ministry of Economy website, https://www.moec.gov.ae/en/establishing-business-in-the-uae.

[24] N. Hadi, "Legal Structuring for Families in Business", Al Tamimi, 2019, https://www.tamimi.com/law-update-articles/legal-structuring-for-families-in-business/. The article also recommends that subsidiaries should be further separated into focused business units also in the form of LLCs. A structure consisting of a holding company consolidates the management of a business and other assets of the family under one group umbrella and provides the flexibility to facilitate sell-downs of, or disposals of equity. Family-owned holding companies are widely acknowledged as functional instruments in the management and transmission of enterprises and assets held by family shareholding structures, both in relation to intergenerational transfers and rationalisation of corporate assets.

[25] This insight is based on expert interviews conducted with leading law firms, members of family offices, and family business advisors in the UAE.

[26] Under the DIFC Prescribed Company Regulations (2019), a "family holding structure" is defined as a structure of one or more persons established for the sole purpose of consolidating the holdings of a specific family member, their spouse and/or bloodline descendants in a Family Office, a Holding Company or a Proprietary Investment Company.

with the register and subject to lower administrative fees and more flexible office space options. Amongst the different legal holding company structures available in ADGM, "Special Purpose Vehicles (SPVs)"[27] are prevalent. They may be established as Private Companies Limited by Shares and licensed to conduct SPV activities or "Restricted Scope Companies (RSCs)" for more limited disclosure on the public register.

In addition, trusts are increasingly being used to hold family business interests, given their inherent flexibility compared to LLC structures.[28] A trust entails separation of the legal and beneficial ownership of an asset, allowing ownership rights to be shared between trustee and beneficiaries; for family businesses this important characteristic is key for creating an arrangement which can protect the many interests of a widened family ownership whilst at the same time insulating the governance of the business by incorporating a management structure that is distinct from ownership.[29] Trusts in the UAE may be established in the DIFC under DIFC Law No. 4 of 2018[30] (DIFC Trust Law), in ADGM under Trusts (Special Provisions) Regulations 2016 and more recently, in mainland UAE under Federal Decree-Law No. 19 of 2020 (Federal Trust Law). The Federal Trust Law governs the formation of a trust, its purpose, operation and dissolution as well as setting out the rights and obligations of the settlor, beneficiaries and trustee. However, in a departure from common law trusts, a UAE onshore trust has a separate legal personality and is required to be registered.[31] Further, under English law, the legal interest in the trust property is held by the trustee, while the UAE Trust Law provides that the trust itself, as a separate legal person, holds the trust property. Notably, the Federal Trust Law excludes from its scope trusts created within the DIFC and ADGM which shall be governed by their own laws.[32] The DIFC Trust Law, which replaced the DIFC Law No. 11 of 2005, is largely based on the American Uniform Trust Code, with specific and significant adaptations designed to address local issues; for instance, it provides for the role of the "advisory trustee" who can be empowered to advise the actual trustee on particular matters set out in the trust without becoming a trustee, particularly useful for matters concerning Shariah compliance.[33]

In the UAE, family businesses also have the option of setting up foundations in ADGM under ADGM Foundation Regulations 2017, in DIFC under Foundations Law No.3 of 2018 (DIFC Foundations Law) or alternatively, in Ras Al Khaimah under RAK ICC Foundations Regulations 2019. In order to address the problems associated with the lack of precedents in the DIFC Trust Law and DIFC Foundations Law, a request for interpretation was made by the DIFC Authority (DIFCA) and heard by the Court of Appeal, following which the Court of Appeal published its judgement (Judgement), thereby providing greater certainty on several specific areas and serving as guidance on the approach of the DIFC Courts.[34]

The judgement alludes to the concept of *waqf* (*plural: awqaf*), the Islamic analogue of the common law trust, as a structure for family businesses to organise their inheritance. A *waqf* traditionally describes a legal endowment of assets for religious or charitable causes with no intention of reclaiming said assets. A *mutawalli* (translated as, wealth manager) would be expected to preserve the property by protecting the terms of agreement, including decisions in relation to any additional income derived from the property.[35] A *waqf* is treated as irrevocable, remains in detention and is separated from the asset owner; traditionally considered exclusively for charitable purposes, some Islamic laws believe that family support counts as the same[36]. *Awqaf*

[27] Please see ADGM, "Guidance Note for Special Purpose Vehicles", March 2020, https://www.adgm.com/documents/setting-up/guidance/guidance-notes/adgm-ra-special-purpose-vehicles-guidance-note.pdf. The key feature of an SPV is its separate legal personality, enabling the isolation of financial and legal risk from the assets and liabilities of the SPV's shareholders or any of its sister companies.
[28] R. Catling, "Trusts in Family Business Structures", Al Tamimi, 2020, https://www.tamimi.com/law-update-articles/trusts-in-family-business-structures/.
[29] *Id*.
[30] A. Glover & J. Ellis, "Shifting Sands: Wealth Structuring Developments in the UAE", IFC Review, 2021, https://www.ifcreview.com/articles/2021/june/shifting-sands-wealth-structuring-developments-in-the-uae/.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] The Dubai International Financial Centre Authority [2020] DIFC CA 002, Court of Appeal - Judgements, 18th January 2021, https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/dubai-international-financial-centre-authority-2020-difc-ca-002.
[35] Pearl Initiative & Outer Temple Chamber, "Best Practices in Waqf Management", 7th April 2020, https://www.pearlinitiative.org/gva_event/webinar-best-practices-in-waqf-management/.
[36] *Id*.

structures may be preferred to a foundation or corporate structures, as the latter tends to be complicated to establish, inherently inflexible in comparison to a *waqf* and do not always guarantee a stable platform for next generation leadership.[37] There are statutory provisions governing *awqaf* in the Emirates of Sharjah[38] and Dubai[39], and at the UAE federal level[40].

Lastly, family offices in the UAE are privately held companies for management of wealth, assets and legal affairs of families. Single Family Offices (SFO) may be established in DIFC, Dubai Multi Commodities Centre (DMCC)[41] or ADGM. A DMCC SFO is a standard free zone LLC company structure with a specific licence to allow wealth, asset and legal affairs management of a single family and provide other administrational or concierge services related to that same family only; whether to a family member, family business, family entity (that is, a corporate structure) or family trust or foundation.[42] The DMCC SFO must be owned 100% by that same family[43]. In the ADGM, there is no single structure or regulation encompassing a family office; rather, the term refers to an umbrella of a variety of structures established to manage family wealth, including RSCs, and hence a bespoke solution is required in each case.

Under the DIFC Single Family Office Regulations (DIFC SFO Regulations), a SFO is defined as any corporate or partnership established within the DIFC which provides services only to a single family[44]. Further, defines a "Family Entity" or a "Family Business" as follows:

> "a body corporate or partnership controlled by a Single Family, meaning if any of the following, acting alone or together, could exercise at least 75% of the voting control, or are otherwise able to exercise direct or indirect control over the affairs of the Family Entity or a Family Business: (a) one or more Family Members, or (b) one or more Family Fiduciary Structures, or (c) one or more Family Entities, or (d) by a combination of any of them".[45]

1.2 Specific family business regulatory framework

There have been several legislative developments in the UAE in the direction of creating a bespoke framework aimed at promoting family businesses and wealth management. As referenced in the previous section, these include the introduction of trust laws, foundations and enactment of wills for non-Muslims in DIFC and ADGM, the issuance of *waqf* decrees in Sharjah and Dubai, a federal *waqf* law containing specific modern provisions which organise *awqaf* for family businesses, and the reduction of the free float requirement to 30% capital under the Federal Law No. 2 of 2015 on Commercial Companies in the UAE (2015 Commercial Companies Law), thereby encouraging family businesses to list on the local bourses.[46]

Until recently, there was no clearly defined legal concept of family businesses in the UAE, with the exception of niche references, for instance, in the DIFC SFO Regulations, and as such, no specific corporate governance code or definitive family business law by which family businesses were mandated to abide. Instead, legislation governing a particular family business depended on its corporate structure, legal form and location of incorporation. However, the UAE authorities have committed to developing the legislative structure to better

[37] *Id*.
[38] Law No 8 of 2018 (Sharjah Endowments Law), replacing Law No 4 of 2011.
[39] Law No. 14 of 2017 Regulating Endowments and Gifts in the Emirate of Dubai, https://dlp.dubai.gov.ae/Legislation%20Reference/2017/Law%20No.%20(14)%20of%202017.html.
[40] UAE Federal Waqf Law No. 5 of 2018.
[41] Under the DMCC Company Regulations 2003.
[42] DMCC, "*Guidelines for Single Family Office Licence"*, Single_Family_Office_Guidelines.pdf (dmcc.ae).
[43] *Id*., p. 1. A family constitutes a single family when it includes individuals who are direct descendants of a common parent or their spouses, which can go up to three preceding generations, including adopted children.
[44] A family constitutes a Single Family either where it comprises one individual or a group of individuals all of whom are the bloodline descendants of a common ancestor or their spouses (including widows and widowers, whether or not remarried), or subject to such other limitations or conditions otherwise agreed with the Registrar. Please see DIFC SFO Regulations, Article 2(3)(1), https://www.difc.ae/application/files/9516/1241/5836/Single_Family_Office_Regulations_2011.
[45] Section 2.4.5, DIFC SFO Regulations. Please see https://www.difc.ae/application/files/9516/1241/5836/Single_Family_Office_Regulations_2011.
[46] F. Hammadeh, "A legacy of resilience", FBCG, 2020, issue 96, p. 2, http://fbc-gulf.org/mediafiles/articles/doc-1611-2020_09_24_01_04_41.pdf.

organise the operations of family businesses in the UAE and to ensure their continuity over successive generations.[47]

A legal framework to regulate the collective ownership and administration of family property in Dubai, and facilitate its smooth and easy transmission among successive generations, was clearly formulated in UAE for the first time under Law No. 9 of 2020 Regulating Family Ownership in the Emirate of Dubai (Dubai Family Ownership Law). Family members, who are bounded by common ownership of movable or immovable property, including stocks and shares in commercial companies, civil companies and assets of a sole proprietorship with the exception of PJSCs[48], may opt to enter into a legally binding and notarized[49] family ownership contract (Family Ownership Contract). The Family Ownership Contract specifies the share of each partner in the family property and is initially valid for a period of fifteen years, further renewable for a similar term subject to the agreement of all the concerned members. The provisions of the Dubai Family Ownership Law regulate the articles of the Family Ownership Contract with respect to disposition of shares, formation of board of directors, appointment of a manager to manage the family property and functions and obligations thereof.

Abu Dhabi thereafter followed suit and implemented its own law regulating ownership of family businesses, Law No. 10 of 2021 on the Governance of Family Businesses in the Emirate of Abu Dhabi (Abu Dhabi Family Business Law)[50]. The Abu Dhabi Family Business Law defines a family business in terms of ownership of capital, as follows:

> "A company shall be deemed as a Family Business, regardless of its legal form, in case it meets the following:
>
> 1- The members of the same Family own the whole capital of the company.
>
> 2- The members of the same Family own a company owned by many juristic entities which are totally owned by the members of such Family.
>
> 3- The Founder solely owns a single shareholder company and allocates all or some of its benefits to the members of his Family.
>
> 4- The Family owns the majority of the capital or keeps the majority of votes in case of involvement of new partners from outside the Family to the extent stipulated in this Law.
>
> 5- The Family Business allocates a part of its profits to the Beneficiaries as agreed by the Founders or as prescribed in the regulations of the company."[51]

The Abu Dhabi Family Business Law provides that the family business ceases to be entitled to the capacity and benefits granted thereto by virtue of the ownership law in case new shareholders from outside the family own over forty percent of the shares. The owners, founders or family members who jointly own a family

[47] The Ministry of Economy made a public announcement on 4th January, 2021 on the formation of a technical committee represented by FBCG and advisors to the prominent family companies, on a roadmap for family businesses including good governance. It was noted that this should be achieved by considering the nature of these businesses and the rights of family ownership and in accordance with the established international best practices. Please see https://wam.ae/en/details/1395302899481.

[48] Article 4, Scope of Application, Dubai Family Ownership Law.

[49] Under Article 6, Conditions for a Family Ownership Contract, Dubai Family Ownership Law, in order to be valid, the Family Ownership Contract shall be ratified by the notary public, in accordance with the rules and procedures provided for in Dubai Law No. 4 of 2013 on Notaries Public in the Emirate of Dubai.

[50] The Abu Dhabi Family Business Law was published in the Official Gazette of the Emirate of Abu Dhabi, Issue No. 9 dated 30th September 2021. Please see p. 7-13 of the Official Gazette, available at https://www.abudhabi.gov.ae/-/media/sites/adgov/gazettes/2021/en/9english2021.ashx. Based on feedback received from public officials, we understand that this law is currently being amended and redrafted.

[51] Article 3, Family Business, Abu Dhabi Family Business Law, p.9, https://www.abudhabi.gov.ae/-/media/sites/adgov/gazettes/2021/en/9english2021.ashx.

business established in any of the legal forms recognised under the 2015 Commercial Companies Law, may opt into the provisions of the Abu Dhabi Family Business Law[52].

Limited examples are found in international comparative law when defining family business or legislation specific to family businesses. A specialised study conducted on behalf of the European Commission[53] pointed to the absence of legislative frameworks for family businesses in Europe; for instance, in some countries, family businesses are mentioned in different regulations without clarification of what is to be understood by the term. By means of Act No. XLVII of 2016, the Parliament of Malta enacted Chapter 565, Family Business Act (Maltese Family Business Act), which as the first legislation of its kind, aimed to encourage the regulation of family businesses, their governance and the transfer of the family business from one generation to the next. The term family business is defined and several business models established in Malta qualify to register under the Maltese Family Business Act, as provided under Article 3:

> "(a) in the case of a **public limited liability company whose shares are listed** on a regulated market or traded on a multilateral trading facility, the majority of the shares including the rights are held, whether directly or indirectly, by at least two owners who are family members within the same family;
>
> (b) in the case of a **limited liability company** constituted in a manner other than that referred to in paragraph (a): (i) all the shares of the company are held, directly or indirectly, by at least two owners who are family members within the same family; and (ii) at least one family member is formally involved in the general governance, its proper administration and management of the company.
>
> Provided that shares held directly or indirectly by individuals who are not family members shall be disregarded for the purposes of this paragraph if their aggregate issued value does not exceed five per cent of the issued share capital of the company:
>
> Provided further that shares held directly or indirectly by employees who have been in continuous, full-time employment within the family business for over three years and who are not family members shall be disregarded for the purposes of this paragraph if their aggregate issued value does not exceed ten percent of the issued share capital of the company:
>
> Provided further that where any business assets are held on lease, the family members are the majority of the lessees in the lease agreement;
>
> (c) in the case of **partnerships** en nom collectif and partnerships en commandite: (i) the full capital contribution to the partnership shall have been made, directly or indirectly, by at least two owners who are family members within the same family having, directly or indirectly, the right to receive the majority of distributable profits; and (ii) at least one of whom holds the majority of the decision making rights [..]
>
> (d) in the case of a family business where all the shares or the interest are being **held by a trustee under trust** for the benefit of members of a family as beneficiaries, and which has been established by a written instrument and all the beneficiaries are owners and family members within the same family:
>
> Provided that other beneficiaries who are not family members within the same family business trust shall be disregarded for the purposes of this paragraph if they do not in aggregate benefit from more than five per cent of the family business [...]
>
> (e) in the case of a business carried out by family members in **a form of partnership other than as indicated in paragraph (c)**, the business and the assets of such business are owned and controlled, directly or indirectly, by at least two owners who are family members within the same family [...]; and
>
> (f) **any other business** as the Minister may prescribe."[54]

The Maltese Family Business Act contains a comprehensive definition of a family business, indicating specific conditions under which different legal forms may qualify to register as a family business. In relation to LLCs, at least one family member is required to be involved in the family business's governance, administration and

[52] Article 2, Scope of Implementation, Abu Dhabi Family Business Law, p. 8, https://www.abudhabi.gov.ae/-/media/sites/adgov/gazettes/2021/en/9english2021.ashx.
[53] I. Mandl, "Overview of Family Business Relevant Issues, Contract No. 30-CE-0164021/00-51, Final Report", Austrian Institute for SME Research & Turku School of Economic, 2007, p. 16.
[54] Article 3, Maltese Family Business Act, 2017, https://legislation.mt/eli/cap/565/mlt.

management for it to qualify as such. And the definition of a family business under the above laws does not apply any aspects of the involvement of a representative of the family in the governance or management of the business. The aspect of active involvement of a family member in the Maltese Family Business Act is consistent with the definition formulated by the European Commission, which provides that "*a firm, of any size, is a family business if [...] at least one representative of the family or kin is formally involved in the governance of the firm*"[55].

The definitions of family businesses[56] under the Dubai Family Ownership Law and Abu Dhabi Family Law revolve solely around ownership. These laws start with a standard, and straightforward definition for family based on lineage or affinity.[57] Under the Maltese Family Business Act, the qualification of a business for registration as a family business is conditional on the prerequisite that it has been actively trading or in operation without interruption for a minimum period of three consecutive calendar years.[58] There is no such requirement for a company to be operational for a stipulated minimum period of time, in order to be considered a family business under the Abu Dhabi Family Business Law.

Additionally, the UAE is in the process of drafting a new federal decree-law on the regulation of family businesses in the UAE under the Ministry of Economy (MOE) that seeks to institutionalise a "Family Business Register" to be established and supervised by the Department of Economic Development (DED) of the various emirates.

For purposes of the Maltese Family Business Act, a "family member" takes the meaning of the family business owner's spouse, ascendants, descendants in the direct line and their relative spouses, brothers or sisters and their descendants or as the relevant Maltese authorities may prescribe. The definition of a family is similar across both Abu Dhabi and Dubai's laws. Under Article 1 of the Abu Dhabi Family Business Law, "*the spouse and the blood relatives up to the fourth degree*" and almost a verbatim definition under Article 2 of the Dubai Family Ownership Law. The draft federal law lays out a similar term, "*relatives by lineage and affinity*". "Relatives by lineage" refer to relatives by consanguinity or an individual's direct descendants, such as children, grandchildren etc., and "relative by affinity" refers to the kinship relationship created or one that exists between two individuals as a result of marriage.

Further, as indicated in Article 6 of the New Commercial Companies Law, the MOE is expected to issue a resolution regulating the governance of companies, including the rules, controls and provisions to be observed[59]; the Board of Directors or the Managers of a company, as the case may be, would be responsible for applying the rules and standards of governance.

[55] "Final Report of the Expert Group: Overview of Family Business, Relevant Issues: Research, Networks, Policy Measures and Existing Studies", November 2009, p. 10, https://ec.europa.eu/docsroom/documents/10388/attachments/1/translations. The definition is based on the one formulated by the Finnish Working Group on Family Entrepreneurship, which was set up by the Ministry of Trade and Industry of Finland in 2006.

[56] The definition of a family business under UAE laws is agnostic to shareholder nationality (i.e., Emirati versus non-Emirati). Despite the interplay of cultural sensibilities, the cosmopolitan demographic in the UAE has paved the way for the success of foreign businesses, including family businesses from the Gulf, the Middle East more broadly, India, the UK and elsewhere. The law does not distinguish between Emirati and non-Emirati (or non-Arab) family businesses and this article accordingly does not attempt to make the same distinction. However, it remains to be seen whether the amended Abu Dhabi Family Business Law or the upcoming federal law will seek to classify family businesses as purely Emirati businesses.

[57] As noted under A. Drake, "Understanding Family Business", Institute for Family Business, there has been no single, universal definition of family businesses in legal or public policy discourse. Family businesses have been defined in a variety of ways around three key pillars: ownership i.e., the family owns a majority of the voting shares or effectively controls the business, management i.e., one or more family members (or their spouses) are involved in the management of the business, and legacy i.e., more than one generation is, or will in future, become involved in the business. Arguably, the final pillar differentiates a family business from an owner-managed business, which is not necessarily passed down to the next generation.

[58] Article 10, Disqualification, Maltese Family Business Act, 2017, https://legislation.mt/eli/cap/565/mlt.

[59] See Article 5, Federal Decree-Law No. 32/2021 On Commercial Companies, p. 5, LexisNexis translation, https://www.lexismiddleeast.com/law/UnitedArabEmirates/DecreeLaw_32_2021.

2. Succession among family businesses

As noted earlier, UAE family businesses account for 90% of the private sector. Succession and inheritance transitions particularly come to fore when a patriarch passes unexpectedly, without a succession plan in place. The death of Majid Al Futtaim in December 2021, left succession of his eponymous business to his ten heirs unresolved.[60] Recently, the UAE has also witnessed the passing of highly influential patriarchs of large family-owned UAE conglomerates, including Saif Al Ghurair, leader of the Al Ghurair Group in 2019 and Easa Saleh Al Gurg, Chairman of the Easa Saleh Al Gurg Group, one of UAE's most eminent family businesses with twenty-seven companies in its portfolio, in 2022. However, despite its significance, there is a low adoption and implementation of formal succession plans by UAE family businesses; only one-third of family firms in the UAE have a formal succession process, lower than 37% for other Arab peers.[61]

This section details the causes and repercussions of succession in subsection 2.1, introduces some of the solutions to address succession in 2.2 and outlines factors to consider regarding executive succession planning in 2.3.

2.1 Causes of succession issues and family disputes

In the absence of consensus, the UAE's courts are left to distribute the family business' financial assets. Else, family disputes may arise between one or multiple members of a family business over the ownership and/or management and controls rights of the business. Such instances include the question of valuation of a given member's stake in the business, the desire of certain members of a family conglomerate to "cash out" by selling their stake elsewhere, poor business performance, the identification of assets that were previously a part of the family business, or when the apportionment of family wealth, including assets and business profits, upon the death or retirement of the founder are perceived as unfair.[62]

Compared to litigation, alternative dispute resolution mechanisms offer greater flexibility, confidentiality, and ease of cross-border enforcement[63]. However, in the UAE, courts, mediation and arbitration centres do not generally differentiate between family business disputes and other commercial disputes.[64] This gap is somewhat addressed under Article 23 of the Dubai Family Ownership Law, which provides that all disputes arising from the Family Ownership Contract shall be heard by a special judicial committee (such as in the case of Majid Al Futtaim, wherein ten heirs have claim to the USD 6.1bn estate[65]), composed of financial and legal experts, and with exclusive competence in Dubai to consider such disputes[66]. This committee shall be formed by a decision of His Highness the Ruler of Dubai; the constitution decision would determine the method of selection of its members, the specification of its competences, the binding force of its decisions and their

[60] Financial Times, "Succession dramas add impetus to UAE's draft family business law", March 2022.

[61] R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report*"*, 2020. Basco, Omari & Abouchkaier attribute this failure to anticipate succession to an informal relationship between the family and the business in UAE family firms. Another estimate by Michael Chahine, CEO of NexGen Desert Green and a subject matter expert, is even lower at 15-20% of family businesses that are planning their succession. *'UAE research centre to help family businesses prepare for the next generation'*, The National, March 21, 2017.

[62] P. Smith, "Building the Case for Family Business Arbitration in the GCC Region", Kluwer Arbitration Blog, Charles Russell Speechlys LLP, June 2022, http://arbitrationblog.kluwerarbitration.com/2022/06/17/building-the-case-for-family-business-arbitration-in-the-gcc-region/.

[63] *"Arbitration awards are often more portable than court judgments: they can be employed in a greater number of foreign jurisdictions for enforcement against assets, and are normally simpler, faster and cheaper to process.".* Please see "Dispute Resolution for Family Businesses in the GCC: Keeping the Family United", FBCG, May 2020, p. 9.

[64] One recommendation laid out by the FBCG (in the same report cited in footnote 47) is to enforce mandatory alternative dispute resolution in family business disputes, which would require parties to move directly to mediation at the outset, as a pre-condition of instigating formal court proceedings. Further, a mandatory arbitration provision may also be considered as an alternative to litigation if mediation fails to conclude the dispute.

[65] S. Kerr, "Succession dramas add impetus to UAE's draft family business law", Financial Times, 1st March 2022, https://www.ft.com/content/d8e60a80-559c-4558-8a15-a78fc880800d. Also see "Billionaire's abrupt death leaves Dubai ruler to untangle messy inheritance", Business Standard, 22nd April 2022, https://www.business-standard.com/article/international/billionaire-s-abrupt-death-leaves-dubai-ruler-to-untangle-messy-inheritance-122042200019_1.html.

[66] See Dubai Law No. 9/2020 Regulating Family Ownership in the Emirate of Dubai Article 23 - Settlement of Disputes, *"All disputes arising from the Family Ownership Contract shall be heard by the Committee which shall be formed, by decision of the Ruler, of members from among experts and specialists in the legal and financial fields and in family business management. The Committee shall have exclusive competence in the Emirate to consider such disputes. Its constitution decision shall determine the method of selection of its members, the specification of its competences, the binding force of its decisions and their implementation method."*, p. 6.

implementation method. In fact, a majority of family businesses in the UAE, particularly in Dubai, are already believed to be dealt with either directly by the Ruler's Court or through a mediator or arbitrator appointed by the Ruler's Court.[67]

In addition to new laws to cater to family disputes, free zones in the UAE are enhancing dispute resolution institutions for family businesses. In Dubai, the Dubai Courts' Centre for the Amicable Settlement of Disputes, the Dubai Chamber of Commerce and Industry and the Dubai International Arbitration Centre are proposing an alternative dispute resolution (ADR) scheme to Dubai Courts to provide more efficient and confidential dispute resolution, and in DIFC Courts, litigating parties in family business disputes may request judge-led mediation. In Abu Dhabi, ADGM Courts are developing tailored mediation services for family businesses, providing a Sharia-compliant and confidential platform for dispute resolution, which family businesses will be able to access regardless of incorporation in ADGM.[68]

2.2 What is the range of options to address succession?

Different strategic options a family business may consider to minimise the disruption and anxiety caused by power transmission. Succession planning, specifically executive succession which will be the focus of this article, via a clearly defined corporate governance mechanism, not only facilitates the transmission of management from one generation in a progressive and non-disruptive manner but also ensures the systematic development of talent within the company[69]. A family business in transition to multiple owners may also consider selling parts of its group holding, an investment by a sovereign wealth fund, and a public listing via an initial public offering (IPO)[70]. (Annex, Figure 2). This article focuses on succession planning.

2.3 Factors for succession planning

Succession planning is not a straightforward exercise. At the *level of the family business*, shareholding may be divided into several sections, the founder may have a tendency to hold on to the business, there might be a mindset clash between generations, or the family business may not have full control over apportioning its business due to compliance with the Islamic rules of Shariah.[71]

Further, the UAE's legal framework does not enable institutionalisation of corporate governance within family businesses. First, the role and composition of the Board of Directors is not defined for any form of business other than publicly listed companies, a category under which few UAE family businesses fall. Moreover, current legal requirements do not support the formation of a high quality Board of Directors or mandate certain stringent characteristics of the Board such as UAE citizenship.[72] Finally, there are issues around the framing of the laws, including definitional issues. For instance, the Arabic term *majlis 'iidara* is used to refer to 'Manager' and 'Director' often interchangeably in the New Commercial Companies Law.[73] Interpretation might also be a concern as there are no official translations of several UAE federal legislation from Arabic into English, resulting in multiple unofficial translations for non-Arabic speaking advisors or practitioners to resort to.

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[67] P. Smith, "Family Business Disputes in the GCC: A Snapshot", Al Tamimi, 2019, https://www.tamimi.com/law-update-articles/family-business-disputes-in-the-gcc-a-snapshot/.

[68] "Dispute Resolution for Family Businesses in the GCC: Keeping the Family United", FBCG, May 2020, p. 10.

[69] "Board Best Practices in the Middle East", Hawkamah and Diligent, December 2019; https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_12012020.pdf.

[70] These solutions and associated considerations were discussed with experts in the field (lawyers, wealth advisors, government officials, research institutes etc.) over a series of interviews and will be elaborated upon in a separate public policy paper. Options of divestment, investment by a sovereign wealth fund (SWF), and IPO were also identified for Majid Al Futtaim Holding, a prominent Dubai family business that controls USD 1.6tn in assets. (*'Billionaire's abrupt death leaves Dubai ruler to untangle messy inheritance'*, Business Standard, 22 April 2022).

[71] The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBCG, 2021.

[72] SCA Code, Chapter 2, Article (6) Board Formation, *"[...] 4. The Chairman and the majority of the Board must hold the* ***nationality of the State****."*

[73] O. Khan & K. Hussain, "Managers and directors in the spotlight!", Al Tamimi, May 2020, https://www.tamimi.com/law-update-articles/managers-and-directors-in-the-spotlight/.

3. Corporate governance to address succession in the UAE

The corporate scandals[74] that erupted in the early 2000s in the US and the UK prompted policymakers and legislators to create codes to improve ethical standards in business.[75] In the US, this resulted in the Sarbanes-Oxley Act to improve auditing and disclosure among public companies[76], and in the UK, the Cadbury Report, which proposed a 'Code of Best Practices' for companies[77], and the Smith Report, which proposed changes to provisions related to the audit committee in the then Combined Code[78]. The Cadbury Report defined corporate governance as the "system by which companies are directed and controlled"[79]. This section investigates corporate governance, i.e., setting up rules, policies, and procedures as the key solution to address the complexity of growing family businesses. Good governance not only helps foster transparency, accountability, and professionalism in the family business, but also helps create long-term family harmony by virtue of the process behind creating governance mechanisms.

Sub section 3.1 identifies the types of governance family businesses must take into account, while 3.2 peers into corporate governance regulations and soft law guidelines promulgating corporate governance, and explores how these might apply to bolster succession planning.

3.1 Types and components of governance for family businesses

Among various types of governance[80], *family governance* and *corporate governance* are the most relevant to address succession. Family governance refers to rules, policies, and processes that regulate the relationship of family owners with the family business and its wealth. There is a growing interest to formalise governance procedures by implementing a 'family charter' or 'family constitution', ideally one which makes reference to the Articles of Association or Memorandum of Association. The family charter (Annex, Figure 3) is a non-legally-binding document that sets out the vision, mission and values of the family business. Governing bodies include (i) the 'Family Assembly', which is the highest governing authority of the family, includes all family members and typically meets 1-2 times each year, and (ii) 'Family Council' which comprises a limited number of family members, meets 2-6 times each year, develops the family charter and provides a platform for conflict resolution[81]. Corporate governance encompasses rules, policies and processes that regulate the family business itself to balance stakeholder interests and is primarily undertaken by an informal 'Board of Advisors' composed of trusted advisors of the family and / or by a formal Board of Directors.

3.2 Corporate governance framework and guidelines in the UAE

In the UAE, corporate governance standards are included in (i) company law, namely the New Commercial Companies Law or where relevant, the legal regime of the selected free zone, as introduced in Section 1 of this article, and (ii) securities law, namely Chairman of Securities and Commodities Authority (SCA) Board Decision No. (03 R.M.) of 2020 concerning adopting the Corporate Governance Guide for Public Joint Stock Companies (SCA Code)[82] (Annex, Figure 4). The UAE's legal instruments are in line with the jurisdictions of the Organisation of Economic Cooperation and Development (OECD), most of which address corporate governance by using various combinations of legal and regulatory instruments on the one hand, and national codes or principles, following a "comply or explain" approach[83], on the other hand. The UAE does not currently have a national corporate governance code. However, there are voluntary corporate governance

[74] These scandals include Enron, WorldCom, Tyco, Adelphia, HealthSouth.
[75] E. Ravina, & P. Sapienza, "What Do Independent Directors Know?: Evidence from their Trading", The Review of Financial Studies, 962 (2010), p. 962.
[76] See Act, Sarbanes-Oxley. "Sarbanes-Oxley act." *Washington DC* (2002).
[77] See "The Financial Aspects of Corporate Governance", Cadbury Report, the Cadbury Committee, 1992.
[78] See R. Smith, "Audit Committees: Combined Code Guidance", London: Financial Reporting Council, 2003.
[79] See "The Financial Aspects of Corporate Governance", Cadbury Report, the Cadbury Committee, 1992, p. 14.
[80] Family businesses must consider various types of governance, including family governance, ownership governance, corporate governance, wealth governance, and public engagement strategies to manage growth and address challenges.
[81] See the GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBGC, 2021.
[82] See the SCA Code, published on 27 February 2020 and in effect from 28 April 2020, repealed the previous 2016 CG Rules (Chairman of SCA Board Decision No. (7 R.M) of 2016 concerning the Standards of Institutional Discipline and Governance of Public Shareholding Companies).
[83] The vast majority of jurisdictions with national corporate governance codes establish these codes as voluntary recommendations coupled with mandatory disclosure of whether they follow them on a "comply or explain" basis. See OECD Corporate Governance Factbook 2021, OECD, p. 33.

codes developed by various corporate governance centres, think tanks and institutes for directors in the UAE, including Dubai SME (an agency of the Dubai Department of Economic Development), the Hawkamah Institute for Corporate Governance (Hawkamah), the Abu Dhabi Corporate Governance Centre, FBCG, Board of Directors Institute GCC (BDI GCC), Pearl Initiative, and the Tharawat Family Business Forum, to name a few.

3.2.1 Corporate governance under the New Commercial Companies Law

The New Commercial Companies Law sets forth the default option concerning the specific corporate structure adopted by the family business, whose detailed framework is determined by the articles and bylaws of the business. The New Commercial Companies Law amended a few key aspects of corporate governance for LLCs and PJSCs. For instance, for LLCs, it extended the term of the Board of Directors to a period of six months in the event of the expiration of the Board's term and in case a new Board of Directors is not appointed.[84] It also increased the number of shareholders obligating LLCs to appoint a "Supervisory Board" from seven to fifteen[85]. The New Commercial Companies Law also amended certain corporate governance provisions related to PJSCs. For example, in the event of a vacancy in the Board of Directors, a replacement director must be appointed within thirty calendar days for the remaining term of the former director. A director may be paid a lump sum fee not exceeding AED 200,000 as remuneration at the end of a financial year in which the company fails to achieve profits.[86] The New Commercial Companies Law places the responsibility for compliance on the Board of Directors of a company and to ensure compliance, levies penalties of up to AED 10 million on a company, its Chairman, Board Members, managers and auditors for contravention of corporate governance rules issued under this law[87]. The corporate governance of DIFC companies is monitored under the DIFC law No.2 of 2009 and that of ADGM companies under the regulatory regime of Companies Regulation and Commercial Licensing Regulation of Abu Dhabi Global Market.

3.2.2 Corporate governance under the SCA Code

Corporate governance in the UAE is primarily focused on publicly listed companies, under the SCA Code, which sets out binding requirements for listed companies to enforce shareholder protection for its securities and financial regulators, namely the SCA and the Central Bank of the UAE (CBUAE). The SCA Code applies to all local PJSCs, i.e., all local public shareholding companies listed on financial markets regulated by SCA (the Abu Dhabi Securities Exchange or the Dubai Financial Market[88]). Additionally, banks and financial institutions are subjected to separate rules issued by the CBUAE.

3.2.3 Corporate governance under "soft law" codes and principles

The Corporate Governance Code for Small and Medium Enterprises (Dubai SME Code), developed by Dubai SME and Hawkamah, and the GCC Corporate Governance Code (FBCG Code) formulated by the FBCG layout guidelines that family businesses may choose to adopt. Dubai SME Code is a voluntary framework that encompasses recommendations and best practices, applicable to all small and medium enterprises in Dubai, regardless of their size, management model, maturity, ownership structure, corporate governance practices and sponsorship requirements.[89] The FBCG Code codifies a set of best practices in family business governance, based on best practices globally and local wisdom, and covers five aspects of family business governance, namely, family governance, ownership governance, wealth governance, public engagement and

[84] O. Khan, "Highlights of Federal Decree No. 32 of 2021 concerning Commercial Companies repealing Federal Decree No.2 of 2015 concerning Commercial Companies and its amendments", Al Tamimi, 7th December 2021, https://www.tamimi.com/news/highlights-of-federal-decree-no-32-of-2021-concerning-commercial-companies-repealing-federal-decree-no-2-of-2015-concerning-commercial-companies-and-its-amendments/.
[85] Id.
[86] O. Momany, A. Jarrar, R. Eid & T. Shomar, "UAE: New Commercial Companies Law: What You Need to Know", Baker McKenzie, 6th January 2022, https://me-insights.bakermckenzie.com/2022/01/06/uae-new-commercial-companies-law-what-you-need-to-know/.
[87] Article 7, Breach of Corporate Governance Rules, New Commercial Companies Law. Please see LexisNexis translation, https://www.lexismiddleeast.com/law/UnitedArabEmirates/DecreeLaw_32_2021.
[88] It might be noted that companies listed on NASDAQ Dubai are regulated by the Dubai Financial Services Authority (DFSA) under DIFC Regulatory Law.
[89] 'The Corporate Governance Code for Small and Medium Enterprises', Dubai SME.

most importantly, corporate governance.[90] The FBCG Code is distributed as a handbook and includes a checklist for family businesses to refer to (Annex, Figure 5).

It is worthwhile to note that in KSA, the Saudi Arabian Ministry of Commerce and Investment (MoCI) issued a Guiding Charter for Family Owned Businesses (KSA Charter) on 02-08-1439H corresponding to 18-04-2018G.[91] The KSA Charter is intended for family businesses that are incorporated as closed joint stock companies in KSA while those listed on KSA's stock exchange (*Tadawul*) as open joint stock companies are subject to the Capital Market Authority's corporate governance regulations. A key objective of the KSA Charter is to advocate family businesses to put succession plans into place, for both ownership and management, to ensure smooth transition.[92]

4. The Board of Directors: The fundamental corporate governance solution

The Board of Directors is the primary mechanism and custodian of corporate governance. The Cadbury Report stated that the Boards of Directors are responsible for governance of their companies.[93]

The failure of the Board of Directors to exercise appropriate corporate governance over a family business and its subsidiaries could result in substantial financial and reputational risk for publicly listed family businesses. In March 2010, the Dubai Financial Services Authority (DFSA), DIFC's financial regulator, announced remedial action and sanctions against Damas International Limited (Damas), one of the few publicly listed family businesses in the UAE.[94] DFSA's undertaking[95] included the dismissal of its Board of Directors and a $7m financial penalty against Damas and its owners, namely the Abdullah brothers, who made unauthorised transactions of an estimated $96.6m of cash and nearly two tonnes of gold valued at $68m from Damas without shareholder approval[96].

This section investigates the mandate for the Board of Directors with respect to the legal responsibility of overseeing succession planning. (Annex, Figure 6). Subsection 4.1 extracts the legal backing for the Board of Directors to address succession, comparing the stipulations within the SCA Code with the principles, guidelines and codes of other jurisdictions. Once it is established that the Board is indeed entrusted with this particular mandate, subsection 4.2 looks at the legal requirements for companies to set-up and ensure an operational Board of Directors. Finally, subsection 4.3 delves into the composition of the Board of Directors, and investigates the factors most affecting the effectiveness of the Board of Directors, such as, its structure (unitary versus two-tier), the Nomination Committee, requirements for Independent Directors and last but not least, gender diversity on the Board of Directors.

4.1 Mandate of the Board of Directors to oversee succession

Under the UAE's laws, and insofar as international and national codes of corporate governance prescribe, the overarching role of the Board of Directors is to approve the company strategy, oversee management, and ensure that a robust corporate governance framework is in place.[97] The second function, that is, executive management oversight entails monitoring executive management to ensure that the company strategy is implemented and Key Performance Indicators (KPIs) are met, electing and dismissing or replacing the CEO,

[90] The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, Family Business Gulf Council (FBGC), 2021. p. 11.
[91] The Guiding Charter for Saudi Family Businesses, Ministry of Commerce and Investment, KSA; https://mci.gov.sa/ar/Regulations/Pages/details.aspx?lawId=28c27281-c41a-44f4-aa47-acb0013c4d5b
[92] M. Chehab, "Guiding Charter for Family Owned Businesses in Saudi Arabia", Al Tamimi, July 2018, https://www.tamimi.com/law-update-articles/guiding-charter-for-family-owned-businesses-in-saudi-arabia/.
[93] 2.5.'The Financial Aspects of Corporate Governance' (Cadbury Report), the Cadbury Committee, 1992, p.14.
[94] "DFSA Takes Action Over Damas Failures: DFSA Media Release, 21st March 2010, https://dfsaen.thomsonreuters.com/rulebook/21-march-2010-dfsa-takes-action-over-damas-failures.
[95] See 'Enforceable Undertaking, Article 89 Regulatory Law 2004 (DIFC Law No. 1 of 2004), DFSA, https://www.dfsa.ae/application/files/8616/3532/1377/261021_Final_DamasInternationalLimited.pdf.
[96] C. Ferris-Lay, "The rise and fall of Damas", Arabian Business, 17th May 2011, https://www.arabianbusiness.com/industries/retail/the-rise-fall-of-damas-399541.
[97] "Board Best Practices in the Middle East", Hawkamah Institute for Corporate Governance and Diligent, December 2019, https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_15122019.pdf.

electing other key executives or setting out guidance for the CEO to elect other key executives, and finally, succession planning. A critical function of the Board of Directors is setting a succession policy and overseeing succession planning by management, reflected in the principles of corporate governance and national corporate governance codes of various jurisdictions including KSA, the OECD, the UK (UK Corporate Governance Code)[98], and France (Afep-Medef)[99].

Pursuant to Article 25 on oversight over executive management in the KSA Corporate Governance Code, *"the Board shall form the Executive Management of the Company, regulate its operating procedures, monitor and oversee it and ensure that it performs the duties assigned to it, and to achieve this, the Board shall: [...] develop succession plans for the management of the Company."*[100]

According to the OECD Principles of Corporate Governance (OECD Principles), Part (VI) on The responsibilities of the Board, D(3), *"The Board of Directors should fulfil certain key functions, including] Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning."*[101]

The UK Corporate Governance Code, states in Section 3, Principle J,

> "Appointments to the board should be subject to a formal, rigorous and transparent procedure, and an **effective succession plan should be maintained for board and senior management**. Both appointments and succession plans should be based on merit and objective criteria and, within this context, should promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths." The UK Corporate Governance Code clearly defines executive management as "executive committee or the first layer of management below board level, including the company secretary".[102]

The Afep-Medef (French Code) identifies the crucial role of the Nomination Committee in succession planning. Section 17 states that "*the **nominations committee plays an essential role in shaping the future of the company**, as it is responsible for preparing the future membership of the leadership bodies*."

The French Code also splits the duties of this Committee by Board succession (selection of new Directors) and executive succession (succession planning for company officers). Under Section 17(2).2, it identifies succession planning for company officers as one of the Committee's key tasks but also permits the Board to create a separate ad-hoc subcommittee to carry out this function. "*The nominations committee (or an ad hoc committee) should **design a plan for replacement of company officers**. This is one of the committee's most important tasks, even though it can, if necessary, be entrusted by the Board to an ad hoc committee [...]*"[103]

4.2 Set-up and existence of the Board of Directors in the UAE

For publicly listed companies, the SCA Code lays out the requirements and terms of establishing a Board of Directors and requires the set-up of a Board in accordance with the Articles of Association (AoA) as follows:

> "1. The **Company shall be managed by a Board**. Its Articles of Association shall determine the method of forming that Board, the number of its members, and its membership terms. 2. The **general assembly elects the Board members** by secret cumulative voting. 3. If the Government holds (5%) or more of the Company capital, it may appoint its representatives in the Board pro rata to such

[98] Some of the largest UAE family businesses such as Majid Al Futtaim have voluntarily adopted the UK Corporate Governance Code. See MAF Investor Presentation, February 2020, p. 32.
[99] See AFEP-MEDEF Code; https://www.alstom.com/sites/alstom.com/files/2020/03/27/Afep-Medef%20Code%20VUK%20Jan.%202020.pdf.
[100] Corporate Governance Regulations (English Translation of the Official Arabic Text), Capital Market Authority, KSA, p. 22, https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CGRegulations_en.pdf.
[101] G20/ OECD Principles of Corporate Governance, OECD, 2015, p. 47.
[102] See UK Corporate Governance Code, Financial Reporting Council, July 2018, p. 8.
[103] 17.2.2, AFEP-MEDEF Code, p. 14, https://www.alstom.com/sites/alstom.com/files/2020/03/27/Afep-Medef%20Code%20VUK%20Jan.%202020.pdf .

> percentage from the number of Board members. At least one member shall be appointed if the percentage required for appointing a member exceeds that percentage. The Government shall forfeit its right in voting in the percentage of its appointment, however, if it holds any balanced percentage not qualifying it to appoint another member, it may use that percentage in voting…"[104]

However, the Board of Directors is still not a commonly used corporate governance mechanism among private UAE family businesses.[105] Less than half (43%) of the sampled UAE family businesses have a formal Board of Directors - even though this percentage is higher than the rest of the world (40%)[106].

4.3 Factors impacting the effectiveness of the Board of Directors

4.3.1 Structure of the Board of Directors

The UAE permits a two-tier board for publicly listed companies, similar to the German system for listed companies, in addition to a unitary board. Under Articles 54-57, the SCA Code[107] introduced provisions for a PJSC, if it so chooses, to implement a dual governance structure under which the management and supervisory functions are separated from each other, by virtue of establishing two distinct Board committees (hence "dual structure"), i.e., (i) a **Control Committee ('CC')** i.e., composed of Non-Executive Members responsible for supervising the Executive Committee and appointing or dismissing its members; and (ii) an **Executive Committee ('EC')** composed of Executive Board Members and responsible for day-to-day operations of the company and for developing and implementing the company strategy as approved by the CC.

In order to adopt the dual management structure, the Board of the listed company must approve the change by majority votes. A change to the company's Articles of Association is required and disclosures concerning the changes must be published on the company's website once adopted. The two committees are expected to maintain close cooperation and coordination (Article 57 on Cooperation between the Control Committee (CC) and the Executive Committee (EC)); for instance, the EC must submit reports on the company strategy and its implementation to the CC on a quarterly and annual basis, and the CC must be in regular contact with the Chairman of the EC to discuss topics around strategy, planning, business development, risk situation, risk management and compliance.

4.3.2 Nomination and Remuneration Committee (NRC)

All publicly listed companies in the UAE are required to establish two Permanent Committees[108], that are, (i) a NRC which is responsible for preparing policies relating to remuneration, benefits, and incentives of the Board and company employees, and (ii) an Audit Committee (AC) which is responsible for reviewing the financial and audit policies of the company and working closely with the external auditor to ensure compliance with the applicable law.[109] Each committee must be composed of at least three Non-Executive Board members, two of whom must be independent, and must be chaired by an independent Board member.

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[104] Chapter 2, Article 6 on Board Formation, SCA Code. Also see Article 54 on Dual Governance Structure, SCA Code.
[105] R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020.
[106] Family Business Ecosystem in the UAE, 2020.
[107] See SCA Code, Article 54 on Dual Governance Structure: *"[...] 2. The company may opt to adopt a **dual governance structure** consisting of internal committees composed of its Board members, in the form of two committees, one of which is the **control committee** and the second is the **executive committee**. 3. A decision of dual governance structure adoption shall be issued by majority votes of all Board members and shall be approved by the Annual General Assembly. The chairman shall inform the Authority and Market about the decision, and disclose the same in the company website. 4. Both the control committee and the executive committee shall be responsible for the company governance and compliance to this regulation."*
[108] In addition, the SCA code encourages the establishment of two non-mandatory committees, a Risk Committee to set out and implement the company's risk management strategy and a Technology Committee to review, approve and drive the company's technology strategy.
[109] See SCA Code, Article 58 on Permanent Committees: *"1. The Board shall form **Permanent Committees** that subordinate directly thereto. 2. The Permanent Committees are the **Nomination and Remuneration Committee** and the **Audit Committee**. These Committees are composed of at least three non-executive board members, provided that at least two members of the Committee, whatever its number, of the independent members and that the Committee is chaired by an independent member. The Board Chairman may not be a member of any of such committees. The Board shall notify non-executive members in committees concerning with the functions that may result in conflicts of interest, such as ensuring the soundness of financial and non-financial reports, determining the remuneration of those members, and reviewing transactions with stakeholders. 3. Committees shall be formed in accordance with procedures established by the Board [...]".*

NRC is the permanent committee entrusted with the succession of the Board of Directors and company executives. The responsibilities of the NRC include but are not limited to developing and implementing a membership policy for Directors and executives, ensuring the independence of independent directors on an ongoing basis, and preparing and reviewing remuneration for Directors and executives. The SCA Code, under Article 54, explicitly bestows the responsibility of identifying the company's competency needs at the level of senior executive management as well as the basis of selecting senior executive management. In relation to the NRC, the SCA Code provides that:

> "The Board shall form a permanent committee called the Nomination and Reward Committee. The Committee shall hold its meetings once during the year or whenever the need arises, with the following tasks:
>
> 1. Develop a policy to **apply for membership of the Board and executive administration**, aiming to take into account gender diversity within the formation and encouraging women through incentive and training programs and benefits, and to provide [SCA] with a copy of such policy and any amendments thereto [...]
>
> 11. **Identify the company needs of competencies at the level of senior executive management and staff and the basis of selecting them**."[110]

This obligation in the UAE is in line with the principles and guidelines of other jurisdictions, such as KSA as reflected in the KSA Corporate Governance Code, and the UK, as reflected in the UK Corporate Governance Code and the Financial Reporting Council's Guidance on Board Effectiveness.

The KSA Corporate Governance Code, states under Chapter 4, Article 64 that "*the Company's Board shall, by resolution thereof, form a committee to be named the "nomination committee". Members of the committee shall not be Executive Directors, provided that there shall be at least one Independent Director among them.*"[111]

Further, under Article 65, the KSA Corporate Governance Code clearly identifies multiple tasks within succession planning as competencies of the Nomination Committee:

> "The competences of the nomination committee shall include the following:
>
> 1- suggesting clear policies and standards for membership of the Board and the Executive
>
> Management; [...]
>
> 3- preparing a **description of the capabilities and qualifications required for membership of** the Board and **Executive Management positions**; [...]
>
> 5- annually reviewing the **skills and expertise required of** the Board members and the
>
> **Executive Management**;
>
> 6- reviewing the structure of the Board and the Executive Management and providing
>
> recommendations regarding changes that may be made to such structure; [...]
>
> 8- providing **job descriptions for** the Executive, Non-Executive and Independent Directors
>
> and the **Senior Executive Management**;
>
> 9- **setting procedures to be followed if the position of** a member of the Board or **a Senior**

[110] See SCA Code, Article (59) p. 41.
[111] Corporate Governance Regulations (English Translation of the Official Arabic Text), Capital Market Authority, Kingdom of Saudi Arabia; p. 37 https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CGRegulations_en.pdf.

Executive becomes vacant [...]"[112]

The UK Corporate Governance Code, states under Provision 17:

> *"*The **board should establish a nomination committee to lead the process for appointments**, ensure plans are in place for orderly succession to both the board and senior management positions, and oversee the development of a diverse pipeline for succession. A majority of members of the committee should be independent non-executive directors. The chair of the board should not chair the committee when it is dealing with the appointment of their successor."[113]

The UK Guidance on Board Effectiveness further reiterates the role of the NRC in taking into consideration diversity and inclusion aspects when developing the executive pipeline. It states in Chapter (3) Composition, Succession and Evaluation, Role of the Nomination Committee:

> "89. Developing a more **diverse executive pipeline** is vital to increasing levels of diversity amongst those in senior positions. Improving diversity at each level of the company is important if more diversity at senior levels is to become a reality. Greater transparency about the make-up of the workforce could support this. This might cover a range of different aspects of diversity, including age, disability, ethnicity, education and social background, as well as gender."[114]

The same Guidance also recommends considering succession planning along different time horizons, for example, contingency planning for sudden departures, medium-term planning to ensure the orderly replacement of senior executives, and long-term planning. The Guidance also recommends, under 101, formalising the succession plan in writing, *"Putting the succession plan in writing can help ensure it is followed through. Succession plans can also help to increase diversity in […] the executive pipeline."*[115]

4.3.3 Independent directors

The SCA Code requires that the Chairman of publicly listed companies be independent (Chapter (2) Article 9, Clause (5) on Board Formation).

> *"*5. The Articles of Association shall determine Executive Board members, Non-Executive Board members and Independent Board members; provided that the majority **of Board members shall be non-executive Independent Board members**. Majority of Board members shall be Non-Executive Board members who shall have the technical skills and experience required to serve the interests of the Company. In all cases, when selecting Non-Executive Board members of the Company, it shall be taken into consideration that a Board member shall be able to dedicate adequate time and effort to his/her role and that such role is not in conflict with his/her other interests. *"*[116]

While these independence requirements apply exclusively to publicly listed companies in the UAE, soft law guidelines, such as those promulgated by the FBCG and Hawkamah, also advocate for independence within the Board of Directors of family businesses. The GCC Corporate Governance Code promoted by the FBCG recommends a Board of Directors with qualified family members, non-family executives and at least a third of its members completely independent, provided the members have required expertise and key skills."[117] It also outlines two alternatives: one being the Board of Directors in family businesses being entirely composed of external directors rather than family members, while another being the majority of the Board being composed of independent directors.

The independence of the Board of Directors that oversee executive management is a common theme in corporate governance guidelines such as the Sarbanes-Oxley Act and the Cadbury Report (Annex, Figure 7), developed in the West in response to corporate governance scandals.[118] The OECD noted that despite

[112] Id.
[113] See UK Corporate Governance Code, Financial Reporting Council, July 2018, p. 8.
[114] See UK Guidance on Board Effectiveness, Financial Reporting Council, July 2018, p. 24.
[115] See UK Guidance on Board Effectiveness, Financial Reporting Council, July 2018, p. 26.
[116] See SCA Code, Article 9 (5) on Controls of Nomination for Board Membership, p. 9.
[117] See the GCC Corporate Governance Code, Governance Guidelines for Family Businesses, Family Business Gulf Council (FBGC), 2021, p. 42., *"Ideally, a board of directors will have well qualified family members, non-family executives and at least a third of the members should be completely independent - provided they have the required expertise and key skills."*
[118] E. Ravina, & P. Sapienza, "What Do Independent Directors Know?: Evidence from their Trading". 23(3), The Review of Financial Studies, 962, 2010, p. 962.

differences in the structure of the Board of Directors, most jurisdictions introduced a requirement or recommendation on the minimum number or ratio of independent directors.[119] The most prevalent voluntary standard is for the Board of Directors to be composed of at least fifty (50) percent independent directors (binding requirement of at least fifty percent or more independent directors in countries such as the United States, India, Hungary, South Africa and Korea) while at least 30% of the board is subjected to legal requirements for independence (including KSA).[120] (Annex., Figure 8)

4.4.4 Nationality of directors

The SCA Code, under Chapter 2, Article 6 on Board Formation[121], requires that the Chairman and majority of Board members for publicly listed companies be UAE nationals. It is worthwhile to note this provision is unique to the UAE and that no such provisions related to the nationality of the Board of Directors were identified in the comparative law assessed, including that of its GCC peer, KSA.[122]

4.4.5 Gender diversity and the case for female directors

Until 2021, the SCA Code (Article 9 (Clause 3) on Controls of Nomination for Board Membership) required publicly listed companies to have at least twenty (20) percent of Board membership[123]. However, pursuant to an amendment (Chairman of SCA Decision No. (08 /R.M.) of 2021 concerning Amendment to the Joint Stock Companies Governance Guide) issued on March 28, 2021, the female representation requirement on Boards of PJSCs was revised to one female member on the Board of Directors, and this must be disclosed in the annual governance report.

> "3. The company's articles of association shall define the method of forming the board of directors, the number of its members and the term of membership, provided that the **representation of women shall not be less than one member in the formation of the board of directors**. Moreover, the company shall be obligated to disclose this representation in the annual governance report."[124]

There is a gap between the UAE and international best standards, particularly in the UK and the European Union (EU). European benchmarks have mandatory female quota ranging from one-third in countries including the UK, Belgium, Greece, Italy and Portugal[125] to 40% of Directors on the Board in countries such as France[126], Norway, Denmark, Sweden and Iceland[127], for corporate Boards. In June 2022, the EU agreed on a Directive to ensure women have 40% of seats among non-executive directors and 33% among all directors on the Board of Directors of EU companies listed on EU stock exchanges[128]. The new measures shall be enforced starting June 30, 2026, and apply to companies with 250 or more employees. The EU Directive 2012/0299 (COD), Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures (EU Directive on Public Companies), originally proposed in 2021, states as following:

> "1. Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by

[119] See OECD Corporate Governance Factbook 2021, OECD, p. 141, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.
[120] *Id.*
[121] *4. The Chairman and the majority of the Board must hold the **nationality of the State**."*
[122] Corporate Governance Regulations (English Translation of the Official Arabic Text), Capital Market Authority, Kingdom of Saudi Arabia, p. 17, https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CGRegulations_en.pdf.
[123] *"3. [...] **Females shall represent at least 20% of the Board membership.** The Company shall disclose the reasons behind not achieving this percentage, and disclose the percentage of female representation in the Board in its Annual Governance Report."*
[124] Article 9, SCA Code.
[125] The Corporate Governance Codes of Belgium, Greece, Italy, Portugal and the UK set a quota of 33% for women Directors on Boards.
[126] Law n°2011-103 of January 27, 2011 on balanced representation of men and women on boards of directors and supervisory boards and on gender equality in the workplace. Please see https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000023487662.
[127] "Board Best Practices in the Middle East", Hawkamah & Diligent, December 2019; p. 21, https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_12012020.pdf.
[128] On 7th June 2022, the EU agreed on a Directive to ensure women have 40% of seats on a corporate Board. The Directive sets a share of 40% of the underrepresented sex among non-executive directors and 33% among all directors, for EU companies listed on the EU stock exchanges.

applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.

2. The number of non-executive director positions necessary to meet the objective laid down in paragraph 1 shall be the number closest to the proportion of 40 per cent, but not exceeding 49 per cent…"[129]

Conclusion and recommendations

The definition of corporate governance in the UAE's laws is in line with international standards.[130] The OECD defined corporate governance as: *"corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined".*

A careful examination of UAE's laws in comparison with international standards is a "hard law" approach to regulate the Board of Directors via statutory requirements, increasing a quota for female Directors by up to 30%. The SCA Code for public companies sets out Independence requirements in line with international practices, such as in the UK, which requires that independent non-executive directors constitute at least half of the Board[131]. The UAE can push the independence agenda among family businesses through education and awareness initiatives as well as encourage family businesses to clearly define independence requirements, ideally within the family charter. The optimal composition of the Board of Directors in a family business is a combination of non-executive directors in proportion to the shareholding structure and independent non-executive directors, such that the majority of the Board is independent. The OECD noted that some jurisdictions link the independence requirement of the Board of Directors with the ownership structure of the company.[132].

Given the private form of the majority of family businesses, one recommendation also propagated by the FBCG is for governments to make family charters legally binding via statutory presumption in favour of such documents being binding on their signatories.[133] Establishing a family charter with clearly defined principles and policies that the family and its business agree to subscribe to and clarifying the roles and function of the shareholders, the Board, management and employees, will help alleviate risk from misunderstandings.[134]

As the UAE is allegedly developing its own non-binding national corporate governance code, it might also be instructive to note a few takeaways from international standards, such as the UK Corporate Governance Code and the Deutscher Corporate Governance Kodex (German Corporate Governance Code), which describes legal regulations for the management and supervision of German listed companies. First, the "comply or explain" principle, which was first introduced under the Cadbury Report may be instructive. The German Corporate Governance Code also distinguishes between recommendations (indicated in the text by the use of the word "shall") and suggestions (indicated in the text by the use of the word "should"). Neither is mandatory; however, deviation from a recommendation has to be explained and disclosed with the annual declaration of conformity (comply or explain) while companies may depart from the suggestions without disclosure. The UAE may consider adopting a similar approach, through a mix of mandatory guidelines, departure from which must be explained and "suggestions" which are voluntary and allow companies flexibility to consider their industry-specific or business-specific characteristics when such departure is in the best interests of the business and its

[129] Article 4, Objectives with regard to non-executive directors. Please see https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012PC0614&from=ES.

[130] The European Central Bank defines corporate governance as the *"procedures and processes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision-making.";* European Central Bank, 2004, Annual Report: 2004, ECB, Frankfurt, Glossary.

[131] UK Corporate Governance Code, Chapter (2) Division of Responsibilities, Provision (11) *"**At least half the board**, excluding the chair, should be non-executive directors whom the board considers to **be independent**."*

[132] OECD Corporate Governance Factbook 2021, OECD, p. 141, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

[133] "Dispute Resolution for Family Businesses in the GCC: Keeping the family united", FBCG, May 2020.

[134] J. Bladen, "Top 10 CG Recommendations", Hawkamah Journal.

shareholders. Second, the UAE may consider setting out a regular review and necessary revision of such a national corporate governance code in consultation with relevant stakeholders. For instance, the German Corporate Governance Code is reviewed by the Regierungskommission Deutscher Corporate Governance Kodex Commission as well as put up for public consultation. In line with the OECD's observation, national corporate governance codes are updated frequently, and the OECD noted that nineteen jurisdictions reported revised codes or equivalent changes in listing requirements or rules during 2019-20.[135]

[135] OECD Corporate Governance Factbook 2021, OECD, p. 33, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

Annex: Figures and illustrations

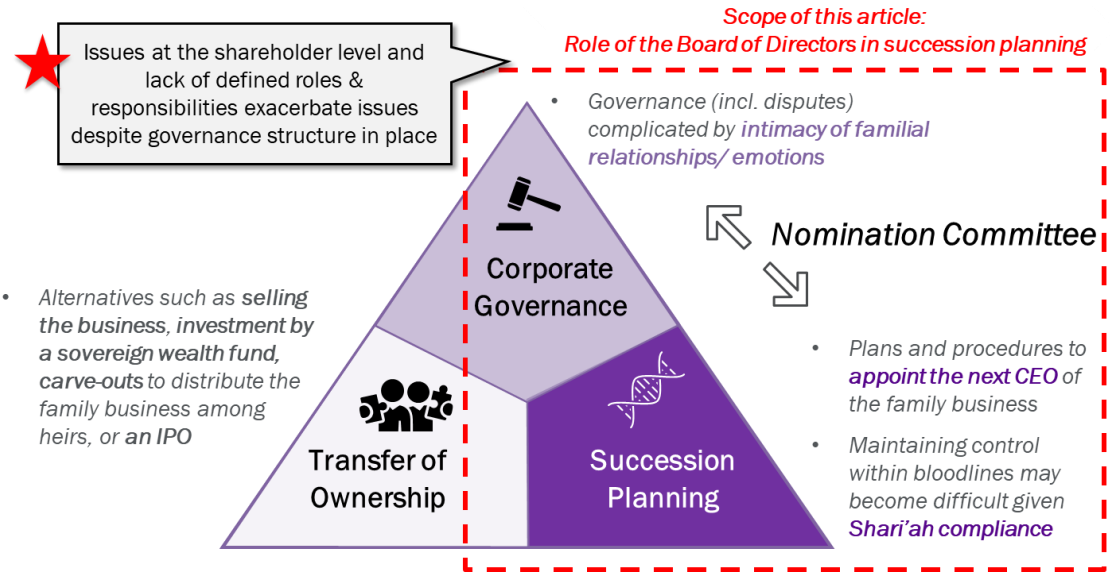
1. Figure 1: Key family governance issues faced by family businesses during their development cycle

Source: IFC Governance Handbook, 2018, https://www.ifc.org/wps/wcm/connect/2c93b2cb-dec6-4819-9ffb-60335069cbac/Family_Business_Governance_Handbook.pdf?MOD=AJPERES&CVID=mskqtDE.

Ownership Stage	Dominant Shareholder Issues
Stage 1: The Founder(s)	• Leadership transition • Succession • Estate planning
Stage 2: The Sibling Partnership	• Maintaining teamwork and harmony • Sustaining family ownership • Succession
Stage 3: The Cousin Confederation	• Allocation of corporate capital: dividends, debt, and profit levels • Shareholder liquidity • Family conflict resolution • Family participation and role • Family vision and mission • Family linkage with the business

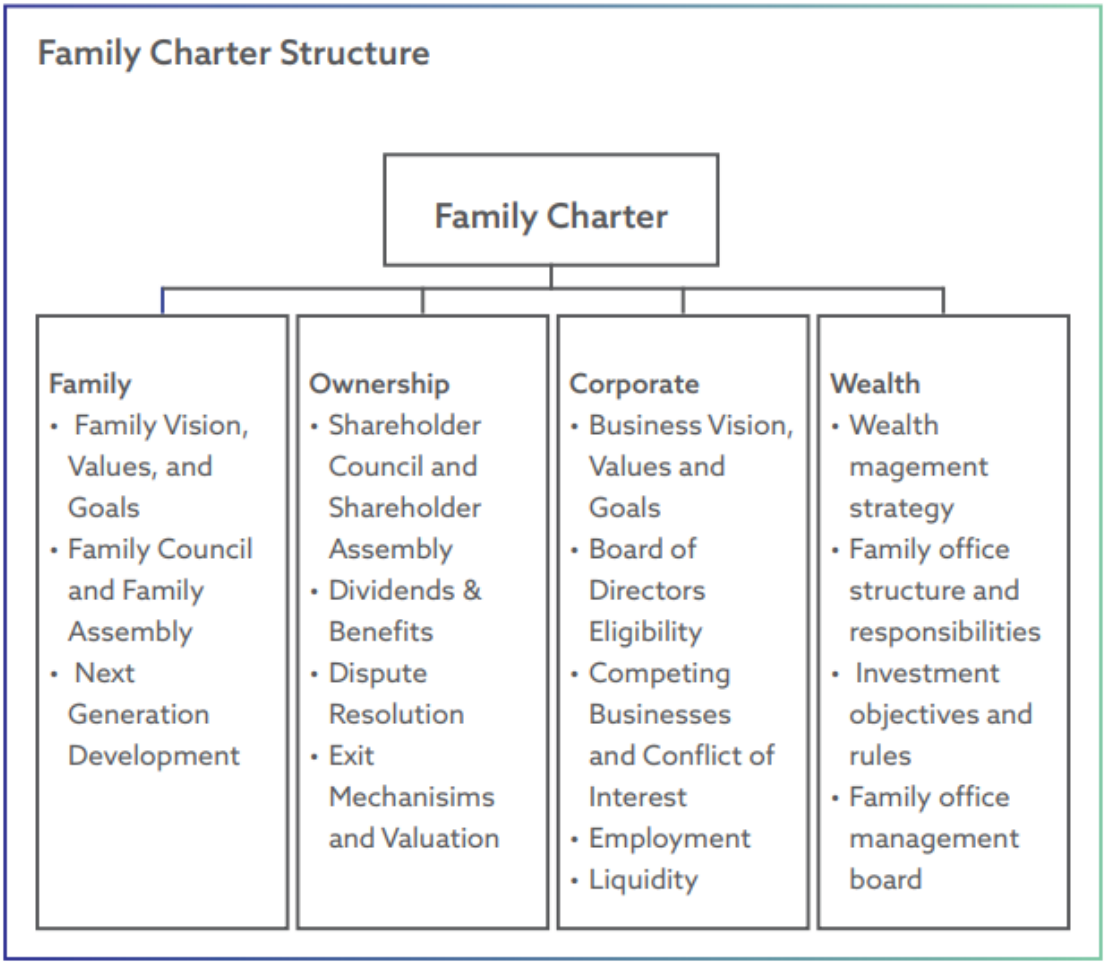
2. Figure 2: Range of options available to family businesses on succession

Source: The authors.



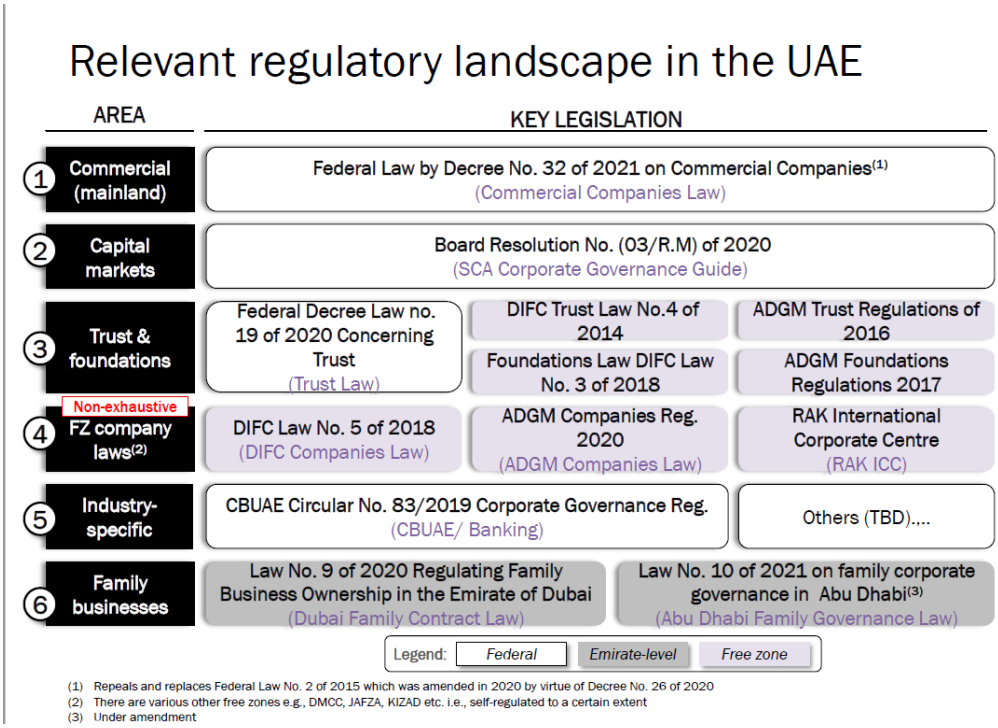
3. Figure 3: Family Charter Structure

Source: The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBCG, 2021.



4. Figure 4: Relevant laws and regulations governing corporate governance in the UAE

Source: The authors.



5. Figure 5: Checklist for family business governance

Source: The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBCG, 2021.

CHECKLIST

The checklist is provided as a guiding tool to assist family businesses in their journey of governance. As previously highlighted, each family business has its own unique properties and requirements, and should, accordingly, identify the specific factors that require its attention and work on implementing the mechanisms necessary. The checklist acknowledges that governance implementation is a journey; it lists the different stages your business might be at, providing you a clear direction on what is left to accomplish.

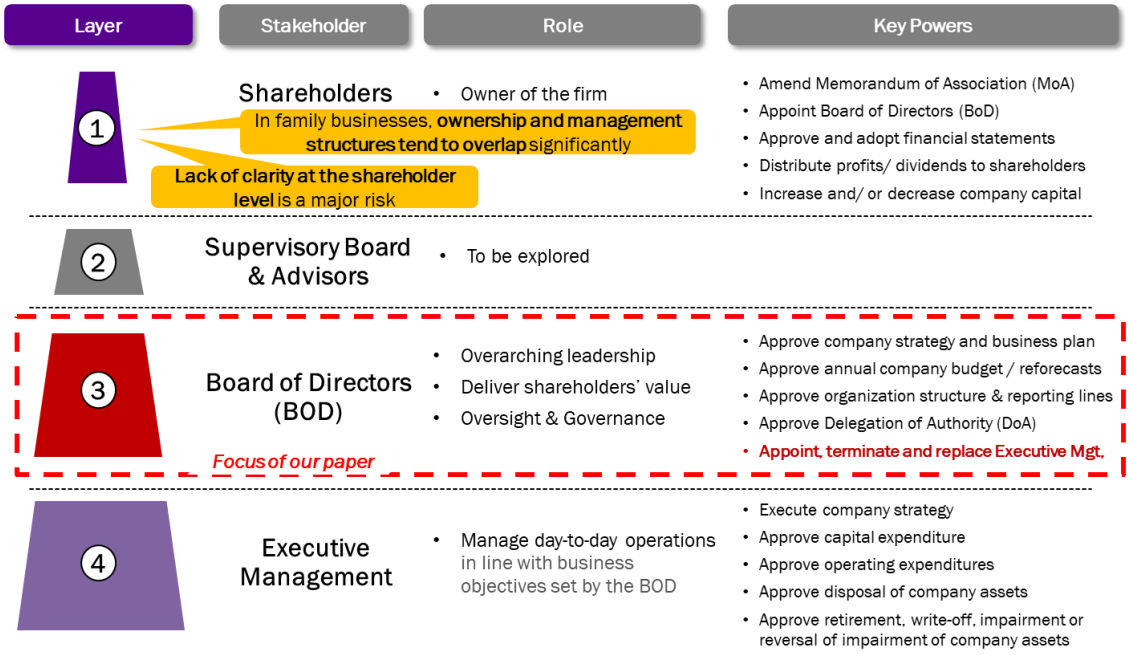
Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
FAMILY GOVERNANCE				
Vision, Values, and Goals • Family members are aligned on the vision and core values, values are embedded in goals, governance and policies.	☐	☐	☐	☐
Family Communication • Regular family reports to document what was planned, send updates, and report achievements. • Regular family meetings where family and business issues are discussed.	☐ ☐	☐ ☐	☐ ☐	☐ ☐
Governing Bodies • A family assembly that acts as a forum for communication between all family members. • A family council that acts on behalf of the family assembly to manage family affairs.	☐ ☐	☐ ☐	☐ ☐	☐ ☐
Family Policies • A family charter/ constitution that identifies and enables shareholders to understand the main elements of the family and the business. • Clear and fair policies that regulate matters of importance to the family and any processes pertaining to them.	☐ ☐	☐ ☐	☐ ☐	☐ ☐

Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
Conflict Resolution • A clear conflict resolution strategy that sets out the means and processes for resolving conflict among family members, and between family members and the company.	☐	☐	☐	☐
Family Members • Family members with entrepreneurial spirits are identified and roles in the business are assigned.	☐	☐	☐	☐
• Family members' performance is regularly assessed and acted upon by an assigned party.	☐	☐	☐	☐
• Female family members are involved in the business, gender parity is minimized/ overcome.	☐	☐	☐	☐
• The next generation is prepared to join the business, equipped with adequate skills and knowledge.	☐	☐	☐	☐
OWNERSHIP GOVERNANCE				
Legal Structure • A coherent legal structure is in place with the necessary legal firewalls to protect the business and family.	☐	☐	☐	☐
Governing Policy • A shareholder agreement that summarizes the will of the shareholders, and sets forth their rights and responsibilities and regulates family matters.	☐	☐	☐	☐
Governing Bodies • A shareholder assembly that comprises of all shareholders and plays a role in business decisions by governing and assists the shareholder council.	☐	☐	☐	☐
• A shareholder council that comprises of a smaller number of shareholders and represents the shareholder assembly in respective business matters.	☐	☐	☐	☐

Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
CORPORATE GOVERNANCE				
The Family and the Business • The relationship between the family and the business is assessed and properly identified.	☐	☐	☐	☐
Corporate Vision • A corporate vision that outlines the business's key values and sets out its primary goals.	☐	☐	☐	☐
Legal Structure and Governing Bodies • Separation of ownership from management.	☐	☐	☐	☐
• A clear distinction between the roles of shareholders, board members, managers and employees.	☐	☐	☐	☐
• The creation of different committees that assist the board of directors.	☐	☐	☐	☐
Corporate Policies • Clear policies that regulate important business matters and processes pertaining to them.	☐	☐	☐	☐
Plans for Non-Family Employees • A fair treatment to non-family employees in terms of appointment, assessment and development.	☐	☐	☐	☐
WEALTH GOVERNANCE				
Wealth Management Strategy • A robust strategy that allocates wealth to different fields of investment and sets out independent policies for each.	☐	☐	☐	☐
Family Offices • A family Office that supervises and manages the family business's private wealth through a separate operation	☐	☐	☐	☐
• Family engagement in the activity and periodical reporting to the family board on activity and performance	☐	☐	☐	☐

Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
Investment Planning and Solutions				
• A clear set of investment objectives aligned with the vision, goals and wealth strategy.	☐	☐	☐	☐
• A clear set of investing rules that regulate family business's investments and ensures that they are	☐	☐	☐	☐
ENGAGING THE PUBLIC				
Philanthropy				
• A commitment towards philanthropy and an engagement in philanthropic activities.	☐	☐	☐	☐
• Setup of family foundations for large charitable causes.	☐	☐	☐	☐
• Creation of a family philanthropy committee to manage philanthropic activities.	☐	☐	☐	☐
Identity and Business Reputation				
• A clear and consistent business identity is established and maintained.	☐	☐	☐	☐
• A positive coherent business image is showcased.	☐	☐	☐	☐
SUCCESSION PLANNING				
Succession Plan				
• A clear carefully designed succession plan to facilitate the transfer of the family business from one generation to another.	☐	☐	☐	☐

6. Figure 6: Key powers for stakeholders in a family business
Source: The authors.



7. Figure 7: Key recommendations from the Cadbury Report, one of which is on the independence of directors.

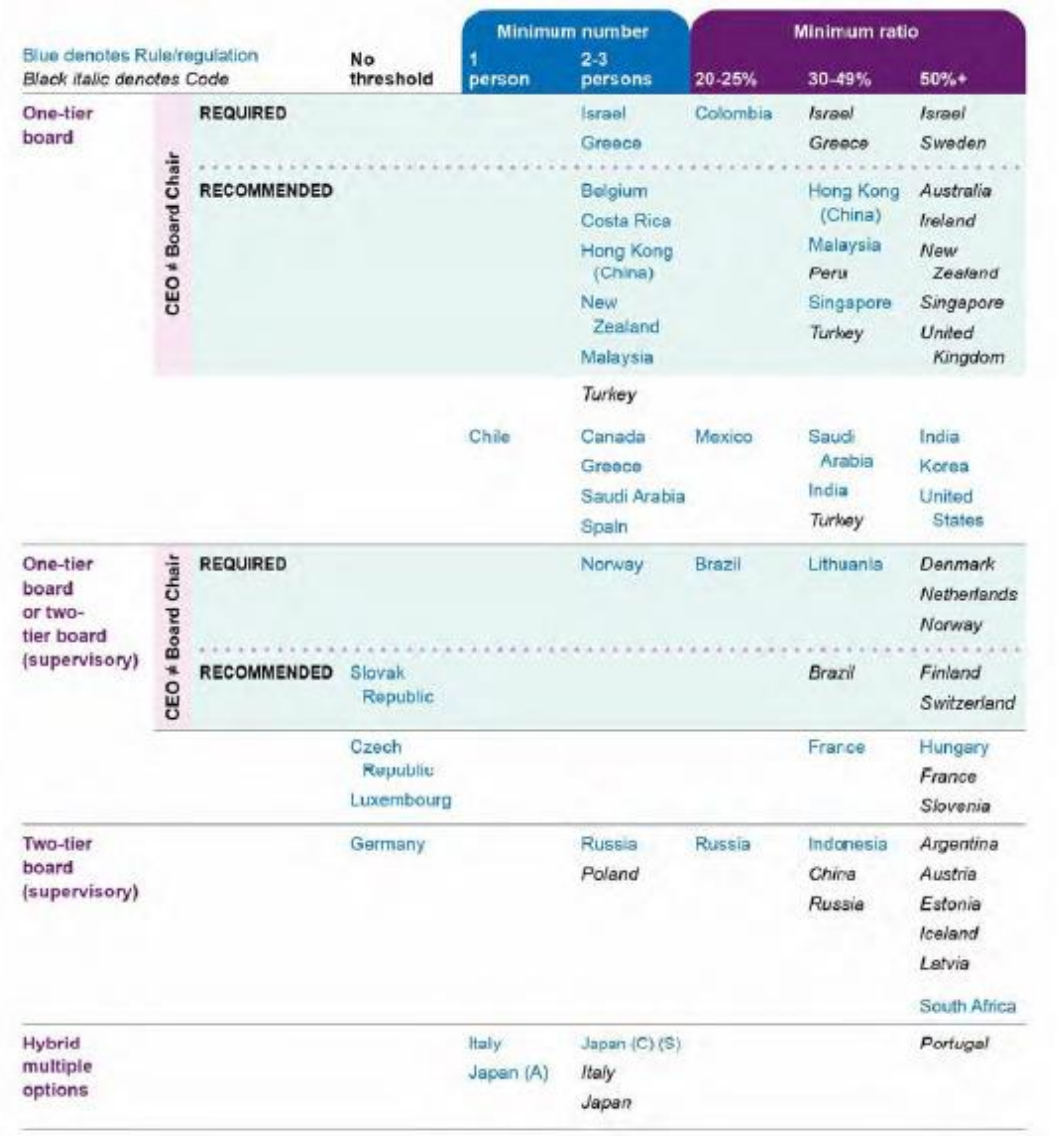
Source: C. Boyd, "Ethics and corporate governance: The issues raised by the Cadbury report in the United Kingdom", Journal of Business Ethics 15.2 (1996): 167-182.

TABLE 1
Main recommendations of the Cadbury Report

Governance Issue	Cadbury Code Recommendation
Separate CEO and Chairperson	Recommended but not compulsory
Nomination of Directors	Formal board process via nomination committee dominated by outside directors
Outside Directors	Minimum of 3 non-executive directors
Independence of Directors	Majority of non-executives to be independent
Rotation of Directors	Directors to be appointed for specified terms with non-automatic reappointment
Pay and Bonuses	Annual Report to reveal disaggregated director's pay; remuneration committee of board to be dominated by outside directors
Independence of the Auditor	Audit committee of the board to be formed, comprised exclusively of outside directors
Flow of information to the Board	Board to have a formal schedule of decisions; directors to have paid access to outside advice
Greater Scope of Auditing	Auditors to review compliance to the Code, including directors' statements on going-concern and on internal audit effectiveness

8. Figure 8: Minimum number or ratio of independent directors on the (supervisory) Board

Source: OECD Corporate Governance Factbook 2021, OECD, p. 142, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.



Blue denotes Rule/regulation *Black italic denotes Code*		No threshold	Minimum number: 1 person	Minimum number: 2-3 persons	Minimum ratio: 20-25%	Minimum ratio: 30-49%	Minimum ratio: 50%+
One-tier board	CEO ≠ Board Chair	REQUIRED		Israel Greece	Colombia	*Israel* *Greece*	*Israel* *Sweden*
		RECOMMENDED		Belgium Costa Rica Hong Kong (China) New Zealand Malaysia *Turkey*		Hong Kong (China) Malaysia *Peru* Singapore *Turkey*	*Australia* *Ireland* *New Zealand* *Singapore* *United Kingdom*
			Chile	Canada Greece Saudi Arabia Spain	Mexico	Saudi Arabia India *Turkey*	India Korea United States
One-tier board or two-tier board (supervisory)	CEO ≠ Board Chair	REQUIRED		Norway	Brazil	Lithuania	*Denmark* *Netherlands* *Norway*
		RECOMMENDED	Slovak Republic			*Brazil*	*Finland* *Switzerland*
			Czech Republic Luxembourg			France	Hungary *France* *Slovenia*
Two-tier board (supervisory)			Germany	Russia *Poland*	Russia	Indonesia *China* *Russia*	*Argentina* *Austria* *Estonia* *Iceland* *Latvia* South Africa
Hybrid multiple options			Italy Japan (A)	Japan (C) (S) *Italy* *Japan*			*Portugal*

Note: Jurisdictions displayed in sections with blue background signify those with requirements or recommendations on split between CEO/Board chair applying to one-tier boards; jurisdictions in the white background areas have no provisions on CEO/Chair split. Jurisdictions in blue text signify provisions by "Rule/regulation" including requirements by listing rule. Jurisdictions in black italics signify code recommendations. Japan (A), (C) and (S) denote statutory auditors model, three committees model, and audit and supervisory committee model, respectively. The US requirement applies to listed companies without a controlling majority. See Table 4.6 for data.

9. Figure 9: The definition of an Independent Director

Source: IFC, Family Business Governance Handbook, 2018, https://www.ifc.org/wps/wcm/connect/2c93b2cb-dec6-4819-9ffb-60335069cbac/Family_Business_Governance_Handbook.pdf?MOD=AJPERES&CVID=mskqtDE

Indicative Independent Director Definition[27]

"Independent Director" means a director who is a person who:

1. has not been employed by the Company or its Related Parties in the past five years;
2. is not, and is not affiliated with a company that is an advisor or consultant to the Company or its Related Parties;
3. is not affiliated with a significant customer or supplier of the Company or its Related Parties;
4. has no personal service contracts with the Company, its Related Parties, or its senior management;
5. is not affiliated with a non-profit organization that receives significant funding from the Company or its Related Parties;
6. is not employed as an executive of another company where any of the Company's executives serve on that company's board of directors;
7. is not a member of the immediate family of an individual who is, or has been during the past five years, employed by the Company or its Related Parties as an executive officer;
8. is not, nor in the past five years has been, affiliated with or employed by a present or former auditor of the Company or of a Related Party; or
9. is not a controlling person of the Company (or member of a group of individuals and/or entities that collectively exercise effective control over the Company) or such person's brother, sister, parent, grandparent, child, cousin, aunt, uncle, nephew or niece or a spouse, widow, in-law, heir, legatee and successor of any of the foregoing (or any trust or similar arrangement of which any such persons or a combination thereof are the sole beneficiaries) or the executor, administrator or personal representative of any Person described in this sub-paragraph who is deceased or legally incompetent,

and for the purposes of this definition, a person shall be deemed to be "affiliated" with a party if such person: (i) has a direct or indirect ownership interest in; or (ii) is employed by such party; "Related Party" shall mean, with respect to the Company, any person or entity that controls, is controlled by or is under common control with the Company.

Towards a Strong UAE National Human Rights Institution: Complying with the Paris Principles and Beyond

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Abstract

National Human Rights Institutions (NHRIs) play an instrumental role in supporting States to fulfil their human rights obligations, by monitoring and reporting on human rights issues, advising the governments on policies and laws, and advocating for reforms that aim to enhance the protection of human rights for all. The Paris Principles, adopted in 1993, have set out universal minimum standards for the establishment and operation of NHRIs and provide guidance to States with regards to their NHRIs' structure, membership, operation and mandate. The Principles stipulate a broad and effective mandate, independence and pluralism as fundamental principles for credible, independent and effective NHRIs. With the establishment of its National Human Rights Institution in December 2021, the Government of the UAE sends a clear message of strong commitment to promoting and protecting human rights and engaging meaningfully with international human rights mechanisms and relevant universal standards. In this context, this essay explores the application of the Paris Principles to the UAE NHRI, considering lessons learned from the region and relevant recommendations of the Global Alliance of National Human Rights Institutions (GANHRI) and its accreditation body, the Sub-Committee on Accreditation (SCA). It critically evaluates the UAE NHRI establishment, making a number of recommendations in relation to its mandate and operation and proposes important agenda items that can inform its action plan.

Keywords

National Human Rights Institutions; Paris Principles; Human Rights; United Arab Emirates

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Introduction

In December 2021, the United Arab Emirates (UAE) formed a National Human Rights Institution (NHRI) with the intent to promote and protect human rights.[1] In doing so, the UAE government reiterated that the body is established in accordance with the UN Paris Principles,[2] a recommended framework for NHRIs to follow in terms of structure and operation, aimed at equipping such bodies with 'credibility, independence, and effectiveness'.[3]

This step by the UAE complements its current interactions with international human rights bodies and mechanisms, indicating a commitment to engage in a meaningful dialogue with such bodies and to develop strategies to improve its human rights protection system. The need to establish a NHRI has been promulgated by a number of UN treaty bodies, noting that such a body should abide by the Paris Principles.[4] In response, the UAE confirmed that such plans were underway, and these have now materialised. Such external international pressure has been identified as being one of the driving forces behind mobilisation in the Middle East region to establish such institutions, usually following damning reports of human rights abuses.[5] Considering that the UAE has been re-elected as part of the Human Rights Council for 2022-2024, the expectations of addressing human rights issues in a manner meeting international standards is key. One way of doing this is for the UAE to ensure that this newly formed institution aligns itself fully with the Paris Principles.

As the body is still in its infancy, the positive proclamations made by the UAE of adhering to such international standards in the establishment and operation of the NHRI need to be considered and clear steps in materialising these set out. Accordingly, this article introduces the newly formed UAE NHRI and examines the extent to which it meets the Paris Principles, as well as steps that can be taken to do so more comprehensively.

In pursuing these objectives, Part A outlines the role of NHRIs, in the context of the scope, importance and criticisms of the Paris Principles. In providing an understanding of these Principles in practice, the article looks at the appraisal of States' adherence to the Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI) and its Sub-Committee of Accreditation (SCA). It specifically explores some lessons from NHRIs in the region, to identify key areas that the UAE should focus on when striving to meet these international standards and ensuring this body is as effective as possible. Part B of the article then critically examines of the UAE's NHRI and its compliance with the Paris Principles, taking into consideration the specific state and political structures in the UAE. Current good practices and intentions relating to the operation of the NHRI are identified, as well as areas in which the UAE should provide more clarity or amendments in ensuring that the potential positive impact of the NHRI is upheld. Having considered the priorities relating to the effective operation of the NHRI, Part C posits an action plan for human rights with key agenda priorities on which the UAE should focus, and the role the NHRI could carve for itself in executing this agenda.

[1] This was established by UAE Federal Law No. 12/2021 On the National Human Rights Authority (2021) (hereinafter 'UAE Law 'or 'Federal Law').

[2] UNGA, *National Institutions for the Promotion and Protection of Human Rights*, adopted 4 March, 1994, G.A. Res. 48/134, U.N. GAOR, 48th Sess., U.N. Doc. A/Res/48/134 (hereinafter Paris Principles).

[3] Paris Principles at 25: Strong National Huma Rights Institutions needed More than Ever, https://www.coe.int/en/web/commissioner/-/paris-principles-at-25-strong-national-human-rights-institutions-needed-more-than-ever?inheritRedirect=true (last visited November 25, 2022).

[4] See Committee on the Elimination of Discrimination against Women (2015), Concluding Observations UAE, CEDAW/C/ARE/CO/2-3, para. 18; Committee on the Elimination of Racial Discrimination (2017), Concluding Observations UAE, CERD/C/ARE/CO/18-21, para. 8; Committee on the Rights of the Child (2015), Concluding Observations UAE, CRC/C/ARE/CO/2, para. 19; UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 5 May 2015, UN doc. A/HRC/29/26/Add.2, para. 91.

[5] Turan Kayaoglou, *National Human Rights Institutions: a Reason for Hope in the Middle East and North Africa?*, Brookings Doha Center, Analysis Paper Number 31, January 2021, at 23.

1. NHRIs and the application of the Paris Principles in the region

1.1 The role of NHRIs

NHRIs are independent bodies, established by States, through a legislative or constitutional mandate to promote and protect human rights at the national level.[6] They operate independently from the government and occupy 'a unique space in the human rights protection framework',[7] which lies between the government and the civil society, without being neither a government body, nor a non-governmental organisation (NGO). The absolute independence of NHRIs from both the government and NGOs and the specific interests they serve and represent is an essential feature and a guiding operational principle. While being independent from the government and civil society stakeholders, they are accountable to both.[8]

NHRIs are assigned with the power to monitor the state of human rights protection in the jurisdiction in which they operate, review and report on laws, policies and practices and advise the government on the development and implementation of strategies to effectively protect and promote human rights. In this context, their role is to support the State's compliance with the human rights obligations deriving from international human rights instruments they have ratified and to fulfil the relevant recommendations put forward by international and regional human rights bodies. In other words, NHRIs monitor how governments give affect to their human rights obligations, identify gaps and challenges, and propose laws and policies to bridge the gap between the State's international human rights obligations and the actual fulfilment of those rights within their jurisdiction.

To carry out their mandate, however, they are expected to communicate and collaborate with all three State powers; the executive, the legislative and the judiciary, but also with different stakeholders and members of the civil society, such as NGOs, professional bodies and associations, as well as representatives of minorities and different political, economic, social and cultural groups.[9]

The NHRIs engage in research and monitoring of government practices, providing advice in areas where the incorporation of human rights is insufficient to satisfy the international standards.[10] This is done through annual reports and engagement with parliamentary human rights committees, where available.[11] Similarly, NHRIs also work with the executive limb of the government, engaging in discussions of policies and State practices that may be incompatible with human rights.[12] Finally, NHRIs can also collaborate with the judicial branch of a State, including acting as *amicus curiae* or 'friends of the court'.[13] This means that they may provide insight and expertise to areas of human rights law and its application. Additionally, they may provide training to judges ensuring their proper understanding of human rights law.[14] A key benefit to NHRIs and their effectiveness lies in the fact that their authority to hold the State accountable is granted by the government itself, adding to its legitimacy.[15]

1.2 The Paris Principles: Setting the standards for the establishment and operation of NHRIs

In order to ensure that NHRIs fulfil their functions and pursue their aims effectively, the international community established a set of universal standards for NHRIs, the Paris Principles. The Paris Principles were initially drafted in 1991 by NHRIs, but quickly gained broad consensus. As a result, they were later adopted by the UN, through the General Assembly Resolution 48/134 of 20 December 1993.[16] They set out a

[6] Article 1, Global Alliance of National Human Rights Institutions Statute.
[7] GANHRI (2017), A Practical Guide to the work of the Sub-Committee on Accreditation (SCA), available at: https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/GANHRI_Manual_online.pdf (last visited on November 25, 2022).
[8] Anne Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing*, 28 HUMAN RIGHTS QUARTERLY 4, 904-946, 905-906 (2006).
[9] Asia Pacific Forum: Fact Sheet 9: Responsibilities and functions of NHRIs: Cooperating at the national level, https://www.asiapacificforum.net/members/what-are-nhris/fact-sheet-9-cooperation/ (last visited November 25, 2022).
[10] European Network of National Human Rights Institutions, https://ennhri.org/about-nhris/ (last visited November 25,, 2022).
[11] Asia Pacific Forum: Fact Sheet 9, *supra note* 9.
[12] European Network of National Human Rights Institutions, https://ennhri.org/about-nhris/ (last visited November 25,, 2022).
[13] Asia Pacific Forum: Fact Sheet 9, *supra note* 9.
[14] *Ibid*.
[15] UN OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (UN, New York and Geneva, 2010), at 20.
[16] *Supra note* 2.

recommended framework for NHRIs to consider when being established and when operating, as well as minimum standards relating to their independence, jurisdiction, mandate and composition, in order to support their effectiveness.[17] The key pillars around which the Paris Principles standards are set are pluralism, independence and effectiveness.[18] Across those pillars, a number of requirements are outlined for NHRIs to meet. Those relate to their mandate and competence, their autonomy from government, independence, pluralism, adequate resources, and adequate powers of investigation.[19] The standards set by the Paris Principles are explored in more detail in Part B and applied in the context of the newly established UAE NHRI.

Although the Paris Principles serve a significant purpose for the effective operation of NHRIs, they have been subject to criticism, particularly in relation to their reach. De Beco and Murray argue that the Principles reflect a strong focus on the establishment of the NHRIs, which does not extend to their way of operation, thus creating a lacuna, as far as standards of operation are concerned.[20] They explain that this gap is evident in the lack of clarity on the nature of the relationship between stakeholders at national, regional, and international levels.[21]

A further criticism of the Paris Principles, particularly relevant to the current discussion on the UAE NHRI, has been that they have been formulated to operate and thrive within a democratic political structure, wherein pluralism, independence and freedom of information constitute principles of fundamental importance, associated with the very existence of the State.[22] In States that operate in different political structures, such as the UAE, the implementation of such principles could therefore prove challenging to implement. However, as elaborated below, this does not render the credible and legitimate establishment and operation of a NHRI in such States impossible.

Such limitations and challenges need to be acknowledged and borne in mind by States establishing such bodies, as well as institutions that evaluate them. The Paris Principles should not be viewed as the end result, but as a good foundation for the effective functioning of such institutions. In this context and to this aim, the Global Alliance of National Human Rights Institutions (GANHRI) was established to support a more realistic application of the Principles, guide NHRIs from inception to operation, and help them realise their full potential.

1.3 The Global Alliance of National Human Rights Institutions and its Sub-Committee of Accreditation

GANHRI, composed of 118 NHRIs across the four regions of Africa, Asia and the Pacific, the Americas, and Europe, aims to coordinate a unified standard for the establishment and operation of NHRIs.[23] Being a part of this collaborative network helps NHRIs to ensure that they are on the right track, both in terms of their compliance with the Paris Principles,[24] as well as in relation to their ongoing operations, through training courses and other support for executing their mandate of promotion and protection of human rights.[25] This body can be seen as the practical application and monitoring mechanism of the Paris Principles. A lot of its work and effectiveness is undertaken by its sub-body, the Sub-Committee of Accreditation (SCA).

The SCA was established by GANHRI in 1999 and has been given the role of reviewing the work of NHRIs and their compliance with the Paris Principles.[26] It does this through its accreditation system, offering band

[17] UNDP and UN OHCHR, 'Toolkit for Collaboration with National Human Rights Institutions' (New York and Geneva, 2010), at 235.
[18] GANHRI (2017), A Practical Guide to the work of the Sub-Committee on Accreditation (SCA), available at: https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/GANHRI_Manual_online.pdf
[19] *Supra note* 17, at 11.
[20] GAUTHIER DE BECO & RACHEL MURRAY, CHALLENGES, In A COMMENTARY ON THE PARIS PRINCIPLES ON NATIONAL HUMAN RIGHTS INSTITUTIONS, 20-30 (2014).
[21] *Ibid.*
[22] The International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (Switzerland, 2004), at 106, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/FF47DFA40E24F7ECC12574FE0051F4F9-ichrp_dec2004.pdf.
[23] Global Alliance of National Human Rights Institutions, Our Identity, https://ganhri.org/ (last visited November 25, 2022).
[24] *Ibid*.
[25] *Ibid*.
[26] GANHRI (2017), *supra note* 18.

A, B, and C accreditations to NHRIs depending on their compliance with the Paris Principles. Such accreditations, according to the SCA, 'confer substantial legitimacy to the NHRI'.[27] Achieving Band 'A', through full compliance with the Paris Principles, allows States to partake in the decision-making of the GANHRI and gain international recognition and acceptance.[28] It is therefore key for the UAE NHRI to align itself with these standards and achieve such status.

The process in which this accreditation is attained is detailed, rigorous, and all-encompassing. Although the standard of work expected from NHRIs is unified, the SCA takes into account the particular circumstances of the States in which NHRIs operate. This is reflected in the 'General Observations' set out by the SCA, a guidance instrument for States seeking accreditation, specifically aimed at remedying the lack of precision within the Paris Principles, and their application within different NHRIs with their varying political structures.[29] The General Observations clarify the meaning and interpretation of the Paris Principles in a two-part document focusing on: a detailed interpretation of the main requirements of Paris Principles, and a showcase of NHRI case-studies that set out models of good practices of compliance with the Paris Principles.[30] Though the method of accreditation strongly relies on meeting a standardised outline, it is also tailored to consider the individual circumstances of States.[31]

The SCA's acknowledgment of such differences amongst States confirms the importance of looking at the recently established UAE NHRI, its compliance with the Paris Principles and its potential to reach SCA 'A' status. However, prior to looking at this, it is important to consider what lessons can be learned from NHRIs in the region. To do so, it is interesting to explore the SCA reports on NHRIs in the MENA region that reflect demographics and socio-political milieus similar to the UAE.

1.4 Lessons from the region

As of December 2021, 86 out of the 128 reviewed NHRIs have been given an A status by GANHRI.[32] In order to investigate the functionality of NHRIs when faced with a multitude of variables, one must consider institutions from a variety of socio-cultural, political, economic, and religious contexts. An examination of other established NHRIs in the region provides a holistic view of the parameters wherein the UAE NHRI would operate. For example, the Kingdom of Bahrain's political system, parallels that of the UAE; therefore, a closer look at its NHRI provides valuable insights.

A recurring theme in the NHRI reports in the Gulf Region (Oman, Bahrain, Qatar and Iraq), is that selection processes are 'not sufficiently broad or transparent.'[33] Most NHRIs which have maintained a B status have been criticised for not having a pre-determined and objective method of appointment, not advertising their vacancies effectively, and not having a broad potential pool of candidates. Conversely, in Qatar, which has consistently maintained an A status, the NHRI has successfully kept a relatively transparent selection process, though there are still issues raised relating to its merit-based approach.[34] This key difference displays the importance GANHRI places on the appointment and selection process, as it underpins all efforts to maintain impartiality and independence. Therefore, transparency must be a top priority, when establishing a NHRI in the UAE.

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[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.
[33] ICC Sub-Committee on Accreditation Report, Report and Recommendations of the Session of the Sub-Committee on Accreditation (Geneva, 18-22 November 2013), at 13 (Oman), available at: https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/SCA_NOVEMBER_2013_FINAL_REPORT_ENGLISH.pdf; GANHRI (SCA), Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (18-29 October 2021), at 17 (Qatar), available at: https://ganhri.org/wp-content/uploads/2021/12/SCA-Report-October-2021_EN.pdf; GANHRI (SCA), Report and Recommendations of the Session of the Sub-Committee on Accreditation (Geneva, 9-13 May 2016), at 8 (Bahrain); GANHRI (SCA), Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (14-24 June 2021), at 24 (Iraq), available at: https://ganhri.org/wp-content/uploads/2021/08/EN-SCA-Report-June-2021.pdf.
[34] GANHRI (SCA) Qatar (October 2021), *supra*, at 18.

Furthermore, transparency also connotes access to information by the public. In the Gulf Region, Qatar's National Human Rights Committee (NHRC) publicly releases its annual reports outlining its investigations and findings over the previous year.[35] Public release of NHRI's reports seems to be a high priority in the accreditation process conducted by the SCA. To successfully operate a NHRI in the UAE and achieve accreditation, public access to an independent complaint system, annual reports, and press releases through an official NHRI website should be guaranteed in order to ensure legitimacy, public support and streamlined effectiveness.

With regards to the composition of the membership of NHRIs, GANHRI is primarily concerned with potential conflicts of interest. Conflicts of interest, either due to members' strong government affiliations put A status at serious risk.[36] On the other hand, lack of equal gender representation will more likely give rise to a strong recommendation in relation to the promotion of diversity and pluralism.[37] These are useful points for the UAE to consider, in relation to the composition of its NHRI membership and the pluralism and diversity reflected therein.

Finally, with regards to the mandate, GANHRI places great significance on a broad mandate that is clearly enshrined in law, is interpreted in a 'liberal and progressive manner to promote a progressive definition of human rights', and is undertaken effectively. NHRIs that do not adequately fulfil this requirement, such as in the case of Oman and Bahrain, won't be awarded A Status. [38]

1.5 The Kingdom of Bahrain – The Bahrain National Institute for Human Rights – B Status

In GANHRI's May 2016 review, Bahrain was awarded with a 'B' status after the SCA examined the Bahraini NHRI in terms of its compliance with the Paris Principles and noted a number of areas where the institution did not satisfy GANHRI requirements.

The main concern the SCA raised was regarding the NHRI's appointment process. Though Bahrain does have an appointment process enshrined in law, the SCA deemed it not sufficiently broad and transparent.[39] It found that the procedures in place to select members lacked a clear merit-based appointment process.[40] The SCA encouraged Bahrain to advertise and publicise their vacancies more broadly, to diversify applicants, whilst assessing these applicants on the basis of pre-determined and objective criteria. Moreover, in order to maintain meritocracy and independence from other organisations, Bahrain was called to select individuals who would serve in their individual capacity, rather than on behalf of an organisation.[41]

Furthermore, the SCA criticised the government affiliations of the Bahraini NHRI's representatives. It stated that four of its members are sitting Parliamentarians and two are members of the Shura Council, who the King directly appoints. The Paris Principles require the NHRIs to be independent of the government to sufficiently conduct their duties, with a potential conflict of interest arising from members holding such dual roles. The SCA referred to General Observation 1.9 on 'Government representatives on NHRIs' and stated that the inclusion of government members has the 'potential to impact on the real and perceived independence of the NHRI'. The SCA further stated that if individuals who are affiliated with the government are to be appointed roles in the NHRI, it should be clearly stated that their role is one of an advisory capacity, and the total number of such members should not outweigh other members of the NHRI's governing body.[42]

Moreover, the SCA found that the Bahraini NHRI did not meet the effectiveness standards enshrined in the Paris Principles, for failing to effectively respond and investigate complaints submitted with regards to breaches of rights of human rights defenders. The SCA advised Bahrain to interpret their human rights mandate in a 'broad and purposeful manner' and to protect the rights of all citizens, without a bias based on

[35] Qatar National Human Rights Committee, Annual Reports, https://nhrc-qa.org/en/annual-reports/ (last visited November 25, 2022).
[36] GANHRI (SCA) Bahrain (May 2016), *supra note* 33, at 9.
[37] GANHRI (SCA) Qatar (October 2021), *supra note* 33, at 19.
[38] GANHRI (SCA) Oman (November 2013), *supra note* 33, at 13; GANHRI (SCA) Bahrain (May 2016), *supra note* 33, at 10.
[39] GANHRI (SCA) Bahrain (May 2016), *supra note* 33, at 8.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid*., at 9.

political alignments and religion. To improve this, the SCA recommended that the NHRI collaborates with regional and international NGOs and civil society organizations to widen their scope.[43]

Additionally, the Bahraini institution failed to publicly release their findings through the media. The SCA report specifically referred to the visit to Drydock Detention Centre in August 2013,[44] which the NHRI has refused to release to GANHRI, or the public. This lack of transparency in their field visits and failure to release human rights reports impacts the institution's credibility, which inhibits the attainment of A Status.

Bahrain's failure to achieve an A status shows the importance GANHRI places on independence, structural transparency, and eliminating potential conflicts of interest. Overall, the NHRI has been unable to fulfil its mandate or meet the standards of autonomy, independence, and compositional pluralism.

Taking on board these considerations, it is important to now identify where the recently established UAE NHRI stands in terms of compliance with the Paris Principles, as well as steps that can be taken to enable it to fully align with the Principles, to work towards achieving an 'A' status, and to gain the approval and support of the international community.

2. The UAE NHRI, the Paris Principles and beyond

2.1 Applying the Paris Principles to the UAE NHRI

The Paris Principles require NHRIs to have a number of characteristics which can be grouped under the following categories: a broad mandate based on universal human rights standards, autonomy and independence from government, and pluralism in their composition.[45] These ought to be examined in the context of the UAE NHRI to both ascertain compliance, as well as generate key recommendations to assist the UAE in fulfilling their declaration of aligning this body with the Principles.

2.2 Autonomy and independence

This principle has been broken down to relate specifically to legal, financial, and operational autonomy.[46] Legal autonomy looks at the founding law establishing the institution, requiring this to provide the NHRI with a distinct legal personality, separate from governmental departments.[47] This is affirmed in Article 3 of the UAE Law.[48] However, the objective behind such legal autonomy, namely to allow the body to make decisions and act independently, is inhibited by a number of factors considered below. Therefore, it is important to consider the other two forms of autonomy and whether these are safeguarded in law and practice. In doing so, the paradox of NHRIs generally needs to be borne in mind, namely that these are 'institutions that will or should act as a watchdog of the very body that created them.'[49] This innately raises questions as to the extent to which such bodies can ever be fully independent from government.

One way of working towards this, as per the Paris Principles, is through ensuring financial independence.[50] This entails adequate funding, allowing them to determine their priorities and activities without external pressures. It is key for this to be reiterated in the founding law, and the UAE refer to the same, stipulating that the authority shall have an independent budget, appropriate to enable it to carry out its work.[51] Yet the paradox of such bodies arises once more since it is the responsibility of the State to ensure such body's core budget, jeopardising the independence of such institutions.[52] The UAE Federal Law indicates that the body's budget will be included in the Federation's annual general budget law.[53] The wording selected raises questions as to the prospects of independence since it is advised that a separate budget line over which the

[43] *Ibid*., at 11.
[44] *Ibid*., at 10.
[45] UN OHCHR, *supra note* 15, at 31.
[46] Ibid., at 40; UNDP and UN OHCHR, *supra note* 17, at 235.
[47] UN OHCHR, *supra note* 15, at 40.
[48] UAE Federal Law, *supra note* 1, article 3.
[49] Anne Smith, *supra note* 8, 909.
[50] Paris Principles, *supra note* 2, Principle B(2).
[51] UAE Federal Law, *supra note* 1, articles 19 and 20.
[52] SCA General Observations, as adopted by the GANHRI Bureau at its meeting held in Geneva on 21 February 2018, at 28.
[53] UAE Federal Law, *supra note* 1, article 10(8).

NHRI has absolute control should be ensured.[54] This may require the UAE to provide further clarity on the financial system in place for the NHRI, including how this budget is drawn and how it is linked to other governmental ministries.[55]

Whilst such financial independence may be difficult to fully realise, the institution's operational details can support this objective. To this end, the Paris Principles stipulate that the body should freely consider questions and information presented to it, where such material falls within its competence, and overall have the ability to conduct their mandate freely.[56] As expanded on, this requires freedom in drafting their rules of procedure, as well as ensuring their reporting mandate does not require prior governmental approval.[57]

Looking at the UAE law, general reference is made to the maintenance of operational independence.[58] In terms of procedural rules, reference is made to The Board's role in approving such plan, yet there is no clarity on who is responsible in drafting this and the role of the government in the same.[59] In January 2022 a 100-day plan for the institutional and organisational workings of the body was approved.[60] Whilst the plan itself has not been made available to the public, in a statement by the Chairperson of the NHRI in May 2022, announcing the completion of the same, some information was provided in terms of the organisational infrastructure and extent of governmental involvement.[61] Specifically, five non-voting government representatives were nominated to participate in the meetings of the Board of Trustees.[62] This is, on its face, in line with the Paris Principles which stipulate that if government departments are to participate, they should only do so in an advisory capacity.[63] Nevertheless, going forward, the UAE should provide further clarity on the input of such bodies in the deliberations of the Board to prevent questions of independence.

In terms of the NHRI's reporting mandate and issuance of the annual report, Article 21 of the Federal Law stipulates that this shall be submitted to the President of the State, the Cabinet and the Federal National Council (FNC) prior to being shared with the public. This may cast some doubt on the body's independence and impartiality of the report, which is stipulated to include a part on the human rights situation in the country and their recommendations.[64] As already highlighted, release of information to the public is of high priority when the SCA examines a NHRI's adherence to the Paris Principles. Thus, for the UAE to strive towards an 'A' status, such reporting and the release of its annual report should be done without the involvement of the State apparatus.

In the context of such operational independence, emphasis is also put on the members' appointment and dismissal procedures, with the relevant law clearly stipulating the method of appointment, criteria, duration, and dismissal process. Looking at the UAE Law, the criteria and duration of membership are clearly set out.[65] Whether the former meets the principle of pluralism is considered in the next section. From a procedural level, the appointment process is unclear from the law. The law states that the mechanism shall be determined by a decision of the President of the State. Yet, no information could be retrieved on how this was implemented in the selection of the first Board of Trustees. Reference has been made to a 'consultative mechanism' in selecting the Board',[66] yet it is unclear what the process entailed and the involvement of the

[54] UN OHCHR, *supra note* 15, at 41.
[55] *Ibid*.
[56] Paris Principles, *supra note* 2, Principle C.
[57] UN OHCHR, *supra note* 15, at 40.
[58] UAE Federal Law, *supra note* 1, article 12.
[59] UAE Federal Law, *supra note* 1, article 10 (2), (3).
[60] Emirates News Agency, NHRI Chairperson announces '100-day plan' for institutional and organisational workings (Thursday, 13 January 2022), https://www.wam.ae/en/details/1395303010831 (last visited November 25, 2022).
[61]Emirates News Agency, UAE's National Human Rights Institution announces completion of its accelerated 100-day plan to set up its operations (9 May 2022), https://www.mediaoffice.ae/en/news/2022/May/09-05/UAE-National-Human-Rights-Institution (last visited November 25, 2022).
[62] Head of State Decision No. (22) of 2021 regarding representatives of government entities in the meetings of the Board of Trustees of the National Human Rights Institutions.
[63] Paris Principles, *supra note* 2.
[64] UAE Federal Law, *supra note* 1, article 21.
[65]I*bid*., article 7, 8.
[66] Emirates News Agency, President issues decisions on Board of Trustees of National Human Rights Institution (Sunday, 19 December 2021), https://www.wam.ae/en/details/1395303004501 (last visited November 25, 2022).

legislative part of the UAE and civil society in this, which have been suggested as possible means of ensuring independence in the selection process.[67]

Regarding the dismissal of members, the guidance stipulates that the founding legislation should specify the instances in which this can be pursued and limited to severe wrongdoing or other serious incapacities. Notably, the Office of the High Commissioner for Human Rights (OHCHR) states that the dismissal mechanism should be independent of the executive.[68] Whilst the UAE Law sets out the dismissal process, it stipulates that this can be done by virtue of a decision of the President, on the recommendation of the Board. It is advisable for the UAE to fully separate this decision-making from the executive. One may argue that an adequate safeguard is already in place since the Board of Trustees is tasked with making such a recommendation to the President. Yet, as examined below, the Board's current composition may also raise questions of independence and thus put such decision-making into question.

2.3 Composition and pluralism

The NHRI's autonomy begins by ensuring that the body itself comprises of independent members, able to effectively execute their human rights mandate. The Paris Principles stipulate that a 'pluralist representation' of society should be reflected in the body's composition.[69] The SCA expands on this, indicating that there are several ways to demonstrate pluralism in this context which would, at least from an accreditation point of view, meet the requirements. The clear route to meeting the standards would be to have different segments of society in the membership. Alternatively, it is also suggested that this can be achieved through pluralism in the appointment process, with diversity coming from the people electing the members; through ensuring cooperation with diverse societal groups; or through diversity in the staff, which then represent the different societal groups.[70]

The UAE Federal Law indicates that the NHRI shall have 11 members 'from advisory and academic bodies, civil society institutions and those with technical and professional expertise, in their personal capacity, taking into account the appropriate representation of women'.[71] Whilst reference is made to gender, no such reference is made to ethnic representation. Focusing on ethnic diversity is key in ensuring a pluralistic composition of the UAE NHRI, especially considering the particular demographics of the country. UAE citizens only make up around 10% of the total population, with more than 200 other nationalities residing in the country.[72] The current composition of the NHRI's Board of Trustees, as per the Federal Law, reflects gender diversity, yet it does not appear to clearly meet requirements of ethnic, philosophical and religious diversity, ensuring full alignment with the Paris Principles.[73]

Furthermore, considering the discussion above on GANHRI's priorities in terms of pluralism and awarding States an A status, whilst gender disparity may be overlooked, potential conflicts of interest due to members being former government officials or part-time government employees may lead to immediate preclusion from obtaining an A status. Therefore, the UAE should strive, not only for gender, ethnic and economic class representation but also representation by individuals, who will work in an individual capacity and not viewed as part of the government apparatus.

While working towards ensuring diversity in the composition of the Board of Trustees, the UAE should also provide clarity on the appointment process, as this may allow them to still meet the pluralism principle as accepted by GANHRI, if they demonstrate diversity in those involved in the selection process. As already noted, limited information exists on how the appointment was conducted in order to confirm this. Accordingly, going forward, it will be beneficial for the UAE to provide such clarity and ensure such diversity

[67] UNDP and UN OHCHR, *supra note* 17, at 248.
[68] UN OHCHR, *supra note* 15, at 42.
[69] Paris Principles, *supra note* 2, Principle B(1).
[70] ICC Sub-Committee On Accreditation *General Observations* (Geneva, June 2009), https://www.ihrec.ie/app/uploads/download/pdf/genera_observations_sca.pdf
[71] UAE Federal Law, *supra note* 1, article 6.
[72] United Arab Emirates Government Portal, Population and Demographic mix, https://u.ae/en/information-and-services/social-affairs/preserving-the-emirati-national-identity/population-and-demographic-mix (last visited November 25, 2022).
[73] SCA General Observations, *supra note* 52.

exists in the appointment process, particularly through the involvement of civil society and different societal groups.

2.4 Mandate and competence

When it comes to this principle, one needs to consider both the mandate's scope, and where its power derives from. Considering the latter first, it is held that this 'shall be clearly outlined in a constitutional or legislative text'.[74] This is key in enhancing the likelihood of such institution's permanency, as well as its independence.[75] However, affirming the latter would require more than simply looking at its founding document, since the legislative process and the involvement of the government of the day therein differs immensely from State to State.

Considering the UAE institution, this has been established by law. This is, at a first level, aligning with the objectives of this Principle, as laws in the UAE are passed by the FNC, considered to be the parliamentary body of the country, before being approved by the President and ratified by the Supreme Council.[76] The process is different to the issuing of a decree, which can simply be passed by the President and the Cabinet, without the involvement of the FNC. This is a welcome approach by the UAE, considering that many of the regional NHRIs have been established by an executive decree,[77] which would not satisfy the Paris Principles, bearing in mind the objective of independence as well as permanency of such a body.[78]

In an effort to maintain the separation of powers principle in this legislative task, the FNC members are prohibited from holding, at the same time, a public office in the UAE, including ministerial portfolios.[79] Yet, a closer look at the legislative process of the UAE raises some questions on whether the founding law provides the NHRI with full independence from the executive. The Electoral College system established in 2006 has provided for each emirate to have its own electoral college with members equal to at least 300 times the number of seats allotted. These members are chosen by the Ruler of that Emirate, who also decides on the demographics of the voters. The members can then apply to run for the FNC.[80] The involvement of the Rulers in the composition of the colleges and thus also the pool of candidates indicates an overlap between the executive and legislative branch which may therefore not fully comply with the objective behind the Paris Principle discussed here. Having said that, the reality remains that, at least when it comes to the legislative process, it is difficult to find a single jurisdiction which has achieved a clear separation of powers between the executive and the legislative. It is, therefore, important to look at the scope of the law and the extent of powers given to the NHRI to assess its potential more thoroughly.

In terms of the mandate's scope, the Paris Principles note that the NHRI should be given as 'broad a mandate as possible'[81] for both promoting and protecting human rights.[82] Elaborating on this, the SCA notes that in terms of promoting, this includes functions such as 'education, training, advising, public outreach and advocacy'; whilst in terms of protecting, this includes actions such as 'monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling'.[83]

The UAE Law seems to be taking on board this principle, reflected in the competences of the body's part therein. In terms of promotion, the mandate of the UAE NHRI refers specifically to nurturing a culture of human rights through various educational activities, as well as advising the federal and local government on the compatibility of proposed and exiting legislation with international human rights standards as per the commitments of the UAE through the various ratifications.[84] Yet, in fully meeting the objectives of promoting human rights through their mandate, States should rely on 'a progressive definition of human rights which

[74] Paris Principles, *supra note* 2, Principle A(2).
[75] SCA General Observations, *supra note* 52, at.5.
[76] United Arab Emirates Constitution, article 110.
[77] Turan Kayaoglou, *supra note* 5, at 13.
[78] SCA General Observations, *supra note* 52, at 5.
[79] United Arab Emirates Constitution, articles 70-71.
[80] The United Arab Emirates Government portal, About the UAE, The UAE Government, https://u.ae/en/about-the-uae/the-uae-government/the-federal-national-council- (last visited November 25, 2022).
[81] Paris Principles, *supra note* 2, Principle A(2).
[82] *Ibid*., Principle A (1).
[83] SCA General Observations, *supra note* 52, at 7.
[84] UAE Federal Law, *supra note* 1, article 5.

includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights.'[85] For the UAE, this should include ratifying the International Covenant on Civil and Political Rights (ICCPR)[86] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[87] Delay in doing so will bring into question the institution's full alignment with the Paris Principle of mandate. Whilst the NHRI is at its infancy, the Chairperson of the body has stipulated that six main committees have been approved already to address specific aspects, including the Civil and Political Rights Committee, and the Economic, Social, Cultural and Environmental Rights Committee.[88] It remains to be seen what the particular committees will be tasked with, but this provides the perfect ground for them to push for such ratification.

Whilst the promotional mandate is, to a great extent, met in the UAE, the protection mandate is harder to fully meet, both due to the generally more interventionist steps required for this to be fulfilled by any NHRI, as well as due to the regional context in particular. It has been observed that many MENA NHRIs whilst having extensive promotional functions, lack in the protection responsibilities due to the political systems in place and the often wrong motivations behind the establishment of such institutions, such as appeasing international critics and controlling the human rights agenda.[89] Having said that, Article 5 of the UAE law possesses key attributes which, if implemented properly, could initiate efforts in actively protecting peoples' human rights and allowing them some recourse when such rights have been violated.

The Federal Law stipulates that the body is tasked with monitoring any human rights violations and reporting them to the Competent Authorities, as well as receiving individual complaints in accordance with the criteria set by the body and then referring those confirmed to the Authorities.[90] The latter is a particularly positive addition, bearing in mind that the Paris Principles accept that not all NHRIs may have the power to receive individual complaints.[91] Yet this welcome addition, giving the body a so called 'quasi-jurisdictional competence',[92] means that additional steps should be taken by the UAE to make this work.

In terms of the Complaints Procedure stipulated in the law, the Chairperson of the institution has explained that the Complaints, Monitoring and Field Visits Committee has been set up to look into the files and issues brought before it for review and assessment. Whilst acknowledging that the set-up of the sub-committees is still in its infancy, the specifics on how the institution will receive such complaints should be fully outlined. According to the Chairperson, the NHRI is in the process of launching a Complaints system for individuals both within and outside of the UAE, including a toll-free number to facilitate further interaction with the public.[93] The very fact that the Complaints Procedure is only now being developed should encourage the UAE to draft specific guidelines, including rules of procedure, relating to such reporting and investigations and for these to be accessible to the public. This is reflective of the relevant provision within the law that indicates that such complaints are to be managed as per the criteria set by the institution.[94] In outlining the specifics, the institution should, as per the OHCHR, address specifically three aspects; intake, investigation and the eventual decision.[95] If the intention is for victims to reach out to the body directly, as indicated in the law, then the procedure of lodging the complaint should be straightforward and accessible to all, regardless of socio-economic status and literacy levels.

Considering recurring reports on human rights violations in the UAE, it is clear that many relate to the exploitation of labour workers, who are often the most vulnerable in any society, due to their working

[85] SCA General Observations, *supra note* 52, at 7.
[86] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.
[87] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.
[88] Emirates News Agency, *supra note* 60.
[89] Turan Kayaoglou, *supra note* 5, at 23.
[90] UAE Federal Law, *supra note* 1, article 5.
[91] UNDP and UN OHCHR, *supra note* 17, at 2.
[92] UNDP and UN OHCHR, *supra note* 17, at 21.
[93] [93]Emirates News Agency, UAE's National Human Rights Institution announces completion of its accelerated 100-day plan to set up its operations (9 May 2022), https://www.mediaoffice.ae/en/news/2022/May/09-05/UAE-National-Human-Rights-Institution (last visited November 25, 2022).
[94] UAE Federal Law, *supra note* 1, article 5 (8).
[95] UN OHCHR, *supra note* 15, at 81.

conditions and lack of access to the authorities.[96] Whilst this is not easy to rectify, potentially making the complaints mechanism outlined in the NHRI's mandate mute for the majority of human rights victims, the UAE should strive to find ways to enhance accessibility to these procedures both through its awareness mandate, as well as its inspection mandate, giving them the opportunity to come in contact with such potential victims. The latter, addressed below, should be supported by a power to initiate investigations, where human rights violations have been identified post-inspection.[97]

Ensuring accessibility and clarity in lodging the complaint is key, yet this needs to be then followed by effective investigation and decision-making. The former requires the UAE NHRI to have clarity on its jurisdiction and powers of investigation. Many laws setting up NHRIs restrict the subject-matter jurisdiction, allowing it for example to only deal with complaints on civil and political and not social and economic rights.[98] This is not a restriction evident in the UAE law and, in the spirit of the Principles, it should maintain a broad mandate and allow for complaints on all human rights. To solidify this obligation, the UAE should start the process of ratifying the two UN International Covenants. Jurisdictional clarity and an expansive scope should also exist when it comes to object-matter jurisdiction, namely the ability to investigate the State, State organs and also the private sector when conducting public functions, as well as time jurisdiction, namely able to investigate both ongoing and past acts.[99]

In terms of the ability to issue a decision after an investigation, as well as the enforceability of such a decision, the UAE Law is silent. Reference is made to a referral power to the Competent Authorities of those cases they deem appropriate,[100] yet this needs clarification on two fronts. First, on whether the NHRI is empowered to make decisions on some of the cases and refer others, which, it may not be in a position to fully address, or whether it only has a referral mandate, with no decision-making powers. If the former is the case, clarification is required on whether the NHRI can make recommendations on how to resolve the matter and/or take such remedies themselves. Additionally, clarification is required on who the Competent Authorities referred to in the law are. It is noted that this includes the federal and local government agencies. The UAE government, in line with the obligation under Article 13 of the UAE Law to cooperate with NHRI, should better stipulate who, within the government, will be specifically tasked with receiving such referrals and ensure the correct procedures are set in place to address these complaints and provide resolution to the victims.

The wider question then arises is what happens next and the extent to which the State is in a position, considering the UAE's political and judicial system, to efficiently address such cases. Whilst this is not the focus of this article, the NHRI can play a role in streamlining the procedure and keeping a check on the development of such cases and how they are addressed. Providing the government with a clear recommendation and steps for rectifying the violation is the first step in doing so. For example, if the particular case involves potential criminal prosecution, this should be stipulated therein. This will, of course, depend on the detailed mandate of the body, since it has been identified that whilst most NHRIs in the region outline some sort of complaints procedure, their decision-making and recommendation powers seem limited.[101] The NHRI can also play a key role in supporting the government to prevent recurring violations. Where cases before them relate to lack of appropriate laws, regulations or policies, the NHRI can provide the relevant authorities with specific steps in addressing the systemic cause of such human rights violations.[102]

As mentioned, the Complaints, Monitoring and Field Visits Committee is also tasked under the UAE Law with conducting field visits to penal, detention, labour and other facilities, as part of their monitoring and reporting mechanism. In terms of reporting, the Paris Principles require that the body has been vested with the power to provide such advice on their own initiative and not only at the request of the State.[103] It is unclear

[96] United States of America Department of State (2021), 2020 Country Reports on Human Rights Practices: United Arab Emirates, available at: https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/united-arab-emirates/ (last visited November 25, 2022).
[97] UN OHCHR, *supra note* 15, at 79.
[98] *Ibid.* at 33.
[99] UN OHCHR, *supra note* 15, at 50.
[100] UAE Federal Law, *supra note* 1, article 5(8).
[101] Turan Kayaoglou, *supra note* 5, at 25.
[102] UN OHCHR, *supra note* 15, at 90.
[103] UNDP and UN OHCHR, *supra note* 17, at 243.

from the law what the dynamic on this is, thus this should also be clarified. As to monitoring, this is a pivotal power, especially considering that human rights violations often occur against labour workers and others hidden due to the nature of their work or employers' intentions. In fully aligning with the Paris Principles, the UAE NHRI should be empowered to conduct impromptu visits without prior government authorisation, as well as speak to potential victims.[104] For example, it is key to be able to access detention centres and speak to detainees, as well as labour workers in labour camps.

Finally, in addition to cooperating with the relevant government authorities in addressing human rights violations and preventing future violations, the NHRI's mandate should, according to the Paris Principles, enable it to engage with both regional and international human rights bodies.[105] This is echoed in the UAE law, referring to the institution's role in supporting the preparation of national reports to be submitted to the UN bodies, as well as liaising with the international bodies.[106] The NHRI's Chairperson also reinstated this objective, noting that the institution is ready to work with both UN organisations, as well as civil society, such as Human Rights Watch and Amnesty International.[107] Their government-sanctioned status can become a key resource for such organisations, allowing them access to information which they would not be able to retrieve independently.[108]

A significant element of the scope of the mandate of the UAE NHRI is the formulation of its agenda that will inform its strategic priorities. The next section provides some recommendations with regards to human rights themes that the UAE NHRI may wish to prioritise when setting up its Action Plan.

3. UAE Action Plan and Agenda priorities

3.1 Action Plan

In recent years the UAE has demonstrated a strong commitment to engage in a meaningful dialogue with international human rights bodies and to develop strategies to improve its human rights record. In this framework, it has ratified or/and acceded to a number of core international human rights treaties and International Labour Organisation (ILO) Conventions, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (UNCRC) and the Convention on the Rights of Persons with Disabilities.[109] By doing so, it demonstrates its consent to be bound by the human rights obligations established by those instruments and, to this aim, engage with those Conventions' treaty bodies. At the same time, the UAE maintains a good communication with the Special Procedures, the UN Charter-based human rights monitoring bodies, most notably with the Special Rapporteurs on the sale of children, child prostitution, and child pornography and trafficking in persons, especially women and children, as well as participates in the United Nations Peer Review system (UPR). In

[104] UN OHCHR, *supra note* 15, at 123.
[105] Paris Principles, *supra note* 2, Principle A 3(5).
[106] UAE Federal Law, *supra note* 1, article 5(9).
[107] The National, 'UAE's human rights institute to be accessible to all members of the public, chairman says' https://www.thenationalnews.com/uae/2022/01/13/uaes-human-rights-institute-to-be-accessible-to-all-members-of-the-public-chairman-says/ (last visited Apr. 21, 2022).
[108] Anne Smith, *supra note* 8, 909.
[109] International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1965), entered into force 4 January 1969. The UAE ratified this Convention on 20 June 1974. Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (1979), entered into force 3 September 1981. The UAE ratified this Convention on 6 October 2004; Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1984), entered into force 26 June 1987. The UAE ratified this Convention on 19 July 2012; Convention on the Rights of the Child, 1577 UNTS 3 (1989), entered into force 2 September 1990. The UAE ratified this Convention on 3 January 1997; Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (2006), entered into force 3 May 2008. The UAE ratified this Convention on 19 March 2010; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by UN General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force 18 January 2002. The UAE ratified this Convention on 2 March 2016; Forced Labour Convention, 1930 (No 29), 39 UNTS 55, adopted 28 June 1930, entered into force 1 May 1932. The UAE ratified this Convention on 27 May 1982; Abolition of Forced Labour Convention, 1957 (No 105), 320 UNTS 291, adopted 25 June 1957, entered into force 17 January 1959. The UAE ratified this Convention on 24 February 1997; Equal Remuneration Convention, 1951 (No 100), 165 UNTS 303, adopted 29 June 1951, entered into force 23 May 1953. The UAE ratified this Convention on 24 February 1997; Convention for the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182), 2133 UNTS 161, adopted 17 June 1999, entered into force 19 November 2000. The UAE ratified this Convention on 28 June 2001; Discrimination (Employment and Occupation) Convention, (No 111), 362 UNTS 31, adopted 26 June 1958, entered into force 15 June 1960. The UAE ratified this Convention on 28 June 2001.

the context of the latter, as noted, the UAE had expressed its support of the recommendations to establish a NHRI[110] and has actively complied with them by setting up the UAE NHRI in December 2021.

The UAE's engagement with international human rights bodies has produced a rich body of recommendations that can support the UAE in its efforts to enhance the protection of human rights and the fulfilment of its international human rights obligations. This is valuable and can inform the agenda of the UAE NHRI. It is, therefore, key to explore the main areas that have emerged from the dialogue of the UAE with international human rights bodies. Those are important for the UAE to address and, as such, should be prioritised in the UAE NHRI action plan. Those areas include, most notably, the need for the UAE to become a State Party to core international human rights treaties and withdraw its reservations to the treaties that it is already a State party to; the improvement of conditions of detention; the respect of the right to fair trial; the protection of freedom of expression; the reform of the kafala system of sponsorship; the protection of women's rights, particularly in the context of inheritance and divorce; and the fulfilment of the right to education.

3.2 Agenda priorities

A. Enhancing the UAE's engagement with fundamental human rights instruments

As mentioned, the UAE has demonstrated a clear intention to engage with the UN human rights system by becoming a State Party to a number of fundamental human rights treaties. However, as noted, it has still not ratified some core instruments that are extremely important for the enhancement of its human rights record.

The ICCPR[111] and the ICESCR[112] give legal voice to the Universal Declaration of Human Rights and, along with the latter, are collectively referred to as the International Bill of Human Rights. Being the cornerstone of the UN human rights system, those two instruments enshrine the most fundamental of human rights, some of them being recognised as International Customary Law.[113] Therefore, States Non-Parties to those two treaties, currently ratified by 173 and 171 States respectively, are inevitably positioning themselves at the periphery of the human rights system.

Considering the indivisibility of human rights, the treaty bodies monitoring the implementation of the Conventions that the UAE is party to have repeatedly urged it to ratify/accede to the International instruments that it has not ratified,[114] particularly the two Covenants, but also other core treaties, whose scope is extremely relevant to the UAE. These include the Convention on the Protection of All Persons from Enforced Disappearance,[115] the International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families,[116] and the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict.[117] Recognisably, ratifying the two Covenants and the other treaties will require radical reforms to be undertaken, such as establishing the right of workers to organise and bargain collectively, protecting the freedom of expression, and taking measures to ensure gender equality. However, the recent legislative reforms demonstrate the clear determination of the UAE to conform with international human rights standards. This determination and commitment can be greatly facilitated by the work of the newly appointed NHRI.

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[110] UN Human Rights Council (2018), Report of the Working Group on the Universal Periodic Review: The United Arab Emirates Views on Conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/38/14/Add.1, para. 5.

[111] ICCPR, *supra note* 86.

[112] ICESCR, supra note 87.

[113] WILLIAM SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS (2021) Oxford University Press; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970*), *Advisory Opinion, ICJ Reports 1971*, 16, Separate Opinion of Vice-President Ammoun, 76.

[114] Committee on the Elimination of Racial Discrimination (2017), Concluding Observations UAE, CERD/C/ARE/CO/18-21; UN Human Rights Council (2018), Report of the Working Group on the Universal Periodic Review: The United Arab Emirates, A/HRC/38/14, paras. 141.28, 141.17, 141.18, 141.32, 141.8, 141.9, 141.16, 141.1, 141.2, 141.3, 141.4, 141.5, 141.29, 141.30, 141.31, 141.6, 141.7, 141.20, 141.25, 141.26, 141.27.

[115] *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, A/RES/61/177, 2716 UNTS 3.

[116] *International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families*, 18 December 1990, A/RES/45/158, 2220 UNTS 93.

[117] *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 25 May 2000, A/RES/54/263, 2173 UNTS 222.

In the same vein, the UAE has been called to withdraw its existing reservations in human rights treaties.[118] Similarly to most Islamic States, the UAE has made reservations in some human rights treaties that it is a State Party to, excluding the application of fundamental treaty provisions that impose State obligations, which it deems to be in conflict with Sharia law. Examples of such provisions include CEDAW 2(f) on the abolition of practices, laws and traditions that constitute discrimination against women, CEDAW 16 on equality between men and women in marriage and family relations, UNCRC 14 on freedom of religion, UNCRC 7 on the right to birth registration and UNCAT 1 on the definition of torture and inhumane and degrading treatment or punishment. The UAE has been criticised for those reservations on the basis that, to a great extent, they are of general and indeterminate scope, and, as such, are perceived to be incompatible with the object and purpose of the treaties.[119] It is important to note that the UAE reservations have been objected to by 28 States Parties to the Conventions (12 to the CEDAW, 2 to the CRC and 10 to UNCAT). There is no doubt that the UAE's NHRI can contribute to a great extent in supporting the government to set up policies and adopt measures that will allow it to withdraw those reservations and fulfil its obligations under the treaties in full.

B. Protecting freedom of expression and the right to a fair trial and improving the criminal justice system

Freedom of expression is guaranteed by Article 30 of the UAE Constitution for both individuals and the press. However, UAE law prohibits criticism of the government and speech that creates or fosters social unrest. Whilst important to pursue political stability and social peace, striking a balance between those legitimate aims and the right to freedom of expression is of primary importance. Laws, such as the 2012 UAE Cybercrime Law, the 1980 Publications and Publishing Law, and other measures seem to impose severe restrictions on free speech, including government control of the press, censorship of media content and excessive scrutiny of social media posts. Such legislative and policy measures would have to be reviewed by an independent authority mandated to monitor human rights to ensure that they make enough room for pluralism and tolerance. These are fundamental principles promoted by the UAE leadership and necessary elements of a society that fosters intercultural dialogue and understanding and pursues innovation and entrepreneurship. It is important to note that the UAE has expressed its support to the UPR recommendations calling the State to guarantee the full respect and protection of freedom of expression.[120] To this aim, the UAE NHRI can play an important role in promoting a strong and open civil society with strong citizenship values.

At the same time, ensuring the independence of the judiciary, respecting the right to a fair trial, improving conditions of detention, abolishing practices of arbitrary arrests and lengthy pre-trial detentions, as well as monitoring and investigating allegations of relevant human rights violations seem to be areas to which the UAE NHRI can make a valuable contribution. Specific recommendations on these issues have been addressed to the UAE in the context of the latest UN UPR process in 2018.[121] In her 2015 Report after her visit to the UAE, the Special Rapporteur on the independence of judges and lawyers, noted significant concerns and made important recommendations in this area.[122] Most crucially, the report notes that, despite commendable progress, access to and delivery of justice face notable challenges, which inevitably affects the respect of human rights.[123] The principle of separation of powers is neither enshrined in the Constitution nor protected through legal and administrative measures. As a result, the independence of judges is not guaranteed.[124]

[118] Committee on the Elimination of Racial Discrimination (2017), Concluding Observations UAE, CERD/C/ARE/CO/18-21; UN Human Rights Council (2018), Report of the Working Group on the Universal Periodic Review: The United Arab Emirates, A/HRC/38/14, paras. 141.45, 141.46, 141.44, 141.47, 141.42, 141.43.
[119] Committee on the Elimination of Discrimination against Women (2015), Concluding Observations UAE, CEDAW/C/ARE/CO/2-3; Committee on the Rights of the Child (2015), Concluding Observations UAE, CRC/C/ARE/CO/2.
[120] UN Human Rights Council (2018), Report of the Working Group on the Universal Periodic Review: The United Arab Emirates Views on Conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/38/14/Add.1, para. 5.
[121] UN Human Rights Council (2018), Report of the Working Group on the Universal Periodic Review: The United Arab Emirates, A/HRC/38/14, paras. 141.133, 141.134, 141.135, 141.141, 141.127, 141.128, 141.129, 141.111, 141.126, 141.143, 141.142, 141,140, 141.130, 141.131.
[122] UN Human Rights Council (2015), Report of the Special Rapporteur on the independence of judges and lawyers, *supra note* 4.
[123] Ibid, para. 86.
[124] Ibid, paras. 85, 96, 97, 98.

Moreover, the report stresses that violations of the right to a fair trial and due process are not investigated and addressed effectively, which reflects important shortcomings relating to the independence, impartiality, transparency, competency, and efficiency of the justice system.[125]

The UAE Constitution explicitly prohibits arbitrary arrest and detention in Article 26. Nevertheless, it has been reported that government authorities have undertaken arrests without charge. Individuals may still be held in custody for extended periods of time without charge or a preliminary judicial hearing, and without access to lawyers and family members. This seems to be happening in cases of individuals arrested for political or security reasons, which seem to be treated differently than other prisoners. Suspects for terrorism-related cases may be held for up to six months without a charge. There have also been reports about mistreatment of detainees that remain unaddressed.[126]

Additionally, penalties and punishments imposed in case of breaches of local laws would have to be reviewed to ensure that they are compatible with minimum human rights standards and respect for human dignity. It has been reported, for example, that corporal punishment is still imposed as a punishment by Sharia courts for breaches of laws, such as adult prostitution, consensual premarital sex, pregnancy outside marriage, defamation of character and drug or alcohol charges.[127]

Furthermore, respecting and fulfilling the right to a fair trial is an equally important area of focus. In relation to the fulfilment of the right to a fair trial, it is important to ensure the independence of the judiciary and its freedom from political interference. Reports about government review of court decisions and discrimination of treatment of non-citizens and women during the judicial process need to be scrutinised. Similarly, it is imperative to ensure the protection of the rights of the defendants, such as their access to legal representation and an interpreter throughout the investigation, prosecution, and trial.

C. Improving the protection of women's rights, effectively addressing violence against women and reforming the Kafala system

The UAE has made significant process in empowering women. However, there is still a need to take action at the legal and policy level, aiming at achieving *de jure* and *de facto* gender equality. The UAE has been called to explicitly embed equality between women and men in its Constitution and take specific measures to abolish laws, practices and traditions that directly or indirectly inhibit gender equality.[128] Currently, structural reforms are required at the legislative, policy and social level, in order to combat discrimination against women and to protect the rights of women and girls in the public and private sphere.

It is essential to combat gender stereotypes that focus on the role of women as mothers and housewives, as well as laws that impose or allow women's subordination to men (their fathers, husbands, and sometimes even their sons). These undermine women's full development and their capacity to reach their full potential, make free choices and lead meaningful lives. Several provisions in the Personal Status Law, mainly deriving from a strict interpretation of Sharia, discriminate against women and girls in family relations. The principle of male guardianship is one such example, as well as the practice of dowry, the obligation imposed on a woman to obey her husband, including sexually, and the limited grounds available to women to seek divorce while men may unilaterally ask for divorce for any reason. The limited rights of women to inheritance and custody over their children are equally problematic. Furthermore, although the minimum legal age of marriage is clearly set at 18 for both men and women, in practice, many judges are allowing exceptions and derogations for girls who have reached puberty, thus opening the door for forced under-aged marriages, which undermine women's personal and professional development. Similarly, polygamy, which is

[125] Ibid, paras. 86, 87.
[126] United States of America Department of State, (2021), *supra note* 91.
[127] Ibid.
[128] Committee on the Elimination of Discrimination against Women (2015), Concluding Observations UAE, CEDAW/C/ARE/CO/2-3; UN Human Rights Council (2018), Report of the Working Group on the Universal Periodic Review: The United Arab Emirates, A/HRC/38/14, paras. 141.177, 141.178, 141.176, 141.180, 141.184, 141.185, 141.187, 141.186, 141.182, 141.183, 141.167, 141.167, 141.175, 141.162, 141.163, 141.164, 141.165, 141.166, 141.167, 141.189, 141.188, 141.189, 141.168, 141.169, 141.172, 141.174, 141.170, 141.171, 141.192, 141.181.

incompatible with human dignity and infringes the rights and freedoms of women,[129] is still permitted under UAE law.

Another area that merits consideration is combating violence against women. Despite the commendable efforts of the UAE government to raise awareness about the phenomenon and protect women victims of violence, including victims of trafficking, domestic violence and sexual abuse, violence against women is not being addressed effectively. The Penal Code still allows men to use violence to discipline their wives and children and women victims' complaints are not dealt with appropriately, mainly due to lack of effective investigations, prosecutions, and punishments of relevant offenders.

Crucially, the UAE has been urged to abolish the system of sponsorship (kafala), whereby the legal status of foreign workers is attached to their employer, who is 'sponsoring' their visa and guarantees their employment permit.[130] Kafala has received intense criticism, including from treaty bodies and other international human rights monitoring mechanisms, for severely restricting the mobility of workers and for being 'inherently problematic', creating 'an unequal power dynamic between the employer and the worker'.[131] The system fosters an environment of abuse and exploitation against women, especially domestic workers.

The recent legal reforms, especially those revising the Personal Status Law and the Penal Code, announced by the UAE government in 2020 and 2021, are without a doubt in the right direction, as they are abolishing laws and practices that are discriminatory against women and they are introducing liberal reforms to criminal law.

The amendments of the Personal Status Law[132] brought about by Federal Decrees adopted in 2020 allow expatriates to have their marriage, as well as any ensuing divorce and financial elements, including division of assets and alimony, governed by the law of the place where the marriage was performed. In the Emirate of Dubai, non-Emiratis are allowed to apply the laws of their country of nationality to their family affairs, including marriage, divorce and inheritance. At the same time, Abu Dhabi adopted Law 14 of 2021 in November 2021, which introduced a personal status law for non-Muslim foreigners. The new law accommodated the concepts of civil marriage, no-fault divorce and joint child custody for non-Muslim residents, allowing them to opt-out from the application of Sharia in marriage, divorce, custody and inheritance. Furthermore, Federal Decree No 15 of 2020[133] amended a range of provisions of the UAE Penal code, including the decriminalization of alcohol possession and consumption, the introduction of strict punishments for sexual violence and rape and the decriminalization of cohabitation.

It remains to be evaluated how the legislative reforms are implemented in practice by judicial and other authorities. The newly established NHRI can be an important driver of further law and policy reform that will address existing issues effectively and will enhance the UAE's compliance with international human rights standards.

[129] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014)

[130] Azfar Khan and Hélène Harroff-Tavel, *Reforming the Kafala: Challenges and Opportunities in Moving Forward*, 20 ASIAN & PACIFIC MIGRATION JOURNAL (3&4), 293-313 (2011).
Nicholas McGeehan,*Trafficking in persons or state sanctioned exploitation? The false narrative of migrant workers in the United Arab Emirates*, (2012) 26 IMMIGRATION, ASYLUM AND NATIONALITY LAW 1, 29–30 (2012).

[131] Hélène Haroff-Tavel and Alix Nasri, *Tricked and Trapped: Human Trafficking in the Middle East*, ILO (2013), available at: https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_211214.pdf; at 14. See inter alia Report of the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, Sigma Huda, Bahrain, Oman, Qatar (2007), A/HRC/4/23/Add.2 (SR THB Bahrain, Oman, Qatar 2007), paras.64, 91; ILO, Giving globalization a human face: General survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III(1B), International Labour Conference, 101st Session, Geneva, 2012.

[132] Federal Law 28 of 2005 Concerning Personal Status, amended by virtue of Federal Decree-Law No 8 of 29/08/2019, Federal Decree-Law No 5 of 25/08/2020 and Federal Decree-Law No 29 of 29/09/2020.

[133] Federal Decree No 15 of 2020 amending certain provisions of the Federal Law No 3 of 1987 Concerning the Penal Code.

Conclusion

The establishment of the UAE NHRI is without a doubt one of the most awaited developments in the area of human rights law in the UAE, and it reflects the country's commitment to engage positively with international human rights mechanisms and improve the respect, promotion and protection of human rights for all individuals under its jurisdiction.

The Paris Principles set universally accepted minimum standards relating to the mandate, independence, pluralism, and effectiveness of NHRIs and provide invaluable guidance to governments for the establishment and operational framework of such institutions. The Principles should be viewed as a solid ground from which a sustainable and efficient system on human rights can flourish, and not as the ultimate goal in legitimising such human rights bodies and achieving international acceptance for human rights adherence. In the UAE context specifically, one must also bear in mind the political reality of the country and the limitations that this may give rise to on the mandate and capacity of a NHRI, as aforementioned. This does not mean that the UAE should not strive to achieve the objectives outlined in the Paris Principles. However, it may require different structures than the ones currently established for this institution in order to make this efficient.

Taking into account lessons learned from established NHRIs in the MENA region, the challenges faced in terms of achieving an A Status accreditation, as well as existing good practices, the UAE has the opportunity to develop an effective NHRI. To this aim, it must ensure the institution's independence from the government, as well as the pluralism of its composition. Most crucially, the UAE should strive to broaden the NHRI's mandate and clarify its functions, especially in relation to its monitoring function. Creating constructive channels of communication with civil society stakeholders representing different social, economic, political and cultural interests is essential in this process. So is setting appropriate agenda priorities, as those emerge from the constructive dialogue that the UAE has maintained over the years with international human rights mechanisms. Enhancing its engagement with international human rights instruments and bodies, protecting the freedom of speech, and enhancing the protection of women's rights should top the strategic agenda of the newly established institution.

Defamation under Subarticle 3(5) of the Saudi Arabian Anti-Cybercrime Law

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Abstract

According to subarticle 3(5) of the Saudi Anti-Cyber Crime Law (SACCL), the commission of defamation by means of information technology devices, which causes damage to others, is punishable by either one-year's imprisonment and a fine of up to 500,000 Riyal or both. However, in court practice, the application of this deeming provision has created a significant imbalance between the competing rights, most notably to the detriment of the rights of defence as a whole. The purpose of this article is to provide a critical review of the Saudi lawmaker's intent behind subarticle 3(5), which explicitly places the right to protection of reputation over the rights of defamation defendants, thereby undermining the right to a fair trial. Also reviewed are Sharia's broad definition of defamation, what can be found to have a defamatory meaning and how said definition is being used as a reference to both the defamation and insult offences under subarticle 3(5) of the SACCL. By highlighting issues critical and crucial to the rights of defamation defendants, this article's purpose is to contribute to the debate on the necessity of amending subarticle 3(5) of the SACCL.

Keywords

Defamation; reputational harm; insult; competing rights; Sharia; Islamic law

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Introduction

Whereas the traditional face-to-face dispute used to be the only way in which a defamatory statement could be expressed in an open and direct way to the affected person, today there are many ways in which defamatory statements can be spread far and wide due to the emergence of new communication technologies, including the Internet.

It is within this context that the Saudi Anti-Cyber Crime Law (SACCL)[1] was issued in 2009 in order to adapt to the advent of the internet and the proliferation of online communications. Subarticle 3(5), which specifically prohibits defamation, has been interpreted by the Saudi courts as applying to written, visual and verbal forms[2] of online communication which could damage someone's reputation, or are likely to cause such harm.[3] Yet, the SACCL may apply to these forms of defamatory communication regardless of whether the parties involved are natural or legal persons, public or private ones, [4] thereby classifying defamation of private figures as a criminal offence, rather than a civil action or fault. [5] Worse still, not only does this law lack definition of what constitutes defamation, but it also does not provide the accused, neither expressly nor by implication, with the right to a complete defence. It follows, at first glance, that the SACCL appears to be almost meaningless with regard to the rights of defence as referred to in many articles of the Saudi Law of Criminal Procedure.

This article does not purport to discuss defamation of public figures[6] or subject-matter of public interest.[7] The somewhat problematic application of the public interest criterion is left aside. Nor does the article intend

[1] The Saudi Anti-Cyber Crime Law (SACCL) was issued under the Council of Ministers Decision No. 79, dated 7/3/1428 Hijri, and it was approved by Royal Decree No. M/17, dated 8/3/1428 Hijri. The Act was published in Issue No. 4144 of the Official Gazette (Um Al Qura) on 13/04/1428 Hijri.

[2] This would include spoken words, for example, during an online session, a radio broadcast or television programme, written or printed materials, including emails, social media posts, blogs and websites, online reviews, drawings and cartoons, paintings, poetry and live theatrical performances, etc.

[3] This article assumes that the general contours of defamation which interact with the Saudi Anti-Cyber Crime Law are derived from Islamic Sharia, thereby excluding the common law of defamation.

[4] Subarticle 1(1) of the SACCL. It is also the case in France where corporate entities can be sued for defamation. *See*, https://www.lexology.com/library/detail.aspx?g=869ea0f6-29ac-47c0-8f39-be0ac5d958e0. By contrast, in some of the common law countries, corporations are treated differently for defamation purposes or not allowed standing to sue in defamation at all. For instance, Australia denies corporations standing to sue in defamation where they have more than nine employees. See, D Mark Jackson, "The Corporate Defamation Complainant in the Era of SLAPPs: Revisiting New York Times v. Sullivan" (2001) 9:2 Wm & Mary Bill Rts J 491 [Jackson] ("[c]orporations have increasingly used defamation suits as an offensive weapon" at 491). See also Civil Law (Wrongs) Act 2002 (ACT), s 121; Defamation Act 2006 (NT), s 8; NSW Act, supra note 11, s 9; Defamation Act 2005 (Qld), s 9; Defamation Act 2005 (SA), s 9; Defamation Act 2005 (Tas), s 9; Defamation Act 2005 (Vic), s 9; Defamation Act 2005 (WA), s 9 [Australia Acts].

[5] Various common law jurisdictions have abolished criminal defamation (*See*, for instance, the *Libel and Slander Act* of Ontario (Canada) and *Defamation Act 2013* (UK) which consider defamation of a private person as a tort (civil wrong). By contrast, civil law jurisdictions (including KSA) approach defamation first and foremost as a criminal offence, although in many countries (including KSA), the claimant's right is also civilly actionable. From a comparative perspective, this distinction supports a generally held view that the national particularisms of defamation laws reflect very different approaches to the protection of reputation.

[6] *See*, for an illustration, *De Carolis and France Televisions v. France*, ECHR 27 (2016) 21.01.2016, available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-5277562-6561162%22]}. This case concerned an accusation of defamation brought by Saudi Prince Turki Al Faisal on account of a documentary on the France 3 television channel concerning complaints lodged by families of the victims of the 11 September 2001 attacks. The first applicant and the journalist who made the documentary were found guilty of public defamation against an individual, Prince Turki Al Faisal, who had joined the proceedings as a "civil party". The TV channel France 3 was declared civilly liable for the damage caused. The applicants complained of a violation of their right to freedom of expression. The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention, finding, after a detailed examination, that the way in which the subject was dealt with did not contravene the standards of responsible journalism. As regards the sanctions, the fine to which the first applicant had been sentenced and the civil liability finding against France 3 were a disproportionate interference with their right to freedom of expression which was not necessary in a democratic society. In this case the Court observed in particular that the facts reported had concerned a subject of general interest. It further noted that Prince Turki Al Faisal held an eminent position in the Kingdom of Saudi Arabia and reiterated that the limits of permissible criticism were wider when it came to civil servants acting in a public capacity in the course of their official duties than in the case of ordinary private persons.

[7] Regarding criminal prosecution on grounds of public interest, go to https://saudigazette.com.sa/article/600903/SAUDI-ARABIA/Court-reverses-verdict-against-journalist-in-defamation-case . In contrast to the KSA, the United States has decided - in a wide range of cases involving matters of public interest - that free expression and vigorous public debate are often more important than compensating plaintiffs for harm caused by defamatory falsehood. *See*, Vincent R. Johnson, Comparative Defamation Law: England and the United States, 24 U. Miami Int'l & Comp. L. Rev. 1 (2017), p.44, available at: https://repository.law.miami.edu/umiclr/vol24/iss1/3. *See* also - from a comparative perspective - how the European Court of Human Rights is dealing with access to information of public interest: Tarsasag A Szabadsagjogokert vs Hungray, no 37374/05, 14 April 2009

to discuss defamation of religion or whether the defamation of private figures should be decriminalised in the KSA.[8] On the contrary, the present paper is mainly addressed to question, in an abbreviated manner, whether the Saudi regulator[9] has, under subarticle 3(5) of the SACCL, forced the balancing of two competing rights with respect to defamation of private figures, that is, the right to protection from reputational harm and the right to a full defence.

1. The lack of definition under subarticle 3(5)

The character of subarticle 3(5) of the SACCL is essentially the product of its inspiring rules of Sharia.[10] Sharia refers to the body of Islamic law. It serves as a guideline for all legal matters, and hence it affords the basis for the enactment of laws and regulations in Saudi Arabia.[11] While subarticle 3(5) and the Sharia it inspires with regard to defamation are applied in an almost identical manner, the former differs from the latter, albeit somewhat slightly, in two ways. First, it exclusively applies to cyber defamation. Second, it clearly fails to define defamation. Indeed, subarticle 3(5) states that:

> *[…] Any person who commits defamation and causes damages to others through the use of various information technology devices shall be subject to imprisonment for a period not exceeding one year and a fine not exceeding five hundred thousand riyals or to either punishment.*

Presumably, knowing that courts will step in and fill the gaps left by this deeming provision may have led the Saudi regulator to draft a broad, open-ended provision rather than a detailed one. If this were the case, we may reasonably assume that the regulator preferred an incomplete over a relatively complete subarticle 3(5) as a means of avoiding a difficult definition of defamation and shifting the responsibility to provide specific examples in terms of what defamation covers to the competent courts. In this respect, it is notable that Article 48 of the Saudi Constitution, which had also been incorporated into Article 1 of the Law of Criminal Procedure and Article 1 of the Law of Civil Procedure, states that

> *[T]he courts will apply the rules of Islamic Sharia in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book or the Sunnah.*

(available at http://hudoc.echr.coe.int/fre?i=001-92171); Sellami vs France, no 61470/15, 17 December 2020 (available at http://hudoc.echr.coe.int/eng?i=001-206518).

[8] We may only observe that the European Court of Human Rights has emphasised on many occasions that the imposition of a prison sentence in defamation cases will be compatible with freedom of expression, as guaranteed by Article 10 of the Convention, only in exceptional circumstances – notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (see, mutatis mutandis, Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 115, ECHR 2004-XI, and Mika, cited above, § 33). However, the Court continually reiterates in its decisions that while the use of criminal law sanctions in defamation cases is not in itself disproportionate (see Radio France and Others v. France, no. 53984/00, § 40, ECHR 2004-II; Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02 and 36448/02, § 47, ECHR 2007-IV; and Ziembiński v. Poland (no. 2), no. 1799/07, § 46, 5 July 2016), a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies (see Frisk and Jensen v. Denmark, no. 19657/12, § 77, 5 December 2017). For instance, in a recent decision dated March 25, 2021 (Matlas vs Greece, no. 1864/18), the Court concluded that the circumstances of the case – a private dispute between the managing director of a company and that company's former legal advisor, which did not reach the public – presented no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect on freedom of speech, and the notion that the applicant's sentence was in fact suspended does not alter that conclusion, particularly given the fact that the conviction itself was not expunged (see Paraskevopoulos v. Greece, no. 64184/11, § 42, 28 June 2018; Marchenko v. Ukraine, no. 4063/04, § 52, 19 February 2009; and Malisiewicz-Gąsior v. Poland, no. 43797/98, § 67, 6 April 2006). To read the above-mentioned decision of Matlas vs Greece, please go to the European Court of Human Rights website at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Matalas%20c.%20Gr%C3%A8ce,%201864/18%22],%22documentcollectionid2%22:[%22JUDGMENTS%22,%22DECGRANDCHAMBER%22,%22ADMISSIBILITY%22,%22ADMISSIBILITYCOM%22]}

[9] It is the legislature, law-making branch of the Saudi Government, as denoted in Article 67 of the Saudi Constitution.

[10] The law, as we understand the word in the West, means the rules that regulate relations among people, is an integral part of Sharia. Rules of law are rules of Sharia, but not all the rules of Sharia are rules of law. However, the words "Sharia" and "law" are often used interchangeably.

[11] Islamic Sharia is a framework of Islamic jurisprudence derived primarily from the Holy Qur'an and secondarily from the Sunnah, the practices and sayings (Hadith) of the Prophet Muhammad during his lifetime. The third source is Ijma', the consensus of opinion of Muslim scholars on the principles involved in a specific case occurring after the death of the Prophet. Qias, analogy, is the fourth source of law. While judges may base their decisions on any of the four Sunni schools of jurisprudence, the Hanbali school predominates and forms the basis for the country's law and legal interpretations of Sharia. *See*, Sharia Incorporated: a comparative overview of the legal systems of twelve Muslim countries in past and present 157, at 23, (Jan Michiel Otto ed., 2010) [hereinafter Sharia Incorporated]; Ann Black et aL., Modern perspectives on Islamic Law 256 (2013), at 10.

Accordingly, the Supreme Court of KSA has made clear that the judiciary ought to observe the law in the interpretation and application of Sharia, considering that all the Saudi enacted laws and regulations are consistent with the fundamental principles of Sharia, including the Constitution. Yet, since under the four Sunni schools of Islamic doctrine the law is subject to judicial interpretation of holy texts, jurisprudence is usually based on a particular judge's religious beliefs and personal understanding and interpretation of Sharia,[12] which may quite often vary according to that judge and the circumstances of the case. Because judges have considerable discretion in decision making, rulings and sentences diverge widely from case to case. It may therefore be worthwhile to claim, at this early stage, that it is the reasoning of the judges in more difficult defamation cases on which the problem quite often turns. In many difficult cases, it would appear, there is no uniquely correct decision.

While a full discussion of the rules of Sharia is beyond the scope of this article, the purpose of this section is to provide Sharia's broad definition of defamation with the aim of highlighting how it is being used as a reference to defamation offences under subarticle 3(5) of the SACCL. The section will also demonstrate how the application of said provision may extend to include insult and disparagement too.

1.1 Using Sharia as a reference to defamation offences under subarticle 3(5)

Before attempting to give some content to the expression defamation under Islamic Sharia, three points are worth noting. First, Islamic Sharia classifies defamation in one major type: "*qazef".* While the prevailing Arabic version of subarticle 3(5) of the SACCL does not contain the word "*qazef*", it does however use the term "*tash-hir"* which means "*qazef*" (defamation) in Arabic. Yet, the classification of defamation offences can be challenging in some instances, as terminology may vary depending on facts and evidence and the lines between defamation and privacy are often blurred to the extent that many aspects of that relationship remain unresolved.[13] Furthermore, in official and unofficial translations of national legislation there is also no standard usage for the Arabic-language terms defamation (*qazef, tash-hir, zam*) and insult (*sab wa shatem, qadeh, tah-qir).*

Second, the punishment for *qazef* (defamation) may take forms ranging from flogging to imprisonment and fines. The applicability of these forms of punishment would depend upon whether the cause of defamation action accrues from a false accusation of adultery or other types of harmful statements. While the former fits the category of boundary crimes (*hudud*) in the KSA, and is arguably a very serious offence since it is punishable by 80-lashes flogging, all other types of defamation offences are deemed to be classified as *taazi'r.*[14] That is to say that should the prosecution for defamation be engaged on grounds of adultery or any other type of harmful statement, this may not exclude the application of subarticle 3(5) of the SACCL, so long as the prosecuted offence is committed by means of information technology devices, including the Internet. In this respect, we may also observe that, as per Article 12 of the SACCL, the latter does not prevent any other related law, such as Sharia for instance, from applying to cybercrimes which fall within its own scope, e.g., the online defamatory statement concerning adultery.

[12]Indeed, there is no concept of judicial precedent in Saudi Arabia, which means that the decisions of a court will have no binding authority in respect of another case. It is not always possible to reach a conclusive interpretation of Saudi Arabian law or how a Saudi Arabian court would view a particular case.

[13]This question may actually occur in both Saudi and western jurisdictions. *See*, Eric Barendt, An overlap of defamation and privacy? (2015) 7(1) JML 85; David Rolph, Vindicating reputation and privacy in Comparative Defamation and Privacy Law edited by Andrew Kenyon (Cambridge University Press, 2016) and Ursula Cheer, Singapore Conference Articles Recognition of business and economic interests of media in defamation and privacy law (2016) 23 TLJ 193. Case law suggests that the precise nature of that relationship is largely untested and therefore merits further analysis. *See*, John Terry (originally LNS) v Persons Unknown [2010] EWHC 11 (QB), [78] (Tugendhat J) and Lord Sumption in Khuja v Times Newspapers Limited [2017] UKSC 49 [21]. See also Nicole Moreham and Mark Warby, Tugendhat and Christie the Law of Privacy and the Media (Oxford University Press, 3rd ed, 2016), 351.

[14]In the KSA, crimes are divided into three main categories. Boundary crimes (*hudud*) are those whose punishments and evidentiary and procedural requirements are clearly delimited in the Quran and the collected deeds and sayings of the Prophet Mohammed (al-sunna). Equity crimes (*qisas*) are those crimes causing physical injury or death to another person, and their punishments are also specified in the Quran and the Sunna. Discretionary or reform crimes (*taa`zir*), include crimes whose punishments are not specified in the Quran or Sunna, or which do not meet the evidentiary and procedural requirements of the first two categories. (*see*, https://www.ojp.gov/ncjrs/virtual-library/abstracts/sharia-penalties-and-ways-their-implementation-kingdom-saudi-0). Sharia presumes that a defendant is innocent until proven guilty, and only in serious crimes or in cases of repeat offenders is one likely to witness severe punishments.

Third, from a procedural perspective,[15] individuals, or victims of *qazef*, who claim to have been defamed are required to file a private criminal complaint with either the Public Prosecution or Criminal Police Officers who work under the supervision of the former pursuant to Article 25 of the Saudi Law of Criminal Procedure. Consider, for instance, Article 17 of the latter law, which provides that prosecution for offences that exclusively involve private interests, such as defamation, is generally to be prosecuted upon complaint only.[16] It should, however, be noted that a Public Prosecution under subarticle 3(5) is not concerned with repairing an injury that may have been done to an individual, but with exacting a penalty for the purposes of deterrence.

More importantly, *qazef* is defined under Islamic Sharia as containing words that cause harm to a person, regardless of whether this person is a natural or legal one, a private or public figure,[17] albeit the wording in many cases is extremely broad and may not be susceptible to exhaustive definition. A possible explanation for defining defamation as such, is the effect of Sharia or greater concern with preventing harm generally. Understandably, this definition would receive an interpretation that advances the overarching aims set out in Islamic Sharia, and a key aim is the prevention of harm.[18] But this is a misleading over-simplification. Indeed, as it stands, this broad definition is problematic not only in and of itself, but also in terms of the general standard it sets for defamation offences under subarticle 3(5) of the SACCL. For one thing, we can scarcely doubt that said definition is relatively easy to apply to multiple complex defamation cases and, more important, that it does not extend to include insult and disparagement, for example.

Quite surprisingly, Islamic Sharia is favourable to defamation complainants not only because a defamatory statement is presumed to be harmful, be it false or not, [19] but because defendants are held strictly liable if no affirmative defence is established. It is not necessary for a public prosecutor to prove that the defendant knew that the defamatory statement was false or even acted intentionally with respect to truth or falsity. On the contrary, the procedural requirement that a public prosecutor prove damage "has, as a practical matter", made it necessary for the Public Prosecution to allege and prove harm, and from a realistic standpoint, has placed the burden of proving defamation on the Public Prosecution. That is to say that defamation does not entail an inquiry either into the defendant's state of mind about the truth or falsity of the defamatory statement, nor into the defendant's motives. Thus, the Saudi courts routinely hold that evidence of what is called "defamation" does by itself establish the intention on the part of the accused to cause harm to a person and inflict damage on that person, which Islamic law or the SACCL requires. This is unfortunate. Indeed, the strict liability and presumed harmful principles of Saudi law may threaten to ensnare, with criminal liability, persons whose statements may have been inaccurate, but were in no real sense highly blameworthy.

Undoubtedly, the SACCL is still relatively complainant friendly. In the United States, for example, where defamation of private figures is deemed tort (negligence or civil fault) by law, and where defamation cases are heard by a jury, not by a judge, there is generally no presumption that a defamatory statement is false. Rather, the falsity of the charge must be proved by the plaintiff. This makes it difficult for a libel or slander plaintiff to prevail under American law.[20] In Canada, the Supreme Court had also confirmed - in many defamation cases filed under Article 1457 of the Civil Code of Quebec - that the defendant's good faith must always be presumed pursuant to Article 2805 of said code, and consequently, it is incumbent upon the plaintiff to prove fault (civil wrong).[21]

Comparatively, although French defamation law is, in practice, more lenient than in the US and Canada, it is predominantly a matter of criminal law and defamation is a criminal offence. Indeed, Art. R.621-1 of the

[15]The Saudi Law of Criminal Procedure sets out the rules and procedures regarding how cases are adjudicated by the criminal courts. The law offers certainty as to who can initiate a complaint and how this is to be done. It also details the evidential requirements, in accordance with Islamic law principles, and provides a clear procedure for processing cases before criminal courts, ensuring the reliability, fairness and integrity of the criminal process.
[16]Zaki Mohammad Shannak, Brief Study of the Saudi Law of Criminal Procedure, ALSHEGREY, 4th Ed. 2020, pp. 82-83.
[17]*See*, for instance, Abdul Kader Awda, *Islamic Criminal Law in comparison to codified laws*, p.353.
[18]Although the vast majority of instances of defamation do not result in litigation — perhaps because the scope of harm does not justify the cost of filing a complaint, however, where defamatory statements are rendered widely accessible on the Internet or social networks, or through text messages, the scope of harm may more often justify filing a complaint.
[19]Case No. 3435426 & 35223096, 25/04/1435 Hijri, *in* the Saudi Courts Reports, Volume 11, 1084, p.188.
[20]*See*, Vincent R. Johnson, *Ibid*, p.24.
[21]*See*, *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 SCR 663, para.57, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2029/index.do

French Criminal Code, which prohibits "non-public defamation of private persons", as well as Article 32 of the French Law of 29 July 1881 on the Freedom of the Press, which prohibits "public defamation of private figures", impose criminal fines in respect of defamation offences. These provisions apply to professional journalists as well as to non-journalists. Whether defamation is punished by a fine of the first degree[22] according to Article 29 or maximum fine of €12,000 pursuant to Article 32 depends mainly on whether said defamation is deemed public or non-public.[23] But in some cases, defamation can be punished by imprisonment, up to one year, and a maximum fine of €45,000 – notably when the defamatory statement concerns the racial origin, colour or sexual orientation of a person or group of persons.

In any case, what is important to understand is that the above-mentioned French provisions expressly refer to Article 29 of the French Law of 29 July 1881 on the Freedom of the Press for the purposes of defining defamation of private figures. According to this article, defamation is defined as *any allegation or accusation of a fact that causes an attack on the honour or consideration of a person*. Statements that insinuate or imply certain meanings can also be found to have a defamatory meaning. However, a statement which does not contain any insinuation or imputation or accusation of a fact that causes an attack on the honour or consideration of a person, would be considered "disparagement"[24] in French defamation law, though it would be defensible in court.

Compared to the US and Canada, one notable similarity between French defamation provisions and subarticle 3(5) of the SACCL is that there is a presumption in French law that all defamatory statements are made with the "intention to cause harm" to the claimant and that all defamatory statements are made in "bad faith". It might be thought to mean that defamation involves falsehood. False allegations or accusations of facts may cause harm to individuals. They can so quickly and completely destroy their good reputation.[25] A reputation tarnished by defamation can seldom regain its former lustre. The defendant is, however, entitled to prove under French Law that he or she didn't act in bad faith. Indeed, since the defamation defendant bears the onus of demonstrating either his good faith or the veracity of his defamatory statement,[26] he can accordingly raise the defence of justification (truth) to prove that the defamatory words carried by the matter of which the plaintiff complains are true. Therefore, the question will be whether there is sufficient evidence to prove that the defamatory statement was in fact true. If the evidence is such that the contested statement might reasonably be true, then there is no realistic prospect of conviction and no charge (fine) should be brought under French Law.[27] And this is probably one of the most distinguishing features of French Defamation Law compared with subarticle 3(5) of the SACCL.

There remains an important practical question over when defamation causes of action may be pleaded alongside other causes of action. Indeed, defamation may also protect a person against humiliation, and from discrimination based on false facts in personal and professional relationships.[28] In this respect, however, it may be said that words which are used to hold the subject up to mockery and ridicule can be found to have a disparaging meaning, not a defamatory one as would be the case under subarticle 3(5) of the SACCL. Moreover, it would surely be wrong in our view to hold that any reputational damage, including personal humiliation, could only be the subject of a defamation action, simply because damage to reputation may

[22] Approximately €1500.

[23]Under French Law, public defamation is an offense when the defamatory words are made to several private persons who are not linked by a community of interest. By contrast, non-public defamation is a simple contravention which may occur when the defamatory words are made to a single private person, or to several private persons linked by a community of interest. Defamation on the Internet is essentially governed by the same principles as defamation by a traditional means of communication. For example, an open-access website is public, whereas an email addressed to a single person is private. *See*, regarding notable differences between public and non-public defamation, Supreme Court of France, Criminal Chamber, Cass.crim. February 7th, 2018, available at https://www.legifrance.gouv.fr. Also: https://braun-avocat.com/en/defamation-and-communication-law/

[24] known in French as *dénigrement.*

[25] *See*, First Degree Court of Marseille, TGI, 11A, Correctional Chamber, November 29th, 2016, available at https://www.legalis.net/jurisprudences/diffamation/?page=3

[26] known in French as *"l'exception de vérité or la bonne foi".*

[27] *See*, Court of Appeal of Toulouse, 3rd Chamber, January 8th, 2020, N°7/*2020* N° RG 19/02701 available at https://www.legalis.net/jurisprudences/diffamation; Supreme Court of France, Criminal Chamber, Cass.crim., March 15th, 2016, n0 14-87.237 available at*:* https://www.legifrance.gouv.fr/juri/id/JURITEXT000032263279/

[28]Nicole Moreham and Mark Warby, Tugendhat and Christie, the Law of Privacy and the Media (Oxford University Press, 3rd ed, 2016), p.351.

sometimes involve an infringement of privacy.[29] That is, where complainants do have a genuine privacy case, they are entitled to bring proceedings for violation of private information, rather than for defamation, on grounds of Article 3(4) of the SACCL. [30]

Out of necessity, this article relies solely on reported decisions[31] and does not claim to have captured every defamation decision. Regrettably, the vast majority of defamation cases are underrepresented and the number of reported cases is lower than one would expect based on the present article. There is also no efficient system of court reporting. Not to mention that the official *Saudi Courts Reports* are posted once every ten years on the Ministry of Justice website.[32] Yet, despite the appearance that the number of defamation cases is not significant in the KSA, this is probably not so. [33]

In the apprehension of defamation cases, which particularly arises in the context of communication technologies, the following case[34] is mentioned to illustrate a judge's misinterpretation of the challenged defamatory statement. The defendant was an acting supervisor at the Educational Supervision Centre in the Qatif district. While he was explaining the code of conduct to a group of newly recruited teachers during an online training session, the defendant referred to a disciplinary measure which was eventually taken against a teacher at the complainant's establishment.

Interestingly, the complainant did not claim that the defendant said anything defamatory, nor was it alleged that the defendant made direct reference to the complainant. Nevertheless, the complainant advanced that the defendant referred to his workplace by calling the listeners' attention to the alleged disciplinary measure, which was eventually taken against one teacher there, albeit without mentioning the name of the complainant. The latter did indeed at one point attempt to draw the judge's attention to the fact that all of the listeners knew that he was the only teacher who was working at the establishment at that time, and therefore, the court should exert control over the implied meaning of the challenged statement.[35] In other words, the complainant's argument was that the contested words were artfully arranged to create in the mind of the ordinary listener an association of ideas which would lead to the judgment that he (the complainant) was guilty of disciplinary action and reprehensible conduct, thereby making even the most impromptu words potentially damaging.

Admittedly, the complainant's alleged meaning does not bind the Court according to Article 158 of the Saudi Law of Criminal Procedure. Also, it would be difficult to quickly and cheaply establish whether or not someone has been defamed, as it is an incredibly complex area of law. However, courts should always be cautious when it comes to understanding the context of statements.

As part of his disposition on this case, the judge had to consider whether the challenged statement caused an appreciable harm to the complainant. The judge began by noting that the *status quo* relating to defamation in

[29]In a case which was reported in a Saudi newspaper in 2021, it was conceded that the husband managed to install a program (application) on his wife's cell phone that allowed him to constantly view her text messages and other information. The judge surprisingly concluded that such conduct falls within the definition of malicious spyware, thereby falling within the scope of Subarticle 3(1) of the SACCL and not Subarticle 3(4) which prohibits violation of privacy. For more information, please go to https://www.alhurra.com/saudi-arabia/2021/06/17

[30]While there are ways in which these concepts overlap and some conduct can give rise to actions in both defamation and privacy, this should be much less of a concern than is sometimes suggested. Both actions involve personal interests, but they do not have the same aims. The principle that a complainant is entitled to bring a privacy complaint where reputation rights or interests are at stake was recognized in the following Case No: 34147100 & 35273714, 10/06/1435 Hijri, *in* the Saudi Courts Reports, Volume 11, 1084, p.206. However, from a German Law perspective, privacy and reputation rights are both aspects of more fundamental rights to human dignity and personal protection. *See*, EJ Eberle, Dignity and Liberty (Praeger, 2002) 98–109.

[31]The reported decisions effectively represent the Saudi Anti-Cyber Crime Law and Sharia — the body of law that courts primarily rely on when deciding defamation cases.

[32]https://www.moj.gov.sa/ar/Ministry/Departments/ResearchCenter/Pages/MojPress_1435.aspx

[33]https://www.loc.gov/item/global-legal-monitor/2015-03-19/saudi-arabia-cyber-crime-conviction/ and https://www.arabnews.com/saudi-arabia/news/823871

[34]Case No. 34467326 & 35153242, 20/02/1435 Hijri, *in* the Saudi Courts Reports, Volume 11, 1084, p.166.

[35]Disagreement in the majority of cases generally centres around the test of meaning, because much of the argument between the parties would be focused on meaning. The argument over the meaning to be attributed to words is often a key element of a defamation action, although the determination of meaning is not an empirical exercise. The test deployed by the court is that of how the words would have been understood by the ordinary recipient. These would be matters ultimately to be decided by a judge who would be required to take all the circumstances of the case into account in making their assessment. The exercise of this discretion could be tightly controlled, however, by way of norm-setting, guidance from Islamic Sharia.

the KSA remains intact: the Public Prosecution showing that the defamatory words (1) refer to the complainant; (2) were expressed to a third party;[36] (3) tend to harm the complainant comes with the presumption of damage. Thus, the intention to do so may be inferred either from the verbal defamatory words or from the posting or publication of the defamatory statement should the latter be made in writing. If these three elements are established, Islamic Sharia (including subarticle 3(5) when applicable) presumes the words to be harmful, and that the complainant has suffered actual damages.[37]

Applying these elements to the facts at hand, the judge squarely ruled that "*though such a general statement may bring the teachers' attention to the existence of a disciplinary measure against a teacher at the complainant's establishment as a result of statutory violations, without more, it does not form an adequate basis on which to hold the defendant liable for the allegedly defamatory information. Nor would this general statement be susceptible to defamation action under Islamic Sharia*."

The judge seamlessly supported his ruling by observing that although the second element of defamation was most likely provable, the Public Prosecution's argument was in any event defeated by the lack of proof of two key elements of the alleged offence, that is, the first and third ones, which were most likely too far from being established. Indeed, criminal defamation is unlike civil fault as it requires a particular mental state, that of knowledge or intention, to be proved against the accused by way of inference (e.g., the intention is inferred from the online, verbal or written defamatory statement). Still, the defendant must have intended to write or to say verbally the words which contain the defamation. The defendant must also have intended to write or to say verbally the words which are alleged to be defamatory with the sole purpose of harming the reputation of the complainant, even without knowledge of whether these defamatory words were true or untrue. Absent the proof of these key elements of defamation, neither the Public Prosecution is capable of meeting its onus under Article 2 of the Implementing Regulation of the Law of Criminal Procedure, nor the defamation complainant can recover damages. In reaching this conclusion, the judge dismissed the case on the grounds that the defendant had used general words which did not directly refer to the defendant, but also because the Public Prosecution could not prove an intention to cause harm to the complainant on the part of the defendant. In short, it was a mystery to the judge why the defendant should be sentenced.

At first glance, the approach of the judge seems to be sound, since there was no direct evidence in the record of this case suggesting that the defendant himself knew of, much less intended, the defamatory meaning. Also, there was not enough of a clear causal link between the challenged statement and the alleged harm. However, the judge escaped answers and that is where the position illogically rests. Of course, the defendant didn't say explicitly that the complainant had been removed from his establishment as a result of a disciplinary measure. However, that does not detract from the point that anyone hearing the statement would come away with that impression. Indeed, an argument could be made that the disciplinary transfer from one establishment to another in a different local authority is only used where dismissal is unwarranted, that is to say if the teacher deliberately violates statutory rules or commits a criminal offence. We believe that the trial judge should have given far more attention to this question.

Although the offence of defamation recognises natural and ordinary meaning of the words, however, this must not be limited to the literal and obvious meaning and may include any inference which the ordinary, reasonable reader or listener would draw from the statement. Indeed, a mere insinuation is as legally actionable as a positive assertion if it is false, harmful and damaging and the meaning is clear. The test of meaning is an objective test in what an ordinary listener or reader would understand the words to mean.

[36]Because third-party witnesses may be called to testify in court. However, it is important to bear in mind that the number and gender of witnesses (male/female) may vary depending on the type of defamation (false accusation of adultery or other). For instance, under Islamic Sharia, the Public Prosecution would be faced with the burden of offering 4 witnesses (excluding women and non-Muslims) to the offence of adultery. *See*, Abdul Kader Awda, *Ibid*, p.318.

[37]The traditional goals of defamation actions under Islamic Sharia are compensating the complainants for the harm they have suffered and signalling to defendants that their behaviour fell below an acceptable standard. Therefore, it is not an unreasonable assumption that any harm caused to a person might be in large part addressed through monetary damages. The amount of actual damages to be awarded for defamation is assessed by the court to compensate the complainant for the harmful statement. It would appear that the Saudi Regulator specifically left the assessment of damages to the judge in defamation actions. Damages are at large and are meant to both compensate complainants and vindicate their reputations. They are meant to reflect the conduct of the defendant and the extent of reputational harm to the complainant. *See*, Raymond Brown, Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States, 2nd ed. (Toronto: Thomson Reuters Canada, 2017) (loose-leaf updated 2016, release 1), ch. 25 at 36 [Brown, On Defamation].

Dismissing complaints based on defamatory implications penalises the complainant for the defendant's artfulness and undermines state interests in preventing harm caused to individuals. Allowing complaints of defamation by implication will accord proper weight to reputational concerns and calibrate the current imbalance that favours defendants.[38]

1.2 Extending defamation offences to include insult under subarticle 3(5)

While Islamic Sharia has general provisions about which there can be no disagreement, in a few cases there is bound to be debate as to whether subarticle 3(5) of the SACCL fits the category of insult or not.

Impinging on the problem is the broad definition of defamation under Islamic Sharia, which provides that *qazef* (defamation) may also contain insulting words (*Sab wa Shatem*) that cause harm to a person, regardless of whether this person is a natural or legal one, a private or public figure. Clearly, this suggests that judges may blur the essential distinction between defamation and insult, so long as the Saudi Regulator does not purport to provide a clearer definition of these two different offences in subarticle 3(5) of the SACCL. In some cases, the broad language used ("cause harm/damage") suggests that liability could conceivably extend to offensive content. In other instances, the objective content focuses primarily on reputational harm, but appears to leave the way clear for other uses. A lack of court practice further complicates categorisation. Consequently, words that are merely vulgar insults are usually found to be defamatory, [39] thus allowing complainants to sue for defamation and claim damages on the grounds of subarticle 3(5) of the SACCL, which is somewhat surprising. [40]

Indeed, there seems no good reason why a complainant or a public prosecutor should not choose between insult and defamation – unless perhaps it is well established that the offence of insult is wholly made-up when the object of the suit is to protect reputation. But that will rarely be the case. Therefore, it can be surmised that defamation and insult are largely separate, even though both connect with harm concerns from an Islamic Sharia perspective.

Under French Law, e.g., both subarticle R.621-2 of the French Criminal Code, which punishes "unprovoked non-public insult of private persons", and Article 32 of the French Law of 29 July 1881 on the Freedom of the Press, which prohibits "public insult of private figures", refer to subarticle 29(2) of the latter law for the purposes of defining insult. According to this subarticle 29(2), insult is defined as "*any offensive expression, scornful word, or invective that does not contain the accusation of a fact*". Although the wording is vague, there is no doubt that the distinction between defamation and insult is commonly one of specific accusations versus offensive expressions that may, in court practice, resemble the facts/value judgments dichotomy. [41] Indeed, insult protects highly subjective concepts such as "honour", "consideration" and "reputation", whereas defamation should only be concerned with false facts. Recognizing this difference leads to the suggestion that there is a certain incongruity in expanding defamation offences to insult under subarticle 3(5) of the SACCL.

The following case[42] is mentioned to illustrate the ease with which defamation and insult can be communicated and spread online. The complainant filed a private criminal complaint with the Qatif police under Article 16 of the Saudi Law of Criminal Procedure, attempting to hold the defendant liable for sending

[38]Nicole Alexandra LaBarbera, *The Art of Insinuation: Defamation by Implication*, 58 Fordham L. Rev., p. 703, 677 (1990). Available at: https://ir.lawnet.fordham.edu/flr/vol58/iss4/4

[39]Abdul Kader Awda, *Ibid*, p.353.

[40]*See*, from a comparative perspective, Hilary Young, "Adding Insult to Injury in Assessing Damages for Corporate Defamation" (2013) 21 Tort L Rev p.127.

[41] Unlike Saudi law, French law distinguishes two different types of libel: defamation proper, the imputation or allegation of a fact that damages the reputation of a person or an institution; and insults, which do not contain the imputation or allegation of a fact. Claimants must choose the legal ground on which they act. If he or she mischaracterises a claim, it will be dismissed (*See*, Cass.Ass.Plen, n°11-14.637, February 13th, 2013, available at https://www.courdecassation.fr/decision/613ff39831486840f12516da and Cass. crim., December 7th, 2010, n°10-81.984, F-P+B available at https://www.lexbase.fr/article-juridique/3900701-jurisprudence-distinction-de-la-diffamation-et-de-l-injure-la-diffamation-suppose-l-imputation-d-un). The reason for this? The possibility of proving truth. A defamatory statement can be proven true; an insulting statement cannot be proven because it doesn't contain the imputation or allegation of a fact. Saying someone is "a dirty pig" is an insult. It can't be proven true. Saying someone "harasses employees in the workplace" is defamation. It can be proven.

[42]Case No. 3521012 & 35239597, 11/05/1435 Hijri, *in* the Saudi Courts Reports, Volume 11, 1084, p.268.

emails of defamatory content to his mailbox. On being questioned about these criminal charges, the defendant did indeed confess to sending these messages to the complainant. However, the defendant's argument was put in two ways, though it is clear that both were alternative ones. The first was that the complainant made regular visits to the defendant's marital home to meet the latter's wife, without his consent, while he was away from home. The second that the purpose of addressing these words to the complainant was legitimately justified as it was only to deter him from visiting the defendant's wife at their conjugal home, without more.

Clearly, the general manner in which the defendant presented his case was irrelevant. The following paragraph included the defamatory words, which became the centrepiece of this litigation:

> *If you were a man, you would not talk to married women, you're such an adulterer…the stupidity is contagious in your family and it obviously arises from a family stupid gene…how quickly you forgot the girls you hanged out with, son of a dog, where did you get the money to buy the truck and the car, obviously from smuggling…you're such a fool, donkey, son of a donkey […].*

The trial judge built upon the defamatory statement being challenged, noting that not only was this message defamatory on its face,[43] but it was also sent repeatedly and simultaneously to both the complainant and his friends and work colleagues. Admittedly, it is not necessary for the defamatory statement to be known to a large group of people to have sufficient grounds to become a legal case. Nor would it be necessary that the defamatory statement be made in an open and direct way to the affected person.[44]

Oddly, the judge ascertained that the defendant's words were made in language that portrayed the complainant in the worst possible light. This was neither necessary nor appropriate in the circumstances, notably in view of evidence which showed the defendant's wife was also the complainant's aunt. While it was not necessary to characterize the defendant's conduct as amounting to insult and disparagement, it was conceded that the Public Prosecution had successfully met his onus under Article 2(2), of the Implementing Regulation of the Law of Criminal Procedure, by proving an intention on the part of the defendant to cause harm and inflict damage on the complainant. The judge's ruling clearly established that, as a result of this being shown, the defendant was held liable for defamation on the grounds of reputational harm.

While this defamation action arose in the context of communication technologies, the elements of a traditional defamation under Islamic Sharia still applied. However, it was unclear whether this case alleged insult or defamation. Apparently, no question of disparagement or insult was raised and the cause proceeded to judgement on the assumption by all parties and the court itself that the contested words amounted only to defamation. Thus, given the greater potential harm from defamation, all things being equal, and perhaps the better availability of evidence of defamation than insult, it is unsurprising to see that the trial judge focused on defamation. That would also explain why the defendant was finally sentenced to 80 lashes on grounds of false accusation of adultery, and a two-month imprisonment with a fine of up to 5000 SAR pursuant to subarticle 3(5) of the SACCL.

2. The significant imbalance in the parties' competing rights

More problematic is whether the parties' competing rights have been balanced in defamation actions under the SACCL. It cannot be doubted that the defamation cases inevitably force the balancing of the right to protection from harm and the right to a full defence bearing in mind that both should carry equal weight. The value of the latter is explicitly enshrined in the Saudi Law of Criminal Procedure and Law of Civil Procedure.

The impetus behind the Law of Criminal Procedure was a recalibration of the balance between the parties' competing and procedural rights. That is, the rationale behind this balancing exercise is that both the Saudi Law of Criminal Procedure and its Implementing Regulation impose duties on courts with respect to the rights of defence. Therefore, the negation of these rights does not resonate with the Law of Criminal

[43]In common law jurisdictions, such as the USA, when libel (defamation) is clear on its face, without the need for any explanatory matter, it is called libel *per se*.
[44]Abdul Kader Awda, *Ibid,* p.370.

Procedure's stated intention of balancing the parties' rights. Consider, for instance, Article 180 of the latter law and Article 129 of the Implementing Regulation, the former states that "*Any judgment rendered on the subject matter of a criminal action shall decide the claims of private right and* ***the claims of the accused****, […]."*

Reading it solely, this provision appears to suggest that the evidentiary requirements should loom large in pragmatic balancing. In deciding whether to accept a defamation action, the Court is in any case bound by law to balance the interests of all parties by weighing the complainant's right to protection of reputation against the right of the defendant to a complete defence. The idea of balancing competing rights will not be pushed to the point that the right to protection from harm is bound by specific rules, notably Sharia's provisions and subarticle 3(5) of the SACCL, that would negate the rights of defence and defeat the proper and just objectives of the Law of Criminal Procedure. Therefore, the principal question to be answered here is whether the existing subarticle 3(5) is worthy of striking an appropriate balance between two rights vital to a fair trial.

When the question, '*What fundamental rule is the SACCL applying when it permits defamatory statements to be actionable and punishable on grounds of subarticle 3(5) even if proved true?'* is put, the answer lies more in Islamic Sharia fulfilling its role of banning harmful statements and acts. As a consequence, neither subarticle 3(5) nor the Sharia provisions on *qazef* (defamation) require a careful balance to adjudicate the right to protection of reputation and the right to a complete defence in such a way that would fully respect the importance of both sets of rights.

In this fashion, the Saudi courts have only routinely accepted the "vital" value Islamic Sharia places on preventing harm in defamation proceedings. They have stated on many occasions that a hierarchical approach to rights which places some over others must be applied, both when interpreting Sharia and when applying subarticle 3(5) of the SACCL. It may be inferred from these decisions that the protection given to victims of harm (*defamation*) accords with a more sophisticated appreciation of the values of Sharia and is therefore more worthy of legal recognition than the rights of defamation defendants. Summarizing Saudi's defamation jurisprudence is therefore confined to this doctrine, which is unfortunate. Indeed, the importance of weighing competing rights equally requires that the Court conducts a sensitive analysis of all relevant facts, with a view to arriving at a balanced approach evincing respect for all relevant rights.

Regrettably, the reason a defendant is quite often found liable is most likely due, in large part, to the limited toolkit of defences available to defamation defendants under the SACCL and Islamic Sharia. Just as Sharia provisions on *qazef* provide for limitations on the rights of defence, excluding adultery,[45] so too does subarticle 3(5) of the SACCL with its unreasonable negations of these rights which cannot be demonstrably justified from a procedural perspective. That is to say, in order for the defendant to avail herself or himself of a successful defence in a defamation action, she or he must satisfy the onus of demonstrating that the complainant committed a sin within the proper meaning of Islamic Sharia.[46] To do so would mean the

[45]Since adultery is a boundary crime (*hudud*) in the KSA (*see*, infra. 14), a person accused of defamation on grounds of adultery may have four types of defence: a) he may argue that the subject of the defamatory statement has confessed to adultery, by offering two witnesses (two male) or (1 male and two women), provided that these witnesses are Muslims; b) he may also deny defamation by offering an unlimited number of witnesses comprised of Muslim men and women; c) he may confess to defamation and be capable of proving the veracity of her or his defamatory statement, by offering four Muslim witnesses, excluding himself; d) finally, should the defamer be the husband of the defamed (spouse), he may offer four Muslim witnesses for the purpose of proving adultery against his wife. *See*, with regard to the toolkit of defences to adultery under Islamic Sharia, Abdul Kader Awda, *Ibid*, p.379.

[46]For many religions, including Islam, Christianity and Judaism, sin is a very common aspect of faith. A sin is considered any act committed by a person that goes against the Law of God, also known as Divine Law. What counts as a sin depends on the religion one follows. For example, in Islam, it is a sin to drink alcohol, whereas, in Christianity, believers often drink red wine as part of holy communion. Other sins may be the same across different religions. For example, in Christianity, Judaism and Islam, theft is a sin. However, the key major sins of Islam which followers consider to be immoral are: 1) Associating others with God (shirk or polytheism) – in other words, to believe that there is another God other than Allah (Allah is the one and only God. This means that Islam is a monotheistic religion) or to lose hope or faith in Allah and to believe that Allah would not save one on the day of Judgement; 2) Murder; 3) sexual relationships between unmarried man and woman or committing adultery or fornication; 4) Theft; 5) Consuming usury (interest); 6) Stealing from an orphan's estate; 7) Bearing false witness; 8) Engaging in magic or fortune-telling; 9) Abandoning the battlefield during a time of war; 10) Drinking alcohol; 11) Slandering chaste women; 12) Disrespecting one's parents; 13) Homosexuality for both men and women; 14; To withhold Zakat; 15) Gambling money is considered immoral; 16) Neglecting or refusing to pray is a major sin, alongside any other obligatory act for God, known as wajib. As for the minor sins in Islam, it is difficult to list them. However, they include anything which violates Allah's guidance, which is not in itself a Major sin. Some of the most

defendant must show that the complainant committed adultery or any other offence that is deemed a sin in Islam. She or he can accordingly not justify the defamatory statement by simply proving that it was true and factually founded, but only by proving that the complainant committed a sin, although it must be noted that it is generally considerably hard, if not impossible, to satisfy this onus and to initiate this type of defence if the complainant did not commit any sin within the religious meaning of Islamic Sharia. Arguing the defendant (defamer) should be criminally liable under subarticle 3(5) in circumstances falling outside the ambit of sinful acts (supposedly committed by the person defamed) is usually not a viable option. Therefore, it is fair to say that there is disagreement not only on whether, but also on how to avail oneself of such a defence in a defamation action.

Likewise, as it seems, the only available type of defence at present - in which the defamation defendant introduces evidence which, if found to be credible, will not negate criminal liability for the reasons mentioned above[47] - can be regarded as setting the breadth of the complainant-friendly defamation jurisprudence in the KSA. A fair inference is that this situation is unsatisfactory as there could be a potential injustice if a complainant is allowed to sue for defamation and claim damages under subarticle 3(5) of the SACCL, whereas the defendant is left without an effective defence. There might, therefore, be good reason for concern. Indeed, the fact that the successful defence is in any case grounded in proof of sin lends support to the view that even if a defamatory statement is true and factually founded, this does not warrant an exemption from punishment for defamation under subarticle 3(5) of the SACCL, as long as the person defamed did not commit a sin according to Islamic Sharia.[48]

In this regard, one may wonder whether the poor quality of a supplier's services or products, if proved true by the defamer, falls within the purview of sinful acts under the Islamic law. Is the veracity of that defamatory statement not reasonably sufficient to provide an absolute defence to the defamation action in such instances? We strongly believe that, in all prosecutions for defamation under subarticle 3(5) of the SACCL, the truth of the defamatory statement should be admitted as evidence. It should be a defence to be pleaded to a charge of criminal defamation if it is found that such a matter was true.[49] Shifting the burden of proof onto the party asserting the truth of the defamatory statement, in cases where a proof of sin is difficult to pin-down, is a matter of procedural rights.[50]

While little case law related to defamation is available at present, the following case [51] highlights just how much is at stake when subarticle 3(5) of the SACCL pits protection from reputational harm against the right to a full defence. The relevant facts of the case can be summarized as follows: A Saudi hospital employee was accused of online defamation by virtue of subarticle 3(5) of the SACCL after posting a defamatory statement about a celebration (wedding) room on an open Facebook page. The post contained photos taken from the celebration room where the defendant was celebrating the wedding of a relative. Alongside the posting were publicly accessible photos showing cockroaches in the guests' meals during the wedding. These photos instantaneously brought comments from many people to which the defendant eventually replied by referring to the location name. Shortly thereafter, the owner of the celebration room in question filed a

common behaviours include: 1) Breach of a promise that one has made; 2) Being immodest (flirting, watching obscene movies/TV, etc.); 3) Being suspicious or spying on others; 4) Name-calling or bullying another person; 5) Talking excessively about things which are not one's business; 6) Swearing, and so on. See, *what Islam teaches about sin*, Huda, April 29th, 2019, available at https://www.learnreligions.com/sin-in-islam-2004092.

[47] I.e., the defamatory statement is true and factually founded, but the subject of the statement did not commit a sin.

[48] Abdul Kader Awda, *Ibid*, p.353.

[49] Indeed, a defendant must be able to assert certain privileges as a defence to defamation. One of these is truth, meaning that if a defendant can show that his or her statement is true, by definition it cannot be defamatory. Under Pennsylvania law, for example, truth is an absolute defence to a commercial disparagement claim, unless the plaintiff can establish that the defendant acted with actual malice and knowledge of the falsity. Similarly, under Michigan defamation law, a business defamation claim consists of several elements: 1) the statement is false; 2) defamatory; 3) about the plaintiff's business; 4) made to a third party; 5) negligent; 6) the business suffered damage.

[50] Under French Law, e.g., the veracity of the defamatory statement, made by private figures, can be established pursuant to Subarticle 35 of the French Law of 29 July 1881 on the Freedom of the Press. French courts, however, will accept a defamation defence based on a claim of truth only if the proof submitted by the defendant is considered full, complete and entirely correlated to all the material elements of a defamatory statement. The evidence must, moreover, be contemporaneous to publication/postings. The test of truth is, therefore, rigorous in France. But, although in France truth, like the English common law defence of truth in the *UK Defamation Act of 2013*, is a general defence to an action for defamation, it is not admissible as a defence if the facts concern a person's privacy.

[51] Case No. 34213166 & 35152634, 19/02/1435 Hijri, *in* the Saudi Courts Reports, Volume 11, 1084, p.273.

complaint under Article 16 of the Saudi Law of Criminal Procedure, alleging that his personal reputation as well as that of his business (celebration room rental) were unfairly traduced and harmed.[52]

It is no surprise that due to its back and forth character, Facebook provides an opportunity for each individual to respond to defamatory comments or postings before the same Facebookers in an immediate or a relatively contemporaneous time frame. Arguably, references to the name of the celebration room would lead all persons reading, liking and sharing the comments to decide not to rent that celebration room in the future. However, presumably this would not be taken as proof of actual damages, nor would it account for the fact that the complainant's business suffered economic loss. The complainant must show that the defamatory posting or statement has caused or is likely to cause serious economic loss.[53] Decline in revenue (if any) might not be actionable as causation is difficult to prove without detailed expert testimony or documentary evidence.

In any event, it may be worth stating directly that while a defamatory statement of a celebration room rental might be thought to harm reputation, it could well be argued that factually false material (photos) or allegations (if any are conveyed by the statement) is what should form the basis of an action for defamation. Moreover, it may be misleading to consider the statement of fact as one of comment. The latter, as distinguished from a statement of fact, is characterized by an element of subjectivity generally incapable of proof, while a statement of fact is capable of being determined to be accurate or not. Comment most commonly includes expressions of opinion but may also extend to inferences of fact which are inherently debatable on the facts of the case. [54] While every case will be extremely fact sensitive, it could be argued that defamation should only be brought when a person deliberately sets out to defame another in a transparent desire to inflict damage on that person, be it a natural or legal person, a public or private figure.

Turning back to the Saudi case at issue, although it was conceded that the photos and defamatory statement complained of were authenticated and proven to be true, and that the accused had confessed to posting them on Facebook, the trial judge specifically found on the evidence before him that all acts of investigation, including interrogation sessions, were carried out by the police[55] contrary to the provisions of Article 15 of the SACCL.[56] Based on these findings, the judge dismissed the case on grounds of trial nullity pursuant to Article 191 of the Saudi Law of Criminal Procedure, which states that *"[i]f the court finds an unrectifiable material defect in the action, it shall dismiss the case. Said dismissal shall not preclude refiling the case if legal requirements are satisfied."*

It is not surprising that the judge concluded that even where persuasive evidence was obtained legally, properly and fairly, the defamation case may still be completely discontinued on grounds of trial nullity under Article 191 of the Saudi Law of Criminal Procedure, should the onus resting upon the Public Prosecution to investigate the facts by itself not have been met; nor that the SACCL would require a decision that the judge

[52]Where a defamatory statement is totally unlawful and harmful, a criminal action will lie. This is even more so in cases of online defamation on Facebook since the comments posted have the potential to remain viewable for a long time and in some cases have the potential to go viral, being viewed and shared repeatedly on various Facebook walls.

[53]*See*, from a comparative perspective, Section 1 of the UK Defamation Act 2013 (the "serious harm requirement") which restricts the ability of claimants (including businesses/companies) to sue for defamation. Serious financial loss needs to be shown.

[54]The defence of honest opinion in some of the western jurisdictions, which is similar to the defence of "fair Comment" at common law, requires the defendant to prove that the matter was an expression of opinion, not a statement of fact. The defendant also needs to prove that the opinion is related to a matter of public interest and is based on material that is substantially true. For instance, in 2012, a restaurant owner in Ottawa (Canada) was sentenced to 90 days in jail for libelling (defaming) a woman who posted bad reviews of the restaurant online. The restaurant owner retaliated through various measures including "sending lewd emails" to the woman's boss and setting up a face account under her name on an "adult dating site". The court reportedly also ordered the restaurant owner to take an anger management course, undergo counselling and perform 200 hours of community service. *See*, CBC, 16 November 2012, http://www.cbc.ca/news/canada/ottawa/cyberbullying-restaurant-owner-gets-90-days-in-jail-1.1297395.

[55]Or the so-called Criminal Police Officers as denoted in Articles 24 and 26 of the Saudi Law of Criminal Procedure.

[56]Article 15 of the SACCL states that "*the Bureau of Investigation and Public Prosecution shall carry out the investigation and prosecution of crimes stipulated in this law*". Therefore, it is notable that the Public Prosecution did not advance a comprehensive and tenable argument as to why all acts of investigation could only have been undertaken and conducted by the police. Instead, the Public Prosecution surprisingly pleaded Article 66 of the Saudi Law of Criminal Procedure which authorizes public investigators to request the police to perform some specific acts of investigation by themselves. In rejecting the submission that the wording of Article 66 of the Saudi Law of Criminal Procedure should be read as authorizing public investigators to request the police to perform some specific acts of investigation by themselves, the Court correctly held that the onus rests on the Public Prosecution to investigate the facts by itself.

regards as grossly unjust and somehow within his official competence to avoid; nor that the resolution of the problem, as espoused by the judge in the case at hand, represents a practical approach. On the contrary, the judge has just deliberated somewhat in applying the law properly. His decision gives full expression to the existing rule of procedure contained in Article 15 of the SACCL upon which he merely rested his position.

What is surprising is that, apart from the contention that the case was unsound and unable to proceed any further in view of the lack of Public Prosecution involvement in the criminal investigations, there was absolutely no way that the trial judge was going to be capable of acquitting the accused on grounds of true facts that were factually founded, simply because neither Islamic Sharia nor subarticle 3(5) of the SACCL entitled him to do so. This is where the great anomaly comes, in our opinion. Notably, the trial judge upheld that the evidence obtained against the defendant would have been admitted in court had it been collected by the designated prosecuting authority under Article 15 of the SACCL, to which the Saudi Regulator had specifically assigned the responsibility with respect to the entire pre-trial stage, including criminal investigations.

Thus, so far as the mandatory requirement set forth in Article 15 of the SACCL is concerned, the question remaining: would the trial outcome – and arguably the outcome on the facts – have been different and more successful in the present case if the Public Prosecution had performed all acts of investigation by itself? This question is borne out by the fact that the defamation action was really standing in here for defamation proceedings which would probably have succeeded if all acts of investigation have been properly undertaken by the Public Prosecution. It would therefore stand to reason that subarticle 3(5) of the SACCL undermines the right to a complete defence. Of course, there is no need to elaborate on this question, however, since it does not arise in the facts of this case. It is sufficient to observe that this anomaly should be a good argument for balancing competing rights in the future. Regrettably, the absence of a fair balance struck between two competing rights - on the one hand the protection of individuals from harmful statements and on the other the right to a full defence - will result in having the trial outcome affected for a great variety of cases that may arise in the future.

Conclusion

The present paper has raised several interesting questions/concerns. First, it reveals that the flip side of the generality of subarticle 3(5) of the SACCL makes it an incomplete text, which could affect the outcome of a variety of cases which may arise in the future. When a legal provision is incomplete, it cannot be applied to cases without clarifying the meaning of its entire terms. This requires that the provision is self-explanatory, i.e., that every addressee agrees to the meaning of its terms and, by implication, that there is no need for interpreting said terms. Otherwise, a provision is incomplete, that is, some of the relevant terms remain ambiguous or overbroad. The basic premise is that subarticle 3(5) is inherently incomplete and that this has important implications for public prosecutors and trial judges.

Second, the paper shows that the chilling effect of subarticle 3(5) of the SACCL is well-attested on the rights of defence. While arguments have been brought that subarticle 3(5) poses no hurdle to the exercise of these rights, this paper offers evidence to the contrary by showing that said provision continues to put the rights of defence at stake. The Saudi Regulator appears to have taken the middle ground in that he had clearly remained conspicuously silent on the rights of defence in subarticle 3(5) of the SACCL. This silence, as has already been noted, signals an implicit refusal to formally accommodate defamation defendants, and it also suggests that the Regulator implicitly negates the right to a full defence, particularly in cases where the subject of the defamatory statements appears not to have committed sinful acts within the proper meaning of Islamic Sharia.

Therefore, and in order to prevent unwieldy and undesirable results, the paper suggests that tools found within the Law of Criminal Procedure itself will play a large role in balancing potential competing rights. The paper also recommends that the Saudi Regulator should seek a “reconciliation” of competing rights, not a hierarchy of rights. Reconciliation of both sets of rights will not shift the burden of proof in future defamation cases, since the defendant will still be faced with the presumption of falsity and the requirement to prove the veracity or justification of his defamatory statement with supporting evidence. In other words, only if a complete defence is exercised by defamation defendants will the presumption of intention be displaced. These criteria also work to ensure a fair and proportionate balancing of rights because they build-in several hurdles that defamation defendants must overcome if they wish to employ their defence.

As things stand, however, aside from the "harm" threshold set out in Islamic Sharia or the "damage" threshold set out in subarticle 3(5) of the SACCL, it might be said that the latter has proved relatively controversial. Our analysis leads to the conclusion that any future alteration or possible amendment to strike an appropriate balance between the right to protection of reputation and the right of defamation defendants to a complete defence will ultimately depend on legislation action. Doing so would amend subarticle 3(5) in a manner that complies with the Saudi Law of Criminal Procedure's stated intention of balancing the parties' competing and procedural rights. However, the Saudi Anti-Cyber Crime Law may find it hard to proceed along these lines, because defamation provisions owe their forms to Islamic Sharia.

Pivotal Legal and Ethical Caveats for Artificial Intelligence in the Middle East

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Abstract

***Editorial Note**: In partnership with Middlesex University Dubai, the Journal of Law in the Middle East by LexisNexis hosted our first student essay competition in 2022. Students were asked to respond to the following question: **Discuss the legal and ethical considerations of AI applications, with a focus on the Middle East**. Our editorial team is proud to select this piece as the winning submission based on its distinct contribution.*

Keywords

Artificial intelligence; information technology; legal technology; ethics; Islam

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Introduction

With the exponential impact of technology over the past century, every novel computerised concept comes with its fair share of praise and scepticism across many demographics of critics, regardless of whether they may be laymen or specialised experts. In the years leading up to the present day, a concept ripe for criticism has been the implementation of Artificial Intelligence ("AI") in various fields that were once human-operated, in favour of automation and perceived convenience to all stakeholders involved. Eliezer Yudkowsky wrote: "By far the greatest danger of Artificial Intelligence is that people conclude too early that they understand it". However, this rapid growth of AI into several spheres, including some that had no technological involvement whatsoever, has complicated the definition of AI itself to scholars and has replaced the previous set of issues held against AI with a non-exhaustive list of concerns instead. Along with the general scepticism that AI merits, its global influence increases the burden on those relevant to AI development, as they need to account for the rules, customs and regulations observed in each country. This essay will focus on AI's legal and ethical implications, with exceptional attention on its application in the Middle East.

Before discussing its implications, it would be prudent to define what AI really is, a definition that encompasses the levels of complexity and the forms it assumes. To this extent, the popular quote "less is better" comes into play, as there is no superior method to illustrate a sizeable chapter in humankind's technological advancements than by a few words. A fitting proposal for such a definition comes from John McCarthy, who states that AI is "the science and engineering of making intelligent machines". From a realistic standpoint, this not only encompasses all the avenues that AI has ventured into, but it simply makes sense. AI concerns the processes and computer engineering that goes into making software or physical technology that is deemed "intelligent". Therefore, by definition, this includes all mediums of AI implementation, ranging from consumer products in Amazon's Alexa or Deliveroo's customer service chatbots to access-based use, such as the NHS's Heartflow, which analyses CT scans, or unmanned drones in military service. With a satisfactory definition in place, the legal and ethical implications that shadow AI in the Middle East can be explored.

1. Ethical reflections in the Middle East

There have been many attempts to formulate principles or tenets that those developing or integrating AI into their establishments must follow. The definitions of ethics contrast any attempt made to define AI holistically. Concisely, all attempts made to summarise ethics boil down to the same theme; it is society's set of principles, customs and tenets that guide and determine our moral values whilst directing us to take actions in line with them. Therefore, when it comes to AI, ethical considerations must be made considering the values, customs and practices of a specified region or the world at large. Many of the ethical dilemmas attached to the implementation of AI are worldwide issues, not just reservations held by the Middle East population. These include broad stroke topics, encompassing concerns of privacy, security, AI consciousness, and the possible lack of control over them. Many great scholars within the AI sphere and outside, have carefully and non-exhaustively set out the problems that arise with those ethics in mind. Crucially, it would be prudent to cater to the geopolitical and socio-economic foundation of the region.

Islamic compliance is the most vital ethical consideration for any development in the Middle East, regardless of its field of origin. Based on data from the 2010 Census, Pew Research estimates that 93% of the Middle East's population comprises of Muslims, or people descending from families of the Muslim faith. Being a majority populated Muslim region, the Middle East has Islamic influence throughout its land, culture, and history. This means that all sorts of innovation, products, or services must comply and remain tolerant of the region's practices to refute the possibility of restrictions or potentially a total embargo. The total ban of Disney Pixar's upcoming film, Lightyear, is a recent example of failing to adhere to the cultural standards of the Middle East, as it was obstructed from cinemas in many countries throughout the region. What does this mean for AI, however? In practice, the ethical considerations that would primarily be made for this field lie in such matters. For instance, any AI advancements made or introduced to the Middle East must not be 'Haram'; a reference to objects or actions that are forbidden and punishable according to Islamic beliefs and

laws. The region possesses a unique societal structure that is of days past when compared to the West, which is the marriage of religion and societal norms. Of course, tremendous changes have been implemented to modernise these practices, but Islamic practices nonetheless reign prevalent. Taking Islamic values into consideration is fundamental to the development of AI here.

Equally, a glaring issue to consider, in tandem with the worldwide concern of automatism and conscience, is that some Muslims interpret the Qur'an in such a way that only Allah has the power to create entities with life, or at the very least with the power of senses – a verse often thought of when interpreting in such a manner is Qur'an 32:9. This clearly contrasts some AI developments currently available even at retail level, given that entities such as Apple's Siri, Amazon's Alexa, and various chatbots can hear, vocally respond, and speak unprompted, albeit with the help of a programme focused on facilitating such discourse. Such creation may also hamper the religious and ethical beliefs of minorities in the region, with a small percentage of Christians and Hindus worldwide also expressing concern on the possible creation of an intelligent being - a privilege that is solely vested with (their) God. Ideally, however, these are problems for the future, given the infancy of AI advancements in current times. While news broke out recently that a Google linguistic AI programme showed signs of sentience, it was a one-off circumstance, given that its self-awareness was possibly down to the method it was coded.

AI capabilities seemingly increase day by day. Developers, along with community creations, such as the automations made by third parties for Alexa, widen the scope of AI influence on an increasing basis. Depending on how one view AI, this is fantastic news on a global stand as, with more complex possibilities, AI can be used for the benefit of humanity, the environment, and other species. Unfortunately, on the other hand, such possibilities can also be used to detrimental effect. Conversely, this introduces another central ethical issue that AI developers in the Middle East must pay attention to Islam, and that is AI's ability to purport 'Haram' actions. In the Middle East, this would translate to using AI channels to purport things or actions of 'Haram' nature, including, but not limited to, chatbots using language inconsiderate of Islamic values or Alexa advertising goods that are typically banned in the region. However, as research into the region's ethical values may show, most the Muslims currently are perfectly content with AI in its current phase, as it is running parallel and in compliance with their values for now. Nonetheless, it is an issue to consider for future projects, especially as it is the Middle East's equivalent of the global automatism concern.

Furthermore, such 'Haram' outcomes could materialise only if its coding allowed it to do so. This segues into another ethical consideration – control. Onlookers outside of the Middle East and a reasonable segment of the population within, understand that the countries within the region prioritise surveillance. This includes phone tapping, monitoring internet submissions, and censorship. It is imperative for those relevant to AI development in the region to remain privy to this, as national authorities would require specialised access to their data and work. Furthermore, compliance would also be necessary, especially as any feature deviating from what is permitted would be caught in real-time, seldom after a client's malign interaction with AI. This also poses a considerable concern to entities that sell or provide AI services across the globe, as they would be required to provide special care to the Middle Eastern climate. At present, it seems that the implementation of such multi-national technology has been successful, given the lack of situations made public. However, with the development of society, and the increasing changes in global views on topics still considered absolutely 'Haram' in the Middle East, such as LGBTQ+ rights, efforts will soon need to be made to appease the Western and the Middle Eastern ideologies respectively.

The final central ethical issue for AI developers to consider contrasts what was previously discussed, the focus that needs to be paid to the inter-regional differences. While the discussion so far has critically alluded to Middle Eastern countries sharing the same sentiments towards societal practices and culture, this is not inherently true in the modern day. To put this into perspective, the practices and cultural outlook in countries like the United Arab Emirates, Bahrain and Qatar are far different than those of Saudi Arabia or Iraq. A prominent exhibit of this delineation in collective ideology is the Abraham Accord, signed by the United Arab Emirates, Oman and Bahrain to facilitate the normalisation of relationships with Israel. This is a significant treaty to come into effect, especially given the historical negative relations that Middle Eastern

countries have held with Israel, many of whom still hold the same opinion. However, this is unsurprising, as with the turn of the twenty-first century, the disparity between the traditional states in the region and those looking to implement Western ideologies and societal practices has been exponentially increasing. This is disconcerting for the development of AI as not only would changes have to be made within the Middle East, but they would also have to be made within it. A very precarious balance needs to be reached in such a situation, as even if AI in the Middle East appeases the modern approach of contemporary countries but fails in the traditional states, it may fail overall. This is due to the Saudi Arabia's incredible influence over the region. An unsuccessful attempt to cater to its relative traditionalism could lead to an overall injunction against such AI technology across the region, leading to a range of losses for the developers. While this is a rare circumstance given that countries are sovereign and they can choose to implement such AI, nonetheless, it is still a possibility.

Another inter-regional dissimilarity to study is the economic disparity among the states. Some economies, such as those belonging to the Gulf Cooperation Council, are flourishing due to several GDP outputs. In contrast, on the opposite end of the spectrum, the economies of Syria and Lebanon are debilitating. This theoretically would pose great concern to AI stakeholders, as while they manage to comply with the entire region's ethics, they may face considerable challenge implementing it into each individual state. However, this might bear fruit for developers as well, as foreign fiduciary or humanitarian led AI would not need any compliance procedures when establishing themselves in territories in dire need of such relief, while capitalist-based AI technology would prosper in the economically stable regions. Eventually, the inter-regional difference amongst the nations is a very important caveat for AI developers to remain wary of.

2. Legal deliberations in the Middle East

When looking at the legal considerations that must be taken regarding the region after assessing those ethics, one would not have to look far. Just as Islam and Middle Eastern ethics are closely knit, so are their religion and states. The marriage of Islam and each country's governance in the Middle East is not a foreign concept since the West historically operated under the same partnership. Even though that may not hold true anymore, an impressionable number of Western laws and practices stem from it. In the Middle East, legislation is often referred to as "Shari'a" law (often anglicised to Sharia for convenience), representing the code that Muslims and expatriates in the region ought to follow. Contrary to the discussion so far, this might be favourable for AI developers since the ethical and legal considerations in the Middle East generally go together; implementing AI technology that adheres to one of these facets should typically be considerate of the other. However, like a lot of its other characteristics, the regional laws often contradict the view of the West or global societies, and so there are still a few important topics to ruminate in the legislation of the territory.

Perhaps the most important legal factor to consider, and the utmost discouraging for all ventures, let alone AI developers, is the type and frequency of legal repercussions allowed for various offences in the Middle East. International media outlets have criticised the region over the years for the punishments available for a range of offences – some of which would never be considered a crime in first-world countries. Furthermore, the Middle East has been notoriously covered for the use of capital punishment and its inconsistent extradition policies. Amongst people, these pieces of information have flown freely, creating a sense of fright amongst not only people outside the region but the population within. This fear could be seen as a debilitating circumstance mitigating many actions as it induces the fear of legal repercussions in the case that things go horrible. Conversely, this could affect AI developers in the region, as it could discourage them; perhaps their code allowed for their AI to deviate into undesirable territory, such as the Google bot discussed prior, or with widespread use of the technology, the AI became malleable enough to the point where it could pander to illegal commands. Ultimately, however, sizeable corporations in the field of AI would not find any of this problematic, given the legal representation they might have who would thoroughly advise them on any frontier, but this would especially be problematic for start-ups or those without the funds or connections to successfully create a compliant AI tool.

As aforementioned, religion and state are combined in the Middle East. This means that the ethical considerations discussed above apply when exploring legal deliberations. Control is the most prominent of those issues to reflect on in a legal manner. As examined, control is second nature to states in the region, extending to moderating free speech. This creates a cause for concern for AI stakeholders as they are gravely limited on what their AI improvement can or cannot do, and what it could facilitate. This could create negative externalities for those starting out in the Middle East, as they may receive international technical criticism for the limitations placed on their creation due to compliance with the region's precarious position, a disadvantage that would potentially be unknown to an AI tool created in the United States or Europe, for example. Conclusively, similar to the ethical considerations, these issues would not actively be found with the AI currently in use in the Middle East.

Conclusion

Eventually, the issues explored through legal consideration face the same reality as those discussed whilst tackling ethical dilemmas; they are hypothetical to the extent that there has been no occurrence yet. AI development has enjoyed relative success in the region, thanks to the modernisation of international technology, as well as the willingness of some states to adapt to Western society. However, with the passing of time, and the recurring theme of contrast between traditional Middle Eastern methods and the advancement of global societal fields, this technological area might potentially be ripe for numerous disputes. Of course, such negative possibilities could be mitigated with continued compliance with ethics and legislation unique to Middle Eastern nations. Still, this compliance comes at the cost of additional capital and effort to adhere to the region's standards. It creates physical and psychological barriers to entry for those wishing to start within the region. In the grand scheme of advancement, such restrictions are disappointing for progression, as the capabilities and benefits of AI technology in daily life outweigh the possible repercussions of the near future. Such computerisations can be used for the benefit of the planet, servicing and assisting with global needs, but hesitation and obstructions from nations, even excluding the Middle East, is detrimental to society. Perhaps with the exponential evolution of global understanding and acceptance in multiple venues, the Middle Eastern nations, along with others who create hurdles for AI, be it truthfully or indirectly, humankind could make great strides in the progression of not just AI, but other technological advancements by the close of the century.

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