

**MALDIVES COMMERCIAL LAWS REFORM:
ACCOMMODATING THE TENETS OF ISLAM**

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**ACADEMY OF ISLAMIC STUDIES
UNIVERSITY OF MALAYA
KUALA LUMPUR**

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ACCOMMODATING THE TENETS OF ISLAM**

MOHAMED IBRAHIM

**THESIS SUBMITTED IN FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF DOCTOR OF
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**ACADEMY OF ISLAMIC STUDIES
UNIVERSITY OF MALAYA
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UNIVERSITY OF MALAYA
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Islam

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ABSTRACT

This thesis examines the existing 38 commercial laws of the Maldives based on the benchmark set out in Article 10 of the Maldives' Constitution 2008: the confirmation of the tenets of Islam. This benchmark represents a constitutional standard that all laws in the Maldives are required to meet. Thus, this thesis aims to identify those laws, and/or provisions, within the Maldives' commercial legislations that remain contrary to the benchmark with the objective of seeking out, and ultimately suggesting, law reforms in order to fully accommodate the tenets of Islam. The study adopts a qualitative method along with content analysis and various informal interviews with Maldivian Islamic scholars, lawmakers and lawyers etc. The key elements of Islamic commercial law contain the prohibition of *ribā*(usury), *gharār* (uncertainty) and *mysir* (gambling), all of which stand as the basic tenets of Islam in relation to commerce. Additionally, these laws must comply with the general tenets of Islam such as the prohibition of any form of business and trade in liquor, pork and pornography etc. To accommodate these tenets, this thesis tested various Islamic commercial reform models, i.e Islamisation and harmonisation of laws with reference to *Shari'ah*. After analyzing the content of these commercial laws, it was revealed that 99.56% of these legal provisions complied with the tenets of Islam, while a very scant 0.44% were found contrary to the tenets of Islam. While regulators of the country can feel comforted with these findings, strict constitutional obligations mandate that reforms be undertaken to resolve the remaining provisions that are not. It should be noted that the existing conventional un-Islamic commercial practices in the Maldives do not result solely from enacted legislation, but also from long-established commercial practices, which could be reformed gradually by adopting comprehensive policies for the Islamisation of commerce and law, as concluded in this study.

ABSTRAK

Tesis ini mengkaji 38 undang-undang komersial Maldives berdasarkan penanda aras yang telah ditetapkan dalam Artikel 10 Perlembagaan Maldives tahun 2008: mengikut prinsip-prinsip Islam. Penanda aras ini mewakili satu piawaian perlembagaan melibatkan semua undang-undang Maldives yang perlu dipatuhi. Oleh itu, tesis ini bertujuan mengenalpasti undang-undang dan/atau peruntukannya, dalam aspek perundangan komersial Maldives yang bertentangan dengan penanda aras yang bertujuan untuk mencari, dan paling penting mencadangkan pindaan undang-undang yang bertepatan dengan prinsip-prinsip Islam. Kajian ini menggunakan kaedah kualitatif seiring dengan analisis kandungan dan beberapa temuramah tidak formal dengan sarjana, penggubal undang-undang dan peguam Islam Maldives. Elemen-elemen utama undang-undang komersial Islam mengandungi larangan riba, *gharar* (ketidaktentuan) dan *maysir* (judi) yang mana kesemuanya adalah prinsip asas Islam yang berkaitan dengan perniagaan. Tambahan lagi, undang-undang ini perlu mematuhi prinsip umum Islam seperti melarang sebarang bentuk perniagaan dan perdagangan arak, babi, pornografi dan sebagainya. Untuk menepati prinsip-prinsip ini, tesis ini melihat kepada pelbagai model pindaan komersial Islam, contohnya Islamisasi dan harmonisasi undang-undang dengan merujuk kepada undang-undang Syariah. Selepas menganalisa isi kandungan undang-undang komersial ini, didapati bahawa 99.56% peruntukan perundangan ini mematuhi prinsip-prinsip Islam, sementara hanya 0.44% didapati bertentangan dengan prinsip Islam. Walaupun pentadbir di negara ini agak selesa dengan dapatan-dapatan ini, peraturan perlembagaan yang tegas memandatkan bahawa pindaan diambil untuk menyelesaikan dan menangani peruntukan selebihnya yang tidak menepati prinsip-prinsip Islam. Perlu diingat bahawa amalan komersial konvensional sedia ada yang tidak bersifat Islamik di Maldives bukan terhasil daripada perundangan yang telah digubal, tetapi dari amalan komersial yang sudah lama dibuat, yang mana ini boleh dipinda secara beransur-ansur dengan cara menggunakan dasar komprehensif Islamisasi untuk bidang-bidang perniagaan dan perundangan, seperti yang telah disimpulkan di akhir kajian ini.

DEDICATIONS

I dedicate this thesis to my beloved parents; Maryam Zakariyya and Ibrahim Adam Haleem Fulhu who raised and guided me to the right path and encouraged me to strive and achieve with unconditional support and affection.

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The Constitution of the Republic of Maldives 1968

The Constitution of the Republic of Maldives 1998

The Constitution of the Republic of Maldives 2008

Contraband Act(Law No.4 of 1975)

Clemency Act (Law No.2 of 2010)

Inheritance Claims Act (Law No. 25 of 1975)

Evidence Act 1976 (Law No. 24 of 1976)

Decentralization Act (Law No.11 of 2010)

Family Law Act(Law No.4 of 2000)

Narcotics Act (Law No. 17 of 2011).

Judicature Act 2010 (Law No.22 of 2010)

Religious Solidarity Act(Law No.8 of 2004)

Penal Code (Law No.1 of 1966)

Pension Act (Law No.8 of 2009)

Maldives Penal Code (Law No.9 of 2014)

Maldives Land Act (Law No. 1 of 2000).

Women Testimony Act 1972 (Law No.14 of 1972)

Note: See also, the list of the laws exhibited in the Appendix II of this thesis

Regulations

Basic Pension Regulation 2014

Benefit Regulation 2014

Guest House Regulation 2012

Islamic Banking Regulations 2011

Public Finance Regulations 2015

Parliament Procedure 2010

Tourists Vessel Regulation 2007

Liquor Regulation 2011

Regulation on the Development and Management of the Tourist Hotels 2013

Regulations on Tax Administration 2011

Regulation on Business Profit Taxation 2011

Regulation on Religious Solidarity 2011

Regulation on Maldives Retirement Pension Scheme 2014

Securities Regulation 2007

Self-Employment Regulation and Regulation on Foreign Employees 2014

Others

Basic Ordinance of the Kingdom of Saudi Arabia 1992

Constitution of the Republic of Yemen 1991

Constitution of the Republic of Sudan 1998

Indian Independent Act 1947

The Constitution of Islamic Republic of Afghanistan 2004

The Constitution of the State of Bahrain 1973

The Constitution of the Islamic Republic of Iran 1979

The Iraqi Constitution 2004

The Constitution of Arab Republic of Egypt 1980

The Constitution of Arab Republic of Egypt 2014

The Constitution of Kuwait 1962

The Federal Constitution of Malaysia 1957

The Constitution of Qatar 2004

The Constitution of Islamic Republic of Pakistan 1956

The Constitution of Islamic Republic of Pakistan 1962

The Constitution of Islamic Republic of Pakistan 1973

The Federal Republic of Somalia Provisional Constitution 2012

United Arab Emirates Constitution 1971

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Best Choice Maldives Pvt. v. Ahmed Waheed[2009/HC-A/92]

Prosecutor General v. Sulhath Abdullah [2009/HC-A/130]

Supreme Court

Aseeth Thaufeeq v. Maldives Election Commission[2011/SC-E/07]

Athama Investment Maldives Pvt. v. Mauritius Commercial Bank [2014/SC-A/36]

Adam Shareef v. BML[2009/SC-A/23]

Ahmed Nashid v. Mohamed Mustafa [2010/SC-A/02].

Bank of Maldives(BML) v. Sultan of the Sea Pvt [2013/SC-A/43]

C.P.S Maldives v. Works Co[2013/SC-A/27]

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My Company Pvt v. Reethi Rah' Resort Pvt [2013/SC-A/23].

Hassan Haleem v. Yong Thye Heng Pvt [2009/SC-A/30].

Ibrahim Hassan v. Ali Rasheed and others [2012/SC-A/07].

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Malaysia

Che Omar Che Soh v. PP [1988] 2 MLJ 55.

Hajjah Halimatussaadiah bint. Haji Kamaruddin v. Public Services Commission Malaysia[1994] 3 MLJ 61

Meor Atiqulrahman bin Ishak & others v. Fatimah bint. Sihi & Others & Anor [2000]

Fatimah Sihi v.Meor Atiqulrahman bin. Ishak [2005] 2 MLJ 25] 5 MLJ 375

Pakistan

Dr. Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law and others, PLD 1992 FSC 1.

Dr. M. Aslam Khaki and Others v. Syed Muhammad Hashim and Others, PLD 2000 SC 225.

Federation of Pakistan v. Public at large [PLD 1986 SC 240].

Mushtaq Ali v. State [Federal Shariat Court of Pakistan PLD 1989 FSC 60]

Khaki and Others v. Hashim and Others PLD 2000 SC [225].

Rashida Begum v. Shahab Din[PLD 1960 Lah. 1142].

Middle East

Kuwaiti Constitutional Court Case No.8/1992

Kuwaiti Constitutional Court Case: Al-Nashi v.Dashti (October, 28,2009).

Egypt Constitutional Court: Case No.29, Judicial Year 11 (March, 26 1994)

Egypt Constitutional Court: Mahmud Sami Muhammad vs. the Minister of Education, the Director of the Education Directorate of Alexandria and the Principal of Isis Secondary School for Girls in al-syuf. Case No.8 of Judicial Year 17 (May 18, 1996).

United Arab Emirates Federal Supreme Court Case No.1/8(January, 1982)

United Arab Emirates Federal Supreme Court Case on Junatta Bank [1985]

Others

National Group for Communication and Computers Ltd. v. Lucent Technologies International, Inc. 331F.Supp.2d 292(2004) United States District Court, D. New Jersey.

Salomon v. Salomon & Co.ltd [1897]

Macaura v. Northern Assurance Co.ltd[1925]

Lee(Catherine) v. Lee's Air Farming Ltd.[1960].

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LIST OF SYMBOLS AND ABBREVIATIONS

pbuh	:	Peace be upon him. This is used exclusively after mentioning the last Messenger Muhammad(pbuh)
RA	:	<i>Radi Allah 'anhu/ 'anha/ 'anhum.</i> This is used following the Companions of the Prophet Muhammad(pbuh)
etc.	:	And so forth
i.e	:	That is.
e.g	:	For example
Ibid.	:	(ibidem) in the same place
Vol.	:	volume
op.cit	:	(opere citato) meaning "in the work cited"

TRANSLITERATION TABLE

A. Consonant

Arabic	Roman	Arabic	Roman
ا، ء	a, ' ,	ط	ṭ
ب	b	ظ	ẓ
ت	t	ع	'
ث	th	غ	gh
ج	j	ف	f
ح	ḥ	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	z	ه	h
س	s	و	w
ش	sh	ي	y
ص	ṣ	ة	h, t
ض	ḍ		

B. Vowel

Short vowel	Transliteration
-----َ-----	a
-----ِ-----	i
-----ُ-----	u

Long vowel	Transliteration
ا، ي	a
ي	i
و	u

C. Diphthong

Diphthong	Transliteration
وَ	aw
يَ	ay
وِ	uww
يِ	iy, i

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CHAPTER 1: BACKGROUND TO THE STUDY

1.0 General Introduction

The Constitution of the Maldives, 2008 (hereafter referred to as “Maldives’ Constitution 2008”) stipulates that “Islam is the state religion”.¹ With regards to the Constitutional reference to Islam, the Muslim world is divided into four main groups. There are countries that have declared themselves as Islamic states, such as Afghanistan,² Bahrain,³ Iran,⁴ Pakistan,⁵ and the Maldives, through explicit provisions in their respective Constitutions. In the second category are some countries such as Egypt⁶ and Malaysia⁷ that have proclaimed Islam as its state religion. Third are those states where Muslims represent the dominant community but there is no constitutional reference about the religion. For example; Indonesia and Sudan. Lastly, there are countries that have declared themselves as secular states such as Turkey. These references are exhibits in the Table: 1.1 below.

According to Stahnke and Blitt, 23 out of the 44 predominantly Muslim countries recognize some Constitutional role for Islam. In 11 of these 23 countries, Islam is declared as an Islamic state, whereas 10 out of these 23 predominantly Muslim countries do not have a constitutional reference to Islam as “the state religion”. The remaining 11 countries are declared as secular states.⁸

¹ The Constitution of the Republic of Maldives 2008, Article 10(a).

² The Constitution of Islamic Republic of Afghanistan 2004, Article 1.

³ The Constitution of the State of Bahrain 1973, Article 1.

⁴ The Constitution of the Islamic Republic of Iran 1979, Article 1.

⁵ The Constitution of Islamic Republic of Pakistan 1973, Article 1.

⁶ The Constitution of Arab Republic of Egypt 2014, Article 2.

⁷ The Federal Constitution of Malaysia 1957, Article 3.

⁸ Stahnke, T., & Blitt, R. C. (2005). The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitution of Predominantly Muslim Countries. *Georgetown Journal of International Law* 36(4), pp. 947-1078.

Table: 1.1 Islam and its Constitutional role in the Muslim World

Declared Islamic States	Declared Islam as State Religion	No Constitutional Reference to Islam	Declared Secular States
1. Afghanistan 2. Bahrain 3. Brunei 4. Iran 5. Maldives 6. Mauritania 7. Oman 8. Pakistan 9. Saudi Arabia 10. Somalia 11. Yemen	[Eleven Islamic states ref. in column: One] and; 12. Algeria 13. Bangladesh 14. Egypt 15. Iraq 16. Jordan 17. Kuwait 18. Libya 19. Malaysia 20. Morocco 21. Qatar 22. Tunisia 23. UAE	1. Albania 2. Lebanon 3. Syria 4. Indonesia 5. Comoros 6. Djibouti 7. Gambia 8. Sierra Leone 9. Sudan 10. Uzbekistan	1. Burkina Fasso 2. Chad 3. Guinea 4. Mali 5. Niger 6. Senegal 7. Azerbaijan 8. Kyrgyzstan 9. Tajikistan 10. Turkey 11. Turkmenistan

Source: Stahnke and Blitt (2005)⁹ (adopted with modification)

Although a constitutional role for Islam has been established in these countries, the role of Islam varies, and in some cases may be restricted to specific matters, such as personal statutes. Furthermore, considering the legal system of these countries in this respect, some countries such as Egypt and other Gulf states have established Islamic law, “principles” or “Jurisprudence” as “the basis for”, “the principal source of”, “a principal source of” or “the source of legislation”. In addition, there are countries such as Syria and Sudan which have declared Islam as a basis of legislation, although they have not declared Islam as a state religion.¹⁰

To examine the Constitutional provisions of the Maldives in this regard as shared in the Table 1:1, the Maldives considers herself as an Islamic state. The clause relating to Islam i.e. the article 10 of the Maldives’ Constitution 2008 is divided into two sub-articles. Article 10 (a) states that the religion of the state of Maldives is Islam. Islam

⁹ *Ibid.*

¹⁰ See discussion on Islamic source clause in Chapter 3.1.2.

shall serve as one of the basis of all laws and Article 10(b) provides that no law contrary to any tenet of Islam shall be enacted in the Maldives.

This is a newly incorporated provision in a constitution of the Maldives. To understand whether the intention of drafters of the Maldives' Constitution 2008 by enacting the Article 10 of the Constitution was to Islamise the whole legal system, or whether it was a literal provision drafted into the Constitution; one should first examine the historical background of the provision as well as the experience of other Muslim countries. The fact is the historical background behind the enactment in the Maldives' constitutional provision could not be found in detail.¹¹ Therefore, the experience of other Muslim countries is regarded and will be offered up as comparisons. Few Muslim countries provide a constitutional provision to confirm the legislation in conformity with the tenets of Islam such as the Maldives. Some of these countries include Afghanistan, Algeria, Pakistan and Somalia.¹² However, the wording of the provision and terms used for its purpose are different from each other. When translated into English these provisions read as the laws shall be in conformity to, "the injunctions of Islam", "the teaching of Islam", "the Tenets of Islam" and "the Principles of *Shari'ah*" or "the norms of *Shari'ah*". These inconsistencies, however, do not make any difference in a practical sense.

It is also found that in some countries, the mandate in relation to the assessment on whether municipal laws are in compliance with *Shari'ah*, is given to the legislative body itself, or to a competent court or to a special council. For example, in cases in Pakistan,

¹¹ However, the royal decree issued to create the Maldives' Constitution 1932 can be referred to here. In that decree, it was stated to enact a Constitution that does "not contradict" principles of Islam. This may be the sole official document available in this respect in the Maldives. A detailed discussion on the background of Article 10 of the Maldives' Constitution 2008 can be found in later in the Chapter 3.1.

¹² Ahmed, D. I., & Gouda, M. (2014). Measuring Constitutional Islamization: The Islamic Constitutions Index. 38 *Hastings International and Comparative Law Review*, 1.

the Federal Shariat Court and Afghanistan, the Supreme Court, respectively, are entrusted with these tasks.¹³

The Constitutional references to Islam, notwithstanding, the religion plays a vital role in law-making throughout the Muslim world. It is also a matter of fact that this is not only because of the Constitutional reference, or statutory requirement held in the respective legal systems, but there is a desire in the Muslim world to live according to Islam. Neither Indonesia nor Sudan has Constitutional references to Islam as a religion, but the efforts of these two countries towards Islamisation of laws in recent years are astonishing. For example, the Indonesian efforts to islamise the laws in three tiers, which are the national, provincial and the local level can be noted here. Similarly, during 1980, the *Numayrī* codification project in Sudan could represent another paradigm.¹⁴

Having examined the above-mentioned facts, it is evident that the implementation of Islamic law is a common debate among most Muslim societies. However, the debate over this issue was never prevalent in the Maldives until recently. The incident in which the UN Human Rights Commissioner Ms. Navi Pillay while addressing the People's Majlis (the Parliament of the Maldives hereafter referred to as "Majlis") on 24th November 2011,¹⁵ described "flogging for fornication as inhumane and degrading punishment" was adamantly rejected in the country which includes some parliament members, NGOs and political parties.

Responding to this statement, the former Minister of Islamic Affairs Dr. Abdul Majeed Abdul Bari was reported to have said to the local media on 27th November 2011

¹³ See discussion on the institutional mechanisms in Chapter 4.3.1.

¹⁴ Shaham, R. (2009). Western Scholars on the Role the "ulama" in Adapting the *Shariah* to Modernity: A Critical View. In Meir Hatina, *Guardians of Faith in Modern Times: 'ulama' in the Middle East* (pp. 171-192). Leiden, Netherlands: BRILL.

¹⁵ Naish, A(2011, November 24). "Flogging for fornication "inhumane and degrading violence against women": Navi Pillay tells Majlis": Minivan News. Retrieved on 23rd April 2016 from <http://minivannews.com/politics/flogging-for-fornication-inhumane-and-degrading-violence-against-women-navi-pillay-tells-majlis-28616>

that “a tenet of Islam cannot be changed” and flogging was a *ḥudūd* punishment prescribed in the Qur’ān (24:2) and “revealed down to us from seven heavens.” He further noted that:

“Article 10 of the Constitution established Islam as “the basis of all the laws of the Maldives” and prohibited the enactment of any law “contrary to any tenet of Islam,” adding that the Maldives has acceded to international conventions with reservations on religious matters such as marriage equality.”¹⁶

Another reported incident was the mass gathering that was held on 23rd December 2011 under the slogan of “protecting Islam” led by an alliance of opposition political parties known as the December 23rd coalition, demanding a ban on alcohol and to close down massage parlors in the country, citing that certain activities that happens in these places are against the Islamic tenets. In response to these demands the government issued a circular on 29th December 2011, directing the closing down of all spas in tourist resorts.¹⁷ To comply with these demands, on 12th January 2012, the government referred the matter to the Supreme Court of the Maldives for a consultative opinion on banning liquor and establishment of massage parlours. The merit of the petition was that as under section 4 of the Contraband Act (Law No.4 of 1975), which permits the import of liquor and pork for consumption in tourists resorts by non-Muslims, is contrary to the tenets of Islam as per the Constitution and raised the question as to whether these services can be rendered as per the provisions of the Maldives’ Constitution 2008.

The above mentioned case was referred by the government of Maldives at the Supreme Court.¹⁸ By referring to Article 269 of the Maldives’ Constitution 2008 which provides that “unless amended by the People’s Majlis, the laws in force at the time this Constitution comes into force which are not inconsistent with this Constitution shall

¹⁶ Naish,A(2011,November 27). “Islamic Minister, MPs, PPM and religious groups condemn UN Human Rights Commissioner”: Minivan News. Retrieved on 23rd April 2016 from <http://minivannews.com/society/islamic-minister-mps-ppm-and-and-religious-groups-condemn-human-rights-commissioner-28687>

¹⁷ See generally; Circular No.8-MBR/CIR/2011/17:Maldives Ministry of Tourism and Arts, Culture’s website, Retrieved on 2nd August 2013 from www.tourism.gov.mv

¹⁸ Maldives Supreme Court [Case No. 1201/SC-L/01].

continue to remain in force”, the Supreme Court held that the matter was not required to be treated by the Supreme Court.¹⁹

On 25th October 2012, Mr. Ahmed Nazim, a Member of Parliament, proposed an amendment to the Contraband Act (Law No. 4 of 1975). He claimed that section 5 of the Act which permits the import of liquor and pork-related items contradicted the principle laid down in Article 10 of the Constitution. As mentioned earlier, based on the principles laid down for law-making under Article 10 of the Maldives’ Constitution 2008, as allowing liquor and pork imports goes directly against the tenets of Islam, thus, section 5 of the Act should be repealed accordingly. The bill is now pending in the Majlis.

From what could be interpreted by the Judgement of the Supreme Court with regard to section 5 of the Contraband Act (Law No.4 of 1975), it is presumed that a similar outcome could result for the amendment submitted to the Majlis of the same section for the same purpose. The reason for this is that when it comes to tourism and other related industries in the Maldives, these issues are always considered very sensitive since tourism represents the main income generating source for the country. A more accommodating position toward liquor and pork imports was taken by many people, regardless of the more strict positions held in society, including Islamic scholars. When the Contraband bill was in the Committee discussion stages at the Majlis, the incumbent Islamic Minister at that time Dr. Mohamed Shaheem Ali Saeed (presently the Vice Chancellor of the Maldives Islamic University) and Ahmed Adeeb, the Tourism Minister of that time (later the Vice President of the Maldives), were summoned to the Parliament Committee together to clarify their views on the proposed amendment of the Contraband Act (Law No.4 of 1975). When the Tourism Minister expressed his concerns about the proposed amendment, by stating that if the bill were to be passed in

¹⁹ See discussion on this case in Chapter 4.1.1.

the proposed manner, the tourism industry would likely collapse; the Islamic Minister, Dr. Muhammad Shaheem Ali Saeed while sitting next to the Tourism minister kept silent on the matter.²⁰ Another statement by Dr. Mohamed Shaheem Ali Saeed was reported in the local media when the government issued a circular calling to close down massage parlours in the tourism sector;

“The backbone of our national economy,” furthermore, Shaheem claimed he was “100 percent sure there is no prostitution in the tourism industry here. It is very professional; it is the most famous tourism industry in the world and is accepted by the international community. Why would we want to attack ourselves?”

From the above-mentioned discussion, even though the Maldives is a hundred percent Islamic country and the Constitutional provisions confirm a great position to the tenets of Islam, it can be understood that there are certain laws in the Maldives which are not in line with the tenets of Islam. Therefore, the importance of application of the tenets of Islam in commerce is anticipated, and for that, laws must be based on the tenets of Islam. Under this thesis, this issue shall be addressed in particular, by reviewing the commercial laws of the Maldives, with an aim to have a better framework of implementing *Sharī'ah* by testing various law reform methods.

1.1 The Statement of Problem

Having examined the dilemma in connection with the conformity of the commercial laws of the Maldives with the tenets of Islam, it is deemed that part of the existing commercial laws of the country are laid down on secular and conventional principles, which are required to be reviewed under the benchmark set out in the Maldives' Constitution 2008: the confirmation of the tenets of Islam. Most of these laws were

²⁰ Nazeer, A (2013, April 25). “Tourism will suffer if parliament bans pork and alcohol: Tourism Minister” Minivan News: Retrieved on 7th July 2013 from <http://minivannews.com/society/tourism-will-suffer-if-parliament-bans-pork-and-alcohol-tourism-minister-56970>

enacted prior to the adoption of the Maldives' Constitution 2008. Article 299 (b) 1 of the Maldives' Constitution 2008 states in the transitional chapter²¹ that;

“The People’s Majlis shall identify laws which are inconsistent with the Constitution at its commencement and approve a course of action until such inconsistent laws or part thereof can be amended or repealed. The Executive shall within thirty days of the commencement of this Constitution draw up a list of such laws or part thereof and submit it to the Majlis. Within ninety days of the commencement of the Constitution, the Majlis shall draw up and approve a schedule for amending or repealing such laws”.²²

However, so far no public information has been forthcoming on the decision that had been taken by the Majlis or by the government regarding this Constitutional clause, although it is a fact that part of these laws are inconsistent with the Constitution on grounds that they are contrary to the tenets of Islam; as the Maldives' Constitution 2008 provides in the Article 10 and Article 70(b) that all laws shall comply with the tenets of Islam.

Therefore, under this research, the existing commercial laws of the Maldives will be identified to assess whether these laws are based on the tenets of Islam as provided in the Maldives' Constitution 2008 and to propose a commercial regime that is in compliance with the tenets of Islam.

1.2 Objectives of the Study

The following objectives are made on the basis of adequate theoretical and practical solution of the subject. These are:

(1) To evaluate the role of tenets of Islam in relation to commercial law reform in the Maldives,

²¹ Chapter XIV of the Constitution of the Republic of Maldives 2008 sets out transitional arrangement with a timeline to fully adopt the Constitution of the Republic of Maldives 2008.

²² The Constitution of the Republic of Maldives 2008, Article 299(b).1, See general discussion on Legislature in the Chapter 1.9.

(2) To assess the consistency of the existing Commercial laws of the Maldives with the tenets of Islam,

(3) To analyse areas that require reformation of Commercial laws of the Maldives in order to accommodate the tenets of Islam.

1.3 Questions of the Study

This study is conducted based on the following questions;

(1) What is the role of tenets of Islam in relation to commercial law reform in the Maldives?

(2) To what extent are the Maldives commercial laws inconsistent with the tenets of Islam?

(3) What are the areas of the laws that require reform in order to accommodate the tenets of Islam?

1.4 Methodology

This thesis uses a qualitative method. The techniques used are content analysis and interviews in order to achieve the objectives of this thesis.

The study used a wide range of resources and materials available in repositories to answer the fundamental concepts and theories in relation to the thesis. To this end, the Researcher utilised available resources in the University of Malaya libraries and the Maldives National University library such as books, journals, published and unpublished reports, court decisions, legislation and parliament archives etc.

Informal interviews and conversations were conducted with the Maldivian Islamic scholars, law-makers, lawyers, judges and key stakeholders in the Maldives during the

period from 1st December 2013 to 30th November 2015. The purpose of these interviews was to support the facts and to achieve clarifications on some key issues where the Researcher considered knowledge gaps were in existence. Altogether, the total number of the respondents was 14 and their names and designations are exhibited in Appendix (A) of this thesis.

In addition to this, where the study requires relevant examples from experiences of other countries, this proposed subject has examined different jurisdictions of the Muslim world; among those Pakistan and Malaysia were used as reference areas. Selection of these two countries was on the basis that, in the case of Pakistan, it has similar constitutional references in relation to the Islamic clause and both Pakistan and the Maldives share common legal heritages. As for Malaysia, both the Maldives and Malaysia follow common practices of Islam, such as in terms of *'ibādāt*, and people of both countries mainly are followers of *shāfi'ī* school. In *mu'āmalāt* matters, both have no restriction on particular schools of law. Besides, Malaysia is one of the best countries that practices Islamic Commercial law where the Researcher is based. In making these comparisons, the Researcher does not consider them to form a part of the method used in this thesis.

1.5 Scope of the Study

This study focuses on the existing Commercial laws of the Maldives. These laws were enacted from 1970 to 2015 and will be detailed later.²³ The meanings of the terms used in this study are limited to those used in the Maldives' Constitution 2008 and the relevant laws of the Maldives. For example, the Islamic term retained in relation to law-

²³ See discussion on Commercial laws Chapter 1.14.

making is “the tenets of Islam”, thus the said term is used throughout the study in the context provided in the provisions of Maldives’ Constitution 2008.²⁴

Although, the term is defined, the application of tenets of Islam has different opinions in Islamic law. As a result, attempts were made in this study to avoid delving into these diverse opinions as this may result in inconclusive findings with regards to the study as the nature of the study is to determine whether any provisions of the law is contrary to the tenets of Islam.²⁵

1.6 Literature Review

In general, the literature pertaining to the subject can be found in areas of law reform, harmonisation of laws, Islamisation of laws and codification of *Sharī‘ah* in the Muslim world. The most common term used in relation with this research is Islamisation of laws, in particular; Islamisation of commercial laws. The three key models of law reform: harmonisation, Islamisation and codification are briefly discussed in view of the Maldives by Wisham & Muneeza²⁶ under the title of “*Harmonization of Civil Law and Shariah in a Small Island Nation: The Republic of Maldives Case Study*”. This article was written in a general manner with a minor portion of it covering the Maldives Commercial law, which will be expedient to start this research. Furthermore, in “*Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms*” an article by the drafters of the Maldives Penal Code (Law No.9 of 2014), Robison and others²⁷ shared the reforming approach of the Maldives Penal Code; which

²⁴ See generally Chapter 2.3.

²⁵ See also discussion on Islamic Commercial law Reform Benchmark in Chapter 2.3.

²⁶ Wisham, I., & Muneeza, A. (2011). Harmonization of Civil Law and Shariah in a Small Island Nation: The Republic of Maldives Case Study. *Journal of Alternative Perspectives in the Social Sciences*, 3(1),208-239).

²⁷ Robinson, P. H., Zulfiqar, A., Kammerud, M., & Orchowski, M. (2007). Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms. *American Journal of Comparative Law* 2(1),61-68.

was based on synthesis of Islamic law, Maldivian tradition and International norms. According to the drafters of the Code, accommodating these three, in particular, the international norms with the Islamic law were not easy, but not impossible by analysing the spirit of Islamic rules. In fact, a similar approach has been taken in a major part of the Muslim world, whether it was in Egypt or Malaysia, regardless of nature of the law, commerce or otherwise. In theory this approach is the harmonisation model of reformation which is in practice now in the area of the Islamic Banking in the Maldives. Thus, this article would be an important contribution to suggest the best commercial law reform model to the Maldives. In the view of the Researcher, studies conducted on the subject in the context of the Maldives are very limited apart from these two key pieces of writing. Therefore, the Researcher utilized available literature in English that is located among different jurisdictions within the Muslim world. These can be summarised as follows:

In modern history, Norman Anderson is one of the pioneers who has promoted the subject of Islamic law reform in the Western World. In the first Noel Coulson memorial lecture at School of Oriental and African Studies, London in 1987, he outlined under the title of *“Islamic Law Today the Background to Islamic Fundamentalism”*²⁸; the law reform in the Muslim world on fundamental perspectives. He considered that the concept of *“Shari‘ah”* is very much wider than could be covered by any modern definition of law in the west. He further elaborated that *Shari‘ah* has been described as a “system of duties” which covers matters of morality as well jurisprudence. In his observation, two questions were raised as to how it was possible to reform a system of law (the *Shari‘ah*) which is believed by the Muslim to be divine revelation and what has been achieved by these reforms. Unlike in the spheres of commerce, crime, contract

²⁸ Anderson, J.N.D. (1987). *Islamic Law Today: The Background to Islamic Fundamentalism*. Arab Law Quarterly 2(4): 339-351.

and tort; Muslims in these countries were determined to retain the family law distinctively Islamic. His work was written decades ago; however his contribution in this area can serve as a guide in the future of law reform in the Muslim world, including the Maldives.

One of the key areas in relation to the subject: “*Ijtihād*”, is explained by Imran Khan Niyazee in his book of “*Theories of Islamic law, The Methodology of Ijtihad*”.²⁹ This book covers the methodology of *ijtihād* and it differs from other similar types of work in its attempt to link the ideas and concepts of *uṣūl al-fiqh* to those in English common law; and it does not treat the discipline of *uṣūl al fiqh* as a common legal theory. Rather it discussed its applicability in the modern legal system. It explained that *ijtihād* is striving to discover the law from the text through all possible means of valid interpretations. He further discussed the islamisation concept, and particularly focuses on the Pakistani approach used in relation to *ijtihād*. It shows two approaches in this regard. The first approach requires adherence to whatever that is expressly prescribed in *Sharīʿah* by way of commission or omission and the remaining laws to be considered as permissible or *mubāḥ* under the principle that “the original rule for all things is permissibility”. The second approach requires all things be considered prohibited, unless specific, or general *Sharīʿah* principles justify, or deem it as permissible. This study avails to learn the methodology of Islamisation of law whether commerce and otherwise.

The selected literature on comparative perspective within the Muslim world, which includes; “*Sharia Incorporated: First Global Overview from Saudi Arabia to Indonesia*”³⁰ by Jam Michel Otto, a book that was based on a comparative survey

²⁹ Niyazee, I.A. (1994). *Theories of Islamic law: The Methodology of Ijtihād*. Islamabad: Islamic Research Institute.

³⁰ Otto, J. M. (2010). *Sharia and National Law in the Muslim World: First Global Overview from Saudi Arabia to Indonesia*. Netherlands: Amsterdam University Press.

conducted in twelve Muslim countries from Middle East to Indonesia.³¹ Otto's book is particularly important as it analyses *Shari'ah* as it was applied within the legal system of those countries surveyed. It is also important to note that the Maldives was not included in the survey. It was highlighted that in the last 25 years, the legal systems in the Muslim World has been islamised and have moved away from the norms of human rights, democracy and the rule of law, which in the view of the Researcher is contradictory. The book contains a factual and comparative overview of the role of *Shari'ah* in the legal system of the twelve represented Muslim countries. For this, the book focused on few questions, such as which aspects of *Shari'ah* is incorporated into state law, to what extent, where, when, and how. This work provides a clear view on *Shari'ah* application within the Muslim world and that may be useful to understand the position of the Maldives within the Muslim world in relation to *Shari'ah* incorporation into its laws.

The term codification of *Shari'ah*, and its experience in the Middle East, in particular, in Iran, Egypt and Sudan has been described by Ahron Layish in his article "*Islamic Law in the Modern World*".³² In the view of Layish, the most effective method for reformation of Islamic law is "the codification of law". The codification of Islamic law means "transformation of *Shari'ah* into statutory form". He demonstrated that the codification of *Shari'ah* by Muslim legislatures since the middle of the nineteenth century brought about transformation of *Shari'ah* from "Jurist law", i.e. law created by independent legal experts to statutory law. In other words, law promulgated by the national-territorial legislature. As in earlier times, there were *qaḍīs* as well as civil judges who resorted to uncodified *Shari'ah* even in cases where there was no

³¹ The countries covered are twelve Muslim countries namely; Afghanistan, Egypt, Indonesia, Iran, Malaysia, Mali, Morocco, Nigeria, Pakistan, Saudi Arabia, Sudan and Turkey. A close look on the list of these countries will reveal that five countries are selected from the Middle East and North Africa (Egypt, Morocco, Saudi Arabia, Sudan, and Turkey), three from Central and South Asia (Afghanistan, Iran, Pakistan), two from Southeast Asia (Malaysia, Indonesia) and two from West Africa (Mali and Nigeria).

³² Layish, A. (2014). *Islamic Law in the Modern World*. *Islamic Law and Society*, 21(3), 276-307.

lacuna in any given statute. Layish considered this as an ongoing process rather than an accomplished fact. Furthermore, the Islamic codification experience in the Arab world is explained in *“The Sanhuri Code, and the Emergence of Modern Civil Law [1932 to 1949]”*³³ - a book by Guy Bechor, where the author argues that the legal and social research has hitherto failed to reveal one of the most comprehensive reforms of modern Egyptian or Arab law in the new Egyptian Civil Code (*Al-Qānūn al-Madani al-Misri*) of 1949. It embodied the codification of all laws connected to the civil life sphere of the ordinary Egyptian such as those related to Property, Contract and Damages but it excluded the law of personal affairs. This book could be used to understand the subject of history of Codification historically and also ideologically as it addressed the early codifications done within the Muslim world.

According to Lombardi, the Islamic Constitutional Clause; Islam as a source of law was for the first time incorporated in a Muslim country’s constitution in Syria in the Syrian Constitution 1956. In his article on *“Constitutional Provisions Making Sharia 'A' or 'The' Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?”*³⁴ where he described Islamic source clause as the “chief source of legislation” and interpretation of this clause as more or less as a voluntary provision and its use in various constitutions throughout the Arab world which became widespread after its inclusion in the Syrian Constitution in 1956. The same provision is newly incorporated in the Maldives’ Constitution 2008.

The experience and approach in the Middle East, particularly in Egypt, Iran and Saudi Arabia on the subject of Islamic judicial review are remarkable to understand in

³³ Bechor, G .(2007). *The Sanhuri Code, and the Emergence of Modern Civil law[1932 to 1949]*. Boston: Brill Academic Publishers.

³⁴ Lombardi, C. B. (2013). Constitutional Provisions Making Sharia'A'or'The'Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?. *American University International Law Review*, 28(3), 733-74.

this regard. Alex Schank, in his article *“Constitutional Shari'a: Authoritarian Experiments with Islamic Judicial Review in Egypt, Iran, and Saudi Arabia”*³⁵ bases his study on a comparative study of Egypt, Iran and the Kingdom of Saudi Arabia for investigation of Islamic judicial review, or the courts as a mechanism of law reform in order to be compliant with *Shari'ah*. The article comprises of three parts: An attempt to survey the literature on Islamic constitutional theory, while the second part examines existing institutional mechanisms for Islamic judicial review in Egypt, Iran and Saudi Arabia. Furthermore, in the last part of the article, the author observed the role of *maṣlahah* in judicial review. According to the writer, the *maṣlahah* as a tool is not only applied in judicial review but also is used as the authoritarian foundation of the constitutional arrangement in these countries. As such this piece of literature would be useful to propose a methodological framework for Islamic judicial review regardless the country of origin, including the Maldives.

Among the South East Asian Countries, the experience of Indonesia and Malaysia are significant to highlight. Salim Arskal claims the contemporary experience in Islamisation of laws in Indonesia in three tiers. These are explained in his book called *“Challenging the Secular State the Islamization of laws in Modern Indonesia”*³⁶ published in 2008. Three tiers mean; the Constitutionalization of *Shari'ah*, the nationalization of *Shari'ah* and the localization of *Shari'ah* in Aceh. He argued that the implementation of *Shari'ah* in Indonesia has always been marked as a source of tension between political aspirations of both proponents and opponents of *Shari'ah* and by and by resistance from the secular state. The result has been that *Shari'ah* rules remain uncodified in Indonesia. The scenario witnessed in Indonesia allows the Researcher to

³⁵ Schank, A. (2014). Constitutional Shari'a: Authoritarian Experiments with Islamic Judicial Review in Egypt, Iran, and Saudi Arabia. *Georgetown Law Journal*, 102, 519.

⁹ Salim, A. (2008). *Challenging the secular state: The Islamization of law in modern Indonesia*. Honolulu: University of Hawaii Press.

draw a conclusion that a certain number of challenges would be expected in the process of islamisation of law, whether it is in Maldives or otherwise.

In respect of Malaysia, Tamir Moustafa emphasizes the role of Islam in the legal system and politics in general. In the article ***“Judging in God’s Name: State Power, Secularism, and the Politics of Islamic law in Malaysia”***³⁷, the author asserts that Malaysia ranks 6 out of 175 countries worldwide in the degree of state regulation of religion. In his opinion, the Malaysian state enforces myriad rules and regulations in the name of Islam and claims a monopoly on the implementation of Islamic law. This, however, represented not a means of applying Islam as a theocratic entity. As such, Malaysia provides an important opportunity to rethink the relationship between the state, secularism and the politics of Islamic law. Likewise, Farid Shuaib ascribes the historical evolution of the Islamic legal system in Malaysia in his article ***“Islamic Legal System in Malaysia”***.³⁸ This work gives an overview on how the existing Islamic legal infrastructure in Malaysia has been developed from the colonial era. Both articles would be helpful to understand the practical operation of Article 3 of the Malaysian Constitution, which will ultimately guide the study of Article 10 of the Maldives’ Constitution 2008, as the said provision was incorporated in the Maldives’ Constitution 2008 based on the Malaysian experiences.³⁹

South Asia is where the Maldives is geographically located. Many reformers in the Muslim world were born in this region such as Ahmad Khan, Shah Waliullah and Mohamed Iqbal etc. In Francis Robinson’s book chapter titled as ***“Islamic Reform and Mordernities in South Asia”***⁴⁰ surveyed the contribution of South Asian reformers such as Sayyid Ahmad Khan, Shah Waliullah, Muhammad Iqbal and Maulana Mawdudi etc.

³⁷ Moustafa, T. (2014). Judging in God’s Name: State Power, Secularism, and the Politics of Islamic law in Malaysia. *Oxford Journal of Law and Religion*, 3(1), 152-167.

³⁸ Shuaib, F. S. (2012). Islamic Legal System in Malaysia. *Pacific Rim Law & Policy Journal*, 21, 85.

³⁹ See discussion on Article 10 of the Maldives’ Constitution 2008 in Chapter 3.1.

⁴⁰ Robinson, F.(2013). Islamic Reform and Mordernities in South Asia.In Osella, F., & Osella, C. (Eds.), *Islamic Reform in South Asia* (pp.26-50). Delhi: Cambridge University Press.

In the view of the author, these reformers considered that Islamic reforms are a way to modernity which makes a more creative engagement of the application of Islam with the present world based on the modern understanding of undiluted human need in the society. The chapter serves as an important contribution in understanding the theory and concept of Islamic law reform.

The similar experience of Pakistan is described by Shahbaz Ahmad Cheema with the scope of interpretation of the injunctions of Islam by the Federal Shariat Court in his article titled “*The Federal Shariat Court’s Role to Determine the Scope of ‘Injunctions of Islam’ and Its Implications*”⁴¹. According to the writer, the Article 203D of the Constitution of Islamic Republic of Pakistan 1973, vested law review to the Federal Shariat Court (hereafter referred to as FSC) on yardstick of the Injunctions of the Qur’ān and Sunnah; yet the meaning and scope of these injunctions were not defined by the Constitution. Thus the interpretation of the provision by the Court extended to spiritual and progressive meanings of the injunctions of Islam beyond the literal language. An article such as this will give guidance to understand the judicial interpretation of Article 10 of the Maldives’ Constitution 2008 based on the FSC’s experience.

In addition to the above-mentioned literature, there are also scholarly works which basically focuses on Islamisation of commercial laws in theory and practice. In this regard, Hascall Susan ascribes that the prohibition of *ribā*, *gharār* and other similar un-Islamic activities are not the only elements that need consideration as being *Shari’ah*-Compliant. In Hascall Susan’s article, “*Islamic Commercial Law and Social*

⁴¹ Cheema, S. A. (2013). The Federal Shariat Court’s Role to Determine the Scope of ‘Injunctions of Islam’ and Its Implications. *Journal of Islamic State Practices in International Law*, 9(2).

Justice: Shari'ah-Compliant Companies, Workers' Rights, and the Living Wage”,⁴² he asserts that in addition to eliminating *ribā*, *gharār* and *maysir* etc., companies must conform to Islamic rules relating to fair treatment of workers in order to claim that the companies' businesses are *Sharī'ah* -Compliant. He further advocates that prohibition of *ribā* and *gharār* are also evidence of fair treatment of workers in terms of social justice; as this restricts the stronger parties demanding unfair economic advantages over weaker persons. Furthermore, the Egyptian experience on Islamisation of Commercial and Financial laws after the Arab spring is highlighted by Elsaman and Eldakak⁴³ in an article entitled “*Is the Middle East Moving toward Islamism after the Arab Spring: The Case Study of the Egyptian Commercial and Financial Laws*”. In the view of the authors, although some areas of the commercial and financial laws may be islamised, the banking sector would remain un-Islamic and associated with the inclusion of *ribā* in its transactions. These exigencies will serve as a guide to set out Islamic Commercial law reform benchmark in the study.

From the above mentioned discussion it is evident that the current literature covers the development of Islamic law in the Muslim world, codification of *Sharī'ah*, Islamisation of law and harmonisation of laws with *Sharī'ah* in general. It appears that there is no comprehensive piece of work that examines the Commercial law reform from the *Sharī'ah* perspective. Similarly, there is no literature focused on commercial law reform of the Maldives to accommodate tenets of Islam with reference to Article 10 of the Maldives' Constitution 2008. Henceforth, this research will bridge this gap in the Maldives commercial law reform to accommodate the tenets of Islam.

⁴² Hascall, S. C. (2014). Islamic Commercial Law and Social Justice: Shari'ah-Compliant Companies, Workers' Rights, and the Living Wage. *St. John's Law Review*, 88, 291.

⁴³ Elsaman, R. S., & Eldakak, A. (2012). Is the Middle East Moving toward Islamism after the Arab Spring: The Case Study of the Egyptian Commercial and Financial Laws. *Richmond Journal of Global Law and Business*, 12, 1.

1.7 Demography-Maldives

The Republic of Maldives is situated in the south-west of Sri Lanka in the Indian Ocean and is comprised of 1,190 coral Islands, forming an archipelago of 26 major atolls which is administratively divided into 20 regions. The nation's capital is Male'. The Maldivians historically originated from Indo-Arian race.⁴⁴ The National Bureau of Statistics of the Maldives reported that in 2014, the population of the Maldives was 338,434, according to the national census.⁴⁵ The language of the country is Dhivehi, which is closely related to Sinhala, the Indo-Aryan language spoken in Sri Lanka. English is widely spoken and considered as a second language and the literacy rate is 98%.

Maldives was under the British protection from 1887 until gaining independence in 1965. British occupation was mainly for strategic reasons, by its occupation of the Gan Island of Atoll and the Kelaa Island of Haa Alif Atoll. These two islands were used as British airbases even after independence. The British troops withdrew fully in 1972.⁴⁶

Since the Maldives has a relatively low population scattered among small islands, providing quality health care has always been a challenge. Each inhabited island has a primary health care facility, with each atoll having one secondary level facility and tertiary level care provided only in the capital city Male'. Life expectancy rate has increased from 46.5 years in 1977 to 74 years by 2011. Communicable diseases such as

⁴⁴ UNDP in Maldives website (2015). *About Maldives*. Retrieved on 20th May 2016 from <http://www.mv.undp.org/content/maldives/en/home/countryinfo/>

⁴⁵ Maldives National Bureau of Statistics (2015). *Statistical Pocketbook of Maldives 2015*, p.27. Retrieved on 23rd May 2016 from <http://planning.gov.mv/nbs/wp-content/uploads/2015/10/Statistical-Pocketbook-of-Maldives2015.pdf>

⁴⁶ The Commonwealth Secretariat website. (2015). *Commonwealth Country Profile-Maldives*. Retrieved on 23rd April 2016 from http://commonwealthofnations.org/yb-pdfs/maldives_country_profile.pdf

tuberculosis and filariasis have been controlled, malaria and polio eradicated and maternal mortality rates reduced.⁴⁷

Before 1960, the educational system in the Maldives remained quite underfunded. Children were taught the *Qur'ān*, Dhivehi, and basic arithmetic. This changed in 1960 with the introduction of English-Medium schools in Male'. Currently, both the government and private sector provides preschool, primary, secondary, tertiary and university education in various parts of the country.⁴⁸

The main economic industries are tourism and fishing sectors in which both local private and international investments are made.⁴⁹ In 2016, the Asian Development Bank reported recently that 15% of the population as living below the national poverty line.⁵⁰

1.8 Conversion to Islam and Freedom of Religion

There are different opinions on how Islam was introduced in the Maldives. Based on these opinions, the religion may have been brought by the Arab traders, who stopped in the Maldives en route to Far East, or by a Moroccan Islamic Cleric named Abul-Barakat Al-Barbari who is widely credited in the popular Maldivian history for the conversion of Maldivians to Islam in 1153 AD. A third opinion states that Islam was brought by a Persian Islamic Cleric named Yousuf Shamsuddin. And yet another version claims that Islam was introduced in the year 1338 AD, by an Islamic Cleric named Abul Barakat Yousuf Al-Thabrazi. Prior to conversion to Islam, Maldivians were known to be practicing Buddhists. After the last Buddhist King Maha Kalaminja embraced Islam, the

⁴⁷ *Ibid.*

⁴⁸ UNESCO-IBE.(2011).World Data on Education(VII Ed.2010/11). Retrieved on 23rd May 2016 from http://www.ibe.unesco.org/fileadmin/user_upload/Publications/WDE/2010/pdf-versions/Maldives.pdf

⁴⁹ Economic and Commerce' information are provided in a separate section in Chapter 1.15.

⁵⁰ Asian Development Bank webiste.(2016). *Poverty in Maldives*. Retrieved on 23rd May 2016 from <http://www.adb.org/countries/maldives/poverty>

Maldivian subjects followed in 1153 AD. From then onwards the King was known as Sultan Muhammad bin Abdullah, the first Muslim king.⁵¹

Among the three opinions, the more popular opinion is the second, which states that Islam was introduced in the year 1153 AD by Maulana Abul-Barakat Al-Barbari, which is still debated by historians. The fact that the tomb of Maulana Abul-Barakat-Al-barbari is situated in the capital city of Male' lends more credibility and reliability to this version of history. His landmarked Tomb: *Medhuziyarayy* exists in Male' where people used to visit daily and show respect to him as a spiritual leader of the Maldives.

No record exists when it was permitted to practice any faith other than Islam after its first inception in the Maldives. However, after the Portuguese invasion of the Maldives in 1558, and following the killing of then Sultan, the self-proclaimed ruler of the Maldives; the Portuguese king sent Christians to take charge of the Maldives and to enforce submission of the Maldivians to the king. With this invasion "the sea ran red with Muslim blood", properties were seized publicly, and the people were treated harshly.⁵² This was brought to an end by the noble national hero Sultan Muhammad Thakurufan and his two brothers Hassan Thakurufan and Hussein Thakurufan, who started *jihād* against the Portuguese invasion. After a 17-year rule, the Portuguese quitted the Maldives, and Muhammad Thakurufan became Sultan and leader of the country. This represented a pivotal time for the Maldives as Islam revived following a lengthy period of Christian rule under the Portuguese.⁵³

Maldivian law now prohibits citizens from practicing any other religion other than Islam and requires the government to exercise control over all religious matters, including the practice of Islam. In this respect two provisions: Article 10 (a) of the Maldives' Constitution 2008, which stipulates that Islam is the state religion and Article

⁵¹ Maloney, C. (1980). *People of the Maldivian Islands*. New Delhi: Orient Longman, p.99.

⁵² *Ibid.*, p.123.

⁵³ *Ibid.*, pp.198-130.

9(d) which provides that a non-Muslim may not become a citizen of the country are given Constitutional reference widely. In addition, Section 4(c).5 of the Religious Solidarity Act (First Amendment) forbids all public religious practices other than Islam in the Maldives. It further restricts building and providing facilities of worship (such as church, temples, synagogues etc.) for non-Muslims in the Maldives.⁵⁴ However, non-Muslims are permitted to practice their faith privately in their residences.

The issue of religious freedom and its permissibility in the Maldives was studied by the Islamic Fiqh Academy of the Maldives due to international pressure to allow religious freedom in the country. The Academy's decision was made in favour of banning the practice of religious faiths other than Islam in a sitting held on 25th April 2010. It further proposed a ban on building of places of worship for non-Muslims in the Maldives. To arrive at this conclusion, the Academy has taken two legal grounds into account: respective Islamic provisions provided earlier in the Maldives Constitution 2008 and *sadd al-dhari'ah*.⁵⁵ In the view of the Academy, the permissibility of religious freedom in a country such as Maldives where 100% of its citizens are Muslims will open a window for infidelity in the country which shall be blocked under the doctrine of *sadd al-dhari'ah*.

To end this segment, it is arguable that the Constitutional provisions and other relevant laws relating to Islam are not the sole basis for imposing any ban on the religious freedom in the Maldives. But there are other facts such as the people's determination to retain Islam as a unitary religion on one hand and the Maldivian customs on the other. In 2010, after 900 years as an Islamic nation, the Maldives witnessed its first test case when Muhammad Nazim (Maldivian) declared public

⁵⁴ Religious Solidarity Act (Law No.8 of 2004).

⁵⁵ Maldives Islamic Fiqh Academy's Resolution No. IFA/2010/01(Retrieved on 23rd April 2016 from http://www.islamicaaffairs.gov.mv/dh/f/fiqh.php?pageNum_rsN=1&totalRows_rsN=13)

apostasy. A few hours later however, he reconverted to Islam.⁵⁶ There is no official record that permits practice of other faiths since the conversion of Maldives to Islam, hence no single church, temple or synagogue etc., can be found in the Maldives.

1.9 The Legal System

According to Abdullahi An-Na'im, the Maldivian Legal System is an admixture of Islamic law and English Common law and the latter has influenced the Commercial law.⁵⁷ In the view of Kanul, "the current Maldivian Legal System relies on a complex combination of Common law and Islamic *Shari'ah*".⁵⁸ In the observation of the Researcher,⁵⁹ the Maldives legal system is based on Islamic law and English Common law, where the first is widely practiced in the area of family and criminal law and the latter influences the rest of the laws of the country.⁶⁰

When the British Empire decided to reform the Sri Lankan Kingdom and adopted the Constitutional Monarchy for the country, the empire also approached the Maldives to enact its first Constitution in 1932 (Maldives' Constitution 1932). This instance could represent the first Colonial impact and influence in the legal system of the country. Under this reform, the British proposed that both countries adopt a Westminster style of government. This proposal was incorporated in the first Constitution, the Maldives' Constitution 1932. The Westminster system was abolished after the declaration of a Republican system in 1952. Another significant feature of the Maldives' Constitution

⁵⁶ Robinson, JJ (2010, May 30). "Islamic Foundation calls for death sentence if apostate fails to repent", Minivan News. Retrieved on 3rd July 2013 from <http://minivannews.com/politics/islamic-foundation-calls-for-death-sentence-if-apostate-fails-to-repent-7606>

⁵⁷ Abdullahi, A. (2002). *Islamic Family Law in a Changing World, A Global Resources Book*. London: Zed Book Ltd, p. 227.

⁵⁸ UN General Assembly (2013). Report of the Special Rapporteur on the Independences of Judges on Lawyers, Gabriela Kanul: MISSION TO MALDIVES. New York: United Nation, p.7. Retrieved from http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-43-Add3_en.pdf.

⁵⁹ The Researcher of this study was granted the Maldives legal Practice licence (via Licence No.11/2003) by the Ministry of Justice, Maldives on 18th November, 2003.

⁶⁰ Ibrahim, M & Karim, M (2013, July). "Research Guide on Legal System and Research of Maldives", GlobalLex. Retrieved on 26th April 2016 from <http://www.nyulawglobal.org/globalex/Maldives.html>

1932 was the adoption of the English style of jury system in the Legal system under the Article 84 of the said Constitution.⁶¹

The colonial legacy can be perceived in the education system of the Maldives. For instance, maintaining the English medium of education and the English Law syllabus in the Law Schools are noteworthy in this respect. Another apparent aspect is the domination of common law-trained lawyers in the legal system of the Maldives.

1.9.1 Constitutional Reform in the Maldives between 1932-2008

On 19th March 1931 Sultan Muhammad Shamsudeen⁶² issued a royal decree to draft the first written constitution, the Maldives Constitution 1932.⁶³ This decree indicated the prospect of Islam in the legal system as it was commanded that the Constitution should be compiled in a way that would not contradict Islamic *Shari'ah* and should also be based on old customs of the nation. Similarly, it was instructed to pay respect to International law and the protectorate treaty in existence between the Maldives and United Kingdom since 1887. With these instructions, the Sultan Muhammad Shamsudeen then created a Committee to draft the first Constitution. The drafting committee was further divided into two councils. The mandate of one council was to review the old customs of the land and the second committee undertook the responsibility to review English statutes provided by the British Government to facilitate the task of drafting.⁶⁴

The British government was actively involved in the drafting of the first Constitution. Once the British Government approved the draft of the Constitution then,

⁶¹ The Jury system was abolished by creation of the Maldives' Constitution 1953.

⁶² Sultan Muhammad Shamsudeen (III) is a king who ruled the Maldives from 1903 to 1934.(Maloney (1980), op.cit., p.195)

⁶³ The Constitution of the Republic of Maldives 1998,preamble

⁶⁴ Ameen, M.(1970). *Dhivehi Rajjeyge Qanūn Asāsige Hayāth* (Maldivian Constitutional History).Male': Novelty Printers & Publishers,p.9.

on 22nd December 1932 it was proclaimed as the first Constitution of the Maldives by the Sultan Muhammad Shamsudeen (hereafter referred to as “Maldives’ Constitution 1932”).⁶⁵

According to Ameen,⁶⁶ the first Constitution was based on English Common law and the Egyptian Constitution. Therefore, it can be assumed that where the basic framework of the first Constitution was based on the local custom of the Maldives, English Common law and those provisions pertaining to Islamic *Sharī‘ah* were borrowed from the Egyptian Constitution.

The Maldives’ Constitution 1932 contained 92 provisions which dealt with transformation and codification of the administrative duties of government, treaties and conventions and local customs that were practiced for ages. In the first provision of the first Constitution of the Maldives, it was stated that Maldives was a country under the British protectorate from 1887, but has authority to govern the domestic affairs of the land. This autonomy was given by the British after adoption of the Maldives’ Constitution 1932.

The provision relating to Islam under the Maldives’ Constitution 1932 was provided under the Article 3 and it said that Islam was the official religion of the country. This Article remained in all the subsequent Constitutions that were formulated in the Maldives. However, the wording of the provision was changed in the Constitution formulated in 1968. Under the Maldives’ Constitution 1968, Islam was the state religion and the provision remained the same in all subsequent Constitutions and amendments under Article 7 of the Maldives’ Constitution 1998 and under Article 10 of the current Constitution: the Maldives’ Constitution 2008.

⁶⁵ The People’s *Majilis*. (1981). *Dhivehi Rajjeyge Qanūni Hayāth* (The Maldivian Legal History): Male’ The Parliament House, p.119.

⁶⁶ Ameen (1970), op.cit., p15.

The Maldives was governed under the Maldives' Constitution 1932 for 7 years and it was then abolished on 30th June 1940. According to Ameen, the first constitution was abolished because of the passage of huge number of laws that were impractical to implement.⁶⁷ Apart from this, some of these laws were not passed on the retrospective effect on one hand and certain legislation made the basic necessity of the people as illicit on the other hand.⁶⁸

Thereafter, the country was without a written Constitution for nearly 2 years. A second Constitution was promulgated on 23rd April 1942 which was based on a total of 17 provisions ("the Maldives' Constitution 1942"). Since then the Maldives has never been governed without a written Constitution.⁶⁹ In 1952, Maldives decided by a public referendum to abolish the monarchy and adopt the republican system as a form of the government. With this decision, the Constitution was changed to facilitate the republican system in the Maldives and adopted a new Constitution on 1st January 1953 ("the Maldives' Constitution 1953") with a total of 30 provisions. After nine months of being governed under a republican system, on 21st August 1953, Maldives adopted the monarchy system again which was brought on by a coup. With this change, the Constitution was changed again and a new Constitution with total 80 provisions was adopted on 7th March 1954 ("the Maldives' Constitution 1954").⁷⁰ The Maldives was then governed by a monarchy under the Maldives' Constitution 1954. The Maldives then decided by another public referendum to re-adopt the republican system in the Maldives. This resulted in a change in the Constitution yet again, and a new Constitution was adopted on 11th November 1968 ("the Maldives' Constitution 1968"), which contained 86 provisions.⁷¹

⁶⁷ Ameen (1970), op.cit, p15.

⁶⁸ *Ibid.*

⁶⁹ The People's *Majlis* (1981), op.cit., p.120.

⁷⁰ *Ibid.*, p.21.

⁷¹ Constitution of the Republic of Maldives 1968, Preamble.

On 29th November 1980 another Constitutional reform-movement began.⁷² This reform was prompted with the hope of changing the government system to establish a more comprehensive system of laws. The Constitution that resulted out of these reforms came into effect on 1st January 1998,⁷³ and contained 156 provisions (“the Maldives Constitution 1998”) and was governed for 5 years during which time immense political pressure was created to pave the way for major and landmark reforms that led to the creation of the Maldives’ Constitution of 2008.

1.9.2 Maldives’ Constitution 2008

The present Constitution of the Maldives came into force on 7th October 2008. This was the latest constitutional reform initiated to establish a multi-party democracy in the country. This action resulted from great pressure both domestically and internationally. On 9th June 2004, then President Maumoon Abdul Qayyoom announced his political reform agenda.⁷⁴ President Qayyoom proposed that a Special Majlis (Constitutional Review Assembly) be created under Article 94 of the Maldives’ Constitution 1998. The purpose of the reform was to create a democratic form of governance that would be based on three separate branches i.e. Executive, Judiciary and the Legislature. Within this democratic model, the Maldives Constitution 2008, containing 301 provisions and three schedules, was adopted.

It is worth noting the salient features of the Constitution of the Maldives summarised below:

(a) Islam as a System

Article 2 of the Maldives’ Constitution 2008 declares that the country is based on Islamic principles. In general, all rights, duties, responsibilities and

⁷² Constitution of the Republic of Maldives 1998, Preamble.

⁷³ *Ibid.*

⁷⁴ The Commonwealth Secretariat website (2015), op.cit.

eligibilities for public posts provided in the Constitution are subject to the tenets of Islam. For example, fundamental rights under the Constitution are granted to the extent not contradictory with the Islamic norms. With regards to the duties and responsibilities of the public office holder, they shall be sworn to respect the religion of Islam as provided in the respective oaths of various office holders in Schedule 1 of the Constitution. These are: oaths of the President, Vice President, and Members of the Parliament, members of the Cabinet, Judges and members of the Independent bodies. Likewise, for eligibility to all Public Posts qualification and candidacy is also stipulated on the basis of Islamic conditions. These include that all public office holders be Muslim and followers of Sunni Islam. Likewise, office holders shall not be convicted of any offences prescribed in Islam as *hudūd*.

(b) Democratic Republic

Article 2 of the Maldives' Constitution 2008 stipulates that the Maldives is a democratic republic and Article 4 of the Constitution provides that all the powers of the State are derived from, and remain within, the Citizens. Democratic norms are core values of all principles laid down in the Constitution. The main purpose for the reform of the Maldives' Constitution 1998 was to transit the country from autocratic rule to a democratic system of governance. To guarantee these democratic norms, the Constitution sets out mechanisms and a framework to protect and safeguard democracy by creating independent institutions such as a Human Rights Commission; Anti-Corruption Commission; Election Commission; Auditor General and Prosecutor General etc.

(c) Separation of Power

The separation of three organs of the state in the Maldives is confirmed under the Constitution. Article 5 of the Maldives' Constitution 2008 states that all legislative powers are vested in the Majlis. Article 6 provides that executive power is vested in the President; and judicial power is vested in the Courts under Article 7 of the Maldives' Constitution 2008. These powers were previously held by the President under past constitutional regimes.

(d) Fundamental Rights

The Constitution guarantees rights to all persons in a manner that these rights are not contrary to any tenet of Islam. The rights and freedoms are contained in Chapter II of the Constitution (Articles 16-69). It is a State duty to ensure, protect, and promote the rights and freedoms outlined in Chapter II. Under this Chapter, there are 50 rights stipulated and defined. These are based on a universally accepted bill of rights as long as they are not contrary to the tenets of Islam. For example, Article 19 provides that a citizen is free to engage in any conduct or activity that is not expressly prohibited by Islamic *Shari'ah* or by law. Likewise Article 27 stipulates that freedom of expression is limited to that extent which is not contrary to any tenet of Islam. With respect to the right to education it is included that education shall strive to inculcate obedience to Islam, instill love for Islam under Article 36.

(e) Flexible

Pursuant to Article 92 of the Maldives' Constitution 1988, to amend, change and repeal the Constitution is a discretionary power of the Constitutional Review Assembly formed under article 93 of the Maldives' Constitution 1998. This body shall be comprised of cabinet ministers, members of Parliament, eight members appointed by the President and two elected members from each

parliament constituency. Any amendment and repeal of the Constitution shall be commenced by the President through his order to create the Constitutional Assembly, under Article 94 of the Constitution.

Historically, the process of the Constitutional review is a lengthy procedure in the Maldives. For example, for the Maldives' Constitution 1998, the reform was initiated in 1980 and continued on for 17 years before being completed in 1998. Similarly, the 2008 constitution reform was commenced in 2004 and ended in 2008. This long process was made more simple and flexible under the present Constitution. Under Article 261 of Maldives' Constitution 2008, the Constitution can be amended by the Parliament itself, by a bill passed by three quarters majority of the total members of Parliament. As a result, the long process of Constitutional reform came to an end and abolished by way of incorporation of provisions relating to Constitutional Review Assembly for the amendment and reform of the Constitution.

(f) Supremacy of the Constitution

According to Article 8 of the Maldives' Constitution 2008, supremacy is vested in the Constitution. It states: "the powers of the State shall be exercised in accordance with this Constitution." Similarly, Article 268 of the Maldives' Constitution 2008 provides that all laws must be enacted in accordance with the Constitution. Any law or part of any law that is inconsistent with the Constitution is, to the extent of its inconsistency, be void and of no force and effect. The obligations imposed by the Constitution must be fulfilled. Any conduct contrary to the Constitution shall be invalid. This concept is derived from the practices of other Common law countries.

The present-day Constitution differs from previous Constitutions in several aspects. These include: universally recognized and accepted democratic tenets, especially freedom of expression; the establishment of political parties etc.

The independence of the judiciary and other institutions are confirmed under the Maldives' Constitution 2008 to facilitate multi-party democracy in Maldives for the first time in its history. All rights and privileges are also subject to the tenets of the Islam. In general, the present Constitution anchors itself more closely in accordance with *Sharī'ah* and Islam when compared to previous Maldives constitutions.

If we consider constitutional reforms undertaken from 1932 to 2008 in relation to Islamic law, the only significant change is in the current Constitution as explained earlier. In the Maldives' Constitution 1932 Islam was declared the official religion. This provision essentially remained unchanged in the subsequent constitutions. With regards to Islamic law, it was mentioned that adjudication shall be based on "*Sharī'ah* and Law" only without any further description. However, the amendment made to the Maldives' Constitution 1932 on 5th July 1934 amalgamated a new provision in connection with the Islamic law and judicial independence. Within Article 73 of the Maldives' Constitution 1932 the Chief Justice oversaw Islamic law enforcement and religious duties.

Another example, by the Maldives' Constitution 1968, which introduced a remarkable change under Article 32 as compared to the previous Constitution in terms of implementation of the Islamic law. Here a provision stipulated that the head of the religion would be the President. The titled used was "Preacher of Islamic *Shi'ār*". This provision was subsequently included in the Maldives' Constitution 1998 under Article 38. Apart from this, under the Maldives' Constitution 1998, it was provided that the President served as the head of Judiciary⁷⁵ and held absolute authority to appoint and

⁷⁵ The Constitution of the Republic of Maldives 1998, Article 39.

dismiss judges including the country's Chief Justice.⁷⁶ As there was no Supreme Court, the High Court served as the highest Court of Appeal in the country and against the decisions of this Court, appeal could only then be referred to the President.

The Maldives' Constitution 1998 provides equal status to law and Islamic *Shari'ah* by defining the law as those laws that were passed by the Parliament and the Islamic *Shari'ah*.⁷⁷

1.10 Form of Governance and Political System

Until 1968, the Maldives had been a Sultanate except for a limited period during the Colonial era under the Portuguese. Maldives Royal Succession Customs is based on hereditary rights over the throne. This was superseded under the Maldives Constitution 1932 in relation to provision of succession. The foundation of the Sultanate was laid down with the arrival of Islam. Sultan Muhammad Bin Abdullah was the first Sultan under whom the Maldives embraced Islam and the last Sultan was Sultan Muhammad Fareed Al-Awwal.⁷⁸

Traditionally, the Sultan holds royal, administrative, and religious duties. With the amendment of the Maldives' Constitution 1932, the duties of the Sultan as the head of the government were terminated. These duties were transferred to the Prime Minister and his cabinet. The Islamic duties remained with the Sultan as the Head of the State. However, in the first amendment made to the Maldives' Constitution 1932 in 1934, some of the religious duties were transferred to the Chief Justice as explained earlier. During the Sultanate era, the system of the government was a federal form of government and was controlled from the Capital City, Male'. The authority and responsibilities of the local administration were given to appointed representatives of

⁷⁶ *Ibid.*, Article 112.

⁷⁷ *Ibid.*, Article 156.

⁷⁸ *Ibid.*

the Sultan. For this, in each Atoll, there was an *atholhuverin* (Atoll's Chief). *Atholhuverin* used to report directly to the Sultan. In each Island, there was an Island Chief, known as *kathyb* appointed by the Sultan who used to report to the *atholhuverin*. The original word of *kathyb* was from *al-khathīb* who usually leads Friday prayer. In addition to these two appointees, there was a *mudhim* in each inhabited Island appointed by the Sultan whose responsibility was to call for prayers five times a day, and to lead prayers and administer funeral rituals.⁷⁹

The transformation of the country from a Sultanate to a Republic on 1st January 1953 did not make a significant difference except for the abolishment of the monarchy in terms of governance. The Head of State since then was the President who was elected by the people. He was also the Head of the Government by holding the position of Prime Minister, and other five portfolios such as external affairs, internal affairs, national security, treasury and health.⁸⁰ The adopted republican system was based on a parliamentary system. The parliament featured two houses: upper house and lower house. The lower house consisted of 38 members where two members were elected from each atoll. The upper house consisted of 9 members elected by the lower house and 9 members appointed by the President. All laws were passed by the upper house. Although the President used to hold certain cabinet posts and was not a Member of Parliament, the main selection of Cabinet ministers was done by the lower house in principle.⁸¹

As explained earlier, the first republic lasted for nearly 9 months and thereafter the monarchy was restored. This continued until the establishment of the second republic in 1968. With the second republic, the monarchy was re-abolished and the Republic

⁷⁹ Maloney (1980), op.cit., p.184.

⁸⁰ Ameen (1970), op.cit, p. 150.

⁸¹ See generally Chapter 1.7.1.

restored. Since then the Maldives has remained a republic until today. There were some prerogative changes made in the Maldives' Constitution 2008. The introduction of political parties represented a significant change when compared to previous regimes as well as a creation of the government which was all based on the principle of separation of powers. With these new changes, Presidential powers over the Judiciary and Legislature came to an end. Executive power is vested in the President who is elected by popular vote. His duties and responsibilities are assigned to his cabinet and representatives at national level under the Article 115 of the Maldives' Constitution 2008 and at the local level to local councils as provided under Article 233.

Another significant change made within the current system was that local councilors are elected by the direct vote of the respective communities. The Maldives local councils follows a three-tier system. Firstly, at the national level, there is the local government authority, which is a statutory body set up under the section 62 of the Decentralization Act (Law No.11 of 2010) to oversee the council affairs. Secondly, there are City Councils and Atoll Councils, created under sections 21 and 12 of the Act. These councils are elected by popular vote in respective atolls and cities. Each council has the mandate to administer to local affairs in its respective atolls and cities. Thirdly, in each inhabited island, a council is elected to govern their districts, and these island councils are elected by residents of those communities.

The executive departments within the government such as ministries, local councils and the state bodies are empowered to create regulations for administrative issues. The autonomy is confirmed under the relevant legislation. Previously, all government orders were considered as equal, having the statutes of law that held legal power. Any violations of these orders carried with it, threats and penalties of prosecution under

Section 88 of the Penal Code (Law No.1 of 1966).⁸² It is also worth noting that Presidential Decrees were also considered as law. With the amendment of the Maldives' Constitution 2008, the violation of an executive order is no longer considered an offence. All orders are subject to the tenets of Islam. If such orders contradict any tenet of Islam, the matter may be referred to the Court of law under the Article 43 of the Maldives' Constitution 2008.⁸³

1.11 The Legislature

Lawmaking power is vested in parliament known as the "People's Majlis".⁸⁴ Parliament is comprised of members elected by the people for a period of 5 years with a total numbers of 77 seats. The Majlis comprised of members elected by 20 Atolls and the Capital Male' as listed in Schedule I of the Constitution in a ratio of one member for each five thousand people.

The legislative history of Maldives began with the creation of its first Constitution, the Maldives' Constitution 1932. Since then laws have been enacted by a parliament. Prior to this time all laws were made by the King himself, and no mechanism existed that could challenge the King's edicts on any basis, whether Islamic, or otherwise.⁸⁵

Principles laid down under the Maldives' Constitution 1932 for lawmaking were very brief. There were few provisions in this respect. The laws had to be based on the Constitution and respecting any treaty in force between the Maldives and the British government. It further provided that laws should not be enacted with retrospective effect, and should be gazetted after having the royal assent. On the basis of these

⁸² The provision reads "...it is an offence to disobey an order issued lawfully with in the *Shari'ah* or law, person guilty of this offence shall be subjected to a punishment of exile or imprisonment or house detention not exceeding MVR150.00". This provision used to be charged as any illegal act which is not specifically provided in law or *Shari'ah*. The provision was repealed with the new Penal Code (Law No.9/2014), as all offences and penalties are clearly stated.

⁸³ See discussion on Institutional mechanism in Chapter 4.3.1.

⁸⁴ The Constitution of the Republic of Maldives 2008, Article 70(a).

⁸⁵ Suood (2014), op.cit., p.9.

guidelines, the first 40 laws that were passed by this Parliament were mainly basic brief legislations relating to governmental administration and taxation. Additionally, there were scant legislation related to law enforcement and the Judiciary. Amongst these legislations there was “The Law on Learning the Holy Qur’ān, *Arabic* and *Dhivehi* Letters”, which outlined proper Islamic teachings. Another legislation of note centered on the enforcement and punishment for adultery, which contained provisions on the offences relating to *Zinā*.⁸⁶ It was found that the legislating rules first laid down under the first Constitution (Maldives’ Constitution 1932) was inherited by all successive Constitutions in the Maldives. However, the rule relating to honoring the British protectorate treaty was abolished from those Constitutions adopted after independence in 1965.

Under Article 70 of the Maldives’ Constitution 2008, the Majilis is empowered to amend the Constitution, to enact and repeal laws, and other duties as prescribed under the Constitution. However, in doing so, it should not violate any tenet of Islam or *Sharī’ah* principles.⁸⁷

There are secondary legislations in the Maldives. Under Article 94 of the Maldives’ Constitution 2008, “the People’s Majlis may, pursuant to law and for prescribed purposes, delegate to any person or body the power to make orders, and regulations, or other instruments having legislative effects, including the power to:

- (a) Determine a date on which any law shall come into or cease to have effect;
- (b) Make any law or part thereof applicable to any area or to any class of persons.”

Under the provisions, government departments, statutory bodies are permitted to make regulations as per their respective legislations. For example, under Section 105 of

⁸⁶ Ameen (1970), op.cit., p.43.

⁸⁷ The Constitution of the Republic of Maldives 2008, Article 70.(c).

the Companies Act (Law No. 10 of 1996) the Ministry of Economic Development and Trade is permitted to make regulations on corporate affairs. Likewise, under Section 15 of the Consumer Protection Act (Law No.1 of 1996), the same Ministry is given the mandate as a regulator. These regulations are by nature like administrative orders issued for the convenience of followers as a regulator. Some pieces of legislation had provisions that created regulations on specific issues, whereas in others a wider scope of enactment was authorized. The limits of these regulations extended to specific powers granted in the legislation.⁸⁸

Under Article 115 of the Maldives' Constitution 2008, the President is entrusted with the power to issue executive orders. This autonomy is vested in the President in separate legislation.

Apart from these examples, as per common law tradition, judges develop laws by way of judicial pronouncement i.e. precedents. Whether it is a regulation, a precedent or an executive order, all are subjected to Islamic tenets.

To conclude this segment, it is important to mention that all laws passed by the Majlis are in the local Dhivehi language, with an English translation produced by relevant authorities, subjected to the Attorney General's approval. In the event of any conflict between the original legislation and its translation, the original version in Dhivehi language will prevail.

1.12 The Court System

Judicial power is vested in the Courts as provided in the Article 7 of the Maldives' Constitution 2008. There exists a three-tier court system: the Supreme Court, which is the highest court of the land, headed by the Chief Justice. Under the Supreme Court is a

⁸⁸ See generally Chapter 4.

single Court of Appeal. Below the appellate court the judiciary divides into two categories: Superior Courts and the Magistrate Courts. In terms of location, the Superior Courts can only be established in the Capital Island Male' as provided in section 53(b) of the Judicature Act 2010 (Law No.22 of 2010). Whereas in each of the inhabited islands there shall be a Magistrate Court under section 62 of the Judicature Act (Law No.22 of 2010). Accordingly, the total numbers of courts in the Maldives are 198. Out of these, 191 are magistrate courts; five are superior courts and the two upper courts: The Supreme Court and High Court.⁸⁹

The jurisdiction of the Magistrate Courts oversees what are described as petty matters (i.e. in relation to the family, *hudūd*, and Criminal and Civil matters) and have territorial jurisdiction within the island where each court is located. Initially, authorities contended creating Magistrate Courts in all inhabited islands – 191 in all – unfeasible, and a waste of resources. However, these Magistrate Courts were established for the convenience of the people in order for them to have easier access to justice. Travelling by sea to another island to file a petition would be a burden both physically and financially unless these courts were in existence.

The five superior courts is comprised of the Family Court, Criminal Court, Juvenile Court, Civil Court and Drug Court. Among these, the Criminal, Juvenile, and Drug, courts all manage criminal matters. The Criminal Court holds jurisdiction in the most severe criminal offences: these include homicide, fraud, terrorism, and *hudūd* offences as well as issues relating to fiscal matters. In addition to settling these types of cases, the court holds authority to mete out penalties and punishments. Juvenile Court deals with underage offenders below age 18; the Drug Court serves as a special court dedicated to hearing narcotics, or drug-related offences and enforcing the law stipulated in Section

⁸⁹ Department of Judicial Administration Maldives (2014).Justice Statistics Report,p.2. Retrieved on 26th Aril 2016 from <http://judiciary.gov.mv/viewer.html?file=/documents/Statistics/2014/2014draft.pdf>

30 of the Narcotics Act (Law No. 17 of 2011). The Family Court deals with family matters except in those cases involving inheritance. Inheritance matters and other civil and commercial matters are dealt with by the Civil Court.

The two higher courts – the Supreme Court (hereafter referred to as “SC”) and the High Court act as Courts of Appeal. Against the decision of the lower Courts, appeal can be referred to the High Courts and against the decisions of the High Court a person can appeal to the Supreme Court. The decisions of the higher Court are binding on the lower courts. The decision of the Supreme Court, which also acts as the guardian of the Constitution is final.

The appointment of judges lies within the mandate of the Judicial Service Commission, a statutory body set up as per Article 157 of the Maldives’ Constitution 2008. The selection criteria for judges are mainly based on Article 149 of the Maldives’ Constitution 2008, which stipulates on the faith, qualification and character of the prospective candidate.

Taking these criteria into account, and the fact that the Maldives is a hundred percent Sunni Muslim nation, the Maldives’ Constitution 2008 dictates that all judges shall be Sunni Muslims. Glaringly, the constitution does not indicate whether judges must also be Maldivian citizens, hence it can be inferred that a foreigner could serve as a judge in the Maldives. Currently, there is no sitting foreign judge but history shows that the Maldives had foreign Muslim judges in the early days of Islam.⁹⁰ Next, with regard to qualifications, it is stated that a basic law degree or *Shari’ah* degree is sufficient. This can be referred to as one area where the Constitution guarantees equal status to *Shari’ah* and the law. With regards to the character of the applicant, the Constitution distinguishes between a person having a criminal record on a *Shari’ah* related offence

⁹⁰ Maloney (1980), op.cit., p.288.

and that of the criminal law of the country. If a person has a record of a prior *hudūd* conviction, then that person is disqualified for life from serving as a judge. However, if a person has a non-*hudūd*-related offence on his record, he may apply for a judgeship after five years from the completion of his sentence.

There are a few quasi-judicial bodies in the Maldives. Such as the employment tribunal which decides on labour related matters and the tax tribunal, which has the mandate to review tax-related matters. The decisions of both these bodies can be referred directly to the High Court.⁹¹

The courts are bound to apply Islamic *Sharī'ah* when the Constitution or law is silent on any particular matter. Every Court has the jurisdiction to overturn the decision of a lower court; likewise lower courts are obliged to follow the decisions of a higher court.⁹²

1.13 Islamic Law

The meaning of Islamic law is derived from all Sunni Schools of law, rather than restricting it to one school in relation to judicial matters under the Maldives' Constitution 2008.⁹³ However, for purposes of worship and other religious duties, Maldivians are followers of the *shafi'i* school.

The Ministry of Islamic Affairs serves as the regulatory body over religion in the Maldives.⁹⁴ The Ministry possesses a mandate to apply the force of law over all legislation and regulations within its purview. In this respect the key legislation is the Religious Solidarity Act (Law No.6 of 1994), which came into force on 4th July 1994. Its central purpose is to eliminate Islamic Religious extremism and to keep mainstream

⁹¹ See generally, Ibrahim, M & Karim, M (2013, July), op.cit.

⁹² The Constitution of the Republic of Maldives 2008, Article 142.

⁹³ See discussion on the definition of the *Sharī'ah* in Chapter 2.1.1; see also the tenets of Islam in Chapter 2.3.1.

⁹⁴ Religious Solidarity Act, First Amendment (Law No.8 of 2014), section 2.

Islamic teachings and Fatwas. The Act decrees that all Maldivians are followers of one religion and one School of law without referring to any religion and School of law, the *madhhab*. However, this creates no confusion in practical terms as the Maldives is a 100% Islamic country and its citizens are followers of the *shafi'i* school. Section 2 of the Act stipulates that the Islamic Teaching, Preaching and Issuance of any Fatwas may be decreed by authorities who are permitted under the Act. The issuance of this permit is based on educational qualifications. The qualification as specified is a recognized degree by the government of the Maldives. A list of recognized universities are provided under the Regulation on Religious Solidarity.⁹⁵ The regulation also provides general guidelines for Islamic teaching for teachers and clerics. Section 4 of this Regulation sets out seven principles in this respect. An analysis shows that on the issuance of a Fatwa, there exists no requirement to maintain the view of the *shafi'i* school but rather the view of majority of *ulamā'* are acceptable. In addition to this, under point 4 of this principle, it is contained that those who teach and preach Islam shall keep in mind religious '*urf*' while doing so, although '*urf*' was never explained.

All mosques belong to the state and are maintained by the Ministry of Islamic Affairs. The *Imāms* of the mosques are employees of the Ministry. Performance of Friday prayers and sermons are guided by the Ministry. Friday sermons are provided to the Imams and they are strictly bound to follow the text provided by the Ministry.⁹⁶

Amongst the religious duties monitored by the Ministry are *Ramadān* (Fasting), *Zakāt* (Aalms) and *Hajj* (pilgrimage). With regard to fasting during *Ramdān*, all restaurants and cafes must remain closed in all inhabited Islands during daytime hours and eating in public is prohibited. Section 616 (a) of the Maldives Penal Code (Law No.9 of 2014) considers eating publicly during the month of Ramadan as an offence

⁹⁵ Ministry of Islamic Affairs' Regulation No. 2011/R-40.

⁹⁶ Religious Solidarity Act, First Amendment (Law No.8 of 2014), sections 3-4.

punishable by law. With regards to *zakāt*, collection of *zakāt* and distribution is managed by the Ministry.⁹⁷ Lastly, in respect to *Hajj* (pilgrimage), a significant reform took place on 16th May 2013 by the creation of the corporate body Maldives Hajj Corporation Ltd by the government. This company is state-owned, and exists with the objective of facilitating affordable *hajj* and *‘umra* pilgrimages for all Maldivian citizens.⁹⁸

Islamic law practices today can be seen in areas of family, inheritance, criminal, and evidence law. The codified Family law originated from the *shafi‘ī* School of law.⁹⁹ All marriages should be registered within the proper court of the law.¹⁰⁰ Unlike some Islamic countries, the marriage *‘urufi* (customary) is not permitted. The proper courts of law are Family court and magistrate courts for purposes of marriage-related matters. Divorce or the dissolution of marriage petitions can be filed by both partners.¹⁰¹ The divorce, *talāq* shall take place before the Court of law. Any dissolution of marriage outside the sanction of the court is considered an offence. Either party who wishes to dissolve the marriage or *talāq* shall submit an application in the relevant court. Once such an application is received, the matter initially will be referred to the counseling department of the Court for reconciliation of the couple. For this, the period is three months. If the court finds that during the reconciliation period, the couple is not in a position to reconcile, then with the permission of *qāḍī*, the husband may recite the *talāq* before the Court. In the case of wife, the dissolution petition is occasionally treated as a

⁹⁷ See discussion on potential reform in the area of the Zakat Management in Chapter 5.2.7.

⁹⁸ Maldives’ Hajj Corporation’s website. Retrieved on April 28th, 2016 from <http://mhcl.mv/about>

⁹⁹ Nasheed, A.M. (2013). Salient features of the Maldivian family law, Maldives Law Review, 2013 1MLR p.17-28.

¹⁰⁰ Maldives Family Act (law No.4 of 2000), section 3.

¹⁰¹ *Ibid.* sections 23- 24.

khulu or a *faskh* case.¹⁰² Polygamy is permissible but with some restrictions following a financial capability analysis of the husband.¹⁰³

In criminal law, the Police investigates crimes and the Prosecutor General issues state charges for offence. The meting out of punishment rests on the Ministry of Home Affairs except in *hudūd* cases, which are enforced by the Court itself before the *qāḍī*.

As discussed earlier, in the salient features of the Maldives' Constitution 2008, in terms of eligibility to various public posts, the candidate must not have a conviction of any *hudūd* offence. The SC interpreted the meaning of this provision as any person who has been charged with any *hudūd* offence as provided in Islamic law, regardless of being convicted or sentenced as a *hudūd* punishment. In other words, the offence of *sariqah* (theft) is an offence prescribed in the Qur'ān, though the actual punishment is neither pronounced, nor applied in the Maldives. Thus, a person who has been convicted of theft will be barred from holding a public post in the Maldives.¹⁰⁴

Hudūd offences are those specified in the Qur'ān and Sunnah. The Qur'ān decrees four offences, namely fornication, theft, slanderous accusation and highway robbery. Two additional offences—alcohol consumption and apostasy—are covered in Islamic law. Mutiny is considered by some as a *hudūd* offence, which makes the total number of *hudūd* offences as seven.¹⁰⁵

In practice, fornication and drinking alcohol are the only offences charged and punished in the Maldives as prescribed under Islamic law. Yet, the penalty provided for adultery: *rajm* (stoning) in Islamic law is not executed. However, 80 lashes and house

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, section 12.

¹⁰⁴ Aseeth Thaufeeq v. Maldives Election Commission [2011/SC-E/07].

¹⁰⁵ Kamali, M. H. (2010). Are the hudud open to fresh interpretation? *Islam and Civilisational Renewal (ICR)*, 1(3).

arrest as *tāzir* are practiced.¹⁰⁶ This practice has not been changed even with the implementation of the new penal code: the Maldives Penal Code (Law No.9 of 2014). The only noticeable reform was the re-writing of past practices, and offences relating to Islamic law. Nevertheless, section 1205 of the Code stipulates, notwithstanding offences relating to *hudūd* and *qiṣās*, shall be punishable as prescribed by *Shari'ah*.¹⁰⁷ Despite the said provision regulating these offences, and the open declaration of *Shari'ah* serving as the supreme authority, the penal code is generally most relied on in these cases. Yet the provision grants autonomy for judges in the application of *Shari'ah* in matters presented to them as provided in section 1205 of the Code.

With respect to the law of evidence, the Evidence Act 1976 (Law No. 24 of 1976) came into force on 23rd September 1976. This is a focused piece of legislation concerning evidence. Article 7 of the Act provides that all legal procedures are governed by the Act itself, except in cases where the Qur'ān prescribes certain offences to be proved in a particular manner. The Act does not state the offences as provided under the Qur'ān. Another piece of legislation concerning the testimony of women is the Women Testimony Act 1972 (Law No.14 of 1972), which came into force on 18th April 1972. This very brief Act contains only one provision, which stipulates that a woman's testimony stands equal to a man's, unless otherwise determined in the Qur'ān.

Regarding inheritance, the Inheritance Claims Act (Law No. 25 of 1975) came into force on 10th November 1975. This law serves as a procedural law containing a provision stipulating that all inheritance claims be submitted within 60 days after death.

In inheritance matters, the Maldives follows Islamic Inheritance law except in certain land cases. Currently, inheritance remains 'uncodified', and follows a brief regulation made by the relevant Court.

¹⁰⁶ Suood, A. 2014). *Maldivian Legal System*. Male': Maldives Law Institute, pp.114-115.

¹⁰⁷ Maldives Penal Code, Third Amendment (Law No.26 of 2015).

1.14 Commercial Law

Black's Law Dictionary defines the term "commercial law" as "to designate the whole body of substantive jurisprudence applicable to the rights, intercourse, and relations of persons engaged in commerce, trade, or mercantile pursuits".¹⁰⁸ K.S Kim states that commercial laws vary, depending on country and its legal system. In some countries commercial law is comprised of several pieces of legislation, while in others it forms a single Code of law. In some cases, a law tends to be commercial law by nature of it, while in other instances, it is listed as part of general civil law. For example, Bankruptcy law is a separate piece of legislation in the United States of America, whereas in other countries it is recognised as part of their respective Civil Procedure Codes.¹⁰⁹

In the Maldives, the commercial laws are comprised of several pieces of legislation. The office of the Attorney General is responsible for law gazetting and publication. According to the Attorney General office websites, commercial laws are listed in eight categories, namely; (a) Administrative and Constitutional laws, (b) Religious and Social laws, (c) Fiscal and Financial laws, (d) Fisheries and Environmental laws, (e) Economic and Commercial laws, (f) Communication related laws, (g) Land and Property laws, and (h) Procedural laws. From these the nature of commercial laws are in two categories, namely Fiscal and Financial laws (15 total) and Economic and Commercial laws (23 total). Therefore there are currently 38 commercial laws enforced in the Maldives (hereafter referred to as "Commercial laws of the Maldives"). From these laws the oldest piece of commercial legislation commenced on 12th April 1970

¹⁰⁸ Campbell, H. (1990). *Black's law dictionary* (7th Edition). St. Paul, MN: West Group, p.270, entry "commercial law".

¹⁰⁹ Kim, K. S.(2014). Codification in East Asia: Commercial Law. In Wen-Yeu Wang. (Eds.) (pp.61-79), *Codification in East Asia*. Switzerland: Springer.

and the latest on 15th November 2015. A list of these laws can be found in Appendix (B) of this thesis.

1.15 The Economy and Commerce

As an island nation, with more territorial sea than land, the economy and commercial activities in the Maldives are based on mainly fishing and tourism.¹¹⁰ In addition to this, the shipping and construction sectors have played a secondary role in the economy. The financial sector remains small by comparison, and is dominated by the banking industry. One of them is the state-owned Bank of Maldives Plc, with the rest being foreign, including an Islamic bank.

In the early 1980s, the Maldives was among the 20 poorest countries in the world, and today it has grown into a middle-income nation, with a GDP of USD 6,300.00 per capita.¹¹¹ With the opening of its first tourist resort in 1972, the economy of the country has undergone rapid change and foreign investments in the country have increased too. The main foreign investment area is tourism, which is governed under the Maldives Tourism Act 1999 (law No.2 of 1999). Under the law, tourist accommodation facilities are divided into four types: tourist resorts, hotels, vessels and guest houses.

There are 105 Island tourist resorts, developed under a one-island, one-resort business model. Besides this, there are 19 Hotels, 75 guest houses and 154 Tourist Vessels. Altogether the total number of tourist accommodations currently stands at 353, according to the latest information provided by the Ministry of Tourism, Arts and Culture.¹¹²

¹¹⁰ The World Bank Group website.(2016).The Maldives Country Profile. Retrieved on 21st May 2016 from www.worldbank.org

¹¹¹ *Ibid.*

¹¹² Ministry of Tourism, Arts and Culture, Maldives.(2013).Tourism Yearbook. Male': The Government of the Maldives, p.1.

Cowry shells (*Cypraea Moneta*), or in the Maldives locally known as *boli*, served as the first known medium of exchange, not only used in the Maldives, but widely circulated as currency in Asia and Africa.¹¹³ According to the Moroccan Traveler *Ibn Batuta*, these cowries were cultivated in the Maldives. Hence, cowry shells exports represented one of the income earning sources in the Maldives until the late 19th century.¹¹⁴ Today, the currency of the Maldives is the “*Rufiyaa*”, with one *rufiyaa* being subdivided into 100 *laari*, which are coins. The word *Rufiyaa* originated from the word of *rupiya*, which is used in India. The exchange rate is MVR 15.42 to 1 USD.¹¹⁵

The Maldives has been a member of the World Trade Organisation since 31 May 1995.¹¹⁶ Apart from this, there are other trade treaties including regional and bi-lateral treaties where Maldives has been a party in the past decades.

1.16 Islamic Finance

In general, the regulatory framework for Islamic finance is the same framework used by conventional finance. The main regulatory body in respect to banking, finance leasing and insurance industries is the central bank: the Maldives Monetary Authority (hereafter referred to as “MMA”).¹¹⁷ And the capital market regulatory body is the Capital Market Development Authority (CMDA).

The Maldives Banking system follows dual Islamic and conventional systems. Two, full-fledged Islamic financial institutions operate in the country: the Maldives Islamic Bank (MIB) and the Amana Takaful. There are also three institutions that have Islamic

¹¹³ Maldives Monetary Authority (1983), “*Dhivehi rajjega Faisaa*” (The Maldivian Currency). Male’: The Government of the Maldives, p. 1.

¹¹⁴ *Ibid*, p. 2.

¹¹⁵ Central Intelligence Agency.(US) website, The world factbook, the Maldives Country view. Retrieved on 2nd July 2013 from <https://www.cia.gov>

¹¹⁶ The World Trade Organisation website. Member Information: Maldives and the WTO. Retrieved on 21st June 2013 from https://www.wto.org/english/thewto_e/countries_e/maldives_e.htm

¹¹⁷ See for the details on functions of the MMA and relevant legislation and regulation in relation to the banking and finance supervisory in Chapter 4.1.4; Chapter 5.5.2; Chapter 5.5.7.

Windows which are the Bank of Maldives (MBL), the Housing Development Finance Corporation (HDFC) and the Capital Market Development Authority (CMDA).¹¹⁸

With respect to Islamic banking, the Maldives Islamic Bank began operations officially on 14th March 2011 as a result of an agreement between the Islamic Corporation for the Development of the Private Sector (ICD) and the Government of the Maldives.¹¹⁹ The bank offers various deposit and financial products. The Maldives Islamic Bank Annual Report (2011) shows that from among the products offered, the most popular products are *Murābaḥah* and *Istisnā'*.¹²⁰

The Bank of Maldives (BML) recently was granted a license to operate an Islamic window. The BML offers various Islamic facilities in personal and business banking. All business products were targeted mainly towards the marine and tourism sectors.¹²¹ Ironically, even though most of the economic investments result from the tourism and marine sectors, Islamic banks often are reluctant investors in these areas because these industries often include the non-halal trade of pork and liquor.

Sheikh Fayyaz Ali Maniku, member of the *Shari'ah* Committee of the Maldives Islamic Bank claimed that MIB does not invest in the tourism sector because of certain activities within the sector which are not *Shari'ah* compliant. However, if the MIB finds a solution to invest in the tourism sector, the bank would welcome it. He further stated

¹¹⁸ Maldives Monetary Authority website, Retrieved on 22nd June 2013 from www.mma.gov.mv

¹¹⁹ Maldives Islamic Bank Pvt. Ltd., Maldives Islamic Bank Annual Report (2011), p.9.

¹²⁰ There are variety of facilities offered by the Maldives Islamic Bank. These include, under the individual deposit facility; the *Current account*, the *Savings Account* and the *General Account*. In addition to this, for the individual financing; *motor bike leasing*, *Consumer Goods*, *Murābaḥah General Asset Financing*, and *Construction Material Financing*. In business facilities, includes; for deposit; *Current Account*, *General Account Investment*. There are certain facilities for business finance also; such as *letter of Credit-LC*, *Shipping Guarantee*, *Murābaḥah General Assets*, *Murābaḥah Vessel Finance*, *al-Istisnā'* (*Project Financing*) and *Guarantee Financing*. (Maldives Islamic Bank's website. Retrieved on 22nd June 2013 from <http://www.mib.com.mv/>).

¹²¹ Bank of Maldives' website. Retrieved on 23rd July 2014 <https://www.bankofmaldives.com.mv/islamic-banking>

that it was a duty upon the academics to propose such a framework.¹²² Although this dissertation is not focused on these issues, some solutions for tourism investment will be suggested in Chapter 4.¹²³

Amana Takaful Maldives is a foreign company that has been operating Takaful services in Maldives as an agent of the Amana Takaful Sri Lanka. This was the first Islamic Finance Institution established in the Maldives, which took place in 2003 under the Company Act 1996 (Law No.10 of 1996). The company offers a wide range of Islamic Insurance products. These include individual and business Takaful products.¹²⁴ The company has since changed to a public listed company and its first shares were listed in the CMDA on 17th September 2011.¹²⁵

The HDFC is a state owned enterprise created on 29th March 2004 to offer housing facilities. In May 2013, it opened an Islamic window to offer *Shari'ah* compliant housing facilities under the name of "HDFC Amana".¹²⁶

The CMDA is the regulator of the capital markets in the Maldives.¹²⁷ The vision of the CMDA is to develop an Islamic Capital Market parallel to the existing conventional market in the Maldives. There are nine principles approved by the *Shari'ah* Council of the Authority.¹²⁸ Looking into these principles and the terms used by the *Shari'ah* Council of the CMDA, it is presumed that these resemble the Malaysian framework

¹²² The Researcher conducted a brief informal interview with Sheikh Fayyad Ali Maniku on 5th December 2013.

¹²³ See generally Chapter 4.1.2.

¹²⁴ The products offers by the Amana Takaful Maldives includes; *Takaful Dhahana, Takaful Expat, Takaful Travel Plan, Takaful Easy Marine, Marine Hull-Takaful, Hotelier-Comprehensive Takaful, Fire Takaful, Protection and Indemnity Takaful, Total Drive, Business Cover, Takaful My home etc.* (Amana Takaful Maldives website. Retrieved on 22nd June 2013 from www.takaful.mv)

¹²⁵ *Ibid.*

¹²⁶ Housing Development Corporation website. Retrieved on 22nd June 2013 from www.hdfc.com.mv

¹²⁷ For further details on function and relevant laws in relation to the capital market, see generally; Chapter 4.1.6, Chapter 5.5.4, and discussion in Chapter 5.5.11.

¹²⁸ The principles approved by the *Shari'ah* Council includes; *Musharak, Mudarabah, Murabahah, Qard Hasan, Istisna, Bay' salam, Bay' Bithaman Ajil (BBA), Ijarah and Ijarah Thumma Al bay'*. There are structuring Supplementary Principles. These includes: *Bay' Dayn, Bai Muzyadah, Kafalah, Haq al-Tamalluq, Hibah, Hiwalah, Ibrā', Rahn, Sukūk, Ujurah, Wakalah and Ithifaq Dhimmī* (Capital Market Development Authority website. Retrieved on 22nd June 2013 from www.cmda.gov.mv)

more than all others. Simmons and Simmon recommended the Malaysian model¹²⁹ for the Maldives *Ṣukūk* Market. However, they noted that there were a number of legal regulatory obstacles to the issuance of *Ṣukūk* in the Maldives. These include: the ability to use bankruptcy remote special purpose vehicle, land transfer taxes and the recognition of trust and beneficial ownership under the Maldivian law. However, there are contractual solutions for this in their view. They suggested that in the absence of a local Special Purpose Vehicle (SPV) framework; the best *Ṣukūk* structure would be *Ṣukūk al -Murābahah* and *Ṣukūk al Wakālah* in the local market in the Maldives.¹³⁰

1.16.1 Challenges

In terms of challenges, the Maldives faces and shares most of the common problems that arise within the Islamic financial industry throughout the world i.e. a lack of a comprehensive legal framework, expertise and awareness. Additionally, the scope of Islamic investment remains very limited as the major economic activities rely on tourism industry which, the Islamic bank is reluctant to invest because of the unconformity of the tenets of Islam with the alcohol and pork trades. To cater to these issues further studies should be conducted based on international experience.

1.17 Significance of the Study

The examination of this topic is significant as its focus is on one country: The Maldives. Previous studies focused on subject matters rather than comprehensive research. It is useful for Islamic countries to establish a legal framework for Islamic finances in the face of this fast growing sector. In particular, policy makers and law-makers in the Maldives should provide such a legal framework as there is no Islamic financial legislation yet.

¹²⁹ Simmons and Simmons.(2013) The Report on Developing a Sukuk Market in the Maldives, p.9. Retrieved on 22nd June 2013 from www.cmda.gov.mv)

¹³⁰ *Ibid*, p.4.

This study is helpful in that it examines one country's *Shari'ah* -based commercial law, and its transformation into a new system. By the end of this research, laws will be identified as being in accordance with the tenets of Islam along with the degree of inconsistency other laws seem to violate Islamic tenets within the Maldives.

1.18 The Structure of the Study

This research contains six chapters including a general framework; the basic Islamic terminologies and the benchmark in relation to commercial law reform is presented in Chapter two; the Islamic commercial law reform models are shared under Chapter three. Chapter four evaluates the existing role of the tenets of Islam in the Maldives Commercial law reform. The main thrust of the research is found in Chapter Five, which reviews the tenets of Islam in the Maldives Commercial laws. Finally, the conclusion and findings are presented in Chapter six, which will wrap up the research.

This thesis, furthermore, exhibits three appendices: the list of interviewees, the reviewed legislations, and the proposal for amending of commercial laws to accommodate the tenets of Islam in the Maldives.

CHAPTER 2: COMMERCIAL LAW REFORM: ISLAMIC TERMINOLOGIES, PRINCIPLES AND BENCHMARK

2.0 Introduction

This chapter develops a framework which will play a key role in evaluating different segments of this thesis. Since the initial object is to explore the Maldives' commercial laws and assess whether these laws contain any provisions in contrary to the tenets of Islam, and the ultimate objective is to suggest possible reform models of these legal provisions, this chapter opens by shedding focus on general principles of Islamic legal reform. A detailed discussion on some concepts of *Sharī'ah*, the tenets of Islam etc., are provided as a proper understanding of these terms are crucial to comprehend different segments of the thesis and are frequently cited.

This chapter also includes Islamic commercial law reform in a historical setting, especially on *majallah al-Aḥkām al-ʿAdliyya*, and Egyptian Civil Code. Subsequently, it sheds focus on the Islamic benchmark for commercial law reforms, containing the divine provisions as found in the *Sharī'ah*, i.e. the prohibition of the *ribā* (usury), *gharār* (uncertainty) and *maysir* (gambling) etc. Such a discussion is instrumental for a comprehensive understanding of commercial law reform from a *Sharī'ah* perspective in general and specifically from the perspective of Maldives with reference to Article 10 of the Maldives' Constitution 2008.

2.1 General Principles of Islamic Legal Reform

Conceptual Analysis

Sharī'ah

2.1.1 Nature of *Sharī'ah*

The term *Sharī'ah* is an Arabic word, which means “way” or “road to the water source” or “pathway”.¹³¹ The Qur’ān describes the term *Sharī'ah* in a similar manner:

“Then We put thee on the (right) Way of Religion: so follow thou that (Way), and follow not the desires of those who know not.”¹³²

Nevertheless, in relation to Islamic legal studies, this term is commonly understood as a body of laws that Allah has prescribed for His servants through the Holy Prophet Muhammad (pbuh).¹³³ Simultaneously, the term “Islamic law” is shared widely as a synonym for the term *Sharī'ah*.¹³⁴ Nonetheless, the distinction between law and *Shari'ah* seems to be rapidly diminishing in its current usage, at least in the Muslim world.¹³⁵ In general, the differences between the two terms are in principle: the *Sharī'ah* is immutable and it was revealed. Whereas laws are generally recognised by the fact that it may be altered and adapted to the changing needs by legislatures and judges and other social factors. However, the laws of Allah were given to man once and for all time; hence, society should adapt itself into the law, rather than generating laws of its own as a response to constantly changing stimulus resulting from the vagaries of life.¹³⁶

¹³¹ Zaidan, A.K.(1985). *Al-Madkhal Li Dirāsāt Sharī'ah Islāmiah*.Baghdad: Maktabah al-Qudus, p. 34.

¹³² Al-Qur’ān 45:18 (Abdullah Yusuf Ali).

¹³³ Hassān, H. H. (1997).*An Introduction to the Study of Islamic law*.Islamabad:Leaf Publication, p.3.

¹³⁴ Shalakany, A. A. (2008). Islamic Legal Histories. *Berkeley Journal of Middle Eastern & Islamic Law*, 1, 1.

¹³⁵ Brown, N. J. (1997). Shariah and State in the Modern Muslim Middle East. *International Journal of Middle East Studies*, 29 (03), 359-376.

¹³⁶ Zweigert, K., Kötz, H. & Weir, T. (1998). *Introduction to Comparative Law* (Vol. 3). Oxford: Clarendon Press, pp. 373-374; Crone, P. (2002). *Roman, provincial and Islamic law: the origins of the Islamic patronate* (Vol. 8). Cambridge: Cambridge University Press,pp.18-19.

Even though the term *Sharī'ah* is widely used in the Muslim world, the Maldives is one of the few countries that has incorporated a constitutional definition for the term *Sharī'ah*: Under Article 274 of the Maldives' Constitution 2008, the word *Sharī'ah* is defined as:-

“[The] ways preferred by the learned people within the community and followers of the *Sunnah* in relation to criminal, civil, personal and other matters found in the *Holy Qur'ān* and *Sunnah*.”

A closer examination of this definition in the Maldives' Constitution 2008 may reveal that it represented an attempt to restrict *Sharī'ah* in the modern sense by specifying three key areas: civil, criminal and family law, and discarding other religious or ritual rules that form part of the *Sharī'ah*. However, Abdul Rauf,¹³⁷ the Acting Chief Judge of the High Court of the Maldives contends that the Constitutional definition of *Sharī'ah* does not restrict it in these three provided areas. In his view the phrase “other matters found in the Qur'ān and Sunnah” in the Constitution denotes that it extends beyond that three areas specified in the Constitution. Thus, Abdul Rauf's interpretation can be used to clarify the intentions of Parliamentarians who proposed such terms at the time of adoption of the Constitution. It can be presumed that their intentions were to facilitate practical references for the application of *Sharī'ah*. Apart from the restriction of the *Sharī'ah* in the area of *mu'āmalāt*, their common convictions were to extend the application of the *Sharī'ah* within the four Sunni schools of laws. In this way, they believed that even though the Maldives is a *Shafī'ī* dominated society; it would facilitate to apply and select the most suitable opinion for the Maldivian community.¹³⁸

In other words, they are referring to Islamic legal terms such as *takhayyur* (selection)

¹³⁷ The Researcher conducted a personal interview with Hon. Abdul Rauf at the High Court of the Maldives in the Maldives on 8th December 2013.

¹³⁸ The People's Majlis website (2008, May 4). The minutes of the Constitutional Review Assembly Proceeding on the definition of the *Sharī'ah*. Retrieved on 2nd April 2013 from www.majilis.gov.mv

and *talfiq* (patching), which will be detailed in the next chapter.¹³⁹ According to Husnu Al-Suood, the former Attorney General of the Maldives, the word ‘*Sharī’ah*’ is referenced in a single situation in the Maldives’ Constitution 2008, which is the provision relating to the duties of judges.¹⁴⁰ According to him, in a situation where the law is silent, *Sharī’ah* will prevail; hence, the definition in the Constitution serves as a practical reference for judges.¹⁴¹ Furthermore, the term “tenets of Islam”, found in the Maldives’ Constitution of 2008, with respect to lawmaking and this will be discussed in a later chapter.¹⁴²

In general, rules of *Sharī’ah* are derived from the revealed sources of law: the Qur’ān and Sunnah, which serve as the primary sources of *Sharī’ah*. The Qur’ān embodies the speech and commandments of Allah (God). Qur’ānic verses can be classified into four categories: Islamic faith, morals and ethics, Qur’ānic stories and legal injunctions. Of the more than 6,200 verses in the Qur’ān, it is found that less than one-tenth of these contain legal injunctions,¹⁴³ or only 228 verses. The specifications of verses are as follows: 70 verses are on family law-marriage, divorce, and inheritance; 70 verses deal with matters on civil law-trade, contracts, mortgages, rent, company, etc.; 30 focus on penal law; 25 govern the relationship between Muslims and non-Muslims; 13 relate to jurisdiction and procedures; 10 guide the relation between rich and poor, public finance, etc. and 10 verses include matters on constitutional affairs.¹⁴⁴

¹³⁹ See generally, Chapter 3.1.

¹⁴⁰ The Constitution of the Republic of Maldives 2008, Article 142.

¹⁴¹ The Researcher conducted a personal interview with Hon. Husnu Al Suood (the former Attorney General of the Maldives’) at his office in the Maldives on 9th December 2013.

¹⁴² See discussion in 2.4.1.

¹⁴³ Laldin, M. A. (2006). *Introduction to Shariah and Islamic jurisprudence*. Kuala Lumpur: CERT Publications, p. 57.

¹⁴⁴ Khalaf, A. W. (1978). ‘*Ilm usūl al-Fiqh*’. Kuwait: Dārul Qalam, pp. 32-33.

According to Doi, these injunctions form the sources of *Sharī'ah*.¹⁴⁵ Assad also observed that the definitive ordinances of the Qur'ān, which are known as the *nusus* or clear legal injunctions are what constitute real eternal *Sharī'ah*.¹⁴⁶

Sunnah is the ideal conduct of the Prophet (pbuh), which explains and clarifies the meaning of the Qur'ān.¹⁴⁷ This means that the *Sunnah* serves as a source of law interlinked to the Qur'ān itself where the legal injunctions provided in the Qur'an are explained in the *Sunnah*.¹⁴⁸ For instance, *ribā al-nasī'ah* is prescribed in the Qur'ān and *ribā al-faḍl* is additional form of *ribā* that are legitimized by the *Sunnah*.

Apart from these primary sources of *Sharī'ah* i.e. the Qur'ān and *Sunnah*, there are also secondary sources: *ijmā'* (consensus) and *qiyās* (analogy).¹⁴⁹ The rest could be identified as supplementary sources, which include: *istihṣān* (juristic preference), *istishāb* (presumption of continuity), *al-maṣlahah mursalah* (consideration of public interest), *qawl al-ṣahabī* (the saying of the Prophet's companions), *'urf* (customary law), *sadd al-dhara'i* (blocking the means) and *shar'min qablanā* (revealed laws proceeding to the *Sharī'ah* of Islam) and *istiqr'a'* (induction).¹⁵⁰

In principle, the primary sources highlighted represent general norms; while the *ijtihad* (independent legal reasoning) could be engaged for purposes of providing details of *Sharī'ah* rules.¹⁵¹ In this respect, secondary sources such as *qiyās* can be employed, *inter alia*, for *maṣlahah*, *istihsan* and *sadd al-dhara'i*.¹⁵² According to Hamidullah, the

¹⁴⁵ Doi, I. A. (1997). *Shari'ah: The Islamic Law*. London: Taha Publishers Ltd., p.36.

¹⁴⁶ Assad, M. (1961). *The Principles of State and Government in Islam*. California: Univ of California Press, p. 12.

¹⁴⁷ Hasan, A. (1968). The sources of Islamic Law. *Islamic Studies*, 165-184.

¹⁴⁸ Duderija, A. (2012). Evolution in the Concept of *Sunnah* during the First Four Generations of Muslims in Relation to the Development of the Concept of an Authentic *Ḥadīth* as Based on Recent Western Scholarship. *Arab Law Quarterly*, 26(4), 393-437.

¹⁴⁹ Al-Zarqa, M. (1968). *Al-Madkhal al-Fiqhī al- 'Āmm: al-Fiqh al-Islāmi fī Thawbihī al-Jadīd*. Damascus: Dar al-Fikr. Vol:1, p.60

¹⁵⁰ Kamali, M. H. (2008). *Shari'ah Law: An Introduction*. Oxford: Oneworld Publications, p. 19.

¹⁵¹ Assad (1961), op.cit., p.15.

¹⁵² Khalaf (1978), op.cit., p. 216.

word ‘source’ means nothing else, but the place from where one gets the first idea of a law. Hence, to derive new rules it is not restricted to the above mentioned sources; it may be extended to other sources, as long as it does not violate the clear tenets of Islam.¹⁵³

In contrast with the modern concept of law, the *Sharīʿah* regulates all aspects of life, which comprises moral, ethical and religious duties.¹⁵⁴ In this sense, the concept of *Sharīʿah* is divided into three main disciplines. First, *al-‘aqīdah* (faith), i.e. the belief in Allah and the Day of Judgment, etc.; second, *al-akhlāq* (morals and etiquettes), i.e. obedience to parents, honesty, etc. and third, matters relating to *al‘amaliyya* (conduct), which constitutes *fiqh* (Islamic Jurisprudence).¹⁵⁵

Fiqh is subdivided into two more disciplines i.e. ‘ibadat (rituals) and *mu‘āmalāt* (transactions). Wael B. Hallaq observed that the former is ritualistic and therefore applies to the “private sphere” of religious faith; while the latter creates the law “proper”.¹⁵⁶ Furthermore, the synthesis of rituals is that all actions should be derived and validated from the primary sources of *Sharīʿah*, which is contrary to *mu‘āmalāt* as generally all transactions are considered permissible unless prohibited by the *Sharīʿah*.¹⁵⁷

It will be relevant to share here that *Sharīʿah* is confined to general directives; the details of these rules are explained in the subject of *fiqh*,¹⁵⁸ which is the product of human reason by applying Islamic legal theory, *uṣūl al-Fiqh* (the principles of Islamic

¹⁵³ Hamidullah, M. (1954). Sources of Islamic Law—A New Approach. *Islamic Law Quarterly*, 1, 205.

¹⁵⁴ Anderson, N. (1976). *Law Reform in the Muslim World*. London :Athlone Press , p. 3.

¹⁵⁵ Schacht, J. (1964). *An introduction to Islamic law* .Oxford: Clarendon Press,p.1

¹⁵⁶ Hallaq, W. B. (2009). *Sharīʿah: Theory, Practice, Transformations*.Cambridge: Cambridge University Press, p. 226.

¹⁵⁷ Ahmed, H. (2006).Islamic Law, Adaptability and Financial Development. *Islamic Economic Studies*, 13(2), 79-101; Nyazee(1996),op.cit., p. 293.

¹⁵⁸ The term *fiqh* literally means understanding. It refers to “the knowledge of the *ahkām al-shar‘ī*(legal rules), pertaining to conduct, that have been derived from their specific evidence”. See generally; Nyazee(1994),op.cit., p. 22.

Jurisprudence)¹⁵⁹ which is used for deriving and explaining *Sharī'ah* rules, which were further expanded through *al-qawaid-al-Fiqhiyyah* (Islamic Legal Maxims).¹⁶⁰ Furthermore, rules relating to *'ibādāt* (rituals) are provided in the Qur'ān and Sunnah. However, rules relating to *mu'āmalāt* are given a more general guidance for human reasoning and interpretation.¹⁶¹ It is certainly evident that substantial parts of Islamic law are based on the rationale and opinions of Islamic jurists, the *fuqahā'*.¹⁶²

The works of these *fuqahā'* are compiled and framed within the platform of the *madhāhib* (sg. *madhhab*), the Islamic schools of law. The most popular and widely practiced are the four Sunni Schools referred with their founding fathers: Abu Hanafi Nu'mān ibn Thābit (699-767), Māliki' ibn Anas al-Asbahī(711-795), Muhammad ibn Idrīs al- Shāfi'ī (767-820) and Ahmad ibn Muhammad ibn Hanbalī (780-855).¹⁶³

Each school offers up its own interpretations of *Sharī'ah* based on the primary sources of law: the Qur'ān and Sunnah. If it refers to the view of the majority *fuqahā'*, it usually indicates that the majority view of these four Sunni law schools are the same, while opposite is the case with the minority view. For application, preference will be given to the view held by the majority over the view held by the minority, unless there

¹⁵⁹ The term *Usul al-Fiqh* literally means “root”. The rule of *fiqh* that are deduced from the Qur'ān and Sunnah in conformity with a body of principles and method are collectively referred to as the disciple of *usul al-fiqh*. See, Kamali, M. H. (2003). *Principles of Islamic Jurisprudence*.UK: Islamic Texts Society Cambridge, p. 13.

¹⁶⁰ The word *al-qawa'id* is derived from the word *al-qa'idah*, which means “the principles”. By merging with the words *fiqh* and *qawa'id*, it then refers to “the principles of Islamic law.” See, Kamali, M. H. (2006). Legal maxims and other genres of literature in Islamic jurisprudence. *Arab Law Quarterly*, 20(1), 77-101.

¹⁶¹ Mansuri, M.T. (2001). *Islamic Law of Contracts and Business Transactions*. Lahore: Turab-ul Madina Printers, p. 3.

¹⁶² Peters,R.(2003). From Jurists' Law to Statute Law or What Happens When the Shari'a Codfied. In Roberson, B. A. (Eds.), *Shaping the Current Islamic Reformation*(pp.81-94). London:Frank Cass Publishers.

¹⁶³ Balala, M.H. (2011). *Islamic Finance and Law: Theory and Practice in a Globalized World* (Vol. 5). London:IB Tauris, p. 32.

remains a valid reason. These complexities and differences of jurists represent “different manifestations of the same divine will” and are regarded as diversity within unity.¹⁶⁴

2.1.2 The Meaning of Islamic Legal Reform

The word “reform” is used in our daily lives to mean “change” or “modify”. The Arabic equivalent is “*iṣlāḥ*.”¹⁶⁵ Black’s Law Dictionary defines it as, to correct, rectify, amend, and remodel.¹⁶⁶ Similar is the view of Wael B. Hallaq who describes it as, “to change into improved form and to improve by change”.¹⁶⁷ Accordingly, “Islamic legal reform” denotes changes that take place in interpretation, increasing flexibility and application of the sources of Islamic law according to contemporary needs.¹⁶⁸

Imam Shāfi‘ī, Muhammad ibn Idris al-Shāfi‘ī is the accredited forefather of Islamic legal reform theory.¹⁶⁹ His main contribution to *usūl-al fiqh* is the fundamental methodological framework for Islamic law reform. Following him, one may find other scholars such as Abū Hāmid al Ghazālī (1058-1111), Taqī al Din ibn Taymiyya (1263-1328), Abū Ishaq al-Shātibī (1320-1388), Muhammad al-Shawkānī (1760-1834), and Muhammad ibn Alī al-Sanūsī (1787-1859). These reformers were far from identical in their respective theories. However, their common convictions were to base Islamic legal theories on two primary sources, the Qur’ān and Sunnah.¹⁷⁰

¹⁶⁴ Kamali(2003),op.cit., p.169.

¹⁶⁵ There are other terms such as “*tajdid*” which means “Islamic revivalism” and “Modernism”. While the latter is widely used interchangeably as synonyms of the term “reform”, the former is referred to as the implementation of the *Shari’ah* as it stood without any further scope of modification of its texts. See, Saeed, A. (1996). *Islamic banking and interest: A study of the prohibition of riba and its contemporary interpretation* (Vol. 2): Brill. p, 8, Robinson, F. (2013),.op.cit.,pp.26-50.

¹⁶⁶ Campbell, H. (1990),op.cit., p.1281, entry “reform”.

¹⁶⁷ Hallaq, W. B. (2009). *Shari’a: theory, practice, transformations*. Cambridge: Cambridge University Press, p. 444.

¹⁶⁸ Black, A. (2011). *The history of Islamic political thought: from the Prophet to the present*. Edinburgh: Edinburgh University Press, p.281;See also generally, Qaradāwī, Y. (1990). *Shari’iah al-Islāmiyya Ṣaliha lil thaḥbiq fi kulli zamān wa- makān*. Cairo:Al-Maktab Wahbah ,pp.75-78.

¹⁶⁹ Opwis,F.(2004).Changes in Mordern Islamic Legal Theory:Reform or Reformation.In Browers, M., & Kurzman, C. (Ed.). *An Islamic Reformation?*(pp.28-53). Lanham, MD: Lexington Books; Shalakany, A. A. (2008),op.cit.

¹⁷⁰ *Ibid*.

Probably, Jamaluddīn al-Afghanī (d.1897) and his disciple Muhammad Ali ‘Abduh (1849-1905) were co-founders of the Islamic modern reform theories.¹⁷¹ Yet, this point is debatable as Sayyid Ahmad Khan (1817-1898) wrote earlier than Afghani and ‘Abduh in the subject of the Islamic legal reform. For instance, in *Mohammedan Commentary of the Holy Bible (1862)* he addressed the harmony between science and scriptures. Likewise, in the *Life of Mohomet (1870)*, he addressed the issue of polygamy and *jihād*. All these writings were written before the publications of Afghani and ‘Abduh.¹⁷² However, Afghani, and ‘Abduh, as well as ‘Abduh’s disciple, Rashid Riḍā (1865-1935), were leading reformers, *inter alia*, in the late-19th and early 20th centuries, respectively. Afghani was an inspiring and prominent figure who held great influence with modern intellectuals in Egypt, Iran and Turkey.¹⁷³ He encouraged the reformation of Islam, and Islamic law in order to brace Muslims against the foreign threat. His thoughts influenced ‘Abduh and Riḍā. While the primary approach of ‘Abduh was to cease *taqlīd* (to imitate) and to present *ijtihād* as the only way to move forward, his disciple Rida further developed it by forming the *maṣlaḥah* as a general principle of legal reform.¹⁷⁴ Thus, modern Islamic legal reforms are either directly or indirectly the outcome of ‘Abduh and Riḍā’ works.¹⁷⁵ Thus, the most prominent reformists who contributed the most modern visions and agendas were Afghani and ‘Abduh in the

¹⁷¹ Jung, D.(2012). Islamic Reform and the Global Public Sphere Muhammad Abduh and Islamic Modernity. In Stetter ,S.(Eds.) *The Middle East and Globalization Encounters and Horizons* (pp.154-169)New York: Palgrave Macmillan; Watt, W. M. (2013). *Islamic Fundamentalism and Modernity (RLE Politics of Islam)*.Abingdon: Routledge, p.51.

¹⁷² Masud, M. K. (2009). Islamic Modernism. In Masud, M. K., Salvatore, A., & van Bruinessen, M. (Ed.). *Islam and modernity: Key issues and debates*(p.250).Edinburgh: Edinburgh University Press.

¹⁷³ Zubaida, S. (2005). *Law and power in the Islamic world* (Vol. 34).London: IB Tauris, p.142.

¹⁷⁴ Codd, R. A. (1999). A critical analysis of the role of Ijtihad in legal reforms in the Muslim world. *Arab Law Quarterly*, 14(2), 112-131.

¹⁷⁵ Dallal, A. (2000). Appropriating the past: Twentieth-century reconstruction of pre-modern Islamic thought. *Islamic Law and Society*, 7(1), 325-358, Ahmed, S. (2013). *Reform and Modernity in Islam: The Philosophical, Cultural and Political Discourses Among Muslim Reformers* (Vol. 26): IB Tauris, p.73.

Middle East and Sir Sayyid Ahmad Khan and Muhammad Iqbal (1877-1938) in the South Asia.¹⁷⁶

Later in the middle of the twentieth century, ‘Abd al-Wahhāb Khallaf (1888-1956) in his book “*Maṣādir al-tashri al-Islami fi-ma la Nassa fih*” (Sources of Islamic Legislation on Matters not addressed in the Revealed Texts) attempted a new form of *usūl al- fiqh*. His arguments were that the sources of law are flexible, rich and fit for responding to the interests of human beings. Cases covered by the clear text of the Qur’ān and Sunnah are not subjected to *ijtihād*, or that of the *ijmā’* of earlier generation jurists. However, when there is no clear text or the pronounced *ijmā’*, then a fresh form of *ijtihād* could be employed to regulate undecided matters.¹⁷⁷

In *Islamic Methodology in History* (1965), the Pakistani Islamic Scholar Fazlur Rahman called for a new approach to Islam and modernity by historicizing Islamic law and legal theory. In his view, the Qur’ānic injunctions can be read and extended to modern context by placing them in a historical approach.¹⁷⁸ ‘Abd Al-Razzaq Ahmad Al-Sanhūrī (1895-1971) is perhaps the most prominent jurist in the field of modern Islamic commercial law reform. He served as the architect of the Egyptian Civil Code of 1949 and subsequently, the Civil Code of Syria, Iraq, Libya and the Commercial Code of Kuwait, which were primary pieces of legislation with respect to commercial procedures in their respective countries.¹⁷⁹

¹⁷⁶ Parray, T. A. (2011). Islamic Modernist and Reformist Thought: A Study of the Contribution of Sir Sayyid and Muhammad Iqbal. *World Journal of Islamic History and Civilization*, 1(2), 79-93.

¹⁷⁷ Hallaq(2009),op.cit, p.509.

¹⁷⁸ Masud (2009),op.cit, p. 250.

¹⁷⁹ Khalil, E. H., & Thomas, A. (2006). The Modern Debate over Riba in Egypt. In Thomas,A.(Eds.), *Interest in Islamic Economics: Understanding Riba(pp.69-95)*.Routledge Islamic Studies. London:Routledge.

Hallaq divides reformers of the Muslim world into two groups: utilitarians and literalists. The first were in favor of the Islamic legislative theory of *maṣlahah*. The second group were the pure rationalists.¹⁸⁰

Despite their differences with regard to their prospect of reformation, most scholars agree their ultimate goal was to define flexibility in Islamic law through continuous interpretation in order to reform those aspects of Islamic traditions and laws.¹⁸¹ Yet, this study focuses on the reformation of the Maldives' commercial laws, which is by nature a positive law; the man-made law in the methodology of *Sharī'ah* is of divine origin. Thus, both are not identical in principle, but are identical as a mode of trade. The prospects of Islamic legal reform therefore act as identifiers to law inconsistencies. The reformation of Islamic law the main obstacle for operating Islamic law in the area of commerce, where the system follows dual Islamic and common laws such as Malaysia¹⁸² and the Maldives.¹⁸³

2.1.3 Scope of Islamic Legal Reform

It is understood that the Qur'ān and Sunnah, which form the *Sharī'ah* are eternal and fixed or unchangeable. Henceforth, the scope for legal reform arises within other sources of laws where the Qur'ān and Sunnah are silent. These were explored by *fuqahā'* and provided in the subject of *fiqh*. Thus, when the reformation, or codification, or harmonisation of *Sharī'ah* is mentioned, it refers to the context of *fiqh*; though both *Sharī'ah* and *fiqh* are used interchangeably.¹⁸⁴

¹⁸⁰ Hallaq, W. B. (1999), op.cit., p. 214.

¹⁸¹ Hunter, S. (2009). *Reformist voices of Islam: mediating Islam and modernity*. New York: ME Sharpe Inc., p. 160; Parray, T. A. (2011), op.cit.

¹⁸² Ibrahim, U., Muneeza, A., & Hassan, R. (2012). Conflicts facing Islamic banking in Malaysia: Dual banking system versus dual legal system. *Australian Journal of Basic and Applied Sciences*, 6(11), 246-251.

¹⁸³ Wisham, I., & Muneeza, A. (2011), op.cit.

¹⁸⁴ Jawad A, M. M(1991). *Buḥūs fi al-Sharī'ah al-Islāmiyya wa al-Qanūn, taqnīn al-Sharī'ah Islāmiyya*. Iskandariyya: Al-Masarif, p.13.

Sharī'ah provides for a wide range of norms as indicated earlier. For example, justice, equality, public interest, consultation, and enjoining in good and forbidding evil are the primary principles. It could be difficult to describe all of them as immutable and permanent. The tenets of faith, rituals (acts of worship) and the basic ethical values of Islam and clear injunctions, and rules in respect of *ḥalāl* (lawful) or *ḥarām* (unlawful), are categorized as fixed.¹⁸⁵ The rest could be regarded as issues not mentioned by the *Sharī'ah* (Qur'ān and Sunnah); therefore, open for reformation and innovation in accordance with the development of society.

Sharī'ah rules could be in the form of *ṭalab* (demand). In such circumstances, it denotes an act (upon it) or refrain (from it). This demand may, or may not be imposed. If it is imposed, then it could be considered as either *wājib* (obligatory) or *haram* (prohibited) and will eventually create the *dilālāt al-qaṭ'iyyah* (definite proof).¹⁸⁶ If the demand is not imposed, then it is either *nadb* (recommended) or *makrūh* (discouraged), which ultimately concludes as *dilālāt al-ẓanniyyah* (indefinite proof). In the case where the subject is not imposed or compulsory (free to execute), the act is then *mubāḥ* (permissible).¹⁸⁷ Many *Sharī'ah* rules fall under this category, including all contracts and transactions and this thesis is grounded in this category.¹⁸⁸

To elaborate more, the rules are divided into two categories: fixed and flexible rules.

2.1.3.1 Fixed Rules

Fixed Rules are clear injunctions from the Qur'ān and Sunnah (“fixed rules”). In other words, these rules are deduced from the *dilālāt al-qaṭ'iyyah* (definite proof).¹⁸⁹ In principle, these types of rulings are immutable; cannot be reformed, or altered even with

¹⁸⁵ *Ibid.*

¹⁸⁶ Nyazee (1994), op.cit., p. 66.

¹⁸⁷ Khalaf (1978), op.cit., p.100-102.

¹⁸⁸ *Ibid.*

¹⁸⁹ Zaidan (1985), op.cit., p.54.

the advancement of time or place. Such rules by nature are very few. The rules pertaining to faith and acts of worship, inheritance, marriage, divorce, and *ḥudūd* (penalties) are fixed.¹⁹⁰

Generally speaking, these rules are ultimately immutable; however mutable based on circumstance. For instance, justice, equality, upholding human dignity, realization of the lawful benefits for the people, elimination of harm and prevention of hardship serve as the primary objectives or the *maqāsid* of *Sharī'ah*, which are fixed or permanent, and not subject to reformation. Whereas, the means for acquiring or attaining these objectives are flexible and are not specified in the Qur'ān and Sunnah. Thus, it was left for consideration of *maṣlaḥah* and justice.¹⁹¹

2.1.3.2 Flexible Rules

In contrast, apart from fixed rules there exists flexible rules (“flexible rules”). By nature, mostly *mu'āmalāt* are considered as part of it. For example, income tax, traffic and cyber-crime laws etc., are subject to reformation according to the needs of the community through renewed *ijtihād* by engaging in the secondary and supplementary sources of *Sharī'ah* as explained earlier.

2.1.3.3 Engagement of *Ijtihād*

The primary sources of *Sharī'ah* encompass all prescribed rules as the Qur'ān states, “We have neglected nothing in the Book (of Our decrees).”¹⁹² However, there are many modern day issues that are not addressed in the primary sources of *Sharī'ah*. A manifest example of such issues would be smuggling, which is prohibited under the modern tariff laws. Similarly, selling and manufacturing nuclear weapons is also restricted and not

¹⁹⁰ Nyazee(1994), op.cit.,p.55.

¹⁹¹ See generally, Maududi, S. A. A. (1955). *Islamic law and constitution*. Lahore: Islamic Publications, pp.58-62.

¹⁹² Al-Qur'ān 6:38(Abdullah Yusuf Ali).

considered as legal commodities in modern commercial laws. None of these two transactions are clearly prohibited by the primary sources of *Sharī'ah*. Albeit, it is not possible to say that provisions that police and prosecute smuggling crimes are in contradiction with the tenets of Islam for the purpose of this study. All these transactions are forbidden by virtue of two supplementary sources, *maṣlaḥah* and *sadd al-dhari'ah* in order to maintain the public law and order.¹⁹³ Here the intellectual process that was followed was known as *ijtihād*.¹⁹⁴ Hence, the word of Tariq Ramadan represents a jurist's effort,¹⁹⁵ made "in order to understand the source and deduce the rules or in the absence of a clear text, formulate independent judgment."¹⁹⁶ This has also been explained in the famous hadith of Mua'az bin Jabal (RA).¹⁹⁷

According to Muhammad Iqbal, *ijtihād* is to revise Islamic law in the light of the primary sources in order to suit the contemporary needs of the Muslim society. In his view, *Sharī'ah* is the "cultural backbone" of Muslim societies and the "anchor of

¹⁹³ Nyazee(1996),op.cit., pp. 48-49.

¹⁹⁴ *Ijtihād* is an Arabic term which literally means "striving, or "self-exertion". The *taqlīd* (to imitate) is opposed to the *ijtihād* which allows to follow the opinion of the jurist without verifying authentication of such opinion which led to the closing the gate of *ijtihād* in about 9th century CE. In principle, the practice of *ijtihād* relies on three forms. *Firstly*, the explanation of the text and elucidation of its meaning. *Secondly*, reference to *qiyās* (analogy), and *thirdly*, its base on the *maṣlaḥah* (public interest) which is not covered either by text or on analogical basis. See, Codd, R. A. (1999). A critical analysis of the role of *ijtihād* in legal reforms in the Muslim world. *Arab Law Quarterly*, 14(2), 112-131; Ali, M. M. (2012). *Ijtihad: A Reflection On Its Role And Scope*. *Journal of Islam in Asia*, 8(1), 443-462.

¹⁹⁵ A jurist who undertakes *ijtihād* is referred to as "*mujtahid*". The person holds such position mainly based on academic merits such as mastering Arabic language in order to understand relevant texts provided in the primary sources. He further has to have adequate knowledge of the legal injunctions provided in the Qur'ān and Sunnah. Likewise, he should have to study *tafsir* (the commentary of the Qur'ān) and sufficient knowledge of the *Sunnah*. Similarly, he must be aware of the *ijmā'* of the Companions of the Prophet (pbuh). Lastly, he should learn the *maqāṣid al- Sharī'ah* (objectives of the *Sharī'ah*) etc. See, Ramadan, T. (2008). *The way (Al-Sharia) of Islam*. In Saint-Blancat, C. (Ed.). *The New Voices of Islam. Reforming Politics and Modernity*.(pp.82-83) *Archives de Sciences Sociales des Religions*, 142(2), 228.

¹⁹⁶ *Ibid.*

¹⁹⁷ "Some companions of Mu'adh bin Jabal (RA) said: when the Apostle of Allah (Pbuh) intended to send Mu'adh to the Yemen, he asked: 'How will you judge when the occasion of deciding a case arises?' He replied: 'I shall judge in accordance with Allah's Book. He asked: 'what will you do if you do not find guidance in Allah's Book? He replied: 'I will act in accordance with the Sunnah of Apostle of Allah. He asked: 'And if you do not find guidance in the Sunnah or Allah's Book?' He replied: 'I shall do my best to form an opinion and spare no pains'. The Apostle of Allah then patted him on the breast and said: 'Praise to be Allah who helped the messenger of Allah's, Messenger to find a thing which please Allah's Messenger'. See Abu Dawud: 3592(Nasiruddin Al-Kattab).

stability and a blueprint for adaptive change.”¹⁹⁸ In the view of Weiss, the function of *ijtihād* is to discover the law rather than to create it. In other words, its functions are to discover laws that are stipulated in the primary sources, waiting to be applied based on time and need.¹⁹⁹

According to Muhammad Hashim Kamali, modern *ijtihād* should be extended to form statutory legislations, the *fatwa*, judgments and scholarly writings.²⁰⁰ Thus, the Islamic models of reformation, such as the codification of laws, islamisation of laws and harmonisation of laws, etc. are, *inter alia*, modes of *ijtihād*, which will be addressed in the following chapter.²⁰¹

2.2 Development of Islamic Commercial Law Reform

The Qur’ān covers the basic guidelines of Islamic commercial laws, which includes contracts, the necessity of their certainty; the central importance of ethics; the strict requirement of honoring one’s obligations and documenting them in written form; the significance of trade, and the prohibition of *ribā* (usury), etc.²⁰² Based on these principles, Islamic Commercial law developed on the basis of several Islamic contracts that were theorized by Muslim jurists, as *muḍārabah* (profit-sharing contract), *mushārah* (profit and loss-sharing contract), *ijārah* (leasing contract), etc. These examples serve as Islamic business model of contracts. Each contract not only expresses theories, but also stipulates the operation of such contracts.²⁰³

¹⁹⁸ Iqbal, M. (2013). *The Reconstruction of Religious Thought in Islam*. California:Stanford University Press,p.118, Abbott, F. (1968). *Islam and Pakistan*. New York: Cornell University Press,pp.106-107.

¹⁹⁹ Weiss, B. (1978). Interpretation in Islamic law: The theory of *ijtihād*. *The American journal of comparative law*, 199-212.

²⁰⁰ Kamali,M.H.(2006).The *Sharī’ah* :Law As the Way of God. In Cornell, V. J. (Ed.). *Voices of Islam* (pp. 51-180). Westport: Greenwood Publishing Group.

²⁰¹ See discussion in Chapter 3.

²⁰² Mallat, C. (2007). *Introduction to Middle Eastern Law*. Oxford: Oxford University Press, p.12.

²⁰³ See generally, Daly, S., & Frikha, M. (2014). Islamic Finance: Basic Principles and Contributions in Financing Economic. *Journal of the Knowledge Economy*, 1-17; Wan Ibrahim, W. H., & Ismail, A. G. (2015).Conventional bank and Islamic banking as institutions: similarities and differences. *Humanomics*, 31(3), 272-298.

The nature of forming a business venture differs from time to time as well as on the development of the commercial world. This fact has never changed regardless of the nature of business, whether Islamic or otherwise, which led to the reformation of Islamic commercial law.²⁰⁴ According to Fazlur Raham, the reformation is a process and not “a coup”. How this process is to be formulated is irksome and there is no consensus on the formula.²⁰⁵ Yet, the formulas of the *majallah al-Aḥkām al-‘Adliyya* (The Collection of Just Rules), the Ottoman Civil Code in 1876, and the Egyptian Civil Code in 1949²⁰⁶ established a conceptual framework for Islamic Commercial law. It is worth noting that the majority of civil and commercial laws in the Muslim world are legacies of these two pieces of legislation.²⁰⁷ Henceforth, these two works are examined below in detail.

2.2.1 The *majallah al-Aḥkam al-‘Adliyya*

The *majallah al-Aḥkām al-‘Adliyya* (hereafter referred to as “*majallah*”) was created by the royal decree of Sultan Abdul Hamid (II) in the last year of the *tanẓīmāt* reforms in the Ottoman Empire, during the period of 1867 to 1876. Under this reform programme, the Commercial Code was first introduced in 1850, which was followed by the Penal Code in 1858 followed by the Code of Commercial Procedure in 1863 and the Ottoman Maritime Code.²⁰⁸ All of these Codes were influenced by the European civil law codification model of which mirrors the French model in particular. As a result, few provisions of these laws were repugnant with *Shari‘ah* such as those Commercial Codes where *ribā* (usury) was permitted and in the Penal Code, where *ḥudūd*-related penalties

²⁰⁴ Black(2011),op.cit, p.283; Shawamreh, C. (2011). Islamic Legal Theory and the Context of Islamist Movements. *Notre Dame J. Int'l & Comp. L.*, 2, 197.

²⁰⁵ Rahman, F. (1970). Islamic modernism: Its scope, method and alternatives. *International Journal of Middle East Studies*, 1(04), 317-333.

²⁰⁶ Buang, A. H. (2000). *Studies in the Islamic law of contracts: the prohibition of gharar*. Kuala Lumpur: International Law Book Services, p.14; Shawamreh, C. (2011),op.cit.

²⁰⁷ Mallat, C., & Revkin, M. (2013). Middle Eastern Law. *Annual Review of Law and Social Science*, 9, 405-433.

²⁰⁸ See generally, Davison, R. H. (2015). *Reform in the Ottoman Empire, 1856-1876*. Princeton: Princeton University Press, pp.253-255.

were not recognised.²⁰⁹ According to Nicholas HD Foster, the primary purpose for promulgation of these Codes was *inter alia*, in order to please European traders who were based in the empire and were reluctant to apply local laws, such as those that were not adequate to protect their rights.²¹⁰ Therefore, they were given special treatment and immunity from application of local laws of the Ottoman Empire and were subjected to their own national laws in the territory under capitulation treaties.²¹¹

Despite these major reforms, the existing *Shari'ah* - based Ottoman law of obligation was un-codified, which created tension between traders as well as the judges, who were not familiar with *Shari'ah*.²¹² Based on the European model of Codes mentioned above, the law of obligation was replaced by the *majallah*.

The *majallah* was the first codified Islamic legislation. It contains 1,851 articles, and was divided into sixteen chapters on sale, hire, guarantee, transfer of debt, pledge, trust, trusteeship, gift, wrongful appropriation and interdiction, constraint and pre-emption, joint ownership, agency, settlement and release, admissions, actions, evidence and administration of oath and administration of justice in court.²¹³

The methodology of the *majallah* is based on three key principles. *First*, it was derived from the Hanafi' jurisprudence. *Secondly*, the selection of rules within the Hanafi' jurisprudence was justified based on public interest to cater for the existing needs of society. For example, section 207 of the *majallah* permits the sale of something that does not physically exist, provided it is the view of the minority. *Lastly*, it simply

²⁰⁹ Zuhaili, W. (1987). *Juhūd Taqni'n al-fiqh al-islāmi*. Beirut: Muahsa'sat al-risalah, p. 49.

²¹⁰ Foster, N. H. (2006). Islamic Commercial Law: An Overview (I). *Indret: Revista para el Análisis del Derecho*(4), 384.

²¹¹ *Ibid.*

²¹² Zubaida, S. (2005),op.cit., p.142.

²¹³ See generally, Tyser, C. R., & Demtriades, D. (2007). *The Mejelle: Being an English Translation of Majallahel-ahkam-i-adliya and a Complete Code on Islamic Civil Law*. Kuala Lumpur: The Other Press.

restricted the transformation of Islamic law into Islamic legislation.²¹⁴ The *majallah*'s significance is the wide-spanning influence it held over Middle Eastern Codes, from Morocco to Iran, although in the present day it is used more as a reference than an applied code.²¹⁵ A glaring example of this is the Egyptian Civil Code, 1949 ("ECC"). Nevertheless, it opened a door for subsequent reform in the area of civil and commercial laws that had been previously restricted.²¹⁶ It is still widely considered as the reference book for Islamic commercial law.²¹⁷

The *majallah* has not quite fulfilled the requirements of *Sharī'ah* as the *majallah* permits the application of interest on debt, which is contrary to the tenets of Islam.

2.2.2 The Egyptian Civil Code ("ECC")

In 1936, the Egyptian government, under the chairmanship of Sanhuri, set up a Commission to revise the existing Civil Procedure framework of Egypt, which was enacted in 1875 and 1883, respectively. The revised Code, the Egyptian Civil Code ("ECC"), was adopted in 1949.²¹⁸

Profound Islamic legal theories were found in the tanzimat reforms particularly in the *majallah*. However, none of these contributions had a holistic approach for reformation of Islamic law. These theories were conceptualized in the drafting of the Egyptian Civil Code in 1949.²¹⁹

²¹⁴ Mahmaseani, S. (1961). *Falsafat Al-Tashrī'ī Fi Al-Islām: The Philosophy of Jurisprudence in Islam* (Ziadeh, F. J., Trans.). Leiden: E.J. Brill., p.42.

²¹⁵ Mallat (2007), op.cit., p.261. See also, Buang (2000), op.cit., p.14.

²¹⁶ Sewilam, H. A. H. (2011). *The Jurisprudential Problems of the Early Codification Movement in the Middle East: A Case Study of the Ottoman Mejelle and the 1949 Egyptian Civil Code*. University Of California, Los Angeles (Doctoral Thesis). Retrieved from Proquest Dissertations and Theses. (UMI 3515058), pp.26-27.

²¹⁷ El-Gamal, M. A. (2001). An economic explication of the prohibition of gharar in classical Islamic jurisprudence. *Islamic Economic Studies*, 8(2), 29-58; Shaaban, H. (1999). Commercial Transactions in the Middle East: What Law Governs. *Law and Policy in International Business*, 31, 157.

²¹⁸ Hill, E. (1988). Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 [Part II]. *Arab Law Quarterly*, 182-218.

²¹⁹ *Ibid.*

Sanhūrī's method was constructed based on the legacy of the French model, which was applied earlier in Egyptian courts on the one hand and Egyptianisation of Islamic laws on the other. This method was described as "social engineering",²²⁰ which will be discussed in the next chapter.²²¹ The Code contained 1,149 provisions relating to business and commercial regulations. Section 1 of the Code indicated that in the absence of clear provision in a given matter, custom should be followed; thus Islamic law held priority; then natural law, followed by equity.

The Code however, did not comply with the tenets of Islam because the Code accommodated interest charges on debt. For instance, Section 226 of the Code embodied that in the event of default, the debtor could impose a 4% interest rate in civil transactions and 5% interest rate in commercial transactions. In Section 227, it further provided that the parties could stipulate an interest rate of up to 7% for default.²²² In the view of Sanhuri, the parliament should determine the extent of prohibiting interest and whatever solution offered should be based on the needs of society. Furthermore, in his view, the legislature should always examine the needs of the society and its extent when accommodating interest. Once established that interest was no longer required, these provisions would be suspended and the original rules relating to *ribā* should be imposed: the prohibition of interest, as it is contrary to the tenets of Islam.²²³

2.2.3 Modern Islamic Commercial Laws

With the independence of Muslim countries, the *majallah* was replaced with the Civil and Commercial Codes in the respective countries. The replacement included new legislation relating to contracts and commercial obligations. For instance, the Civil Code of Syria 1949, Libya 1953, Algeria 1975, Jordan 1976, Yemen 1979, 1983 and

²²⁰ Bechor, G (2007),op.cit., p.19; Mallat, C. (2007),op.cit., p. 263.

²²¹ See generally Chapter 3.3.2.

²²² Al-Sanhuri, A.R. (1956). *Maṣadir al-ḥaqq fi al-fiqh al-Islāmī*. Cairo: Ma'had al-Dirāsāt al-'Arābiyyah al-'Āliyyah, Vol:3.p.273.

²²³ Khalil, E. H., & Thomas, A. (2006).op.cit.

1992 respectively, Kuwait 1980, Sudan 1984 and the UAE 1985 are all noteworthy. The laws impacted the legacy of the EEC, although it in mind that they were politically and economically crafted, with little attention given to *Shari'ah* compliance.²²⁴

In this respect, major Arab jurisdictions took two approaches incorporating Islamic principles into these laws during the 1980s.²²⁵ *Firstly*, by incorporating amendments in the Constitution; *secondly*, in the case of civil and commercial laws, by amending the existing laws, and later on by introducing new legislation to eliminate *ribā* and *gharār*. Examples of *Shari'ah* compliant Civil Codes are: the Kuwaiti Civil Code 1980; the Qatari Civil and Commercial Code 1982, and the United Arab Emirate's Law of Civil Transactions 1985. For example, Article 200 (1) of the UAE Civil Code stipulates that the formation of a contract must be in lawful commodities as per the *Shari'ah*; that is, it must prohibit any form of business in liquor, pork and pornography etc.

Commercial laws were the least focused area of reform with regard to *Shari'ah* and these laws still operated according to conventional framework.²²⁶ However, in past decades, the Islamic financial system has made significant progress around the world. Since this time many primary laws have been enacted. For example, Law No. 66/1971 (the law pertaining to the establishment of Nasir Social Bank), Egypt; Law No.28/1977 (the law pertaining to the establishment of Faisal Islamic Bank), Egypt; Modaraba Companies Ordinance 1980, Pakistan; Islamic Finance Service Act 2013, Malaysia; Federal Law No. 6 of 1985 (regarding Islamic Banks, Financial Institutions and Investment Companies), UAE; Banking Regulation Act 1991, Sudan; Law No.21/1996 (regarding Islamic Banks in the Republic of Yemen) Yemen; Law No.28/2000 (Banking Law) Jordan; Law No.30/2003 Amendments (additional section

²²⁴ See generally, Saleh, N. (1993). Civil Codes of Arab Countries: The Sanhuri Codes. *Arab Law Quarterly*, 8, 161.

²²⁵ Buang(2000), op.cit, p.8.

²²⁶ Rahman, F. (1970),op.cit.

on Islamic Banking to Part Three of Law No.23/1968 (dealing with the Currency, Kuwait Central Bank and the Banking Profession), Kuwait; and Law No.575/2004 (establishment of Islamic Banks in Lebanon), Lebanon. All of these significant laws were enacted with the objective of allowing Islamic commercial systems an operational framework to remain within *Sharī'ah* principles regarding trade, and avoiding *ribā*, *gharār* and *maysir*.²²⁷ These are the clear tenets of Islam in respect to commerce and thus, enshrined in Article 10 of the 2008 Maldives' Constitution. Additionally, they also serve as a benchmark for commercial law reformation.

2.3 Benchmark for Islamic Commercial Law Reform

Commercial law reform and benchmarks, within the context of the Maldives' Constitution of 2008, is best captured in Article 10(b).²²⁸ It directs that no law shall violate the tenets of Islam. Thus, a benchmark is based on “the tenets of Islam”. Hence, it is essential to identify and explain the tenets of Islam in relation to commerce.

2.3.1 Tenets of Islam

Article 274(a) of the Maldives' Constitution 2008 has defined the tenets of Islam.

According to this article, the ‘tenets of Islam’ are -

“the Holy Qur’ān and those principles of *Sharī'ah* whose provenance is not in dispute from among those found in the Sunnah of the Noble Prophet, and those principles derived from these two foundations.”

A closer look reveals that there are two keywords i.e. “tenet” and “Islam”. Literally, the word “tenet” refers to “a principle or belief, especially one of the main principles of

²²⁷ Ballantyne, W. (1985). The States of the GCC: Sources of Law, the *Sharī'ah* and the Extent to Which It Applies. *Arab Law Quarterly*, 3-18; Shaaban, H. (1999), op.cit.; El-Gamal, M. A. (2003). Interest and the paradox of contemporary Islamic law and finance. *Fordham International Law Journal*, 27, 108.

²²⁸ See background to the Study in Chapter 1.0.

a religion or philosophy.”²²⁹ For Muslims, the concept “Islam” means a way of life or a complete code of life. It provides spiritual faith, moral, ethical, social and legal values. Believing, fasting, praying, paying *zakāt* and performing *hajj* are the five pillars of Islam. In general, these are the tenets on which Islam is based.

It may be relevant to share that in the provisions of other Constitutions one may find different words in this regard. For example, the Constitution of Islamic Republic of Pakistan 1973 retains the terms “Injunctions of Islam”, in place of the “tenets of Islam”, which refers to the “injunctions of the Qur’ān and the Sunnah’ as provided in article 203D of the Pakistan Constitution. Thus, it can be inferred that whatever commerce-related injunctions are provided in the Qur’ān and Sunnah, will also be a target of study in this thesis.

According to the chairman of the Maldivian Constitutional Drafting Committee, Ibrahim Ismail,²³⁰ the purpose of providing a definition of the phrase “tenets of Islam” is to discard the differences of opinions in application of relevant Islamic provisions in the Maldives’ Constitution 2008. He further explained that the *ratio legis* of the provision was to be interpreted accordingly and the meaning of the “tenets of Islam” are “fixed rules” provided in the Qur’ān and Sunnah. It does not cover “flexible rules” that could be changed over the time; this reveals the debate over the definition of the phrase “tenets of Islam”, which took place in the parliament proceedings on 5th May 2008.²³¹ The Maldivian lawmakers proposed four definitions for the tenets of Islam. It is essential to grasp the historical and contextual significance of these provisions:

²²⁹ Hornby, A. S., & Wehmeier, S. (1995). *Oxford advanced learner's dictionary*. Oxford: Oxford university press., p.1231 ‘entry’ “tenet”.

²³⁰ The Researcher conducted a personal interview with Hon.Ibrahim Ismail at his office in the Maldives on 3rd December 2013.

²³¹ The People’s Majlis(2008,May 5). The minutes of the Constitutional Review Assembly Proceeding on the definition of the tenets of Islam. Retrieved on 2nd April 2013 from www.majilis.gov.mv

Firstly: the tenets of Islam are the Qur'ān, the Sunnah and the established *Ijmā* (consensus of the community) which has no alternative meaning, even by *ijtihād* (consensus of scholars), other than the one provided in the text. Later minor amendments were made in the wording to adopt the existing definition of the tenets of Islam as stated above.²³²

Secondly: the tenets of Islam are *al- arkān-al imān* (pillars of the faith), *al-arkān-al islām* (pillars of the Islam), the Sources of Islamic *Shari'ah*, which are the Qur'ān and Sunnah, and those principles established by *adilla al-Shar'iyya* (decisive evidence) for the protection of human body, life, intellect, dignity, property and wealth.²³³

Thirdly: the tenets of Islam are the fixed rules that cannot be changed by location and time. These fixed rules are *al- arkān-al imān* (the pillars of the faith) and *al- arkān-al Islām* (the pillars of Islam). This definition was also rejected. It further includes the Qur'ān and the Sunnah as well as any other rule established based on those two primary sources. Any principle flexible rule cannot be considered as the tenets of Islam.²³⁴

Fourthly: the tenets of Islam are the Qur'ān, the Sunnah, *Ijmā* (consensus) and *Qiyās* (analogy). This was also rejected.²³⁵

The Constitutional Review Assembly of the Maldives was ideologically divided into three groups based on their positions on these four definitions. The majority were in support of the first definition of the tenets of Islam. The second group disagreed on the content of the definition. The last group was against providing any definition because, according to them, that has already been done through Islamic law.²³⁶

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

Amongst these four proposals, the second is more comprehensive and practical, though, the House adopted the first definition with a minor change in the wording.

Similar were the views of reformers such as ‘Abduh’, Ridā and Sanhūrī.²³⁷ In contrast, other Maldivian Islamic Scholars have expressed different opinions in relation to the definition of the phrase as shared in the Constitution. According to Abdul Sattar,²³⁸ Abdul Majeed Abul Bari,²³⁹ and Abdullah Shiyam,²⁴⁰ the definition refers to sources of the *Shari’ah*. This is because, the equaling Arabic word for “principles” and “tenets” is “*al-usūl*” or “*al-mabādi*”, which means “*dalīl*”(proof) in the view of “traditional ‘*ulamā*’ of *usūl*”(the experts of Islamic Jurisprudence), which they refer to as sources of Islamic laws.²⁴¹

2.3.2 Basic Islamic Commercial Tenets

In principle, it is permissible to frame and enact any law provided that it does not violate the tenets of Islam as prescribed in the holy Qur’ān and Sunnah, which serves as the Islamic benchmark to law reform. With regard to commerce, the three basic tenets of Islam are the prohibition of the *ribā* (usury), *gharār* (uncertainty) and *maysir* (gambling).²⁴² Additionally, these laws must comply with the basic commercial tenets of Islam such as the prohibition of trade in pork liquor, and pornography, etc.²⁴³ These represent universal tenets of Islam and are inviolable. Laws that are contrary to these

²³⁷ See discussion in Chapter 3.3.

²³⁸ The Researcher conducted a personal interview with Dr. Abdul Sattar Abdul Rahman (the Dean Faculty of *Shari’ah* and Law, the Maldives National University) at his office in the Maldives on 2nd December 2013.

²³⁹ The Researcher conducted a personal interview with Hon. Dr. Abdul Majid Abdul Bari (Former Maldives Islamic Minister) at his office in the Maldives on 2nd December 2013.

²⁴⁰ The Researcher conducted a personal interview with Dr. Abdullah Shiyam (Ex-Chairman of the Bank of Maldives) in the Maldives on 1st December 2013.

²⁴¹ Kirru, A. (1982). *Uṣūl al-Tashrī’ al-Islāmi*. Tunisia: Dar Al-‘Arabiyya lil-Kitāb, p. 20.

²⁴² El-Gamal, M. A. (2006). *Islamic finance: Law, economics, and practice*. Cambridge :Cambridge University Press,p.46; Hascall, S. C. (2014),op.cit.

²⁴³ The Dow Jones Islamic Market™ website. Retrieved on 11th June 2015 from <http://www.djindexes.com/islamicmarket/>; Financial Times Stock Exchange website. Retrieved on 11th June 2015 from, http://www.ftse.com/products/downloads/FTSE_Shariah_Indices.pdf; Morgan Stanley Capital International Inc. (“MSCI”) website. Retrieved on 11th June 2015 from <http://www.morganstanley.com/about-us-articles/4>; Security Commission Malaysia website. Retrieved on 11th June 2015 from <http://www.sc.com.my/>.

tenets are regarded as repugnant to the tenets of Islam and therefore are null and void as provided in the Maldives' Constitution 2008. Therefore, these tenets could be referred to as the Islamic benchmark for the commercial law reform.

2.3.2.1 *Ribā*

The word *ribā* originates from the Arabic word “*rabā*” which means “an increase or an addition to something” and it is translated as “usury” or “interest”.²⁴⁴ Technically, it refers to an increase to the principal amount in a loan transaction.²⁴⁵ Nabil Saleh defined it as:

“[generally] agreed as unlawful gain derived from quantities inequality of the counter values in any transaction purporting to effect the exchange of two or more species (*anwa',sng.naw'*), which belong to the same genus (*jins*) and are governed by the same efficient cause (*illa, pl.ilal*).”²⁴⁶

From both these definitions, *ribā* is considered excessive without a counter-value in commercial transaction. It encompasses every return and all excess arising from exchange of property for property regardless of whether exchange takes the form of loan or sale of money or barter transaction between two homogeneous items or two different commodities etc. Thus one can conclude that *ribā* is an additional charge imposed onto the principal amount in any form of commercial transactions and is therefore prohibited. Additionally, the word “*ribā*” often describes unlawful earnings and unjust enrichment. By demanding excess or giving less than the capital is *zulm* (injustice).²⁴⁷ Thus, underlying philosophy of the prohibition of *ribā* in Islamic law stands for promotion of social justice and equality etc. It encourages the earning of profits but forbids the charging of interest for earned profits. It advocates for core value of borrowers and

²⁴⁴ Usmani, M., & Zubairi, Z. (2002). *Meezan, Bank's Guide to Islamic Banking*. Karachi: Darul Ishaat, p.45.

²⁴⁵ Mansuri, M.T.(2001),op,cit., p. 117.

²⁴⁶ Saleh, N. A. (1986). *Unlawful gain and legitimate profit in Islamic law*: Cambridge: Cambridge University Press, p.16.

²⁴⁷ Al-Sanhuri, A. R. (1956), op.cit., Vol:3, p. 259.

lenders who share rewards as well as losses in an equitable fashion and that the process of wealth accumulation and distribution in the economy is fair and representative of true productivity.²⁴⁸

2.3.2.2 General Rule

The prohibition of *ribā* is established by virtue of the following tenets of Islam, which is specified in the Qur’ān, Sunnah of the Prophet (pbuh) and *ijmā*.²⁴⁹

The following verses of the holy Qur’ān strictly prohibits *ribā*.²⁵⁰

- (a) “Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to will abide therein (for ever))”.
- (b) “Allah will deprive usury of all blessing, but will give increase for deeds of charity: For He loveth not creatures ungrateful and wicked”.
- (c) “Those who believe, and do deeds of righteousness, and establish regular prayers and regular charity, will have their reward with their Lord: on them shall be no fear, nor shall they grieve”.
- (d) “O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers.”
- (e) “If ye do it not, Take notice of war from Allah and His Messenger. But if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly”.

There are many Hadiths prohibiting *riba*. These include the following:

- (a) Abū Sa‘īd al-Khuduri (RA) narrated that,
“The Messenger of Allah(pbuh) said: Do not sell gold for gold except like for like, and do not give more of one and less of other. Do not sell silver except like for like, and do not give more of one and less of the other. And

²⁴⁸ Iqbal, Z., & Mirakhor, A. (Eds.). (2013). *Economic Development and Islamic Finance*. World Bank Publications, p.4.

²⁴⁹ Rushd, I. (1975). *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*. Beirut: Al-Dar Ibn- Hazam, p.499.

²⁵⁰ Al-Qur’ān 2:275-279 (Abdullah Yusuf Ali).

do not exchange something to be given later for something to be given now.”²⁵¹

(b) Jābir (RA) narrated that,

“The Messenger of Allah (pbuh) cursed the one who consumes *ribā* and the one who pays it, the one who writes it down and the two who witness it”, and he said: “They are all the same.”²⁵²

From all these evidences it is clearly understood that the prohibition of *ribā* is a clear tenet of Islam.

2.3.2.3 Explanation

The verses and hadiths mentioned earlier denote that all forms of excess over the principal amount/capital are not prohibited, but prohibition of merely lending and borrowing as trade is permitted. Taqi Usmani J. observed in *Khaki and Others v. Hashim and Others*²⁵³ that the Qur’ān does not define *ribā*. This is because, it was well known to the immediate audience who were Arabs. It is like the prohibition of pork, liquor, gambling, etc. In the pre-Islamic era Arabs used *ribā* as a mode of business transactions that represented an extra financial benefit over the principal amount without due consideration. There are mainly two types of *ribā*: *Ribā al-nasi’ah* and *Ribā al-faḍl*.²⁵⁴

Ribā al-nasi’ah, known also as *ribā al-duyūn* is considered to be that which is mentioned in the Qur’ān. It is an extra amount paid by the debtor to his creditor in addition to the principal amount.²⁵⁵ The word “*nasi’ah*” implies “to postpone” or “defer” and “wait”. Hence this form of *ribā* occurs, whether fixed or variable, whenever extra money (interest) is paid in advance, or over the maturity of a financial instrument

²⁵¹ Al-Muslim: Hadith No. 4054(Nasiruddin Al-Kattab).

²⁵² Al-Muslim: Hadith No. 4093(Nasiruddin Al-Kattab).

²⁵³ PLD 2000 SC [225].

²⁵⁴ Saeed,A(1996),op.cit., p.35

²⁵⁵ El-Gamal, M. A. (2003),op.cit.

as a condition for a loan. This extends also to include gifts or services received as an expectation for the loan's disbursement. These processes and expectations are prohibited.²⁵⁶

Ribā al-faḍl, which is also known as *Ribā al-buyū'*, is established by Sunnah. It is considered as "excess compensation without any consideration resulting from a sale of goods".²⁵⁷ This form of *ribā* is explained in the hadith narrated by Abū Sa'īd al-Khudri (RA) as mentioned above. Accordingly, the hadith specified that if gold, silver, wheat, barley, dates and salt are exchanged, it shall be for the same quantity, and size with the transaction made on the spot, otherwise the transaction is invalid because of the element of *ribā* involved in it. The hadith specifically listed only six commodities that may be confined in the meaning of *ribā al-faḍl*. This does not mean these are the only six commodities which contained *ribā al-faḍl*, but generally all those commodities used as money.

The issue of bank interest prohibitions or similar trades in commercial transactions is no longer ambiguous, and clearly considered *ribā* in today's modern world. This was settled with the inception of the Islamic finance industry by setting into place relevant legal frameworks, court interpretations, and fatwas. For example, modern Islamic commercial law prohibits levying interest as a matter of course. Moreover, in the decision of the Supreme Court of Pakistan (SCP), Shariat Appellate Bench in the case of *Khaki and Others v. Hashim and Others*, it was concluded that modern banking interest is *ribā*. It held that any amount, big or small, over the principal in a contract of loan, or debt, is and prohibited by the Holy Qur'ān, regardless whether the loan is used for consumption, or some productive use.²⁵⁸ In a similar issue, the International Islamic

²⁵⁶ Hasan, A. (2011). *Fundamentals of Shariah in Islamic finance*. Institute of Islamic Banking and Finance. Kuala Lumpur: IBFIM, p.200.

²⁵⁷ Usmani, M., & Zubairi, Z. (2002), op.cit., p.45.

²⁵⁸ PLD 2000 SC[225]

Fiqh Academy of the Organization of Islamic Conference (OIC)'s resolution pertaining to a particular Islamic bank and its transactions, concluded:

“[any] increase or profit on a loan, which has matured in return for an extension of the maturity date, in case the borrower is unable to pay, and the increase or the profit on the loan at the inception of the loan agreement, are both form of usury which is prohibited under the *Shari'ah*”²⁵⁹

Thus, it is apparent that those modern commercial laws that permit interest payment are contrary to Islamic commercial tenets and should therefore be repealed. But this does not extend to profits as none of the said tenets banned profits, which is based on Profit and Loss Sharing (PLS) principle in Islamic commercial law. This principle operates in the form of trading between the customer and the Islamic Bank on partnership and profits are shared between them based on the predetermined ratio.²⁶⁰

2.3.3 *Gharār*

The term *gharār* (uncertainty or risk) literally means danger; it originates from the Arabic word *al-taghrir*.²⁶¹ Technically, it refers to “purposive cheating and deception as well as ignorance of the object of sale and un-deliverability of the object.”²⁶² Al-Amīn Darīr defined it as, “anything whose consequences are hidden.”²⁶³

According to El-Gamal, *gharār* covers some form of inadequate information and/or fraud, as well as risk and uncertainty to the fundamental objects of contract.²⁶⁴ He further explained that,

²⁵⁹ Resolution No.10(10/2). International Islamic Fiqh Academy website. Retrieved on 10th July 2016 from <http://www.iifa-aifi.org/rr>

²⁶⁰ Kettell, B. (2011). *Introduction to Islamic banking and finance* (Vol. 1): John Wiley & Sons, p.32.

²⁶¹ Zuhaili, W. (1984). *Al-Fiqh al-Islāmī Wa Adillatuhū*. Damsyik: Dar Al-Fikr, Vol:5 p.3409.

²⁶² *Ibid*, p.3401.

²⁶³ Darīr, S. -A. (2012). *Gharar: Impact on contracts in Islamic fiqh*. Riyadh: al-Baraka Banking Group, p.50.

²⁶⁴ El-Gamal, M. A. (2006). *Islamic finance: Law*, op.cit., p.58.

“[*gharār*] incorporates uncertainty regarding future events and qualities of goods, and it may be the result of one-sided or two-sided and intentional or unintentional incomplete information”²⁶⁵

From above one can conclude that *gharār* represents any element of doubt, suspicion and uncertainty that does not specify the formation, price, method and delivery of the contract by one or both parties.

2.3.3.1 General Rule

The Qur’ān does not contain any explicit reference to *gharār*; since then the general rule for *gharār* was established on the basis of the prohibition of *maysir* (gambling) and various hadiths of the Prophet (pbuh),²⁶⁶ which will be explained later in this section.

There are various hadiths on the prohibition of *gharār*. These include the following:

(a) Ibn ‘Umar (RA) narrated that,

“The Messenger of Allah (pbuh) said: whoever buys foodstuff should not sell it until he has received it in full.”²⁶⁷

(b) Abū Al-Bakhtarī(RA) narrated that,

“The Messenger of Allah (pbuh) forbade selling the fruit of date palms until it (some of it) could be eaten, and until was weighed.”²⁶⁸

(c) Anas (RA) narrated that,

“The Prophet forbade the selling grapes until they turn black and the selling of grain until it becomes hard.”²⁶⁹

²⁶⁵ *Ibid.*

²⁶⁶ Buang (2000), op.cit.,p.34.

²⁶⁷ Al-Bukhari: Hadith No.2136 (Muhammad Muhsin Khan);Al-Muslim:Hadith No.1526 (Nasiruddin Al-Kattab).

²⁶⁸ Al-Bukhari: Hadith No. 2246(Muhammad Muhsin Khan); Al- Muslim: Hadith No.1537 (Nasiruddin Al-Kattab).

²⁶⁹ Abu Daud:Hadith No.3371(Nasiruddin Al-Kattab).

(d) Abū Hurairah (RA) narrated that,

“The Messenger of Allah (pbuh) forbade Hasah²⁷⁰ transaction and transaction involving ambiguity.”²⁷¹

Thus, these above-mentioned hadiths explicitly stipulate clear tenets of Islam with regard to *gharār* and the prohibition thereof.

2.3.3.2 Explanation

According to Maha-Hanaan Balala, if one wants to understand *gharār*, one should look into how gambling is formed.²⁷²

There are two types of *gharār*: the *gharār al-fahish* (major *gharār*) and the *gharār al-yasīr* (minor *gharār*).

(a) *Gharār al-fahish* is where a degree of uncertainty is higher compared to the degree of certainty in a contract in terms of quantifying, etc.²⁷³ The existence of such *gharār* makes the contract null and void as per Islamic commercial tenets. This can be due to the inexistence of a commodity, discrepancy of specification and availability, and also in a deferred sale, in which the deferment period is indefinite. In fact, this type of *gharār* may originate from ignorance, and classic examples of these sales include, selling of fetuses and embryos; selling of a bird in the sky and selling definite or indefinite goods against an indefinite price, i.e., a sealed box of which contents are unknown.²⁷⁴

²⁷⁰ Hasah means those that involve throwing stone, and based upon where they land a deal is finalized. See Al-Muslim(Nasiruddin Al-Khattab) Vol.4, p.216,footnote 1.

²⁷¹ Al-Muslim:Hadith No.3808(Nasiruddin Al-Khattab).

²⁷² Balala, M. H. (2010),op.cit.,p.35.

²⁷³ Visser, H. (2013). *Islamic finance: Principles and practice*. Cheltenham: Edward Elgar Publishing, p.52.

²⁷⁴ AL-Saati, A. (2003). The permissible gharar (risk) in classical Islamic jurisprudence. *Islamic Economics*, 16(2).

(b) *Gharār al-yasīr* or the minor *gharār*, is present in nearly all commercial transactions and does not void a contract in existence.²⁷⁵ Some examples of this category includes the purchasing of fruits without peeling or cutting the rinds; selling a building before its foundation is laid, and charging a fixed rate per night for an accommodation, even though utilities used by lodgers may differ from one person to another.²⁷⁶

In modern commercial laws, insurance law represents legislation that is based on *gharār*. It was concluded in the First International Conference on Islamic Economics held in 1976²⁷⁷ that modern commercial insurance schemes are considered gambling since risk is involved against the insured fate, as it most probably will not occur; hence, such trades would be invalid as per the tenets of Islam. However, when there are various types of conventional insurance policies, it would be difficult to determine if all these are contrary to Islamic commercial tenets. Nevertheless, it is a fact that insurance contracts are formed on the basis of elements of uncertainty and lack of awareness; therefore payouts are based on circumstance and the occurrences thereof. In other words, the contract terms, the acquisition of insurance money, its quantity and maturity date are all based on circumstance and therefore, are considered *gharār*.

Another aspect where modern commercial law could be considered within the scope of *gharār* is liquidated damages. In the American case of *National Group for Communication and Computers Ltd. v. Lucent Technologies International, Inc.*²⁷⁸ the issue of compensatory damages for breach of contract was addressed. The dispute between the parties arose in relation to a construction contract that fell under the laws of Saudi Arabia where the basic law is the Qur'ān and Sunnah. It was claimed that losses

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ Zuhaili, W. (1984), op.cit, Vol: 5 p. 3423.

²⁷⁸ 331F.Supp.2d 292(2004) United States District Court, D. New Jersey.

resulting from the breach of such a contract would be considered “speculative”, which is prohibited in the scaling of losses by virtue of *Shari‘ah* as it is *gharār*.

2.3.4 *Maysir*

The two terms *maysir* (gambling) and *qimār* (games of chance) are referred to interchangeably. In Arabic, *maysir* denotes easily available wealth or acquisition of wealth by chance, whether or not it deprives another’s right.²⁷⁹ *Al-qimār* refers it as:

“[the] game of chance-one gains at the cost of out others(s); a person put his money or a part of his wealth at stake wherein the amount of money at risk might bring huge sums of money or might be lost or damaged.”

One can conclude from the discussion above that both terms *maysir* (gambling) and *qimār* (game of chance) are the same in terms of prohibition and nature. Yet, the difference between these two could be that the latter is part of the former.

2.3.4.1 General Rule

The general rule for the prohibition of gambling is laid down in the following tenets.

The Qur’an states with respect to the gambling:

- (a) “O you who believe! Intoxicants and gambling, sacrificing to stones and divination by arrows, are abominable actions of Satan; so abstain from them, that you may prosper”.²⁸⁰
- (b) “Satan intends to excite enmity and hatred among you with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer; will ye then abstain?”²⁸¹
- (c) “They ask thee concerning wine and gambling. Say: "In them is great sin, and some profit, for men; but the sin is greater than the profit." They ask thee how much they are to spend; Say: "What is beyond your needs." Thus doth Allah make clear to you His Signs: In order that ye may consider-”.²⁸²

²⁷⁹ Ayub, M. (2009). *Understanding Islamic Finance* (Vol. 462).Englnad:John Wiley & Sons, p. 61.

²⁸⁰ Al-Qur’ān 5:90 (Abdullah Yusuf Ali).

²⁸¹ Al-Qur’ān 5:91 (Abdullah Yusuf Ali).

²⁸² Al-Qur’ān 2:219 (Abdullah Yusuf Ali).

With respect to gambling the following hadiths are cited-

(a) Khaula Al-Ansariya (RA) narrated that,

“Some people spend Allah’s wealth (i.e. Muslim’s wealth) in an unjust manner; such people will be put in the (Hell) fire on the day of resurrection.”²⁸³

(b) Abu Hurairah (RA) narrated that,

“The Messenger of Allah (pbuh) said: whoever says to his companion: ‘Come, I will gamble with you,’ let him give charity”.²⁸⁴

2.3.4.2 Explanation

Gambling is a type of a *gharār* as the gambler is unable to predict the outcome of it. This applies to all activities in which a person relies on winning or losing merely by chance. It covers betting on horse racing, soccer matches, and lotteries.²⁸⁵ As a result of gambling activities, winners can acquire property of others unlawfully and unfairly, as there is no exchange for counter values between the parties.²⁸⁶

To elaborate more in the modern commercial world, tickets, coupons or tabs are gifted upon purchasing the items leading to an impending drawing of lots. In such schemes, the inducement is uncertain and indefinite; this type of promotion is contrary to the tenets of Islam. Furthermore, various forms of competition via SMS (text message) are also considered as against the tenets of Islam. This is because by sending an SMS (text message) to participate in an event is like spending money to win a competition; thus, it contains the elements of *gharār* and gambling. The International Islamic Fiqh Academy of the (OIC) regards all forms of competitions and games in which prizes are rendered by the bidding-up of prices as forbidden in Islam.²⁸⁷

²⁸³ Al- Bukhairi: Hadith No.3118(Muhammad Muhsin Khan).

²⁸⁴ Al-Muslim:Hadith No.1647((Nasiruddin Al-Kattab).

²⁸⁵ Saleem, M. Y. (2012),op.cit., p.4.

²⁸⁶ Paldi, C. (2014). Understanding Riba and Gharar in Islamic Finance. *Journal of Islamic Banking and Finance*, 2(1), 249-259.

²⁸⁷ Resolution No. 127(14/1). International Islamic Fiqh Acadmey webiste,op.cit.

Furthermore, more relevant to the discussion, prizes based on conventional bond schemes are formed with elements of *ribā* and gambling. It is because prizes are associated with interest generated from a capital fund, which accumulates from bondholders. The interest is then distributed among them as a pre-calculated ratio. Besides, there is also the possibility that a few participants will receive a prize free of charge at the cost of other bondholders; hence, it is contrary to the tenets of Islam.²⁸⁸

Another example would be government-run lotteries, ostensibly for public benefit. Incentives granted to participants, however, results not from investment profits, rather through prizes by the drawing of lots.²⁸⁹ In this regard, in the Pakistani case of *Mushtaq Ali v. State*, section 294-A of the Pakistan Penal Code, a public lottery was challenged as contrary to the tenets of Islam. Under section 294-A of the Pakistan Penal Code, drawing lotteries was declared as impermissible for the general public, but the government could conduct and manage all sorts of lotteries. Finally, the Court held that sections 294-A and 294-B of Pakistan Penal Code were repugnant to the tenets of Islam as a lottery represented a game of chance.²⁹⁰

2.3.5 The General Commercial Tenets

In principle, parties are free to form a contract within the boundaries of *ḥalāl* and *ḥarām*.²⁹¹ In other words, the general principles with regard to contracts and their stipulations are permissible by mutual consent of the contracting parties except for that which is forbidden under *Sharīʿah*. In this respect, Ibn Taymiyyah writes:

“[a]s for the *muʿāmalāt* (transaction), the principle governing them would be permissibility and absence of the prohibition. So, nothing can be prohibited unless it is prescribed by Allah and His Messenger”.²⁹²

²⁸⁸ Ayub, M (2009), op.cit., p.64.

²⁸⁹ *Ibid*, p.63.

²⁹⁰ Federal Shariat Court of Pakistan PLD 1989 FSC 60.

²⁹¹ Darīr, S. -A (2012), op.cit. , p. 29.

²⁹² Ibn Taymiyya, A. (1998). *Al-Fatāwā Al-Kubrā*. Beirut: Dar Al-Maʿrifa. Vol.29, p.16-18.

Though, it could be difficult to provide a full list of non-Islamic activities with respect to the formation of commercial ventures, yet with inception of Islamic finance various guidelines emerge that will form a list. This list includes the prohibition of any form of business in liquor, pork, pornography, etc.²⁹³ Hence, if any provision of law permits trading of any of these items, then that provision will be contrary to the tenets of Islam.

2.3.5.1 Exception to the General Rules

After the discussion on the commercial tenets of Islam, it now becomes relevant to discuss the exceptions to the application of these tenets. There are a few circumstances that permit a deviation from the original rules embodied in these commercial tenets of Islam. In other words, under some inevitable conditions it is permissible to secure a *ribā* based loan or the trading of liquor, pork and pornography etc. These views are justified in line of the *darūra* (doctrine of necessity) and it is based on the Islamic legal maxim, “Necessities make unlawful lawful”,²⁹⁴ which has been confirmed in the following verse of the Qur’ān:-

“He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without wilful disobedience, nor transgressing due limits, - then is he guiltless. For Allah is Oft-forgiving Most Merciful.”²⁹⁵

Under the above-mentioned verse, Muslims are permitted to eat prohibited food to avoid starving to death. The verse has emphatically stated the only satisfactory excuse for avoiding the original rules, provided it should be reasonable and genuinely

²⁹³ Khatkhatay, M., & Nisar, S. (2007). Shariah compliant equity investments: An assessment of current screening norms. *Islamic Economic Studies*, 15(1), 47-76; Berg, N., & Kim, J. Y. (2014). Prohibition of Riba and Gharar: A signaling and screening explanation?. *Journal of Economic Behavior & Organization*, 103, S146-S159.

²⁹⁴ The word *darurat* means necessity which refers to a circumstance in which a person is permitted to undertake certain haram (prohibited) activities in order to preserve the universal essential daruriyyat which are the objectives of *Sharī’ah*. This permissibility will remain valid until the event is ceased or a way is found to avoid the *harām* (prohibited) activities. See, Khalaf, A. W. (1978). op.cit, p.208; Ismail, A., & Rahman, M. H. (2013). *Islamic Legal Maxims: Essentials and Applications*. Kuala Lumpur: IBFIM., pp.173-175.

²⁹⁵ Al-Qur’ān 2:173(Abdullah Yusuf Ali).

necessary. To determine the proportion to be granted, the application of the doctrine of necessity is the yardstick of *maqāṣid al-Sharīʿah* (objectives of *Sharīʿah*), which are the five fundamental necessities of *Sharīʿah* (faith, life, lineage, intellect and property). Furthermore, none of the above-mentioned commercial tenets of Islam are imposed for hardship but for *raʿf al-haraj* (removal of hardship). Likewise, it is not imposing harm but leading the *dafʿ al-dharar* (prevention of harm).²⁹⁶ These two key principles of *Sharīʿah* are clearly stated in the verses, “...He has chosen you, and has imposed no difficulties on you in religion”²⁹⁷ and “Allah doth wish to lighten your (difficulties)...”.²⁹⁸ Thus, the original rules are stated to uphold these five necessities and deviation from the original rules should also be to protect these necessities in an inevitable circumstance in modern commercial world.²⁹⁹

Therefore, based on the objective of *Sharīʿah* relating to acquiring and holding of a property, it is a basic necessity in macro and micro levels regardless of faith. Most of the time the housing schemes in the market are non-Islamic, particularly in a country where the Muslims represent a minority community. Furthermore, the global economy is interconnected, and there is no holistic mechanism to operate a *ribā* free economy yet, and under such circumstances, the tenet of *ribā* is subject to waiver.³⁰⁰ Similarly, for a person if the only available facility is conventional insurance, under such a circumstance, he/she is obliged to accept the interest-based insurance scheme in order to preserve life.³⁰¹

²⁹⁶ Khalaf, (1978), op.cit., p.198.

²⁹⁷ Al-Quʿrān 22:78 (Abdullah Yusuf Ali).

²⁹⁸ Al-Quʿrān 4:28 (Abdullah Yusuf Ali).

²⁹⁹ Zakariyah, L. (2012). Necessity as a pretext for violation of Islamic Commercial Law: A Scenario of Mortgage Contract in the UK. *Journal of Islamic Economics, Banking, and Finance*, 8(1).

³⁰⁰ *Ibid.*

³⁰¹ Ladin, M.A., Ansary, S.B.R., Ali, M.F.A.K.M. & Mustafa, M.M. (2013). *Islamic Legal Maxims & Their Application in Islamic Finance*. Kuala Lumpur: Isra, p. 98.

Many Scholars such as Sanhūrī,³⁰² Abdullah Saeed,³⁰³ and Yūsuf Al-Qaradāwī³⁰⁴ justify *ribā* with the objective to alleviate poverty, or if there is no other option.³⁰⁵ It is further posited that for the general welfare of the society and development, it is permissible to grant *ribā*-based loans to the extent that it is required.³⁰⁶

Likewise, it is the view of scholars regarding the International *Shari'ah* Compliance Standards such as *Dow Jones, USA, Security Commission of Malaysian (SEC), Standard & Poor's*, the *Financial Times and London Stock Exchange and Morgan Stanley Capital Index*³⁰⁷ that for lifting the application of the basic and general commercial tenets of Islam *ribā* is justified up to 5%, which is also the stand of CMDA.³⁰⁸ In other words, the total revenue of a company should not exceed the income generated from *ribā, gharār* and *ḥarām* activities by 5%.

Difficulties arise however, when an attempt is made to implement these guidelines in commercial law reform. Whether any law can be drafted permitting interest, *gharār* etc., and beyond 5% interest when it is contrary to the tenets of Islam. The clear principle here is that it is permissible to introduce flexibility in the application of the original rule with valid and reasonable grounds. The extent of lifting the rule is determined on the basis of *maṣlaḥah*, which is determined by relevant state bodies,³⁰⁹ who would oversee whether the rate should be 5%, or otherwise. Yet, for purposes of this study, if such a case existed where interest would be permitted without referencing, or attributing

³⁰² Al-Sanhuri, A. R. (1956), op.cit, Vol:3, p. 277.

³⁰³ See generally, Saeed, A. (2013). *Reading the Qur'an in the Twenty-first Century: A Contextualist Approach*. Routledge. pp.169-171.

³⁰⁴ Qaradāwī, Y. (1989). *The lawful and the prohibited in Islam*. Kuwait: International Islamic Federation of Student Organizations, pp. 165-169.

³⁰⁶ Saleem, M. Y. (2012), op.cit., p. 117.

³⁰⁷ The Dow Jones Islamic Market™, Retrieved on 11th June 2015 from <http://www.djindexes.com/islamicmarket/>, Financial Times Stock Exchange, Retrieved on 11th June 2015 from http://www.ftse.com/products/downloads/FTSE_Shariah_Indices.pdf, Morgan Stanley Capital International Inc. ("MSCI"), Retrieved on 11th June 2015 from <http://www.morganstanley.com/about-us-articles/4797.html> and Security Commission Malaysia, Retrieved on 11th June 2015 from <http://www.sc.com.my/>.

³⁰⁸ Maldives Capital Market Development Authority website. Retrieved on 11th June 2015 from www.cmda.gov.mv

³⁰⁹ Khalil, E. H., & Thomas, A. (2006), op.cit.

directly a departure from the original Islamic rule, then the provision should be declared void and invalid. Although, most Islamic reform models such as islamisation and harmonisation of laws and *Shari'ah* recognize the doctrine of necessity, yet there is no consensus as to the application of this doctrine of necessity, as the latter focuses on the practical approach and the former is determined to adhere to the wording of the provision.³¹⁰

2.3.6 Declaration of Valid Laws

The Islamic commercial law reform benchmarks are based on negative rationality, which means that the commercial tenets of Islam are rooted in the prohibition of certain elements as can be found in various Commercial laws of the Maldives. Henceforth, the approach should establish whether the existing Commercial laws of the country recognize the commercial tenets of Islam in positive rationality. In other words, any provision of law that permits *ribā*, *gharār*, and *maysir* etc., is to be considered contrary to the tenets of Islam as provided in the Article 10 of the Maldives' Constitution 2008.

Each law should be reviewed provision by provision in order to determine their validity based on the provided benchmark. The reading should focus on the hierarchy of the Literal Rule,³¹¹ the Golden Rule³¹² and the Mischief rule³¹³ to decide whether such a provision is contrary to the tenets of Islam.³¹⁴ Those provisions contrary to the tenets of Islam should be declared as null and void and should be amended by way of

³¹⁰ See discussion on commercial law reform models in Chapter 3.

³¹¹ One piece of legislation states that if the obvious meaning of any document cannot be contested, then it must be accepted as it is. (Langan., P.St J.(1976). Maxwell on the Interpretation of Statutes. Bombay: NM Tripathi, p. 28).

³¹² Unless doing so would be patently absurd, the Courts should hold the commonly understood meanings of the words of a document. (*Ibid*, p. 43).

³¹³ This principle is used by the Courts to determine the intention of the legislators. (*Ibid*, p. 40).

³¹⁴ This formula is based on the Maldives Interpretation Act (Law N0. 4/2011) which is not in conflict with the general methodology of the *usūl al-fiqh* (Principles of Islamic Jurisprudence) for the purpose of interpretation of laws. See generally (Khalaf(1978), op.cit., pp.140-143).

reformation. The remaining laws should be declared as valid based on the ground “the original rule for all things is permissibility”.

2.4 Conclusion

In general, it is permitted to introduce law of any nature if it is not in violation of the tenets of Islam as prescribed in the holy Qur’ān and Sunnah, e.g. no law can be passed containing provisions on *ribā*, *gharār* and *maysir* etc. It further reveals that these Islamic commercial tenets are in accordance with general directions and benchmarks set out in Article 10 of the Maldives’ Constitution 2008 for the reformation of commercial laws. Furthermore, the development of Islamic commercial law since the establishment of *majallah*, the primary aim of any Islamic commercial law reform serves to incorporate these basic tenets of Islam, which is the minimum conforming standard of any law that is *Shari’ah* compliant. Thus, in this thesis the existing commercial laws in the Maldives will be tested under the said benchmark. It will declare laws to be valid in case of conformity with the tenets of Islam and the rest will be declared null and void. The result of these tests will be required to incorporate into the commercial law utilizing various models of law reform, which will be discussed in the next chapter.

CHAPTER 3: ISLAMIC COMMERCIAL LAW REFORM MODELS

3.0 Introduction

This chapter can be considered as an extension of the previous chapter, which examines the Islamic legislative models for the purpose of reforms of existing Maldives' commercial laws. Four prominent and popular reform models used in major areas of the Muslim world will be analyzed for comparative purposes. These models represent *al-Siyāsah al-Shar'īyyah*, the codification of Islamic laws, the Islamisation of commercial law, and harmonisation of law and *Sharī'ah*. Such a discussion is crucial for the Maldives policy makers to decide on a suitable and appropriate reform model in relation to all existing laws in general, and specifically in commercial law.

The discussion of this chapter begins with how various Islamic countries such as, Malaysia, Pakistan and a few in the Middle East, have initiated commercial law reforms in order to comply with *Sharī'ah*. Through a comparative approach, these four reform models allow for conclusions to be drawn that reveals the appropriate model for the Maldives.

3.1 Article 10 of the Maldives' Constitution 2008

It has already been discussed that Article 10 of the Maldives' Constitution 2008 provides that- (a) the religion of the State of the Maldives is Islam. And Islam shall be one of the basis of all the laws of the Maldives, (b) No law contrary to any tenet of Islam shall be enacted in the Maldives. An analysis of this article reveals that the tenets of Islam are given extreme importance in the country and therefore no law can be enacted contrary to any tenet of Islam, which serves as the benchmark for commercial

law reform as explained earlier. According to Husnu-Al Suood³¹⁵ the framer of Article 10 of the Maldives' Constitution 2008 and the former Attorney General of the Maldives,-

“As the religion of Islam is a national trait worthy of constitutional protection, the framers of the Constitution thought it proper to make provisions for the protection and preservation of the religion of its people. Therefore, upholding Islam is a central feature of the Constitution of the Maldives.”³¹⁶

Al-Suood disclosed that Article 10 of the Maldives' Constitution 2008, originated as a central influence resulting from the Malaysian case of *Che Omar Che Soh v. PP*³¹⁷ in which it was held that expressions “Islam” or “Islamic religion” in Article 3 of the Malaysian Federal Constitution (“Malaysian Constitution”) means “only such acts as related to rituals and ceremonies”. In the said Malaysian judgment, Salleh J. observed that:

“if it had been otherwise, there would have been another provision in the Malaysian Constitution which would have the effect that any law contrary to the injunctions of Islam will be void.”

Al-Suood further explained that the purpose of drafting of Article 10 of the Maldives' Constitution 2008 was because all the previous Constitutions of the Maldives retained merely “Islam as the state religion” which was similar to Article 3 of the Malaysian Constitution. Thus including similar provisions as “state religion” would not safeguard Islam in the public domain of laws based on the Malaysian circumstances detailed in *Omar Che Soh v. PP* [1988]. Subsequently, Al-Suood proposed that apart from the provision inspired by Salleh J., two other provisions should be combined into a single article. These provisions provided clauses stating that Islam served as the state

³¹⁵ The Researcher conducted a personal interview with Hon. Husnu Al- Suood, (the former Attorney General) at his office in the Maldives on 9th December 2013.

³¹⁶ Suood(2014), op.cit., p. 76.

³¹⁷ *Che Omar Che Soh v. PP* [1988] 2 MLJ 55.

religion, the source of laws and the final determiner of all laws, permissible and repugnant. In this regard that the first provision is the current provision of the Article 3 of the Malaysian Constitution, the second is influenced by the ruling of Salleh J. and the third is the source clause which is popular in the Middle Eastern countries. These clauses or provisions will be dealt with later in detail.³¹⁸ Therefore, by amalgamation of the most popular Islamic constitutional clauses, a single provision emerged in the form of the Article 10 of the Maldives' Constitution 2008.

These three Islamic clauses are *inter alia* provisions encapsulated in the Model of Al-Azhar Islamic Constitution 1979, which is widely considered as the most authentic benchmark for Islamic Constitutions.³¹⁹ Thus, it would be necessary to understand all these important Islamic clauses in order to provide a clear pathway and to understand the need for Islamic law reform in the Maldives.

3.1.1 Malaysia - Islam as a state religion

Historically, the 1923 Egyptian Constitution was the first to incorporate Islam as the state religion ("religious clause").³²⁰ Since then, as indicated in Tab 1: 1, the provision on Islam as the state religion was incorporated into the constitutions of 23 Muslim countries including Malaysia, Maldives and Pakistan.³²¹ A likely explanation for retaining such a provision is the robust reassurance of religious right. This can be seen in the case of *Che Omar Che Soh v. PP* [1988] as explained earlier.

The main provision of the Malaysian Constitution relating to the religious clause is the Article 3(1), which stipulates that Islam is the religion of the Federation but all other

³¹⁸ See discussion in Chapter 3.1.1, 3.1.2 and 3.1.3.

³¹⁹ The draft Al-Azhar Model of Islamic Constitution was proposed by Al-Azhar University, Egypt in 1979. It contains a Preamble and encompasses 93 provisions in 9 Articles. These include the principles relating to Islamic economics, judiciary, formation of government and individual rights etc., Ahmed, D. I., & Gouda, M. concluded, based on the said model, that the Maldives' Constitution 2008 is in the rank of 4th in terms of its Islamicity, See generally, Ahmed, D. I., & Gouda, M. (2014), op.cit.

³²⁰ Jawad A, M. M(1991), op.cit , p.19.

³²¹ See Tabal:1.1 in Chapter 1.0.

religions may be practiced in peace and harmony.³²² This means that Islam is subject to the supremacy of the Malaysian Constitution³²³ as Article 4 provides that the Constitution is the supreme law of the nation.³²⁴ It is considered that the case of *Che Omar Che Soh v. PP* is the landmark case concerning the interpretation of the status of Islam as enshrined in Article 3 of the Malaysian Constitution.

To understand the interpretation of Article 3 by Salleh J, it will be relevant to discuss the case of *Che Omar Che Soh v. PP* [1988] in detail. In this case, it was submitted that the imposition of the death penalty under the Dangerous Drugs Act 1952 and the Firearms (Increased Penalties) Act 1971 was contrary to the injunctions of Islam; therefore, they are unconstitutional and void. It further argued that referring to “Islam” in Article 3 of the Malaysian Constitution encompasses all Islamic penalties. In this respect, Islamic law provides neither “*qiṣāṣ*” nor “*ḥudūd*” penalties for the trafficking of dangerous drugs and firearms offences.

In this case, the Supreme Court of Malaysia (now the Federal Court) was reluctant to interpret the word “Islam” as contained in Article 3 of the Malaysian Constitution beyond the scope of ritual and ceremonial, which covers all aspects of life including laws etc. Doing so would impact all laws and subsequently every single piece of legislation would have to be held up to Islamic scrutiny. Thereafter, Islamic law is limited to Muslims and only within the sphere of personal and family laws and could not be extended to the body of public law. In order to extend Article 3 of the Malaysian

³²² Schedule 9, List II, Paragraph 1 of the Malaysian Constitution provides that State legislatures are permitted to legislate for the implementation of Islamic laws in area of personal and family law, succession, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, trusts, *zakāt*, *fitrah*, *baitulmal*, similar Islamic religious revenue and mosques.

³²³ Shuaib, F. S. (2012), op.cit; see also Moustafa, T. (2014), op.cit.

³²⁴ Article 4 of the Malaysian Constitution reads: “[any] law passed after *Merdeka* Day which is inconsistent with the Constitution shall, to the extent of inconsistency”. With regards to the *pre-merdeka laws*, by virtue of Article 162(6) and (7) of the Malaysian Constitution, those laws which are inconsistent with the Constitution, may be amended, adapted or abolished by the relevant courts in order to conform with the Constitution.

Constitution for the application of Islam in the area of public law, there should have been another provision that made un-Islamic legislations voidable. It is a matter of fact that even after this ruling of the Malaysian Supreme Court, there had been various efforts to make laws in accordance with Islam, such as the harmonisation of both commercial laws and *Sharī'ah*. Some of these will be discussed later in this chapter.³²⁵ Furthermore, there were manifestations of Islam to be adopted as a Code at individual level. This can be clearly seen in the case of *Hajjah Halimatussaadiah bint. Haji Kamaruddin v. Public Services Commission Malaysia & Anor*³²⁶ where a clerk at the office of the Perak State Legal Adviser was dismissed for dressing with *pardah* (face-veil) which is against the official dress code of the civil servants. It was challenged by her at the Malaysian Supreme Court that such a ban deprived her of fully enjoying her constitutional rights to practice religion protected under Article 3 of the Malaysian Constitution. It was held that the prohibition of face-veil does not infringe the plaintiff's religious right guaranteed under the Malaysian Constitution as the face-veil is not prescribed in the Qur'ān.³²⁷ This interpretation contrasts with that of *Meor Atiqulrahman bin Ishak & others v. Fatimah bint. Sihi & Others*³²⁸ where the two boys were suspended for wearing "serban" which was against the school dress code. Thus, these two decisions overruled the decision of *Che Omar Che Soh v. PP* and granted a proper interpretation of Article 3 of the Malaysian Constitution by expanding Islam beyond rituals and ceremonials. Consequently the decision was overturned by the Court of Appeal.³²⁹ Thus, the Malaysian experience shows that inclusion of the provision that Islam as the state religion provision did not provide adequate grounds to declare that laws in such countries should be enacted according to the tenets of Islam.

³²⁵ See discussion in Chapter 3.5.

³²⁶ [1994] 3 MLJ 61

³²⁷ [1994] 3 CLJ 532.

³²⁸ [2000] 5 MLJ 375.

³²⁹ *Fatimah Sihi v. Meor Atiqulrahman bin. Ishak* [2005] 2 MLJ 25.

3.1.2 Middle East: *Islam as the source of laws*

Apart from the state religion clause, more than 18 Constitutions in Muslim countries have adopted Islam, or *Shari'ah* as “a principal source”, or “the principal source” for legislation (hence, the “source clause”). Many Middle Eastern countries such as Syria, Kuwait and Qatar can be cited as glaring examples.³³⁰

In 1950, contrary to Malaysia, the Syrian Constitution Assembly recommended Islam as the official religion of the state in their first Constitution following independence. However, religious minorities were horrified over the provision as they believed that it would lead to Islamisation of public law. Later it was proposed and accepted that Islam should play a source of law role instead of an official religion.³³¹ The provision reads as, “*al-fiqh al-Islami huwa al-masdar al-r'aisi li'l tashri'*” (Islamic *fiqh* shall be the chief source of legislation).

It was believed that it would have no real impact as it did not make Islam the official religion of the state and did not require state laws to conform to Islamic tenets.³³² This provision was however expunged in the Syrian Constitution 1958 and went on to be reinstated in the Syrian Constitution 1973. This time, the language was altered slightly, but significantly, from “the principal source of law” to “a principle” source of laws.³³³

Other Arab countries eventually followed suit, and incorporated similar “source clause” changes in their constitutions. Kuwait was the first country to incorporate the source clause by following Syria as an example. Article 2 of the Kuwait Constitution 1962 stipulates that “Islam is the state religion and Islamic *Shari'ah* is a primary source of legislation”. Hence, it is apparent that unlike the Syrian Constitution 1973, the

³³⁰ Ahmed, D. I., & Gouda, M. (2014), op.cit., Gouda, M. (2013). Islamic constitutionalism and rule of law: a constitutional economics perspective. *Constitutional Political Economy*, 24(1), 57-85.

³³¹ Yet, the most recent version of the provision, in Article 3 of the Constitution of Syria 2014 adopted the provision contained Islam as state religion along with the sources clause.

³³² Lombardi, C. B. (2013). Constitutional Provisions Making Sharia., op.cit.

³³³ *Ibid.*

Kuwaiti Constitutional provision used the word “*Sharī’ah*” in place of “*fiqh*” in the Constitution.³³⁴

Most constitutions of the Gulf countries such as that of the United Arab Emirates, Bahrain and Qatar are based on the Kuwaiti version. Article 7 of the UAE Constitution 1971 serves as the direct influence from Article 2 of the Kuwaiti Constitution 1962, which refers to *Sharī’ah* as “a” source of law. The Article 1 of the Constitution of Qatar 2004 and Article 2 of the Constitution of Bahrain 1973 have similar provisions. Furthermore, Article 2 of the Constitution of Egypt 1980 and Article 3 of the Constitution of Yemen 1991 retained the same provisions. However, the structure of the Yemeni Constitution differs from the rest as it provides that “Islamic *Sharī’ah* as the source of all legislation”.

According to Wahbah Al-Zuhali, the source clause provided in the Constitutions of Muslim countries has no significant role in practice. Neither the laws were formed from *Sharī’ah*, nor are they compatible with the tenets of Islam and the universal principles of *Sharī’ah*. Furthermore, the legislation was derived from western laws and as a result these laws often made permissible that which is forbidden such as *ribā*. In his view, religious clauses are mere political tools that rulers use to please their citizens.³³⁵ On this point Mayer notes the idea of religious clauses have been imported from European constitutions where the notion of religion remains secular. Thus adopting such a clause in a Muslim Constitution does not represent or give specific importance to the religion of Islam. Likewise, the source clause more “often have symbolic than practical significance” in terms of applying *Sharī’ah*-based laws in a given legal system.³³⁶

³³⁴ *Ibid.*

³³⁵ Zuhaili, W. (1987). *Juhūd Taqnīn*, op.cit, p.25.

³³⁶ Mayer, A. E. (1987). Law and religion in the Muslim Middle East. *The American Journal of Comparative Law*, 127-184.

In terms of interpreting these provisions, the Constitutional Court of Kuwait observed that neither the courts nor the government is obliged to ensure that all laws are in conformity with *Shari'ah*.³³⁷ However, this view contrasts with the position of the United Arab Emirates Federal Supreme Court as it held that all laws should respect general principles of *Shari'ah* and declared all un-Islamic legislations null and void.³³⁸

For various reasons Egypt is cited as the leading country for the interpretation of Islamic laws. The Egyptian Supreme Constitutional Court made a clear distinction between the fixed and flexible rules for interpreting the source clause. If any law was found inconsistent with the fixed rules, then such a law shall be deemed to be void.³³⁹ This general view, however, only became applicable to those laws enacted after the promulgation of constitutions in countries like Egypt, United Arab Emirates and Sudan etc.³⁴⁰

In summary, according to Abul Jawad, despite the different wordings of the source clause, it still denoted that *Shari'ah* represented a source of laws, but it was not the only source of law. Such a provision proved adequate to make the laws in accordance with *Shari'ah*. Its use made it impossible to justify the un-Islamic legislation since there would be no distinction between the religious clause and the source clause. Drafting the source clause was considered more progressive towards islamisation of legislation as it was not adequate in prohibiting un-Islamic laws, such as the manufacturing and trading

³³⁷ *Kuwaiti Constitutional Court Case No.8/1992; Kuwaiti Constitutional Court Case: Al-Nashi v.Dashti (October, 28,2009).*

³³⁸ *United Arab Emirates Federal Supreme Court Case No.1/8(January, 1982); United Arab Emirates Federal Supreme Court Case on Junatta Bank [1985].*

³³⁹ See discussion in Chapter 3.4.1.2.

³⁴⁰ See generally; Hamoudi, H. A. (2011). Repugnancy in the Arab World. *Willamette Law Review*48,427; Lombardi, C. B. (2013). Constitutional Provisions Making Sharia.,op.cit.

of liquor.³⁴¹ These actions, therefore, did not represent a genuine attempt at Islamisation of laws, which never changed even in the wake of the Arab Spring in 2010.³⁴²

3.1.3 Pakistan: *Repugnancy clause*

From the previous discussion, it can be seen that Salleh J. anticipated a significant issue through his position of declaring un-Islamic laws invalid in Malaysia – a provision for making un-Islamic laws void, a provision which is embodied in Article 10(b) of the Maldives' Constitution 2008 (“the repugnancy clause”). It has been assumed, however, the first repugnancy clause provision originated out of Pakistan.³⁴³ Since then, other Muslim countries have adopted repugnancy clauses. They include: Afghanistan,³⁴⁴ Iraq,³⁴⁵ Sudan,³⁴⁶ Somalia,³⁴⁷ Pakistan and Maldives.³⁴⁸ The Pakistani objective resolution of 1947 followed by the 1956,³⁴⁹ 1962,³⁵⁰ and 1973³⁵¹ Constitutions stipulated that all laws shall be enacted in accordance with the Qurʾān and Sunnah. Following independence from British in 1947, Pakistan, inherited the bulk of colonial rules and laws some of which were not in accordance with the tenets of Islam.³⁵² The current Constitution of Pakistan 1973 provides numerous Islamic provisions in respect to legislation of laws. For instance, in addition to making Pakistan as an Islamic state, the constitution made a special provision relating to Islamic commercial laws, which

³⁴¹ Jawad A, M. M(1991),op.cit, p.21.

³⁴² See generally,Sultany, N. (2013).Against Conceptualism: Islamic Law, Democracy, and Constitutionalism in the Aftermath of the Arab Spring. *Boston University International Law Journal* 31, 435;Hashish, A. A. (2013). The Egyptian Second Republic: The Future of Litigating Islam Before the Supreme Constitutional Court. *5 Berkeley Journal of Middle East & Islamic Law* 119.

³⁴³ Saleh, N., & Mayer, A. E. (1987). Unlawful Gain and Legitimate Profit in Islamic Law. *Middle East Studies Association Bulletin*, 21(2), 302-304.

³⁴⁴ Article 3 of the Afghanistan Constitution 2004 states that “no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan”.

³⁴⁵ Article 2 the Constitution of Iraq 2004 provides that Islam is a source of law, and it made prohibition of enacting laws which are in conflict with the “settled ruling of Islam” or “*thawābit aḥkām al-Islām*”.

³⁴⁶ Article 114 of the Constitution of Sudan 1998 provides that “[every] legislation passed after the adoption of this Constitution in contravention with the provision of *kitāb* and *sunnah* should be void”.

³⁴⁷ Article 2 of the Somali Constitution 2012 provides that “no law which is nor compliant with the general principles of the *Shariʿah* can be enacted”.

³⁴⁸ Ahmed, D. I., & Gouda, M. (2014),op.cit.

³⁴⁹ The Constitution of Islamic Republic of Pakistan 1956,Article 198.

³⁵⁰ The Constitution of Islamic Republic of Pakistan 1962 Article 204.

³⁵¹ The Constitution of Islamic Republic of Pakistan 1973, Article 227.

³⁵² Section 98(3) the Indian Independent Act 1947 provides the validity of colonial rules.

demanded that Pakistan eliminate *ribā* as soon as possible.³⁵³ It unequivocally stipulated:

“[all] existing laws shall be brought in conformity with the injunctions of Islam and no law shall be enacted which is repugnant to these injunctions.”³⁵⁴

Unlike Malaysia or Maldives, this provision had less ambiguous implications, by way of Article 203 of the Constitution of Islamic Republic of Pakistan 1973, Federal Shariat Court (FSC), was established to review laws for *Sharīʿah* compliance; this suggests the legal framework for this action was already in place. In the past, the FSC had struck down several laws on the basis of repugnancy to the *Sharīʿah*. For instance, in the landmark judgment on *ribā* in 1991, modern banking interest was classified as *ribā*.³⁵⁵ The Shariat Appellate Bench of the Supreme Court of Pakistan (SCP) upheld this decision on appeal.³⁵⁶ Additionally, the SCP further expunged and ruled that as of 31st March 2000 the following commercial laws would cease to exist because of being contrary to the tenets of Islam. They were; the Interest Act 1839, the West Pakistan Money Lenders Ordinance 1960, the West Pakistan Money Lenders Rule 1965, the Punjab Money Lenders Ordinance 1960, the N.W.F.P. Money Lenders Ordinance 1960, the Balochistan Money Lenders Ordinance 1960 and the Section 9 of the Banking Companies Ordinance 1962.³⁵⁷ However, in the view of Jan Michiel Otto, the repugnancy clause was a constitutional provision containing a repeated pattern within major areas of the Muslim world. Such a phrase did not mean much in practice as the same Constitution provides bulk of provisions to safeguard human rights, independence of the Judiciary and democracy.³⁵⁸ Conformity of divine and positive norms in a single

³⁵³ The Constitution of Islamic Republic of Pakistan 1973, Article 38(f).

³⁵⁴ *Ibid.*, Article 227.

³⁵⁵ *Dr. Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law and others, PLD 1992 FSC 1.*

³⁵⁶ *Dr. M. Aslam Khaki and Others v. Syed Muhammad Hashim and Others, PLD 2000 SC 225.*

³⁵⁷ *Ibid.*

³⁵⁸ Otto, J. M. (2008). *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy.* Amsterdam :Amsterdam University Press, p. 18.

piece of legislation is challengeable and inconsistent with each other in some cases. The best option could be the “compatibility of *Shari’ah* and rule of law”- a mechanism for harmonisation of these two under a single formula,³⁵⁹ which will be explained later in the chapter.

3.1.4 Analysis of Article 10 of the Maldives’ Constitution 2008

It is evident from these discussions that the religion clause, the source clause and the repugnancy clause are constitutional symbols of *Shari’ah* in law-making. However, the degree of recognition varies from one nation to the other. There exists no clear, and consistent manifestation of applying these clauses. Nevertheless, the religion clause represented laws in the sphere of personal matters and the repugnancy clause tends to be more robust in method and practice. The source clause is more or less the voluntary clause in terms of applicability and compliance with the *Shari’ah*. Accordingly, the application of Article 10 of the Maldives’ Constitution 2008 is visible in method and practice. Overall interpretation of these clauses supported the view that by merging the religion, source and repugnancy clauses into a single provision is a clear and irrefutable evidence that all laws of the nation shall be enacted in accordance with the *Shari’ah*. With Article 10 providing the minimum criteria in the repugnancy clause and the maximum criteria in the other two clauses (the religion and the source), there existed no justification for continuing to rely on un-Islamic laws in the Maldives under its constitution of 2008. Accordingly any law which is repugnant with this Article shall be declared as null and void.

3.2 Islamic Commercial Law Reform Models

It should be noted that at least four prominent models of commercial law reform can be found in major parts of the Muslim world as mentioned earlier. These models are (a)

³⁵⁹ *Ibid*, p.19.

al-Siyāsah al-Shar‘iyyah (“*al-Siyāsah*”), (b) codification of Islamic laws, (c) Islamisation of the prevalent commercial laws and (d) harmonisation of *Sharī‘ah* with prevalent laws. The example, *al-Siyāsah*, is seen within the Kingdom of Saudi Arabia where rulers play a central role in lawmaking.³⁶⁰ The second model, which codified Islamic laws, was adopted by Egypt, Syria, Lebanon, Jordan, Iraq, Iran, Tunisia and Morocco. The third model represents the Islamisation of the prevalent commercial laws, which was experimented with by the Republic of Sudan and Pakistan where lawmakers took initiatives to islamise their respective legal systems.³⁶¹ The last model – Islamic Banking and Finance – is widely practiced in Malaysia.

Al-Siyāsah is the oldest model of law reform in accordance with *Sharī‘ah*. All three models were derived from *al-Siyāsah*. In other words and in a broader sense, *al-Siyāsah* is the theory that practically formulated the models of Islamic codification, the Islamisation of laws, and the harmonisation of prevalent laws in accordance with *Sharī‘ah*.

Thus, the legitimacy of these models is beyond question. Yet, there are minor differences of opinion with respect to the validity of these models. These contrasts will be examined later. In general, the following references of *Sharī‘ah* are widely cited for the justification of these models:

The Holy Qur’ān says:

- (a) “O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination.”³⁶²

³⁶⁰ Layish, A. (2014),op.cit.

³⁶¹ Mayer, A. E. (1987),op.cit.

³⁶² Al-Qur’ān 4:59(Abdullah Yūsuf Ali).

In this respect the following *hadiths* are narrated:

(a) Alī (RA) narrated,

“The Messenger of Allah (pbuh) said: There is no obedience if it involves disobedience towards Allah; obedience is only in that which is right and proper”.³⁶³

(b) Ali (RA) narrated,

“The messenger of Allah (pbuh) said: There is no disobedience to any created being if it involves disobedience to Allah, may He be glorified and exalted”.³⁶⁴

The stated Qur’ānic verse has established the concept of “those in Authority” or “*ulul amr*” who empowers the Ruler to formulate rules, decisions and policies while keeping in view those limitations detailed in the *ahadith* and tenets of Islam.³⁶⁵ Thus, based on these references it is permissible to operate these models without violation of the clear tenets of Islam.

3.2.1 Al-Siyāsah Model

As indicated earlier, the term “*al-Siyāsah al-Shar‘iyyah*” denotes the authority of the *ḥākim* (Ruler) to issue executive orders and regulations on issues where no rules have been provided in the *Sharī‘ah*, or where rules may be provided but further regulations are needed in order to implement the rules properly.³⁶⁶

The term *al-Siyāsah* means a *Sharī‘ah*-oriented policy, or governance.³⁶⁷ Taqī al-Dīn al-Maqrīzī (d.1441) describes the term as *al-qanūn* (law).³⁶⁸ Al-Marwardī (972-1058), a

³⁶³ Al-Bukhairi: Hadith No. 7257 (Muhammad Muhsin Khan), Al-Muslim: Hadith No.4765 (Nasiruddin al-Khattab).

³⁶⁴ Al-Ahmed: Hadith No.1095(Nasiruddin al-Khattab).

³⁶⁵ IbnTaymiyyah, A.(1971). *Al-Siyāsah al-Syar‘iyyah fī Iṣlāḥ al-Rā‘i wa’l-Ra‘iyya*.Cairo:Dar al-Sha'b,p12.

³⁶⁶ Hazri, T. A. (2014). Conceptions of the Political in Islamic Thought: Reconciling Legal and Philosophic Approaches to Siyasa. *Islam and Civilisational Renewal (ICR)*, 5(2).

³⁶⁷ Kamali, M. H. (1989). Siyasa Shar‘iyah or the Policies of Islamic Government. *The American Journal of Islamic Social Sciences*, 6(1), 61.

³⁶⁸ Maqrīzī,Al (1934). *Kitāb al-Mawā‘iz wa-al-i‘tibār bi-dhikr al-khiṭaṭ wa-al-āthār, al-ma‘rūf bil-Khiṭaṭ al-Maqrīzīyah*. Beirut:Dar Al-kuthubu ‘ilmiyya. Vol.2, p. 220.

Shafi' jurist and judge during the Abbasid Caliph al-Qadir (991-1031) was of the view that the function of *al-Siyāsah* is vested on the ruler who is entrusted with this authority given to him by Allah (God). He further said that a ruler, who is regarded also as a successor of the Holy Prophet (pbuh) is responsible to oversee the management of *al-Siyāsah* in worldly and religious affairs of the state.³⁶⁹

According to Mustafa Al-Zarqa, the scope of *al-Siyāsah* in modern legal terminology falls under the category of administrative and constitutional laws.³⁷⁰ While Muhammad Hashim Kamali is of the opinion that procedural rules, policy decisions, as well as legislative and administrative measures that are promulgated for implementation purposes of *Sharī'ah* are considered to be a part of *al-Siyāsah*.³⁷¹

Since the doctrine of *al-Siyāsah* is the oldest model of law reforms, it is important to review the process of evolution of this classical theory. Probably for the first time in the Islamic history, Ibn Taymiyya (1263-1328) referred to it in his famous work, "*al-Siyāsah al-Shar'īyah fī Islāh al-Ra'ī wa'l-Ra'īyah*". Later on the theory was further conceptualised by his disciple Imam Ibn al-Qayyim (1292 -1350) in the thirteenth century.³⁷² However, various historical examples show that the doctrine was referred to even earlier than the thirteenth century. The first example is the suspension of the *ḥadd* by the second Caliph Ummar bin al-Khattab (577-644) after the time of the Holy Prophet (pbuh).³⁷³ In another incident, in the late eight century, Ibn al-Muqaffa (714-759), a secretary at the court of Caliph Al-Mansur (714-775), made a proposal to the Caliph for the uniformity of laws in the Caliphate. Ibn al-Muqaffa was extremely worried about conflicting judgments of different courts, which led to rigidity in the execution of those judgments. He believed that harmonising conflicting judgments

³⁶⁹ Al-Mawardi, A.H. (1978). *al-Aḥkām al-Sulṭānīyah wa al-Wilāyāt al-Dīniyyah*. Beirut: Dar al-Kutub al-Ilmiyah.,p.5

³⁷⁰ Al-Zarqa, M. (1968),op.cit p. 28.

³⁷¹ Kamali, M. H. (2008). *Sharī'ah law*,op.cit., p. 225.

³⁷² Shalakany, A. A. (2008), op.cit.

³⁷³ Kamali, M. H. (1989). *Siyasah Shar'iyah*, op.cit.

represented one of the duties a Caliph. He reasoned that it was essential for the Caliph to exercise *ra'y* (discretion) when drafting legislation.³⁷⁴

Probably Caliph Al-Mansur's attempt to implement Imam Maliki's *al-Muwatta* was the outcome of this debate. Caliph Harun al-Rashid (763-809) agreed with Caliph al-Mansur in this regard; however, both attempts failed due to opposition by Imam Malik. Imam Malik held the view that since many *hadith* existed within Islamic law, people ought not to be bound to a particular opinion. The Imam opined that to impose one set of rules for the entire *ummah* may not be feasible due to different environments, communities as well as different views of *fuqhā'* on any particular issue.³⁷⁵

According to Khalid Masud, the doctrine of *al-Siyāsah* had no instrumental role in legal reform. He suggested that the state should promulgate new laws in those cases where *Sharī'ah* prescribes no rulings.³⁷⁶ However, Amr A. Shalakany emphasized that law reforms during the first 75 years of the nineteenth century in Egypt were an indigenous legal development based on the doctrine of *al-Siyāsah*.³⁷⁷ He further revealed that those reforms were in fact the continuation of the Ottomans' *qanūns*³⁷⁸ (e.g. ECC), which were actually the continuation of *al-Siyāsah* itself.³⁷⁹ *Al-Siyāsah* is the most ancient statutory instrument in Islamic law, which has evolved and remains vested in the three organs of the state. For example, one of the first Islamic legislation in Pakistan, the Hudood Ordinance 1979 was promulgated on the basis of *al-Siyāsah* by the executive branch of the government. Article 128 of the Constitution of Pakistan 1973 empowers the President of the country to promulgate Ordinances. Similarly the provincial governor holds the same authority to promulgate Ordinances. In addition, the

³⁷⁴ Masud, M. (2001). The doctrine of siyasa in Islamic law. *Recht van de Islam*, 18, 1-29.

³⁷⁵ Qaradāwī, Y. (1990). *Al-Madkhal li Dirasāt al-Shari'ah al-Islāmiyyah*. Cairo: Maktabah Wahbah, p. 269.

³⁷⁶ Masud, M. (2001), op.cit.

³⁷⁷ Shalakany, A. A. (2008), op.cit.

³⁷⁸ *Ibid.*

³⁷⁹ Vogel, F. E. (2000). *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (Vol. 8): Brill, p.173.

Malaysian Islamic Financial Services Act, 2013, which is the legislation pertaining to Islamic finance and the famous *ribā* judgment, which was delivered by the Federal Shariat Court of Pakistan are examples of the modern form of *al-Siyāsah*.³⁸⁰ In the absence of modern form of Parliament, the Kingdom of Saudi Arabia adopted the doctrine of *al-Siyāsah* in its classic form by vesting lawmaking power in the King and *ulamā'*.³⁸¹ This model will be examined with reference to the Saudi legislative framework in which the doctrine of *al-Siyāsah* has frequently been adopted.

3.2.1.1 Saudi Legislative Model

Unlike other states in the Muslim world, the Kingdom of Saudi Arabia had never gone under colonial influence. Yet the Ottoman Code of Commerce 1850 was enforced there until 1931, which was later abrogated due to opposition by the Saudi *ulamā'* as it was a man-made law.³⁸² Pertinent to mention here is that in the Saudi legislative model the term “legislation” was not applied as it was used with secular laws. Under the Saudi legislative system, instead of “legislation” the term “*nizam*”, which means regulation, is used.³⁸³ Likewise, legislative authority is referred to as “regulatory authority”, and was responsible in promulgating the Ordinances and Regulations under *al-Siyāsah*. The Saudi regulatory authority ratifies international treaties, agreements, and regulations.³⁸⁴ The legislative authority is vested in the King, the Council of Ministers, and the Advisory Council collectively.³⁸⁵ In this regard, Article 67 of the Basic Ordinance of the Kingdom 1992 provides that:

³⁸⁰ *Dr. Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law and others, PLD 1992 FSC 1.*

³⁸¹ Otto(2010),op.cit. p. 156; Schank, A. (2014),op.cit.

³⁸² Otto(2010),op.cit., p.145.

³⁸³ Zuhaili, W. (1987), op.cit., p.51.

³⁸⁴ Ansary, A. F (2008)“A Brief Overview of the Saudi Arabian Legal System” Retrieved on 21st July 2015 from http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm.

³⁸⁵ The Board of Senior *Ulama* is a body established by virtue of the Article 44 of the Basic Ordinance 1992, which is comprised of 30-40 of the most senior religious scholars of the Kingdom. The main function of the body is to pronounce fatwas on concerned issues. Though this body is not part of the regulatory authority, which has significant role in law-making as the Qur’ān and Sunnah, the board represents a main source of all regulations in the Kingdom and in most cases, the explanations stipulate

“[t]he regulatory authority lays down regulations and motions to meet the interests of the state or remove what is bad in its affairs, in accordance with the Islamic *Sharī'ah*. This authority exercises its functions in accordance with this law and the laws pertaining to the Council of Ministers and the Advisory Council.”

Under the Saudi legal system, the King serves as the ultimate authority over the three state organs, i.e. the Judicature, Executive and Regulatory Authorities.³⁸⁶ As Head of State and the Head of the Council of Ministers, the Saudi King may enact, repeal or amend any law and regulation by issuing a Royal decree, which comes through the Kingdom's legislative bodies (the Council of Ministers and the Shura Council).³⁸⁷

Article 1 of the Basic Ordinance of the Kingdom of Saudi Arabia 1992 provides that the Constitution is the Qur'ān and Sunnah. The King shall undertake the administration of the state in accordance with *al-Siyāsah* in order to implement laws prescribed by the Qur'ān and Sunnah.³⁸⁸ The regulatory authority has the authority to make *nizams* (regulations) for purposes of public welfare and avoidance of harm within state functions under the general principles found in the *Sharī'ah*. The Saudi model is significant as it recognizes the doctrine of *al-Siyāsah* in theory and practice by stating clearly the word “*al-Siyāsah al-Shar'īyyah*” as a mechanism for lawmaking.³⁸⁹ In the past, the King promulgated several legislations so that the legal system functioned promptly, particularly in areas of commerce, such as Social Insurance Regulation, Banking Regulation etc. All these regulations have forbidden *ribā* as well as *gharār*.³⁹⁰ Despite the fact that the official *madhab* of Saudi Arabia is the Hanbali, it has adopted the opinions of the other schools of law for lawmaking by selecting *takhayyur* based on

that the Regulations are based on these two sources. (The Shura Council of the Kingdom of Saudi Arabia. Retrieved on 21st July 2015 from

<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG/>)

³⁸⁶ Basic Ordinance of the Kingdom of Saudi Arabia 1992, Article 44.

³⁸⁷ See generally, Kéchichian, J. (2012). *Legal and political reforms in Saudi Arabia*. Abingdon: Routledge, pp.25-27.

³⁸⁸ Basic Ordinance of the Kingdom of Saudi Arabia 1992, Article 55.

³⁸⁹ *Ibid.*

³⁹⁰ Shaaban, H. (1999), op.cit.

maṣlaḥah.³⁹¹ To sum up, it can be concluded that the Saudi model of *al-Siyāsah* is unified into commercial laws for protection from adverse economic changes on one hand, and to safeguard the Islamic values in the society on the other.³⁹²

3.2.1.2 The Methodology of *al-Siyāsah al-Shar‘iyyah*

As explained earlier, all forms of *al-Siyāsah* should be in accordance with the rules prescribed by *Sharī‘ah*, which otherwise would be considered as null and void. Yet, it is arguable as to the degree of conformation of *al-Siyāsah* with the Islamic tenets. According to Imam al-Shafī‘ī, the society should be administered by the Qur’ān and *ḥikma* (wisdom), the latter is referred to the Sunnah. He rejected any *al-Siyāsah* not in accordance with the Qur’ān and Sunnah.³⁹³ He is of the view that the *ra’y* (discretion) and an arbitrary opinion in the application of Islamic law are not acceptable. Furthermore, if a clear rule were not provided in the Qur’ān and Sunnah, then *qiyās* should be applied.³⁹⁴ However, Kallaf has explained this concept in a broader sense as following:

“Securing public welfare and removal of harm in such a way that it did not transgress the limits prescribed by the *Sharī‘ah* and did not violate its universal principles, even though it may not be in complete conformity with the statement of the *al-a’imma al-mujtahidun* (the leading jurists)”³⁹⁵

In short, the objective of *al-Siyāsah* model should be confined to the upholding of *Sharī‘ah* objectives.³⁹⁶ To achieve this goal it is required that *al-Siyāsah* model shall not

³⁹¹ Sfeir, G. N. (1988). The Saudi approach to law reform. *The American journal of comparative law*, 729-759.

³⁹² Baamir, A. Y. (2013). *Shari’a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*. England: Ashgate Publishing, Ltd., p.8.

³⁹³ Al-Shafī‘i, M. (1990). *Kitāb al-Umm*. Cario: al-Dar al-Misriyya, n.d., vol.1, p.7.

³⁹⁴ *Ibid.*

³⁹⁵ Kallaf, A. W. (1350). *al-Siyāsah al-Shar‘iyyah*. Cairo: al-Matba‘ah al-Salafiyyah, pp.14-15.

³⁹⁶ For instance, taxes imposed by the state must be affordable for the people to pay and the ultimate goal of taxes should be to maintain the economic justice in the society and not merely levying unaffordable taxes. See, Kamali, M. H. (1989), op.cit.

be in contradiction with the clear tenets of Islam, Sunnah and *ijmā* of the Muslim Ummah.³⁹⁷

The general methodology of *al-Siyāsah*, which is set out here, will be applied in relation to all legislative models and the findings will be shared in relevant sections of the respective models.

3.3 Codification of the Islamic Laws Model

The concept of ‘codification of laws’ generally means to form certain legal rules and norms that belong to a particular branch of law into a single piece of statute or Code. The term also refers to the process of reducing a customary law into writing.³⁹⁸

Black’s Law Dictionary defines the term codification as “the process of collecting and arranging the laws of a country or state into a Code, which in theory is promulgated by the legislative authority”.³⁹⁹ Bentham, who introduced the term “codification” in English language, referred to it as “an orderly and authoritative statement of the leading rules of law on a given subject, whether those rules are to be found in statute law or in common law”. However, Austin has defined it as “the re-expression of the existing law and does not involve any innovation in the matter of existing law”.⁴⁰⁰

Arabic synonym for the term codification is *taqnīn*. Sanhūrī defines the term *taqnīn* as “drafting the laws within prescribed texts, in a formal and consistent manner.”⁴⁰¹ The formal process is referred to as “*tashrī*” in case of the national parliament codifying

³⁹⁷ Belhaj, A. (2013). Law and Order According to Ibn Taymiyya and Ibn Qayyim al-Jawziyya: A Re-Examination of *siyāsa shar‘iyya*. In B. Krawietz, & G. Tamer (Eds.). *Islamic Theology, Philosophy, and Law: Debating Ibn Taymiyya and Ibn Qayyim al-Jawziyya*(pp.400-21).Berlin: Walter de Gruyter.

³⁹⁸ Bergel, J. L. (1988). Principal Features and Methods of Codification. *Louisiana Law Review*, 48, 1073.

³⁹⁹ Campbell, H. (1990),op.cit., p. 258.

⁴⁰⁰ Acharyya, B. K. (1914). *Codification in British India*.Calcutta:SK Banerji&Sons, p. 6.

⁴⁰¹ Al-Sanhuri, A.R (1936). Wujūb Tanqīh al-Qānūn al-Madani al-Miṣrī wa ‘ala- Ay Asas Yakūn Hādihā al-Tanqīh”, *Maj. Al-Qānūn wa al-Iqtisād*,6(1),p.3.

the law, “*marsūm*” (administrative orders) in case of the law promulgated by a ruler and “*tadwin*” where laws are codified by the *ulamā*⁴⁰²

The “codification of Islamic law” means to enact a law by choosing a single, or several opinions derived from various opinions belonging to different schools of Islamic law (i.e. Commercial Code).⁴⁰³ Such legislation is formed from the diversified opinions of the *fuqhā* into a uniform body of law, which could result in easier application and acceptance and is understood by statesmen and laymen.⁴⁰⁴

In this respect Muhammad Asad quoted-

“...But once its ordinances are codified, the *Shari‘ah* will emerge as a very small code of laws; and because of the clearness and conciseness of their language, these laws will not require for their understanding any extraneous guidance-so that every intelligent Muslim, be he a scholar or layman, will be in a position to find out for himself what the law of Islam says about this or that problem.”⁴⁰⁵

In a Maldivian context, Abdullahi An-Nai‘m says that *Shari‘ah* cannot be codified while commenting on the draft of the Penal Code of Maldives (Law No.9 of 2014).⁴⁰⁶ In response to the An-Nai‘m’s view, the draftsmen of the Code, Robinson & Zulfiqar stated that if *Shari‘ah* has “any real world effect-if it can ever produce a rule to be followed” then such “rule can be written down”.⁴⁰⁷ Furthermore, there are various historical evidences which reveals that the *Shari‘ah* can be codified and it was developed with *al-Siyāsah*. In this sense, Ibn-Muqaffa’s call to Caliph al-Mansur for unification of Islamic law represents the first example and significant progress toward

⁴⁰² Layish, A. (2014), op.cit.

⁴⁰³ Al-Zarqa (1968), op.cit., p. 244.

⁴⁰⁴ Asad, M (2000). *This Law of Ours And Others Essay*. Kuala Lumpur: Islamic Book Trust, p.68.

⁴⁰⁵ *Ibid*, pp. 68-69.

⁴⁰⁶ An-Na‘im, A. A. (2007). Brief Comment on the Maldives Penal Code Project: Failure to Take Shari'a Seriously, Not Codifying It, A. *Journal of Comparative Law*, 2, 54.

⁴⁰⁷ Robinson, P. H., & Zulfiqar, A. (2007). Of Neocolonialism, Common Law and Uncodifiable Shari'a: A Reply to Professor An-Na‘im. *Journal of Comparative Law*, 2, 07-20.

codification of (all) Islamic laws.⁴⁰⁸ Subsequently, during the reign of the Abbasid Caliphate, there was the formation of *al-Siyāsah*, particularly in the area of tax laws, land laws and criminal laws.⁴⁰⁹ Thereafter, codification had no role in the Islamic legal system until the first Ottoman *qānūnu-nema* (The message of law) enacted during the sixteenth century.⁴¹⁰ The *tanẓimāt* reforms and the codification of the *majallah* represented the turning point of codification of Islamic laws, which was followed by several codification projects in various parts of the Muslim world.⁴¹¹ All this historical evidence demonstrates clearly that Islamic law can be codified.

Although, the legitimacy of codification of Islamic law was justified on the basis of public interest and relating to *qiyās* of the codification of Qur’ān and Sunnah, there are opposite positions that detail negative and destructive consequences to Islamic law codification.⁴¹² In this regard, the Saudi Board of Senior *Ulamā’* issued a fatwa in which it stated that the concept of law codification was predominantly a western theory and incompatible with the teachings of the Qur’ān and Sunnah. The fatwa further said that the codification of Islamic laws would usurp the role of *ulamā’* for its interpretation.⁴¹³ The fatwa’s intent can best be summarised by using the example of a *mujtahid* judge who chooses to disregard a single opinion in favor of applying several contrasting opinions from various Islamic schools of law. This action, in fact, freezes *ijtahād*, which runs counter to Islamic law.⁴¹⁴

According to Sami Zubaida, earlier *taẓimāt* and Egyptian law reforms were adopted in an ad hoc approach. It was later during the nineteenth and twentieth centuries that

⁴⁰⁸ Mallat(2007),.op.cit, p. 239.

⁴¹⁰ *Ibid.*

⁴¹¹ See discussion in Chapter 2.3, See also Anderson, J.N.D. (1987). *Islamic Law Today*, op.cit.

⁴¹² See generally, Abu Zaid, B.A. (2006) *al-fiqh al-Nawāzil qaḍaya fiqhiyya mu’asirah*. Beirut: Muahsa’sat al-risalah nashirun: Vol.1, p.29-53.

⁴¹³ Fatwa No.8/2000 “Rejection of Codification of *Sharī’ah*”, Saudi Board of Senior *Ulema*. A similar view was expressed by another scholar, based in Saudi Arabia, Bakr bin Abdullah Abu Zaid (See generally, Abu Zaid, B.A(2006),op.cit., p.32).

⁴¹⁴ Qarādāwī, Y. (1990),op.cit., p. 295.

Afghani and ‘Abduh’ theorized methodologies and renovated their own theories as done by Ridā and Ṣahūrī in Egypt.⁴¹⁵ Hence, the approaches of these two leading reformists are discussed below.

3.3.1 The Neo-*Ijtihād* Theory of Rashid Ridā

It was submitted by Rashid Ridā that the laws were to be enacted through the utilitarian form of *ijtihād*, which was influenced by ‘Abduh’. He entirely rejected the practice of *taqlīd*, holding the view that laws should be directly derived from the Qur’ān and Sunnah. According to Rida’s approach, few *Sharī’ah* rules needed incorporation in modern legislation. The selections of these rules ultimately falls under the discretion of the ruler. In order to do this, the ruler should rely on his personal view, however by upholding the objectives of *Sharī’ah* which shall be the best approach.⁴¹⁶

In the absence of *Sharī’ah* ruling on any particular point of law, the state should simply promulgate the laws upholding the interest of the community. This is what Ridā refers to as “*qiyās*”.⁴¹⁷

The criticism over this method was that it permitted *ḥukm* of Allah (laws of Allah) on largely rational calculation of utility.⁴¹⁸ This means that whatever a ruler judges in the best interest of the people can be concluded as “Islamic”.⁴¹⁹

3.3.2 The Neo-Comparative Theory of Sanhūrī

Sanhūrī had taken an innovative approach by enacting Islamic legislation with the application of *fiqh* on a comparative perspective with the reference of sociological tools.

⁴¹⁵ Zubaida(2005),op.cit. P. 142; Hamoudi, H. A. (2010). The death of Islamic law. *Georgia Journal of International and Comparative Law*, 38, 293.

⁴¹⁶ Kerr, M. H., & University of California, L. A. N. E. C. (1966). *Islamic reform: the political and legal theories of Muhammad'Abduh and Rashid Rida*.California: University of California Press, pp. 194-197; Badawi, M. A. (1978). *The Reformers of Egypt*. London: Croom Helm.Ltd., pp.105-107.

⁴¹⁷ *Ibid.*

⁴¹⁸ Hallaq, W. B. (1999). *A History of Islamic Legal Theories*,op.cit., p. 224.

⁴¹⁹ Lombardi, C. B. (2006). *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law* (Vol. 19): Brill Academic Publishers, p. 91.

This approach is similar with those methods that have been adopted to codify the German and French national codes. He referred to it as “Social Engineering” theory. In his view, like an engineer, the jurist is obliged to calculate the social and legal elements that will be proposed while drafting the legislation.⁴²⁰ This involves a two-part process; in the first stage, a legal specialist should identify the universal principle of *Sharī‘ah* applicable for the drafting of the legislation in a Muslim state. Second, the government should draft laws in line with these principles and social goals.

To identify the applicable rules of *Sharī‘ah*, Sanhūrī then proposed that relevant rules of *fiqh* proposed by the *ulamā’* in the past should be compared and contrasted. By going through this exercise, the universal principle rules which are fixed and valid for all time and places, could be understood. Furthermore, the state is required to ensure that laws are consistent with these fixed rules.⁴²¹ Relating to variable rules, he opined that Muslims are not bound to comply with it. Such rules would be replaced by new flexible rules.⁴²²

In summary, the principle arguments of Sanhūrī was that the law should be developed by keeping it consistent with the fixed rules and with reference to *fiqh* in a comparative setting, and taking into account the sociological perspective.⁴²³ The criticisms over this theory were *inter-alia*, discarding of large numbers of essential principles of *Sharī‘ah*, and also whether the proposed strongly historical and sociological theory could be declared as “Islamic”.

⁴²⁰ Bechor, G. (2007)op.cit., p.43-45.

⁴²¹ Hill, E. (1988). Al-Sanhuri and Islamic Law. *Arab Law Quarterly*, 3(2), 182-218.

⁴²² *Ibid.*

⁴²³ Shalakany, A. (2001). Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing your Asalah Can be Good for You). *Rethinking the Masters of Comparative Law*, 157.

3.3.3 Analysis

In general, it is apparent that the general purpose for Islamic codification serves to confirm the respective fixed rules in the proposed legislation.⁴²⁴ The first step in this process is to identify the fixed rules and, with respect to commerce, represents the *benchmark Islamic Commercial law Reform*. The second step is that in the absence of clear Islamic tenets, it is an obligation to engage in *ijtihād* to draft proposed legislation. Furthermore, the whole process is justified by *maṣlaḥah*, which is undefined within the framework of the objectives of *al-Sharī'ah*.⁴²⁵

3.4 Model of Islamisation of Laws

The concept of “model of islamisation of laws” is used to refer to experiments made by Sudan and Pakistan through which they attempted to Islamise their respective legal systems, which were originally based on secular English laws.⁴²⁶ Prior to discussing the concept, it will be relevant to explore the meaning of the term “islamisation”.

The term “Islamisation” is very popular among the law reform discussions in the Muslim world. According to Mayer, it is an English term meaning the effort of making the legal system less secular and more Islamic which will ultimately result in the establishment of an Islamic state.⁴²⁷ It has been defined as:

“ [the] process of certain measures and campaign regardless of the identity of advocates and the motivation behind the actions, that call for establishment of what are regarded as Islamic doctrine in Muslim legal, Political and Social life.”⁴²⁸

⁴²⁴ Zuhaili (1987), op.cit, p.7.

⁴²⁵ *Ibid.*

⁴²⁶ The concept was applied in Pakistan for the first time with its independence. Later it was followed in Sudan and in other countries. *See generally*, Saleh, N., & Mayer, A. E. (1987). Unlawful gain and legitimate profit in Islamic law. *Middle East Studies Association Bulletin*, 302-304.

⁴²⁷ Mayer, A. E. (1987). Law and Religion in the Muslim Middle East, op.cit.

⁴²⁸ Salim, A. (2008), op.cit., p. 45.

In the past, the term was also used in the meaning of conversion to Islam, however in practice it refers to the process of making laws of a country in conformity with the Qur'ān and Sunnah. The primary aim of Islamisation is to make all state laws *Sharī'ah* compliant. Under the process of Islamisation, all existing laws or provisions that contradict *Sharī'ah* are made to conform with *Sharī'ah*. Islamisation therefore, strives to implement laws compliant with *Sharī'ah*, and to establish an Islamic state where all laws are derived from the Qur'ān and Sunnah.⁴²⁹ However, the theory has been applied differently in various parts of the Muslim world. For instance in Malaysia, the term refers to the process of promoting Islamic values in society without reducing it into a specific plan or concrete measures.⁴³⁰ On the contrary, as Martin Lau notes, the Islamisation policies of Pakistan were intended to reform the entire legal system by setting up relevant institutional and legal mechanisms.⁴³¹

In Malaysia, the designers of the Islamisation projects, especially former Malaysian Prime Minister Tun Mahathir bin Muhammad, understood that Islamisation served to instill Islamic values in all forms of law and government. In case of laws, the *Sharī'ah* is applied to Muslim personal matters i.e. the application of *Sharī'ah* is restricted to Muslims and it cannot be imposed upon non-Muslims as there is no compulsion in Islam. In fact, the practice of Islamisation of laws in Malaysia has not been to islamise the non-Islamic laws. Instead the islamisation in the Malaysian context was an ad hoc and ceremonial approach that advocated the implementation of “universal values” common to all religions and societies.⁴³² These values included the elimination of corruption and upholding honesty and integrity in governance. Thus, these values upheld the spiritual and material standards in virtuous societies. An example of the

⁴²⁹ *Ibid.*

⁴³⁰ Kamali, M. H. (2000). *Islamic law in Malaysia: Issues and developments*. Kuala Lumpur: Ilmiah Publishers, p.163.

⁴³¹ Lau, Martin (2006). *London-Leiden Series on Law, Administration and Development: The Role of Islam in the Legal System of Pakistan*. Martinus Nijhoff Publishers, p.5.

⁴³² Yassin, N.M. (1996). *Islamisation or Malaynisation?: a study on the role of Islamic law in the economic development of Malaysia: 1969-1993*. Kuala Lumpur: A.S Noordeen, p. 148.

former is using state resources in the building of mosques, and the latter would be using the state similarly in the establishment of Islamic Banks. The Malaysian concept of Islamisation does not mean to declare *Shari'ah* as the fundamental law of the land in the country.⁴³³ According to Tun Abdul Hameed, the former Chief Justice of Malaysia, the phrase “Islamisation of law” in the Malaysian context means “harmonisation of law”.⁴³⁴ However, these two terms are not identical as Muhammad Hashim Kamali describes that the first is based on a unilateral process, whereas the latter is based on a bilateral process by harmonising two systems of laws, both of which are the *Shari'ah* and secular laws. Muhammad Hashim Kamali further states that, “the harmonisation differs from islamisation because of its openness to reciprocity and exchange in the quest to establish harmony between the different legal rulings and legal traditions”.⁴³⁵

3.4. 1 Methodology of Islamisation

It can validly be said that for purposes of law reforms, the process of codification is undertaken by the Parliament, *al-Siyāsah* is vested in the executive body and the islamisation of laws is accomplished through judicial review. Subsequently, the methodologies for islamisation are developed by the courts.

Under the Pakistani model of islamisation, the FSC has been entrusted with *suo moto* authority to abrogate laws or legal provisions to make it conform with *Shari'ah*.⁴³⁶ Furthermore, as the highest court of the land in Pakistan, the Shariat Appellate Bench of the Supreme Court of Pakistan (ABSC) has passed various judgments that sets out the general direction concerning the islamisation of laws in the country. Similarly, the

⁴³³ Bakar, O. (2012). A Doctor in the House: Looking for New Insights on Mahathir’s Islamisation Policy in His Memoirs. *Islam and Civilisational Renewal (ICR)*, 3(2).

⁴³⁴ Abdul Hamid, M. (2008). Harmonization of common law and shari’ah in Malaysia: a practical approach? paper presented at the Abd Al-Razzaq Al-Sanhuri Lecture. *Islamic Legal Studies Program, Harvard Law School*, 6.

⁴³⁵ Kamali, M. H. (2007). *Shari'ah And Civil Law*, op.cit.

⁴³⁶ The Constitution of Islamic Republic of Pakistan 1973, Article 203.

Egyptian Supreme Constitutional Court has also produced a method for the islamisation of laws.

3.4.1.1 Islamisation of Laws: Pakistan's Approach

For the purpose of islamisation in Pakistan, the Federal Shariat Court (FSC) was established. The Court comprises eight Muslim judges, three of whom were required to be *ulamā'*. The Court was given the task of ensuring that no law in the country remains repugnant to the injunctions of Islam. If a law was found repugnant to the Qur'ān and Sunnah, the Court was granted the authority to declare it non-Islamic. The FSC also had jurisdiction to examine the decisions of criminal courts relating to the application of *hudūd* cases. The decisions of the FSC could be appealed to a special Shariat Appellate Bench of the Supreme Court, which also comprised of *ulamā'* representatives.⁴³⁷ The contribution of FSC and the Shariat Appellate Bench of the Supreme Court in relation to the task of islamisation of laws will be discussed in the following sections.

(a) The Approach of the Federal Shariat Court (FSC)

The Annual Report of the Federal Shariat Court of Pakistan (2013)⁴³⁸ reveals the methodology followed by the FSC for reviewing laws. While examining a law, the Court first refers to the relevant verse or verses of the Qurā'n regarding the given matter. After that in absence of any Qurā'nic verses pertaining to the matter, it then considers the relevant *hadiths*. In cases where the Qurā'n or Hadith do not have a direct reference, the intention, or spirit of the Qur'ān and Sunnah on the subject is researched. Finally, if none of the above three methodologies do not yield any results, the opinion and views of renowned jurists are sought on the subject or case.

⁴³⁷ See generally, Munir, M. (2008). Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan. *Islamic Studies*, 47(4), 445-482.

⁴³⁸ Annual Report of the Federal Shariat Court of Pakistan(2013)para 10-13. [Retrieved on 5th May 2015](http://www.federalshariatcourt.gov.pk/) from (<http://www.federalshariatcourt.gov.pk/>

In the above-mentioned approaches, the last two methods were adopted primarily by Pakistani courts in the earlier days. For instance, in the case of *Rashida Begum v. Shahab Din*,⁴³⁹ the opinion of the *fuqahā'* was duly acknowledged as is evident from the following:

“the views of the earlier Imams and Jurists are entitled to receive the utmost respect and no court or commentator would differ from them except for very compelling and sound reasons...”

However, divergent views or minority opinions of jurists are not taken into consideration by the FSC. In the opinion of the Court, where no verse of the Qurā'n and authentic tradition is available on any issue, the ruler is empowered to examine the issue with the objective of protecting and preserving the public interest in rendering a judgment in the case.⁴⁴⁰

(b) The Approach of the Shariat Appellate Bench of the Supreme Court

In *Federation of Pakistan v. Public at large*,⁴⁴¹ the Supreme Court of Pakistan observed that despite the definition of Islamic injunctions, expounding marginal divergences could be realized which could lead to proper and improper consequences. To mitigate these disparities, the Bench charted out several approaches. Subordinate courts are bound to follow where the text of the Qur'ān and Sunnah and its spirit do not envisage the subject matter. If the Court addresses any new issue or a new approach, a 10-step process must be followed before resulting in any final judgment. Out of these ten, four refer to the formation of *ijtihād*. In this respect the first four should mandate that in any case where some relaxation of *Sharī'ah* rules might be required, it should allow only as a last resort. This is required to apply where the society cannot be changed towards Islam and in such circumstances, it is permitted to make fresh *ijtihād* in order to

⁴³⁹ [PLD 1960 Lah. 1142].

⁴⁴⁰ Annual Report of the Federal Shariat Court of Pakistan(2013),op.cit.

⁴⁴¹ [PLD 1986 SC 240].

make progress and reach high attainment for the Muslim ummah. Further emphasis was also given on the use of secondary and supplementary sources for *ijtihād*.

The next three instructions were to refer to any precedent. The judgement first ordered to explore if any similar precedents were set among Pakistani courts; lastly foreign judgments were sought in other court decisions throughout the Muslim world. Similar precedents were set among Pakistani courts; lastly foreign judgments were sought in other court decisions throughout the Muslim world. When referring to precedent; the highest consideration was given to judgments, opinions, among the companions of the Prophet and the leading *ulamā'* in earlier times. In this respect the most importance was given to the *Al-Khulafa'-ur-Rashidun* (the four the Rightly-Guided Caliphs) followed by the companions of the Prophet and *thabin* (followers).

The last two instructions were for the adoption of new rules. In order to adopt such a rule, the best interests of the Islamic ummah should be considered. It also directed the person undertaking the process to judge himself spiritually and mentally during the course of *ijtihād* in order to ask himself whether it was necessary to depart from the original rule of the *Sharī'ah*.

Finally, the application of the above-mentioned approach should be within the limitations provided in the Hadith of Mu'az bin Jabal (RA)⁴⁴² which represents a binding precedent and method for law reform in the present context. This hadith illustrates the order of applying the laws: i.e. the Qur'ān, Sunnah, *ijmā'* and *qiyās*.⁴⁴³

⁴⁴² Abu Dawud:3585,op.cit.

⁴⁴³ See for details of the methodology of the FSC in Cheema, S. A. (2013),op.cit.

3.4.1.2 The Approach of the Egyptian Supreme Constitutional Court

The Egyptian Supreme Constitutional Court (ESCC) has followed a two-step formula. The relevant fixed rules are identified in the beginning. Then it is determined whether the law in question violates any of these fixed rules. To identify these rules the formula calls first for a reference to the Qur'ān, Sunnah and the interpretation of these fixed rules provided in the Sunni schools of law. If any inconsistencies are found it is then disregarded as a rule.⁴⁴⁴

This practice of the ESCC can be observed in following two landmark cases: the *Child Support Case [1994]*⁴⁴⁵ and the *Veil Case [1996]*.⁴⁴⁶ Though, these two cases are not in the area of the commercial law, the methods set out by them represent general methods adopted earlier in reformation of the commercial law in Egypt (e.g. ECC).

(a) *The Child Support Case 1994*

In this case, the issue in contention was whether the Egyptian Family Law permitting the granting of child support retroactively stands contrary to *Shari'ah* under the Article 2 of the Egyptian Constitution as explained earlier.⁴⁴⁷ The plaintiff was the father of a child who refused to comply with the lower court's decision granting a retroactive order in favour of the defendant, the child's mother. The plaintiff had earlier argued that Egypt traditionally followed the Hanafi School of Law. In general, under Islamic law, men hold a moral obligation to feed, clothe, all minor children until a court order renders a judgment which is the same view of the Hanafi School. According to the

⁴⁴⁴ Lombardi, C. B. (1998). Islamic law as a source of constitutional law in Egypt: The constitutionalization of the Sharia in a modern Arab state. *Columbia Journal of Transnational Law*, 37, 81.; Shawamreh, C. (2011). Islamic Legal Theory and the Context of Islamist Movements. *Notre Dame Law School Journal of International and Comparative Law*, 2, 197.

⁴⁴⁵ *Case No.29, Judicial Year 11 (March, 26 1994)*.

⁴⁴⁶ *Case No.8 of Judicial Year 17 (May, 181996)*.

⁴⁴⁷ See Chapter 3.1.2.

plaintiff it was prohibited to issue such an order because it ran contrary to *Shari'ah*, and therefore invalid.

To examine this issue, the ESCC adopted the methodology containing two steps. First, ESCC examined whether there was any fixed rule in respect to the retroactive order provided in the Qur'an. It was found that there was no specific fixed rule provided in the Qur'an on the subject.⁴⁴⁸ Subsequently, various opinions of the *fuqahā'* of the Sunni schools of law were examined. It was found that the Maliki School of law permitted the issuance of retroactive orders in such cases. The ESCC held that the legislature can be passed in the view of Article 2 of the Egyptian Constitution which says: any law that does not contradict fundamental principles of *Shari'ah* is permissible. Hence, the order for retroactive child support payment did not contradict *Shari'ah* principles.

(b) The Veil Case 1996

In *Mahmud Sami Muhammad v. the Minister of Education, the Director of the Education Directorate of Alexandria and the Principal of Isis Secondary School for Girls in al-syuf* the ESCC's ruling set out that fixed rules are the yardstick for islamisation of laws.⁴⁴⁹ ESCC examined whether the banning of the *niqāb* (face-veil) for school girls as imposed by the executive order of the Ministry of Education is repugnant to the Islamic law. In reaching its decision the Court first examined the Qur'an and Sunnah to identify the fixed rule. It was found that the face-veil is not provided as a

⁴⁴⁸ But it is unclear whether the court further examines whether there was any specific rule in Sunnah. However, it's clear in the Veil case that the ESCC went for examining the relevant tradition of the Sunnah. See generally, Lombardi, C. B. (1998). Islamic law as a source of constitutional law in Egypt, op.cit.

⁴⁴⁹ See generally, Brown, N. J., & Lombardi, C. B. (2006). The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996). *American University International Law Review*, 21, 437.

fixed rule. Subsequently the ESCC concluded that the rule relating to the face-veil is variable and should be disregarded in operandi of law review.

3.4.2 Analysis

In principle, both the Pakistani and Egyptian Models with respect to islamisation of laws are based on broad guidelines designating the conformation of fixed rules. In the case of Pakistan, the Constitution itself determines the meaning of the fixed rule, however, in the case of Egypt, the ESCC has defined the meaning of the source clause.

Therefore, their methodologies served to discover these fixed rules. In this regard, the Pakistani approach was comprehensive, as compared to the Egyptian approach, yet, the goal and purpose of both were the same. The Pakistani approach is closer to the traditional form of *ijtihād* as compared to the approach of the ESCC as it followed in chronological order of examining the matter in the hadith Mua'dh bin al-Jabal (RA).

3.5 Model of Harmonisation

Generally, the term “harmonisation” can be understood as an effort made to bring about agreement in cases of conflicting laws. It can also be used to indicate standards of any particular nation that are brought in line with each other, or to harmonise local laws with international soft laws.

Blackstone Law Dictionary defines the term “harmonisation” as “in harmony with” which is synonymous with “in agreement, conformity, or accordance with”.⁴⁵⁰ The equivalent of “harmonisation” in the Arabic term is “*tawfiq*”.⁴⁵¹ It is referred to harmonise the embedded problem of duality between *Shari'ah* and the law that

⁴⁵⁰ Campbell, H. (1990), op.cit., p. 718.

⁴⁵¹ Amanullah, M. (2012). Principles to be Followed in Partial Harmonization Between Islamic Fiqh and Man-Made Law. *IIUM Law Journal*, 16(2).

continues in the existing laws. Thus, if both are identical there is no need for harmonisation as they are already in agreement and are compatible.⁴⁵²

With respect to harmonisation between the Common Law and *Shari'ah*: in Malaysia, the Islamic Banking and Finance entities use common law terms that are not contrary to the Islamic commercial tenets. It stipulated that provisions of the Contract Act 1950; the Sale of Goods Act 1957; the Companies Act 1965, and the Hire Purchase Act 1967 and other relevant regulations shall be complied within Islamic commercial tenets for purposes of Islamic banking business operations. To achieve this objective it is required that existing laws be amended as well as new laws are made.⁴⁵³

Accordingly, the Islamic Finance Law Harmonization Committee Report (2013)⁴⁵⁴ has recommended the amendments of Order 42 Rule 12 of the Rules of the High Court 1980 and Order 29 Rule 12 of the Rules of the Subordinate Court Rules 1980. These rules permitted the claim of interest on late payments, which is repugnant to the Islamic tenet regarding *ribā*, and cannot be permitted in financial matters. The revised new Order 42 Rule 12 has excluded the application of the Rule in the Islamic finance cases. In spite of the provision the newly incorporated Order 42 Rule 12A of the High Court Rules 1980 will be followed, which has imposed *ta'widh*.⁴⁵⁵ Yet, the Court's rule relating to payment of interest on late payment is applicable for conventional financial matters, which means that the reformation of the rules were not to prohibit *ribā* as a whole, instead it served to facilitate the proceeding of Islamic finance matters according to the Islamic commercial tenets. Therefore, the application of the doctrine of

⁴⁵² Ahmed, H. (2006). Islamic law, adaptability, op.cit.

⁴⁵³ Hassan, Z (2007). "Harmonisation of Shari'ah and common law in the implementation of Islamic Banking in Malaysia," available at <https://zulkiflihasan.files.wordpress.com/2008/05/jurnal-iscol-2007.pdf>

⁴⁵⁴ Bank Negara Malaysia.(2013). Islamic Finance Law Harmonisation Committee Report. Retrieved on 5th May 2014 from <http://www.bnm.gov.my/>

⁴⁵⁵ *ta'widh* means Penalty agreed upon by the contracting parties as compensation that can rightfully be claimed by the creditor when the debtor fails or is late in meeting his obligation to pay back the debt.

harmonisation can be applied where both the *Sharī'ah* and law are required to operate in a single regime and in most cases that could be done within a single piece of legislation.

3.5.1 Methods of Harmonisation

The methods followed to introduce harmonisation between law and *Sharī'ah* varies according to the nature of the law and needs of society. Despite this, the following strategies could be employed for harmonisation between *Sharī'ah* and existing laws.

Firstly, the harmonisation of *Sharī'ah* and laws should be restricted to areas of *mu'āmalāt* only, as matters relating to ritual and faith are not open for any sort of reform as explained earlier.⁴⁵⁶

Secondly, comparative law methodology should be adopted for the identification of those areas in which harmonisation between law and *Sharī'ah* would be required.⁴⁵⁷

Thirdly, it should not be believed that both *Sharī'ah* and the law are equal in status as the former is divine law and the latter is the positive law. The primary aim of harmonisation of both are for implementation of *Sharī'ah* rather than (positive) law.⁴⁵⁸

Fourthly, ethical rules and tenets of Islam should not be compromised. In respect of commerce, all Islamic commercial tenets shall neither be compromised, nor violated. Furthermore, it should not be repugnant to the universal principles of *Sharī'ah*, i.e., principles of fairness, equity and so on.⁴⁵⁹

Fifthly, the purpose of this process should be to uphold the objectives of *al- Sharī'ah*.⁴⁶⁰

⁴⁵⁶ Amanullah, M. (2012)op.cit.

⁴⁵⁷ Engku Ali, E. (2008). Constraints and opportunities in harmonisation of civil law and Shariah in the Islamic financial services industry. *Malayan Law Journal*, 4, xiii.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Hakim, R. (2013). Harmonization of Shariah Rulings in Islamic Finance: An Analysis. *IJTIHAD*, 7(2).

⁴⁶⁰ Nyazee(1996),op.cit.,p.48-49.

Sixthly, for the selection of relevant rules from *Sharī'ah*, the preference should be given to the majority view of the *fuqahā'*. The minority opinion should be considered only in matters where a significant societal need exists, and applied only after *maṣlaḥah* consideration.

Furthermore, the selection of rules from *Sharī'ah* should be chosen keeping in view the principles of *takhayyur* and *talfīq*. The application of the latter can be expanded to the existing statutory legislations as a part of the process.⁴⁶¹ All of this can be justified on the basis of earlier precedents of Caliph Umar bin Al Khattab's adoption of the Persian origin of Record System Policies as part of forming *al-Siyāsah* in relation to keeping records (*diwan*).⁴⁶²

Finally, the harmonisation process should be left mostly in the hands of those well-versed in Islamic teachings. In this respect, Muhammad Hashim Kamali proposed a formula that combines modern legislation with *ijtihād*. In his opinion, the legislators should ensure that all laws are in line with the *Sharī'ah*. Likewise, the *mujtahid* is required to make his best effort to ascertain that *ijtihād* is in line with the statutory legislation. This should be done by having the experts of Islamic law and the experts of common law work together in council for undertaking the task of harmonisation. This process represents an ideal model and both the experts could apply all forms of the harmonisation of *Sharī'ah* with the law.⁴⁶³ A successful example of this was the Harmonization Committee of Bank Negara, Malaysia where the scholars from both sides i.e. *Sharī'ah* scholars and legal experts undertook the process of harmonisation together. Unfortunately there is no such a body in the Maldives. However, by mutual

⁴⁶¹ Kamali(2007). *Sharī'ah* and Civil Law, op.cit.

⁴⁶² See generally Al-Mawardi(1978),op.cit., pp.249-250.

⁴⁶³ Kamali, M. H. (2007). *Sharī'ah* And Civil Law,op.cit.

coordination of the Maldives Monetary Authority (MMA),⁴⁶⁴ and the Maldives Capital Market Development Authority (CMDA); the Attorney General Office (AGO) has been undertaking the task of harmonisation in the area of Islamic Banking and Finance. In this regard it was recommended that certain provisions of the Maldives Land Act (Law No. 1 of 2002) be amended in order to facilitate the Islamic Banking and Finance sectors to function efficiently.⁴⁶⁵

3.5.2 Analysis

From this discussion one can conclude that the concept of harmonisation is a dual process, which facilitates the incorporation of Islamic tenets into existing laws while it does not forbid conventional laws. For example, the revision of Order 42 Rule 12 of the High Court Rules 1980 of Malaysia did not ban *ribā* but gave discretion to judges to decide in accordance with *Shari'ah* in those cases where disputes are based on Islamic commercial law.⁴⁶⁶ Thus, such a model is suitable for a country having multi-religious population such as Malaysia where *Shari'ah* is applied in the personal sphere for Muslims as explained earlier in the religious clause. Regardless of this fact, “harmonisation” has been applied widely in commercial law reforms in the Maldives, in which its citizenry are all Muslim.⁴⁶⁷ An important example in this regard is the reformation of the Maldives Penal Code (Law No.9 of 2014), which was constructed and synthesised based on Islamic law, the Maldivian traditions and international norms in an attempt to harmonise the laws. According to the code drafters Robinson, Paul H, Adnan Zulfiqar, Margaret Kammerud, and Michael Orchowski, harmonisation of these

⁴⁶⁴ The subordinate function of the *Shari'ah* Council of the Maldives Monetary Authority is to recommend any law that requires harmonisation with *Shari'ah* in order to discharge the duties of the Islamic financial system smoothly. See generally, Maldives Monetary Authority. (2014). Annual Report, p. 68.

⁴⁶⁵ The Researcher conducted a personal interview with Ms. Sheeza Ahmed, the Director of legal Affairs of the Maldives Monetary Authority in the Maldives at her office on 11th December 2013.

⁴⁶⁶ See generally, Bakar, B. A. (2013). “The Commercial Law of Malaysia”-Revisited Section 5 (2) of the Civil Law Act 1956; Constitutionality, the EU and Islamisation. *IIUM Law Journal*, 21(1).

⁴⁶⁷ See discussion in Chapter 4.1.4.

three, particularly the international norms with Islamic law was not an easy job, although it was not impossible. In fact, a similar approach has been taken in other areas of the Muslim world, in Egypt or in Malaysia, regardless of the nature of the law, commerce or otherwise.⁴⁶⁸

3.6 Islamic Theoretical Tools

The building of Islamic reformation models are made by combination of several tools, such as *takhayyur* and *talfiq̄*. In addition, the *hiyāl* (legal stratagem), has widely been practiced in areas of Islamic commercial law reform. Without these tools, Islamic legal reforms would have been too rigid as Islamic law has more than one ruling for a single issue. These complexities are minimized by expanding these opinions as an amalgam of each other, or discarding a rigid opinion and choosing a more flexible one. Wael B. Hallaq considered that the use of these elective devices proved the most effective method for the reconstruction and reformation of Islamic law.⁴⁶⁹ These theoretical devices are now explained below.

3.6.1 *Takhayyur* and *Talfiq̄*

Generally, *takhayyur* is the selection of rules and opinions from all schools of Islamic law in order to address a particular problem, which is needed to be elevated and refined to meet the needs of modern life.⁴⁷⁰

Literally the term “*takhayyur*” means “to choose”. Technically it has been defined as “liberty of an individual Muslim to be governed by the law from any four schools of jurisprudence”.⁴⁷¹

⁴⁶⁸ Robinson, P. H., Zulfiqar, A., Kammerud, M., & Orchowski, M. (2007), op.cit.

⁴⁶⁹ Hallaq, W. B. (2009). *Sharī'a: theory, practice*, op.cit., p. 448.

⁴⁷⁰ Ercanbrack, J. (2014). *The Transformation of Islamic Law in Global Financial Markets*. Cambridge: Cambridge University Press, p. 134.

⁴⁷¹ Dio, I. A. (1997), op.cit., p. 470.

Al-talfiq is the subordinate tool of the selective process, which denotes “patching or amalgamation”. It has been defined as “combination of two different opinions of different schools of law by putting them together as a single constituted part of a section or article of laws”.⁴⁷²

According to Coulson, the application of these two tools is undertaken in three stages. In the first stage, *al-talfiq* is permitted from schools other than the one to which the local legal system is applied to. This was the case in the Ottoman legislation of 1915-1917, in particular the law of Family Rights (1917). As a second stage, it could be brought into the application those isolated opinions of the individual jurists. An individual as *muqallid* may choose and follow any opinion as long as he considers it as part of the Sunni School.⁴⁷³ The last phase is when *takhayyur* is transformed to *talfiq* by amalgamation of different opinions on the particular issue, followed by the drafting of the law based on such an opinion. The example of such is the Egyptian Law of *Waqf* (1946).⁴⁷⁴ The legitimacy of these elective devices was justified on the basis of the *maṣlaḥah* doctrine.⁴⁷⁵

The function of *takhayyur* is to generate different opinions from various schools of law, while *talfiq*'s function serves to combine different opinions of Islamic law for making new rules.⁴⁷⁶ According to Yūsuf al-Qaradāwī, the selection of opinions should be expanded to all schools of Islamic law regardless of the nature of school i.e. whether Sunni or otherwise as long as it does not violate the clear tenets of Islam.⁴⁷⁷ Similarly within the said parameter, it can further be extended to the general legal resources provided by contemporary scholars such as Muhammad Hashim Kamali and Amanullah

⁴⁷² *Ibid.*

⁴⁷³ Coulson, N. J. (2011). *A history of Islamic law*. London: Aldine Transaction, p. 196-197.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ Zuhaili, W. (1981). *Uṣūl al-Fiqh al-Islāmī*. Libanon: Dar al-Fikr al-Muashir, p. 1142.

⁴⁷⁶ Hallaq, W. B. (2009). *Sharī'a: theory*, op.cit., p. 448.

⁴⁷⁷ Qaradawi, Y. (1990). *Al-Madkhal*, op.cit., p.297.

as indicated earlier (e.g. Parliament Acts, Scholarly writings and Court's decisions etc.).⁴⁷⁸

This can be seen in the methodology set out by Sanhūrī in the Egyptian Civil Code (1949). This Code was employed as a selective approach from two different perspectives. That is adoption of the basic principles of these tools as provided by Islamic law on one hand and consideration of sociological ideology on the other.⁴⁷⁹ To attain this objective many legal resources as were available were studied to determine the most appropriate framework for Egyptian society. Using this method, foreign laws and customary laws were compared with the *Sharī'ah*. The ideological approach was consolidated to the Code at first followed by the principles of *takhayyur*. If both were found in harmony with each other then both were integrated into the legislation regardless as to the origin of rules, or whether it came from the Polish Civil Code or *Shari'ah*. In the event of any conflict between the laws and *Sharī'ah*, the latter would prevail.⁴⁸⁰

Therefore, both *talfīq* and *takhayyur* are applied in various perspectives in modern legislative reform particularly in commerce such as in structuring of Islamic banking products (e.g. make-up sale for the purchase order, *murābahah lil amir bish-shira* etc.).⁴⁸¹

3.6.2 *Hiyāl*

The *Hiyāl* legal stratagem originated in the works of the Hanafī Jurists. From amongst them, the “*al-makhrij fī al-hiyāl*” by Muhammad ibn al-Hassan al-Shaybānī

⁴⁷⁸ Amanullah, M. (2012),op.cit.; Kamali(2007). *Sharī'ah* and Civil Law, op.cit.

⁴⁷⁹ Bechor, G. (2007),op.cit.,pp.76-78.

⁴⁸⁰ *Ibid.*

⁴⁸¹ See generally, Khan, G. G. (2013). Application of Talfiq in Modern Islamic Commercial Contracts. *Policy Perspectives*, 10(2).

referred “*al-makharij*” (exist) for *hiyāl*.⁴⁸² According to Ibn Qayyim al-Jawziyya (d.751/1350) this implies the elusive coordination aspect of a legal contract in a way for which they were not intended for.⁴⁸³

During the second century, *hiyāl* was envisaged to avoid non-Islamic elements in trading but soon it developed as a legal tool. Thereafter, it was used for the formation and guiding of contracts. In practice, it is used “to achieve a certain objective, lawful or not, through lawful means. It is employed where there is no possibility to secure the objective without violating the law”.⁴⁸⁴

The Hanafī and a number of *Shafi’ī* jurists are quite liberal by recognising such impermissible *hiyāls*.⁴⁸⁵ In general, the concept of *hiyāl* was sanctioned by the Hanafī jurists as well as by later generations of the *Shafi’ī* jurists. However, it was rejected by al-Shaybānī, the imminent disciple of Imam Abū Hanifah, Imam al-Shafi’ī, Imam Malik and Hambali jurists.⁴⁸⁶ For instance, with respect to the avoidance of *ribā*, loans may be advanced under the guise of trading transactions where double contracts of sale would be operated. For instance, in the case of *bai’al-’inah* (double contract sale),⁴⁸⁷ where Mr. A sells to Mr. B a commodity who has asked for a loan of RM100. Instead of offering Mr. B the loan (with interest at fixed terms) he sells his goods for RM100 in a separate contract. Later Mr. A purchases the goods back from Mr. B at a lower cost of RM80.00 in cash. In this scenario, both the contracts are ostensibly valid. Yet for an illicit purpose and in common understanding, such a contract is not permissible as that it

⁴⁸² Billah, M. M. (2014). The Prohibition of Ribā and the Use of Ḥiyāl by Islamic Banks to Overcome the Prohibition. *Arab Law Quarterly*, 28(4), 392-408.

⁴⁸³ Al –Jawziyya, Ibn Qayyim. (1955). *I’lam al-muwaqqi’in*. Cairo: Sa’ada Publication, Vol 4. p. 252-253.

⁴⁸⁴ Horii, S. (2002). Reconsideration of Legal Devices (Ḥiyal) in Islamic Jurisprudence: The Ḥanafīs and Their " Exits"(Makhārij). *Islamic Law and Society*, 312-357.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *See generally*, Buang, A. H. (2000), op.cit., p.164; Mahmaseani, S. (1961), op.cit, p.125.

⁴⁸⁷ Bai`’inah refers to an arrangement that involves the sale of an asset to the purchaser on a deferred basis and a subsequent purchase of an asset at a cash price lower than the deferred sale price, or vice versa, and which complies with the specific requirements of bai`’inah see, Bank Negara. (2013). Bai`’inah Shari’ah Requirement and Optional Practices: An exposure Draft guideline, p.4. Retrieved on 5th May 2014 from <http://www.bnm.gov.my/>

involves *ribā al-nasi'ah*. Another example, in the present form of *al-ijārah Thumma al-bay'* (hire purchase contract), the main purpose of such transactions are not to hire but to sell products after the lease period, thus, that is *hiyāl*. However, in the opinion of the Shafi'ī and the Hanafī jurists, such contracts are valid and binding. The intention of the parties in such a contract is irrelevant. On the contrary, the Malikis and Hambalis hold that such a contract is void as the motivation of the contract is unlawful.⁴⁸⁸

It shows that *hiyāl* plays a vital role for accommodating Islamic commercial tenets into commercial law as it belongs to procedural law. It provides guidelines for drafting contracts in Islamic commercial law.⁴⁸⁹

3.6.3 Analysis

It can therefore be assumed that the role of these theoretical devices made several noteworthy contributions in the reformation of commercial laws in accordance with the tenets of Islam. In the wake of the reforms, these devices create options to facilitate rigid Islamic tenets into practically feasible and sound ones in the commercial world. For example, the present form of *bai'inah* is widely practiced in personal finance, Islamic credit card, Islamic overdraft etc. All these products are considered high-demand instruments, as they raise equity for personal consumption and immediate need. These devices are utilized for drafting primary bills, challenging laws on their validities before the court of law and structuring commercial contracts. Yet, in terms of practicality, the latter is more feasible and popular in commercial system, which is by nature subordinate to commercial legislation, as stated earlier.

⁴⁸⁸ See generally, Mansoori, M. T. (2011). Use of hiyal in Islamic Finance and its Sharīah Legitimacy. *Journal of Islamic Business and Management Vol. 1*(1); Agha, O. (2013). Islamic Finance: Principle before Profit. *Berkeley Journal of Middle Eastern & Islamic Law*, 2(1), 5; Hunt-Ahmed, K. (2013). *Contemporary Islamic Finance: Innovations, Applications and Best Practices*. John Wiley & Sons, p. 273.

⁴⁸⁹ Nyazee (1996), op.cit, p. 305.

3.7 Appropriate Model

It should be noted that there are two general approaches followed by modern Islamic commercial law reform as indicated earlier.⁴⁹⁰ In the first approach, amendments were introduced into the respective legislation in order to accommodate Islamic tenets. This can be formulated either in the models of Islamisation or harmonisation of law. The second approach is to introduce new Islamic legislations in the way of codification. However, it is hard to declare that none of the Muslim countries have relied on a single model of reform, though the particular model of law reform i.e. Islamisation model of Sudan and Pakistan is popular in these countries, and they have frequently adopted the Islamic codification of laws (e.g. Modaraba Companies Ordinance 1980, Pakistan). Sudan has also adopted harmonisation of laws in addition to above.⁴⁹¹

Article 10 of the Maldives' Constitution 2008 envisaged that the entire legal system of Maldives shall be fully based on *Sharī'ah* as explained earlier. However, according to Al-Suood this constitutional directive has not been given any attention to in commercial law reform, and instead the best international commercial practices have been adopted in the Maldives.

In the view of Layish, the most effective method for Islamic law reform is “the codification of law.”⁴⁹² Similarly, Niyazee suggested to re-codify laws in light of clear injunctions of the Qur'ān and Sunnah than to islamise them.⁴⁹³ Yet, the existing Commercial law of Maldives are codified; therefore, the model is ineffective for the purpose of this study. Thus, in order to bring the existing commercial laws in conformity with the tenets of Islam, it should be done in either the form of islamisation

⁴⁹⁰ See discussion in Chapter 2.3.3.

⁴⁹¹ Akolda, M.T (2011). harmonisation of civil law and Shari'ah: The Sudanese Experience. In Ansari, A. & Rashid, K. S (Eds.). “Harmonisation of the Shari'ah and Civil laws”: Perspective and Practice (pp.4-20). Selangor: IIUM Press.

⁴⁹² Layish, A. (2014), op.cit.

⁴⁹³ Nyazee (1994), op.cit., p. 295.

or harmonisation of laws. The current practice in the Maldives is “harmonisation of commercial laws with *Sharī‘ah*”, following that which has been adopted in Malaysia.⁴⁹⁴ However, in theory, Article 10 of the Maldives’ Constitution 2008 inspired “islamisation of the commercial law” as being practiced in Pakistan.

Therefore, in choosing a suitable model for law reforms in the Maldives, it should depend on the practical operation of law, rather than mere reliance on theories. This can be practiced when introducing new codification laws and for existing laws by both “harmonisation” and “islamisation of laws” through Parliament and the relevant Courts. Thus, all these are based on the theory of *al-Siyāsah*, which covers three models and which can be translated into the modern commercial law term “*the Sharī‘ah - Compliant law*”; which means to make the laws in conformity with the ICLRB.

3.8 Conclusion

In general, the benchmark laid down in Article 10 of the Maldives’ Constitution 2008 needs to be fully complied with the tenets of Islam in laws. It is apparent that the primary responsibility of the Maldivian stakeholders is to comply with the laws in line with the ICLRB. However, the chapter concludes that although in theory the ICLRB is based on “islamisation of the commercial law” but in practice; it is actually “harmonisation of the commercial laws with *Sharī‘ah*” in the Maldives. Thus, application of these models rely on the existing role of *Sharī‘ah* in the enactment of the commercial law in the Maldives which will be discussed in the next chapter.

⁴⁹⁴ With the inception of the Islamic Banking and Finance industry in the Maldives, the term harmonisation which is commonly used term in area of commercial laws in the Maldives. *See*, Wisham, I., & Muneza, A. (2011). Harmonization, op.cit.

CHAPTER 4: ROLE OF TENETS OF ISLAM IN THE REFORM OF MALDIVES' COMMERCIAL LAW

4.0 Introduction

This chapter examines the role and function of the tenets of Islam in relation to Commercial law reform in the Maldives. It has been shared in the previous chapters that the tenets of Islam in relation to commercial law reform is conforming to the *Islamic Commercial law Reform Benchmark* (ICLRB), which consists of the prohibition of *ribā* (usury), *gharār* (uncertainty) and *maysir* (gambling) etc. Thus, to understand the existing role of the tenets of Islam in commercial law reform in the Maldives, it is required to review the laws, government policies and court cases that were produced with respect to commerce by the three organs of the state. For this purpose, the relevant policies made by the respective government authorities, followed by the fatwas issued by the Maldives Islamic Fiqh Academy. It further examines selected commercial court cases to assess the existing role of the tenets of Islam for adjudicating commercial matters. The chapter continues on with a general discussion and analysis of the tenets of Islam in commercial law reform by addressing key issues such as; institutional framework for law reform and interpretation of the tenets of Islam. The chapter concludes by making a comparison of policies and interpretations of law between those made prior to and after the Maldives' Constitution 2008 came into effect.

The analysis of laws passed by the Majlis are excluded from this chapter as these comprise the main body of the thesis, and will be discussed in detail in the next chapter.

4.1 Maldives Commercial Policies and Fatwas

In general, a commercial policy is related to regulations, decisions, strategies, and instruments that influences the trade sector of an economy. However, the main focus of this chapter is on commercial regulations, which are created by the respective public bodies such as the government ministries, Central Bank etc. Specifically, this chapter reviews the subsidiary legislation that has been formulated under the respective primary commercial legislation. The main commercial regulatory bodies in the Maldives are the Ministry of Economic Development, the Ministry of Tourism, the Ministry of Finance and the Maldives Monetary Authority.

Moreover, the institution of fatwa holds a special position within the Muslim communities for upholding the tenets of Islam. The mandated body is the Maldives Islamic Fiqh Academy. Thus, any fatwas issued by this body are subjected to review for further understanding of the role of the tenets of Islam in commercial law reform. The following is a brief analysis of the commercial regulations and fatwas made by the relevant authorities.

4.1.1 Ministry of Economic Development

The Ministry of Economic Development serves as a key government department to create trade-related policies in the Maldives. As a regulating department, to foster trade and investments, it has created various commercial regulations to run the businesses smoothly in the trade sector of the country. The official website of the Ministry has listed about 27 regulations that are in place for implementation in the commercial sector of the country as provided in respective commercial legislations i.e. Company Act (Law No.10 of 1996), Consumer Protection Act (Law No. 1 of 1996) and Business

Registration Act (Law No.18 of 2014) etc.⁴⁹⁵ Most of these regulations are administrative in nature and are in accordance with the ICLRB. For example, the Company Registration Regulation contains provisions about the registration process as stipulated in the Maldives Companies Act (Law No.10 of 1996).

Among these items, the Regulation on Trading Liquors and Pork-related products 2011 (Hereafter referred to as “Liquor Regulation 2011”) is required to be studied here, as it is the one regulation made by the Ministry that is repugnant to the ICLRB, as this permits un-Islamic trade activities. This regulation was framed under the section 5(b) of the Contraband Act (Law No.4 of 1975) as explained in the introduction of this thesis. The total number of provisions are 24. The regulation covers issues like granting licenses for the importation of liquor and pork-related items; operation of bars in tourist resorts; tourist vessels; trade of liquor and pork-related items at duty free facilities at airports and the consumption of these items at foreign diplomatic missions in the Maldives.⁴⁹⁶ It strictly prohibits alcohol-serving bars in the inhabited islands of the country where local Maldivians live. Thus, these services and facilities are limited to tourist resort islands, vessels built for conveying only tourists and in airports among others. By examination of the regulation, it is clearly understood that its purpose is to extend these services only for foreigners and tourists. Yet the regulation does not make any distinction between the Maldivian companies and foreign companies for granting licenses. Furthermore, it does not make any distinction whether the license holder is a Muslim or otherwise. Therefore, the Liquor Regulation 2011 by nature is un-Islamic, hence, it is considered to be contrary to ICLRB.

As explained in the introduction, this regulation was referred to the Supreme Court for consultative opinion (No. 1201/SC-L/01); as it is considered to be repugnant to the

⁴⁹⁵ Ministry of Economic Development website, Retrieved on 20th December 2015 from www.trade.gov.mv

⁴⁹⁶ Regulation 3, 11 Regulation on Trading Liquors and Pork related Items 2011.

Article 10 of the Maldives' Constitution 2008.⁴⁹⁷ While granting the consultative opinion by the Supreme Court, the following observations were made:

- (a) The laws of the country shall be in accordance with the tenets of Islam as provided in Article 10 and 70 of the Maldives' Constitution 2008.⁴⁹⁸
- (b) It is a fundamental right to acquire and hold property in accordance with Article 40 of the Maldives' Constitution 2008. Thus, this right may not be seized except on committing an action which is “expressly prohibited in the Islamic *Shari'ah*” and law as provided in Article 19 of the Maldives' Constitution 2008.⁴⁹⁹
- (c) It is clear that those laws that have been previously enacted prior to the effect of the Maldives' Constitution 2008 are binding, unless they were repealed by the Parliament or relevant courts of the law. The law relating to the Contraband items and its regulations are binding as these are not restricted by any decisions of the Parliament or court of law.
- (d) Operating a bar and the sale of pork-related items etc., are rendered under restricted circumstances for tourists only, which is not contrary to the tenets of Islam as well as the law of the land.

Former Chief Justice of the Maldives, Hon. Ahmed Faiz Hussain explained his view with regards to the opinion. He believed that the SC held the view that granting licenses of operation by the government for bars and other un-Islamic activities made available only to tourists and/or the hospitality sector of the country was considered a *darūrah*. Even though trading of un-Islamic goods were prohibited, the tourism industry represents the major income generator of the country, and providing alcohol and pork-

⁴⁹⁷ See discussion in 1.0.

⁴⁹⁸ Article 70(c) of the Maldives' Constitution 2008 is directed to the Majlis only. It is a repetition of the repugnancy clause: the People's Majlis shall not pass any law that contravenes any tenet of Islam.

⁴⁹⁹ Article 19 of the Constitution of the Republic of Maldives 2008 stipulates “a citizen is free to engage in any conduct or activity that is not expressly prohibited by Islamic *Shari'ah* or by law. No control or restraint may be exercised against any person unless it is expressly authorised by law.”

related products in this instance results as an inevitable circumstance created by this industry and therefore is justifiable.⁵⁰⁰

Despite this, the Trade Ministry promotes Islamic commercial tenets simultaneously. The Regulation relating to the *Halāl* Certificate is an important example in this context. This regulation is a basic regulatory framework for the operation of the *halāl* food industry in the Maldives. Furthermore, they have recently announced various Islamic facilities for the Small and Medium Enterprises (SMEs) to develop their businesses.⁵⁰¹

In general, all trade policies formulated by the Ministry are positive to ICLRB except for the Liquor Regulation 2011.

4.1.2 Ministry of Tourism

The Ministry of Tourism is responsible for regulating tourist-related matters. The primary legislation for governing tourism is the Maldives Tourism Act (Law No.1 of 1999) (“Tourism Act”). The Act lays down procedures in relation to the leasing of islands; the sale and transfer of the lease rights to third parties, and taxation from establishments and tourists. Various regulations and standards are also framed for implementation of the Act and operation of the tourism sector. List of such Regulations includes the Regulation on the Development and Management of the Tourist Hotels 2013; Tourists Vessel Regulation 2007, and Guest House Regulation 2012.

It is a matter of contention, whether the tourism model as practiced in the Maldives is in accordance with the best practices of the Islamic tourism models. A plethora of literature suggests that key standards to be fulfilled in Islamic hospitality facilities are- (a) Halal food served on the premises, (b) beds, toilets positioned not to face the qiblat,

⁵⁰⁰ The Researcher conducted a brief informal interview with Former Chief Justice of the Maldives Hon. Ahmed Faiz Hussain at his office on 10th April 2015.

⁵⁰¹ Ministry of Economic Development website, *Faseyha Madhadhu Islamic Financing Scheme*. Retrieved on 21st May 2016 from http://trade.gov.mv/page/faseyha_madhadhu

(c) prayer facilities available in rooms and within the premises (d) no inappropriate entertainment services, (e) separate salon, recreational facilities and swimming pool for men and women, (f) no gambling and (h) to be operated under Islamic funding etc.⁵⁰² It is a fact that no government policy or regulation has banned retaining these standards in the tourism model; thus, these Regulations are considered to be in harmony with ICLRB.

It is pertinent to mention here that most Islamic banks are reluctant to invest in the industry as stated earlier because of the limitations set on serving alcohol, and pork-related items.⁵⁰³ A review of the most recent tourism policy, the “Fourth Tourism Master Plan 2013-2017” revealed no clause on development of Islamic tourism.⁵⁰⁴ Thus, the Maldives tourism investments have adopted a harmonisation model rather than an Islamisation model.⁵⁰⁵ To embark on Islamic investments, the following may be considered as part of the options.

4.1.2.1 Tourist Establishments and Facilities –Overview

The tourist establishments are defined as resorts, tourist hotels, guest houses and tourist vessels.

⁵⁰² Samori, Z., & Rahman, F. A. (2013). Towards the formation of Shariah compliant hotel in Malaysia: An exploratory study on its opportunities and challenges. In *WEI International Academic Conference Proceedings, Istanbul, Turkey*; Razalli, M. R., Yusoff, R. Z., & Roslan, M. W. M. (2013). A Framework of Halal Certification Practices for Hotel Industry. *Asian Social Science*, 9(11), P316; Stephenson, M. L. (2014). Deciphering ‘Islamic hospitality’: Developments, challenges and opportunities. *Tourism Management*, 40, 155-164.)

⁵⁰³ See discussion on Islamic finance and its challenges in the Maldives in Chapter 1.16.

⁵⁰⁴ Ministry of Tourism and Arts& Culture(2013), Fourth Tourism Master Plan 2013-2017. Male’: The Government of the Maldives.

⁵⁰⁵ However, there are few initiatives to operate Islamic tourism facilities. A local company, ADK company and Turkish company, Caprice Gold signed to form a joint venture company to develop first Islamic resort in the Maldives on 23rd January 2014. (“ADK Company on Wednesday signed an agreement with Turkish hotel giant Caprice Gold to develop the Maldives’ first Islamic resort”: Haveeru Daily, 23rd January 2014, Retrieved December 20th, 2015 from <http://www.haveeru.com.mv/business/53387>

(a) Resorts

The resorts in the Maldives are built under “one-island-one resort concept”. This means that only one resort can be built for each island. According to section 50(a) of the Tourism Act a “tourist resort” means “an island or a designated area of an island that has been developed to accommodate tourists and provide board and lodging facilities for them.”

The resorts are built on uninhabited islands. Accordingly, the islands and land for the development of tourist resorts are leased to the party who submits the best-qualified open bid. The lease period is 50 years for private individuals and companies. For public listed companies, it can be extended for a period of 99 years and renewal is optional and subjected to the terms and conditions.⁵⁰⁶

The bidding documents shall be submitted with a development plan to the Ministry of Tourism of the Maldives. The comprehensive development plan is specified based on the guidelines provided by the Ministry such as allocated areas in the island for all residential rooms, villas and other facilities including bars etc.

(b) Tourist Hotels

The tourist hotels are defined in section 50(b) of the Tourism Act. It provides that:-

“an establishment, other than a tourist resort or tourist guesthouse that has been developed to provide board and lodging or [only] lodging for tourists for a payment decided at a certain rate per day of stay.”

By virtue of Section 2 of the Regulation on the Development and Management of the Tourist Hotels 2013, a tourist hotel can be developed in both private and public properties, which is registered under the Maldives Land Act (Law No. 1 of 2000).

⁵⁰⁶ Maldives Tourism Act(Law No.2 of 1999), (Second Amendment 2010) sections 8-9.

As a result, tourist hotels are developed on inhabited islands as well as uninhabited islands. The Liquor Regulation 2011 prohibits rendering bar services and serving pork-related items in hotels developed in inhabited islands where the local Maldivians reside. However, in the second case, the regulation does not prohibit and in fact permits operation of bar services in hotels located on uninhabited islands and those islands that have airports, which is against ICLRB.

(c) Tourist Vessels

The tourist vessel is defined in section 50(d) of the Tourism Act as-

“a seagoing vessel that has been developed, in compliance with standards determined by the Ministry of Tourism, to provide board and lodging for tourist for a payment decided at a certain rate per day of stay on board such vessel”.

In principle, such an establishment is built in accordance with the Tourist Vessel Regulation 2007. The regulation provides for the standards and services required to render to guests on these vessels. Under clause 18 of the Regulation permits to operate a bar, there exists no restriction to serving non-*halāl* food on the vessel.

(d) Tourist Facilities

There are other facilities such as guest houses where tourists can stay within the Maldivian local communities on inhabited islands. Furthermore, yacht marinas, diving centres etc., are, *inter alia*, services rendered in the tourism industry in the Maldives. As these facilities are not permitted to render non-*halāl* food services on their premises, the Islamic banks generally have no reservations towards investing in these facilities as these are compatible with ICLRB.

4.1.2.2 Modification of the Development Plan

All establishments and facilities are normally developed through various financial facilities granted by banks. However, Islamic banks are not permitted to invest in some

areas because of the presence of un-Islamic activities in the industry as explained earlier. Unlike conventional financing institutions, the Islamic banks are partners in business ventures and it is an obligation of the Islamic banks to check all phases of any of its financed projects. It is further required that all investments operate in accordance with the tenets of Islam until the investment partnership between the Islamic banks and the resort owners or the builders has been dissolved.

To embark on Islamic investments in the tourism sector, the resort development plan should be changed. The bar services and facilitation of non-*halāl* food items such as pork and alcohol should be separated from the main operation of the resort, hotels and tourist vessels etc., and should be out-sourced.

4.1.2.3 Isolation of Bars and other un-Islamic activities

To isolate the bar in respect to a resort, it should be erected in the lagoon-area of an island that can be interconnected through a walkway or a small jetty; the bar can be located at one end of the island, which is isolated from the general facilities of the resort. Importantly, the income generated from this activity should be managed in an account separate from the rest of the general accounting system of the resort. If this is to be implemented, Islamic banks can have the satisfaction that the Islamic investments are not being mixed with the un-Islamic activities. It also is recommended to create another regulation that covers the Islamic investment plan by setting all relevant conditions and terms that are compatible with ICLRB.

As stated earlier, there are no restrictions for Islamic investments for hotel development in the uninhabited island areas. In such a project, the operation of bars and other un-Islamic activities are not permitted under the law. However, the existing developmental plan should be changed in order to introduce Islamic investment facilities to develop hotels in the uninhabited islands such as islands with airports and

other industrial islands. In this instance, the operation of bars should be vested as a separate business vehicle and the bar should be separated physically from the hotel. If this were to be implemented, the Islamic banks would not have any reservations of embarking into this sector as well. In order to achieve this objective, the existing Regulations on the Development and Management of the Tourist Hotels 2013 should be revised. In addition to Clauses 13 and 14 of the Regulation, an extra special provision to safeguard ICLRB should be included with reference to the development and design of the hotels. Similarly, if any hotel is to be built using Islamic finance, an additional provision prohibiting trade, pork-related and non-ḥalāl food items needs to be introduced under Clause 30, which stipulates standards of restaurants and cafes of a tourist hotel. Besides this, an additional provision is required to clearly state prohibition of all forms of un-Islamic activities if the project is based on Islamic finance as 51 of those regulations merely prohibit any act that may be contrary to laws of the land, which is very vague and non-specific.

With regards to tourist vessels, section 18 of the Regulation on Tourist Vessels 2007 provides standards which needs to be fulfilled for the operation of bars on board any vessel. Thus, it would be ideal for the Regulation to prohibit placement of bar services on board of such vessels if development investments were made with Islamic financing. The bar services should be out-sourced and guests should be obliged to leave the vessel for drinks.

Lastly, tourist facilities such as yacht marinas and diving centres can be developed through Islamic facilities. Neither the law nor the *Sharī'ah* forbids investing in such establishments provided Islamic principles are followed in their operation and management.

4.1.2.4 Separation of Operation and Management

It is important to completely separate the management of a bar from the general operation of the rest of the hotel. Therefore, it is proposed to establish a separate entity for the bar operation and selling pork-related items or to outsource these matters to another company. It should be ascertained beyond a reasonable doubt that no link exists between the management of bar services and that of the company that operates the resort.

By all means, customers or visitors should be satisfied that neither the resort builder, nor the service provider has no link with the operation of a bar and selling of pork-related items. Therefore, it can be assumed that there should be no restrictions in granting Islamic financing facilities by Islamic banks once the above-mentioned alternatives are applied in the development of these entities.

4.1.3 Ministry of Finance and Treasury

The Ministry of Finance and Treasury is a government department that charts the fiscal policy of the country. Section 63 of the Public Finance Act (Law No.3 of 2006) empowers the Minister for Finance with the authority to regulate fiscal policies. He is also responsible in overseeing government expenditures by virtue of section 40 of the Fiscal Responsibility Act (Law No.7 of 2013).⁵⁰⁷ Article 96 of the Maldives' Constitution 2008 states that the Minister of Finance submits the annual government budget to the Majlis on a specified date. Thus, the Ministry has adopted in the past several regulations, guidelines and released multiple circulars relating to the budget, public finance, and general administration of public accounts e.g. Public Finance Regulations 2015. In principle, after an assessment of the contents of all these

⁵⁰⁷ Ministry of Finance and Treasury website , Retrieved on 20th December 2015 from <http://www.finance.gov.mv/v2/aboutus?act=8&id=2>

guidelines and circulars, it can be said that the provisions as contained in these guidelines and circulars are not in violation of the ICLRB.

Upon reviewing various reports, articles, and newspaper accounts one believes that the country has a vision to develop Islamic finance along with the conventional financial system. For instance, in March 2014, then Deputy Minister of Islamic Affairs, Hon. Aishath Muneeza (presently the Deputy Minister for Finance and Treasury) announced that the country was going to establish an international finance centre, which can be facilitated for the SAARC region.⁵⁰⁸ Similarly, Dr. Azeema Adam, the Governor of the Maldives Monetary Authority also announced on various occasions that the country holds a vision to develop Islamic finance along with conventional finance.⁵⁰⁹

4.1.4 Maldives Monetary Authority (MMA)

Maldives Monetary Authority (MMA) is the central bank of the country, which is mandated to regulate and supervise the financial sector under the Maldives Monetary Authority Act (Law No.6 of 1968). The MMA issues regulations, policy guidelines and directives from time to time that must be complied with by the financial industry in the country.

Three key areas regulated by the MMA are banking, insurance and finance leasing sectors. With respect to the banking sector, there are several regulations, guidelines and directives created under the Maldives Banking Act (Law No. 24 of 2010), such as the Regulation on Payment Systems 2011. Likewise, the MMA has enforced regulations

⁵⁰⁸ Muneeza,A (2016, January 20). Time to make hay as the future is bright and sunny in the Maldives. IFN Islamic Finance News. Retrieved from <http://islamicfinancenews.com/authors/dr-aishath-muneeza>.

⁵⁰⁹ Naish, A(2014,September 18). Potential of Islamic finance yet to be fully explored in Maldives, suggests MMA Governor:Minivan News. Retrieved on 20th December 2015 from <http://minivannewsarchive.com/business/scope-and-potential-for-islamic-finance-not-fully-explored-in-maldives-suggests-mma-governor-90157>

such as regulation on the prevention of money laundering; financing of terrorism for money transfer business; money changing business 2015, which was made under the Prevention of Money Laundering and Terrorism Financing Act (Law No.10 of 2014). The regulation covers all aspects related to money laundering and terrorism financing. These are offences that are not clearly prescribed in the tenets of Islam. However, the absence of relevant laws that prevent these offences would lead to anarchy in society and hence, a need exists requiring regulations under the doctrines of *maṣlaḥah* and *sadd al-dhari'ah*. Thus, regulations provided in the banking sector are in harmony with ICLRB.

The MMA further regulates the insurance and the finance leasing sectors. Both sectors are regulated under the Maldives Monetary Act (Law No 6 of 1981). For example, the Insurance Industry Regulations 2004 serves as a basic regulatory framework that governs the insurance sector in the Maldives. Likewise, the Regulations for the Finance Leasing Companies and Finance Leasing Transactions 2001 provide for the licensing and regulation of companies engaged in finance leasing in the Maldives. These regulations define rights and duties of the parties to finance lease agreements and related matters. Although these two regulations are framed to regulate conventional finances, none of these regulations impede operations of the Islamic financial system in these two sectors in the country. Thus these Regulations are harmonised with ICLRB.

In addition to conventional finance, the MMA simultaneously regulates the Islamic finance sector, i.e. Islamic banking, *takaful*, and *ijārah* finance etc. As a result, Islamic Banking Regulations 2011 were adopted to govern the licensing, financial, prudential and supervisory matters related to Islamic banking business in the Maldives. The regulation contains 27 sections, which covers procedural licensing and supervision of the Islamic banking industry. Section 27 of the Regulation defines Islamic Banking as follows:

“any Company, licensed under Law No. 24/2010, (Maldives Banking Act) and Law No. 6/81 (Maldives Monetary Authority Act 1981) to engage in banking business carrying out all of its banking business according to the precepts and principles of Islamic Shariah”

By virtue of section 11 of the Regulation, which enclosed the broad guideline for the Islamic products that may be sold in the Maldives includes a total 10 items. These are: mobilisation of funds by deposit and saving accounts, investment products, finance leasing of movable and improvable assets on basis of *Ijrah*; benovate loans, debit and credit cards, safe keeping, money transfer, functions of trustee-based Wakala; credit facilities and other facilities and product as may be approved by the authority. These facilities are listed as Islamic finance facilities. Yet, these products may be enhanced later on where regulation provides for Islamic financial providers to allow other Islamic contracts and products that may be approved by *Shari'ah*.

To gather an in-depth understanding of the MMA's role to uphold the ICLRB, the Annual Reports of the MMA were reviewed over a four-year period, 2011 to 2014.⁵¹⁰ These reports revealed that since the establishment of the first Islamic Bank in 2011, the MMA undertook various measures to promote the ICLRB in the commercial industry. The most significant step was to form a *Shari'ah* Council, an umbrella body of the MMA, which is responsible for advising on *Shari'ah* matters, and to strengthen regulatory and supervisory oversight of the Islamic banking and finance industry.⁵¹¹ The Council holds the mandate to ensure that all Islamic banking and finance operations are compatible with *Shari'ah* principles.⁵¹² The first standard guideline, the Guideline on Approval of Products on Islamic Products was issued by the council on 30th September 2013.⁵¹³ Accordingly, the Council approved three main types of structures of Islamic products, namely- deposit products, financial products and trade finance products. With

⁵¹⁰ Annual Report and Financial Statements, 2011, Annual Report, 2012, Annual Report, 2013 and Annual Report, 2014, Maldives Monetary Authority website, Retrieved 28th January 2016 from www.mma.gov.mv

⁵¹¹ Maldives Monetary Authority (2011). Annual Report and Financial Statements, p.16.

⁵¹² *Ibid.*(2014). Annual Report, p.68.

⁵¹³ *Ibid.* (2013).Annual Report, p.49.

regards to deposit products, the council approved *Qarḍ*-based, Current Accounts and *Muḍārabah*-based, Saving/Investment Accounts. As for the structures of financial products *Murabaḥah*-based Products, *Ijārah*-based Products and *Al-Ijārah Thumma Al-bai'*, *Mushārahah Mutanāqisah* (Diminishing *Mushārahah*) and Parallel *Istisnā'* were approved. Lastly, for trade of financing products, *Wakālah*-based Letter of Credit (LC), *Murabaḥah*-based Letter of Credit (LC) and Shipping Guarantee (SG) and Bank Guarantee(BG) were approved.⁵¹⁴

Until November 2013, the only sovereign debt instrument available was the conventional Treasury bill issued by the MMA. However, in recognition of the significance of sovereign *ṣukūk* by the government, the MMA acted as agent of the government to issue its first Islamic Treasury bill i.e. the *Muḍārabah* Certificate.⁵¹⁵

In general, the MMA as the central bank has taken several steps to develop the Islamic Banking system although its purpose is not to islamise the whole financial system of the Maldives. According to Mohamed Nazim, the Manager of Islamic Finance Unit of the MMA, the reason the country does not have such a vision is because the Islamic financing system is not as well developed as its conventional partners, which are linked-in with the entire global economy; the Maldives relies heavily on foreign currencies through the earnings of the tourism sector. He further emphasized that Article 10 of the Maldives' Constitution 2008 is a new provision that requires reinterpretation on whether the article is meant to Islamise the system as a whole, or whether it represents a symbolic provision. To understand it clearly, he anticipates a

⁵¹⁴ Please see for further details of Product Structures Approved by the *Shari'ah* Council of MMA 2013. Retrieved on 28th January 2016 from www.mma.gov.mv

⁵¹⁵ Maldives Monetary Authority (2014). Annual Report, p. 66.

clear judgment from the SC on this matter similar to the judgment concluded on the issue of *ribā* by the Supreme Court of Pakistan in 2000.⁵¹⁶

4.1.5 Maldives Inland Revenue Authority (MIRA)

Maldives Inland Revenue Authority (MIRA) was set up under the Tax Administration Act (Law No.3 of 2010) for the purpose of implementing tax related laws and policies. Most of these policies and regulations are harmonised with the ICLRB. However, 39 of the regulations on Tax Administration, 2011, which imposes interest and fine in the event of default is repugnant to the ICLRB. It is also of note that there are provisions in various Regulations framed by the MIRA that promotes Islamic commercial values. For example, 23 of the regulations on Business Profit Taxation 2011 provide tax deduction in payment of *zakāt* as an incentive. The provision reads:

“Payments made as *zakāt al-mal* may be deducted in calculating a Person’s taxable profits provided that the person possesses a receipt that states that the *zakāt* was paid to the relevant government authority.”

In general, the collection of tax management and relevant regulations are positive to ICLRB. The review of relevant taxation laws will be reflected in the next chapter.⁵¹⁷

4.1.6 The Capital Market Development Authority (CMDA)

The Capital Market Development Authority (CMDA) serves as a regulatory body for securities and stock exchange in the country. It was established by virtue of provisions of the Maldives Securities Act (Law No.2 of 2006). The CMDA regulates both conventional and Islamic Securities Markets, thus there are various regulations, guidelines and standards, made by the CMDA to regulate both the sectors. For instance,

⁵¹⁶ The Researcher conducted a brief informal interview with Mohamed Nizam, Manager at Islamic Finance Unit, Maldives Monetary Authority at his office on 11th December 2013.

⁵¹⁷ See discussion in Chapter 5.2.

the Securities Regulation 2007, the Guidelines on Principal Advisers 2011 and the Rules on Credit Rating Agencies 2010 etc. are important examples of the conventional regime.⁵¹⁸ None of them promote ICLRB, nor do they restrict operation of Islamic finance regimes. Hence, the existing conventional securities regime are harmonised with ICLRB.

Except for these regulations on conventional regimes, the rest of the CMDA Regulations, Guidelines and Standards intended for Islamic securities regime promote the ICLRB. These include: Regulation on *Ṣukūk* Issuance, Regulation on *Sharī'ah* Screening of Securities, Regulation on Capital Market *Sharī'ah* Advisory Council (CMSAC), 'Fit and Proper' Guidelines for CMSAC Members and 'Fit and Proper' Guidelines for CMSAC Members etc.

As a regulating body, the Capital Market *Sharī'ah* Advisory Council (CMSAC) considers the ICLRB as the benchmark for validating all capital market operations to ensure their compatibility with *Sharī'ah*.

In general, the relevant regulations do not restrict operations of a *ṣukūk* market. However, it should be noted that stock exchange share sales represent one key area where *gharār* may occur because of the nature of such transactions being based on speculation and nonexistence. These issues will be elaborated more with analysis of Banking and Finance laws in the next chapter.⁵¹⁹

4.1.7 Pension Administrative Office

Maldives Pension Administrative Office (MPAO) is a statutory body formed under the Pension Act (Law No.8 of 2009) to oversee the pension-related matters. Section

⁵¹⁸ Capital Market Development Authority website. Retrieved on 28th January 2016 from www.cmda.gov.mv

⁵¹⁹ See discussion in Chapter 5.5.11.

12(b) of the Act made participation of all public servants and individuals compulsory in the pension schemes. The MPAO framed various regulations, guidelines and circulars relating to the pension administration. These include the Basic Pension Regulation 2014; Benefit Regulation 2014; Regulation on Maldives Retirement Pension Scheme 2014; procedures for taking action against non-compliant employers 2014; Self Employment Regulation, and Regulation on Foreign Employees 2014. In principle, these regulations are not in violation of ICLRB. However, regulation 40 of the Pension Regulation 2010 imposes a fine of 0.5 in the event of default of the monthly amount paid as part of the pension scheme. These are: 14% of basic salary divided by 7% paid by the employer, and another 7% by the employee.⁵²⁰ Fines would be imposed on a monthly basis of compound interest. Thus, in relation to the pensions-related regulations, the provisions containing interest need to be repealed in order to meet ICLRB.

4.1.8 Maldives Islamic Fiqh Academy

The Maldives Islamic Fiqh Academy was established in 2009 as an umbrella body of the Ministry of Islamic Affairs. The sole function of the academy is to issue fatwas. The members of the academy are appointed by the President upon the advice of the Minister for Islamic Affairs. The number of appointees, terms and their qualifications are not explicitly defined. Currently there are 16 Academy members who have formal Islamic education from various recognised universities. The President and Vice President of the Academy are elected during the first sitting after convening of the academy.⁵²¹ Since its establishment in 2009 until 26th August 2015, it has issued 13 (thirteen) fatwas and among these, only three fatwas relate to commerce, and these were issued on tax

⁵²⁰ Regulations 15 &16, the Regulations of the Pension Retirement 2014.

⁵²¹ Ministry of Islamic Affairs website, Retrieved on 20th December 2015 from www.islamicaffairs.gov.mv

administration,⁵²² Kosher Meal⁵²³ and the life insurance beneficiary.⁵²⁴ With respect to tax administration, the fatwa concluded that it is permissible to collect tax from people by the government in order to deliver necessary public services. With regards to Kosher Meal, the view of the Academy was that there was no room to declare invalidity of ingredients and methods for production of Kosher Meal, however, it was not advisable to consume such foods in an Islamic nation such as Maldives since the products represented a Jewish customary food. The decision of the Academy in these cases stated: all insurance schemes that involve *ribā*, *gharār* and gambling etc and are contradictory to Islam. In general participation in such schemes is prohibited. The exception to this rule are instances where no other option is available and assuming this circumstance, the insurer is only permitted to the principle amount paid for the scheme. This fatwa further illustrated the formula for insurance beneficiary distributions as following;

Firstly, the beneficiary is entitled to one-third of the amount if the beneficiary is not the rightful heir, and if the insurance money remains as the only asset of the insurer.

Secondly, the beneficiary is entitled to the total amount if the insurance money is less than one-third of the total asset of the insurer.

Thirdly, if the beneficiary is among the heirs of the insurer, he/she will be entitled to the total sum of insurance money if the rest of the heirs agree. If there is a disagreement among the heirs, the money should be divided among them according to the rules of Islamic inheritance jurisprudence.

It is clear that the fatwa body has a significant role in law reform. In fact, with the inception of Islamic finance and its integration into commercial laws, the academy's

⁵²² *Ibid.*, Fatwa No. 3 IFA/2013/03.

⁵²³ *Ibid.*, Fatwa No. IFA/2014/2.

⁵²⁴ *Ibid.*, Fatwa No.2 IFA/2013/02 .

role is more prominent as they are both capable and responsible to answer questions that arise in the Islamic finance industry and can assist the courts to interpret Islamic laws. Yet, the ideal role of such an Academy can only be preserved when it has a proper legislative framework. Current verdicts of the body are voluntary and non-binding. For instance, the fatwas analysed above related to tax administration and the Kosher Meal and life insurance beneficiary are opinions of the Academy on referred matters. No court or government authority is obliged to follow or implement them.

Thus, The Maldives Islamic Fiqh Academy requires a comprehensive legal framework by following other pioneering Muslim countries in this regard. In general, the existing Fatwa bodies in the Muslim world are of two types: governmental and non-governmental. The fatwa body of Malaysia is an example where it holds formal recognition and its conclusions are legally binding upon official publication in respective states.⁵²⁵ On the contrary, in Indonesia there are three dominant fatwa bodies: *Nahdwatul Ulama*, *Muhammadiyah* and *Majelis Ulama Indonesia* which are all non-governmental organisations.⁵²⁶

The recent amendment to the Maldives Religious Solidarity Act (Law No.6 of 2016) is designed to establish a Maldives Supreme Fatwa Council for the replacement of the Maldives Islamic Fiqh Academy as an umbrella body of the Ministry of Islamic Affairs, which is composed of 5 members. The members are appointed by the President, a selection based on a nominee list from the Minister of Islamic Affairs. The list of nominees includes a sitting judge as nominee of the Chief Justice of the Maldives; a nominee from the Maldives Islamic University, and two nominees by the President of the Maldives. The head of the Council and his deputy are appointed by the President.

⁵²⁵ See generally, Adil, M. A. M. (2015). Standardisation of Fatwa In Malaysia: Issues, Concerns And Expectations. *Islam and Civilisational Renewal (ICR)*, 6(2).

⁵²⁶ Black, E. A., Esmaili, H., & Hosen, N. (2013). *Modern Perspectives on Islamic Law*. Cheltenham: Edward Elgar Publishing, p.94.

The mandate of the council remained the same as the function of the Maldives Islamic Fiqh Academy and their findings are voluntary. The only change made by the new amendment was the renaming of the Islamic Fiqh Academy as the Maldives Supreme Fatwa Council. The council is yet to be formed and its complete mission is unclear.⁵²⁷ Thus, it would be advisable for future reforms to adopt the Malaysian model of the Fatwa council with modifications suitable for the Maldives as a unitary state for the formal recognition of fatwas.

4.2 Maldives Commercial Court Cases

Most commercial disputes are decided in the Civil Court of the Maldives. The High Court and Supreme Court are vested with the jurisdiction to review laws on grounds of nonconformity with the tenets of Islam.⁵²⁸ Thus, the decisions of these courts are required to be discussed with respect to the application of the tenets of Islam in general, and in particular the ICLRB.

Mostly commercial matters referred to the Civil Court are matters relating to banking, enforcement of commercial contracts, and civil disputes. According to Hon Ali Rasheed, the Chief Judge of the Civil Court⁵²⁹, most of these cases disregard the ICLRB such as the permissibility of bank interest. A similar view is held by Hon. Abdul Rauf, the Acting Chief Judge of the High Court.⁵³⁰ With respect to the bank interest and similar types of commercial interests, there are various precedents the courts are bound to apply while determining similar cases. An example of such a case is *Best Choice Maldives Pvt. v. Ahmed Waheed*⁵³¹ where the High Court concluded that the appellant

⁵²⁷ The bill ratified on 25th April 2016. For the view of the amendment, available at <http://www.mvlaw.gov.mv/pdf/ganoon/chapterII/6-2016.pdf>

⁵²⁸ See discussion on in Chapter 4.3.1.

⁵²⁹ The Researcher conducted a personal interview with Hon. Ali Rasheed at Civil Court of the Maldives on 5th December 2013.

⁵³⁰ The Researcher conducted a personal interview with Hon. Abdul Rauf at High Court of the Maldives on 8th December 2013.

⁵³¹ [2009/HC-A/92]

held the right to impose administrative charges over the principal amount in the event of default of the payment under hire-purchase contract, which is contrary to the ICLRB as this is considered *ribā*.

As indicated earlier, the Courts were bound to apply earlier precedents, which permitted bank interest. This fact has never changed, despite the effect of the Maldives' Constitution 2008. Thus, it is important to understand that the SC is the highest court of the land and its position and decisions with respect to the application of ICLRB in the commercial matters are bound by the lower courts.

4.2.1 The Supreme Court of Maldives

By virtue of Article 145 of the Maldives' Constitution 2008, the Supreme Court was established on 18th September 2008.⁵³² In the past 7 years, it has concluded 130 cases.⁵³³ Out of these, 62% involved commercial matters, e.g. breach of contract, corporate disputes etc. In general, 85% of these commercial cases were decided by sharing the reference of the Maldivian laws only to reach a verdict. In 15% of these cases, apart from the Maldivian laws, the tenets of Islam were considered as an issue of contention. The tenets observed include the Islamic contract law principles, such “*al wafā' bil al-'aqd*”, the Islamic principle relating to honor a contract etc.⁵³⁴ It further alluded to the ICLRB in reference to *ribā*. For the purpose of discussion, 15 % of these cases were divided into two categories: cases related to the tenets of Islam and those related to ICLRB.

⁵³²The Supreme Court of the Maldives website, Retrieved December 20th 2015 from www.supremecourt.gov.mv.

⁵³³ Out of these 80(eighty) commercial cases, in 12 (twelve) cases general Islamic principles are observed.

⁵³⁴ The word ‘*aqd*’ is synonymous with the word ‘contract’ in Islamic law. The parties of the contract are obliged to honor terms and conditions of the contract. See further details, Billah, M. M. (2003). Modern Financial Transaction under *Sharī'ah* .Selangor: Ilmiah Publishers, p.26,

4.2.1.1 Application of the Tenets of Islam by the Supreme Court of Maldives

It is of the understanding that the SC frequently retains that freedom of contracts shall be limited to the tenets of Islam, which can be observed in the following two areas. Firstly, in a compensation claim in *Ibrahim Yusuf v. Aiminath Muna*⁵³⁵ where the SC observed that freedom of contract was restricted to the tenets of Islam by stating; "...it is obligatory to honor a contract as long as it does not contradict the tenets of Islam and the laws of the land." Secondly, in a debt recovery matter in *My Company Pvt v. Reethi Rah' Resort Pvt*,⁵³⁶ the SC reaffirmed the freedom of the contract shall be restricted to the yardstick set out in Article 10 of the Maldives' Constitution 2008, which is the tenets of Islam.⁵³⁷ In both cases, the limitations provided in the drawing up of contracts were not illustrated.⁵³⁸ However, in principle, freedom of contract represents an essential feature of all free societies and parties must have the opportunity to set contract terms without restrictions. Conversely, in Islamic Law the concept is treated differently, as in principle no contract that derogates any tenet of Islam is considered to be valid, i.e contracts that contain *ribā*, *gharār* and gambling etc., are invalid.⁵³⁹

On the same outset, a debt recovery claim in *Ahmed Nashid v. Mohamed Mustafa*,⁵⁴⁰ the SC reserved that as provided in Article 42 of the Maldives' Constitution 2008⁵⁴¹ the hearing must be fair and transparent, which was subjected to international best practices

⁵³⁵ [2009/SC-A/16].

⁵³⁶ [2013/SC-A/23].

⁵³⁷ See for the details discussion on Islamic Commercial law Reform Benchmark in Chapter 2.6.

⁵³⁸ See discussion on freedom of contract under Maldives Contract Act (Law No.4 of 1991) in Chapter 5.4.

⁵³⁹ See generally, Sole, M. J., & Jobst, A. (2012). *Operative Principles of Islamic Derivatives: Towards a Coherent Theory* (No. 12-63). International Monetary Fund, pp.4-5. Retrieved on 1st May 2016 from <https://www.imf.org/external/pubs/ft/wp/2012/wp1263.pdf>

⁵⁴⁰ [2010/SC-A/02].

⁵⁴¹ Article 42 of the Constitution reads- "(a) In the determination of one's civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent court or tribunal established by law. (b) All judicial proceedings in the Maldives shall be conducted with justice, transparency and impartiality."

as stipulated in Article 68 of the Maldives' Constitution 2008,⁵⁴² and are subjected to the tenets of Islam. The SC further emphasized one principle relating to Islamic procedural law where the Arabic text reads: *al-bayyinah 'alā al-Mudda'i wa al-Yamīn 'alā Man Ankar* (burden of proof falls on the complainant) to support the reasoning and affirming a fair trial on the case.

In addition to the following cases, the SC frequently adopted reasoning of some Islamic principles along with conventional principles to arrive at a conclusion in judgments. An example is "*al wafah bil al-'aqd*"; which is an Islamic legal principle referring to the obligation of honoring a contract as stated above. The principle was stressed along with equivalent civil law doctrine "*pacta sunt servanda*", signifying that agreements and stipulations of parties in a contract must be observed. Likewise, in a matter related to the breach of contract, as in the case of *Hassan Haleem v Yong Thye Heng Pvt*,⁵⁴³ where the SC ordered the defendant to honor the contract by stressing the importance of honoring the contract and referring to the doctrine of "*al- wafa bil al-aqd*" even though the respondent was a non-Muslim Singaporean. A similar observation was made in *Ibrahim Hassan v. Ali Rasheed and others*,⁵⁴⁴ which also related to breach of contract.

Another case that involved both state and a private individual was in *Zahir Adam v. Attorney General*,⁵⁴⁵ where the SC retained both the relevant principles of laws and *Shari'ah* principles. The facts of the case are as following: The Appellant, Zahir Adam filed a petition against the Attorney General, the Respondent, to extend the lease contract of a public property that was leased for 5 years, from 1998 and expired on 15th September 2003. The Appellant wished to renew the contract as he believed that the

⁵⁴² Article 68 of the Constitution reads- "No provision of the Constitution shall be interpreted or translated in a manner that would grant to the State or any group or person the right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set out in this Constitution."

⁵⁴³ [2009/SC-A/30].

⁵⁴⁴ [2012/SC-A/07].

⁵⁴⁵ [2010/SC/72].

properties located on the land belonged to him and therefore the state was obliged to renew the contract. While reasoning in the case, the SC believed the contract could be renewed on mutual consent by both parties, and in the event of refusal by the state for renewal, such a plea cannot be sustained, as is established in both civil and Islamic laws, respectively that “*pacta sunt servanda*”, and “*al ‘aqd Sharī‘ah tul muta a ‘qida‘in*”. In accordance with both principles, a contract may be enforced in accordance with the terms and conditions laid down in the agreement as explained earlier.

In an acquisition of a tourist island claim, in *Nika Maldives Pvt v. Abdullah Rasheed*⁵⁴⁶ the SC clearly stated that hierarchy of the application of laws for transferring ownership of properties follows the Constitution, relevant laws of the land, and the *Sharī‘ah*. Yet, in general for transferring property, *Sharī‘ah* serves as the governing law where inheritance claims are administrated, as inheritance law is un-codified. Under Article 142 of the Maldives’ Constitution 2008, the courts are to refer to *Sharī‘ah* where the laws of the land remain silent and in the instances where no codified law is available.⁵⁴⁷ This raised the question of why the SC had observed Islamic principles for reasoning where relevant codified laws were in place i.e Contract Act (Law No.4 of 1991).

According to Ahmed Faiz Hussain, references made to Islamic principles in these matters are more or less for the sake of argument, and therefore moved to support the reasoning, rather than the application of Islamic Law. This is because no restriction existed even to retain common law principles, or similar traditions for sake of constructing an argument to reach a verdict. Maldives as a Muslim nation and with the importance given to Islam in the Constitution, references made to Islamic principles are

⁵⁴⁶ [2011/SC-A/02].

⁵⁴⁷ Article 142 reads as “the judges are independent, and subject only to the Constitution and the law. When deciding matters on which the Constitution or the law is silent, judges must consider Islamic Shariah. In the performance of their judicial functions, judges must apply the Constitution and the law impartially and without fear ,favour or prejudice”.

natural. However, all judgments will be delivered based on laws of the land where laws are codified.⁵⁴⁸

In summary, references made to the tenets of Islam in the analyzed cases are different in theory and in practice. This is to say the lower courts are bound to follow the precedence of higher courts. In the first two cases above, two precedents that refer to the freedom of contract is limited to the tenets of Islam. Yet, these limitations are not applied to most banking cases. Regardless, it is fair to conclude that these references made to the Islamic principles by the SC shows the significant role of the tenets of Islam in commercial law practice.

4.2.1.2 Application of the ICLRB

In respect to the application of the ICLRB, the SC makes distinction between *ribā* and interest. It considered that interest, which is imposed in general commercial contracts in the sphere of the private individuals, stands contrary to the tenets of Islam as it is *ribā*. On the contrary, in the case of financial institutions, the SC disregarded *ribā* and ordered to pay the interest etc., as per the terms and condition laid down in respective financial contracts.

This can be seen in *Onus Pvt v. PGO*⁵⁴⁹ where the appellant, *Onus Pvt* referred to the SC for Judicial Review against the respondent, the Prosecutor General Office (PGO). In this case the appellant argued that refusal of the Prosecutor General (PG) to prosecute his clients is contrary to earlier precedents of cheque bounce matters. The appellant's clients Hussain Shareef and Ibrahim Abdul Latheef ("clients") had borrowed from the appellant the amount of USD 5,173,961.21 as agreed per terms and conditions. Accordingly, the appellants' clients paid USD 818,608.13 and the remaining balance of

⁵⁴⁸ The Researcher conducted a personal interview with Hon. Ahmed Faiz Hussain at his office in the Maldives on 10th April 2015.

⁵⁴⁹ [2012/SC-A/22].

USD 4,355,353.08 and agreed to settle on an installment basis in nine payments. For each payment, the clients issued a dated cheque and these cheques bounced. Section 39 of the Maldives Negotiable Instrument Act (Law No.16 of 1995) stipulates that dishonouring a cheque without having sufficient funds in the bank account is a criminal offence punishable by imprisonment for a period of six months to two years. The clients appeared before the SC and claimed they were not liable to honor the transaction as it contained *ribā*, which is contrary to the tenets of Islam. Without sustaining the clients' submission, the SC concluded that the dismissal of the earlier petition by the Appellant at the High Court on the subject would not be sustained, and the appellant was entitled to recover the money from his clients based on the cheques that were issued. Yet the following was observed by the SC while reviewing the decision of the PGO:

“the issue of *ribā* is a criminal offence that has to be investigated, however, merely such allegation cannot be made as an excuse for non-compliance of the due payment in the transaction without due process.”⁵⁵⁰

It should be noted that although the SC noted that *ribā* is a criminal offence, neither any law nor any precedent has specified *ribā* as a criminal offence. Furthermore Ahmed Muizzu stated that in his capacity as the former prosecutor general he was not aware that the police investigated *ribā*-related matters as a criminal offence, nor has any court of law concluded a *ribā*-related matter as a criminal offence. Thus, it is presumed that the observation made by the SC on the issue of *ribā* was not a fact observed previously within the legal system of the country.

In *Hassan Ali Maniku v. Ahmed Janah*⁵⁵¹ where the SC upheld the decision of the High Court, which imposed a 15% fine in addition to the principle amount of the debt

⁵⁵⁰ *Ibid.*

⁵⁵¹ [2009/SC-A/20].

to be repaid, which is *ribā* as explained in the previous chapter.⁵⁵² The facts of the case are as following: the appellant, Hassan Ali Maniku and the respondent Ahmed Janah made an agreement on 8th February 2007 to sell 33% share, which was held by the respondent in *H.M.S.M Maldives Pvt* to the appellant. According to the agreement, the total selling price of the shares was USD 700,000.00. Payments were due on a monthly installment basis. Accordingly, the appellant shall make the first payment USD 100,000.00 within the first month from date of signing of the agreement as provided in Clause 8 of the agreement. In event of default, the Appellant was liable to pay 15% of monthly payment as liquidated damages for non-compliance, as provided in Clause 10 of the agreement. While upholding the High Court's judgment, the SC observed that the commercial transaction between the parties represented not a debt claim between two private individuals, but were a matter of a commercial agreement, thus the fine, which had been agreed by the parties, shall be entertained.

With regard to bank interest, the view of SC was the same as explained earlier: i.e. applied interest was permissible based on the terms and conditions agreed by the bank and its client. This can be seen in *Bank of Maldives(BML) v. Sultan of the Sea Pvt*⁵⁵³ and *Athama Investment Maldives Pvt. v. Mauritius Commercial Bank*⁵⁵⁴ where the claims of the bank were sustained, including the interest.

Another case relating to uncertainty was in *Adam Shareef v. BML*⁵⁵⁵ where the Appellant, Adam Shareef filed a petition at the SC arguing that the contractual terms set out in the Credit Card Agreement, which was signed on 19th February 2005 by the appellant and the BML, were not clear. According to the appellant, as per section 6 of the Maldives Contract Act (Law No.4 of 1991), the conditions and terms of credit

⁵⁵² See for discussion in Chapter 2.3.2.1.

⁵⁵³ [2013/SC-A/43].

⁵⁵⁴ [2014/SC-A/36].

⁵⁵⁵ [2009/SC-A/23].

offered must be clear; they should not be vague and uncertain; thus, the contract was deemed void. In this case, the presiding Judge Mu'thasim J observed that the contract was binding as long as "it does not contradict the laws of the land and the tenets of Islam". According to Mu'thasim J, the contractual terms set out by the BML were clear and agreed by the appellant. Furthermore, it observed that the appellant utilized his credit card several times, and adherence to the contract was enforced. Thus, there was no question of uncertainty in the terms and conditions. On this issue, the SC failed to retain the basic Islamic Commercial tenets. The issue of uncertainty and interest relating to the Credit Card Agreement must be addressed. A credit card is permitted as long as it does not involve the element of interest in Islam. For instance, the cash-advance withdrawal from the credit card will draw interest charges, which is contrary to ICLRB. Likewise, additional charges due to delay in payment is also prohibited.⁵⁵⁶

*C.P.S Maldives v. Works Co*⁵⁵⁷ is a landmark case where the SC assessed various principles with regards to Islamic commercial law. Thus, these are elaborated with a brief overview of the facts in this case. The appeal raised by the appellant, *C.P.S Maldives Pvt.*, against the respondent, *Work Corporation Pvt.*, were that the respondent refused to comply with the penalty clause imposed by the Appellant for delayed payment as per the terms and conditions laid down in the Services Contract, which was entered into by both parties on 10th October 2010, ("the Service Contract"). Under section 3(a) of the Service Contract, the Service Provider (the Appellant) is required to present an invoice of work performed after completion of each task to the Company (the Respondent). The period for settling these claims were 5 (five) working days. However, the section did not mention penalties that could be imposed in the event of default. The respondent refused to comply with the fine imposed by the appellant, as it was not specified in section 3(a) of the Service Contract.

⁵⁵⁶ AAOIFI *Sharī'ah* Standard No.2(3/2). Retrieved on 28th January 2016 from <http://aoifi.com/>

⁵⁵⁷ [2013/SC-A/27].

However, the appellant established the argument claiming the invoice clearly stated these terms: that in the event of default of the payment, a 2% interest would be imposed as a fine. Similarly, it further stated that any discrepancy in the invoice should be notified within 48 hours. Thus, when the invoice period expired, the Appellant presumed the respondent accepted the fine. In addition, the case is significant as both the parties raised the principles related to the law coupled with those laid down in Islamic law. A summary of the principle arguments are highlighted below.

Firstly, in respect to the penalty clause as agreed in the commercial contracts, the SC considered that it was valid as long as it did not contradict the tenets of Islam as well as the relevant laws of the land. It further stressed that imposing the penalty clause represented a well-established commercial practice in the Maldives, which had no restriction either in *Sharī'ah*, or in the law of the land.

Secondly, the SC illustrated that general principles with regards to the formation of a contract are Offer and Acceptance. It further highlighted that the relevant Islamic principles by referring to the doctrine of "*al 'aqd al Sharī'ah al muta 'qidayin*", which is vested in the parties for freedom of contract within the limitation provided in the tenets of Islam. The SC considered that the contract terms were determined by the parties, whether it was mentioned in the original contract or not. Even though the penalty clause is not mentioned in the contract, for purposes of contract execution, imposing a penalty in the event of default is regarded as an acceptable remedy. In this context, the appellant served the invoice by specifying that in case of any discrepancies, these items should be brought to the respondent within 48 hours. Once the 48-hour period expired, however, the appellant offer was considered acceptable by the respondent as additional contract terms, which represent normal and valid commercial trading, agreement practices.

Thirdly, for the construction of argument for refusal of the penalty clause was, *inter alia*, the retention of some Islamic legal maxim by the Respondent. For example “*la yun sab ila sākīt l qawl wa la kin al-sukūt fī ma‘urād al-kalām bayān*” is an Islamic legal maxim which establishes that no statement can be attributed to one who is silent, however, where the statement is necessary, silence will amount to statement.⁵⁵⁸ The first part of maxim was referred to by the respondent for their silence on the penalty, which was imposed by the appellant, was not enough to establish agreement for the penalty clause. The SC noted on this point that silence of the Respondent in such a scenario represented clear evidence of agreement by reading of the second part of the maxim, and that both should be read together.

Fourthly, the SC further elucidated the vital role of the penalty clause for enforcement of the contract. The penalty clause is imposed where in the event of a contract breach the offending party has to compensate the other. The penalty clause is acceptable under Islamic law, and it is permissible in all commercial transactions, except when the contract involves *ribā*. For reasoning the SC referred to the following hadith:

“The Messenger of Allah (pbuh) said: Reconciliation is allowed among the Muslims, except for reconciliation that makes the lawful unlawful or the unlawful lawful. And Muslims will be held to their conditions that make the lawful unlawful or unlawful lawful.”⁵⁵⁹

Fifthly, it should be noted that apart from the above, it is understood that the view of SC on the issue of penalty compensations covers direct and indirect losses arising out of breach of commercial contracts, which represent one of the key areas where *gharar* occurs.

⁵⁵⁸ The first part of this maxim: refers that most transactions are based on parties verbal expression which reflects their intention. Thus, silence would not be regarded as admission. In the second part of the maxim denotes a person who kept silent where absolutely required to speak out would be considered as admission. (A., & Rahman, M. H. (2013),op.cit.,pp 82-85)

⁵⁵⁹ Narrated by Khathīr bin ‘Amr bin ‘Awf Al-Muzanī from his father, his grandfather. See Al Tirmidi: Hadith No.1352(Abū Khaliyl).

In conclusion, it is evident that despite ignoring the ICLRB rulings, and in particular on the issue of interest by the SC, it reserved a significant role for the tenets of Islam for adjudication.

4.3 Discussion and Analysis

The Maldives operates as a multi-party democracy. All government policies are originally derived from objectives and visions of the respective political parties in power at a particular time. The primary objective of all these parties is to uphold “unity, nationalism and Islam”.⁵⁶⁰ Thus, promoting the tenets of Islam, serves as a common objective of everyone, regardless of party-affiliation in the Maldives. However, the adoption of this vision in the commercial regime is undefined. This is evident from three perspectives: the issues related to the institutional mechanism; the policies and the interpretation of the ICLRB.

4.3.1 Issues related to the Institutional mechanisms

In general there is no consensus with regards to the authoritative body in the Muslim world that determines whether provisions in laws passed by the legislature, or decrees issued by the President are in accordance with the tenets of Islam. In this regard, in some countries it is at the discretion of the legislature itself; in others, these questions are bestowed upon a constitutional council, and yet in other instances Islamic-tenet issues are vested in a formal, or special constitutional court. For instance in Iran, the Council of Guardians (*wilayu al-faqih*) is comprised by several prominent *ulamā'*, and

⁵⁶⁰ Article 10(a) of the Constitution of the Maldives Democratic Party 2010, Retrieved on 28th January 2016 from <http://www.mdp.org.mv/>; Article 8(a) of the Constitution of Progressive Party of the Maldives 2011, Retrieved on 28th January 2016 from <http://www.ppm.mv/>; Article 2(a) of the Constitution of Dhivehi Rayyithun Party 2006, Retrieved on 28th January 2016 from <http://www.drp.org.mv/>; Article 9 of the Constitution of Republican Party 2008, Retrieved on 28th January 2016 from <http://www. www.jumhooreeparty.com> and Article 2(a) of the Constitution of the Maldives Development Alliance, Retrieved on 28th January 2016 from <http://www.mda.mv/>. Furthermore, Adaalath Party is an Islamic party and the sole objective of the party is to promote Islam in all aspects of life, Retrieved on 28th January 2016 from <http://www.adhaalath.org.mv/>. Thus, the total number of listed parties at Election Commission of the Maldives are 6 (six). Retrieved on 28th January 2016 from <http://www.elections.gov.mv/>

wield authority in these tasks.⁵⁶¹ Whereas, in Egypt, the mandate is vested in the Supreme Constitutional Court; and in Pakistan to a special Court, the FSC.⁵⁶²

In the Maldives, bills passed by the Majlis only become law following assent of the President, who is also held responsible in formulating all fundamental policies of the state.⁵⁶³ Likewise, the Maldives' Constitution 2008 recognised the conformity of the repugnancy clause as the jurisdiction of the High Court and the Supreme Court, respectively. Therefore, overseeing and monitoring the repugnancy clause is part of the check and balance mechanism within the three branches of national government. These facts have never changed whether pertaining to commercial law, or otherwise. The mandated bodies in commercial law reform are utilized by the three organs of the state: Executive, Parliament and the Courts.

Despite the presence of these powers, some argue that there should be a separate arrangement for the conformation of the repugnancy clause in the Maldivian law. In 2009, Abdul Majeed Abdul Bari,⁵⁶⁴ in his capacity as the Minister for Islamic Affairs, proposed to the Majlis to create a separate post with the title of *Sharī'ah* Counsel, whose responsibility would be to advise the Majlis with respect to *Sharī'ah*-related matters prior to any bill passed by Parliament. Alternatively, he proposed revising existing mandates of the Counsel-General at the Majlis, who is appointed by virtue of Section 5 of the Parliament Procedure 2010 to provide legal advice to the Majlis. He believed the Counsel-General duties extended into advising on *Sharī'ah*-related matters to the Majlis. Thus, the appointed official must hold qualifications in both *Sharī'ah* and

⁵⁶¹Chapter VI, Articles 91-99 of the Constitution of Iran deals with Council of Guardians. Article 94 provides that, "All legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable."

⁵⁶² See generally Chapter 3.10.

⁵⁶³ Article 115(e) of the Constitution of the Republic of Maldives 2008.

⁵⁶⁴ The Researcher conducted a personal interview with Hon. Abdul Majid Abdul Bari (Former Islamic Minister of the Maldives) at his office in the Maldives on 2nd December 2013.

law. However, both of these proposals were later rejected by the Majlis. Ibrahim Ismail⁵⁶⁵ explained that the parliamentarians were not bound to be experts in every field of life and *Shari'ah*; and the confirmation of the repugnancy clause in the bills can be made within the existing rules of the Majlis i.e. the Parliament Procedure 2010. Accordingly, the confirmation of the repugnancy clause can be assured in the committee stage by inviting Islamic scholars to the relevant Parliament committees, which is a common practice. He further noted that in the case that should any discrepancy come to light within the laws then the SC can intervene, which represented the view also held by Al-Suood.⁵⁶⁶ He also suggested enhancing the Maldives Islamic Fiqh Academy mandate for the confirmation of the repugnancy clause by its participation in the consultation process before any bill-submission to the Majlis.⁵⁶⁷ Al-Suood believed under this path, the *ulamā'* would still have a say of confirming the repugnancy clause before any bill passed by the Majlis. Thus, all these show the significance of confirmation of the tenets of Islam before any law is passed by the parliament with the help of the *ulamā'* which represent the views of prominent scholars such as Muhammad Iqbal. According to Iqbal, the role of the *ulamā'* in the Muslim legislative assembly is vital for helping and guiding free discussion on questions relating to law.⁵⁶⁸

According to Ahmed Muizzu, a prominent lawyer and former Prosecutor General of the Maldives, the central role of ensuring conformity of the repugnancy clause is the responsibility of the President.⁵⁶⁹ He, as the head of state, remains responsible to

⁵⁶⁵ The Researcher conducted a personal interview with Hon. Ibrahim Ismail at his office in the Maldives on 3rd December 2013.

⁵⁶⁶ The Researcher conducted a personal interview with Ahmed Muizzu at his office in the Maldives on 4th December 2013.

⁵⁶⁷ Section 75 of the Parliament Procedure 2010 provides 3(three) readings of the bills. The third reading is committee stage where bill is studied. The committee can summon government officials and experts, or witnesses, to come and answer questions. The committee can suggest changes or amendments to the bill when it gives its report to the House.

⁵⁶⁸ Iqbal, M.(2013),op.cit., p.175.

⁵⁶⁹ The Researcher conducted a brief informal interview with Ahmed Muizzu at his office on 3rd December 2013.

formulate all general policies of the state, and assent to bills and its publication.⁵⁷⁰ In the past, there were few bills sent back to the Majlis by the President on grounds of ambiguity and non-conformity with the repugnancy clause.⁵⁷¹ Thus, the President has the full authority to ensure that all laws are in conformity with the repugnancy clause, at all stages of the law-making from drafting to promulgation.⁵⁷²

If both the President and the Majlis have failed to conform to the repugnancy clause, then any individual of the Maldivian community can bring the matter to the High Court or Supreme Court for determination of any law's validity.⁵⁷³ On 30th November 2015, the first case of such nature was concluded. The case of *Abdul Maniu and others v. Attorney General Office (AGO)*⁵⁷⁴ where the Petitioners argued that Section 21 of the Clemency Act (Law No.2 of 2010) is contrary to the tenets of Islam by vesting the power to the President for the commutation of death penalty to life imprisonment. The Petitioners believed that the death penalty represented an *al-qiṣāṣ* offence that could not be commuted by the President under Islamic law. The High Court concluded that section 21 of the Act is a general provision, and represented a prerogative vested in the President to commute death penalty sentences to life imprisonment, regardless of the nature of offences including culpable homicide. Thus, the provision shall not be extended for culpable homicide, which is a *qiṣāṣ* offence, and given such an offence, the

⁵⁷⁰ Article 10 of the Maldives' Constitution 2008 is a general provision and it was mentioned under the sub-heading of the state religion which contained the religious clause, the source clause and the repugnancy clause. Thus, by reading this provision with Article 115 of the Maldives Constitution 2008: the powers and responsibilities of the President, it is clearly understood that the President is the head of state, whose responsibility is to faithfully implement the provisions of the Constitution. Furthermore, his responsibility includes assurance of the compliance of the provisions of the Constitution by organs of the state. Likewise, the President is a person who declared the fundamental policies of the state. By accumulating all these together, it shows the confirmation of the ICLRB in the commercial law is a fundamental responsibility of the President, who is obliged to confirm through his departments.

⁵⁷¹ On 14th January 2014, the President send back the Sexual Harassment bill on the ground that the law was inconsistent with the tenets of Islam. The main issue was the recognition of 'marital rape' in the bill., (Retrieved January 19, 2016 from

<http://www.presidencymaldives.gov.mv/Index.aspx?lid=68&dcid=13859>)

⁵⁷² See generally, to understand law-making process, Zander, M. (2015). *The law-making process*. Oxford: Hart Publishing Ltd.,pp.3-43.

⁵⁷³ See discussion on court system in Chapter 1.10.

⁵⁷⁴ Case No.2012/HC-DM/08.

right to waive the death penalty remains vested in the heirs of the deceased. According to Abdul Rauf, in practice, once the High Court concluded that any provision of law is null and void on any grounds contrary to the Constitution, and such a provision should be repealed unless overturned by the SC. Likewise, if the same case is concluded by the SC then it is immediately in effect and applicable as the ruling of the highest court of the land.⁵⁷⁵

In view of these discussions, it is also arguable that these issues of non compliance of the repugnancy clause have been arising due to the lack of a proper independent institutional framework, such as the FSC of Pakistan. When divulging further into the issue, it is noted, firstly, it is not feasible to create a separate body for the confirmation of the repugnancy clause in the Maldives like the FSC in Pakistan; the Maldives is a small country compared to Pakistan. Secondly, the confirmation of the repugnancy clause is not always dependent on having a separate entity, as in those countries who have created an institutional arbiter. Presumably, not all laws are in accordance with ICLRB, i.e. Pakistan.⁵⁷⁶

Another aspect to consider is whether the issue of the non-compliance of the ICLRB results from a lack of expertise in the Maldives. To further divulge on this point, it is of note that the responsibility of providing legal advice to the state lies with the Attorney General (AG) as provided in Article 133 of the Maldives' Constitution 2008. His chamber serves as the locale from where the government drafts the laws, proposes amendments and reform laws as per the needs of the society. Furthermore, the President ratifies bills upon advice of the Attorney General. Although no adequate data is available on the number of lawyers who are trained in the area of *Sharī'ah* in the office of the AG, it can be presumed that the office of the Attorney General, which is

⁵⁷⁵ The Researcher conducted a personal interview with Hon. Abdul Rauf at the High Court of the Maldives on 8th December 2013.

⁵⁷⁶ See discussion on Pakistan Repugnancy Clause in Chapter 3.1.3.

compromised of a large number of lawyers who are knowledgeable in *Shari'ah* matters, as the majority of them are locally trained lawyers and are subjected to reading *Shari'ah* law as part of their law programmes. So, they could easily draft laws that are in conformity with *Shari'ah*. Additionally, the Islamic Fiqh Academy also operates as a government body and has the capacity to conduct research on any Islamic discipline. All these examples show that the Executive branch as a whole has the capacity to ensure that the policies and regulations of the country are formulated in accordance with the ICLRB.

Secondly, the Majlis features its own research department, and holds authority to invite anyone, including Islamic scholars if the Majlis requires deeper understanding of a *Shari'ah* issue contained in any bill being drafted and debated. Based on these points, it is difficult to declare that the Majlis has no capacity to ensure the conformation of the repugnancy clause in the process of lawmaking.

The third point is whether earlier decisions rendered by the courts have ignored the ICLRB simply by not being aware of these matters. The relevant courts are: the High Court comprised of eight Justices; five of whom hold degrees from well-known Islamic Universities⁵⁷⁷; the SC composed of 5 (five) Justices and all being graduates from reputed Islamic universities.⁵⁷⁸ Thus, it would be difficult to argue that non-compliance of ICLRB by the relevant courts resulted from a lack of expertise.

It is fair to conclude that the existing mechanism for Islamic legal reform and the institutional capacity remains adequate to carry the mandate vested in those respective Maldives institutions for conformation of the repugnancy clause.

⁵⁷⁷ See profile of Justices of the High Court of the Maldives. Retrieved on 28th January 2016 from www.highcourt.gov.mv

⁵⁷⁸ See profile of Justices of the Supreme Court of the Maldives. Retrieved on 28th January 2016 from www.supremecourt.gov.mv

4.3.2 Issues related to Policies

According to Al-Suood, a drafter of the bills and policies of commercial law in the Maldives, generally the view taken is to determine the best commercial practices rather than relying on the ICLRB.⁵⁷⁹ On the contrary, Ahmed Muizzu believed that it was very unlikely to draft any commercial bill, or offer up any policy with the intention to violate the ICLRB. He further asserted that in the past, there was no question of the validity of laws from an Islamic perspective. In the past, people held good faith in their institutions, judges, and lawmakers, since even some ministers were graduates from Islamic universities. As a result, most of laws enacted were in accordance with the tenets of Islam. A clear example of this is the way Section 23 of the Contract Act (Law No.4 of 1991) was crafted, as it restricted *gharār* in commercial contracts in the calculation of liquidated damages. It reads: “the loss directly arising from the breach; and the loss which was known by the parties to the contract to be probable result of the breach”.⁵⁸⁰ The provision will be illustrated in detail in the next chapter.⁵⁸¹

Based on all these discussions, it can be assumed that most policies are harmonised with the ICLRB. However, the Liquor Regulation 2011 represents an example to the contrary. In addition, there are few provisions in other regulations which are contrary to ICLRB, e.g. Section 39 of the Regulation on Tax Administration, 2011 and Section 40 of the Pension Regulation 2010.

Unexpectedly, it is a fact that neither any law nor any policy of the Maldives clearly restricts gambling, yet no company has been permitted to operate a gambling business. According to Ahmed Muizzu, in practice, if the police are alerted to gambling activities

⁵⁷⁹ The Researcher conducted a personal interview with Hon. Husnu Al Suood (Former Attorney of the Maldives) at his office on 9th December 2013

⁵⁸⁰ The Researcher conducted a personal interview with Ahmed Muizzu at his office in the Maldives on 3rd December 2013.

⁵⁸¹ See generally Chapter 5.3.1, 5.3.6.

in any part of the Maldives, the activity will be restrained but no charges will be filed.⁵⁸²

Hence, new laws are required to address this.

A key priority should therefore be given to plan a sustainable Islamic commercial regime in the Maldives by placing the relevant regulatory frameworks. For instance, in order to enhance the *sukūk* market, there is a need to revise the existing Company Act (Law No. 10 of 1996) and to create an SPV for private liquidity funds as the current SPV only enables publicly listed companies. Furthermore, policies should be in place to develop Islamic asset management. There are various funds managed by relevant departments created under Section 25 of the Public Finance Act i.e. *Zakāt* Fund; Higher Education Fund, and Waqf Fund etc. To conclude this segment, new laws should be drafted to address further growth of the Islamic commercial apparatus, i.e Takaful Bill; Waqf bill, and *Zakāt* bill etc., and these issues will be discussed in the next chapter.

4.3.3 Issues related to Interpretation of the ICLRB.

Upon review of the concluded court cases, one would be of the opinion that court interpretations and theory are different in respect to ICLRB.

Firstly, the SC regards that the freedom of contract as subjected to the tenets of Islam. However, the intention and meaning of such a statement is unclear as the stand of the SC on banking-related matters is contrary to the basic Islamic commercial tenets.

Secondly, with respect to banking-related matters, the key disputed issue is the permissibility of interest, which is not entertained by the SC. The meaning of *ribā* is limited to dealings between individuals and not those between companies and banks.

Thirdly, the calculation of liquidated damages represents one area where *gharār* occurs. The recent trend for interpretation of the provision relating to liquidated

⁵⁸² *Ibid.*

damages covering direct and indirect losses is contrary to ICLRB. This is because of increasing cross-border transactions and the presence of English common law-trained judges in the judiciary.⁵⁸³

Fourthly, despite the above-stated discrepancies, all judgments by the High Court and Supreme Court of the Maldives clearly states that “this judgment is delivered in accordance with the *Shari’ah* and law”, which holds not much legal sway, at least in commercial cases. According to Ahmed Faiz Hussain, writing such a phrase is “more like a legal drafting style than stating a reality”. By stating such a phrase, it implies that judges have looked into each issue referred to them on point of law as well as *Shari’ah*, which is not the reality.⁵⁸⁴ If it had been otherwise, there would have been recognition of ICLRB in a positive direction.

4.3.4 The Question on whether the existing role of the tenets of Islam in Commercial law Reform is in accordance with the Maldives’ Constitution 2008

A volume of repealed laws under the title of “A Review of Repealed laws”, which contained a summary of the Maldivian repealed laws from 1932 to 1975,⁵⁸⁵ was further studied. This revealed that these laws passed by Parliament were in compliance with the tenets of Islam despite of no repugnancy clause being followed at that time. However, during that period, the Contraband Act was enacted in 1975, which was substituted later by the existing Contraband Act (Law No.4 of 1975). This law is in need of further elaboration for understanding. In Section 2 of the old Contraband legislation, the law provides for a list of items banned from being imported into the Maldives. These include liquor, pigs (including pork-related items), dogs, idols and pornography.

⁵⁸³ The Researcher conducted a personal interview with Hon. Ahmed Faiz Hussain at his office in the Maldives on 10th April 2015

⁵⁸⁴ *Ibid.*

⁵⁸⁵ The book presented laws passed by the first parliament to the modern economic revival period which is believed to be the opening of first resort in the Maldives 1972 and opening of the first bank in 1975, See generally, Novelty Printers and Publication.(2008). A Review of Repealed laws. Male: Novelty Printers and Publication Pvt.

However, the law also permitted foreigners (those who were residents of the Maldives for various reasons) to import dogs and liquor with a special permission. Compared to the predecessor, the existing Section 5 of the Contraband Act (Law No.4 of 1975) extended the permissibility of importing the pork-related items, liquor and even dogs to the local Maldivians with a special permission. Thus, the operation of the said provision is even more un-Islamic now in comparison with the old law despite the presence of the repugnancy clause.

The first bank that opened in the Maldives was the State Bank of India in 1975, which was a conventional bank and from its example, various other banks started to operate. The first Islamic Bank, the Maldives Islamic Bank opened its services in 2011 and several other developments in Islamic finance in the past 3 years are notable in the islamisation of the Maldives commercial system. Despite all these changes in the Islamic finance sector, the main policies, regulations and directives have never changed with effect of the Maldives' Constitution 2008.

Considering whether the Maldives commercial regime can be islamised, which is currently based on the harmonisation model, is debatable for the following reasons.

Firstly, those Parliamentarians who adopted the repugnancy clause in the Maldives' Constitution 2008 never held the intention of creating a fully islamised commercial system by inserting such a provision into the Constitution. According to Ibrahim Ismail⁵⁸⁶, Parliamentarians assumed that trading in and operating un-Islamic business ventures were acceptable as long it did not disturb or offend the general public. For example, a liquor license cannot be granted to operate a pub in an inhabited island as that would disturb and offend the local community. But the relevant government

⁵⁸⁶ The Researcher conducted a personal interview with Hon. Ibrahim Ismail at his office in the Maldives on 3rd December 2013.

department would be free to grant a license to operate a pub in an uninhabited island for foreigners and tourists as part of the hospitality industry operations.

Secondly, no policy has been adopted at the national level by the government to fully islamise the commercial regime.

Thirdly, according to Abdullah Shiyam,⁵⁸⁷ people do not generally bother to ascertain whether the transaction is un-islamic or otherwise in commercial transactions. He supported his argument by highlighting the trend that even with the presence of an Islamic Bank, people still preferred to secure conventional finance in their dealings. A similar view was expressed by Abdul Majeed Abdul Bari.⁵⁸⁸ He believed that despite the choice for investment being given for the participants of the National Pension Fund, the majority of people preferred conventional systems over the Islamic finance. Yet, it is important to note here that there is no clear data to support this claim. Both Abdullah Shiyam and Abdul Majeed Abdul Bari believed that there exists a need to educate the people about the Islamic financial system.

To sum up the above points, realizing a fully islamised commercial regime in a near future in the Maldives isn't likely and it will probably continue on as a dual system of Islamic and conventional financing systems.

4.4 Conclusion

The tenets of Islam in Commercial law reform as set out in Article 10 of the Maldives' Constitution 2008 is not in full compliance. Most policies, regulations and directives are in accordance with ICLRB. The provisions that do not comply are divided into two: the provisions that are contrary to the ICLRB and those that are harmonised

⁵⁸⁷ The Researcher conducted a personal interview with Abdullah Shiyam at his office in the Maldives on 1st December 2013.

⁵⁸⁸ The Researcher conducted a personal interview with Hon. Abdul Majid Abdul Abari (Former Islamic Minister of the Maldives) at his office in the Maldives on 2nd December 2013.

with the ICLRB. The chapter concludes that the repugnancy clause, which was inserted into the Constitution, was never intended to be adopted for an Islamic commercial regime. It continues to remain a policy through adoption and subjected to judicial review, and then left to the perception of the people. Hence, all commercial legislation needs to be reviewed for deeper understanding, and this will be presented in the next chapter.

University of Malaya

CHAPTER 5: A REVIEW OF THE TENETS OF ISLAM IN MALDIVES

COMMERCIAL LAWS

5.0 Introduction

This chapter reviews the existing commercial laws of the Maldives based on *the Islamic Commercial Law Reform Benchmark* (ICLRB). The official website of the Maldives' Attorney General's Office has categorized commercial laws into two areas: Financial laws and Economic and Commercial laws, as explained earlier. The total number of pieces of legislation is 38. Out of these, 14 were enacted after the promulgation of the Maldives' Constitution 2008 and the remaining 24 were enacted prior to that. For purposes of review, these statutes are divided into five categories: (a) laws pertaining to import and export, (b) laws relating to taxation, (c) laws concerning commercial obligations and contracts, (d) corporate and investment laws; and (e) banking and financial laws. Furthermore, law provisions are calculated on the basis of section, subsection and are considered two separate provisions; as it is not justifiable to declare an entire section of law contrary to the tenets of Islam simply because of a minor portion being negative to ICLRB standards.

This chapter first outlines an overview of each piece of legislation in order to decide whether the law is positive or negative with the elements of the ICLRB. This will be followed by a general discussion, analysis and conclusion.

5.1 Laws Pertaining to Import, Export and Duties

The laws relating to import, export and duties total six, namely: Sellers of Imported Goods, Cafes and Canteens Act (Law No.60 of 1978); Airport Service Charge Act (Law No. 71 of 1978); the Law Governing the Import and Trade of Pharmaceuticals (Law No. 75 of 1978); the Export Import Act (Law No. 31 of 1979); the Law Endowing

State the Right to Exclude Imposition of Import Duty on Specific Parties (Law No. 5 of 1980); the Law Governing Duty Free Areas in the Maldives (Law No. 9 of 1981).

5.1.1 The Sellers of Imported Goods, Cafes and Canteens Act (Law No. 60 of 1978)

This legislation aims to regulate sellers of imported goods, cafes, and canteens in the Republic of Maldives. This law contains four sections and seven subsections, which accumulates into eleven provisions. The Act came into force on 3rd June 1978. This Act requires that imported goods can only be sold in Male' and other islands in the Republic, after registering and acquiring a permit from the Ministry of Trade and Industries for the premises from which the goods will be sold. Similarly, cafes and canteens are also required to register and acquire a permit from the Ministry of Trade. However, this law does not require the registration of those canteens operated on various occasions, for a period of not more than seven days.⁵⁸⁹

In addition, the Act prescribes monthly fees payable to the government for the business of selling imported goods as well as fees levied on cafes and canteens. Uninhabited islands and travel vehicles authorized to conduct such businesses are also charged fees in accordance with this law.⁵⁹⁰ Failure to pay all prescribed business fees during the stipulated period draws a fine of MVR15, and/or the business permit is revoked. Furthermore, if a permit cancellation notice is submitted after the monthly fee is due, the cancellation can only be finalized after paying 1/5th the monthly fee as a penalty.⁵⁹¹ All eleven provisions of this Act are considered positive with the elements of the ICLR.B.

⁵⁸⁹ Sellers of Imported Goods, Cafes and Canteens Act (Law No. 60 of 1978), section 1.

⁵⁹⁰ *Ibid.*, section 2.

⁵⁹¹ *Ibid.*, section 4.

5.1.2 The Airport Service Charge Act (Law No. 71 of 1978)

The Airport Service Charge Act came into force on 5th June 1978. Its purpose is to regulate service charges levied on passengers departing from a Maldivian airport to destinations abroad⁵⁹². The Act contains three sections. The Act sets out that all passengers irrespective of nationality departing from any domestic airport to overseas destinations will be taxed with an Airport Service Charge of US\$12.⁵⁹³ Diplomats holding diplomatic immunity, ministers and high-ranking officials of foreign states, transit passengers and children below the age of two years are exempted from the charge.⁵⁹⁴ Airport service charges have been increased several times. The current charge is US\$25, which was adopted on 1st July 2014 via the Amendment no 15/2014. All three provisions of the Act are positive with the elements of the ICLRB.

5.1.3 The Law Governing the Import and Trade of Pharmaceuticals (Law No. 75 of 1978)

This law governs the import and trade of pharmaceuticals in the Republic of Maldives. This law came into force on 1st October 1978. This three-provision Act outlines three specific regulations. Firstly, the selling of drugs without the prescription of a medical doctor is forbidden.⁵⁹⁵ Secondly, without the prescription of a doctor, advising on the use of contraceptives, importing different products of contraceptives to Maldives is also forbidden.⁵⁹⁶ Thirdly, importation of drugs is subject to the written approval from the Ministry of Health.⁵⁹⁷ All provisions contained in the legislation are positive to the elements of the ICLRB.

⁵⁹² Airport Service Charge Act (Law No. 71 of 1978), section 1.

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid.*, section 2.

⁵⁹⁵ Law Governing the Import and Trade of Pharmaceuticals (Law No. 75 of 1978), section 1.

⁵⁹⁶ *Ibid.*, section 2.

⁵⁹⁷ *Ibid.*, section 4.

5.1.4 The Imports and Exports Act (Law No. 31 of 1979)

The Imports and Exports Act regulates the import and export sector of the Maldives. The Act contains fifteen sections and thirty subsections. Section 7 of the Act contains a product table schedule showing levy import duties, categorized and divided into 97 chapters. Each chapter lists items subject to import duties, and the total items specified in the law are 198. Thus, the total number of provisions (including fifteen sections, thirty subsection and 198 items) are 243. According to this Act, exporting items naturally formed and produced in the Maldives, importing items into the Maldives, re-exporting, selling of imported goods, and operation of such activity are to be carried out with the permission of the Ministry of Trade, Industries and Labour.⁵⁹⁸ The Act stipulates that export duty should not be charged on the export of items naturally formed and produced in the Maldives, except for ambergris, which has an export duty set at 50% of its F.O.B value, and on items re-exported from the Maldives.⁵⁹⁹ The Act asserts that no act of fraud or negligence can be committed in the production of items exported from the Maldives in so far that negative elements may result in an undesirable impact on businesses, and upset the goodwill the Maldives has fostered internationally.⁶⁰⁰ The Act also lists a number of items exempted from import duty, which includes: staple food, the Holy Qur'ān and so forth.⁶⁰¹ According to the Act all imported goods other than those exempted from import duty shall be charged an import duty, payable to the government, as prescribed in the 97th chapter table included in the Act. The 97th chapter table comprehensively lists and specifies the types of goods for which import duty shall be levied with their respective duty amounts of. The Act allows for discretion by the President to waive duty payments under certain circumstances.⁶⁰² Additionally,

⁵⁹⁸ Imports and Exports Act (Law No. 31 of 1979), section 1.

⁵⁹⁹ *Ibid.*, sections 2-3.

⁶⁰⁰ *Ibid.*, section 4.

⁶⁰¹ *Ibid.*, section 5.

⁶⁰² *Ibid.*, section 7.

the Act states how the government should come to its decisions on settlements of duty with regard to regional or international treaties and bilateral agreements between Maldives and other states. Furthermore, the Act also provides for the fixing of prices for purposes of duty payments concerning those goods whose price is unknown.⁶⁰³ Similarly the Act also deals with offences related to smuggling of goods and penalties imposed on such offences includes from six months to two years of imprisonment, or/ house arrest / and banishment.⁶⁰⁴ The Act was amended four times in 2011, and twice in the years 2014 and 2015. These amendments were made in order to make changes in duty amounts.

In Chapter 18 of the Act, items (b), 19 (c), 20(c), 21(d) and 22(b), (d) total six provisions, which permit import of liquor, alcoholic beverages and pronounces duties imposed on these items which are 35% of the C.I.F price. Another two provisions in Chapter 16 (c), 21(c) set permits for the import of pork-related items and the duty imposed on it is 35% of the C.I.F price. Duties for liquor, alcoholic beverages and pork-related products have been raised from 35% to 50% of the price. Thus, a total of eight provisions of the Act are negative with the elements of the ICLRB.⁶⁰⁵

5.1.5 The Law Endowing the State the Right to Exclude Imposition of Import Duty on Specific Parties (Law No. 5 of 1980)

The Law Endowing the State the Right to Exclude Imposition of Import Duty on Specific Parties represents legislation allowing the Government to exercise the right to exempt those parties who reach an accord with the Maldivian government to make huge investments in the Republic in lieu of import duty payments for a duration of time

⁶⁰³ *Ibid.*, sections 8-9.

⁶⁰⁴ *Ibid.*, sections 13-14.

⁶⁰⁵ Although it is arguable for the permissibility of collection of taxes or revenues from un-Islamic activities by the Muslim government, yet for the purpose of the study any provision which is contrary to the basic and general Islamic Commercial Tenets are regarded as contrary to the tenets of Islam thus null and void. See generally Chapter 2.3.5.

sanctioned by the government.⁶⁰⁶ The law contains one provision and is positive with the elements of the ICLRB.⁶⁰⁷

5.1.6 The Law Governing Duty Free Areas in the Maldives (Law No. 9 of 1981)

The Law Governing Duty Free Areas in the Maldives came into force on 9th November 1981. The Act contains one provision only. In accordance with this legislation, the President is vested with discretionary powers to establish duty free areas in the Maldives. The Act provides that goods brought into these areas shall be exempted from the payment of import duty.⁶⁰⁸ The law is positive to the elements of the ICLRB.

5.1.7 Analysis

The above six laws mentioned in the area of imports-exports and duties were enacted prior to the effect of the Maldives' Constitution 2008. These are the oldest pieces of commercial legislation in the Maldives. The Review results of these import-export laws are provided below in Table 5.1.

⁶⁰⁶ Law Endowing State the Right to Exclude Imposition of Import Duty on Specific Parties (Law No. 5 of 1980), section 1.

⁶⁰⁷ The Act came into force 6.8.1380 (the date of effect on this statute was written on Islamic calendar of year).

⁶⁰⁸ Law Governing Duty Free Areas in the Maldives (Law No. 9 of 1981), section 1.

Table 5.1: Laws relating to Imports- Exports and Duties

Title	Total Provisions	<i>Ribā</i>	<i>Gharār</i>	Gambling	General Islamic Commercial Tenets	Total provisions Negative
Sellers of Imported Goods, Cafes and Canteens Act	11	✓	✓	✓	✓	0
Airport Service Charge Act	3	✓	✓	✓	✓	0
Law governing the Import and Trade of Pharmaceuticals	3	✓	✓	✓	✓	0
Imports And Exports Act	243	✓	✓	✓	8	8
Law endowing State the right to exclude imposition of import duty on specific parties	1	✓	✓	✓	✓	0
Law Governing Duty Free Areas in the Maldives	1	✓	✓	✓	✓	0

Source: The Researcher

As can be seen, all the above-mentioned laws regulate the importation of goods except Airport Service Charge Act, which provides airport service charge duties. With respect to laws relating to import of goods, some provisions of the Import Export Act are contrary with the elements of the ICLRB. These total eight in number, and permit the import of goods forbidden by the tenets of Islam i.e. pork related items, liquors and tobaccos. Apart from tobacco, these goods are imported under the special provision provided in the Contraband Act (Law No.4 of 1975) as explained earlier in the previous chapters. However, the Act does not fall in the category of Commercial laws as

provided in the website of the office of Attorney General. Instead it is listed as a procedural law. Thus it is excluded from the Review.⁶⁰⁹

Any form of permissibility in the transaction of un-Islamic goods directly and indirectly are negative to elements of the ICLRB. Allowing importation of these goods and imposing 35% duties on each item are indirect involvement in the trading of the goods forbidden by the tenets of Islam.⁶¹⁰ Moreover, these revenues are received and managed by MIRA. Neither any provision of law, nor any policy exists to ensure separation of these forbidden revenues being assimilated into the taxation system of the country. As a result, all these forbidden revenues are assimilated into the economy of the nation and this requires immediate attention by the legislative bodies in order to comply with the tenets of Islam.⁶¹¹

Apart from the above mentioned, it has also been observed that there are some provisions in these laws that uphold the tenets of Islam. For instance, the import and export of the Holy Qur'ān has been excluded from the payment of duty. The Law also strictly prohibits the import of pornography-related materials (films or similar items) to the Maldives.

5.2. Laws Pertaining to Taxation

Tax-related legislations are six in number: the Revenue Stamp Act (Law No. 4 of 1970), the Bank Profit Tax Act (Law No. 9 of 1985); the Taxation on Petroleum Companies Act (Law No. 1 of 1989); the Tax Administration Act (Law No. 3 of 2010);

⁶⁰⁹ See discussion in Chapter 4.1.1.

⁶¹⁰ See generally Islamic General Commercial law Tenets Chapter 2.3.5.

⁶¹¹ As indicated earlier by virtue of 5 of the Regulation on *Shari'ah* Screening of Equity Securities of the CMDA permits up to 5% of the income of the company generated from un-Islamic activities. But this is an exception to the general rule relating to the Basic Islamic Commercial Tenets and General Islamic Commercial Tenets for the companies. And there is no such rule or fatwa issued by the relevant authorities of the Maldives for application of similar rules or alternatives in public laws such as tax laws. Additionally, as nature of the study any provision of a law found negative to elements of the ICLRB is considered null and void regardless the degree of permissibility of un-Islamic activities. See generally ICLRB in Chapter 2.3.6.

the Business Profit Tax Act (Law No. 5 of 2011), and the Goods and Services Tax Act (Law No. 10 of 2011).

5.2.1 The Revenue Stamp Act (Law No. 4 of 1970)

The Revenue Stamp Act sets out rules relating to taxes levied in the form of stamps in the Republic of Maldives. This Act contains six provisions. The Act came into force on 12th April 1970. The Act categorizes documents that require stamping, for purposes of taxation, into six categories.⁶¹² These include registries, government approval letters for logging; legal documents; registry of individual agreements; government service training certificates, and other documents.⁶¹³ The registries are comprised of various types of licenses and property deeds. The legal documents, as per the Act includes summary of case reports, marriage certificates, and death certificates and so forth.⁶¹⁴ The specific documents under the registry for individual agreements, government service training certificates and other documents are also listed in detail in the Act.⁶¹⁵ It is noted that registries relevant to tourist resorts, hotels, guest houses, and vessels are charged the maximum stamping tax, pursuant to the Act.⁶¹⁶ All provisions of the legislation are positive with the elements of the ICLRB.

5.2.2 The Bank Profit Tax Act (Law No. 9 of 1985)

This legislation aims to govern taxation of bank profits earned in the Republic of Maldives. This Act has three provisions. The Act came into force on 27th June 1985. According to the Act, banks operating in the Maldives must submit annual financial statements prepared up to the end of each calendar year, and before the end of June each

⁶¹² Revenue Stamp Act (Law No. 4 of 1970), sections 1-6.

⁶¹³ *Ibid.*, section 1.

⁶¹⁴ *Ibid.*, section 3.

⁶¹⁵ *Ibid.*, section 5.

⁶¹⁶ *Ibid.*, section 1.

subsequent year to the Ministry of Finance and Treasury.⁶¹⁷ These profit statements must be prepared and audited by an auditor recognized by the Ministry of Finance and Treasury. Most importantly, the Act demands that the net profit earned by a bank for any given year will be taxed at a rate of 25%, payable before the end of July of the subsequent year to the Ministry of Finance and Treasury.⁶¹⁸ All provisions of the Act are positive with the elements of the ICLRB.

5.2.3 The Taxation on Petroleum Companies Act (Law No. 1 of 1989)

The Taxation on Petroleum Companies Act is a law that regulates taxation on petroleum companies operating in the Republic of Maldives.⁶¹⁹ The Act is divided into 7 chapters, 22 sections and 45 subsections, which comprise 67 provisions. The Act came into force on 9th February 1989.

Pursuant to this Act, taxes shall be levied on all petroleum companies in each tax year from the taxable income generated by the company during that tax year that taxable income will be computed according to rules set out in the Act. The rules for calculating taxable income are comprehensively listed out in Chapter 2 of the Act.⁶²⁰ Accordingly, these include interest, profit, and income etc., of petroleum companies as provided in 6 (a) and 8 (c), respectively. Chapter 3 of the Act stipulates that the petroleum tax rate will be fixed with regard to the regulation formulated by the Minister of Finance. Additionally, procedures in relating to tax charges are defined in the Act, which include timeframes for the submission of all audited financial statements for each tax year.⁶²¹ Furthermore, matters relevant to tax offences and penalties also are declared by this Act.⁶²² In accordance with 22 (a), a first violation of the provisions of the Act carries a

⁶¹⁷ Bank Profit Tax Act (Law No. 9 of 1985), section 1.

⁶¹⁸ *Ibid.*, Sections 2-3.

⁶¹⁹ Taxation on the Petroleum Companies Act (Law No. 1 of 1989), section 1.

⁶²⁰ *Ibid.*, sections 4-8.

⁶²¹ *Ibid.*, sections 13-14.

⁶²² *Ibid.*, sections 19-22.

penalty of USD15 to USD75,000. Furthermore, the Act provides that such penalties increase for the second-time violators, from USD75,000 to USD150,000; and USD150,000 to USD250,000 for third offence violators. Two provisions mentioned earlier in relation to interest are negative with the elements of the ICLRB and the rest of the provisions are positive with the elements of the ICLRB.

5.2.4 The Tax Administration Act (Law No. 3 of 2010)

The Tax Administration Act represents an administrative law and established a regulatory arm for tax supervision in the Maldives; it came into force on 18th March 2010. The Act contains 335 provisions, divided into 8 chapters with 86 sections and 249 subsections.

The Act created an independent administrative agency – the Maldives Inland Revenue Authority (MIRA) for the collection and administration of taxes in the nation. The functions of the MIRA include, enforcement of tax laws, implementation of tax policies, and the performance all duties related to the collection of taxes imposed by the State.⁶²³ The MIRA is managed and governed by a Board of Directors appointed under this Act. The Act contains provisions relating to its purpose, and board functions, some of which include: removal and resignation of members of the Board; compensation to panel members, and other compensatory benefits to board members.⁶²⁴ In addition, the Act creates the administrative head of the MIRA; the Commissioner General of Taxation, and the Deputy Commissioner General of Taxation, all of whom are appointed by the President with the approval of the People’s Majlis.⁶²⁵ Provisions relating to the qualifications for these posts and job descriptions are also defined in the

⁶²³ Tax Administration Act (Law No. 3 of 2010), sections 2-3.

⁶²⁴ *Ibid.*, section 4.

⁶²⁵ *Ibid.*, section 8.

Act.⁶²⁶ Additionally, other matters in relation to the administration of the MIRA are dealt with in depth. These include budgeting and annual reports of the MIRA; its legal immunity; employees, confidentiality and disclosure of information; signing and service of documents; registration of taxpayers, and tax agents. Obligations of the taxpayer and obligations on the payer of withholding tax are also particularized in this Act.⁶²⁷ Specific chapters are accommodated in the Act that comprehensively elaborates on matters auditing authority and investigation; tax recovery; relief in cases of double taxation, and offences, penalties relating to taxes payable.⁶²⁸ Moreover, this Act provides for a Tax Appeal Tribunal, established for purposes of adjudicating disputes related to this Act and other tax laws. Items falling under the purview of the tribunal would be: tax rulings and notices; aiding and abetting offences, and powers to formulate regulations, are also included within the supplementary provisions of the Act.⁶²⁹

Nearly all provisions of the Act are positive with the elements of the ICLRB. However, sections 64 (b) and 65 (b), respectively, which imposes fines over principle taxable amount as civil penalties in the event of default are considered negative with the elements of the ICLRB.

Section 64(b) of the Tax Administration Act reads as follow:

The civil penalty for an offence specified in subsection (a) shall be:

- (1) “A fine of 0.5% (zero point five percent) of the amount of tax payable for the taxable period; and
- (2) “A fine not exceeding MVR100 (One Hundred Rufiyaa) for each day of delay from the date required to file a tax return or provide information or pay withholding tax.”

⁶²⁶ *Ibid.* section 9.

⁶²⁷ *Ibid.*, sections 10-23.

⁶²⁸ *Ibid.*, sections 24-34.

⁶²⁹ *Ibid.*, sections 39-47.

Similarly Section 65 (b) of the Act reads as:

The civil penalty for an offence specified in subsection (a) shall be:

- (1) “A fine of 0.5% (zero point five percent) of the amount of tax payable for the taxable period; and
- (2) “A fine not exceeding MVR50 (Fifty Rufiyaa) for each day of delay from the date required to file a tax return or provide information or pay withholding tax.”

In sections 64(b) and 65(b), of the Act a civil penalty is imposed for violations of tax provisions over the principle taxable amount for the taxable period. The calculation of such a fine over the principle amount is considered to be an extra and unjustified amount. Thus, it is considered to be *ribā* as provided in ICLRB.

5.2.5 The Business Profit Tax Act (Law No. 5 of 2011)

This legislation established an administrative framework for the purpose of implementing a Business Profit Tax (“BPT”).⁶³⁰ The Act came into force on 18th July 2011. The Act contains 267 provisions, which are divided into 6 chapters, 49 sections and 218 subsections.

The Act sets down the mechanisms by which taxation on business profits can be imposed. Businesses that are defined and taxed in the Maldives are: companies, firms and/or any individuals trading goods and services for profit in the Maldives. The Act stipulates one provision that only applies to profits from sources outside Maldives. Tax on the profits from those sources are to be charged under the conditions provided in the Act.⁶³¹

The Act further details royalties and other payments subject to tax at source, rates of tax; general rules on computation of tax; deductions against rent; pre-trading, and pre-

⁶³⁰ Business Profit Tax Act (Law No. 5 of 2011), section 1.

⁶³¹ *Ibid.*, section 2.

registration expenditures; loss relief, and special provisions relating to insurance companies.⁶³²

Chapter 2 of the Act provides for those parties receiving tax exemptions.⁶³³ These include MMA and banks that are subject to the bank profit tax under other laws, charities and foreign investments with tax exemption agreements. Exemptions for shipping or aircraft businesses are also mentioned in the Act.⁶³⁴

The Act further sets out rules on tax returns; assessments by the MIRA; objections to assessments; accounting for and payment of withholding tax and payment of tax.⁶³⁵ According to the Act, appeals against penalties, assessments, and claims made under Tax Acts are heard by the Tax Appeal Tribunal.⁶³⁶ Furthermore, tax avoidance and offences and penalties for tax evasion are also dealt with in detail in Chapters 4 and 5 of the Act.⁶³⁷

Four provisions of the Act are negative with the elements of the ICLRB. They are:

According to 23 (h) of the Act:

“tax which is not paid on or before the date it is due under this Section shall carry interest at the rate of 5% (five percent) per annum from one month after that date until the tax is paid”

Similarly, section 24 (c) says:

“tax which is not paid on or before the date it is due under this Section shall carry interest at the rate 5% (five percent) per annum from one month after that date until it is paid”

⁶³² *Ibid.*, section 14.

⁶³³ *Ibid.*, sections 15-16.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*, sections 17-25.

⁶³⁶ *Ibid.*, sections 26-27.

⁶³⁷ *Ibid.*, sections 28-40.

Section 25 (c) reads:

“if any tax required to be deducted from any payment under this Section is not accounted for in accordance with Section 25 (b), the person liable to make that deduction shall be liable to pay interest to the MIRA at the rate of 1% (one percent) per month on the tax for the time being outstanding”

Section 40 of the Act provides:

“a penalty under any of the provisions of this Act shall carry interest at the rate of 5% (five percent) per annum from the date on which it becomes due and payable until payment”

The above-mentioned four provisions contain unjustifiable interest penalties over the taxed receivable amounts, which are negative with the elements of the ICLRB.

5.2.6 The Goods and Services Tax Act (Law No. 10 of 2011)

The main objective of the Act was to set up provisions for the imposition of Goods and Services Tax (“GST”), on the value of goods sold and services rendered in the Maldives.⁶³⁸ The Act came into force on 2nd October 2011. The Act contains 210 provisions that are divided into 11 chapters, 68 sections, and 142 subsections. It also contains one schedule. Pursuant to this Act, GST is the tax levied on the value of goods sold and services rendered in the Maldives.⁶³⁹

Taxable activity includes any business conducted continuously or permanently for the supply of goods or services.⁶⁴⁰ The Act requires the collection of GST from two major categories of trade, namely: goods and services relating to tourism and those goods and services sourced from a general nature.⁶⁴¹ All goods and services other than those specified as tourism goods and services are considered as general goods and

⁶³⁸ Goods and Services Tax Act (Law No. 10 of 2011), section 1.

⁶³⁹ *Ibid*, section 2.

⁶⁴⁰ *Ibid*, section 13.

⁶⁴¹ *Ibid.*, section 14.

services. Tourism related goods and services are levied 8% GST⁶⁴² and other general goods and services 6% GST.⁶⁴³

Chapter 4 of the Act lists those goods and services that are tax exempted and the terms of exemption from GST. Goods and services that are GST tax-exempt include: electricity, water, communication, and health services provided by the concerned State institution, or by a service provider registered with the concerning government authority. In addition, the Act defines those essential goods that are classified as zero-rated goods.⁶⁴⁴ A full list of these items are exhibited in Schedule 1 of the Act, which include rice, sugar, and flour etc.⁶⁴⁵ It is recommended that this Act be read in conjunction with the Tax Administration Act (Law No. 3 of 2010) since in cases of default of any taxable amount, the above-mentioned penalties that contain interest are applicable under the Act.⁶⁴⁶ All provisions of the Act are positive to the elements of the ICLRB.

5.2.7 Analysis

With regard to all legislation covering taxation in the Maldives, it has been observed that 50% of the laws were enacted prior to the commencement of the Maldives Constitution 2008 (eg. the Revenue Stamp Act was promulgated in 1970). The remaining half were enacted after the enforcement of the Maldives' Constitution 2008 i.e. Goods and Services Tax Act etc., in 2010 and 2011, respectively. The review results are exhibited in Table 5.2.

⁶⁴² *Ibid.*, section 15(3).

⁶⁴³ *Ibid.*, section 16(b).

⁶⁴⁴ *Ibid.*, sections 20-21.

⁶⁴⁵ *Ibid.*, schedule 1.

⁶⁴⁶ *Ibid.*, section 60.

Table 5.2: The Laws Concerning Taxation

Title	Total Provisions	<i>Ribā</i>	<i>Gharār</i>	Gambling	General Islamic commercial tenets	Total provision Negative
Revenue Stamp Act	6	✓	✓	✓	✓	0
Bank Profit Tax Act	3	✓	✓	✓	✓	0
Taxation on Petroleum Companies Act	67	2	✓	✓	✓	2
Tax Administration Act	335	2	✓	✓	✓	2
Business Profit Tax Act	267	4	✓	✓	✓	4
Goods and Services Tax Act	210	✓	✓	✓	✓	0

Source: The Researcher

As indicated above, three out of six laws are fully positive to the elements of the ICLRB. However, two provisions of the Taxation on Petroleum Companies Act require interest payments in the calculation of tax. Six provisions of other two laws i.e. the Tax Administration Act and the Business Profit Tax Act are permitted to impose interest in the event of default, which is also negative to the elements of the ICLRB. Yet, fines are permitted in cases of tax payment defaults, and other dues by the Ruler or relevant authority in order to maintain public order. However, such fines must be justifiable.⁶⁴⁷ The provisions mentioned earlier do not fall under this category as these charges are based on interest of principle amounts due (that eventually compound), which is *ribā*.

⁶⁴⁷ Al Markaz Dirāsāt al -fiqhiyya wa al iqthiṣādiyyah. (2010). *Mawsū'āt fatāwā al-muāmalāt al-māliyyah li al-maṣārif wa al-mua'ssasāt al -māliyya al Islāmiyya* .Cairo: al-Dar al salam.Vol 14, p.315.

There are some provisions of laws that impose justifiable fines. For instance, section 22 (a) of the Taxation on Petroleum Companies Act permits a penalty of between USD15 to USD75,000 for the first incidence of non-compliance with the Act. This fine is a fixed amount and does not contain interest, thus is justifiable.

As indicated earlier, The Revenue Stamp Act is the oldest commercial law in the Maldives, which is positive to the elements of the ICLRB. However, for the operation of Islamic commercial system, some provisions of the Act require amending, i.e. no provision of the Act enables multiple documents of a single Islamic financial transaction to be considered as one if they are registered in the courts. Furthermore, a 15% land tax is imposed under section 19 (f) of the Maldives Land Act (Law No. 1 of 2001),(10th Amendment) on every land transaction will increase costs of Islamic finance transactions, thus, it becomes necessary to provide for some exemptions on Islamic finance matters.⁶⁴⁸ Apart from this, it is required to introduce new reforms, such as Waqf Regulation. Section 37 of the Maldives Land Act (Law No. 1 of 2001) stipulates that any land, or any fixed assets, on such land can be declared to be a religious endowment subject to the respective policy. However, the Act states no portion of land situated in Male' is ineligible to be declared as religious endowments as it is strictly prohibited.⁶⁴⁹ Unfortunately, no government policy is available in the public domain with respect to endowment, which needs to be created. According to Ibrahim Saleem, Editor of *Dharma Magazine*⁶⁵⁰, during earlier days, there were some lands on religious endowment in Male', however, these lands were exchanged and relocated in rural islands. Most of these lands were relocated in Thodoo Island⁶⁵¹ in the early 1970s, as

⁶⁴⁸ Muneeza, A. (2014). Maldives: The Struggle for New Hope in a Garland of Palm-Clad Islands. In Thiagaraja, S., Morgan, A., Tebbutt, A., & Chan, G. (Eds.) *The Islamic Finance Handbook: A Practitioner's Guide to the Global Markets* (pp.337-354). Singapore: John Wiley & Sons Singapore Pte.Ltd.

⁶⁴⁹ Maldives Land Act (Law No. 1 of 2001), section 37.

⁶⁵⁰ The Researcher conducted a personal interview with Mr. Ibrahim Saleem at his office in the Maldives on 4th December 2013.

⁶⁵¹ *Thoddo* is an inhabited island of North Ari Atoll in the Maldives. Secretariat of the North Ariatholhu Atoll Council website. Retrieved on 22nd May 2016 from http://www.alifalif.gov.mv/?page_id=25

Male,' the capital city and the Maldives most a populous island, needed land for public use. Since then the religious endowment of land in Male' is prohibited by law, which has remained a controversial issue on the validity of *waqf* property—if it were exchanged or to be reassigned other than the original endowment. To cater for these issues, referencing section 37 of the Maldives Land Act (Law No. 1 of 2001), the “*Waqf Regulation*” can apply administration and policy respecting *Waqf*.

Currently, *zakāt* affairs are managed by the Ministry of Islamic Affairs. *Zakāt* is collected in Male' by the Ministry directly. In the rest of the Maldives *zakāt* is collected through local councils. A draft of a *Zakāt* bill has since been widely circulated. On review of the draft bill, the most significant proposition is the creation of a *Zakāt* Management Council which serves as the mandatory supervisory body of *zakāt* administration. Furthermore, it is proposed that the collection of *zakāt* should be administrated by MIRA with the direction of the *Zakāt* Management Council. This model offers credibility and public confidence to the process of *zakāt* collection. The bill calls for various penalties in the event of default of *zakāt* payment. However, all penalties are by nature pecuniary rather than criminal. This should be addressed for future law reform to have a sustainable *zakāt* enforcement mechanism.⁶⁵²

5.3 Laws Relating to Commercial Obligations and Contracts

Laws that cover general commercial obligations and contracts include: the Law of Contract (Law No. 4 of 1991); the Sale of Goods Act (Law No. 6 of 1991); the Mortgages Act (Law No. 9 of 1993); the Negotiable Instruments Act (Law No. 16 of 1995), and the Consumer Protection Act (Law No. 1 of 1996).

⁶⁵²This bill is in drafting stage and may undergo changes before being passed as a law by the parliament.

5.3.1 The Contract Act (Law No. 4 of 1991)

The Contract Act came into force on 28th May 1991. This law contains 66 provisions, based on 22 sections and 44 sub-sections. This law briefly explains the components and matters that arise during the formation of contract. According to the Act, a contract is defined as an agreement between two or more persons, which must be legally valid and enforceable.⁶⁵³ The parties in a contract must consent freely, and must possess the legal capacity to enter into a contract agreement. According to the Act, “legal capacity” is defined as soundness of mind of both parties, and being a minimum of 16-years-old.⁶⁵⁴ A contract is concluded when an offer is made by one party that is accepted by the other to whom it was made.⁶⁵⁵ The Act defines certain other elements concerning a contract, such as: offer, invitation to treat; offerer and offeree; communication of the offer; revocation of offer; irrevocable offer; acceptance; valid acceptance, and termination of offer.⁶⁵⁶

Additionally, the Act provides for instances where a contract may be deemed void. These cases include: mistake of fact; duress; misrepresentation; undue influence and illegal contracts⁶⁵⁷. Moreover, the Act defines clauses that, if included renders that clause void or invalid. These may include clauses that restricts a person’s ability to trade, or any clause prohibiting legal action etc.⁶⁵⁸

Furthermore, the Act outlines instances for discharge of a contract, and discharge of performance.⁶⁵⁹ The Act stipulates that, a party who commits a breach of contract shall be liable to pay the aggrieved party, damages from losses arising from that breach. Legal outcome of a specific performance and joint and several liability is also concisely

⁶⁵³ Contract Act (Law No. 4 of 1991), section 2.

⁶⁵⁴ *Ibid.*, section 3.

⁶⁵⁵ *Ibid.*, section 5.

⁶⁵⁶ *Ibid.*, section 6.

⁶⁵⁷ *Ibid.*, sections 13-14.

⁶⁵⁸ *Ibid.*, section 18.

⁶⁵⁹ *Ibid.*, section 19.

detailed in the Act.⁶⁶⁰ All provisions of this Act are positive to the elements of the ICLRB.

5.3.2 The Sale of Goods Act (Law No. 6 of 1991)

The Sale of Goods Act is a law relating to trade in the Republic of Maldives, and came into force on 1st September 1991. The Act contains 48 provisions that have been divided into 22 sections and 26 subsections. The Act defines trade as, the transferring of ownership of goods for a specified price from seller to buyer under an agreement between, known as a trade agreement under this Act.

The Act asserts that a trade agreement can be undertaken by persons with capacity to contract.⁶⁶¹ Pursuant to the Act, the price for goods in a trade agreement are fixed, or decided in a manner provided in the trade agreement.⁶⁶² It is also acceptable for a third party to decide the price, on agreement of the contracting parties.⁶⁶³ The Act further explains the right of the seller to sell goods, transfer of ownership; adequacy of goods for specific use; the right to withhold goods until requirements or part of the requirements of the trade agreement have been met; risk of goods transferable with the ownership; whether goods are delivered on specific terms, and each party's responsibilities.⁶⁶⁴ Additionally, the Act states that, if not agreed otherwise, providing goods and collecting costs should take place at the same time, and at the business premise of the seller.⁶⁶⁵ Also, if goods are less, or in excess of the amount contracted, or are damaged, the buyer can refuse delivery and payment of the agreed price stipulated in the trade agreement.⁶⁶⁶ Furthermore, the Act, allows for the termination of the trade agreement by either party upon completion of the trade; to sell the goods to another

⁶⁶⁰ *Ibid.*, section 23-25.

⁶⁶¹ Sale of Goods Act (Law No. 6 of 1991), section 2.

⁶⁶² *Ibid.*, section 5.

⁶⁶³ *Ibid.*, section 6.

⁶⁶⁴ *Ibid.*, sections 7-10.

⁶⁶⁵ *Ibid.*, section 13.

⁶⁶⁶ *Ibid.*, section 14.

party upon the fulfillment of specific factors; provides a provision of legal action against the buyer; details the rights of the buyer for breach of contract by the seller and vice versa.⁶⁶⁷ All provisions of the Act are positive to the elements of the ICLRB. However, it should be noted that section 22(a) defines goods as “all moveable items other than money,” which presumably includes un-Islamic goods such as liquor, pork-related items, which are in practice now.

5.3.3 The Mortgages Act (Law No. 9 of 1993)

This law regulates mortgages in the Republic of Maldives. It contains 23 provisions based on 14 sections and 9 subsections. The Act came into force on 16th December 1993. It defines mortgages as anything capable of being sold or leased, deposited by the borrower with the lender, so that it can either be sold, or leased by the lender in the event of default.⁶⁶⁸ According to the Act, the mortgagor and mortgagee must be at least 16-years-old; of sound mind; absent from duress, and with no legal prohibition against disposal of his property.⁶⁶⁹ As per the Act, anything considered lawfully for sale can be mortgaged.⁶⁷⁰

The Act further outlines instances where, revocation, compensation and reclamation of mortgaged property can take place.⁶⁷¹ Pursuant to the Act, where the mortgagor has defaulted on any term of the mortgage, the mortgagee is given the right to submit a claim in court.⁶⁷² Subsequent to such claim, the court can issue two orders, namely, to give the possession of the mortgaged property to the mortgagee, or to order the payment

⁶⁶⁷ *Ibid.*, sections 16-17.

⁶⁶⁸ Mortgages Act (Law No. 9 of 1993), section 2.

⁶⁶⁹ *Ibid.*, section 3.

⁶⁷⁰ *Ibid.*, section 4.

⁶⁷¹ *Ibid.*, section 5.

⁶⁷² *Ibid.*, sections 6-7.

of rent directly to the mortgagee, if the mortgaged property is rented out to a third party.⁶⁷³

The court-ordered duration will stand as a stipulation for a period determined by the court, or until the settlement of the loan, or until the mortgagee has waived the loan.⁶⁷⁴ Furthermore, the Act mentions circumstances for the issuance of interim orders; foreclosure of a property as a result of the mortgagor's failure to keep up the mortgage payments, and management of any sale proceeds.⁶⁷⁵ All provisions of the Act are positive to the elements of the ICLRB.

5.3.4 The Negotiable Instruments Act (Law No. 16 of 1995)

The Negotiable Instrument Act came into force on 11th December 1995. It contained 94 provisions divided into 5 chapters, consisting of 41 sections and 53 subsections. According to the Act, negotiable instruments can be bought and sold, and they are easily transferable from person to person. They can be exchanged for cash as well.⁶⁷⁶ The Act deals with bills of exchange, cheques and promissory notes. A specific chapter for each of these negotiable instruments is provided in the Act. A bill of exchange has been defined as an unconditional order in writing, addressed by one person to another, requiring the addressee to pay on demand, or on a specified day and time, the amount stated in the bill. The Act requires the names of the drawer and payee shall expressly be mentioned in the bill. Matters in relation to bills of exchange, such as, inchoate instruments; delivery; acceptance of a bill; general and conditional acceptance; bills payable on demand and/or specified times; discharge of liability of a party; alteration of a bill; non-negotiable bills; liability of acceptor, drawer and endorser, and bill validity,

⁶⁷³ *Ibid.*, section 9.

⁶⁷⁴ *Ibid.*, section 10.

⁶⁷⁵ *Ibid.*, sections 11-12.

⁶⁷⁶ The Negotiable Instruments Act (Law No. 16 of 1995), section 2.

are set out comprehensively in the Act.⁶⁷⁷ Chapter 3 of the Act interprets the meaning of a cheque and lays down terms in relation to cheques. These include, crossing of cheques; alterations of crossed cheques; payment by banks in good faith, and revocation of banker authority.⁶⁷⁸ Similarly, Chapter 4 of this Act deals with the matters in relation to promissory notes.⁶⁷⁹ Furthermore, good faith requirements; powers to formulate regulations; bounced cheques, and subsequent penalties, are also covered within this Act.⁶⁸⁰ All provisions of the Act are positive with the elements of the ICLRB.

5.3.5 The Consumer Protection Act (Law No. 1 of 1996)

This legislation provides for the establishment and protection of consumer rights in the Republic of Maldives. The number of provisions are 44, which is divided into 19 sections and 25 sub-sections. The Act contains a provision against subjecting consumers to unfair discrimination.⁶⁸¹ The Act requires that consumers shall not be discriminated by sellers in the course of selling goods, or by service providers in the provision of services.

The Act prohibits the hoarding of commercial goods in order to prevent its sale to a buyer.⁶⁸² Conversely, a list of circumstances in which goods may be hoarded was included in the Act. These include: when the sale of particular goods is prohibited by law; reasonable quantity of the goods that have already been sold to a customer, and when a wholesale trader is faced with a demand to sell lesser quantity goods contrary to normal wholesale business practices.⁶⁸³

⁶⁷⁷ *Ibid.*, sections,3-20.

⁶⁷⁸ *Ibid.*, sections 21-30.

⁶⁷⁹ *Ibid.*,sections 31-36.

⁶⁸⁰ *Ibid.*, sections.37-41.

⁶⁸¹ Consumer Protection Act (Law No. 1 of 1996),section 1.

⁶⁸² *Ibid.*, section 2.

⁶⁸³ *Ibid.*, section 3.

The Act demands that all commercial good prices wholesale and retail, be displayed in clear manners to buyers.⁶⁸⁴ Display and packaging, expiry dates of goods are also regulations provided in the Act.⁶⁸⁵ Similarly, the sale of goods without any price and packaging information, except for payment requirements, is prohibited; prices for services rendered and its conditions are to be displayed clearly in Dhivehi language on the premises of all trades.⁶⁸⁶

Additionally, The Ministry of Trade and Industries holds discretionary powers to control availability of any product and service; it can also place price controls on goods and services based on community necessity or economic conditions in the country.⁶⁸⁷

The Act further lists prohibited items relating to sale of goods; provision of services; advertisements, and penalties for committing any offence prescribed in the Act—false representation of services, style, grade or model.⁶⁸⁸ Situations of communicating product defects prior to sale, presentation, testing, and prior knowledge of defects, are also detailed in the Act.

The Act requires receipts be issued containing details of sale shall be provided for every good sold or service rendered to any buyer or service seeker.⁶⁸⁹ All provisions of the Act are positive with the elements of the ICLRB. Furthermore, it is fair to say none of the provisions are restricted to entertaining commonly understood Islamic consumer principles such as fair trading, equity in scaling, monopoly and avoidance of fraudulent trading etc.⁶⁹⁰

⁶⁸⁴ *Ibid.*, section 4.

⁶⁸⁵ *Ibid.*, section 5.

⁶⁸⁶ *Ibid.*, section 6.

⁶⁸⁷ *Ibid.*, section 7.

⁶⁸⁸ *Ibid.*, section 8.

⁶⁸⁹ *Ibid.*, sections 11-14.

⁶⁹⁰ See generally; El-Bassiouny, N. (2014). The one-billion-plus marginalization: Toward a scholarly understanding of Islamic consumers. *Journal of Business Research*, 67(2), 42-49.

5.3.6 Analysis

Five laws (5) laws in area of contract and commercial obligations are positive to ICLRB as seen in Table 5.3.

Table 5.3: The Laws relating to Commercial Obligations and Contract

Title	Total Provisions	<i>Ribā</i>	<i>Gharār</i>	Gambling	General Islamic Commercial Tenets	Total provision Negative
Contract Act	66	✓	✓	✓	✓	0
Sale of Goods Act	48	✓	✓	✓	✓	0
Mortgages Act	23	✓	✓	✓	✓	0
Negotiable Instruments Act	94	✓	✓	✓	✓	0
Consumer Protection Act	44	✓	✓	✓	✓	0

Source: The Researcher

All these laws were enacted prior to the promulgation of Maldives' Constitution 2008. Although all these legislations are positive with the elements of the ICLRB, it is fair to say that existing un-Islamic commercial practices are based mainly on these 6 statutes. In beginning of the analysis, the law of contract serves as the main legislation guiding most business transactions. As discussed earlier, the courts enforce contracts as agreed by the parties regardless of the fact whether the contract is contrary to the tenets of Islam.⁶⁹¹ For instance, section 23 of the Contract Act that covers compensation for breach of contract is significant from the onset. This provision embodies direct loss and

⁶⁹¹ See discussion on the application of ICLRB in 4.2.1.2.

foreseeable damages. In principle, direct loss is considered certain, i.e paying labour cost etc. However, foreseeable damage are often uncertain, and due to this circumstance, the provision specified losses known by the parties. As mentioned earlier in *National Group for Communication and Computers Ltd. v. Lucent Technologies International, Inc.*⁶⁹² the losses that flowed from breach of contract are considered as “speculative,” which is equivalent to the Islamic concept of gharar. Thus, the aim of wording of provision-23 in the Contract Act was restricting of seeking innocent parties such anticipated profits in the position as highlighted earlier⁶⁹³. Thus, the provision is considered positive with the elements of the ICLRB as the provision does not make compulsory the award of foreseeable damages that at the time were unknown to the parties.

In principle, things considered immoral in Islamic law are thusly treated as immoral in an Islamic society. However, the question arises whether section 17 of the Contract Act, which applies restrictions on illegal and/or immoral contractual terms, are covered by the Basic Islamic Commercial Tenets and General Islamic Commercial Tenets holding similar meaning in contracts such as *ribā* and un-Islamic activities. The practice shows that not all un-Islamic activities are covered in the meaning of immoral terms as stipulated in the section.

Furthermore, it should be noted that operation of section 17 is subject to section 18. Section 18 reads “where any clause in a contract purports to restrain or prohibit the conduct of a person’s trade or profession, such clause may be enforceable only if it is reasonable to do so”. Does this mean that the restriction of trading of un-Islamic goods is not justifiable as this will restrain business of a person? To avoid such interpretations,

⁶⁹² 331F.Supp.2d 292(2004) United States District Court, D. New Jersey.

⁶⁹³ See discussion in Chapter 4.3.2.

the provision must be revised to sustain the tenets of Islam in the commercial trade, regardless whether the current provision remains positive to the elements of the ICLRB.

In conclusion of this segment, no provision of the Consumer Protection Act, Mortgage Act, Sale of Goods Act, and Negotiable Instrument Act are negative with the elements of the ICLRB. Nevertheless in practice, e.g. mortgage agreements, the Sale of Goods transaction and writing of negotiable instruments etc., frequently involve interest that is against the elements of the ICLRB. Such practices exist not only because of law, but because a holistic public policy remains unavailable that could apply the tenets of Islam in the commercial marketplace as discussed earlier in chapter 4.⁶⁹⁴

5.4 The Corporate and Investment Laws

Laws in this segment are: Foreign Investments Act (Law No. 25 of 1979); the Companies Act (Law No. 10 of 1996); the Maldives Tourism Act (Law No. 2 of 1999); the Cooperative Societies Act (Law No. 3 of 2007) the Copyrights & Related Rights Act (Law No. 23 of 2010); the Partnership Act (Law No. 13 of 2011); the State Business Privatization, Corporatization, Monitoring and Evaluation Act (Law No. 3 of 2013); The Small and Medium Enterprises Act (Law No. 6 of 2013); the Business Registration Act (Law No. 18 of 2014); the Sole Proprietorship Act (Law No. 19 of 2014), and the Special Economic Zone Act (Law No. 24 of 2014).

5.4.1 The Foreign Investments Act (Law No. 25 of 1979)

The Foreign Investment Act relates to foreign investments in the Republic of Maldives. It has 24 provisions, divided into 17 sections and 7 subsections. The date of commencement of the Act was on 1st May 1979. According to the Act, foreign investment is defined as “goods, money and services brought into the Republic of the

⁶⁹⁴ See generally Chapter 4.7.

Maldives by foreign governments, bodies or nationals”.⁶⁹⁵ Pursuant to this Act, tourism-related businesses must be registered at the Ministry of Tourism, and all other investments at the Ministry of Trade with the terms and conditions set by the government and respective parties.⁶⁹⁶

In terms of incentives from the host country, the government of the Maldives may exempt foreign investors from certain import duties. Moreover, the Maldivian government will facilitate investments made in the Republic for the full term of the agreement as long as they remain within the confines of this law.⁶⁹⁷ Conversely, the government reserves its right to use discretionary authority to cease foreign investment in the event of violation of national laws. Besides, the government may, without any notice, suspend any investment before the expiry of the agreement on grounds of national security with full compensation.⁶⁹⁸

The Act emphasizes strongly that locals should be employed as part of the investment venture. According to the Act, foreign employees can be utilized in the categories where locals are not available.⁶⁹⁹ All provisions of the Act are positive to the elements of the ICLRB.

5.4.2 The Companies Act (Law No 10 of 1996)

This Act governs the formation, registration and management of companies in the Republic of Maldives. It came into force on 1st July 1997. The Act contains 254 provisions, divided into 104 sections, 150 subsections and 2 schedules.

All companies should be formed and managed within the confines of this legislation.

The Act classifies two types of companies i.e. Public Limited and Private Limited

⁶⁹⁵ Foreign Investments Act (Law No. 25 of 1979), section 17(a).

⁶⁹⁶ *Ibid.*, sections 1-2.

⁶⁹⁷ *Ibid.*, section 14.

⁶⁹⁸ *Ibid.*, sections 6-8.

⁶⁹⁹ *Ibid.*, section 11.

Companies. According to the Act, every company is required to have a Memorandum of Association and Articles of Association.⁷⁰⁰ The details about the contents of both are expressly provided in the Act.

Having met all requirements as stipulated in the Act, the company will be registered and the Registrar of Companies will issue a Certificate of Incorporation. Like all business entities, companies are also required to have a name, which the registrar of companies will approve.⁷⁰¹ Matters in relation to company name, register of shareholders, alterations of memorandum and articles of association, interchanging the type of company and sale of shares to public, are dealt in detail in the Act.⁷⁰² For instance, it is stated that every company shall issue to its members a share certificate as evidence of the shareholder's title to the share specified in the certificate.⁷⁰³

According to the Act, every company shall be managed by a Board of Directors.⁷⁰⁴ Additionally, every company is mandated to hold an Annual general meeting each year and to carry out important business of the company.⁷⁰⁵ Moreover, the Act stipulates that every company shall keep clear and sufficient accounting records, and that these accounts must be audited by an appointed auditor, and an audit report be submitted to the registrar annually.⁷⁰⁶

Furthermore, company winding up procedure is set out in detail, which includes the voluntary winding up; the Registrar of the Companies, and/or by the relevant courts.⁷⁰⁷

Therefore all provisions of the Act are positive with the elements of the ICLRB.

⁷⁰⁰ Companies Act (Law No 10 of 1996), sections 3-4.

⁷⁰¹ *Ibid.*, section 10.

⁷⁰² *Ibid.*, sections 23-41.

⁷⁰³ *Ibid.*, section 34.

⁷⁰⁴ *Ibid.*, section 44.

⁷⁰⁵ *Ibid.*, section 54.

⁷⁰⁶ *Ibid.*, Section 71.

⁷⁰⁷ *Ibid.*, section 75.

5.4.3 The Maldives Tourism Act (Law No. 2 of 1999)

The Maldives Tourism Act regulates tourism-related activities in the Republic of Maldives. The Act came into force 16th May 1999. The total provisions of the Act are 111, divided into 51 sections, and 60 subsections. The Act provides for the determination of zones and islands earmarked for the country's tourist development. This includes: leasing of islands for tourist resort; leasing of land for development for tourist hotels and guesthouses; leasing of area for marina development and management of these facilities, and the operation of tourist vessels, dive centers, travel agencies, and government regulation of all such services.⁷⁰⁸

According to the Act, tourist development zones; islands slated for tourist hotel, resort and marina developments shall all be determined by the President.⁷⁰⁹ The Act requires that islands and tourist resorts land development projects shall be let out following a competitive bid process to the party that submits the best-qualified bid in accordance with pre-established procedures in a public tender held by the Ministry of Tourism.⁷¹⁰

The Act further empowers the Ministry of Tourism to create procedures for registration and licensing operations of these tourism-related activities.⁷¹¹ All provisions of the legislation are positive with elements of the ICLRB.

5.4.4 The Cooperative Societies Act (Law No. 3 of 2007)

The objective of the Cooperative Societies Act is to govern the formation, registration and administration of Cooperative Societies in the Republic of Maldives.⁷¹²

⁷⁰⁸ Maldives Tourism Act (Law No. 2 of 1999), sections 1-3.

⁷⁰⁹ *Ibid.*, section 4.

⁷¹⁰ *Ibid.*, section 5.

⁷¹¹ *Ibid.*, sections 41-42.

⁷¹² Cooperative Societies Act (Law No. 3 of 2007), section 1.

The Act came into force in 2007. The Act is comprised of 175 provisions, divided into 68 sections and 107 subsections.

The Cooperative Societies Registrar is responsible for registration and the overseeing of cooperative societies in the Maldives and is appointed under the Act.⁷¹³

Pursuant to the Act, the cooperative society operates as a separate legal entity,⁷¹⁴ which promotes social and economic activities.⁷¹⁵ Additionally, the Act particularizes matters in respect to the organization and management of any registered society in detail. These include; matters relevant to general meetings; first general meeting; annual general meetings; special general meetings; formation of the management board; eligibility for appointment to the board; duties and powers of the board; address of the registered society; documents open to inspection; property and funds of registered society, and rights and liabilities of members.⁷¹⁶

Furthermore, the Act provides comprehensive provisions under specific subheadings for audit, inspection, dissolution and powers of the liquidator.⁷¹⁷ The society wind-up is in three forms: dissolution by the society themselves; the Registrar of the Cooperative Societies and relevant courts.⁷¹⁸ All provisions of this legislation are positive with the elements of the ICLRB.

5.4.5 The Copyright & Related Rights Act (Law No. 23 of 2010)

The Copyright & Related Rights Act is a law promulgated for the protection of copyrights and other related rights.⁷¹⁹ It came into force on 21st October 2010. The Act has 140 provisions, divided into 5 chapters, 41 sections and 99 subsections. The Act

⁷¹³ *Ibid.*, section 5.

⁷¹⁴ *Ibid.*, section 19.

⁷¹⁵ *Ibid.*, section 7.

⁷¹⁶ *Ibid.*, sections 19-53 .

⁷¹⁷ *Ibid.*, sections 54-58.

⁷¹⁸ *Ibid.*, section 60.

⁷¹⁹ Copyright & Related Rights Act (Law No. 23 of 2010), section 1.

protects works that are produced in the Maldives and/or produced by signatories of international conventions of which the Maldives is a party.⁷²⁰

Works eligible for protection are provided in section 3 of the Act. These include literary, dramatic, artistic or musical works; sound recording; film or broadcast, and photographic works etc.⁷²¹ Section 4 of the Act, further includes those derivative works such as translations, adaptations, arrangements, and other transformations or modifications of works etc.⁷²²

The Act also lists intellectual property that is not protected. These include those works not listed in section 3 and 4 of the Act. Section 6 of the Act considers that any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work all do not fall under copyright protection. Furthermore, no protection shall extend to any official text of a legislative, administrative, or legal nature, as well as any official translation of such documents.⁷²³

There is no compulsory registration process to secure copyright protection. Registration purposes serve only as a means for a copyright holder to prove in court a work's origins and author.⁷²⁴

Additionally, author's rights, economic rights and moral rights relating to the author's copyright are listed out comprehensively in the Act. Notwithstanding the author's economic rights, private production for personal purposes, temporary reproduction, quotation, reproducing for teaching, reprographic reproduction by libraries and archives, reproduction, broadcasting and other communication to the

⁷²⁰ *Ibid.*, section 2.

⁷²¹ *Ibid.*, section 3.

⁷²² *Ibid.*, section 4.

⁷²³ *Ibid.*, section 6.

⁷²⁴ *Ibid.*, section 7.

public for inforamatory purposes, reproduction and adaptation of computer programs and display of works are permitted without any author authorization, or owner of copyright, where it is done as stipulated in this Act.⁷²⁵

The Act also sets out matters relating to copyright duration (eg. the economic and moral rights protected during the author's lifetime, and 50 years after death).⁷²⁶ The Act also provides protection to performers, producers of sound recording and broadcasting organization and acts requiring authorization of performers and, matters of enforcement of rights, which includes civil and judicial measures and civil remedies.⁷²⁷ All provisions of the legislation are positive with the elements of the ICLRB.

5.4.6 The Partnership Act (Law No. 13 of 2011)

The Partnership Act came into force on 29th December 2011. It contains 126 provisions divided into 9 chapters, 51 sections, and 75 subsections. This Act governs matters relating to formation, registration, administration and procedures in relation to partnerships in the Republic of Maldives.

The Act defines partnership as “an association of two or more persons for carrying on business” based on two forms: General Partnerships and Limited Liability Partnerships (LLP).⁷²⁸ The Act required that the maximum number of partners shall be 20; how the partnership's assets and money can be used; document handling and decision-making in a partnership and the requirements and responsibilities of a Managing Partner.⁷²⁹ The Act comprehensively sets out procedures by which registration of the partnership shall be completed. The Act requires that the partnership agreement be submitted to the Registrar of Companies with the requisite documents for

⁷²⁵ *Ibid.*, section 10.

⁷²⁶ *Ibid.*, section 20.

⁷²⁷ *Ibid.*, sections 30-32.

⁷²⁸ Partnership Act (Law No. 13 of 2011), section 2.

⁷²⁹ *Ibid.*, sections 6-10.

registration purposes.⁷³⁰ Chapter 5 of the Act deals with the relationship between the firm and partners. For example, how to act in situations where a firm, or a partner acts against the provisions of the partnership agreement.⁷³¹ In general any partnership is dissolved in accordance with the partnership agreement.⁷³² All provisions of the Act are positive with the element of the ICLRB.

5.4.7 The State Business Privatization, Corporatization, Monitoring and Evaluation Act (Law No. 3 of 2013)

The State Business Privatization, Corporatization, Monitoring and Evaluation Act came into force 17th January 2013. The Act contains 259 provisions divided into 65 sections and 194 subsections. The Act operates within the privatization and corporatization details of state businesses and assets.⁷³³ According to the Act “privatization” means the transfer of ownership, property or business from the government (which includes all forms of state business enterprises, shares and rights etc.) to the private sector. Corporatization refers to restructuring state assets, government agencies, or authorities into corporations.⁷³⁴

The substantial part of this law deals with the mechanics of privatization and corporatization. To do this the Act established the Privatization and Corporatization Board, charged with overseeing privatization and corporatization functions. The Board comprises seven members, including a Chairman and Vice Chairman. All board members are appointed by the President, and all panel members finalized on approval from Parliament. Members from specific fields with certain qualifications are eligible to serve as board members, as stipulated in the Act.

⁷³⁰ *Ibid.*, section 12.

⁷³¹ *Ibid.*, sections 25-32.

⁷³² *Ibid.*, section 39.

⁷³³ State Business Privatization, Corporatization, Monitoring and Evaluation Act (Law No. 3 of 2013), section 1.

⁷³⁴ *Ibid.*, section 65.

The Act also specifies office terms, vacancies, remuneration, appointment, and qualifications of the Chairman and his Vice Chairman; the jurisdiction and board mandate; the holding of Board meetings, and provisions for declaration of conflict of the interest in relation to a board meeting discussions.⁷³⁵ According to the Act, the President decides on entities requiring privatization and corporatization, based on divestiture sequence plans by the government.⁷³⁶ Moreover, specific chapters are accommodated in the Act that elaborate on the principles of privatization and/or corporatization, and those principles relating to financial matters etc.⁷³⁷ All provisions of the legislation are positive to the elements of the ICLRB.

5.4.8 The Small and Medium Enterprises Act (Law No. 6 of 2013)

The Small and Medium Enterprises Act aims to provide rules and a supervisory framework for the development of small and medium enterprises in the Republic of Maldives.⁷³⁸ This legislation came into force on 14th April 2013. The Act is based on 172 provisions, divided into 9 chapters with 56 sections and 116 subsections.

The Act categorizes enterprise types into three groups: micro-, small-, and medium-sized enterprises,⁷³⁹ which are required to register at the Registrar of the Companies.⁷⁴⁰ One of the most significant aspects of this Act was the creation of the Small and Medium Enterprises advisory council by the President. The Council mandate includes: overseeing and advising on the Small and Medium Enterprises' affairs to the Minister for Economic Development and Trade.⁷⁴¹ It is further charged with to

⁷³⁵ *Ibid.*, sections 3-16.

⁷³⁶ *Ibid.*, section 23.

⁷³⁷ *Ibid.*, sections 23-49.

⁷³⁸ Small and Medium Enterprises Act (Law No. 6 of 2013), section 1.

⁷³⁹ *Ibid.*, section 3.

⁷⁴⁰ *Ibid.*, section 43.

⁷⁴¹ *Ibid.*, sections 11-12.

creating business centres throughout the nation to assist in capacity building and guidance for the Small and Medium Enterprises.⁷⁴²

The Act obligated the government to formulate various financial schemes and incentives to support micro-, small- and medium-sized enterprises.⁷⁴³ Moreover, the Act provides special provisions for employment in these sectors, with some provision exemptions of the Employment Act (Law of 2/2008). All provisions of this Act are positive to the ICLRB.

5.4.9 The Business Registration Act (Law No. 18 of 2014)

The Business Registration Act came into force on 31st May 2014. The Act contains 99 provisions, divided into 31 sections and 68 subsections. The Business Registration Act requires that every business in the Maldives be registered as a business entity in order to lawfully engage in commerce.⁷⁴⁴

The Act calls for the appointment of a Registrar of Companies, who is responsible for the registering of business entities.⁷⁴⁵ Under the Act any business carried in the Maldives must be registered as a company, partnership, cooperative society or as a sole trader. Foreign businesses are allowed trading and commerce privileges in the Maldives upon having its business registered as a company, or firm, and after meeting the criteria specified in the Act.⁷⁴⁶

⁷⁴² *Ibid.*, sections 23-17 .

⁷⁴³ *Ibid.*, section 28.

⁷⁴⁴ The Business Registration Act (Law No. 18 of 2014),section 1.

⁷⁴⁵ *Ibid.*,section 3.

⁷⁴⁶ *Ibid.*,section 4.

The Act further prescribes businesses that require registration and those which are exempted from registration. Exempted businesses include, any employment carried on for remuneration and activities carried on by a person for his/her own livelihood.⁷⁴⁷

The Act also requires that no person shall carry on a business in Maldives except after registering as a business name. The Registrar of Business, without prior notice, has the power to inspect any business premises, and upon finding reasonable grounds to suspect the operation of an unregistered business, appropriate measures can be undertaken such as, closing down the business and imposing a fine.⁷⁴⁸ All provisions of the legislation are positive with the elements of the ICLRB.

5.4.10 The Sole Proprietorship Act (Law No. 19 of 2014)

The Sole Proprietorship Act sets out rules relating to sole proprietorships, which came into effect on 10th August 2014. The Act contains 105 provisions, divided into 36 sections, 69 subsections and one schedule. According to the Act a sole proprietorship means a registered business name owned by any individual.⁷⁴⁹ All forms of businesses other than companies, partnership and corporative societies are considered as sole proprietorship under the Act, which requires registering at the Registrar of Business.⁷⁵⁰

According to the Act, once the sole proprietorship is registered, liabilities of business are unlimited to its owner—the sole trader. Hence, capital, assets, profit, loss, debt and all business transactions pursued in the course of the business will be the sole responsibility of the business owner.⁷⁵¹

Under the Act, when an owner decides to dissolve and close down his business he holds an obligation to inform the Registrar of Business of his intention within 14 days

⁷⁴⁷ *Ibid.*, section 9.

⁷⁴⁸ *Ibid.*, section 19.

⁷⁴⁹ Sole Proprietorship Act (Law No: 19/2014), section 36(c)

⁷⁵⁰ *Ibid.*, section 6.

⁷⁵¹ *Ibid.*, section 15.

of his decision.⁷⁵² It is also prescribed that even though the sole proprietorship comes to an end, business owners will not be exempted and be required to settle all business transactions, debt and other responsibilities incurred in the duration of the venture.⁷⁵³ All provisions of the legislation are positive with the elements of the ICLRB.

5.4.11 The Special Economic Zone Act (Law No. 24 of 2014)

The Special Economic Zone Act contains 341 provisions and 10 chapters, divided over 82 sections, 259 subsections and 2 schedules. The Act's objective is to stimulate economic development and growth in the Maldives. The Act provides for creation and management of certain tax-free zones, or "Special Economic Zones".⁷⁵⁴

The Act classifies and defines investment zones, regulating how investments and incentives are meted out for businesses who locate in these areas. There are eight specified investment zone categories. These include: industrial estate; export processing zones; free trade zones; enterprise zones; free ports; single factory; export processing zones; offshore financial services centres, and high technology parks.⁷⁵⁵

The legislation established a five-member board of investment as *one-stop-shop* to manage applications, permits and licenses, and general oversight authority within these investment zone areas. The board is assisted by a technical committee nominated from government and private sectors as stipulated in the law itself.⁷⁵⁶

Pursuant to the Act, a developer is granted an investment permit based on a business proposal.⁷⁵⁷ Once receiving a zone permit the developer holds the responsibility for creating and managing commerce within his zone based on terms and conditions set by

⁷⁵² *Ibid.*, section 22.

⁷⁵³ *Ibid.*, section 26.

⁷⁵⁴ Special Economic Zone Act (Law No: 24/2014), section 1.

⁷⁵⁵ *Ibid.*, section 20.

⁷⁵⁶ *Ibid.*, sections 56-64.

⁷⁵⁷ *Ibid.*

the government.

The Act provides various incentives for zone development such as tax exemptions between two-to-20 years. Furthermore, special provisions are accommodated for development compensation and investment expropriation by the government.⁷⁵⁸All provisions of the Act are positive with the elements of the ICLRB.

5.4.12 Analysis

The majority of the contemporary commercial laws of the Maldives relate to corporate and investments. Out of the eleven laws, seven were enacted after the promulgation of the Maldives' Constitution 2008. The remaining four laws: The Foreign Investments Act (Law No. 25 of 1979); The Companies Act (Law No. 10 of 1996); The Maldives Tourism Act (Law No.2 of 1999), and the Cooperative Societies Act (Law No. 3 of 2007) were enacted prior to the promulgation of the Constitution. In this regard the details are given in the following Table: 5.4.

⁷⁵⁸ *Ibid.*, section 23.

Table 5.4: The Corporate and Investment laws

Title	Total Provisions	<i>Ribā</i>	<i>Gharār</i>	Gambling	General Islamic Commercial Tenets	Total provision Negative
Foreign Investments Act	24	✓	✓	✓	✓	0
Companies Act	254	✓	✓	✓	✓	0
Maldives Tourism Act	111	✓	✓	✓	✓	0
Cooperative Societies Act	175	✓	✓	✓	✓	0
Copyrights Act	140	✓	✓	✓	✓	0
Partnership Act	126					
State Business Privatization, Corporatization, Monitoring and Evaluation Act	259	✓	✓	✓	✓	0
Small and Medium Enterprises Act	172	✓	✓	✓	✓	0
Business Registration Act	99	✓	✓	✓	✓	0
Sole Proprietorship Act	105	✓	✓	✓	✓	0
Special Economic Zone Act	341	✓	✓	✓	✓	0

Source: The Researcher

In this segment, laws are divided into corporate and investment-related laws. Corporate laws include: the Companies Act; the Cooperative Societies Act; the Partnership Act; the Sole Proprietorship Act, and the Business Registration Act. The rest are investment-related laws. All of these laws are positive with the elements of the ICLRB; however, the following points are important to note to understand the degree of conformity of these laws with the tenets of Islam.

With regards to corporate laws the concept of limited liability, or juristic personality, which is detailed in the Company Act and Partnership Act contains little mention in

Islamic law. It is understood, however, that no clear tenets of Islam exist prohibiting the incorporation of companies.⁷⁵⁹

One of the most important features of the concept of limited liability or juristic personality is that in a juristic personality i.e. the capacity to sue or be sued—a business entity can own property in its own name. This company as a juristic personality holds a distinct and separate position from its shareholders. The liability of shareholders is limited to their unpaid shares only.⁷⁶⁰

The concept of the limited liability is not a new notion to Islamic law.⁷⁶¹ The characteristics of treasury and *waqf* resemble the concept of limited liability as the *waqf* institution is a separate vehicle that operates differently from the administrators, with separate financial rights and obligations. Likewise, the treasury as an institution has a history for management of monetary affairs of Muslim ummah.⁷⁶²

Imran Khan Nyazee considered this fact before adoption of the limited liability concept; it must be taken into account the general principles that relate to Islamic business organizations so as to be free from any non-Islamic activities such as *ribā* etc. He further proposed that the application of such a concept shall be limited for *dhimmah* to a non-human, i.e no religious obligation is compulsory for a juristic person such as *zakāt*, and the recognition of 'aql by a juristic person through a board of directors for the liability purpose of *ahliyat al-adā*'.⁷⁶³ Additionally, with the emergence of various

⁷⁵⁹ See generally, Resolution: 63/1/7. International Islamic Fiqh Academy website, op.cit.

⁷⁶⁰ See generally; *Salomon v. Salomon & Co.ltd* [1897], *Macaura v. Northern Assurance Co.ltd*[1925], *Lee(Catherine) v. Lee's Air Farming Ltd.*[1960].

⁷⁶¹ Nyazee, I. A. (2010). *Islamic Law of Business Organization: Corporations*. Kuala Lumpur: Adam Publishers & Distributors, p.316

⁷⁶² Uusmani, M. T., & Taqī 'Uṣmānī, M. (2002). op.cit., pp.226-227.

⁷⁶³ See generally Nyazee(2010), op.cit. pp. 316-317.

Islamic financial institutions in the form of companies, these debates on the validity and recognition of the limited liability concept in Islamic law are less frequent.⁷⁶⁴

The next issue is that in earlier writings of Islamic law no clear references existed pertaining to intellectual properties rights as a business commodity. This is because the concept of “*mal*” relates to tangible assets, which it does not cover as intangible assets such as intellectual property. However, the existence of intangible rights such as easement rights and pre-emption rights are well known to exist in Islamic law.⁷⁶⁵ The International Islamic Fiqh Academy of OIC declared that intellectual property rights “are recognized by *Sharī‘ah* and shall not be infringed”.⁷⁶⁶ Therefore, the Copyrights & Related Rights Act is positive to the elements of the ICLRB, and the key policy laid down for protection of intellectual rights, which are not contrary to the tenets of Islam.

In the Maldives the major investments are centered in the tourism-related businesses. However, the existence of some un-Islamic activities in tourism investment and some suggestions on ways to harmonise on these issues are given in Chapter 4. It is noted that no provision of law has neither prohibited, nor permitted gambling in the Maldives as indicated earlier.⁷⁶⁷ In moving this discussion forward Abdul Majeed Abdul Bari,⁷⁶⁸ while he serving as Minister for Islamic Affairs, the cabinet reviewed a proposal to grant a license to gambling business in the Maldives as no law existed that clearly prohibited it. The proposal was rejected on grounds of the concerned raised by him as the Islamic Minister of the nation that gambling represented a contrary to tenet of Islam.

⁷⁶⁴ See generally; Zahid, A. (2013). Corporate Personality from an Islamic Perspective. *Arab Law Quarterly*, 27(2), 125-150.

⁷⁶⁵ Bouheraoua, S., Mohamad, S., Kasri, N. S., & Abdullah, S. (2015). *Sharī‘ah* Issues in Intangible Assets. *Jurnal Syariah*, 23(2).

⁷⁶⁶ Resolution No.43(5/5), International Islamic Fiqh Academy website, op.cit.

⁷⁶⁷ See Issues related to policy discussion in Chapter 4.3.2

⁷⁶⁸ The Researcher conducted a personal interview with Hon. Abdul Majid Abdul Abari (Former Islamic Minister of the Maldives) at his office in the Maldives on 2nd December 2013.

Although, there is no specific law prohibiting gambling, the issue can be discussed in the following two ways:

Firstly, section 7 (a) of the Companies Act has clearly stated that the incorporation of companies is subjected to the laws of the land and Islamic scrutiny. This means that since gambling is contrary to the tenets of Islam, to grant a permit for a gambling business is beyond the authority of the Registrar of Companies.

Secondly, as discussed earlier, the application of *Shari'ah* is needed where no codified statutory provisions of law is available; which is an established precedent as observed in *Prosecutor General v. Sulhath Abdullah*⁷⁶⁹ in the High Court of the Maldives. In this regards the Court noted that;

“..in our mind, we have no doubt that there is no way that an act or conduct that is prohibited under Islamic *Shari'ah* can be deemed as permissible in the Maldives and all acts so prohibited under *Shari'ah* are punishable pursuant to Article 59(a) of the Constitution”⁷⁷⁰

In view of the above argument, there is no law in the Maldives that forbids the business of gambling, yet it is prohibited under the tenets of Islam. Despite this, it would be difficult to prosecute someone involved in a gambling business as gambling has not been recognized as an offence in the Maldives Penal Code (Law No. 9 of 2014).

5.5 The Banking and Finance Laws

The number of the existing banking and financial laws in Maldives are ten. These laws have been listed for review in the set order: The Act governing the entry of Maldives as a Member State into the International Monetary Fund; International Bank for Reconstruction and Development and International Development Association (Law

⁷⁶⁹ 2009/HC-A/130.

⁷⁷⁰ Article 59(a) reads: “no person shall be found guilty of any act or omission which did not constitute an offence under Islamic *Shari'ah* or law at the time committed. Nor shall a more severe penalty be imposed than the one applicable at the time the offence was committed. If the punishment for an offence has been reduced between the time of commission and the time of sentencing, the accused is entitled to the benefit of the lesser punishment”

No.16 of 1977); The Maldives Monetary Authority Act (Law No. 6 of 1981); The Act governing the Membership of Maldives in the International Finance Corporation (Law No. 15 of 1982); The Maldives Securities Act (Law No. 2 of 2006); Public Finance Act (Law No. 3 of 2006); The Audit Act (Law No. 4 of 2007); The Maldives Banking Act (Law No. 24 of 2010); The Fiscal Responsibility Act (Law No.7 of 2013); The Prevention of Money Laundering and Terrorism Financing Act (Law No. 10 of 2014), and The Act governing the Membership of Maldives in the Asian Infrastructure Investment Bank (Law No. 34 of 2015).

5.5.1 The Act governing the entry of Maldives as a Member State into the International Monetary Fund, International Bank for Reconstruction and Development and International Development Association (Law No.16 of 1977)

This legislation establishes a local legislative framework for recognition of the Maldives as a member of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), and the International Development Association (IDA). The Act came into force on 10th November 1977. This law contains one preamble and three schedules that are based on 42 provisions. The preamble sets general rules and procedure for recognition of three financial institutions: IMF, IBRD and IDA. The three schedules exhibit articles and membership resolutions of these institutions.

In the first schedule, special provisions relating to the IMF were detailed and defined. The second schedule offers IBRD provisions; similarly, the third schedule lists the provisions related to the IDA. The Act empowers the President to appoint

representatives to sign the agreements for the Maldives membership in the IMF, IBRD, and IDA and to submit the relevant documents on behalf of the Maldives.⁷⁷¹

Furthermore, the Act grants authority to the Ministry of Finance and Treasury to release subscriptions and donations to these institution as obliged under the Act.⁷⁷² Additionally, the Act sets local focal points and relevant stakeholders in relation to banks in the Maldives as the Maldives Monetary Authority.⁷⁷³ All provisions of the legislation are positive with the elements of the ICLRB.

5.5.2 The Maldives Monetary Authority Act (Law No. 6 of 1981)

The Maldives Monetary Act came into force on 20th May 1981. The Maldives Monetary Authority (MMA) serves as the central bank of the Maldives as stated earlier. It was established under this Act as an independent and accountable corporate body responsible for formulating monetary policies in the Maldives.⁷⁷⁴ The Act contains 138 provisions, based on 37 sections, and 101 subsections that divide into seven chapters.

As the central bank of the Maldives the Act implied the MMA to supervise and regulate the financial sector, formulate and implement monetary policy and to advise the government on matters relating to the economy.⁷⁷⁵ These include: the currency issue, liquidity management; lender of last resort; financial supervision; administration of foreign currency reserves, and determination of exchange rate etc.⁷⁷⁶ Furthermore, the Act primarily regulates the conventional financial sector, yet by various powers granted by the Act, the MMA regulates the Islamic financial sector as well.⁷⁷⁷

⁷⁷¹ The Act governing the entry of Maldives as a Member State into the International Monetary Fund, International Bank for Reconstruction and Development and International Development Association (Law No.16 of 1977), preamble 1.

⁷⁷² *Ibid.*, preamble 4.

⁷⁷³ *Ibid.*

⁷⁷⁴ Maldives Monetary Authority Act 1981 (Law No. 6 of 1981), sections 3-11.

⁷⁷⁵ *Ibid.*, section 4.

⁷⁷⁶ *Ibid.*, sections 23-24.

⁷⁷⁷ See discussion in Chapter 4.10.

The MMA is managed by a seven-member board of directors, which is headed by a Governor. Powers and duties of the Governor and his deputy are provided in the Act. Accordingly, MMA day-to-day operations are overseen by the Governor. In the event of the Governor's absence, his duties are then delegated to his deputy.

Furthermore, the Act deals in the details of operation and organization of the MMA. These include monthly financial statement preparations and yearly financial reports, which all require auditing by a certified external auditor. The reports are subsequently approved by the board, published, and submitted to the President and the Majlis.⁷⁷⁸ All provisions of the Act are positive to the elements of the ICLRB.

5.5.3 The Act governing the Membership of Maldives in the International Finance Corporation (Law No. 15 of 1982)

This legislation provides for the Maldives entry and membership into the International Finance Corporation (IFC). The Act came into force on 6th September 1982. It contains eight provisions. This Act gives discretion to the President to appoint representatives to sign agreements for the membership in the International Finance Corporation, and to submit official documents on behalf of the Maldivian government.⁷⁷⁹ These include governors and alternates who would represent the Maldivian government at the IFC.⁷⁸⁰

The Act stipulates that, in accordance with the membership resolution and regulations of the agreement, the subscription fee to the IFC by the Maldivian government shall be released by the Ministry of Finance and Treasury.⁷⁸¹ Additionally,

⁷⁷⁸ *Ibid.*, section 35.

⁷⁷⁹ The Act governing the Membership of Maldives in the International Finance Corporation (Law No. 15 of 1982), section 3

⁷⁸⁰ *Ibid.*, section 6.

⁷⁸¹ *Ibid.*, section 4.

the Act declared the Maldives Monetary Authority as the local focal point of the IFC.⁷⁸²

All provisions of the Act are positive to the elements of the ICLRB.

5.5.4 The Maldives Securities Act (Law No. 2 of 2006)

The Maldives Securities Act came into force on 19th January 2006. The Act contains 243 provisions, divided into 10 chapters, 64 sections and 179 subsections. The Act establishes the Capital Market Development Authority (CMDA) as the regulatory body for developing and regulating the capital market in the Maldives.⁷⁸³ The CMDA is managed and operated by a board of directors who are appointed by the President.⁷⁸⁴

The Act assigns the CMDA broad powers to regulate and oversee the securities markets, self-regulatory organizations, brokers, dealers and investment advisers etc. The Act also empowers the CMDA to investigate suspected cases such as: insider trading, market manipulation and other securities related matters etc.⁷⁸⁵

The provisions for licensing securities businesses are provided in Chapter 4 of the Act.⁷⁸⁶ Accordingly, CMDA is responsible for the licensing of market intermediaries, and in particular, the licensing of dealers, dealers' representatives and investment advisers. The Act contains special provisions for financial institutions to hold an underwriters' license, which is issued for certain specific purposes such as provisions of custodian services and financial journalists. All licenses are granted for two years, and options are provided for renewal in accordance to the Act.⁷⁸⁷ The details of the Act encompass in respective regulations and some of these are discussed in chapter 4.

⁷⁸² *Ibid.*, section 5.

⁷⁸³ Maldives Securities Act (Law No: 2/2006), section 3.

⁷⁸⁴ *Ibid.*, sections 6-7.

⁷⁸⁵ *Ibid.*, section 9.

⁷⁸⁶ *Ibid.*, sections 28-38.

⁷⁸⁷ *Ibid.*, section 33.

It is significant that the Act serves as a basic regulatory framework for the Islamic securities market. However, no provision of the Act recognises *ṣukūk* as a security instrument. According to the Act, “securities” are considered in three categories. Firstly, debentures, bill or bonds issued, or proposed by the government; Secondly, debentures, stocks, shares, bonds or notes issued, or proposed or any right warrant or option in respect thereof by a corporate body or institutions. Lastly, any other instruments as the CMDA may deem as securities under the Act.⁷⁸⁸ Currently, *ṣukūk* is regulating under the third category, which the CMDA categorized as a security instrument in the Maldives. All provisions of the Act are positive to the elements of the ICLRB.

5.5.5 The Public Finance Act (Law No. 3 of 2006)

This legislation outline principles and procedures to control and manage finances and properties of the State.⁷⁸⁹ The Act came into force on 26th January 2006. It contains 157 provisions based on seven chapters, with 51 sections and 106 subsections.

Chapter 1 deals with matters relating to public money and public properties.⁷⁹⁰ Specific provisions of this chapter detail processes for payments and expenditures of public money, lending public money for approved loans, borrowings and guarantees by State, authorization of sale and/of dealing with public property and grace payments.⁷⁹¹

The Act requires that all public money be kept in the Public Bank Account, opened and maintained by the Minister of Finance, and held within the MMA.⁷⁹² It further requires the Minister of Finance to establish and maintain, records of public accounts in accordance with procedures laid down by the Auditor-General, as specified in the

⁷⁸⁸ *Ibid.*, section 62.

⁷⁸⁹ Public Finance Act (Law No. 3 of 2006), section 1.

⁷⁹⁰ *Ibid.*, sections 2-10.

⁷⁹¹ *Ibid.*, sections 3-7.

⁷⁹² *Ibid.*, section 11.

Act.⁷⁹³ This Act also requires the Minister of Finance to prepare and submit an annual state budget to the Majlis at least one month before the beginning of the new fiscal year. Additionally, matters of financial reporting, such as annual reports, be prepared and submitted to the Auditor General; audited and annual reports are submitted to the President.⁷⁹⁴

Moreover, the Act empowers the Minister of Finance to take administrative measures for government agency accountability, such as the appointment of regulatory officers among those respective agencies.⁷⁹⁵ Furthermore, matters of improper conduct; the imposing of fines for improper conduct, and provisional powers to create and enforce regulations, are also dealt within this Act.⁷⁹⁶ All provisions of the Act are positive with the elements of the ICLRB.

5.5.6 The Audit Act (Law No. 4 of 2007)

The Audit Act sets out procedures and other essential requirements for the auditing of all government institutions, accounts and corporate bodies of the state.⁷⁹⁷ The Act came into force on 13th March 2007, and contains 73 provisions, based on 21 sections and 52 subsections.

Article 209 of the Maldives' Constitution 2008 implies to appoint an independent and impartial Auditor General in the Maldives. The Auditor General is appointed by the President on the recommendation of the Majlis.⁷⁹⁸ According to the Act, the key responsibilities of the Auditor General include the auditing and preparation of financial reports on all government agencies and trading bodies. The Auditor General is also

⁷⁹³ *Ibid.*, section 14.

⁷⁹⁴ *Ibid.*, sections 35- 41.

⁷⁹⁵ *Ibid.*, section 43.

⁷⁹⁶ *Ibid.*, section 47.

⁷⁹⁷ Audit Act (Law No. 4 of 2007), section 1.

⁷⁹⁸ *Ibid.*, section 2.

responsible to promote public accountability, good governance and sound financial management in the administration of government institutions.⁷⁹⁹

Pursuant to this Act, the Auditor General may at any time conduct performance audits of Ministries, departments, government offices, state-owned enterprises, and trusts under the care of the government.⁸⁰⁰ The Act also empowers the Auditor General to access of information and premises in connection with the performance of his functions from time to time.⁸⁰¹

The Act commands that government annual financial statements be prepared by the Minister of Finance and Treasury in accordance with the Public Finance Act (Law No. 3 of 2006), and submitted to the Auditor General for auditing within three months, 14 days, of the fiscal year end.⁸⁰²

The Act also deals with matters such as notifications of irregularities, audit fees, Auditor General's Annual Report; resignation and removal of the Auditor General etc. Similarly, the act provides procedures for the running of the Auditor General's Office. These include expenditure for office administration, recruitment, transfers and termination of staff.⁸⁰³ Furthermore, in matters of auditing the Auditor General's Office, disclosure of confidential information, offences and penalties are detailed, including powers to formulate regulations are also taken into account under this Act⁸⁰⁴. All provisions of the Act are positive with the elements of the ICLRB.

⁷⁹⁹ *Ibid.*, section 3.

⁸⁰⁰ *Ibid.*, section 4.

⁸⁰¹ *Ibid.*, section 6.

⁸⁰² *Ibid.*, section 8.

⁸⁰³ *Ibid.*, sections 9-11.

⁸⁰⁴ *Ibid.*, sections 17-18.

5.5.7 The Maldives Banking Act (Law No. 24 of 2010)

The Banking Act serves as a primary piece of legislation that governs the banking industry in the Maldives; it came into force on 12th December 2010. The Act contains 413 provisions, divided into 17 chapters, 115 sections and 298 subsections. The Act manages the licensing of banks in the Maldives; regulations stipulating banking operations; , bank supervision,, and the appointment of conservators, receivers in the event of bank liquidations.⁸⁰⁵The MMA is responsible for enforcement and implementation of this Act.⁸⁰⁶Pursuant to this Act, no person is allowed to engage in banking commerce in the Maldives unless he has obtained a license issued by the MMA.⁸⁰⁷

The Act covers special provisions for Islamic banking. These are specified in Chapter 3.⁸⁰⁸ In accordance to the Act “Islamic banks shall aim to provide banking services and engage in financing and investment operations on a non-interest basis in all forms and cases”.⁸⁰⁹ The Act also defined “ Islamic bank” as “ a legal entity licensed to engage in banking business according to the percepts and principles of Islam, in accordance that may be provided by the MMA”.⁸¹⁰

According to Section 11 of the Act, Islamic banks are permitted to engage in consumer, commercial, financial and investment operations, and participate in consumer, commercial, economic development, and construction projects, in connection with provision of Islamic banking services to customers, to the extent that participation in such activities functionally equaling to conventional baking services.⁸¹¹ It should be noted that the Act is drafted in the harmonisation model that accommodates Islamic and

⁸⁰⁵ Maldives Banking Act (Law No. 24 of 2010), section 1.

⁸⁰⁶ *Ibid.*, section 2.

⁸⁰⁷ *Ibid.*, section 3.

⁸⁰⁸ *Ibid.*, sections 9-11.

⁸⁰⁹ *Ibid.*,section 10.

⁸¹⁰ *Ibid.*, section 116(d).

⁸¹¹ *Ibid.* , see generally section 11.

conventional banking. This can be seen in various sections of the Act. For example, in section 26 (a) of the Act prohibits banking services from being involved in other business ventures, such as retail. However, the subsequent section 26(b) made an exception for Islamic banks. Likewise, in general holding and registering properties under bank names are prohibited; however, section 31(a) excludes Islamic banks from this stricture. Islamic banks are excluded because, unlike the conventional banking, Islamic banking represents a business venture, which is based on underline assets. Thus, without such an exemption Islamic banks could not operate.

Despite all these, there are some commercial banking provisions that are negative to the elements of the ICLRB. The provisions center on the charging of interest in banking services, which is contrary to the tenets of Islam. These provisions are explained as below.

Section 25 a (1) of the Act permits interest/non interest-based products as part of the conventional activities. It reads:

“... receiving money deposits or other repayable funds, bearing interest or not”⁸¹².

Likewise, sections 27 (a), 27 (b), 29a (2) and 29a (3) permit the charging interest in various banking facilities. These five provisions are stated as below.

Section 27 (a) reads as,

“..conditions concerning matching as maturity and interest in respect of assets and liabilities contingent or otherwise”⁸¹³

Section 27(b) reads as,

“..the MMA shall by regulation prescribe prudential requirements including procedures and methods of calculation to be followed in their application with regard to capital adequacy; asset-classification; suspension interest...”⁸¹⁴

⁸¹² *Ibid.*, section 25 a(1).

⁸¹³ *Ibid.*, section 27 (a).5.

⁸¹⁴ *Ibid.*, section 27(b).

Section 29(a).2

“.. regulation may establish a limit on the maximum credit outstanding to a related person, credit limit on all related persons in the aggregate, conditions and repayment terms, service charge and interest rate”⁸¹⁵

Section 29(a).3

“.. a bank may offer loans to its employees, but not to its directors, at concessionary rates of interest and service charge in accordance with an employee benefit scheme..”⁸¹⁶

Thus, all five provisions are negative with the elements of the ICLRB.

5.5.8 The Fiscal Responsibility Act (Law No. 7 of 2013)

The Fiscal Responsibility Act came into force on 6th May 2013. It has 134 provisions, divided into 40 sections and 94 subsections. The Act prescribes rules relating to fiscal policy of the state and sound administration of financial resources.

⁸¹⁷The Act defines fiscal policy as the budgetary policy of the state, which includes: expenditure controls, collecting revenues (taxation), and managing government debts etc.⁸¹⁸

The Act outlines basic fiscal policies of the government. Policies itemized in the Act cover areas such as: transparency, the principle of stability and principles of equity etc.⁸¹⁹

The Act imposes on government regular fiscal reporting obligations. Every fiscal year, a report that lays out medium-term government fiscal strategies must be published and submitted to Parliament. The report contents must also contain provisions for amending its results, which are particularized in Chapter 4 of this Act.⁸²⁰ Similarly, this Act calls for an annual Budget Position Report, which details upcoming budgetary

⁸¹⁵ *Ibid.*, section 29(a).2.

⁸¹⁶ *Ibid.*, section 29(a).3.

⁸¹⁷ Fiscal Responsibility Act (Law No. 7 of 2013), section 1.

⁸¹⁸ *Ibid.*, section 4.

⁸¹⁹ *Ibid.*, section 9.

⁸²⁰ *Ibid.*, sections 10-13.

matters expected in the following year, also be published and submitted to Parliament. Those contents expected to be included in this report are specified in chapter 5 of this Act.⁸²¹

Chapter 6 of the Act deals with government debt strategy and matters relevant to the Debt Strategy Report.⁸²² The Act also specifies terms of borrowing monies from the central bank for short-term government expenditures.⁸²³ All provisions of the Act are positive with the elements of the ICLRB.

5.5.9 The Prevention of Money Laundering and Terrorism Financing Act (Law No.10 of 2014)

The Prevention of Money Laundering and Terrorism Financing Act came into force on 13th October 2014. It contains 292 provisions, divided into 77 sections and 215 subsections. The primary objective of this Act is to provide for the prohibition and prevention of money laundering and financing of terrorism in the Republic of Maldives.⁸²⁴

Part 1 of the Act deals with the preliminary matters like introduction, objectives and relevant definitions of the Act.⁸²⁵ Part 2 contemplates the prevention of money laundering and the financing of terrorism, both of which forms the most important content of the Act. These include, preventative measures to combat money laundering and terrorist financing; monitoring of non-profit organizations; money or value transfer service providers; designated non-financial businesses and professions, and financial transaction disclosure information.⁸²⁶

⁸²¹ *Ibid.*, sections 14-18.

⁸²² *Ibid.*, sections 19-22.

⁸²³ *Ibid.*, section 32(a).

⁸²⁴ Prevention of Money Laundering and Terrorism Financing Act (Law No.10 of 2014), section 1.

⁸²⁵ *Ibid.*, sections 3-15.

⁸²⁶ *Ibid.*, sections 16-22.

In part 3 of the Act, stipulates the establishment of a Financial Intelligence Unit at the MMA. Its primary aims are the detection of money laundering and to prevent the financing of terrorism. Obligations to report suspicious transactions; exemption from liability for good faith reporting of suspicious transactions; responsibilities of supervisory authorities; exemption from banking secrecy, and professional privilege, are dealt with in part 3 of the Act.⁸²⁷

Part 4 provides for investigative techniques that should be used when exercising a court of law order.⁸²⁸ The penalties and provisional measures such as, freezing, seizing and confiscation of funds and properties, are stipulated in part 5 of the Act.⁸²⁹

Moreover, in part 6 of this Act, matters in relation to establishing and maintaining international cooperation, such as: extradition and mutual legal assistance and security measures concerning financing of terrorism are enumerated.⁸³⁰ Furthermore, administrative sanctions for non-compliance and powers to create regulations are also prescribed in part 7 of the Act.⁸³¹ All provisions of the Act are positive with the elements of the ICLRB.

⁸²⁷ *Ibid.*, sections 16.

⁸²⁸ *Ibid.*, section 23.

⁸²⁹ *Ibid.*, section 24.

⁸³⁰ *Ibid.*, sections 25-26.

⁸³¹ *Ibid.*, section 27.

5.5.10 The Act governing the Membership of Maldives in the Asian Infrastructure Investment Bank (Law No. 34 of 2015)

This Act allows the Maldives its entry and membership into the Asian Infrastructure Investment Bank.⁸³² It contains 23 provisions, divided into 10 sections and 23 subsections. The Act is the most recent and last commercial enactment made by the Majlis on 15th November 2015.

On 29th June 2015 the government adopted the Articles of the Agreement of Asian Infrastructure Investment Bank (“Articles of the Agreement”), which required a local legislative framework for recognition of the bank. Thus, the Act outlines the procedure for entry of the bank, and responsibilities of the relevant local authorities, including the appointments of governors and representatives to the Bank.⁸³³

By virtue of the Act, the President appoints governors and representatives to the bank to negotiate and sign relevant deeds on behalf of the government of the Maldives.⁸³⁴ The Act has vested all powers for establishment of the bank upon the Minister of Finance and Treasury, and at his discretion to exempt tax levies.⁸³⁵ The Maldives Monetary Authority, acting under the direction of the Minister of Finance and Treasury, serves as the local focal point, according to the Act.⁸³⁶ All provisions of the Act are positive with the elements of the ICLRB.

5.5.11 Analysis

There are ten banking and financial laws in the Maldives. The review result of these laws is exhibited in Table 5.5.

⁸³² Act governing the Membership of Maldives in the Asian Infrastructure Investment Bank (Law No. 34 of 2015), section 1.

⁸³³ *Ibid.*, section 2.

⁸³⁴ *Ibid.*, section 3.

⁸³⁵ *Ibid.*, section 4.

⁸³⁶ *Ibid.*, section 5.

Table 5.5: Banking and Financial laws

Title	Total Provisions	<i>Ribā</i>	<i>Gharār</i>	Gambling	General Islamic Commercial Tenets	Total provision Negative
Act governing the entry of Maldives as a Member State into the International Monetary Fund, International Bank for Reconstruction and Development and International Development Association	42	✓	✓	✓	✓	0
Maldives Monetary Authority Act	138	✓	✓	✓	✓	0
Act governing the Membership of Maldives in the International Finance Corporation	8	✓	✓	✓	✓	0
Maldives Securities Act	243	✓	✓	✓	✓	0
Public Finance Act	157	✓	✓	✓	✓	0
Audit Act	73	✓	✓	✓	✓	0
Maldives Banking Act	413	5	✓	✓	✓	5
Fiscal Responsibility Act	134	✓	✓	✓	✓	0
Prevention of Money Laundering and Terrorism Financing Act	292	✓	✓	✓	✓	0
Act governing the Membership of Maldives in the Asian Infrastructure Investment Bank	23	✓	✓	✓	✓	0

Source: The Researcher

In this segment 10 laws are reviewed. These laws consist of two areas: banking related laws and financial laws.

Six laws relate to banking; three serve as the basic legislative framework for affiliation with international entities such as the IMF, IFC, and the Asian Infrastructure Investment Bank. Furthermore, the Maldives Monetary Authority Act stands as the central bank law. All these laws act as effective components to regulate the banking sector, whether it is Islamic or conventional. However, the Banking Act is subject to analyses as five provisions of it are negative to the elements of the ICLRB. These five are singled out because they allow for interest charges on transactions.

Nonetheless, no law specifies the interest rates banks may charge in the Maldives, which is left to banks to decide, with the guidance of the MMA. According to Sheeza Ahmed⁸³⁷, banks are free to charge interest up to the maximum ceiling of 20%. Current interest rate charges that banks levy in the Maldives hover between 7% – 14%.

Moreover, the Pension Act (Law No.8 of 2009) is not listed as a commercial law at the website of the Attorney General's Office, instead it is listed in the category of social legislation, and therefore, it is excluded. Nevertheless, the mandate of Maldives Pension Administration office, along with the regulatory framework is present in the chapter as the Pension legislation is generally understood as a financial law.

Three laws currently govern public finance management: the Public Finance Act; Audit Act, and the Fiscal Responsibility Act, which are in place for management and accountability of state funds and wealth. Moreover, the Securities Act serves as an important piece of legislation for entering the equities market, whether Islamic or conventional. The validity of a stock exchange as an permissible instrument is debatable in Islamic law such that stock trade transactions are based on market speculation, which is *gharār*. Nonetheless, it is allowed as it is not grounded solely in speculation, but also on skills and knowledge of the market. Furthermore, with the

⁸³⁷ The Researcher conducted a personal interview with Sheeza Ahmed (Director Legal Affairs of the MMA) at her office in the Maldives on 11th December 2013.

emergence of the Islamic *sukūk* market in the modern commercial world, the debate on validity of using a stock exchange to pursue equity options becomes unnecessary.⁸³⁸ The issue now is findings ways to boost and promote the sukuk market. In this respect, the existing Securities Act is harmonised with the tenets of Islam, however, there exists a need to reform this Act to enhance the role of the *sukūk* market by defining *sukūk* through statutory recognition by the Capital Market *Shari'ah* Advisory Council (CMSA).⁸³⁹

Apart from the above, it should be noted the absence of the Insurance Act and Hire-Purchase Act. These two areas are regulated by regulations made by the MMA as discussed in the chapter 4.⁸⁴⁰ To regulate these two areas, it is ideal to draft legislative framework based on harmonisation model until the introduction of a fully Islamised financial system in the country. A single piece of legislation could be drawn up both for conventional and Islamic financing such as Insurance and Takaful, and Leasing and *Ijra*, which is already in practice as per the Banking Act(Law No.24/ 2010).

To conclude this segment, the existing un-Islamic financial practices in the Maldives exist not merely because of deficient laws, but due its best commercial practices are often being abiding by the International soft laws.

⁸³⁸ See generally, Resolution No.60/11/6. Interantional Islamic Fiqh Acadmey website.op.cit.

⁸³⁹ See generally, Muneeza, A. (2014). Maldives: The Struggle for New Hope,op.cit. pp.337-354.

⁸⁴⁰ See discussion in Chapter 4.1.4.

5.6 Declaration of Valid Laws

The ICLRB is based on the assessment of Basic Islamic Commercial Tenets and General Islamic Commercial Tenets in commercial laws. The overview of the results are exhibited in Table 5.6 below.

Table 5.6: The Result of the review: the confirmation of repugnancy clause

Category	Total Number of laws	Total Number of Provisions	Negative	Positive	Negative %	Positive %
Import and Export	6	262	8	254	3.05%	96.95%
Taxation	6	888	8	880	0.90%	99.10%
Commercial Obligations and Contracts	5	275	-	275	0.00%	100.00%
Corporate and Investment laws	11	1,806	-	1,806	0.00%	100.00%
Banking and Financial laws	10	1,523	5	1,518	0.33%	99.67%
Total	38	4,754	21	4,733	0.44%	99.56%

Source: The Researcher

As provided in Table: 5.6 the total number of commercial laws in the Maldives are 38. The first category includes six laws related to the Import and Export Acts; six target taxation, and five regulate Commercial Obligations and Contracts. The last two categories comprise the Corporate and Investment laws, which total 11; followed by 10 Banking and Financial laws. The total combined number provisions within these laws are 4,754. Of these 4,754 provisions, 21 provisions (0.44%) are negative to the elements of the ICLRB. The remaining 4,733 provisions (99.56%) of the laws are positive with the ICLRB.

As explained in Table 5.6, all provisions related to Commercial Obligations and Contracts are 100% positive to the elements of the ICLRB. Likewise, the provisions of laws concerning Corporate and financial laws are also 100% positive to the ICLRB.

However the remaining categories of laws are not fully compliant; the Import and Export laws are only 96.95% compliant; 99.10% of the taxation law provisions, and 99.67 % provisions of the Banking and Financial laws are positive to the ICLRB.

5.6.1 Testing Basic Islamic Commercial Tenets

In order to test provisions on the basic Islamic Commercial Tenets, such as *ribā*, *gharār* and gambling, the following are taken into account.

Firstly, the provisions that contained permissibility of *ribā* are in the tax and banking laws, respectively. Within the tax laws, 0.90% of provisions of the laws are negative to the ICLRB because of its permissibility of interest. These result from the two provisions in the Tax Administration Act, which are the sections 64 (b), 65 (b), and four provisions in the Business Profit Tax Act under sections 23 (h), 24 (c) 25(c) and 40, respectively.

In relation to the banking laws, a total of 0.33% of the provisions are negative to the elements of the ICLRB, also because of the permissibility of interest. These are present in five provisions of the Maldives Banking Act, which are under the sections 25a(1), 27(a), 27(b), 29 a(2) and 29 a(3). Additionally, two provisions under the sections 6 (a) and 8 (c) of the Taxation on Petroleum Companies Act are also negative to ICLRB.

Secondly, no provision of the law is negative to the element of *gharār*. Nonetheless, it should be noted with regards to *gharār*, there are some areas in conventional commercial practice that could prove debatable, such as those items containing *gharār*, as the practice of compensations. The debate on this issue is excluded for the purpose of the Review in Chapter 5, as the existence of such conventional commercial practice is

because of bilateral contracts they enter into, rather than the law being un-islamic as discussed earlier.⁸⁴¹

Thirdly, the results show that no provisions of the law are negative to gambling as discussed earlier.⁸⁴²

5.6.2 Testing General Islamic Commercial Tenets

The provisions of the laws are tested on General Islamic Commercial Tenets, i.e permissibility of un-Islamic activities etc. It shows that 3.05 % of the provisions of the Import Export Act permit importing of goods are forbidden by the tenets of Islam. These total eight provisions. Six provisions of the Act permit the import of liquors and alcoholic beverages in the chapter 18 under the items (b), 19 (c), 20 (c), 21(d) and, 22 (b), (d). Furthermore, two more provisions in the chapter: 16(c) and 21(c) permit the import of pork-related items and additionally impose a 35% C.I.F price as import duties.

By permitting the import of liquors, and pork-related foods – even indirectly – involves the trading of goods forbidden by the tenets of Islam; all are negative with the ICLRB.

5.6.3 Accommodating Tenets of Islam

The oldest law included in this Review is the Revenue Stamp Act, which was enacted on 12th April 1970. The most recent latest legislation in this regard is the Act governing the Membership of Maldives in the Asian Infrastructure Investment Bank, which was enacted on 15th November 2015.

The Review results show that 63.16% of the laws were enacted before the promulgation of the Maldives' Constitution 2008, and the remaining 36.84% were

⁸⁴¹ See generally Chapter 4.3.2;Chapter 5.3.6.

⁸⁴² See generally Chapter 5.4.12.

enacted after the promulgation. In general, there existed no differences between the laws enacted prior to commencement of the Maldives' Constitution 2008 and those after, in terms of upholding the tenets of Islam. In this instance, 12 provisions containing permissibility of interest were in the taxations laws and Banking Act, which were enacted in 2010 and 2011, respectively after commencement of the Constitution in 2008. The 8 provisions permitting un-Islamic goods by virtue of Import Export Act were enacted in 1978, thirty years before the Maldives' Constitution 2008.

To conclude this segment, a total of 21 provisions of laws related to commercial law were identified as contrary to tenets of Islam. Therefore, these provisions of the commercial laws of the Maldives are declared to be void by virtue of the Islamic Commercial Law Reform Benchmark. The rest of the body of the laws are declared valid based on the "the original rule for all things is permissibility".

Thus, these 21 provisions requires reform in order to fully accommodate the tenets of Islam in the commercial laws of the Maldives.

5.7 Conclusion

In general, the findings of this review highlights that 0.44% of the commercial law provisions are negative to the elements of the ICLRB. All these identified provisions require reform because the ICLRB is based on the Islamisation model. However, none of these provisions actually must be reformed, if they were to be considered under the harmonisation model; as none of them restrict the operation of the Islamic commercial system in the Maldives. Yet, these provisions are required to be reformed in order to accommodate the tenets of Islam based on the ICLRB, and to be fully compliant with the Article 10 of the Maldives' Constitution 2008.

CHAPTER 6: GENERAL CONCLUSION AND RECOMMENDATIONS

6.0 Introduction

The compliance of the tenets of Islam in Maldivian laws is one of the basic pillars of the Maldives' Constitution 2008, which is provided for in Article 10 of the Maldives' Constitution 2008. This requirement shall be applicable to laws enacted prior to the commencement of the Constitution 2008, as well all future laws unless the provision is specifically amended by the legislature. Albeit, it represents a matter of great concern that the constitutional requirement is neither fully complied with, nor understood.

With the inception of the first Islamic financial institution: Amana Takaful in 2006 and the first Islamic bank in 2011, there was a great move for the Islamisation of commercial laws in the Maldives. Conversely, the present conventional commercial system in the country, as it is to be in line with modern commercial laws, bear the testimony of the existence of certain un-Islamic provisions in the commercial laws of the Maldives, which thus can be interpreted as unconstitutional.

A search through literature included in this study has revealed that the subject covers the development of Islamic law in the Muslim world, codification of *Sharī'ah*, Islamisation of law, and harmonisation of laws in general. It has also been found that there are very limited Islamic references in the Maldives' commercial laws other than in the area of Islamic Banking law. Similarly, there is no literature focused specifically on commercial law reform of the Maldives to accommodate tenets of Islam with reference to Article 10 of the Maldives' Constitution 2008, which needs to be addressed. Thus, this thesis attempts to identify these un-Islamic provisions in the existing Commercial laws of the Maldives with the aim of stimulating reform. Three issues need to be settled: (a) to evaluate the role of tenets of Islam in Commercial law reform; (b) to assess the consistency of the existing Commercial laws with the tenets of

Islam, and (c) to analyse commercial law areas that require reforms in order to accommodate tenets of Islam. To accomplish these objectives, a qualitative method of research was adopted. The findings explored from this present study are shared below and some recommendations offered so that policymakers can consider bringing these provisions in line with the tenets of Islam.

6.1 Establishment of the Benchmark and Appropriate Model for the Reformation

Despite a Constitutional obligation to conform to the tenets of Islam in laws, the mechanisms for enforcement of such provisions are new in the Maldives. Therefore, by analyzing Article 10 of the Maldives' Constitution 2008, it was found that the provision itself embodies a benchmark for law reform by its clear directive that no law shall violate the tenets of Islam. Thus, the benchmark is "the tenets of Islam", which is defined in the Constitution as those fixed rules provided in the Qur'ān and Sunnah.

To understand the purpose of incorporating and defining such a term, in the Constitution the minutes of the Parliamentary proceedings on the definition of the tenets of Islam were studied. It shows that the intention of parliamentarians was to conform each law passed by the parliament to be adherent to the fixed rules as provided in Qur'ān and Sunnah only. In other words, it does not extend to include flexible rules. This is the view of most prominent reformists such as 'Abduh, Rashid Riḍā and Sanhūrī as detailed in Chapters 2 and 3, respectively. This facilitates an understanding of the law reform benchmarks in practice, as laws are required to test whether they violate any fixed rule: the tenets of Islam.

To identify the tenets of Islam with respect to commerce, an extensive qualitative research was conducted by reading the classical fiqh books, modern writings on Islamic commercial laws and the *Shari'ah* Screening Standards i.e Dow Jones. It was found from the content analysis of this literature that the basic tenets of Islam are the

prohibition of *ribā* (usury), *gharār* (uncertainty) and *maysir* (gambling). In addition to these, the laws must comply with general Islamic commercial tenets such as the prohibition of any form of business involving liquor, pork and pornography etc. All these tenets were referred collectively as the Islamic Commercial law Reform Benchmark (ICLRB).

It was found to be very challenging to test these laws, which are secular by nature based on ICLRB, and because of the different opinions on Islamic law. Although there are Islamic commercial tenets which contain fixed rules, there are differences of opinions relating to application of these rules in modern commercial practice. Some conventional commercial concepts embodied in a law of the Maldives are contrary to tenets of Islam such as limited liability concept. These specific debates, however, are not included in the scope of this thesis. Furthermore, the wide ranging views in these matters, could impede arriving at any definitive conclusions when determining whether any particular provision of laws are valid. Yet, the seminal issues, highlighted in Chapter 4, demonstrate how the tenets of Islam are reacting in commercial practice. This is because, ICLRB rationality is testing whether the law, or policies of the government is positive or negative to the tenets of Islam; yet this fact alone does not illustrate the whole dimension of the existing role of the tenets of Islam in commercial practice in general.

Therefore, as it sets out the formula for declaring valid laws in Chapter 2, every single provision relevant in the commercial law of the Maldives was reviewed in order to determine its validity based on the provided benchmark. The provisions found contrary to the tenets of Islam should be declared as null and void and be amended, or reformed. The remaining provisions should be declared valid on the grounds that “the original rule for all things is permissibility”. Based on this formula the review results were provided in Chapter 5, and the result overview is presented later in this chapter.

6. 1 .1 Adoption of Models

To determine an appropriate model for reformation, it was first necessary to study the historical background of Article 10 of the Maldives' Constitution 2008. To do so, the Researcher was engaged in an informal conversation with the drafter of the provision as discussed in Chapter 3. Further analysis showed that Islamic constitutional clauses of different prominent Islamic countries, such as Malaysia, Pakistan, and a few others in the Middle East, have initiated reforms in commercial law to be in compliance with *Shari'ah*. Based on this, the following conclusions were arrived at in relation to adaptation of the methods for law reformation.

Firstly, the major part of the Muslim world retain three constitutional clauses namely; religion clause, the source clause and repugnancy clause, all of which are constitutional symbols of *Shari'ah* in lawmaking. There are no clear manifestations of the operation of these clauses. Nevertheless, the religion clause represents laws in the sphere of personal matters and the repugnancy clause tends to be robust in methods and practice. The source clause is more or less a voluntary clause in terms of applicability and compliance in *Shari'ah*.

Secondly, it is found that Article 10 of the Maldives' Constitution 2008 merged with three Islamic clauses. With Article 10 providing the minimum criteria in the repugnancy clause and the maximum criteria in the other two clauses (the religion and the source); there is no justification for entertaining un-Islamic laws in the Maldives under the Maldives' Constitution 2008.

Thirdly, models of reform are determined by each country based on its legal interpretation of Islamic clauses. In general, the Muslim world has adopted four models of reformation: *al-siyāsah*, codification, islamisation of laws and harmonisation of laws. It is understood, generally, that all models are *al-siyāsah*, which are transformed into

practical forms in the methods of codification, islamisation of laws, and harmonisation of laws, as detailed in Chapter 3. It is apparent that the primary purpose of these models serves to confirm the respective fixed rules in the proposed legislation.

Fourthly, in the codification process, the first step is to identify fixed rules in respect of commerce. The second step is in the absence of clear Islamic tenets, it remains an obligation to consider *ijtihād* to draft the proposed legislation. Furthermore, the whole process is justified by *maṣlaḥah*, which is undefined within the framework of *al-Sharī'ah* objectives. This represents the main methodology adopted in Egyptian reforms theorised by Riḍā, innovated and applied by Sanhūrī, which was covered in Chapter 3.

Fifthly, Islamisation of laws was based on the broad guideline of conformation of the fixed rules as stated earlier. Therefore, the main methodology as followed by the FSC of Pakistan, and ESCC of Egypt, respectively, were all based on the discovery of these fixed rules before being applied. In this respect, the Pakistani approach was more comprehensive when compared to the Egypt, yet, the goal and purpose of both were the same. The Pakistani approach is closer to the traditional form of *ijtihād* as compared to the approach of the ESCC as it followed the chronological order of examining the matter as suggested in the hadith of Mua'dh bin al-Jabal (RA) as elaborated in Chapter 3.

Sixthly, the model of the harmonisation studied closely with the Malaysian experience is a dual-form process that facilitates the incorporation of the Islamic tenets in the existing laws while not forbidding conventional laws. Thus, such a model is suitable for a country having a multi-religious population such as Malaysia where *Sharī'ah* is applied in the personal sphere for Muslims. Regardless of this fact, the model has been applied widely in commercial law reforms in the Maldives, whose

citizenry is all Muslim. Furthermore, it is important to note that, even in the area of the criminal law, the same model was applied in the Maldives.

Seventhly, two general approaches were followed by the modern Islamic commercial law reform as indicated earlier in Chapter 2. In the first approach, amendments were introduced into the respective legislation in order to accommodate Islamic tenets. This can be formulated in the models of Islamisation, or harmonisation, of law. In the second approach, new Islamic legislation was introduced by the way of codification. However, it is evident that no Muslim countries relied on any single model of reform, though the particular model of law reform i.e. Islamisation model of Sudan, and Pakistan are popular in these countries and they have frequently adopted the Islamic codification of laws (e.g. Modaraba Companies Ordinance 1980, Pakistan). Pertinent to mention here is that Sudan has also adopted harmonisation of laws.

Therefore, in choosing a suitable model for law reforms in the Maldives should depend on the practical operation of law, rather than a reliance on theories. This could be implemented by introducing new laws on “codification” and for existing laws by both “harmonisation” and “islamisation” of laws through Parliament and the relevant courts. Thus, all these are based on the theory of *al-Siyāsah*, which covers the three models, and which can be translated into the modern commercial law term “*the Shari’ah - Compliant law*”, which make laws conform with the Islamic commercial law reform benchmark.

Apart from the unification of these models, legal devices such as *Talfiq* were utilised. It therefore can be assumed these theoretical devices made several noteworthy contributions in the reform of commercial laws in accordance with the tenets of Islam. These devices created options that took rigid Islamic tenets and transformed them into practical feasible, and pliable regulations for the commercial world. These devices are

now used for drafting primary bills, challenging laws, and structuring commercial contracts. Yet, in terms of practicality, the latter is more feasible and popular in commercial systems, which by nature act as subordinate commercial pieces of legislation.

6.2 Existing Role of the Tenets of Islam in the reform of Commercial laws

In order to evaluate the existing role of the tenets of Islam in commercial law reform, apart from the adoption of ICLRB, Chapter 4 contained the general observation of efforts made by relevant authorities —government departments, and courts to uphold the tenets of Islam within commercial systems in the Maldives. In general, a commercial policy relates to the regulations, decisions, strategies, and instruments that influence the trade sector of an economy. However, the main objective of this research focused on commercial regulations, which were created by public bodies such as government ministries, Central Bank etc. Specifically, Chapter 4 reviews the subsidiary legislation, which were formulated under the primary commercial legislation by the regulatory bodies: the Ministry of Economic Development; Ministry of Tourism, and the Maldives Monetary Authority etc.

The result of these evaluations can be summarised as below.

- (a) The general directions and benchmark set out in Article 10 of the Maldives' Constitution 2008 for reforming the commercial laws and their conforming to the tenets of Islam are not fully realized. It can be assumed that most of the policies are harmonised with the ICLRB as none of the regulations restrict the operation of the Islamic commercial regime. However, the Liquor Regulation 2011 is contrary to ICLRB. In addition, there are few provisions in other regulations that are contrary to ICLRB, e.g. section 39 of the Regulation on Tax Administration 2011 and section 40 of the Pension Regulation 2010.

(b) The policies, regulations and directives that do not comply with the tenets of Islam are in the areas of import-exports, tourism, and the financial sector. The first two issues are related to violations of general commercial tenets by permitting trading of un-Islamic goods such as liquor and pork-related items in the tourism sector only. The matter was referred to the SC for its opinion on the permissibility for granting licenses by the government for bars and other un-Islamic activities for non-Muslim tourists in the hospitality sector of the country. The Supreme Court based its decision on the doctrine of *darūrah* as the tourism industry served as the major income generator of the country, and to sanction the commerce of alcohol and pork-related items represented an inevitable part of this industry in modern times and thus, was deemed justifiable as stated in Chapter 4.

(c) With regards to banking and the financial sectors, it was found that lawmakers never intended to incorporate Article 10 in the Maldives' Constitution 2008 to establish a fully Islamised commercial system. Thus, there were no policies to Islamise; instead the trend commenced to guide all policies towards the harmonisation of the commercial law model to retain dual systems: conventional and Islamic. In general, the MMA, as the central bank, has taken several steps to develop the Islamic Banking system though it does not have any vision to islamise the whole financial system of the Maldives. The reason is because the Islamic financing system has not developed fully, as well as the conventional partners and the entire global economy being interlinked. In particular the Maldives relies heavily on foreign currencies earned through tourism sector revenues. Article 10 of the Maldives' Constitution 2008 represents a more recent provision that needs to be interpreted and settled on whether this article should

be used to Islamise the system of the country as a whole, or whether its role is merely symbolic. A clear judgment from the Supreme Court, therefore, is needed on this matter, similar to the judgment concluded on the issue of *ribā* by the Supreme Court of Pakistan in 2000. Beside this, there is no difference between policies made earlier and the position of the Maldives' Constitution 2008 in terms of upholding the tenets of Islam. It was found that drafters of bills and policies that related to the commercial law in the Maldives normally take into account the best commercial practices rather than the ICLRB.

- (d) The tenets of Islam with respect to commerce are sometimes ignored by the courts; commercial contracts which are contrary to ICLRB are also sometimes enforced by the courts. The Supreme Court decisions in the past seven years since its establishment in 2008 shows that it has concluded 130 cases relating to commerce. Of these, 62% involved commercial matters: breach of contract, corporate disputes etc. In general, 85% of these commercial cases were decided by sharing the reference of the Maldivian laws only, to reach a verdict. The remaining 15%, apart from the Maldivian laws, the tenets of Islam were considered as an issue of contention. The tenets observed include Islamic contract law principles, such “*al- wafa’bil al- ‘aqd*”, the Islamic principle relating to the honouring of contracts. With respect to the application of the ICLRB, the SC has made a distinction between *ribā* and interest. It was considered that interest imposed in general commercial contracts among private individuals are contrary to the tenets of Islam as it is *ribā*. On the contrary, in the case of financial institutions, the SC disregarded interest as *ribā* and ordered interest paid as per the terms and conditions laid down in financial contracts.
- (e) With regard to the issue of institutional framework for Islamic legal reform; it is vested in three organs of the states rather than in a single body such as found in

Afghanistan, Egypt and Pakistan. If law by nature of commerce (mainly tax laws) are drafted and submitted by the government to the Majlis for enactment, the Majlis is bound to fulfill all constitutional requirements: the confirmation of the tenets of Islam in the proposed draft bill as provided in Article 70 of the Maldives' Constitution 2008, and as mentioned *inter-alia* function of the parliament in Chapter 1. The President is the head of government; he ratifies bills and is obliged to check on constitutional validity in terms of the conformity of the tenets of Islam. In the past, the President has sent back some bills to the Majlis as they were contrary to the tenets of Islam. If both the President and the Majlis have failed to conform to the repugnancy clause, then any individual of the Maldivian community can bring the matter to the High Court or the Supreme Court for final determination of validity, which is in practice now.

6.3 Degree of the conformity of the tenets of Islam in Maldives' Commercial laws

A total of 38 Maldives commercial laws, containing 4,754 provisions, were reviewed in this research. For the purpose of review, the statutes are divided into five categories: (a) laws pertaining to import and export (total 6 laws); (b) laws relating to taxation (total 6 laws); (c) laws relating to Commercial Obligations and Contracts (total 5 laws); (d) Corporate and Investment laws (total 11 laws), and (e) Banking and Financial laws (total 10 laws).

Of these 38 laws, 63.16% were enacted before the Maldives' Constitution 2008 came into force, and the remaining 36.84% were introduced after commencement of the constitution. Out of 4,754 provisions, only 21(0.44%) were found negative to ICLRB and the remaining 4,733 provisions (99.56%) were positive to ICLRB.

Testing these laws on the basic commercial tenets, 21 provisions were found negative to ICLRB; 13 contained provisions relating to interest, which is *ribā*. The rest

of the eight provisions are contrary to the general commercial tenets and the permissibility of trading of un-Islamic goods as discussed in Chapter 5.

Having said this, no provision of law is negative to ICLRB on the ground of *gharār* (uncertainty). Nonetheless, it should be noted with regards to *gharār*, there are some areas in conventional commercial practice that could be debatable: issues on whether such practices contains *gharar* or not, e.g. practice of compensations. The debate on this issue was excluded for the purpose of the Review in Chapter 5 as existence of such conventional commercial practices results from bilateral contracts, rather than the law being un-islamic.

6.4 Reforms

As indicated earlier, the Review result showed that 21 provisions of the commercial laws require reforms, based on ICLRB. These are because of eight provisions in the Import Export Act permit the importation of un-Islamic goods. These provisions are in Chapter 18 of the law under the items: (b), 19(c), 20(c), 21(d) and 22(b), (d), a total of six provisions, which permit the imports of liquors, alcoholic beverages, with duties levied at 35% of the C.I.F price. Chapter 16(c), 21(c) of the law permits pork imports and applies a 35% duty of the C.I.F price.

Apart from these provisions as contained in the Import Export Act, two provisions in Tax Administration Act: sections 64(b), 65(b) and four provisions in Business Profit Tax Act: sections 23(h), 24(c) 25(c) and 40 respectively, provide for imposition of fines over the principle taxable amount as a civil penalty in the event of default/ and or violation of tax provisions. All are considered negative to ICLRB. The above-mentioned six provisions contain unjustifiable interest over the principle amount, which are contrary to ICLRB, thus reforms are required. Furthermore, 6 provisions of Maldives Banking Act permits interest and require reforms as per ICLRB.

All 21 provisions require reform because ICLRB is based on Islamisation of existing laws of the Maldives. A proposal for such a reform is exhibited in Appendix C.

If these had been considered within the harmonisation model, none of these provisions would require reforms as none are restricted to the operation of the Islamic commercial system in the Maldives.

6.4.1 Strategies

It is a key policy for reform that priority should be given to plan a sustainable Islamic commercial system in the Maldives by setting into place relevant regulatory frameworks. The courts have not been ignorant of the ICLRB because of their incapacity to deal with it. There seems to be, however, a lack of willingness to apply Islamic tenets fully as a whole. There is a need to formulate a national policy on Islamisation with the commercial system. Such a policy must address gradual, long-term strategies to bring laws in line with the tenets of Islam with equal participation by the public and relevant stakeholders. The short-term plan should be to continue on with the harmonisation model.

The key policy should be to embark on Islamic financing in the tourism sector within the existing tourism framework by adopting the harmonisation model. In this regard, the following can be considered-

(a) Modification of the Development Plan

To embark on Islamic investments in the tourism sector, the resort development plan should be changed. The bar services and facilitation of non-halal food items such as pork and alcohol should be separated from the main operation of the resort, hotels and tourist vessels etc., and should be out-sourced.

(b) Isolation of Bars and other un-Islamic activities

To isolate the bar in respect to a resort, it should be erected in the lagoon of the island that can be interconnected through a walkway or a small jetty or the bar can be located at one end of the island, which should be isolated from the general facilities of the resort. Importantly, the income generated from this activity should be managed in an account separate from the rest of the general accounting system of the resort. If this is to be implemented, Islamic banks can have the satisfaction that the Islamic investments are not being mixed with the un-Islamic activities. It is recommended also to create another regulation that covers Islamic investment plan by setting all relevant conditions and terms compatible with ICLRB.

As stated earlier, there is no restriction for Islamic investments in relation to the tourist hotels development, as these are developed in the inhabited islands. In such a project, the operation of bars and other un-Islamic activities are not permitted under the law. However, the existing developmental plan should be changed in order to introduce Islamic investment facilities to develop hotels in the un-inhabited islands such as islands with airports and other industrial islands. In this instance, the operation of a bar should be vested in a separate business vehicle, and the bar should be separated physically from the hotel. If this were implemented, the Islamic banks would not have any restrictions of embarking into this sector as well.

With regards to the tourist vessels, section 18 of the Regulation on Tourist Vessels 2007 provides for standards bar operators in the development of vessels. Thus, it will be ideal for the Regulation to prohibit placement of bar services on board of such vessels if the development project uses Islamic financing. Bar services should be out-sourced and guests should be obligated to leave the vessel for drinks.

Lastly, the tourist facilities such as yacht marinas and diving centres can be developed through Islamic facilities. Neither the law nor *Shari'ah* forbids investing in such establishments provided Islamic principles are followed in their operation and management.

(c) Separation of Operation and Management

It is important to completely separate the management of bars from the general hotel operations. Therefore, it is proposed to establish a separate entity for bar operation and selling pork related-items, or to outsource these matters to another company. It should be ascertained beyond a reasonable doubt that no link exists between the management of bar services and the logistical, financial, accounting and human resources of the main company operating the resort.

6.5 Recommendation

The significance of this research includes to ultimately find a way to suggest areas of reform to implement an orderly, smooth-running Islamic commercial system. By doing this research, it was found that some areas of laws are required to be amended and new laws introduced in order to fill in the existing lacuna, which are mentioned below-

6.5.1 Recognitions

Neither any law nor any policy of the Maldives clearly restricts the operation of gambling, yet no company is permitted to operate a gambling business. In practice, if the police are alerted to gambling activities in any part of the Maldives, the activity will be restrained but no charges will be filed. Hence, new laws are required to address this issue, as it is contrary to the tenets of Islam.

Furthermore, the Fatwa body has a significant role in law reform, particularly with inception of Islamic finance, which is mentioned in Chapter 4. It is a matter of fact that

the mandate body in the Maldives i.e. the Islamic Fiqh Academy, an administrative body of the Ministry of Islamic Affairs, has no formal recognition in its Fatwa issuances. Similarly, despite the new amendment of the existing Maldives Religious Solidarity Act (Law No.6 of 1994)⁸⁴³ that established a Fatwa Council, no change was proposed in terms of applicability in the verdicts of the council. Thus, there is a need for new legislation to define meaning, scope, and applicability of Fatwas. Once this is incorporated, the conclusions of the council would be binding, and can be enforced. Thus, it is ideal to grant formal recognition of their verdicts, which may be enforceable at least in Islamic finance sector.

6.5.2 New Policies and Laws

Firstly, the existing insurance framework of the country is based on a brief regulation made by the MMA as discussed in Chapter 4. Likewise, the country is in need of a hire-purchase act. In both areas, it would be ideal to propose a single new law which could be applied to conventional and Islamic finance, respectively. A similar approach was taken in drafting of the Banking Act (Law No.24 of 2010), which covers both Islamic and Conventional Banking.

Secondly, in order to enhance Islamic Banking, section 18 of the Maldives Land Act (Law No.1 of 2002) must be revised. Currently, it provides that land sale transactions can only be performed by 100% Maldivian companies. Nevertheless, the only full-fledged Islamic Bank in the Maldives—the MIB—has 85% of its shares controlled by a foreign company. Thus, this restriction must be repealed to enhance MIB services.

Thirdly, in various forums and platforms the government has pledged to boost growth in the Islamic financing sector by positioning the Maldives as an Islamic financial centre for the South Asia. Yet no documented policy has been offered to

⁸⁴³ See generally, discussion on Religious Solidarity Act in Chapter 1.13.

accomplish this goal. Therefore, it is important to create a comprehensive policy, perhaps by following the Malaysian model of Islamic finance. Such a policy must specify a timeline, and address current needs such as the existing Company Act (Law No. 10 of 1996), which extends SPV only to publicly listed companies, when in fact, it should also be extended to create SPV for private liquidity funds.

6.6 Conclusion

This study set out to determine whether the existing commercial laws of the Maldives actually conform to its constitutional benchmark: the tenets of Islam. The results of this study show that 99.56% of the laws complied with the tenets of Islam. Furthermore, the existing role that Islamic tenets have performed in commercial law reform, also play a significant part in general commercial policies that promote a dual Islamic and conventional-based commercial system, based on the harmonisation model of reform. Therefore, the findings of this thesis could be used to help reform existing commercial systems through harmonisation of laws, or the Islamisation of all commercial laws of the nation, as this study has covered all commercial laws currently enacted in the Maldives. Future research could be carried out in another area of Maldivian law: Criminal laws, Administrative laws and Procedural laws etc. with reference to Article 10 of the Maldives' Constitution 2008.

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