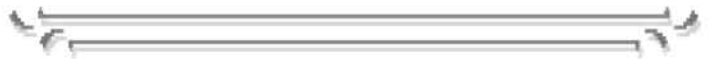


## **Chapter 2**

**“The Golden Thread that Binds” –**

**The *Shariah* and  
Intellectual Property Protection**



## 2.1 Introduction – “The Golden Thread”

Islam has been described as the cultural epicentre of identity in Arab Muslim life.<sup>1</sup> There exists an inter-relational and reciprocal influence between its legal, religious and ethical aspects. As a divine-sourced religion, Islam, like many other religions, is characterized by:

- divine sources which are the highest primary sources and therefore possess supreme character and authority;
- other sources based on human reasoning which are therefore secondary and must defer to the primary sources, taking account of the settled rules and principles of Islamic methodology;
- divine sources which are free from errors whereas human sources are fallible;
- divine sources which form the framework outlining the general doctrines and principles, according to which the corpus of the detailed Islamic rules can be formulated;<sup>2</sup>

Islamic law, or the *Shariah*, in its simplest definition, is the corpus of rules and principles that are derived from the Holy *Qur'an* and *Sunnah* (Traditions) of the Holy Prophet and aimed at regulating the spiritual as well as the temporal conduct of the Muslim in his relationship with God, with other Muslims and with non-Muslims.<sup>3</sup> The precedence of Islamic law, or the *Shariah*, as a legal imperative is unequivocal; its status has been described thus:

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<sup>1</sup> Susan Rayner, *The Theory of Contracts in Islamic Law* (1991), 372.

<sup>2</sup> Mahda Zahraa, “Characteristic Features of Islamic Law: Perceptions and Misconceptions”, (2000) 15(2) *Arab Law Quarterly* 169.

<sup>3</sup> *Ibid*, 168.

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“Behind all secular law stands the *Shariah* law of Islam ... the *Shariah* runs like a golden thread through the legal systems of the Arab Middle East.”<sup>4</sup>

As the *Shariah* is a whole, comprehensive and interrelated unit, the application of its various branches is subject to a single set of standards. Hence one does not find a separate discipline of Islamic law called intellectual property law, or international law. What Islam has is the *Shariah*, which deals with every aspect of every possible human conduct regardless of its description as a personal civil or international code of conduct.<sup>5</sup> The function of the Muslim jurist is to identify the detailed rules of Islamic law to meet the particular needs of time and place. Islamic jurisprudence (*fiqh*) is the body of rules and principles that are developed by the reasoning of Muslim jurists to aim at approaching as close as possible to the highest ideals of Islamic doctrinal aspiration.<sup>6</sup> The different views that emerge are seen not so much as an inconsistency or deficiency in the *Shariah*, but rather a flexibility in its application which does not lose sight of the *Shariah*, but still takes account of the unique timeframe and facts of a particular circumstance or instance. Since Islamic law is set within these formulated rules, the doctrine of legal precedence of the common law system does not occupy an important place in the Islamic judicial system. The value of legal precedent in the Islamic context, which is therefore limited, lies in merely aiding consistency.

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<sup>4</sup> William M Ballantyne, *Commercial Law in the Arab Middle East: The Gulf States* (1986), 1-2.

<sup>5</sup> The *Shariah* or sacred law of Islam was developed and assembled during the first three centuries following the death of the Prophet Muhammad in 632 AD. The *Shariah* consists of Muhammad’s revelations as compiled in the *Qur’an*, and the pronouncements and deeds of Muhammad and his companions which are collectively known as the *Hadith*. While *Shariah* (literally the way) is translated as ‘Islamic law’, it is neither canonical law nor secular law, because no such concept exists in Islam; it is rather a whole system of social and personal morality, prescribing the way a man should live if he is to act according to God’s Will. Peter Mansfield, “A History of the Middle East”, 5, quoted by John Carroll, “Intellectual Property rights in the Middle East”, (2000/2001) 11 *Fordham Intellectual Property, Media and Entertainment Journal* 588.

<sup>6</sup> Zahraa, above n 2, 174.

Twenty five years ago, Ballantyne (1980) described what he perceived to be the impasse between the *Shariah* law and western law as the classical situation of an ‘irresistible force meeting an irremovable object’:

“The problem is that the Arabs have, to a greater or less degree, in wishing to adopt the existing international world of commerce, come face to face with the classic situation: an irresistible force against an irremovable object. As is not uncommon in these circumstances (not by any means only in the Arab world) the question has been begged on all sides. It will be, to say the least, interesting to see for how long and to what extent this apparent anomaly can continue.”<sup>7</sup>

The irresistible force to which Ballantyne refers is the ongoing codification of laws in the (GCC) states, particularly in the area of commercial activity, while the irremovable object is the Islamic *Shariah*. The conundrum, at least at the time of Ballantyne’s writing, was whether the anomaly could be sustained or whether there would be, legislatively at least, a clear domination by western secular law with Islamic law becoming an irrelevancy in all but personal matters. In the present age, the anomalous situation to which Ballantyne referred has been resolved in that the clear domination of western-based secular laws over the *Shariah* in the commercial and civil contexts has already arrived. The conundrum has now shifted to being one of whether the position of *Shariah* law in respect of personal status of Muslims may be further eroded, or maintained, or even re-asserted.

Amin argues that, although Islamic law is complete, supplying answers to all questions in all times and places, its very content and style leaves it to jurists to answer the many questions unanswered in the original textual sources of Islam.<sup>8</sup> Such a general and non-specific prescription existing in the classic textbooks in Islamic law is inadequate in modern times. At

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<sup>7</sup> William Ballantyne, *Legal Development in Arabia* (1980), 121.

<sup>8</sup> S H Amin, *Law of Intellectual and Industrial Property in Developing Countries: Muslim World* (1993) 36.

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the same time the general principles and basic structure of Islamic *fiqh* (jurisprudence) leave ample room to manoeuvre, and jurists are thus given broad and general guidelines to regulate new issues in the modern environment.<sup>9</sup> New rules of law may also be developed through modern legislation and administrative regulations, incorporating concepts of secular thought and custom as appropriate. Unlike western legal theory, Islamic law and principles of morality in government, business and personal conduct are indivisibly linked.

Stovall suggests that the argument that Islamic law is irrelevant is a myth, as is its sister myth that Islamic law is also inherently unsuitable for modern commercial transactions. Practical minds have developed expedients to overcome these difficulties in most cases, and hence Islamic law has continued to be revitalised in the Arabic world.<sup>10</sup> The application of the prohibition upon *riba* (usury, or interest charged upon money lent) is the classic example. Despite the universal prohibition in the *Shariah* upon *riba*, most Arab legal systems draw a distinction that permits interest charges on commercial transactions, at least under specified ceilings, but not on civil transactions. However, such expedient might be viewed as a practical solution or an unprincipled shortcut, depending on one's opinion of the underlying impasse, and such expedients might not offer permanent solutions. Stovall further suggests that this type of fine-tuning is likely to become more common in future throughout the Arab world, both in civil codes and in other laws.<sup>11</sup>

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<sup>9</sup> Ibid, 37.

<sup>10</sup> Howard Stovall, "Arab Commercial Laws – Into the Future", (2000) 34 *The International Lawyer* 841.

<sup>11</sup> Ibid, 841-2.

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It is thus impossible, proposes Rayner, to talk about a secular legal system in the Gulf States in the real sense: the legislation may appear to be secular but the sources of reference and the consciences of its interpreters are innately religious<sup>12</sup>.

## 2.2 The *Shariah* and the GCC States' Constitutions

Throughout the constitutions of the GCC states, or constitution-equivalents in the case of Oman and Saudi Arabia, the *Shariah* weaves its influence - as that common golden thread as earlier portrayed by Ballantyne. But that weave varies in its paramountcy from state to state. Whilst the *Shariah* is still primary in all GCC states, it is not always paramount.

Based upon their constitutional and political development, the constitutions of the GCC states can be categorized into three groups: the western-style which comprises those of Bahrain and Kuwait and the UAE; a combination of quasi western and traditional styles as epitomized by Qatar's constitution, and the more fundamentalist style of those of Oman, and Saudi Arabia.<sup>13</sup> Kuwait, Bahrain, Qatar and the UAE received their respective constitutions upon gaining independence, the constitutions based on a common model which drew much from the French, United States and Egyptian constitutions, and the Universal Declaration of Human Rights on which the Egyptian constitution was also partially based.<sup>14</sup> Since Kuwait received its constitution a decade before the other three states, its model formed a useful precedent for the

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<sup>12</sup> Rayner, above n 1, 372.

<sup>13</sup> Ahmad Saif, "Constitutionalism in the Arab Gulf States", *GCC Research Program – GCC Constitutions* (2004), Gulf Research Centre, 17.

<sup>14</sup> Ballantyne, above n 4, 27.

constitutions of the other three states.<sup>15</sup> Kuwait's constitution has remained unaltered since it was first introduced over forty years ago, while the other three states have since introduced new constitutions or significant changes in recent times. Saudi Arabia and Oman have both promulgated statutes entitled 'Basic Statute' and 'Basic Law' of the State, as distinct from constitutions, as a formal recognition of the status of the *Shariah* within those statutes, but they essentially serve the same purpose. Hence all GCC states are governed within constitutional frameworks. The constitutions have very strong common elements which stipulate that the state in each case is a sovereign independent state with a hereditary constitutional monarchy, and that Islam is the religion of the state, and Arabic its official language. However, although the position of the *Shariah* is primary, it is not by any means paramount in every case. The GCC states each place the following degree of primacy on the *Shariah* within their constitutions:

- Bahrain, Kuwait and the UAE provide that the *Shariah* is a main source of law;<sup>16</sup>
- Qatar declares that the *Shariah* is the main source of laws;<sup>17</sup>

<sup>15</sup> *Bahrain* first adopted a constitution on 26 May 1973, which came into effect on 6 December 1973. It adopted a new constitution on 14 February 2001, which came into effect one year later.

*Kuwait* achieved its independence from the United Kingdom on 19 June 1961, and gained its original constitution on 16 November 1962. This constitution still remains in place.

*Oman* did not establish a form of constitution until 6 November 1996, by the promulgation of Royal Decree No. 101/1996, the Basic Statute of the State, or White Book, as the state's constitutional equivalent.

*Qatar* was granted a provisional constitution by the United Kingdom on 2 April 1970, and gained its independence on 3 September 1971. A new and permanent constitution was approved by national referendum on 29 April 2003, and is still awaiting final royal assent.

*Saudi Arabia*, like *Oman*, does not possess a formal constitution *per se*. It has enacted, in March 1992, a "Basic Statute of the State" which declares that the Holy *Qur'an* is the constitution of Saudi Arabia.

*The UAE* adopted a provisional constitution on 18 July 1971, which, with some minor amendments, was eventually confirmed on 2 December 1996 by the Constitutional Amendment Law No. 1 of 1996.

<sup>16</sup> Bahrain, Constitution, art 1; Kuwait, Constitution, art 2; UAE, Constitution, art 7. Bahrain and Kuwait also make a rather contemporary declaration on the importance of social and the importance of the family in the social fabric of the state. The Kuwaiti Constitution, art 12, declares that justice, liberty and social solidarity are the bases of society, and the family – founded on religion, morality and patriotism - is the nucleus of society. The Bahrain Constitution, art 12, goes even further and places the sovereignty of the democratic government that Bahrain enjoys in the hands of the people, the source of all powers.

<sup>17</sup> Qatar, with a constitution that is arguably more conservative than Bahrain's or Kuwait's, also formally acknowledges in Article 59 that "People are the source of authority, and [they] shall practice it according to the provisions of this Constitution." The Qatari constitution referred to in this context is that recommended by the state's Advisory Council and endorsed by national referendum in April 2003. While it is generally anticipated that the constitution in this nationally endorsed version will be eventually come into force, the requisite decree has yet to be enacted.



























































