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. 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;²

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.³ The precedence of Islamic law, or the Shariah, as a legal imperative is unequivocal; its status has been described thus:

³ Ibid, 168.
"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."  

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.  

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.  

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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5 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* 388.

6 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.”

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. 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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7 William Ballantyne, Legal Development in Arabia (1980), 121.
8 S H Amin, Law of Intellectual and Industrial Property in Developing Countries: Muslim World (1993) 36.
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.⁹ 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.¹⁰ 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.¹¹

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⁹ Ibid, 37.
¹¹ Ibid, 841-2.
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."12

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.13 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.14 Since Kuwait received its constitution a decade before the other three states, its model formed a useful precedent for the

12 Rayner, above n 1, 372.
14 Ballantyne, above n 4, 27.
constitutions of the other three states. 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; 

- Qatar declares that the Shariah is the main source of laws;

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15 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. 

16 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. 

17 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. 

18 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. 

19 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. 

20 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. 

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. 

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.
- Oman mandates that the *Shariah* is the basis of legislation;¹⁸
- Saudi Arabia declares that the *Qur'an* and the *Sunna* of the Prophet are not only the sole source of law, but are also the constitution of the state.¹⁹

Only Saudi Arabia, and to a slightly lesser degree, Oman, make the *Shariah* paramount.

As a main source of law, the *Shariah* has, at best, equal standing with other sources of law. It is neither the sole source nor even the main source of law, and thus cannot take general precedence over other sources. The impact is two-fold: firstly, the constitutional position facilitates the implementation of modern codified laws derived from non-Islamic sources. Secondly, their application replaces the *Shariah* and progressively reduces its general jurisdiction so that it becomes increasingly confined to matters involving personal relationships between Muslims. But absent from the Bahraini, Qatari and Emirati constitutions is any direction or guidance as to when the judiciary should turn to either one source or another for application of the proper law. For this, one must seek direction firstly from specific legislation and then general legislation. Where existing legislation is incomplete, the *Shariah* shall prevail.

The Qatari constitution declares that the *Shariah* is the main source of laws, though not the sole source. It is thus given more weight in this context than those of Bahrain, Kuwait and the UAE, but still considerably less weight than the Saudi and Omani constitutions. While no further guidance as to the application of the *Shariah* is provided, the oaths of Office of the Emir, the Advisory Council and the Cabinet reinforce the higher status of the *Shariah* in the daily operation of government. Each is required to swear to respect, in order, “the Islamic *Shariah*,

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¹⁹ The Basic Law of the Kingdom of Saudi Arabia, art 1.
the Constitution, and the Law ... and people’s freedom and interests”. The clear implication here is that, in the first instance, one must turn to the Shariah.

The Omani Basic Statute of the State asserts that the Shariah is the basis of all legislation. It is also one of the fundamental pillars of national political policy. The government, that is, the Sultan and his advisory councils, are required to maintain genuine consultation with the people, “based on the national heritage, its values and its Islamic Shariah, while incorporating such contemporary manifestations as are appropriate”. In respect of the place of Shariah in the constitutional framework, Oman is closer to Saudi Arabia than to the other GCC states. However, notwithstanding the constitutional mandate, the degree of Shariah control is also being emasculated as Oman, too, moves to a greater codification of its laws.

The position of the Saudi Basic Law in respect of the Shariah stands in stark contrast to that in the constitutions of Bahrain, Kuwait, and the UAE. Although there has been some erosion of the position of the Shariah with the introduction of modern codified laws, its position is still paramount and is reiterated throughout the Saudi Basic Law as being the fundamental principle underlying the government, the law, the economy and society. The Basic Law in essence ties the very existence of the Kingdom to Islam. It declares that Saudi Arabia is a sovereign Arab Islamic state whose constitution is the Holy Qur’an and the Sunna (Traditions) of the Holy Prophet. The government derives its authority from the Holy Qur’an and the Sunna, which are the ultimate sources of reference for the Basic Law and for all other laws of the state. Governance must be based on the principles of justice, Shura (consultation), and equality in

20 Qatar, Constitution, arts 74, 92, 119.
21 Oman, Basic Statute or the State, art 10.
22 Saudi Arabia, Basic Law of the State, art 1.
23 Ibid, art 7.
accordance with the Islamic Shariah. The state is required to protect Islam, implement its Shariah, and order the people to do right and shun evil. Legislation, enacted by resolution of the Council of Ministers and ratified by royal decree, must be compatible with Shariah Law.

Property, capital and labour are essential elements of the Kingdom’s economic and social well-being. They are personal rights which perform a social function in accordance with Islamic Shariah. Saudi society is based on the principles of adherence to God’s Command. The family is the kernel of Saudi society and its members shall be brought up on the basis of the Islamic faith and loyalty and obedience to God, his Messenger, and to the guardians.

Although the Basic Law provides for the separation of the branches of government, the King, in principle at least, is still the source of authority, and thus the ultimate (mortal) power, in the governance of the state. However, the King’s powers are not without limit since he is still obliged to observe the Shariah and other Saudi traditions in the execution of his office, amongst which is maintenance of Shura (consultation) with the (male) members of the Saudi royal family, the country’s religious leaders, and the leading members of the Saudi elite.

24 Ibid, art 8.
26 Ibid, art 67.
28 The Saudi King is also “The Custodian of the Two Holy Mosques”, a responsibility and title which it could be argued is perhaps akin, in theory if not in practice, to the British Monarch’s awful responsibility as “Defender of the Faith”. The two holy mosques referred to above being the sacred Islamic sites in Makah and Madinah.
29 See Saudi Arabia, Basic Law of the State, art 43, which establishes the right of every citizen to have consultation with the King, in his capacity as the final arbiter on any complaint. The constitution of Oman has similar provision; the Sultan spends up to three months each year travelling around the country to “meet the people”, having personal but public face-to-face meetings with any citizen who wishes to raise a matter with him or to petition him.
The GCC states, with the exception of the UAE federation, are hereditary monarchies, with the ruler\textsuperscript{30} being the titular and effective Head of State and Head of Government and enjoying, to varying degree, considerable actual authority and autonomy. As the highest authority in the state, the ruler is also the final avenue of appeal in legal and personal matters. The UAE is not all that dissimilar in terms of the practical effect: as a federation of seven emirates, it is governed by a Supreme Council of Rulers comprising the rulers of the individual emirates - which themselves are hereditary sheikhdoms.\textsuperscript{31} The chairman of the Supreme Council is the President of the UAE federation. In all states, supreme executive, legislative and judicial authority is vested in the central government and ultimately the ruler and his family, although in the UAE authority is divided between the federal government and the seven constituent emirates.\textsuperscript{32} Most

\textsuperscript{30} Variously entitled King (Bahrain and Saudi Arabia), Emir (Kuwait, Qatar, the UAE and the individual emirates), or Sultan (Oman).

\textsuperscript{31} The UAE Federation has exclusive rights to legislate on and execute a wide variety of matters, the list being so comprehensive as to be almost all-inclusive. Each emirate can still issue its own laws, but where a conflict arises between federal and local laws, the former take absolute precedence to the extent necessary to remove the conflict.

\textsuperscript{32} Bahrain: The government comprises the King (formerly Amir, until 1995) as Head of State, and separate executive and legislative branches. The executive branch consists of the Prime Minister (as Head of Government), and the Council of Ministers (Cabinet), all of whom are appointed by the King. Prior to 2003, the offices of Crown Prince and Prime Minister were combined. Now separated, they are nonetheless both held by senior members of the royal family. With the very recent death of the Emir (January 2006), and new Crown Prince being elderly and in very poor health, there is considerable speculation that the two offices will be again combined. The legislative arm of government consists of a bicameral National Assembly with a partially representative and elected lower house and an appointed upper house. In general, all legislation passes through both bodies before it is submitted to the Cabinet for recommendation to the King for royal assent. The King and the Cabinet may also promulgate legislation directly through Royal, prime ministerial and ministerial decrees, all of which carry the force of law.

Kuwait: The Constitution provides for the establishment of separate executive and legislative branches of government. Like Bahrain, the executive branch comprises the Amir (as Head of State), the Prime Minister (as Head of Government) and a Council of Ministers which serves as the Cabinet. The Amir appoints the Prime Minister who in turn appoints the Council of Ministers, the appointments still being subject to Amiri approval. Oman: The Cabinet, deriving its authority solely from the Sultan, is the highest executive authority, with its members all appointed directly by the Sultan. The Cabinet considers matters related to administrative functions of the State, internal policies and foreign relations, and submits its recommendations to the Sultan for approval. A Consultative Council, whose members are popularly elected, provides advice to the Cabinet on state policy and reviews draft legislation prepared by the ministries.

Qatar: The Qatari Constitution stipulates that the system of governance shall be based on the separation of authority with cooperation in accordance with the provisions stipulated in the Constitution; the Emir as Ruler holds the executive authority to be assisted by his Cabinet, while an Advisory Council holds the legislative authority. The Advisory Council consists of 45 members, 30 of whom are elected and the remainder appointed by the Emir. Since the Emir appoints the Cabinet and one third of the Advisory Council, the division between the two branches of government is not a great one. The Constitution requires the Emir to rule in accordance with Islamic precepts, and his authority is influenced by continuing Islamic traditions of consultation, rule by consensus, and the citizen's right to appeal directly to the Emir.
states separate the executive and legislative branches of government, although the latter does not necessarily enjoy its own autonomy and independence. In most cases, the executive branch firmly cements in place the authority of the ruling family, since it predominately comprises the royal family’s senior male members by virtue of both their blood lineage and the senior government offices they also hold. The executive branches may also include representatives of a council of ministers (which more often than not are also members of the ruling family or members of the elite families within the state). Only in Kuwait and Bahrain is there a clear distinction between the legislative and executive branches of government. The distinction is observed in Oman, Qatar and the UAE, but the legislatures there are accorded primarily a consultative role.

2.3 The Shariah and the Judicature

All GCC states have undergone a dramatic reformation and restructuring of their judicial systems in very recent years, and have introduced significant legislation that has dramatically changed the nature of the judiciary and judicial proceedings, and the relationship between Shariah law, secular or codified law and customary law. The developments to date have been an extraordinary and unique development of modern statutory legal frameworks in a remarkably short period of time.

Saudi Arabia: The Constitution provides for the existence of a Council of Ministers, which constitutes the executive arm of government, and a Consultative Council, which constitutes the legislative arm. The members of both bodies are appointed by the King. The Council of Ministers, comprising 28 ministers, is led by the King in his capacity as Prime Minister. It is responsible for drafting and overseeing the implementation of national policies and general affairs of state. The primary role of the Consultative Council, a body of 120 members, is to advise the King and Council of Ministers. It may also propose new laws or amendments to current laws. The King has the power to restructure and to dissolve the Consultative Council as he deems necessary.

The UAE: The chairman of the Supreme Council and thereby the President of the Federation is elected from amongst their own number – by unchallenged convention since independence in 1971, the Presidency has been held by the ruler of Abu Dhabi, the largest and wealthiest of the emirates, and the Prime Ministership by the ruler of Dubai.
The independence of the judiciary is enshrined in the constitutions of all the GCC states. The respective constitutions all mandate that the courts are independent, and judges shall not be subject to any authority or interference. The Oman constitution, for example, guarantees the “Rule of Law” as the basis of government, and establishes an independent judicial authority vested in the courts of law. It also states that there shall be “no higher non-judicial authority over the judges in their administration of justice apart from the law.” The conduct of the legal profession and of the judiciary, including conditions of appointment and dismissal are governed by legislation; the circumstances in which they can be dismissed must also be specified by the law. The Saudi Basic Law also provides that no control may be asserted over judges in the dispensation of their judgments except in the case of the Islamic Shariah. Nevertheless, the state executive may still have leverage over the judicial power, since senior members of the judiciary are appointed by the exercise of executive authority through law or royal decree, and the laws that determine their prerogatives may be both initiated and issued by that same executive power. Apart from the UAE, where the constitution contains explicit conditions for their removal from office, the states’ executive authorities (that is the Rulers) still retain a power, in principle at least, to appoint and dismiss members of the judiciary, notwithstanding constitutional provisions apparently to the contrary.

In Oman and in the pre-independence Trucial States (Bahrain, Kuwait, Qatar, and the UAE), a dual system of courts has emerged over the last generation or so, with differing degrees of visible distinction and duality. The former British-derived common law system and ternary structure of courts that existed in respect of foreigners and non-Muslims were progressively

33 Oman, Basic Statue of the State, Chapter 6, art 60.
34 Ibid, art 61.
36 Saudi Arabia, Basic Law of the State, art 46.
replaced as these states achieved independence (or experienced a change in monarchy, in the case of Oman), and proceeded with a general codification of their commercial and civil laws. The tendency is for these codes to be comprehensive, both in terms of empowerment and exclusivity, and hence reduce the necessity and opportunity for other laws with possible overlapping, complementary or similar terms of reference to intrude and generate ambiguities. This replacement process started with Kuwait, being the first of these states to gain independence and thereby the first in having a large corpus of laws enacted as part of its post-independence political, legal and commercial re-structuring and development. Since Kuwait was the first GCC states to acquire an emancipated system of codes already written in Arabic, the common practice of the other states was to take up these codes and adapt them for their own use.

While the principles derived from the Shariah are still a primary basis for all laws, separate secular courts have been established in recent years to deal with civil, criminal and commercial cases for which codified laws have been established or to which the Shariah cannot always be applied. The result is a dual legal system (with lesser or greater degrees of seamless amalgamation) in which a civil law orientation exists in parallel with the Islamic Shariah.\textsuperscript{37} The

\textsuperscript{37} Bahrain: The legal system of Bahrain is a mixed system based on English common law models and Sunni and Shi'a Shariah traditions. Bahrain has been influenced by English (British India) systems than any other Gulf State. The Bahraini Judiciary Law of 1971 divides the judiciary into two divisions – the civil courts and the Shariah courts with the Sunni and Shia (Jafari) jurisdictions. The civil courts are empowered to settle all commercial, civil, and criminal cases, and all related to the personal status of non-Muslims. These courts are structured in a three-tier system, namely, the lower courts (also known as the courts of minor cases), the appeals courts and the courts of cassation. The Shariah court system is limited to personal status cases of Muslims. It comprises a high court and a high court of appeal, both with Sunni and Jafari divisions. The Sunni Shariah court has jurisdiction over all personal cases brought by Sunni Muslims, while the Jafari court has jurisdiction over cases brought by Shia Muslims.

Kuwait: The legal system of Kuwait is based upon a number of diverse sources. Commercial and criminal laws derive from Ottoman and several modern Arab sources, notably Egyptian, and they also reflect elements of the French legal code and the English common law.

Oman: The Omani system is based primarily on the Islamic Shariah traditions of the Ibadi school. Custom, tradition and the Shariah still occupy important places as guides in judicial decision-making. Oman was the last of the GCC states to overhaul its judicial system, with major changes in 1999 by Royal Decrees Nos 90/1999 to 94/1999, which brought the judiciary into line with the dictates of the Basic Statute of the State. These changes also greatly simplified the judicial system and consolidated the various jurisdictions into one regular system. A three tier system comprising courts of first instance, courts of appeal, and court of cassation replaces the earlier system of separate Shariah courts, commercial courts and criminal courts. The Shariah courts, which formerly held competency in all civil and most criminal cases, have had their jurisdiction restricted to personal cases.
civil or secular courts exist side by side with the Shariah courts, but in practice the Shariah courts and the body of Shariah law is becoming increasingly restricted to personal status matters of Muslims – family matters, divorce, inheritance, succession, property and charitable donations, some limited torts and a few criminal matters. The structures in place in Kuwait and Saudi Arabia, reflect the opposite ends of the spectrum. At one end, Kuwait (which, it will be recalled, holds the Shariah as a main source of law, along with Bahrain and the UAE) avoids the civil court-Shariah court dualism extant in some of the other states; it has generally favoured a unified court structure approach, rather than establish separate secular and Shariah court systems. Hence Muslim personal status cases are not assigned to a separate Shariah judiciary; instead, sections of the civil courts are designated for hearing personal status cases. The courts rule on the basis of codified Sunni law or Shia (Jafari) law, depending on the school of Islam to which the litigants adhere.

involving Muslims in both parties, and then as a primary court. Appeals against decisions of the Shariah court are made to the court of appeal.

Qatar: The Qatari constitution defines the Islamic Shariah as the main source of law. Accordingly, the Shariah court has full jurisdiction in all civil and criminal disputes over Qatar's nationals and Muslims from other countries. The legal bases for the secular courts are a modern western concept of law, where rules have been taken from Egyptian legal traditions via the Kuwaiti legal system.

Saudi Arabia: The Saudi judicial system retains the traditional form of Shariah courts. At the primary level there are the general courts or courts of first instance. Appeals may then be made to courts of appeal and ultimately to the High Shariah Court. Within this Shariah system there exists the Board of Grievances, which is effectively a civil court with jurisdiction over commercial matters which fall within the terms of reference of codified laws.

The UAE: The UAE remains unusual for the Arab world because of its federated structure. The Constitution permits each emirate to have its own legislative body and judicial authority, thereby allowing the existence of federal courts and local courts. Atop this federal/local structure there exists another division between secular and Shariah judiciary, giving the UAE a fairly complex judicial structure. The UAE is essentially a civil law jurisdiction heavily influenced by the Egyptian legal system which in turn has its source in French and Roman law. It has also been influenced by Islamic law codified in the Shariah and embodied in the UAE civil, criminal and commercial codes.

Dubai and Ras Al-Khaimah: The emirates of Dubai and Ras al-Khaimah have retained their own judicial structures. The Dubai court structure comprises the primary court, the court of appeal and the court of cassation. The primary court includes the civil, criminal and Shariah divisions, each of which have both lower and upper primary circuits. Judgments delivered by the Dubai court of appeal are subject to appeal to the Dubai court of cassation. Judgements of the court of cassation are final and, unlike the other GCC states, there is no further avenue of appeal. Ras al-Khaimah possesses a primary court and appeals court only. Final appeals may be made to the federal court of cassation.

The Qatari Criminal Code, for example, stipulates that jurisdiction over certain crimes, such as intentional or unintentional homicide, and crimes of a sexual nature, such as sexual assault, homosexuality and prostitution, rests with the Shariah court if the accused is a Muslim, and the secular court in respect of non-Muslims.

Saif, above n 13, 14.
While the Kuwaiti constitution remains silent on the question of the relative order of priority of the various sources of law, the law governing the conduct of the judiciary moves to qualify that flexibility. The law requires a judge to proceed first by reference to the civil and commercial laws of the state, then to custom, and finally by reference to the *Shariah*:

“(a) Legislative provisions apply to the matters to which such provisions relate both expressly and by implication.

(b) If there is no legislative provision, the judge gives judgement in accordance with custom. If there is no custom, the judge deduces his opinion taking guidance from the dictates of the Islamic jurisprudence (*fiqh*) most in accord with the reality and the interests of the country.”

Hence the order of priority of primary sources of Kuwaiti law is firstly constitutional, then legislative, customary and tribal, and lastly the *Shariah*.

This judicial obligation is reinforced by the Kuwaiti civil code, which makes provision for the code, as a general law, to be expressed without prejudice to specific legislation. In other words, the civil code lays down the general pattern of the law, but the specific law takes full precedence. The Kuwaiti commercial code, on the other hand, does not refer to either the *Shariah* or the civil code to complete its provisions, but refers to contracts and custom and the principles of natural law and justice. The significance is that the civil code includes many specific provisions, whereas the commercial code which until 1993 included trademark, trade name and unfair competition provisions, is to a large extent able to preserve commercial transactions from incursions of the *Shariah*. Both strategies reinforce the hierarchy of legal authority in which specific legislative provision is at the apex and the principles of *Shariah* are at the base.

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40 Kuwait, Law No. 19 of 1959, the Judicial Code, as amended by Law No. 19 of 1990.
41 Ibid, art 1; see S H Amin, *The Legal Systems of Kuwait* (1991), 77.
42 Kuwait, Law No. 67 of 1980, the Civil Code, art 3.
43 Ballantyne. above n 4, 57.
The Bahraini constitution provides the same degree of flexibility as does the Kuwaiti equivalent, and, in similar fashion, its law governing the judiciary also moves to qualify that flexibility.\textsuperscript{44} But, unlike Kuwait, it requires that, in the absence of an express statutory legal, reference is directed firstly to the Shariah:

"In the event that a judge finds no provision of law capable of application, he shall deduce the bases of his judgement from the principles of the Shariah and the provisions thereof; in the absence of any such provision, custom shall be applied. A particular custom shall be preferred to a general custom. In the absence of custom, the tenets of national law and the principles of equity and good conscience shall be applied."

Oman and Qatar, like Kuwait, also have a largely unified system, but both place a much greater emphasis on the importance of the Shariah in judicial decision-making. Both have in place a unified structure integrating the earlier systems of Shariah courts, commercial courts and criminal courts. In the case of Oman, the separate Shariah courts system, which formerly held competency in all civil and criminal cases, has had its jurisdiction restricted to cases involving matters of personal status and has now been reduced to the status of a court of first instance. Appeals against a decision of the Shariah court are now brought before general courts of appeal. Qatar has maintained Shariah divisions in both the primary and appellate jurisdictions, but retains a unified court of cassation, or supreme court. While these integration actions might be viewed as a weakening of the position of the Shariah, it could also be equally argued that they constitute a strengthening of its position by keeping it in the mainstream of the judicial system instead of marginalizing it.

\textsuperscript{44} Bahrain. Legislative Decree No. 13 or 1971. the Law of the Judiciary.
\textsuperscript{45} Ballantyne, above n 7, 25.
However, this still raises the issue of whether the general dictates of Shari'ah should apply in the first instance as general principles, or latterly in respect of the particular circumstances of the case being heard. Since both the Omani and Qatari constitutions are not exclusive in their status of the Shari'ah (since Omani stipulates as the basis of legislation, and Qatar as the main source of legislation), it may well have been the intention of the Omani and Qatari legislators to allow some degree of flexibility to avoid direct conflict between the Shari'ah and the secular codes. Where the civil or commercial laws or other laws or sources are silent on the matter of legislative application, then there would be little question that it would be appropriate to turn in the first instance to the Shari'ah as the principal source of law. However, where the codes do give voice, they are generally comprehensive, and their intentions are clearly prescribed, as the following extract from Qatar’s civil commercial code illustrates:

"1. The tenets of this law shall apply to all matters embraced expressly or by implication by the provisions hereof as well as to all commercial acts engaged in or by any person even if not a merchant.
2. In prescribing principles which apply to merchants and commercial acts, regard shall be had to contracts recognized by law, which constitute the law of the contracting parties.
3. If there is no contract, or if there is but it is silent as to a particular provision, or the provisions set out in the contract are void, the legislative provisions contained in this Law shall apply.
4. In the absence of the legislative provision which can be applied, the judge shall adjudicate in accordance with custom, special or local custom taking precedence over general custom, and in the absence of custom the principles of the Islamic Shari’a shall be applied."\(^{46}\)

The UAE recognizes both primary sources of law, such as codified federal and local laws and Shari'ah, as well as secondary sources law in the form of trade custom and practice.\(^{47}\) Generally,

\(^{46}\) Qatar, Law No. 16 of 1971, the Civil and Commercial Code, arts 1-4.

\(^{47}\) Federal laws, applicable throughout the UAE, are issued either by the federal Supreme Council or by federal ministers, whereas local laws are enacted by the rulers of the individual emirates and have effect only within that particular emirate. In the event of a conflict between a federal and a local law, the federal law takes precedence.
in determining an issue, a secular court is required to first give consideration to the provisions of any applicable federal law, and then any local law, and finally any provisions of Shariah law. The Shariah courts are required to apply relevant provisions of the codified law and then in the absence of any specified provision, the Shariah law will apply. The complex structure of the federal and local courts, compounded by the fact that the emirates of Dubai and Ras Al-Khaimah maintain their own judicial structures, can lead to some overlap of jurisdiction. However, the civil courts tend to accept the jurisdiction of Shariah courts in the absence of clear legislative texts and in personal status cases. The laws establishing the UAE federal supreme court and the federal courts of first instance require the courts to apply the provisions of the Shariah in the first instance:

"The Supreme Court shall apply the provisions of the Islamic Shari'a, federal laws, and other laws in force in the member emirates of the federation conforming to the Islamic Shari'a. Likewise it shall apply those rules if custom and those principles of natural and comparative law which do not conflict with the principles of the Shari'a."\textsuperscript{48}

In similar vein, the local courts are required to adhere to the following directive:

"The federal courts shall apply the provisions of the Islamic Shari'a, federal laws, and other laws in force, just as they shall apply those rules of custom and general legal principles which do not conflict with the provisions of the Shari'a."\textsuperscript{49}

All these positions would appear to give precedence to the Shariah over all other sources of law, and thereby, in effect, hold it as the principal source of law. As the courts would therefore appear to hold that any measure contrary to the Shariah would seem, by express provision, to be invalid, there arises the question of whether the laws establishing these courts contradict a

\textsuperscript{48} UAE, Law No. 10 of 1973, Establishing the Federal Supreme Court, art 75.
\textsuperscript{49} UAE, Federal Law No. 6 of 1978, Establishing the Courts of First Instance, art 8.
constitutional position which has established that the Shariah is but one source of law amongst others.\(^{50}\) Since the Supreme Court also acts as the federal constitutional court, and would thus rule on such question should it arise, it would presumably uphold the basic constitutional dictate.\(^{51}\)

Notwithstanding the fact they have retained separate judicial structures, the emirates of Dubai and Ras Al-Khaimah provide that their respective courts shall exercise their powers, in order of priority, on the basis of the laws in force in the emirate, on the provisions of the Islamic Shariah, on provisions of custom unless these contradict the law or public order or decency, and finally on the principles of natural justice, right and equity.\(^{52}\)

At the other end of the earlier-mentioned spectrum is Saudi Arabia. As the most conservative and fundamentalist Islamic state in the Gulf region, the principles of the Shariah still maintain a stronger hold in Saudi Arabia than in any other GCC states. The Shariah remains the fundamental basis of the legal system, and justice is administered according to the Shariah by a system of religious courts. While traces of a hybrid dual system can be found in parts of the Saudi legal order, with the existence of quasi-judicial administrative tribunals such as the Board of Grievances, the foundation of the Saudi judicial order is still wholly Shariah-based.\(^{53}\)

Having proclaimed the Holy Qur’an and the Sunnah as the basis of laws and the constitution, the Basic Law requires the Saudi courts to apply the rules of the Islamic Shariah, in accordance with what is indicated in the Holy Qur’an and the Sunnah, and then in accordance with the statutes of

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\(^{50}\) Ballantyne, above n 4, 58.

\(^{51}\) Ibid.

\(^{52}\) Law Forming the Dubai Courts of 1970, art 4; Law Forming the Courts of Ras Al-Khaimah, art 1.

\(^{53}\) See Saudi entry, above n 36.
the Kingdom provided they do not contradict the Qur'an or the Sunnah. Thus, the Shariah is seen as superior to any positive legal or judicial order, a provision which assumes a unified, Shariah-based judiciary, independent of the King. Since this form of judicial system was well established by the time Saudi Arabia introduced the Basic Law in 1992, the Basic Law does not so much establish a new judicial order as describe and codify the prevailing custom and practice.

Hence the Shariah courts have never lost their status as courts of general jurisdiction, and there is no special personal status court structure or personal status code as exists in the other GCC states under their dual or integrated systems. However, still within the Shariah judicial system, but operating at arms-length from the Shariah courts, are a number of quasi-judicial specialized tribunals which adjudicate on matters which are essentially administrative in nature, or on disputes between government bodies and the members of the public over government processes or decision-making (such as disputes over trademark registrations). Although the tribunals address matters which are governed by regulations which do not derive from the Shariah or are not easily covered by existing Islamic jurisprudence (fiqh), they are still required to ensure that they do not conflict with its provisions. One outcome of this structure is that the pure essence of the Shariah can be better preserved without the constant diluting effects of introduced secular laws.

While Ballantyne saw the Shariah as a golden thread running through the legal systems of the Gulf and the Arab world beyond, he also suggested that the key characteristic of the position of the Shariah within the legal and judicial systems of the Gulf was one of uncertainty. Twenty-five years on, the uncertainty is being progressively removed as the secularization and

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54 Saudi Arabia, Basic Law of the State, art 49.
55 The most significant of these tribunals, being the only one recognised in the Saudi Basic Law, is the Board of Grievances, which has a longer standing, higher public profile, and greater prestige than the other tribunals. The Board of Grievances and its role is discussed further in Chapter 5.2.
56 Ballantyne, above n 4, 64.
codification of the laws within each respective continues. With the possible exception of Saudi Arabia, and Kuwait in commercial matters, both of whom still enjoy comprehensive legislative prescriptions, albeit at opposite ends of the spectrum, the Shariah could still intervene to a lesser or greater degree in most jurisdictions. The unknown factor in this progression exists outside the legal framework – namely the resurgence of Islam domestically and its growth internationally. As it attracts increasing numbers of new followers, Islam may well have an as yet unforeseen impact on the domestic legal, judicial and societal structures which could stimulate something of a reversal of status towards its former enhanced status within the legal frameworks.

2.4 The Shariah and Intellectual Property Protection

The question of the concept of intellectual property and its recognition and acceptability in Shariah Law has been a subject of discussion among contemporary Muslim scholars, whose opinions differ about its acceptability in the Shariah. Intellectual property as an intangible object, being the product of one’s mental labours, is a recent concept not expressly mentioned in either the Holy Qur’an or in the Sunnah, or in the early Islamic jurisprudence. Accordingly, its acceptability or otherwise can only be inferred from the general principles laid down by the Shariah. As the views of Islamic jurists differ on the issue of the application of these principles to new situations, it follows that there are differences of opinion in relation to intellectual property.

Some contemporary scholars reject the concept of intellectual property on the grounds that the concept of ownership in the Shariah is confined to tangible objects only.\textsuperscript{58} They contend that there is no precedent in the Qur'an, the Sunnah or in the views of early Muslim jurists for an intangible object, such as knowledge, to be subjected to private ownership or to sale and purchase. Since it originates from, or owes its origin to God, knowledge and its expression in all their manifestations is the common heritage of all mankind.\textsuperscript{59} It cannot therefore become the exclusively property of one individual, and therefore cannot be prevented from being acquired by others. Accordingly, a concept of intellectual property which leads to a monopoly over knowledge by an individual can never be accepted by Islam.\textsuperscript{60}

On the other hand, other scholars have argued that intellectual property and its exclusive ownership is acceptable in the Shariah, since there is no express provision in the Qur'an or in the Sunnah which restricts the rights of ownership to tangible objects only.\textsuperscript{61} They point to several instances of intangible rights being accepted and maintained by the Shariah, and further instances where such intangible rights have been transferred to others for financial consideration. They contend that the concept of intellectual property does not restrict the scope of knowledge, since an intellectual property law does not prevent an individual from accessing or utilizing knowledge which enjoys some form of protection as offered by that law. An individual, for example, may still read another person's writings or utilize another's invention for his own benefit, even if permission may need to be first obtained or some form of payment made. On the contrary, the law prohibits a third party from gaining commercial advantage from the work without the permission of the individual who, by mental labour, produced the work and who is therefore most entitled to enjoy the commercial benefits that derive from it.

\textsuperscript{58} Ibid, 99.
\textsuperscript{60} Usmani, above n 57, 98.
\textsuperscript{61} See Amin, above 8, 36-7.
Jamar suggests that, in general, one should distinguish between areas in which Islamic law;

- has spoken with a relatively full voice, such as spiritual duties, personal status, and inheritance;
- has provided some general principles, but with many lacunae, as in contract law with its general injunction to fulfill all obligations and its general prohibitions on *riba* (usury) and indefiniteness; and
- is silent, such as in the field of intellectual property, where the ruler of the people is free to act provided that the laws promulgated do not run afoul of *Shariah* prohibitions and are consistent with *Shariah* principles.\(^62\)

He argues that although the *Shariah* does not specifically address intellectual property matters, it does not prevent Islamic-based governments from enacting or enforcing intellectual property laws.\(^63\) Since the protection of intellectual property is neither prohibited nor mandated in the *Shariah*, its legal protection is therefore fully consonant with the *Shariah*. In this sense, intellectual property law is no different to criminal law or commercial law in its relationship to the *Shariah*: once it has been created, the *Shariah* dictates that, as a law, it should be respected, and the intellectual property which it addresses should be protected.

Other proponents of this line of reasoning argue that ownership of intellectual property is justified on the basis of “economic gain through labour.” Intellectual property can represent the outcome of mental productivity or labour, and the person who produced it is entitled to its


\(^{63}\) Ibid.
exclusive use. As is the case with movable and immovable property, any creative idea of a person expressed in written, technical or graphical terms should be respected in Islam. While it may be intangible, intellectual property can be deemed to have a value which can be quantified in a market context, and therefore can be traded, transferred and transacted. This is further borne out by writings of Muslim jurists who deal with the prohibition of unjust enrichment, and the discouragement of certain types of commercial transactions such as those involving misrepresentation, fraud and trickery.

Since the views of the contemporary scholars differ on the concept of "intellectual property" and none of them is in clear contravention of the injunctions of Islam as laid down in the Qur'an and Sunnah, an Islamic state through its laws may freely adhere to either view. If it expresses this adherence by a specific law, its decision is binding on all, including those who may adhere to an opposing view. It is an accepted position in Islamic jurisprudence that the legislation of an Islamic state resolves the juristic dispute in a manner not expressly mentioned in the Qur'an or in the Sunnah. Accordingly, if the state promulgates a law in favor of the concept of intellectual property without violating any provision of the Qur'an and Sunnah, then that law must be binding on all its citizens. Those who have an opposite view can enunciate their position as an academic discussion, but they cannot violate the law in their practice.

In an Islamic state, every citizen enters into an express or a tacit agreement to abide by its laws to the extent that they do not compel compliance with anything that is not permissible in the

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64 According to the cardinal Islamic principle of annasu musallatuw als amwalihan - "People should be given recognition for the exclusive use of their property". Amwal (labour) applies equally to intellectual property outputs; see Amin above n 8, 36.
65 Ibid. See also Azmi, above n 59, 671.
66 See Amin, above n 8, 37.
67 See Azmi, above n 59, 672.
Therefore, if the law requires a citizen to refrain from an act which was otherwise permissible in Shariah, then the citizen must so refrain. Even those scholars who do not accept the concept of intellectual property do not hold that is a mandatory requirement of the Shariah to violate the rights recognized by this concept. While they hold that it is permissible in Shariah to publish a book without the author's permission, for example, they would accept that, if the law prevents them from performing this "permissible" act, they should refrain from doing so under their tacit agreement with the state.

According to Khoury, some commentators have gone so far as to contend that Islamic law comprises "enough inconsistencies to [generally] make predictability in certain matters a serious concern. The disagreements arising from these inconsistencies cut across sectarian lines and within the sects themselves. One classic example, referred to above, is the disagreement amongst Islamic schools of thought regarding the possession and ownership of intangibles. Khoury quotes a source that observes in the context of the debate on the position of Shariah law on intellectual property protection:

"The very nature of Islamic law as a jurist's law and differences of opinion even within individual schools means that it is not possible to provide firm answers to many of the questions that arise. As usual in the Shariah, which proceeds by way of example rather than principle, it is only possible to evaluate the general risks involved through isolation and investigation of the particular issues arising in [connection with the legal issue]."

68 Usmani, above n 57, 99.
69 Ibid.
70 Ibid.
72 Ballantyne, above n 4, 121-2.
It has been argued that the Shariah fails to keep abreast of the needs of increasingly complex economies and commercial practices.\textsuperscript{73} And this failure constitutes the most severe criticism against the functionality of the Shariah as a viable intellectual property regime. Consequently, there exists a trend away from Shariah law towards modern western law throughout the commercial laws in the Middle East. Indeed one commentator suggests that the bulk of commercial law in the Middle East reads as a direct transportation of European law, while the case law is perceived as a direct translation of western terminology.\textsuperscript{74}

This trend is also quite apparent with respect to intellectual property laws generally. The Islamic legal system provides basic principles and rules that promote the protection of intellectual property; however, in view of the lack of comprehensive legislation, the legal systems of the Middle East appear to opt for a direct adoption of western legal norms and standards of protection. Some commentators argue that in reality there is a gulf between concepts and practice in Islam, but their arguments, according to Khoury, ignore the following:

- Shariah includes clear norms and teachings concerning fair trade, and rejection of unfair competition;
- while the Shariah law is an ancient law which does not provide clear-cut answers to modern legal issues such as those surrounding intellectual property, the answers to these modern questions may still be formulated by religious scholars through reasoning based on the underlying Islamic principles;
- the Shariah is not the only legal system not to have a binding precedent system – the civil law system does not have one – and therefore this should not pose an

\textsuperscript{73} Khoury, above n 71, 193.
\textsuperscript{74} Ibid, 195.
insurmountable hurdle to the development of consistent and fair rules relating to intellectual property protection; 
- where conflict does arise it is not in respect of inner conflicts between the principles within Islamic law, but rather a balance between principles and conflicting interests.⁷⁵

In Khoury’s view, the Shariah does not directly address the issues relating to intellectual property rights, but the principles provided therein clearly indicate that Shariah does not stand neutral on the question of intellectual property protection. Where a state does not have specific statutes in place for the protection of trademarks, patents or copyright (which is now no longer the case in the GCC states), for example, the Islamic legal and general principles of equity, prohibition of unjust enrichment and of misleading and dishonest representation can still be applied, particularly in respect of passing-off and trademark infringement. Even where a state does possess and apply secular laws governing intellectual property protection, the traditional Islamic principles would still feature prominently since constitutionally no legislation can be contrary to the provisions of the Shariah, and the interpretation of the secular law should be aided and supported in such a way as to support the Islamic legal culture.⁷⁶ Where the secular law of the west and the Shariah are philosophically opposed on this point is that the secular law is designed to protect the exploitative interests of the intellectual property right holder, while the Shariah aims at condemning dishonesty by the deceiver and protecting the consumer.⁷⁷

Nevertheless, the lack of clear rules warrants intervention by Arab states and their governments to create or adopt a set of rules for the protection of intellectual property in their states. Even

⁷⁵ Ibid.  
⁷⁶ Amin, above n 8, 40.  
⁷⁷ Ibid.
where formal Arab laws are non-existent, many Arab states may formulate legal solutions through codifying existing Islamic law, or through enacting secular laws of foreign origin.

As the basis of intellectual property rights must be the principles of the Shariah, the standards concerning the availability, scope and use of such rights must be measured by their compatibility with the Shariah. Azmi suggests a number of emerging areas on intellectual property protection that would not satisfy this fundamental criterion and which therefore may result in conflict with religious tenets of the Shariah, notably patents arising out of biotechnological inventions. In so doing, Azmi draws a distinction between patents of animals and plants, and those involving human tissues, genes and body parts. The patenting of animals and plants would not be contrary to the Shariah in the sense of it being a direct confrontation to God’s power of creation. While we have domination over other creatures, this domination does not grant an absolute right to do anything we wish without limit. We must act in a sense of stewardship whereby we will ultimately be held responsible for our actions and their consequences. Islam still requires animals to be treated with due respect and with a lack of cruelty. Accordingly, experimentation on animals and patenting of the outcomes may be allowed under the Shariah provided there is a balancing of the relative harm to the animals and the benefits to mankind. In respect of modification and manipulation of biological materials, the position is not quite so clear. The Qur’an reiterates that the universe and all its creations are created in a sense of order and proportion according to a set of laws of nature, which have been established or given by God and which man cannot therefore change. On the other hand, it also recognises the use of science to improve what is in existence in nature for the benefit of mankind. The issue comes to a head in respect of transgenic animals used as xenografts, which Azmi suggests are beyond the limits

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78 Azmi, above n 59, 655-6.
allowed by the advancement of science and the Qur'anic bounds on man's stewardship over other creatures.\textsuperscript{79}

In respect of the exploitation of the human material, whether genetic material or body parts, Azmi argues such exploitation is \textit{haram}, (forbidden), according to the Qur'an.\textsuperscript{80} Classical scholars have long held that any transaction involving parts of the human body, whether by sale or donation, is \textit{haram} on the grounds that it demeans the human dignity and the place of man in the fixed order of creation and function of living things. In other words, it constitutes an interference with nature. But modern scholars accept circumstances in which transplantation and donation of body parts may be acceptable, namely:

- if transplant or donation constitutes the lesser of two evils, the benefits outweigh the risks, and if the potential donation does not cause harm to the donor;
- if the process of donation or transplant is assured of success; and
- if the transplant, donation or extraction does not impair the function of the human body.\textsuperscript{81}

By the same token, research using human tissue and genetic material which are easily replaceable may be allowed in Islam, for example, for the production of synthetic human tissues produced through cell cultures. However, this does not change the basic abhorrence of the commercialisation of human biological material, as this reduces human beings to mere matter. To this end, Azmi suggests that, while experimentation is allowed for therapeutic purposes,

\textsuperscript{79} Ibid, 666.
\textsuperscript{80} Ibid, 667.
\textsuperscript{81} Ibid, 667-8.
actual experiments should be regulated and certain processes for modifying the genetic identity of the human body, particularly for commercial gain, should not be allowed.\textsuperscript{82} 

Intellectual property is not the only area of law where the Islamic states need to promulgate civil or secular laws. Indeed, the \textit{Qur'an} is silent, or at least too vague on a wide range of commercial issues, including modern commercial transactions, financing arrangement, and limited liability commercial entities such as corporations. The \textit{Qur'an} itself addresses subjects of poverty, commercial transactions, honest dealings, testimony and association in a less extensive manner. In these fields the \textit{Qur'an} does not provide systematic rules, but rather exhorts the believer with words of wisdom, admonition, and guidance amounting to mandatory injunction. Islamic law recognises non-\textit{Shariah} laws and requires its citizens to respect them provided the laws do not run afoul of \textit{Shariah} and its prohibitions, and provided they are consistent with \textit{Shariah} principles.

\section{2.5 Conclusion}

While the \textit{Shariah} is prescribed as at least a major source of law, the increasing codification of the law, particularly in commercial relations, has acted to progressively reduce its former pre-eminence in proportion, and will likely continue to do so in the future. As commercial and business law continue to develop along western lines, the position of \textit{Shariah} will continue to be eroded, and the customary laws and remaining remnants of the common law systems will become extinguished.\textsuperscript{83}

\textsuperscript{82} Ibid, 667.

\textsuperscript{83} Ballantyne, above n 4, 66.
Despite the absence of formal rules within the Shariah on the issue of intellectual property protection, the Shariah has within its primary sources, basic principles that do not discourage such protection. The analysis of the underlying principles of fair trade, prohibition of unfair competition and the importance of private property lead to the conclusion that Islam does not stand idle on issues pertaining to intellectual property rights and their protection. Indeed, the underlying principles might appear to be not all that dissimilar to the rationales of intellectual property protection as perceived by modern western legal systems.

Hence, it could be argued that position of the Shariah is one that need not hinder the transplantation of intellectual property laws of foreign or western origin with great drama and conflict with the Shariah. The drama may arise when the application of the western based law conflicts with the principles of the Shariah. By incorporating in their intellectual property laws a qualification to the wholesale deference to western based criteria by at least requiring the practical application of the law to be not inconsistent with the Shariah, some GCC states have not resiled from this potential for conflict. While all GCC states exclude from patentability inventions which, amongst other conditions, are in violation of public order or morals, Oman’s patent law and the GCC patent regulation extend that provision to also exclude inventions which conflict with or violate the principles of the Islamic Shariah. The Saudi patent law includes a similar exclusion provision, but narrows it somewhat by confining the exclusion to inventions whose commercial exploitation (instead of the invention itself) violates the Shariah.

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84 Ibid.
85 Oman, Royal Decree No. 82/2000, art 2; GCC, Unified Patent Regulation 2000, art 2.
Thus Oman and Saudi Arabia reject the western liberal philosophy established by the US Supreme Court generalization that “anything under the sun can be patentable”.87

Even more subtle, yet of much greater application, is the reflection of the Shariah exhortation against the consumption of alcohol by Muslims, which ultimately becomes manifest in most GCC states in the prohibition of registration of trademarks for wines, spirits and alcoholic beverages.88 While the domestic intellectual property laws are generally silent on this matter, the universal practice is that such types of trademarks are not protectable.

However, one cannot assume that the bastion of Shariah preservation is not being continually eroded. The recent decision of the Saudi Board of Grievances to rule against a longstanding Shariah prohibition on the registration of trademarks depicting pictures or drawings of living animals, despite strident opposition from the traditionalists, illustrates how that erosion continues on a number of fronts.89 Some might argue that the Board ruling reinforces the argument that the Shariah is irrelevant in the modern context when it confronts the commercial/legal imperative. It could also be argued that it simply illustrates yet another anomaly pertinent to Ballantyne’s conundrum of a generation ago concerning the irresistible and the irremovable. The real test is in the interpretation and application of these respective legal imperatives in the streets and in the courts. It is in this context that one needs to look at the development of intellectual property regimes in the GCC states.

88 This subject is discussed in greater length in Chapter 4.3.6.
89 Board of Grievances Decision No. 9/1424 of 23 August 2003. In arriving at its decision, the Board ruled that the principles on which the original prohibition was based, was disputable, and, more importantly in this context, that the prohibition was against the public policy of Saudi Arabia and the interests of consumers and owners of the genuine trademarks. Reported in Abu-Setta & Co, Legal Attorneys Saudi Arabia, “Letter to Clients”, September 2003, available at www.abu-setta.com