LEGAL TRANSPLANTS IN THE SAUDI ARABIAN BANKING SYSTEM: THE EFFECTS OF WESTERN LAWS ON THE DEVELOPMENT OF THE SAUDI ARABIAN MONETARY AGENCY

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Legal transplants in the Saudi Arabian banking system: The effects of Western laws on the development of the Saudi Arabian Monetary Agency

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Abstract

This thesis examines the principal legal transplants that established the central banking system in Saudi Arabia, beginning in 1952 with the founding of the Saudi Arabian Monetary Agency (SAMA), which involved transplanting banking and fiscal rules from the Common Law jurisdiction of the USA into a nation whose constitution is the Qur'an. Other significant developments are the Banking Control Law 1966 and the establishment of trade courts on the established Egyptian model, which was originally transplanted from the Civil legal roots of France. The contribution of legal transplants in the establishment of Saudi Arabia as an internationally recognised financial centre is examined through theoretical perspectives, starting with Alan Watson's seminal 1974 work, extended rather than radically amended by later contributors to legal transplant theory. This study uses the PESTLE framework to analyse the functioning of legal transplants and their harmony with Islam in the evolution of the banking sectors of Saudi Arabia and other Islamic states. Malaysia and Turkey are noted as having successfully adopted Western banking institutions and their regulation, whereas Pakistan's experience is assessed as a failure. The success of transplants in Malaysia, Turkey, and many Gulf neighbours of Saudi Arabia is ascribed to what Örücü calls 'legal tuning' and Teubner labels 'autopoiesis'. Conversely, Pakistan's retention of selective Islamic principles is seen to have created schisms when Western banking was introduced. In essence, the analysis suggests that for a legal transplant to become established and grow, it must be nurtured in its new conditions. Thus, transplanting Western laws into Islamic society requires conditions of harmonisation and support, rather than impediments to its operation. Transplants succeed if they act as 'legal irritants' and have the support of the legal elite. Recommendations for the future of legal transplantation in the Saudi banking sector are made in light of this analysis.

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Declaration

I hereby declare that no portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Statement of Copyright

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Abbreviations

AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
AD	Anno Domini
ARAMCO	Arabian American Oil Company
BCE	Before Common Era
BCE	Before Common Era
BCL	Banking Control Law
BNM	*Bank Negara Malaysia*
CASOC	The California Arabia Standard Oil Company
EC	European Commission
EEC	The European Economic Community
EU	European Union
FFZ	financial free zones
GAP	General Agreement on Participation
GCC	*Gulf Cooperation Council*
IBA	The Islamic Banking Act
IMF	The International Monetary Fund
KSA	Kingdom of Saudi Arabia
OPEC	The Organization of Petroleum Exporting Countries
Pbuh	peace be upon him
SAC	Sharia Advisory Council
SAMA	The Saudi Arabian Monetary Agency
SATCO	the Saudi Arabian Maritime Tankers Company
SOCAL	Standard Oil of California
SRCB	The Saudi Commercial Board
UAE	United Arab Emirates
UK	United Kingdom
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
USA	United States of America
USSR	The *Union of Soviet Socialist Republics*
WTO	The World Trade Organization

Chapter One

Introduction

1.0 Introduction

This chapter introduces the aim of the study, informed by background context of the evolution of the banking environment of the Kingdom of Saudi Arabia (KSA). Particular emphasis is given to the forms and effects of the legal transplants that facilitated these developments. This discussion is divided into two main sections: the aims and rationale of the study (Section 1.1) and an overview of the chosen research methodology.

1.1 Aims and rationale

There is broad agreement among the predominant legal transplant theorists, such as Watson,[1] Orucu,[2] Legrand,[3] Kahn Freund,[4] and Teubner,[5] that a nation receiving a legal transplant (the donee nation) typically becomes more attractive to international trade and investment. This creates a strong incentive for governments to embark upon informed legal transplant programmes.

However, despite Western laws having been transplanted into countries operating under the jurisdiction of Islamic law, these legal transplants have met with varying degrees of success. In this context, the current thesis has been motivated by a perception that the Islamic banking field in Saudi Arabia has generally failed to offer terms that are competitive with those available to the private customers of Western, or 'conventional',[6] banks. This perspective has informed the research question addressed in the current thesis. It was developed from an academic experience in Sharia law.

Given that the legal approaches and instruments of a range of Western donors have been adopted into the systems utilised by Islamic nations, the original hypothesis focused on an

[1] Alan Watson, Legal Transplants: An Approach to Comparative Law (2nd edn, University of Edinburgh 1974). 21
[2] Esin Örücü, 'Law as Transposition' (2002) 51 International and Comparative Law Quarterly 205.
[3] Pierre Legrand, 'Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European & Comparative Law 111.
[4] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1.
[5] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 1.
[6] Muhammad Hanif, 'Differences and Similarities in Islamic and Conventional Banking' (2011) 2(2) International Journal of Business and Social Sciences 166.

examination of transplants from Western banking law. Having discerned that Saudi Arabia had been a recipient of banking law from the United States and other Western national sources, the following principal research question was developed:

> *How do the fundamental areas of common ground and divergences between Western banking laws and Sharia practices operate following legal transplants into the Saudi Arabian banking environment?*

In addition to examining the evolution of the transplant environment in Saudi Arabia from 1932 to 1974, this study compares other Middle Eastern nations with an Islamic heritage. These countries adopted laws from a range of jurisdictions that evolved from Romanic sources, as well as from the United States, which has essentially inherited a Common Law legacy. According to Hanigan and Martin (2012), the Harvard Law School introduced the concept of case studies in the 1890s, taking advantage of existing cases that are traditionally part of the practice of law.[7]

Adapting Hanigan's and Martin's model for researching complex problems, the following framework of classifications was used in developing the research methodology for this study:

1. Planning, scoping and definition
2. Exploration, synthesis and research design, using affinity diagrams
3. Generation of the concept of the research
4. Evaluation and refinement of the concept
5. Results and analysis
6. Clustering the notes with reference to the affinity diagrams to develop the research theme.

The outcome of these investigations was the design of the following supplementary research questions, which emerged from the application of the affinity diagram method:[8]

1. How does the development of Islam include elements that were originally transplanted from other nations?
2. To what extent is Saudi Arabia receptive to legal transplants?
3. How do transplants of Western banking law into Saudi Arabia harmonise with Islam?
4. How are these banking and related rules transplanted?

[7] Bruce Hanington and Bella Martin, Universal Methods of Design: 100 Ways to Research Complex Problems, Develop Innovative Ideas, and Design Effective Solutions (Rockport 2012). 28.
[8] ibid

5. How does Saudi Arabia compare with other states with an Islamic history, in terms of politics, economics, religion, and law?
6. How do Western transplants operate with the Islamic sources and guidelines that are woven into the fabric of Islam, in terms of governing the conduct of Islamic society and the lives of individual Muslims?

This thesis constitutes the first formal evaluation of the ways in which theories of the transplantation of Western laws align and conflict with the fundamentals of Sharia law. Existing research analyses how legal transplants operate in Islamic countries, but these studies do not examine the extent to which the transplanted laws interrelate with the fundamentals of Muslim life in accordance with Islam.

In addition to its religious, political, financial and economic social framework, Islam embeds Sharia law into the lives of all Muslims. This inclusivity differs from Western legal systems, in which the law is situated within the state machinery, with the maintenance of a clear separation between organised religion and the nation state. In the context of this thesis, such separations involve the creation of a secular state, with or without explicit reference to such separation. This is illustrated in the case of the United Kingdom, where a separation exists. However, it should be noted that the Queen of England is still the Supreme Governor of the Church of England and therefore appoints its senior clergy on the advice of the Prime Minister. In addition, the Church nominates twenty-six of its most senior bishops to seats in the upper house of the legislature, the Supremcourt.[9] The separation of church and state can be seen more clearly in Turkey, where the government replaced intimate Islamic involvement in the state to a more secular approach that removed its constitutional relationship with Islam. Another example of an explicit constitutional separation of powers can be seen in the United States, where clearly enunciated constitutional and legal barriers exist between church and state.

The research focus on Islam (or Sharia) does not posit that it constitutes a 'legal system' in the sense that one refers to a system of Common Law or Civil Law.

[9] Individuals may only succeed to the throne if they are 'in communion with' the Church of England, or are personally Roman Catholic or are married to a Roman Catholic. In addition, the ruling sovereign is responsible for the appointment of all 111 English bishops, many of the deans of cathedrals, and is responsible for all 700 parishes in England and Wales. Importantly, 26 of these bishops are ex officio 'Lords Spiritual', giving them the right to sit in the House of Lords, with the corresponding involvement in English Law.

In evaluating this difference, Scholars[10] discern that Islam is governed by the Five Necessities" (Ad-Dharooriyyaat Al-Khams) in addition to all the divine laws. These necessities are:

1. Religion
2. Life
3. Intellect
4. Lineage
5. Property (real and personal)

In grounding these Necessities within this thesis, they underpin the Saudi Arabian Monetary Agency (SAMA). This is illustrated with the SAMA being prevented by the religious basis of Islam from charging interest (riba) which is forbidden by all the governing sources of Islam. Whilst Islam accepts that people need to deal with property and exchange money for goods and services in order to live, the mind cannot be contaminated by, for instance, the greed that relates to extortionate credit bargains. With regard to progeny, these Islamic principles have bound Muslims throughout their generations and will pass to their descendents.

These established facts of Islam are recognised and protected by the Sharia and not open to any amendments through scholarly reasoning. In this vein, each of the Necessities constitutes an established fact, each of which is recognised by the Scholars.

In contrast to Islam, the UK is officially a Christian nation, with its legal system that is separate from its religious base. In illustrating this model, Christianity espouses that Moses came from the Mount with a tablet containing the Ten Commandments, two of which are that people shall not kill or steal. These are not legally binding rules in the sense of being part of a system of law. The legal rules are contained in statutes that are applied in the courts of law by judges whom are governed by the system of judicial precedent. In this vein, murder is prohibited and punished according to the Homicide Acts (1957, 2007, 2009); theft is legally organised according to the Theft Acts (1968, 1978, 2006). Thus, the legal system exists independently from the Church according to the English system of separation of powers[11].

[10] Ramadan, T. (2013). *To be a european muslim*. Kube Publishing Ltd. 86-87.

[11] Benwell, R., & Gay, O. (2011). The Separation of Powers. *Parliament and Constitution Centre, House of Commons Library*, *15*.

Therefore, Islamic 'law' cannot be compared with other legal systems, notably those that are classified as Common Law, such as those of England or Malaysia, or Civil Legal Systems that include France, Italy and Germany. Consequently, the hypothesis and the thesis does not depend upon a proposition that Islamic law constitutes a 'legal system'. The research focuses on legal transplants of Western laws into the Muslim state of Saudi Arabia. The study is not grounded in comparative aspects of different systems; it is concerned with how Western, secular laws from Christian societies fit into the fundamentalist Islamic state of Saudi.

The analysis of the introduction of Western laws into Islamic societies in this thesis is therefore extended to evaluate areas of conformity and dissonance. Specifically, this examination focuses on the adoption of Western banking law into Saudi Arabia, examining the challenge of integrating foreign principles, whilst ensuring the continuation of the Islamic identity of the nation and adherence to the associated mandatory rules within its society.

1.1.1 Scope of the research

The research assesses the principal theories of legal transplants, from the Code of Hammurabi in the eighteenth century BCE to contemporary schools of thought. The two main branches of modern thought on legal transplants are situated on an axis between the diametrically opposed positions of Watson,[12] who argues that transplants are 'easy', and Legrand,[13] who contends that they are 'impossible'. Other acknowledged philosophies have also contributed to the theoretical debate regarding the importance of the socio-political context of legal transplantation, as seen in the writings of Kahn-Freund[14] and Montesquieu.[15] In contrast, the contextual perspective has been re-evaluated by Teubner, who perceives transplants as 'legal irritations'.[16] Teubner evaluates the dynamic state of legal transplants and the existence of an endemic interconnection between law and other social systems by utilising the systems theories of Luhmann[17] and Maturana.[18] More recently, Örücü[19] expanded her historical perspective of legal change with the proposition that a donee nation

[12] Watson (n1) 91
[13] Legrand (n3) 111
[14] Kahn-Freund (n 4). 1
[15] Secondat, Charles-Louis, and Baron de Montesquieu. 'De l'esprit des lois.' XII, vii (1748).
[16] Teubner (n 5) 31-32
[17] David Seidl, Luhmann's Theory of Autopoietic Social Systems (LMU 2004).
[18] Humberto R Maturana and Francisco J Varela, Autopoiesis and Cognition: The Realization of the Living (D Reidel 1980).
[19] Örücü, (n 2) 215-218

should apply 'legal tuning' in order to embed the 'legal transposition'[20] from the context of the donor state to its own local context.

In this research, the perspective of donation from a Western host is modified to enable the comprehensive review of legal transplants into specific areas of the Middle East. This evaluation commences with a review of the academic analysis of the evolution of Islam from the perspective of the development of the rules of Sharia. Once a historical basis for Islamic law has been established, an evaluation is conducted into a number of selected countries (Malaysia, Turkey, Bahrain, and Pakistan) that have transplanted Western approaches into their banking systems. These focal nations have been chosen as offering valuable insights into the characteristics of states in terms of their success and failure in the transplantation of Western methods and laws. On the basis that legal transplants into Saudi Arabia comprise the core of this research, particular attention is given to the KSA in terms of the legal evolution of its banking sector. Within this direction of research, an assessment of Western banking law will include both Civil (Roman) Law systems and English Law from the perspective of its Common Law roots. Member States of the European Union (EU)[21] are governed by the precedence of EU Law in its areas of competence.

The empirical element of the thesis adopts a qualitative research approach, with the development of case studies informed by the assessment of theoretical literature, published empirical research and published works on national banking. In this context, comparisons are made between legal transplants into banking sectors of other Islamic nations. These sources are analysed to indicate dissonant and complementary factors that have arisen when Western banking rules are adopted into Saudi Arabia's national banking sector.

Analysis of the results assesses the schisms and nexus between Western and Islamic sources being subsumed between the 1930s and 1970s, which are four of the most significant decades in Saudi banking history. Overall, the results suggest that legal transplants of Western banking law into Saudi Arabia requires due consideration to harmonise with Saudi Arabia's Islamic roots, whilst also avoiding conflicts with Sharia law. The conclusions show how the Saudi Arabian banking sector might benefit from transplanting Western banking law into the Kingdom. Implications for future research and practice are then considered, followed by proposals regarding promising avenues for future legal transplant research.

[20] ibid

[21] The UK voted in a referendum to leave the EU in 2016; in the UK, this is popularly known as 'Brexit'.

1.1.2 Hypothesis

The formation of the hypothesis was predicated upon the assumption that the legal transplants of Western laws into a donee state should work in harmony with the existing legal system in the local context. This requires an analysis of the fundamental areas of common ground and divergences between central banking systems and regulation that were generally developed in the United States (US) and England, with the Sharia practices in Saudi Arabia. In particular, before a legal transplant is established, resolution is required of any emergent areas of conflict, especially in terms of what is permitted and prohibited by Islam. Accordingly, the following hypothesis is examined:

> *The legal transplant of Western banking institutions and their regulation cannot be introduced into Saudi Arabia and operate successfully unless endemic conflicts between the Common law and Sharia rules are assessed and resolved.*

In the following subsection on the aims and objectives of the research, 'Islamic' and 'Sharia' are used as synonyms.

1.1.3 Aims and objectives of the research

The theoretical element of this study reviews the principal schools of legal transplant theory on which to base an assessment of legal transplants of Western laws into the banking system of Saudi Arabia, with a focus on their impact on the Kingdom's central bank, the Saudi Arabian Monetary Agency (SAMA).

This study contributes to the state of knowledge in its resolution of the impact of Western socio-legal values when they are transplanted into Saudi Arabia, which is a fundamentalist Islamic nation with an emerging economy. It aims to achieve the following:

- To assess the role of Sharia Law in the governance of Islam.
- To review the role of adopted customs, practices and rules within Islam.
- To evaluate the characteristics of the legal transplantation of Western systems in the Islamic countries, with particular reference to Saudi Arabia.
- To establish criteria for selecting the Islamic countries to which Western laws have been transplanted for consideration in this thesis,.
- To contrast legal transplants enforced as a result of colonisation with those introduced voluntarily by independent nations.

- To formulate reasons for the success, partial success or failure of legal transplants from Western donors to specific Islamic donee countries.
- To propose how legal transplant theories relate to the selected Islamic nations regarding the success, partial success and lack of success of their reception.
- To review the success, partial success and failures of transplants of Western banking institutions and their regulation in Saudi Arabia.
- To develop a framework for successfully transplanting Western banking law into Saudi Arabia.

The study is grounded in the period from the 1930s to the 1970s, selected to enable an assessment of the establishment and growth of the Saudi banking sector during its transition from a market for itinerant Bedouin and other Middle Eastern tribes, prior to the founding of the Kingdom in 1934, to its recognition as an international banking force some four decades later.

1.2 Research methodology

The research methodology evolved from an initial intention to utilise a qualitative, mixed line of enquiry to one that was instead grounded in both theoretical and existing empirical sources. The reasons for this strategy are influenced by the nature of Islam, with its particular ethics and beliefs that inform its institutions and peoples, as expounded in the sections below.

1.2.1 Introduction

The context of how the methodology evolved is bounded by the limitations of this study as summarised in Section 1.2.3 below.

The original policy was to adopt a mixed-methods approach utilising questionnaires and semi-structured interviews, followed by the analysis of the results. However, the pilot phase was limited by those respondents who were involved in the selected eras (1930s–1970s) declining to participate or died. People currently working in the Saudi banking sector also refused to contribute, fearing that their involvement could appear to be either un-Islamic or disloyal to the Kingdom.

Nevertheless, the comparative aspect of the methodology endured, involving the relationship of the central bank and banking sector of Saudi Arabia with commercial banks. The evaluation considered Saudi Arabia's core similarities and differences in comparison to selected Middle Eastern Islamic regions (see Chapter 3).

The original research hypothesis was reviewed and amended to inform the research question guiding the entire investigation. This principal research question is supported by supplementary questions which function as organising devices for data collection and analysis. This methodology takes account of Mousourakis's experience of barriers to research being erected by the social reality of the environment that is the focus of the study. Mousourakis suggests that within any belief system, 'truth claims' are made when there are no plausible or credible propositions or statements.[22] He expands his theme to propose that is possible for the 'relevance and importance of the [research] topic within the substantive field'[23] to contribute to a body of research whilst relying on existing truth claims that are academically or empirically robust.

The following section explains the specific data collection and analysis approach and the limitations of this research, followed by a brief summary of the significance of the study.

1.2.2 Data collection and analysis

The development of the chosen methodological approach was informed by a review of legal transplant theories. This assessment of the theoretical foundations is reported in Chapter 2 and developed thereafter. Thus, Chapter 3 and Chapter 4 analyse the form and progress of legal transplants in specific Islamic countries, with the emphasis on Saudi Arabia. This evaluation of the historical influences from Common Law and Roman Civil Law on Western legal systems in turn represents an important factor in legal transplants from the West into the banking sector in Saudi Arabia. This line of reasoning is assessed in Chapter 5.[24]

Given that the literature review in Chapter 2 establishes that legal transplant scholarship exists within the overall subject of comparative law, its role is fundamental to the evolution of law. In this context, studies of legal transplants seek to analyse existing rules and to enhance their effectiveness, whilst informing the formulation of new ones.[25] In determining

[22] Mousourakis, George. 'Transplanting legal models across culturally diverse societies: a comparative law perspective.' Osaka University law review 57 (2010): 87-106.
[23] Hammersley, Martyn. What's wrong with ethnography?. Routledge, 2013. 73-74
[24] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), Oxford Handbook of European Private Law (OUP 2006); Edward J Eberle, 'The Method and Role of Comparative Law' (2009) 8 Washington University Global Studies Law Review 451; Shaheen Sardar Ali, 'Resurrecting Siyar through Fatwas? (Re) Constructing 'Islamic International Law' in a post-(Iraq) Invasion World' (2009) 14(1) Journal of Conflict and Security Law 115; Konrad Zweigert and Hein Kotz, An Introduction to Comparative Law (OUP 1998) 34; George Mousourakis, 'Transplanting Legal Models across Culturally Diverse Societies: A Comparative Law Perspective' (2010) 57 Osaka University Law Review 88.
[25] Mousourakis (n 22) 88-93

the relative success or failure of legal transplants in Saudi Arabia, the critical analysis in this investigation seeks to assess and process the following factors:

- The manner in which the laws were applied,
- The extent to which they are, or could be, meaningful and appropriate,
- The reasons and motivations for their adoption, and
- The degree to which such laws have potential to achieve their objectives.

As noted in Section 1.2.1, a pilot study was undertaken to assess the likely efficacy of interviewing respondents drawn from the administrative, political and banking environments of Saudi Arabia. Representatives from these sectors were therefore approached by telephone and email. While many individuals who were contacted expressed their willingness to participate in interviews, in practice all prospective respondents deployed apparent evasion tactics to prevent such interviews from taking place. Background investigations indicated that the basis of this policy was that the participants feared that they would be perceived by both their peers and their superiors as expressing views contrary to the maxims of Islam. The undertaking of confidentiality did nothing to dispel these persons' concerns.

This rejection of the initial approaches led to the methodology being reappraised. The result was the adoption of a case study approach, in line with Yin's proposition that case study research is an iterative process.[26] Thus, a stage-gate process was adopted to test the original hypothesis and to develop complementary research questions, supported by the use of the affinity diagram technique.[27] The resultant data was analysed by classifying it in tabular form, then grouping it and expressing the results as narratives addressing each research question.

Essentially, the data utilised in the study is literature-based, focusing on theoretical models of legal transplant in Chapter 2. An assessment of how the evolution of Islam relates to real-world phenomena with respect to foreign legal transplants being grafted onto or embedded into Sharia law is given in Chapter 3, Section 3.1 on the sources of Islamic Law. This is followed by a comparative study of legal transplants in Saudi Arabia and other jurisdictions.

[26] Robert Yin, Case Study Research: Design and Methods (4th edn, Sage 2009). Passim chapter 6
[27] Hanington and Martin (no 7). 28

These regions were selected in accordance with the following criteria:

- Islamic heritage
- The political status of Islam
- The history of dominion or independence.

Thus, two Islamic countries with successful legal transplant experience were chose, namely the secular state of Turkey and the Islamic nation of Malaysia. The experience of partially successful transplants is represented by the Gulf Cooperation Council (GCC) region, with Saudi Arabia being dealt with separately as the focus of this study. Finally, Pakistan was selected as an Islamic state where legal transplants have been unsuccessful.

Data was also derived from other documents, including the publications of official bodies such as the International Monetary Fund (IMF), academic journals, conference papers, and law reports.

1.2.3 Limitations of the research

This subsection considers the historical, geographical, disciplinary, and socio-political limitations of the present study. Its historical limitations are determined by the fact the state under study, the KSA, was founded in 1932, followed by the establishment of its oil industry (principally in the form of SOCAL/Aramco) in 1933 and the creation of its central banking system, SAMA, in 1952. The research also includes the 1960s and 1970s, when the Saudi Arabian banking sector was affected by important legal transplants. The research thus spans the years from 1932 to 1974, but there were no living persons who could be approached to provide evidence of activities during the eras of King Abdul Aziz (1932-1953), King Saud (1953-1964) or even King Faisal (1964-1975). Furthermore, many important individuals involved in the development of the Saudi oil and banking sectors were either incapable of participating or had died before this research began.

Studying this topic from the United Kingdom raised a number of insurmountable geographical barriers. Primarily, the cost and time involved in travelling between the United Kingdom and Saudi Arabia were exacerbated by the vastness of Saudi Arabia and the corresponding difficulty of obtaining data from across the Kingdom.

In terms of disciplinary constraints, the lack of academic journals published in the Middle East, including Saudi Arabia, made it necessary to rely almost entirely on Western sources for the literature review and other assessments undertaken during the research programme.

The constraints posed by confidentiality are particularly egregious in the context of Saudi Arabia, where the prevailing perception is that the criticism of any matters within the Kingdom is inherently anti-Islamic, heretical, and thus forbidden. This meant that empirical methods of data gathering were inappropriate because of ethical and confidentiality concerns. The ethical constraints were imposed by potential concerns regarding the perception that the comments of respondents might be damaging to Islam. This is closely related to the structure of Saudi society, which caused respondents to fear for their employment or social prospects. As a consequence of this position and obfuscation, certain promises were made regarding access to interviews or primary data, but these were never fulfilled. Despite representations being made by potential respondents, socio-political sensitivity caused gatekeepers to prevent primary access from being granted in practice.

As a consequence of these four areas of limitation, the current research is necessarily founded on a qualitative approach, which follows Yin's experience of qualitative research yielding rich sources of data.[28] The use of a wide range of sources of information is supported by the recommendations of Hammersley and Atkinson (2007) regarding research methods in ethnography. These schools of methodological thought agree that the priorities and responses of participants are inherently influenced by changes to the external environment, which means that the research environment can inhibit empirical study.[29] In such cases, it is held that a literature review supplemented by comparative analysis can constitute a sufficiently rigorous and informative research methodology.

1.3 Outline of the thesis

This thesis is organised into six chapters, the aims and significance of which are briefly outlined here.

This introductory chapter has sought to provide a succinct overview of the motivation, rationale and structure of the thesis. It outlines the key aim of the current work, namely, to review the relevant literature in this field and to conduct research that offers a deeper understanding of the conflicts between Western banking laws and the principles of Islam.

Chapter 2 then considers the development and progress of legal transplant theory, examining the application of theoretical approaches to comparative legal study in the specific context of the term 'legal transplant'.[30] A coherent review of the salient legal

[28] Yin (n 26) passim Chapters 1, 2
[29] Hammersley, Martyn, and Paul Atkinson. Ethnography: Principles in practice. Routledge, 2007. 1-2.
[30] Watson (n 1) 21-23; Legrand (n 3) 114.

transplant theories requires a definition of this term and its core objectives, such as 'the moving of a rule or system of law from one country to another, from one people to another'.[31] The theory tends to focus on 'not just the statutory rules – [but the] institutions, legal concepts and structures that are borrowed, not [the] spirit of the legal system'.[32]

The literature review begins with an overview of the historical development of legal transplant theories, from the importance of Hammurabi's legal code in the ancient era to applications of legal transplant theory in more modern contexts. This is followed by a review of the principal schools of thought on this topic.[33] The principal debates surrounding contemporary legal transplant theory began in the West in the 1960s and the discussion therefore focuses on the leading texts from this era. The two opposing ends of the theoretical spectrum are represented by the assessments of the works of Watson,[34] who holds that legal transplantation is relatively straightforward, and Legrand,[35] who argues that it is impossible. The review also covers analyses of acknowledged legal transplant theories that are situated between these two positions. These include the theories of Montesquieu, Kahn-Freund, Teubner, Örücü and Sacco. The chapter concludes with an analysis of legal transplant theory, positing that Watson's pioneering work from the 1970s continues to underlie the theories that have followed, albeit that later theorists tend to agree or disagree with Watson's position. Work in progress concerns the verification of references in Sacco's work and a final analysis of the literature in the context of the thesis.

Having reviewed legal transplant theory, **Chapter 3** provides an examination of the most important sources and jurisdictions that have experienced legal transplants. In addition, the sources of Islamic (Sharia) law are introduced and its historical and contemporary relevance is assessed with respect to legal transplants. An evaluation is then provided of the legal transplantation of finance and banking laws from Roman Law and Common Law donors in the West to nations which have adopted Islamic legal systems. Comparisons are made between these transplant models and propositions offered in relation to the core study of this thesis.

The legal transplant of Western banking law into Saudi Arabia necessarily involves the reception of Western law into an Islamic state. For this reason, an assessment is made of

[31] Watson (n 1) 21.

[32] Watson, 'Legal Transplants and European Private Law' (2000) 4(4) Electronic Journal of Comparative Law <http://www.ejcl.org/ejcl/44/44-2.html> accessed 07/04/2017

[33] JW Cairns, 'Watson, Walton, and the History of Legal Transplants' (2012) 41 Ga. J. Int'l and Comp. L. 643

[34] Watson (n 1) 21-23.

[35] Legrand (n 3) 114

countries that have had similar experiences, resulting in the successful, partially successful or entirely unsuccessful operation of the transplanted law. The countries that have experienced successful transplants are Malaysia and Turkey, countries that are diametrically opposed in their contemporary political foundations, with Malaysia having a colonial legacy and a continued adherence to the primacy of Islamic law, whereas Turkey is a secular state where religion is sharply defined as being purely a private matter. Bahrain is also assessed in terms of the role played by its legal transplants in achieving its position as a Sharia banking centre. Finally, the example of Pakistan, with its endemic corruption and systemic governmental failures, illustrates a failure to implement transplanted law at the strategic and operational levels. Along the axis of success and failure, partially successful legal transplants have been achieved by some GCC countries, as well as Bahrain.

The overall review of Islamic sources and the analysis of legal experiences enable this chapter to contribute to constructing definitions of legal transplants; it also supports insights into factors that influence the relative success of their adoption. This classification is systematically applied in the research methodology of the chapter.

Chapter 4 concentrates on the transplantation of laws from the secular, Western Romanic and Common law jurisdictions into the banking environment of Saudi Arabia. As with many developing nations, Saudi Arabia seeks to attract, increase and retain foreign investment, which has led to increased sympathy towards and adoption of Western banking law into its Islamic legal structure. Given this position, the chapter reviews salient sources of Saudi Arabian law, in terms of both Islamic Law and its transplanted Western statutes, governance, and dispute resolution mechanisms. The subject of Sharia banking is then examined in greater detail, focusing on the relationship between Sharia and legal transplants, supplemented by details of the legal structure, sources, rules, and governance of Sharia banking in Saudi Arabia. This is supported by an examination of the contributions that foreign powers have made to the construction of the financial infrastructure of the Kingdom of Saudi Arabia, particularly from the United States and the United Kingdom. The chapter concludes with an overall analysis of aspects of the Saudi Arabian legal and financial services before discussing the relevance of assessing 'Western law', which is the focus of the following chapter.

Chapter 5 provides a focused comparison of the laws of Saudi Arabia and the transplanted Western laws in the specific context of Sharia banking, with an emphasis on identifying and discussing the key areas of fundamental similarity and disparity.

This thesis concludes in **Chapter 6** by proposing an initial framework to ensure the successful introduction of secular, Western banking law into the Islamic state of Saudi Arabia. In so doing, the relationship between the results of the thesis and the research question and hypothesis are clarified and situated within the context of the conclusions drawn from the literature review. A brief discussion is provided of the lessons learned from the research and the implications for future research and practice, with specific reference to the theory of legal transplants.

Chapter Two

Legal Transplant Theory

2.0 Introduction

The term 'legal transplant'[1] describes a theoretical approach to comparative legal study. This chapter considers the development and progress of legal transplant theory. In order to facilitate this discussion, it is first important to define what is meant by 'legal transplant', as well as to outline its core or primary objectives. A working definition of a legal transplant is 'the moving of a rule or system of law from one country to another, from one people to another'.[2] The theory tends to focus on 'not just the statutory rules – [but the] institutions, legal concepts and structures that are borrowed, not [the] spirit of the legal system'.[3]

This comprehensive review of literature begins with a discussion of the historical development of legal transplant theories, before turning to an analysis and systematic review of the principal schools of thought on this concept.

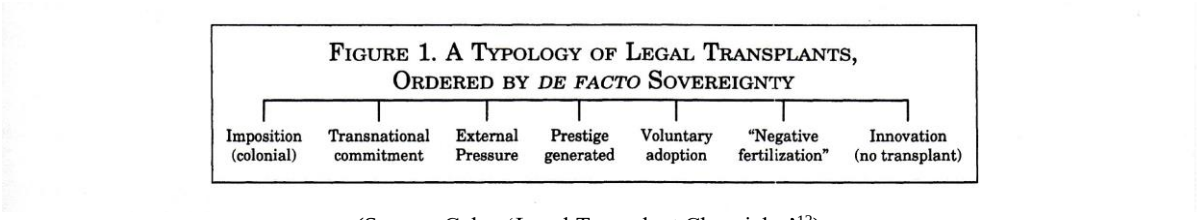
2.1 Historical development of legal transplant theories

Perhaps the earliest evidence of the phenomenon of legal transplantation can be found in the Code of Hammurabi, an ancient law code written during the seventeenth century BCE,[4] when the term 'legal transplant' had not yet been coined. According to Watson,[5] the Code functions to illustrate the reality of legal transplant by means of the similarity between the laws of Hammurabi, Exodus and Eshnuna. These similarities relate to the formulation and substance of the rules in each of the three codes.[6] A historical analysis of legal transplant theory[7] indicates that Hammurabi's legal principles were later incorporated into Roman law during the eleventh century AD. The influence of Hammurabi can be traced from Roman

[1] Alan Watson, Legal Transplants: An Approach to Comparative Law (University of Georgia Press 1974); P Legrand, 'Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 112.
[2] Watson (n 1) 21
[3] A Watson, 'Legal Transplants and European Private Law' (2000) 4(4) EJCL <http://www.ejcl.org/ejcl/44/44-2.html.07/04/2016> accessed 06 June 2017.
[4] Watson (n 1) 23
[5] Ibid.
[6] Ibid.
[7] Kenneth Pennington, 'Roman and Secular Law in the Middle Ages' in FAC Mantello and AG Rigg (eds), Medieval Latin: An Introduction and Bibliographical Guide (Catholic University Press of America 1996) 254-266

law through to the European Civil Code,[8] which functions as the basis of a number of contemporary legal systems in many mainland European countries.[9] In the meantime, Sharia law had been in development since 1437, as an inclusive system that accepted the rules of other religions provided that they did not conflict with its own principles. This clearly illustrates that the history of legal transplants transcends Judeo-Christian legal systems to include radically different systems, such as those of Islam. Sharia law and its principles are reviewed in detail in Chapter 3.

There is a diverse body of work that analyses legal transplants. However, scholars such as Miller[10] have stated that the field lacks clarity of classification in order to enable transplants to be properly analysed. It has therefore been proposed that research should map the existing frameworks. Miller also argues that as legal transplant literature focuses on post-colonial plantings of complete legal systems, future research should consider the viability of applying existing frameworks to contemporary types of states. This theme of rationalisation is supported by Nelken,[11] who advocates research to construct a predictive framework, based on the collection of detailed information about recent transplants from their diverse political and social perspectives, rather than focusing exclusively on their legal constituents. In promoting this theme, Cohn[12] acknowledges Miller's typology structure in its contribution to multi-faceted rather than binary distinctions. Miller's 'Typology of Legal Transplants Ordered by De Facto Sovereignty' is illustrated below:

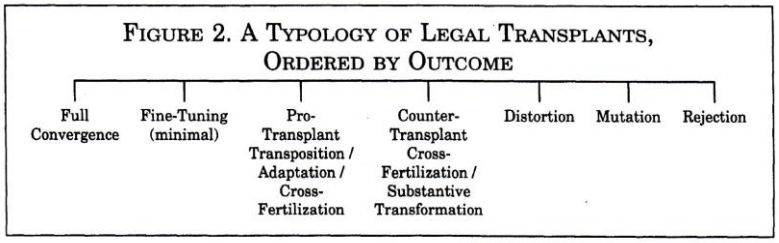


(Source: Cohn, 'Legal Transplant Chronicles'[13])

[8] passim, also known as the Code Civil or Code Napoléon (1804).
[9] Jan M Smits, 'Comparative Law and its Influence on National Legal Systems' in Mathias Reimann and Reinhard Zimmermann (eds), Oxford Handbook of Comparative Law (OUP 2014) 3.
[10] Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 American Journal of Comparative Law 839.
[11] David Nelken, 'Comparativists and Transferability' in Pierre Legrand and Roderick Munday (eds), Comparative Legal Studies: Traditions and Transition (CUP 2003) 329.
[12] Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58(3) American Journal of Comparative Law 583.
[13] Cohn (n 12). 592.

This initial phase of Miller's analysis focuses on the **forms** of adoption, which can be categorised according to the extent to which the donee is free either to adopt wholesale or to adapt the legal system of the donor.

The second phase of Miller's classification analyses the **outcome** of the passage, rather than the transfer itself, as illustrated below:



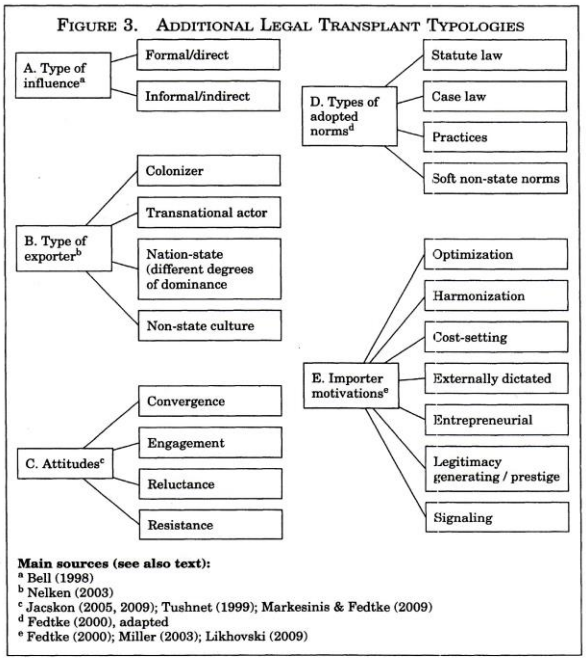
(Source: Cohn, 'Legal Transplant Chronicles'[14])

According to Miller, the outcomes resemble those of a culinary recipe. This is resonant of Örücü's[15] analogy of legal transplants as preparing cuisine. Furthermore, the transplant models of both Miller[16] and Örücü[17] span the spectrum from ostensibly simple donations to highly complex ones.

Miller's analyses culminate in his typological model, in which he proposes the existence of additional legal transplant typologies in recognition of the contribution of a substantial body of scholarship.[18] In essence, Miller suggests that external influences overflow onto the transplanted law and that this 'spill-over effect'[19] influences the adoption of the law along both informally and formally recognised routes. He also proposes that contemporary legal transplants are complex, as they are typically a representation of ingredients from more than merely one donor and one donee state. It is suggested that transplants into the Middle East are exemplars of this complexity.

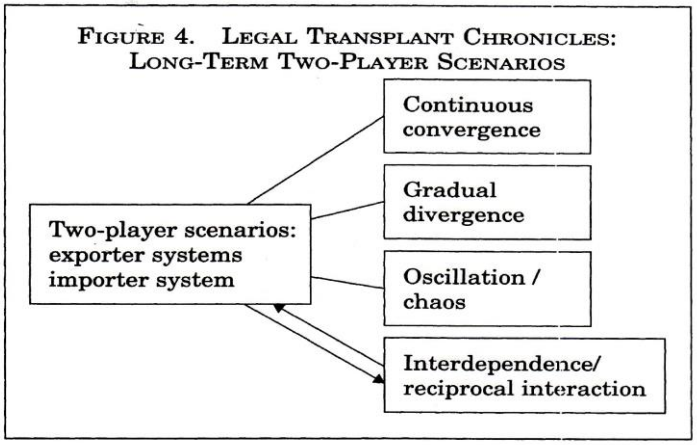
[14] Cohn (n 12) 592-593
[15] Esin Örücü, 'A Theoretical Framework for Transfrontier Mobility of Law' in R Jagtenberg, E Örücü and A Roo (eds), Transfrontier Mobility of Law (Kluwer Law International 1995).
[16] Miller (n 10) 845
[17] Örücü (n 15) 13
[18] Nelken (n 11) 7; J Bell, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe' in Jack Beatson and Takis Tridimas (eds), New Directions in European Public Law (Hart 1998) 147; Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108(6) Yale Law Journal 1225; Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 HLR 109; Vicki C Jackson, Constitutional Engagement in a Transnational Era (OUP 2013); Basil S Markesinis, Engaging with Foreign Law (Bloomsbury 2009); Assaf Likhovski, 'Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling' (2009) 10(2) Theoretical Inquiries in Law 619.
[19] Gordon Anthony, UK Public Law and European Law: The Dynamics of Legal Integration (Bloomsbury 2002). 124

Cohn acknowledges Miller's contribution to the clarification of the understanding of the legal transplant vista.[20] However, he emphasises the complexity of the transplant horizon in this field of study. Both Cohn and Miller seem to concur with Teubner,[21] who perceives contemporary legal transplants as being complex adaptive systems. These dynamic examples of Teubner's version of autopoiesis encompass transfers of individual areas of law to entire systems; recognise elements of time and space, as well as diverse sources of internal and external influence; and enable the adoption of a long-term perspective. This last factor conforms to the transposition theory devised by Örücü,[22] as well as to her concept of local tuning. In his support of the establishment of a predictive tool to enable the assessment of legal transplants, Cohn undertakes three further modifications of Miller's framework, as illustrated below:



(Source: Cohn, 'Legal Transplant Chronicles'[23])

[20] Cohn (n 12) 593,594
[21] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61. 31-32 Modern Law Review 11; Francis Snyder, The Europeanisation of Law: The Legal Effects of European Integration of European Law (Hart 2000) 243; Peter Hall and David Soskice (eds), Varieties of Capitalism (OUP 2001) 417.
[22] Esin Örücü, 'Law as Transposition' (2002) 51(2) International & Comparative Law Quarterly 205. 210.
[23] Cohn (n 12) 594



(Source: Cohn, 'Legal Transplant Chronicles'[24])

Cairns's evaluation of the evolution of legal transplant theory saw the advance of scholarly work on legal transplant theory.[25] The origin of these ideas can be found initially in the work of Frederik Parker Walton in 1927,[26] then again in the 1960s and 1970s, particularly in the works of Watson,[27] Legrand,[28] and Kahn-Freund.

A more recent body of research has endeavoured to analyse the relative successes and failures of legal transplant phenomena around the world. For example, Edwards investigated the failure of the World Bank's transplant programme during the 1970s and 1980s,[29] utilising the two different frameworks provided by Watson and Legrand. This approach was supplemented by reference to other recognised bodies of work, such as the theories of Teubner and Kahn-Freund (Sections 2.2.3.3 and 2.2.3.4). The significance of these pioneering works has been acknowledged by more recently developed schools of thought, such as those of Dean[30] and Cuniberti.[31] Established legal transplant theory has also been subjected to criticism, such as by Alshorbagy, who cites the failure of legal transplantation law to regulate takeovers in Egypt.[32]

[24] Cohn (n 12) 600
[25] John W Cairns, 'Watson, Walton, and the History of Legal Transplants' (2012) 41 Georgia Journal of International and Comparative Law 637.
[26] Frederik Parker Walton, 'The Historical School of Jurisprudence and Transplantation of Law' (1927) 9 Journal of Comparative Legislation and International Law, 183 – 192.
[27] Watson (n 1) 21
[28] Legrand (n 1) 111
[29] Gail Edwards, 'Legal Transplants and Economics: The World Bank and Third World Economies in the 1980s – A Case Study of Jamaica, the Republic of Kenya and the Philippines' (PhD Thesis, University of London 2007) 4
[30] Meryll Dean, 'Legal Transplants and Jury Trial in Japan' (2011) 31(4) Legal Studies 570.
[31] Gilles Cuniberti, 'Enhancing Judicial Reputation through Legal Transplants: Estoppel Travels to France' (2012) 60(2) American Journal of Comparative Law 383.
[32] Ahmad A Alshorbagy, 'On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law' (2012) 22 Indiana International and Comparative Law Review 237.

In 1974, Watson proposed the Romanian constitution[33] as an example of a legal transplant from the Belgian constitution of 1831. In tracing the history of legal transfer into the twentieth century, the more recent analysis by Watson proposes that 97% of the 'Book Volume 2 on Obligations in the new Armenian Civil Code' is a verbatim transfer, albeit in Russian, from the civil code that was enacted in the former Soviet Union.[34]

In general, the legal transplant approach to comparative law is classified under two headings, which represent diametrically opposed theoretical branches of study. At one end of the spectrum, Legrand opposes the concept that a body of law can be effectively transplanted to the existing rules or culture of another country, whereas Watson asserts that legal transplants from donor nations have been successfully adopted by other states and that they have operated in recipient nations for protracted periods.

The fulcrum of this review is the establishment of legal transplant theory during the twentieth century, which occurred with Watson's pioneering work, Legal Transplants: An approach to comparative law.[35] Many commentators have noted the importance of Watson's scholarship in developing the theory.[36] In the wake of his seminal work, other recognised transplant theorists have also contributed to the legal transplant debate.

This chapter reviews the principal schools of thought on legal transplant theory. The structure of the chapter is informed by Watson's theory of legal transplant, with other branches of legal transplant theory being distinguished and discussed. Other acknowledged schools of thought, notably those of Kahn-Freund[37] and Montesquieu, also contribute to the theoretical debate with their overall concurrence on the importance of the socio-political context of legal transplantation. Teubner has made an important contribution to the theory, emphasising the need for clarity in understanding the dynamics of legal transplant and examining the extent to which interconnection exists between law and the political base. In his contribution, Teubner explores the law's 'binding arrangements'[38] with the social system in his theory of 'legal irritations'.[39] Meanwhile, Sacco refers to 'legal formants'[40] in his

[33] ibid.
[34] Alan Watson,(1998). Ancient Law and Modern Understanding, Athens and London; The University of George Press. 48
[35] Watson (n 1) 3
[36] Cairns (n 25) 639 ; TMH Do, 'Evaluation of the Applicability of Common Law Approaches to Precedent in Vietnam' (PhD Thesis, University of Wollongong, 2011). 62
[37] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) Modern Law Review 1.
[38] Teubner, Gunther. (1998). Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies. The Modern Law Review. 61. 12
[39] Teubner (n 21) 11
[40] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39(1) American Journal of Comparative Law 1

theory that extends the ambit of legal transplant models. His assertion that few legal transplants are innovative is made with reference to Grazidei[41] and has much in common with Watson's[42] theory that cross-border transmissions are the historical sources of legal developments. Örücü (1999)[43] also broadly concurs with Watson, whilst adding the belief that a degree of 'legal tuning' is required to embed what she terms 'legal transposition'.[44]

In essence, this review proposes that Watson's theory is the fulcrum of the legal transplant debate, with other principal branches of transplant theory revolving around his pioneering work. This concept is illustrated in Diagram 2.1:

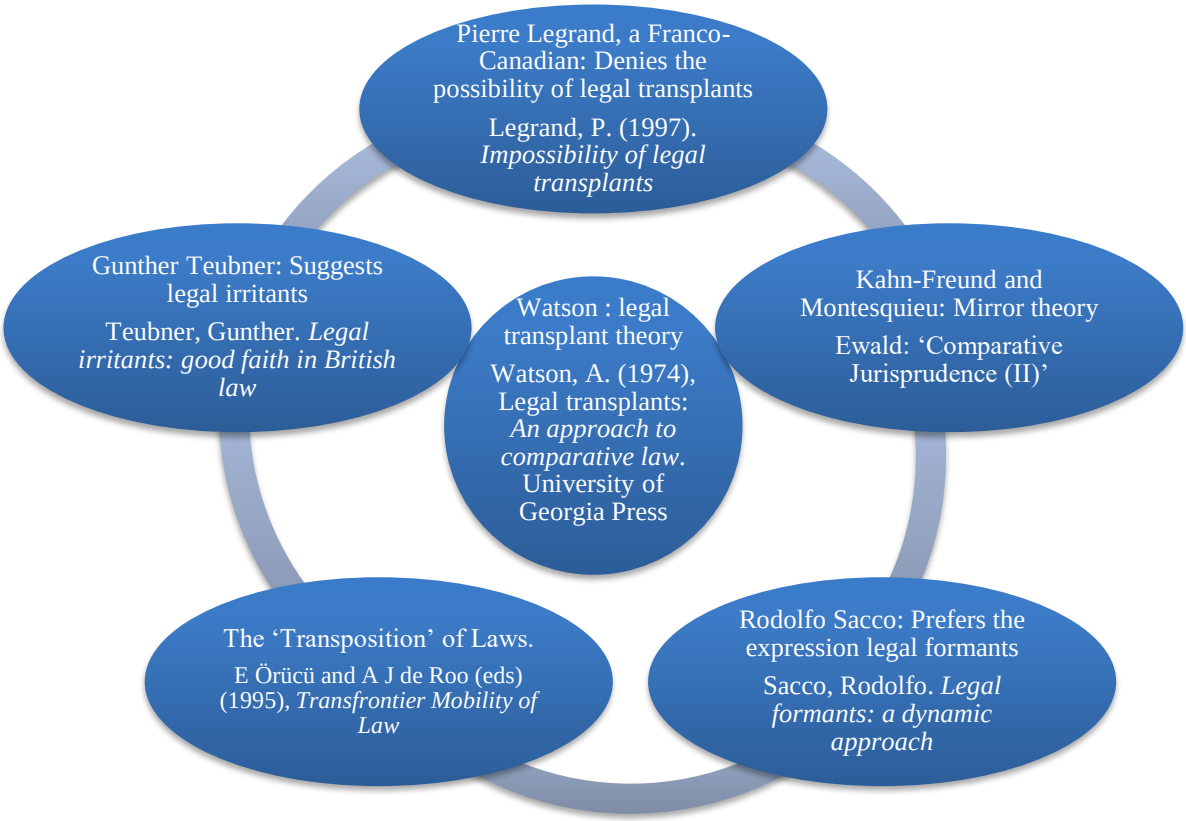


Diagram 2.1: Watson's pivotal role in legal transplant theories

[41] Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (OUP 2006).
[42] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39(1) American Journal of Comparative Law 1.
[43] Örücü, Esin, Hans Ulrich Jessurun d'Oliveira, and Wendy Maria Schrama. Critical comparative law: considering paradoxes for legal systems in transition. Vol. 59. Deventer: Kluwer, 1999.
[44] Örücü (n 22). 205-210

2.2 Principal legal transplant theories

2.2.1 Watson's theory

With the publication of his seminal work in 1974, Watson became widely considered the founding scholar of the 'transplant camp'.[45] Legal transplant theory developed during the twentieth and twenty-first centuries. As part of that process, Watson established the historical comparative law school during the 1970s,[46] from which it has evolved in the decades since. Watson found that legal transplants had occurred since Roman times.[47] Xanthaki writes that Watson 'is the guru of transplants'[48] and recognises the perspicacity of his analysis that transplants can be successful, irrespective of whether or not similarities exist between the donor and the host. Nevertheless, in expanding the theme of differentiation, with reference to evidence of the continual percolation of Roman legal principles into the Common Law, she suggests that Watson's refusal to acknowledge common ground between Common Law and Roman law can be seen as an oversimplification.[49]

In assessing his theory, Halperin suggests that Watson most likely concluded that foreign transplants are the main mechanism driving the evolution of private law because of the progression of English law and the Roman law roots of continental Europe.[50] This proposition is based upon the fact that legal rules are often largely autonomous and thus may be relocated to a context other than their original host.

The development of Watson's body of work has also been evaluated and critiqued by Cairns,[51] praises Watson's contribution to legal transplant theory. Cairns assesses the ways in which Watson agrees or disagrees with the works of other scholars in the field. Cairns refers to Legrand as Watson's principal critic, with Cairns's principal source being Kahn-Freund.

In expanding upon his own proposition almost two decades after its first publication, Watson considerably developed his own perspective. In 1996, he wrote that 'the act of borrowing is usually simple. To build up a theory of borrowing, on the other hand, seems to be an

[45] Cohn, Margit. "Legal transplant chronicles: the evolution of unreasonableness and proportionality review of the administration in the United Kingdom." *The American Journal of Comparative Law* 58, no. 3 (2010): 587.
[46] Watson (n 1) 1
[47] ibid 22
[48] Xanthaki, Helen. "Legal transplants in legislation: Defusing the trap." *International & Comparative Law Quarterly* 57, no. 3 (2008): 659-673.
[49] ibid
[50] Halpérin J-L, 'The Concept of Law: A Western Transplant?' (2009) 10(2) Theoretical Inquiries in Law 351
[51] Cairns (n 25) 637

extremely complex matter'.[52] This was the first time that an effectively distinction was created between the theoretical and practical aspects of legal transplant.

In his analysis of Watson's considerable body of work, Ewald refers to its 'logical complexity'[53] and divides its content into four main theses: the comparative law thesis, the Roman thesis, the transplant thesis, and the insulation thesis.

2.2.1.1 The comparative law thesis

The comparative law thesis concerns the examination of foreign law, supplemented by an assessment of the relationship between law and society. It is subdivided into the actual relationships thesis, on how real-world phenomena link one system of legal rules with another, and the legal history thesis, which has Roman law and its evolution as the focal point of study.

The comparative law thesis is the foundation for the next thesis, while the following three theses form the core of Watson's theory in addition to his refuting mirror-theories.

2.2.1.2 The Roman thesis

The Roman thesis is subdivided into strong and weak variants. The former holds that Roman law is the core of modern civil law systems from which everything else follows,[54] whereas its weak counterpart merely states that Roman law is necessary to assess the differences between the Common Law and the Civil law.

The Roman Law thesis comprises the empirical core of Watson's contention with the various mirror theories that originated with Montesquieu,[55] who concluded that culture is reflected by national systems, most notably in law and politics. In terms of legal transplant theory, Kahn-Freund[56] acknowledged Montesquieu's thesis, which he embodied in his legal transplant theory.

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[52] Watson, Alan. "Aspects of Reception of Law." *The American Journal of Comparative Law* 44, no. 2 (1996): 335.
[53] Ewald, William. "Comparative Jurisprudence (II): The Logic of Legal Transplants." *The American Journal of Comparative Law*43, no. 4 (1995). 502
[54] Watson, Alan. *Law making in the later Roman Republic*. Clarendon Press, 1974.
[55] Charles Montesquieu, 'De l'Esprit des Lois' in Roger Caillois (tr), Oeuvres Completes (Gallimard 1951).
[56] Kahn-Freund (n 37) 6

2.2.1.3 The transplant thesis

Ewald explains that Roman Law has been transplanted into the legal systems of many states of Continental Europe and continues to form the foundation of their current legislature. This theme of borrowing can also occur within a country, when legal changes arise from the transplantation of an existing rule from one area of law as a new rule in a different area of law in the same jurisdiction.[57] An example of this is provided by Kahn-Freund,[58] in his analysis of the evolution of the role of good faith in contracting across the EU, which he utilises as an example to show the potential mutation of a rule or principle to reflect its particular cultural domains.

2.2.1.4 The insulation thesis

Watson assesses the evolution of the Civil Law as the result of a purely legal history, without reference to social, political, or economic factors. Ewald again divides Watson's insulation thesis into two versions, strong and weak. According to the strong insulation thesis, in considering jurisdictions outside the Western world, rulers are normally indifferent to the nature of the legal rules in operation.

Ewald perceives that Watson's actual perspective favours a more subtle position than merely stronger or weaker interpretations of this theory. Instead, according to Ewald, Watson suggests that in reality, while laws are imposed by rulers, they are also influenced by their social context. At the heart of Watson's historical perspective is the proposal that the law is not the natural outgrowth of a society, but rather the intellectual creation of 'clever lawyers'.[59] In essence, he suggests that the professional tradition of lawyers is a far more important condition in law than meeting real societal needs.[60] Ewald notes that Watson considers the legal profession in broad terms, including legislators, judges, and scholars.[61] In expanding this theme, Ewald argues that the elite members of society need to play an important role in interpreting, preserving, and developing the law. It is especially important to note that lawyers are often creatures of habit, who perceive legal rules within the rules of legal substance and procedure, meaning that are likely to be endemically cautious about altering (or borrowing) a rule from a foreign legal system.

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[57] For example, taking a company law rule and transplanting it into a banking law; both within England.
[58] Kahn-Freund (n 37) 23
[59] Watson A, Society and Legal Change (Scottish Academic Press 1977). 133
[60] James Muldoon. (1968). Reviewed Work: Sources of Law, Legal Change, and Ambiguity by Alan Watson. The American Journal of Legal History. Vol. 30, No. 3. 279-281
[61] William B Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43(4) American Journal of Comparative Law 490. 499

In analysing these theories, Spataru-Negura argues that Watson has adopted a narrow perspective to examine legal transplants, focusing on the transfer of a legal rule from one jurisdiction to another.[62] Her criticism of Watson is predicated on his failure to recognise the influence that the cultures of the 'sending' or 'receiving' societies can have when determining the fate of a particular rule. While Spataru-Negura does not explicitly define culture, her standpoint on this issue can be detected in her comparison of Watson's narrow perspective with the stance of Chiba, who defines legal transplant in the wider sense of a 'law transplanted by a people from a foreign culture'.[63] In support of his proposition, Chiba refers to the transfer of law through the migration of people.

Contemporary studies by Kyselova[64] and Xanthaki[65] support Watson's assessment that legal rules are transplantable regardless of their historical origins, because the 'rules of private law can survive without any close connection to any particular people, any particular period of time or any particular place'.[66] In analysing the validity of this hypothesis, Perju cites a number of examples of successful constitutional transplants that have occurred at the 'interpretative stage' of a constitution's existence.[67] It is important to note that while recent research has occurred in the twenty-first century world of globalisation and electronic media, Watson did not operate in the era of a 'global community of courts'.[68]

Numerous differing lines of research have been undertaken to classify Watson's works. As Perju notes, the adoption of foreign law by a given host may ebb and flow. This variability can be illustrated by the South African Constitution, which has been an example of the significance of legal transplants since its inception.[69] Its continued existence can be seen through the example of Section 39(c) that the courts may refer to foreign law in interpreting

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[62] Laura-Cristiana Spataru-Negura, 'Exporting Law or the Use of Legal Transplants' (2012) 2 Challenges of the Knowledge Society 812. 816

[63] Masaji Chiba, 'Legal Pluralism: Toward a General Theory Through Japanese Legal Culture'. Tokyo: Tokai University Press, 1989. 179. Shah, Prakash. "Globalisation and the challenge of Asian legal transplants in Europe." Singapore journal of Legal Studes. (2005): 348-349.Subsequent streams of migrants from the Korean peninsula continued to have a crucial bearing on legal, agricultural and artisanal developments, notably with the introduction of Buddhism in the 6th century AD.

[64] T Kyselova, 'The Concept of legal transplant: Literature Review' (Academia 2008) <http://www.academia.edu/3371274/The_Concept_of_Legal_Transplant_Literature_Review_DRAFT_2008 > accessed 30 March 2016; John Jupp, 'Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation' (2014) 3 Cambridge Journal of International and Comparative Law 381.

[65] H Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57(3) Int'l & Comp LQ. 660-661

[66] Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 Law Quarterly Review. 81, Xanthaki (n 65) 661; Örücü (n 44) https://www.ejcl.org/41/art41-1.html.

[67] V Perju, Constitutional Transplants, Borrowing, and Migrations (OUP 2012) 27-35

[68] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.

[69] The introduction of Dutch and Common Law into South Africa by the colonials has resulted in the present Romano-Dutch legal system. Over time, it could be argued that both Dutch (Roman) law and the Common Law have supplanted the laws of the indigenous peoples.

the country's Bill of Rights. In his response to Perju, Watson argues that the successful transplant is evident in the function of section 39(c), which does not appear to preclude any legal system and does not limit any discretion to its historical Romano-Dutch roots, dating from the colonial era. In support of his contention that legal transplants can succeed across time and space, Perju agrees with Watson that if a law is not transplanted as a discrete module, there will be an associated risk of 'transplant bias', which may potentially detract from its success.[70] Noting the potential for confusion, Perju recognises that if English is the lingua franca of a legal transplant, the effect of the transplant can nonetheless be changed by translations and different local usage.[71]

Having noted Watson's extreme assumption that the law often bears little relationship to its cultural foundation, Nichols holds that the theory can be divided into four elements:[72]

1. Utility of the transplant law
2. Accident and chance
3. The difficulty of clear sight
4. The authority-enhancing effect of transplanted law

In analysing the first and fourth elements of his reasoning regarding the utility of transplantation, Nichols[73] examines the evolution of transplant law after it has been enacted, which he illustrates with reference to the Kazakhstani experience. He suggests that when banking law is transplanted into a host nation, the perceived benefits for local business people can increase the incentive for the host (donee) to attract foreign investment by transplanting foreign banking law. In this way, Nichols believes that this combination of local, commercial and national political factory will positively contribute towards the successful operation of the transplanted law following its enactment. Nichols further refutes Watson's assertion that effective operation of a transplanted law requires the force of the legal administration in the host country, supporting this proposition by noting that no interviewees in his research made reference to the fact that the studied law was the result of a foreign transplant.

[70] Perju (n 67) 27-35.
[71] ibid.
[72] Philip M Nichols, 'The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code' (1997) 18 University of Pennsylvania Journal of International Economic Law 1271. 1271-1272
[73] ibid

In contrast to Nichols's findings, Kyselova (2008)[74] classifies Watson's theory in terms of the effects of a transplant.[75] She suggests that legal transplant theory can be described under the following headings:

1. Transplants are easy and very common in all legal systems. (The theory can explain most of the changes in the law of a particular country)
2. Much law is out of step with the needs and desires of society
3. Law is primarily a product of the deliberate work of a closed group, the legal elite,[76] represented by lawyers, judges and legal academics whose needs are reflected in the law.

In considering Watson's focus on the ease of legal transplants, Abel[77] expands the criticism initially levelled by Kyselova, suggesting that Watson assumes a degree of subjectivity when imposing his own values in the formulation of his theory.[78] On the issue of Watson's subjective focal lens, Twining refers to Berlin's hedgehog analogy,[79] arguing that Watson has a range of thought lines that he encloses in a tight circle, while steadfastly avoiding criticism of his work or its reasoning.[80]

Kyselova also explicitly criticises Watson's assertion that legal transplantation is easy, arguing that this is a conclusion based on study that is limited to legal enactment and that such a view fails to consider a law's progress once it has been enacted in a host nation. Jupp examines legal transplants in host nations with cultures extremely different from those the countries from which the law was transplanted. In two recent examples, supporting Watson's theory, Jupp cites the adoption of French law into Japan in 1882, as well as the more recent assimilation of Italian law into Afghanistan. On this matter, while Kyselova and Jupp agree that Watson fails to consider the post-enactment phase, they disagree about his advocacy of the need for 'clever lawyers' to develop and process the transplant. In support of the important role of lawyers in ensuring a successful transplant, Jupp cites the failure of legal integration in Somalia and Afghanistan. He claims that the shortage of effective lawyers, exacerbated by their embedded corruption and instability, constitute evidence for the need for Watson's circle of legal elite to support the transplant after its statutory enactment.[81]

[74] Kyselova (n 64) 2-3
[75] ibid 3-4
[76] See later English Law Commission Reports.
[77] On the issue of Watson's subjective focal lens, Twinning refers to Isaiah Berlin's hedgehog analogy, in that Watson steadfastly declines to consider any critique of the ambit of his work or its content.
[78] Richard L Abel, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80(4) Michigan Law Review.793
[79] Isaiah Berlin, The Hedgehog and the Fox: An Essay on Tolstoy's View of History (Weidenfeld and Nicolson 1953).
[80] William Twinning, Generalizing About Law: The Case of Legal Transplants (Tilburg–Warwick Lectures 2000) 22.
[81] Jupp, John (2014) Legal transplants as tools for post-conflict criminal law reform: justification and evaluation. Cambridge Journal of International and Comparative Law, 3 (2).402.

Jupp[82] notes that the foundation of Watson's hypothesis is his legal positivist stance,[83] whilst agreeing with Watson that the fundamental issue regarding any successful transplant is bounded by the specific environment of its host. In particular, he emphasises the effectiveness of 'clever lawyers' in engineering the successful establishment of an adopted legal system or rule.

Jupp's research also supports Watson's contention that the architects and engineers of transplanted law are composed of an elite order of lawyers, judges and legislators who insulate law from its host society. Thus, the law's relevance to the wider culture is negated. However, it can be noted that Jupp has extended the classification of 'clever lawyers' to include legislators who are politicians and do not necessarily have a legal background, which effectively adds another dimension to Watson's 'elite group'.

The role of the elite is also a significant element in the assessment that Foster has made of the transplant of banking law. Unlike some other academics, Foster suggests that the concept of culture is neither a fundamental nor an unchangeable norm in the commercial environment. Instead, he suggests that transplants into systems where case law exists automatically give effect to culture. In addition, Foster's results suggest that when a law is transplanted by legislation there is usually less room for local amendments and the operation of the transplant is therefore more likely to be largely contained by the legal (and related) elite group.

Jupp's and Foster's position on Watson's recognition of the role played by an elite group resonates with Weber's[84] assumption that law is applied by persons who hold themselves ready for this purpose, with the objective of achieving conformity. Weber has also influenced Legrand, despite his opposition to Watson, as discussed in Section 2.2.2.

Kyselova heavily criticises Watson's assertion that successful legal transplant is reliant upon the groundwork of 'clever lawyers' to embed the law into a host.[85] Her argument is predicated upon her analysis of Wise's thesis, which holds that the actions of lawyers in many countries, most notably the US, result from their dialogue with other disciplines and

[82] ibid
[83] Raz defines positivism by stating that 'there is no necessary connection between law and moral values'. Joseph Raz, 'The Purity of the Pure Theory' in Anne Barron and others, Introduction to Jurisprudence and Legal Theory: Commentary and Materials (OUP 2005) 202.
[84] Reyes, M. (2014). The Challenges of Legal Transplants in a Globalized Context: A Case Study on 'Working'Examples. 15-16
[85] Kyselova (n 64) 2-3.

social sectors, rather than from being constrained within a closed legal circle.[86] However, Hoeflich has commented that:

> Central to Professor Watson's theory is the notion that where a professional class develops (and he—like I— would argue that such a class develops early in Western Europe) it is this group's professional traditions and professional concerns which shape the law—especially private law—far more than any social input.[87]

This suggests that there is some debate as to whether the legal transplant process is specifically lawyer-centric, even within this phase of the analysis of Watson's theory.

Edwards conducted a comparative study in 2007, in order to examine the real-world phenomenon of a World Bank sponsored transplant of a neo-classical model during the 1980s.[88] According to Edwards, the basis of Watson's support for transplant by imitation can be broken down into the following headings:

1. Nexus between the law, legal structure, rules and institutions with the balance on the requirements and political economy of the ruling elite.
2. Ease of transplant, since there is no close assimilation between the law and its social context. This is evident in the modular transformation of legal systems throughout history.
3. The borrowing by different systems of a legal rule from the same source. During its development, changes arise that can be evaluated in isolation.

2.2.1.5 Strengths of Watson's arguments

In his support of Watson's theory, Cairns advocates the continuation of scholarly development of the work, stating that 'there is life in the idea yet'.[89] Kyselova goes further, arguing that while flawed, Watson's studies are valuable and hold the promise of developing the examination of legal transplant theory. Despite his inherent scepticism regarding Watson's theory, Ewald also recognises that the stability of the law and its systems have survived the social upheavals of both the American and communist revolutions.[90] In this sense, Ewald recognises Watson's contribution to transplant law, despite questioning whether the theory is equally relevant to public and to private law.

[86] Edward Wise, 'The Transplant of Legal Patterns' (1990) 38 American Journal of Comparative Law 13.
[87] Hoeflich, M. H. "Law, Society, and Reception: The Vision of Alan Watson." Michigan Law Review 85, no. 5/6 (1987): 1085. Wise, Edward M. "The transplant of legal patterns." *The American Journal of Comparative Law* (1990): 1-22.
[88] Edwards (n 29) 8
[89] Cairns (n 25) 639
[90] William B. Ewald, 'The American Revolution and the Evolution of Law' (1994) 42 American Journal of Comparative Law Supplement 1, 9

With regard to successful transplants, which Watson attributes to their being 'socially easy',[91] Do proffers the example of Vietnam,[92] noting Watson's observation that the application of a rule can vary from the donor to the host countries and that modifications are a 'natural consequence'. Similarly, in support of successful transplants in terms of Watson's theory, Chiba refers to the transfer of law to Japan, through immigration from the Korean peninsula in the 3rd century AD, as being 'probably the first transplantation of foreign law to Japan'.[93]

Meanwhile, citing later instances of legal transplant that serve to provide empirical support for Watson's theory, Örücü points to changes that have taken place concerning the laws of the Turkish Republic. These changes can be traced from their origins in the Ottoman Empire to those of an Islamic state and then to a mixture of French, Swiss, German, and Italian legal codes that have culminated in the secular constitution of contemporary Turkey. According to Örücü,[94] the successful reception and integration of foreign laws by Turkey is mainly predicated on the existence of choice regarding which system to adopt, rather than the imposition of another legal system by an external force. In response to Örücü's analysis of the Turkish experience, Watson[95] argues that the borrowing encapsulated court decisions and academic opinions, in addition to the statutory rules. Furthermore, the project involved Turkish lawyers and academics studying law in European universities, while European professors were teaching Turkish law in Turkey.[96] Underpinning her theme, Cairns agrees that Turkey is the most extreme and important example of legal transplants that meet Watson's criteria.[97]

Ewald's strong support for Watson's theory extends to stating that it 'has radical implications' and he agrees with Watson that legal rules can be readily transported from society to society:

> The very same rules of contract can operate in the worlds of Julius Caesar and the medieval Popes, of Louis XIV, of Bismarck, and of the twentieth-century welfare state [without relying on matters that are extrinsic to the legal environment].[98]

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[91] Watson (n 1) 95
[92] Do (n 36) 58
[93] Shah (n 63) 59; Shah (n 63) 59; Lorraine M McDonough, 'The Transferability of Labor Law: Can An American Transplant Take Root in British Soil?' Comparative Labour Law Journal 13 (1992). 509; Alan Watson, 'Comparative Law and Legal Change' (1978) 37(2) Cambridge Law Journal 313.
[94] Örücü (n 44) website
[95] Watson (n 3) 6
[96] ibid 7
[97] Cairns (n 25) 669-670
[98] Ewald (n 61) 490

In addition to his contributions to the legal field and comparative law, Ewald also argues that Watson makes an important contribution to jurisprudence. According to this argument, the accusation that Watson lacks academic acknowledgment can be attributed to the inherent complexity of his historical arguments, which may have obscured his logical structure and caused his propositions to be misinterpreted by critics. Supporting his evaluation that Watson is frequently misunderstood, particularly by mirror theorists, is the observation that these academics tend to confuse the distinctions between the 'Weak Watson' and the 'Strong Watson'.[99] According to Ewald, both Watsons refute the mirror theory of Montesquieu which was adopted by Kahn-Freund and integrated into his legal transplant thesis with regard to the role of culture (Section 2.2.3.3). In expanding this theme, Ewald suggests that the Weak Watson's propositions are more persuasive than those of the Strong Watson. The following excerpt summarises this line of reasoning:

> It seems clear to me that the Weak Watson argument is sufficient to defeat the mirror theories, certainly in their cruder (and therefore more influential) forms. It is a major theoretical advance; and if it is correct, it opens the door to a new style of comparative law which we have dubbed 'Comparative Jurisprudence'. I have sought in my other work to detail what the landscape would look like on the other side of this door.[100]

This assessment suggests that Watson's legal transplant thesis is widely acknowledged as the foundation of the legal transplant theories that follow and that Watson's founding work endures, despite conceding that strengths and weaknesses exist with his approach and reasoning. These are outlined in the sections below.

2.2.1.6 Weaknesses of Watson's arguments

Watson claims that his perspective is not a theory of legal transplant, but rather that it is a challenge to those who advocate that the law mirrors the society in which it exists. Although scholars like Ewald support this proposition,[101] Abel argues that Watson has not developed any theory of legal transplant, instead merely making observations on existing schools of thought that focus on the subject. Indeed, Kyselova goes so far as to assert that Watson's work cannot be termed a theory because he has failed to consider the operation and state of the transplanted law once it has been established within its host.[102] Nevertheless, Kyselova accepts that Watson has at least advanced an incomplete theory. Perju tentatively supports this position, noting that although Watson mentions a link between law and society, he also

[99] ibid
[100] ibid
[101] Ewald (n 61) 491-493
[102] Kyselova (n 64) 6 ; Abel, Richard L. "Law as Lag: Inertia as a Social Theory of Law." Michigan Law Review 80, no. 4 (1982): 785-809.

avoids any examination with the argument that the social environment should be examined on a 'case by case' basis.[103] In illustrating the weaknesses in Watson's theory, Perju refers to other evidence of legal transplantation of private law from Italy to Afghanistan, two diametrically different cultures. He cites the problems of rooting Italian law in Afghanistan where there are insufficient experienced legal experts to fulfil Watson's requirement for 'clever lawyers'.

In refuting the arguments of scholars who oppose Watson, Ewald refers to a wealth of research, spanning from the eighteenth century to more recent analysis by scholars like Abel.[104] According to Ewald's evaluation of this overall critique, the proponents counter Watson by suggesting that legal transplantation and the law both generally require the evaluation of social and environmental matters. Importantly, despite his support for the Weak Watson position, Ewald perceives weaknesses in the arguments of Strong Watson, as they are restricted to black letter, private law.[105] In terms of discerning a fault line in the Strong Watson argument, Jupp refers to the aforementioned evidence of legal transplantation from Italy to Afghanistan, where there has been a successful transplant despite the different cultures of the donor and host nations.[106]

Kyselova notes that Watson has consistently published rich repositories of scholarly work since his original submission in 1974,[107] although these works consist of different developments of the original concept. The themes in his original thesis provide differing emphases that transform and magnify the inconsistencies in his reasoning. Kyselova expands her critique of Watson's theory to suggest that it considers transplants only to the point of their statutory enactment and fails to view their impacts once they have been rooted. Although it is possible to argue that this criticism is unfair, Watson suggests that a successful legal transplant will grow in its new body and will 'become a part of that body just as the rule or institution would have continued to develop in its parent system.'[108]

In acknowledging Kyselova's summary of the critics of Watson's work, scholars like Mattei[109] have argued that the flaws in Watson's theories arise from his over-emphasising the significance of legal history. In contrast, the other principal body of scholarship supports

[103] Perju (n 67). 17
[104] R Abel 'Law as Lag: Inertia as a Social Theory of Law (Book Review)' 80 MICH. L. REV. 785, 793.
[105] Perju (n 67). 17
[106] Jupp (n 81) 393
[107] Kyselova (n 64) 4
[108] Watson (n 1) 27
[109] Ugo Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law' (1994) 42 American Journal of Comparative Law 195.

Ewald, who recognises that Watson's works are of varying strength, containing both robust assertions and less sound ones. Kyselova cites Watson's rebuttal of Legrand that the law mirrors its society as an example of a Strong Watson argument, whereas the Weak Watson focuses on the delivery of the law to its host and fails to consider how it is installed.

In criticising the Strong Watson position, Foster suggests that Watson's thesis was adopted by the World Bank for the imposition of its neo-classical model, thereby ignoring the cultural foundations of the host states by focusing exclusively on the preliminary stages.[110] This approach also failed to follow through and examine how the transplant worked in practice. Foster cites Crabbe, one of the legal draftsmen in the World Bank project, who supports his proposition that 'law does not operate in a vacuum. Statute law less. A statute is intended to guide and regulate the conduct and affairs of those to whom it is addressed.' Its content takes cognisance of the cultural, economic, political and social conditions of the society within which it is intended to operate.[111]

However, Foster claims that the Word Bank favoured Watson's theory in its legal reform process and declined to consider matters external to the ostensibly modular nature of legal transplants.[112] In practically implementing Watson's theory, the World Bank therefore referred to mathematical modelling that was based on data from developed countries, rather than underdeveloped ones. In support of the errors of both Watson's theory and the World Bank's practice, Foster refers to the work of Seidman, who agrees that the political independence of post-colonial countries freed them from political subjugation, but left the institutions intact.[113] This 'neo-colonialism' creates an emerging fraction of rulers (Seidman terms them 'the bureaucratic-bourgeoisie'), who operate in different societies from those of their former colonial rulers.[114]

While acknowledging the value of Watson's contribution to the history of transplants, Örücü notes that his theory was developed during an era when legal transplants were generally considered in terms of entire legal systems.[115] She likens the effect of the transplant of an entire legal system to the impact of a meteor, a single profoundly altering event. In this

[110] Nicholas H Foster, Transmigration and Transferability of Commercial Law in a Globalised World (Kluwer Law International 2002) 60.
[111] Crabbe, Vincent, 'Legislative Drafting' (1993). Cavendish Publishing Limited, London. 12.
[112] Later in its programme during the 1980s, Foster discerns that the World Bank perceived shortfalls in its practice of transplant and during the 1980s, according to him, it moved towards LeGrand's thesis.
[113] A Seidman and RB Seidman, State and Law in the Development Process. Problem-Solving and Institutional Change in the Third World (Macmillan Press 1994) 107
[114] A Seidman and RB Seidman, State and Law in the Development Process. Problem-Solving and Institutional Change in the Third World (Macmillan Press 1994) 107.
[115] Örücü (n 44) website

manner, she challenges Watson on the basis that his works fail to consider the transplant of discrete components of a foreign legal system into the existing legal system of a host nation. In this way, both Örücü and Jupp[116] express a degree of scepticism about the success of Watson's theory in situations when the construct of the transplant is not a homogeneous unit.

Having studied the World Bank's transplantation of laws that reinforced its economic support framework into Jamaica, Kenya and the Philippines, Edwards argues that the legal transplants included within this model did not succeed because of the failure of the World Bank to take into account the extra-legal factors of the political and social environment in the host countries. Edwards suggests that as this project was informed by Watson's framework, the failure to consider the conditions of the hosts was almost certainly a factor in the failure of the transplant. However, there are two weaknesses in Edwards's propositions: the first is that the totality of the transplant was an economic model, so it was not simply confined to the legal system; and there was an apparent lack of 'clever lawyers' to implant any law.

It is important to note that the present thesis considers the transplanting of Western banking law into Saudi Arabia, where the legal system is founded on Sharia law, whereas Watson limited his focus to Western legal systems.[117] This is a relatively serious limitation, since other legal systems, such as Sharia law, fall outside the scope of the theory.

In direct contrast to Watson's assessment that legal transplants are 'easy', Legrand expresses the view that they are 'impossible'. This theory is the focus of the following section.

2.2.2 The theory of Pierre Legrand

In direct contrast to the argument made by Watson for examining legal transplants from a historical perspective, the overriding theme of Legrand's thesis is that legal transplants are 'impossible'.[118] Legrand suggests that Watson's arguments can be perceived as simplistic and inadequate due to the failure to consider the political, cultural, and other 'baggage'[119] that is necessarily attached to laws. Legrand goes so far as to suggest that Watson's transplant thesis merely adopts the positivist 'law-as-rules'[120] approach in lifting law from its donor straight to its host without any further consideration. In support of this position, he cites

[116] Jupp (n 81) 381-407
[117] Martin Krygier, 'Is There Constitutionalism after Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law' (1996) 26(4) International Journal of Sociology 17.
[118] Legrand (n 1) 111
[119] ibid 114
[120] Legrand (n 1) 113-114; Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45(1) International & Comparative Law Quarterly 52. 55-60

Montesquieu's statement that law is an expression of its environment and that it is generally 'adapted in such a manner to the people that there is little chance that the legal rules of one nation are suitable also for another nation.'[121]

Despite his opposition to Watson's thesis, Legrand's perspective of the impossibility of legal transplants also draws upon Weber's ideas. For example, Weber's[122] claim that a comparative study should investigate the individual elements of the developments being researched and the characteristics that caused divergence is central to Legrand's position. However, Legrand and Weber differ in the sense that Weber disapproves of a perceived trend to construct evolutionary schemata that focus on similarities, whereas Legrand is of the view that the introduction of new law necessarily requires a prior examination of 'the existence of similar rules'.[123] However, despite having taken a positivist perspective towards rules, Legrand then introduces a metaphysical constituent into legal transplant theory. This esoteric perspective is inspired by the earlier theories of Pringshem[124] and Montesquieu,[125] seeking to promote the concept that the fundamental character of a national culture can be understood as being its spirit and soul. Legrand delves further into metaphysics, arguing that that a legal transplant scholar should embody the dyad enclosing 'a connoisseur of diversity', whilst eschewing 'the guardian of universality'.[126] He then dismisses the state of legal convergence as a fantasy. As Legrand adopts the role of King Canute towards the existence of the EU, based on the incompatibility of his proposition that transplants are 'impossible' with his assertion that there are circumstances where they may become possible, his theory represents a limited contribution to legal transplant scholarship.

In his criticism of Watson, Legrand agrees with Merryman's evaluation of Watson's theory as superficial and misleading.[127] This school of thought holds that the superficial factor pertains to the concept of rules as merely floating on the surface of a legal system. It proposes laws as endemic social factors, thereby suggesting that Watson's approach is misleading because it ignores the underlying foundations of society. Legrand expands this challenge to Watson, arguing that his approach is deceptive, on the grounds that the state is not a monolith within society. In contrast, Legrand contends that a state and its laws reflect the specific

[121] Montesquieu (n 55) Chapter III.: Of positive Laws
[122] Reyes (84) 15-16
[123] Legrand (n 1) 111
[124] Fritz Pringsheim, 'The Inner Relationship Between English and Roman Law' (1935) 5 Cambridge Law Journal 347. 348
[125] Richard Rorty, Objectivity, Relativism, and Truth (CUP 1991).206
[126] ibid
[127] John Henry Merryman, David S Clark, and John O Haley, The Civil Law Tradition: Europe, Latin America, and East Asia (The Michie Company 1994) 50.

elements of its culture. In terms of this thesis, the position of Legrand would refer to the importance of recognising cultural differences between the West and Saudi Arabia in assessing a transplant of Western banking law into the Sharia law of the host nation.

In his critique of Watson, Legrand also emphasises the role of differing cultures in embedding law from a donor nation into a host society. He stresses the linguistic aspects of rules,[128] arguing that these result in a transplant having distinctive aspects according to the way in which the particular rule will be interpreted in a given language. In supporting his contention, Legrand refers to the Roman laws of sixth-century Constantinople, which were written in Latin. The same laws were later transplanted into France before its Revolution (1789-99) and into Germany during the Prussian Empire,[129] using the native languages of the respective hosts. In emphasising his perception of the importance of the role of language, Legrand differentiates the wide variety of local meanings of words, according to the way in which they are received in their native countries, noting that comparison shows that a word may acquire a different meaning once translated. For example, he distinguishes how 'bread', 'pain' and 'brot' may all refer to the same food across national boundaries and that while each version of the word is founded in a different culture, there is a common understanding of the type of food to which the word refers. With regard to this thesis, the Saudi word for bread, which is 'koobz' may also be considered. Thus, Legrand argues that borrowed words will always assume a meaning that is specific to the inherent 'culture host' language.[130] In a legal context, he adds the example of the potential procedural differences relating to the words 'offer' and 'offre', depending on whether they are heard in an English or French legal context.

In responding to Legrand's commentary on the linguistic elements of transplants, Watson uses the bread example to indicate that its significance often differs, even within a single country.[131] He argues that this can also be true in terms of the law, even in a single town. In illustrating his challenge to Legrand, Watson discusses the possibility that the different economic sectors of a neighbourhood might have differing stances on whether the sale of cocaine is criminal. Thus, in one part of the country the coca plant might be seen as a cash crop, whereas people in a wealthier area will be more likely to consider the drug derived from it to be a recreational luxury.

[128] Legrand (n 1) 119
[129] 12th to early 20th centuries.
[130] Legrand (n 1) 118
[131] Watson (n 3) 2

In the context of this thesis, bearing in mind Legrand's emphasis on culture and linguistics, the following example is offered, with reference to the legal transplant of Western banking law into Saudi Arabia, a nation with a markedly different culture. Recognising that a literal interpretation of the English term 'credit card' would offend Sharia principles, it would be translated as 'a card to pay later' in an Arabic document. In this way, an elegant smoothing of the path facilitates harmonious financial transactions in the face of linguistic problems that may arise with the divergence of customs concerning payment for loans between Sharia and Western societies.

With regard to his perspective of 'the [legal] rule',[132] Legrand is adamant that it cannot travel and therefore again posits that legal transplants are 'impossible'. He assumes a slightly different position when admitting that historically and culturally conditioned transplants may succeed, however. In Legrand's terms, 'conditioning' – 'assimilating the cultural profile'[133] of the law school – is preordained from the legal education of the lawyers of the host nation. In fact, in this strand of his theory, Legrand agrees with Watson's contention that legal transplants are affected by a 'legal elite'.[134]

In summary, Legrand contends that legal transplants are impossible, because:

> First, legal rules are inseparable from the cultural and social context,
>
> Second, legal rules designed to serve the needs of a particular nation and thus cannot be of use for another nation,
>
> Third, legal rules change as soon as they are transplanted, and
>
> Fourth, because the disconnectedness of the law from society causes it to be 'permanently dysfunctional.[135]

Legrand[136] analyses legal transplants since the 1940s, focusing on globalisation and the emergence of the EU. With regard to the evolution of the EU, he suggests that the implementation of Community laws in its Member States reflects 'a process of relentless juridification [that has] assumed the role of a "steering medium"'.[137] In this sense, Legrand perceives the steering element of the EU to be largely driven by the legislators and judges, with the aim of creating an extended network of interconnected directives and regulations

[132] Legrand (n 1) 112
[133] ibid 114
[134] Watson, A. (1995). From legal transplants to legal formants. The American Journal of Comparative Law, 43(3), 469
[135] Kviatek, Beata. "Explaining legal transplants." *Transplantation of EU law into Central Eastern Europe, Oisterwijk* (2015). 55-70.
[136] Legrand (120) 52.
[137] Jurgen Habermas, The Theory of Communicative Action. Vol 2: Lifeworld and System: A Critique of Functionalist Reason (Beacon Press 1992).

that form a 'supra-system'.[138] Despite this acceptance of the convergence theory propounded by Markensis,[139] Legrand considers this 'law-as-rules' theory to be shallow and brittle.[140] He argues that the theory yields scant information on the system or even the actual extent of convergence. As a consequence, Legrand suggests that both legal structures and cultures could be revealed by legal transplant theory replacing a convergence that is founded on a 'thin description' with Geertz's expression of a 'thick' junction.[141]

Having used the phrase 'legal change as legal transplants' to summarise Watson's thesis, Legrand expands his linguistic perspective to remark that Watson ignores the 'frameworks of intangibles'[142] within the original country and the host nation, despite their intrinsic importance. In extending this criticism, he refers to Watson's mechanical treatment of transplants, suggesting that this illustrates an extreme form of positivist thinking. Again, Watson counters Legrand's view that a law is seen from different perspectives within the same nation, such as by a farmer and a banker.

In his dismissal of Watson's methodology and accusation of omission, Legrand suggests two overall problems: that Watson does not ground his propositions in critical theory and that he fails to support his propositions with qualitative, empirical results. However, this criticism is unfair, because Legrand himself neither bases his research on legal theories nor refers to qualitative, empirical research in his response to Watson. According to Legrand, Watson is being somewhat facile, in that he is merely lifting a legal system from its origins and implanting it into its host without having made any adjustments in response to local conditions, instead predicating it on the maintenance an unquestioned status quo. This is a palpably inaccurate representation of Watson's position, as is evident from his cocaine and bread examples, as well as his observation that within a jurisdiction, the same law is understood by both urban and city dwellers.

Despite Legrand's[143] suggestion that Watson[144] uses a 'formalistic, rule-centred approach … [so that] Law's rich nomos makes convergence impossible',[145] the Common Law system

[138] Legrand (n 120) 52.
[139] Basil S Markesinis, 'Bridging Legal Cultures' (1993) 27 Israel Law Review 363, 382.
[140] William Bechtel and Adele Abrahamsen, Connectionism and the Mind: An Introduction to Parallel Processing in Networks (Basil Blackwell 1991).17
[141] Clifford Geertz, The Interpretation of Cultures (Fontana Press 1993). 7
[142] Legrand (n 1) 121
[143] Legrand (n 120) 62
[144] A Watson, 'From legal transplants to legal formants' (1995) 43(4) Am. J. Comp. L. 470
[145] Legrand (n 120) 52. Perju (n 67) 41: comparative legal study should understand, not reform. He refers to Watson, who compares constitutional law with a religious faith. He advocates than one need not seek answers to other faiths nor reach beyond, for instance, the ambit of the US Constitution as a means of investigating the foundations of the civic religion of the US.

was successfully integrated into the legal systems of Australia, New Zealand, and Canada after they were colonised by the British.[146] The existence of examples of transplants that operate across national or state boundaries, such as EU Law and the system in the USA, refutes Legrand's proposition. These examples clearly show legal transplants occurring across two different territories: the former being across the borders of sovereign member states and the latter across federal boundaries.

A weakness in Legrand's theory is his failure to provide a full definition of the term 'culture'. During the mid-1990s, Legrand defined culture as a system comprising of frameworks of intangible factors, which ['if'] they exist, represent a fulcrum between what is common to all humanity and that which is particular to each individual.[147] Legrand's attempt to define culture offers little assistance to research, however, save for his suggestion that culture contains ethnic, linguistic and even more confusingly 'other lines'.[148] In addition to accepting in his analysis of the EU transplant model, that legal transplants are not actually possible, Legrand concurs with Watson in acknowledging the relevance of 'historical experience'.[149]

The contention that Legrand is refuting his own theory during his examination of the topic with respect to globalisation is supported by his use of the example of the transplantation of laws between the Civil and Common law systems in the development of the EU. Indeed, Legrand's overall perspective of the convergence between the two legal systems constitutes 'a regulated encounter between the... traditions' that are porous, while remaining discrete. It is submitted that these statements cannot be construed in any other way than as referring to legal transplants that are not only possible but have demonstrably occurred.

Despite these inconsistencies in Legrand's theory, Gillespie's later research proposes that Legrand does extend legal transplant theory beyond the law-as-rules perspective,[150] largely because he has drawn upon the work of eminent anthropologists such as Geertz and Lévi-Strauss.[151] The consequence is that if his work were to be applied or extended, it would also be necessary to review the anthropological theories upon which he relies.

[146] Passim provinces of Canada were also colonised by the French; hence the transplant of both Romano French and English Common Law into particular colonies.
[147] Legrand (n 120) 56
[148] ibid
[149] ibid
[150] J Gillespie, 'Towards a discursive analysis of legal transfers into developing East Asia' (2008) 40 JILP 657
[151] Gillespie (n 150) 671.

In continuing the theme of Legrand's failure to define legal culture, Forsyth[152] proposes that it is defined by Nelken[153] in his analysis of Legrand's work:

> ... the idea of legal culture thus points to differences in the way features of law are themselves embedded into larger frameworks of social structure and culture which constitute and reveal the place of law in society.[154]

However, this self-referential proposition would arguably support Watson's position that legal transplanting is easy, given that it can be achieved successfully without meeting Legrand's requirement to examine and understand the host culture.

In summarising his approach to comparative legal studies, Legrand considers that it is imperative to ensure the inclusion of aspects outside the legal system and its community of lawyers. He also stresses the need to consider cultural matters. However, it may be helpful for future research to examine the constituents of Legrand's perspective of key elements that he cites in his arguments, such as 'culture', 'frameworks of intangibles' and 'an initial receptivity to the otherness of others'.[155] Legrand fails to define these terms, the importance of which is introduced by Perju,[156] who notes that a lack of clear definitions can mislead a comparative scholar, given that meanings frequently overlap, resulting in theory becoming excessively complicated and open-ended.

The following subsections assess first the academic support for Legrand's propositions, then criticism of them.

2.2.2.1 Supporting evidence for Legrand's culturalist approach

In a body of research that examines the legal transplants of criminal legal systems, the World Bank's operations during the late 1980s are alleged to have initially followed the Watson model. According to Edwards,[157] this explains the lack of successful transplants and the negative results for host nations. Once the Legrand model was applied and adjustments made, with extra-legal factors being taken into account, the transplants became better embedded into the hosts. According to Legrand, a rigorous study of the host is necessary at

[152] Anthony Forsyth, 'The 'Transplantability' Debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law (Centre for Employment and Labour Relations Law, 2006) <http://apo.org.au/node/6218> accessed 14 April 2016. He also refers to the definition of Cooney regarding the importance of legal culture.
[153] David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), Adapting Legal Cultures (Hart 2001) 6.
[154] Nelken (n 153) 25
[155] Legrand (n 1) 124
[156] Perju (n 67) 9
[157] Edwards (n 29) 10

the preliminary stage of a legal transplant, although he does not provide specific guidance as to what this might entail. In his study of the World Bank transplant operation during the 1980s, Edwards offers the contentious suggestion that the Bank should initially have applied Legrand's theory, rather than Watson's.[158] However, as discussed earlier, Edwards's study of the programme applied a legal transplant model to a socio-economic project, meaning that his conclusions can be deemed to be somewhat flawed.

2.2.2.2 Criticisms of Legrand's theory

In her assessment of flaws in Legrand's 'culturalist' approach to legal transplants, Kyselova claims that three oversights exist.[159] The first is that empirical evidence has been ignored by both Watson and Legrand, as evidenced by the transplants from Turkey and Japan, which adopted entire codes from the Roman roots of Western Europe as authorities.[160] The second oversight is that the theories contain many elements of contradiction. The final challenge is that rather than mere cost-saving exercises, legal transplants possess their particular social dynamics that differ from indigenous factors, meaning that the law adapts to its host. In an overall argument against Legrand, she refers to his contradictory claim that transplants are impossible, whilst simultaneously proposing that certain difficulties attach to the transplantation process. This theme is echoed by Gillespie, who refers to the spread of legal knowledge as part of globalisation, which supports legal transplants. He identifies examples of this phenomenon in six Asian nations between the 1960s and the 1990s.

However, Forsyth considers that Legrand's position is too extreme in underscoring the primacy of cultural differences, particularly in terms of the legal environment.[161] In support of this, he refers to Gould and Porges,[162] citing transplants from Roman law into both Japan and South Korea. This recognition of the need for adjustments to be made when the law is implanted into its new host complies with the transposition theory devised by Örücü,[163] which resonates with Watson rather than Legrand. According to Örücü (Section 2.2.5) transplanting needs to be tuned to its host, not unlike a musical instrument, which can be played even in different conditions.

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[158] ibid 52
[159] Kyselova (n 64) 3
[160] In common with Watson.
[161] Forsyth A, 'The 'Transplantability' Debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law (Centre for Employment and Labour Relations Law, 2006) <http://apo.org.au/node/6218> accessed 14 April 2016.
[162] JL Porges, Development of Korean Labor Law and the Impact of the American System. (1991) 12(3) Comp. Lab. L. J. 335; W Gould, Japan's Reshaping of American Labor Law (1985) xv, xvii, 16
[163] Örücü (n 22) 205

In his more recent response to Legrand, Watson[164] emphasises that the value of comparative legal study is its focus on legal developments, which illustrate the relationship of law in legal systems that have a historical relationship to society at a given stage of its development. In support for this proposition, Watson cites the establishment and operation of an overarching legal code across the European Union.

2.2.2.3 Summary of Legrand's theory

This review of Legrand's theory, including schools of thought that both support and criticise his scholarship, in addition to the responses of his rival, suggests that Legrand's assertion that Watson has developed 'only a formal frame, without cultural substance' is not warranted.[165] Indeed, rather than introduce a different position in relation to transplanting law, Legrand has only embellished what already existed. This proposition is illustrated in Diagram 2.2, which suggests that Legrand has extended Watson's historical study to emphasise the need for comparative legal systems to involve cultural and linguistic factors if they are to be successfully assimilated into the host state. Based upon this proposition, it can be argued that Legrand has simply refuted certain strands of Watson's theory, rather than introducing any new ideas into the study of legal transplantation.

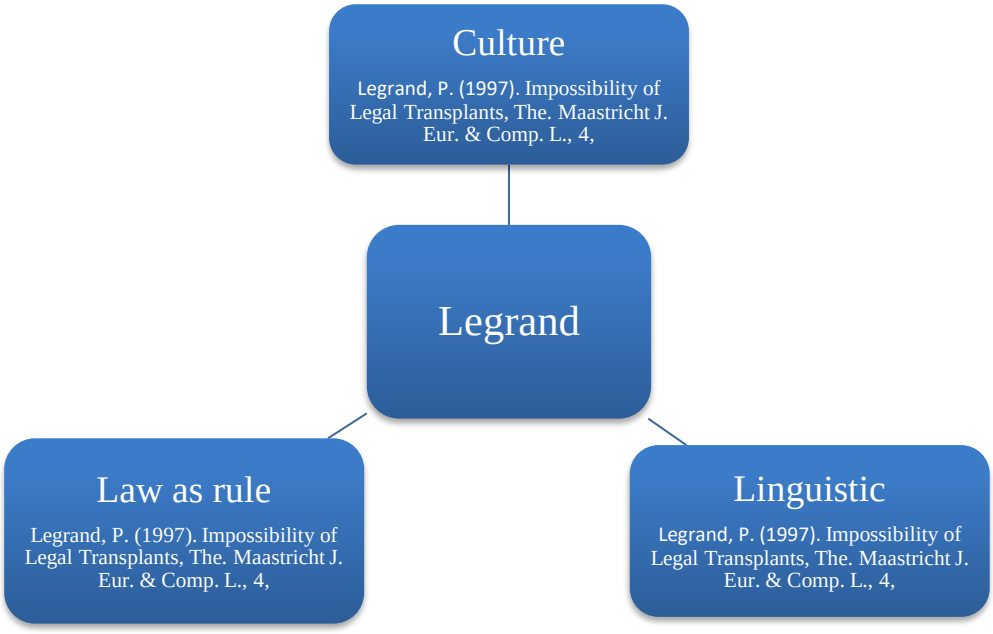

Diagram 2.2: The three points of Legrand's theory

[164] Watson (n 3) 3
[165] Jean-Louis Halpérin, 'The Concept of Law: A Western Transplant?' (2009) 10(2) Theoretical Inquiries in Law 351.

In summarising Legrand's criticisms of his work, Watson notes that numerous examples exist of effective legal transplants and that Legrand's position is therefore a misrepresentation based upon an exaggerated emphasis on law as rules.[166] Watson considers historical developments that necessarily involve the study of the social and economic contexts in which the law has evolved. Furthermore, he notes that the acceptance and partial non-acceptance of foreign law in understanding legal change is one of the main themes of his original work. 'Legal Transplants'.[167]

Watson concludes his response to Legrand's[168] criticisms with an analogy between transplanted law and tomatoes. He argues that in the same way that a transplanted tomato can survive, change its form, or wither, whatever happens to a legal transplant has occurred and is therefore not impossible. In support of this position, Edwards argues that Legrand does indeed acknowledge that transplants have actually occurred, but that he considers that they are slow and complex. In other words, Watson and Edwards agree that while Legrand perceives legal transplants to be the outcome of good fortune and likely to have unexpected results, they are still not impossible.

Irrespective of whether Legrand considers a transplant to be impossible or difficult, future research should investigate what he refers to as 'culture'. In recommending future research opportunities, Kyselova[169] suggests that conducting an examination of actual transplant processes in post-USSR countries would do much to enrich the field of study. Support for future research into the process and models of legal transplant have also been recommended by scholars including Spataru-Negura[170] and Sacco.[171]

The evidence seems to suggest that instead of proposing an alternative theory to Watson's, Legrand bluntly states that legal transplants are 'impossible',[172] after which he criticises Watson without offering any other theoretical framework as an alternative. This chapter will now analyse and discuss the stances of other important theorists, beginning with the mirror theories influenced by Montesquieu's original work. These are reviewed in the following section on the grounds that this school of thought agrees that it is not possible to separate the law from its social and political roots.

[166] Watson (n 3) VI
[167] ibid VI
[168] ibid VII
[169] Kyselova (n 64) 15
[170] Spataru-Negura (n 62) 818.
[171] Sacco (n 42) 401
[172] Legrand (n 1) 111

2.2.3 The mirror theorists' perspective on legal transplants

2.2.3.1 Montesquieu's influence on legal transplant theory

Montesquieu was a French philosopher who published his seminal mirror theory in the book *De l'Esprit des Lois* ('The Spirit of Laws').[173] Before the evolution of legal transplants as an acknowledged body of thought, Montesquieu's[174] work focused on the role of politics and law in its social and environmental context. Although his focus was through a political lens, Montesquieu used the law to support his perspective and propositions. His argument is that law is the product of human reason and that it therefore cannot be categorised within rule-focused, positivist legal perspectives. By considering law in a political context, he suggests that the preservation of liberty is the bedrock of political society and, as such, requires power to be held by society, rather than concentrated in the hands of the few. Because of this, he argues for a separation of powers, with checks and balances to maintain divisions, preventing the law from becoming a means for a minority of people to control the rest of their particular society. In this regard, Montesquieu states that:

> The political and civil laws of each nation should be so closely tailored to the people for whom they are made, that it would be pure chance [un grand hazard] if the laws of one nation could meet the needs of another…. They should be relative to the geography of the country; to its climate, whether cold or tropical or temperate; to the quality of the land, its situation, and its extent; to the form of life of the people, whether farmers, hunters, or shepherds; they should be relative to the degree of liberty that the constitution can tolerate; to the religion of the inhabitants, to their inclinations, wealth, number, commerce, customs, manners.[175]

Montesquieu subdivides his concept of his natural law as follows:[176]

1. Natural laws pre-date society [in its everyday meaning], having precedence over the rules of religion and the state.
2. The law and justice of a particular society can be changed; they are determined by the conditions of its particular environment.
3. The form in which laws appear must be clear, being neither rhetorical nor hypothetical.
4. Simultaneously laws must not be extreme, unjust, or beyond the reasoning of an ordinary person.

These principles form the basis of later legal transplant theories, notably that of Kahn-Freund, who acknowledges that Montesquieu's contribution to legal theory is to argue that

[173] Montesquieu (n 55) Chapter III.: Of positive Laws
[174] ibid
[175] ibid
[176] Michael Freeman, Lloyd's Introduction to Jurisprudence (Sweet and Maxwell 2008)

systems of law are culturally embedded in their own societies. Legrand adds that Montesquieu contributed the approach of basing transplant theories on the defining role of comparative law as being 'not the body of laws ... but their soul'.[177]

With regard to his influence on legal transplant theory, Gillespie[178] argues that Montesquieu contributes through the assertion that politics and laws are unique to a given society, meaning that they mirror its environmental and social conditions. Furthermore, in advancing Montesquieu's proposition that a rule can adapt to social changes, Gillespie[179] challenges Legrand's[180] assertion that legal transplants are impossible, given the premise of the 'ruleness of the rule'.[181] Logically, Gillespie therefore expands Montesquieu's reasoning to argue that as a rule evolves with shifts in society, it also adapts to an alien society. This means that when a law is transplanted, it may appear to be the same but it will culturally adapt to exist in its new social host, enabling it to address its intended purpose.

In considering the role of law within a new social structure, Gillespie agrees with Montesquieu in rejecting positivist perspectives, a position based upon the stance that law cannot be isolated from its political factors in a just, fair pluralistic society. Extending his line of reasoning, Gillespie concurs with Watson's concept of legal transplants succeeding as a result of the contribution from 'clever lawyers',[182] in the form of a 'legal elite'.[183] In particular, Gillespie refers to the context of the current global society where his study of law reform identifies the presence of Western commercial legal reforms on six Asian countries. Future research could assess the veracity of Gillespie's research regarding the Middle East. However, the focus of the present thesis is Saudi Arabia.

Do states that the influence of Montesquieu on legal transplant theory is due to his analogy of transplanting law with that of plants, using evocative imagery regarding adaption to the new soil and other conditions into which it is moved.[184] However, Do adds that while Legrand is also influenced by Montesquieu, he reaches the opposite conclusion, that legal transplants are impossible.

[177] Montesquieu (n 55) Capter III.: Of positive Laws
[178] Gillespie (n 150) 670-673
[179] ibid 670
[180] Legrand (n 1) 114
[181] Tahirih V Lee, 'Risky Business: Courts, Culture, and the Marketplace' (1993) 47 University of Miami Law Review 1335, 1338 (noting that transplanted law is particularly susceptible to creating 'chaos'); Marcus Radetzki, 'From Communism to Capitalism in Laos: The Legal Dimension' (1994) 34 Asian Survey 799.802
[182] Watson (n 134) 469
[183] Gillespie (n 150) 674
[184] Do (n 36) 55

In relating Montesquieu to the environment, Do seeks to consider how industrialisation, urbanisation and increasingly sophisticated communications media around the globe have influenced legal transplants. However, Do fails to expand on this theme; this omission will be addressed later in the present chapter.

A robust challenge to Montesquieu is raised by Watson,[185] who asserts that Montesquieu[186] ignores the history of successful legal transplants. In considering the history of legal transplants, Watson notes that there was a surge of transfers of Roman law into Western Europe immediately prior to the publication of Montesquieu's theory. In these cases, the climate of the hosts was frequently diametrically different to that of the Roman Empire.[187]

Another point of divergence between Montesquieu[188] and Watson[189] can be seen in Watson's assertion that Montesquieu promotes the role of the environment in order to support legal transplants, while seriously underestimating its hindrance factor. Watson holds that even within a nation, differences in environmental factors occur, citing those between England and Wales as examples.[190] In another area of transplant theory, Legrand considers this point under his classification of culture,[191] which he extends to include linguistics. These factors are more fully reviewed in Section 2.2.2 above.

Montesquieu was writing in the eighteenth century and it is important in the context of the current study to note that there have been numerous subsequent shifts in terms of the way that the economic, social-scientific, and technological perspectives of states have all evolved since. For instance, from a geographical, political and environmental perspective, the nation of Saudi Arabia did not exist during Montesquieu's era. Instead, its population lived as Bedouins, who formally gathered to become Saudi Arabia only in 1932.[192] The European Union also did not exist, having been originally founded as the European Coal and Steel Community in 1950, then as the European Atomic Energy Community and the European

[185] Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 Law Quarterly Review 79.
[186] Montesquieu (n 55) 10.
[187] This history of legal transplantation is assessed at the beginning of the chapter, with particular reference to the code of Hammurabi.
[188] Montesquieu (n 55) 301.
[189] Alan Watson, Legal Transplants and Law Reform, 92 L.Q.R. 79 (1976). 144
[190] Eg the application of the Animal Identification, Movement and Tracing Regulations (2016) Department of Environment and Rural Affairs; passim, in practice, with regard to additives; the regulations are interpreted differently in England and Wales.
[191] Legrand (n 1) 117-122
[192] Nahedh, Monera. 'The sedentarization of a Bedouin community in Saudi Arabia.' PhD diss., University of Leeds, 1989. 90-92

Economic Community in 1957.[193] The United Kingdom only became a member of this group in 1973.[194] The establishment of the World Trade Organisation (WTO)[195] and the World Bank also occurred during the twentieth century, with Saudi Arabia's accession to the WTO taking place in 2005.[196] This clearly illustrates there have been innumerable changes to the world that Montesquieu could not have envisaged, creating opportunities for more legal transplant theories during the twentieth and twenty-first centuries.

The following section reviews the influence that Montesquieu's writings had on Kahn-Freund, in terms of the nexus between law and society. In his evaluation of Kahn-Freund's perspectives, Watson[197] argues that he extends Montesquieu's eighteenth-century environmental and political perspectives of society to embrace power structures that are more contemporary. Nevertheless, it should be borne in mind that the two theorists broadly concur regarding the significance of political institutions.

2.2.3.2 Kahn-Freund's theory of comparative law

In his twenty-first-century analysis of the application of legal transplants of Common Law to repair perceived defects in the legislation of Vietnam,[198] Do refers to Kahn-Freund's theory of legal transplants. Do identifies Kahn-Freund's strategy of tracing development from Montesquieu's firm proposition that the law of one country is inexorably embedded in its national fabric and environment, meaning that transplants are inherently exceptional.[199]

Nevertheless, in his acknowledgement of Montesquieu's contribution to legal transplant theory, Kahn-Freund (1974)[200] departs from the former's sceptical summing up of legal transplants as 'un grand hazard' (a significant risk). In developing his theory, Kahn-Freund cites numerous examples of legal systems, nations and classifications of law, suggesting that when attention is given to the factors in his analysis, legal transplants are possible and have actually succeeded. His examples of successful transplants range from international

[193] On March 25, 1957, France, West Germany, Italy, the Netherlands, Belgium, and Luxembourg signed a treaty in Rome establishing the European Economic Community (EEC), also known as the Common Market, originally envisaged by Constantine.
[194] UK joined the [now] EU on 1 January 1973, having passed the European Economic Communities Act [1972]
[195] The World Trade Organisation[195] was established in 1992/3, to reinforce the principles of the GATT. The WTO's jurisdiction covers manufactured goods (excluding food) and services such as transport, insurance and intellectual property.
[196] WTO, 'Saudi Arabia' (WTO Member Information 2016) <https://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm> accessed 11 June 2016
[197] Ewald (n 61) 492
[198] Do (n 36) 62
199 'Un grand hazard' (a great risk): Montesquieu (n 55) Book I, Chapter 3.
[200] Kahn-Freund (n 37) 6

unification treaties (e.g. the European Communities Act 1972), to specific private laws covering industrial relations, divorce and commercial law.

Kahn-Freund's discussion of comparative law examines arguments regarding its uses and misuses as a means of law reform. Rather than proposing solutions, he seeks to pose questions and ideas regarding the way in which foreign models of law can potentially affect the law-making process. Within the framework of his analysis, Kahn-Freund discerns three considerations,[201] two of which are highly appropriate in the context of the legal transplanting of Western banking law into Saudi Arabia:

1. ' ... giving legal effect to a social change shared by the foreign country with one's own country ...',[202] and
2. '... promoting at home a social change which foreign law is designed either to express or produce ...'[203]

To illustrate how law mirrors its society, Kahn-Freund prefers metaphors of human organs, rather than Montesquieu's horticultural analogies. Extending this biological theme, Kahn-Freund also considers the transfer of mechanical parts from one machine to another, stating that a specific component either fits or it does not and there is therefore no room for adjustment. He then creates a basis for his legal transplant theory by suggesting that an axis exists upon which a transplant can or cannot be adjusted to fit its host. He refines his evaluation by proposing that legal transplants be situated on a continuum of the extent to which the transplanted subject performs satisfactorily.

When considering the political context of legal transplants, Kahn-Freund argues that since Montesquieu developed his theory more than two centuries ago, the political climate has experienced major changes in both national and international terms. For example, in Montesquieu's era, before the onset of industrialisation, employment in the West was almost exclusively agrarian. Kahn-Freund also traces the evolution of transnational trading, communications, and media to the globally recognised similarities that had occurred by the latter half of the twentieth century, when he delivered his Chorley lecture.[204] Nevertheless, he recognises Montesquieu's focus on the importance of environmental factors for legal transplants, to the extent that in spite of such differences, nations shared common legal problems during the twentieth century. He provides examples of industrialised nations and

[201] Kahn-Freund's first purpose is the unification of international law eg Carriage by Air (Supplementary Provisions) Act 1962; thus the numbered 1) and 2) in the text are in fact Kahn-Freund's second and third purposes.
[202] Kahn-Freund (n 37) 2
[203] ibid
[204] This was the second Chorley Lecture delivered at the London School of Economics on June 26, 1973.

their diverse industrial cities, such as Leningrad and Manchester, which have similar employment and housing issues despite geographical or cultural differences. However, rather than perceiving shared legal elements as negative aspects of legal transplants, Kahn-Freund sees them as evidence of the developing uniformity of culture and society across national borders. His position regarding common legal concerns considers many contemporary themes that cross national borders, notably liability for accidents, insurance, risk, and fault and other laws that embody similar themes, but which differ in their details according to the country in which they apply.

On this matter, Kahn-Freund asserts that

> … the degree to which any rule … or institution … can be transplanted, its distance from the organic and from the mechanical end of the spectrum still depends to some extent on the geographical and sociological factors mentioned by Montesquieu, but especially in the developed and industrialised world to a very greatly diminished extent. The question is in many cases no longer how deeply it is embedded … but who has planted the roots and who cultivates the garden. Or, in non-metaphorical language: how closely it is linked with the foreign power-structure …[205]

In effect, he argues that constitutional and political factors are of paramount importance.[206] Any government or body inclined to borrow laws should therefore reflect on the nature of the society that generated the borrowed rule.[207]

> We cannot take for granted that rules or institutions are transplantable … Any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores the context of the law.[208]

Furthermore, he argues that

> … legal rules could be ordered along a continuum ranging from rules very close to 'organic matter', for which the concept 'transplant' was appropriate, at the one end

[205] Kahn-Freund (n 37) 6
[206] JW Cairns, 'Watson, Walton, and the History of Legal Transplants' (2014) 41(3) Georgia Journal of International and Comparative Law 644
[207] Cairns (n 206) 644- 645
[208] Kahn-Freund (n 37) 27

> of the continuum, to rules more like 'mechanical matter', where one could speak of a simple replacement of a spare part (e.g. of a carburettor), on the other.[209]

Referring to the context of legal transplants, Kahn-Freund proposes three 'essential features'.[210] His initial category addresses the different environments that stem from different models of national governance, principally the totalitarian centrally planned economies and the absolute monarchies of Continental Europe, to illustrate the above themes. With reference to these frameworks, the current political governance structure of Saudi Arabia and the influence of the WTO[211] over the Kingdom in 2013 are assessed in Chapter 4.

Kahn-Freund then extends the categories of political models to consider the divergences between federal states and parliamentary democracies. Finally, he assesses the influence of 'organised groups',[212] including unions, consumer organisations, religious groups, and charitable organisations, showing how each exercises its power. He illustrates the differing exercise of power by the Catholic Church in the republics of Ireland and France in terms of the influence of the Church, especially regarding the extent to which legal change could be enacted in terms of family law legislation. This example is relevant in the context of the current study and can be evaluated with regard to the power of Sharia in Saudi Arabia, a factor that is addressed in the next chapter.

Kahn-Freund perceives that the role of religion has declined in the lives of individuals,[213] but he paradoxically refutes his own observation by noting that the Catholic Church in the Republic of Ireland continues to exert power over law reform. Although he mentions the Islamic religion as making adjustments in family law in order to better cope with an urban society, he makes no further comment than acknowledging the successful transplant of family law reforms into other countries with a non-Christian majority religion. The relevance of this point is that Kahn-Freund suggests that the role of religion is important in successful legal transplants, although he neither provides nor intends to provide any solutions in this area. In fact, Kahn-Freund's[214] analysis of the increasing influence of shared cultures and the mass media on society is utilised as evidence to show that the influence of religion has

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[209] AB Engelbrekt, 'Legal and Economic Discourses on Legal Transplants: Lost in Translation?', in: Bakardjieva Engelbrekt (ed) Law and Development (2015) 60 Scandinavian Studies in Law 114.
[210] Kahn-Freund (n 37) 11
[211] Ahmed Bagaresh, 'Accession of Kingdom of Saudi Arabia's to World Trade Organization and its Benefits' (23rd International Business Research Conference, Australia, 18 November 2013).
[212] Kahn-Freund (n 37) 12
[213] ibid 15-16
[214] ibid 13

diminished. It follows logically that he would perceive religion to be a diminishing factor to consider in transplanting a foreign law.

In drawing these threads together, Kahn-Freund suggests that as Montesquieu's vista of the environment took account of a relatively agrarian era, it should be adjusted and updated to accommodate the industrialised global landscape of the mid-twentieth century. In this regard, beneficial further research could reassess this environmental factor in the context of the twenty-first century, particularly in a comparison of the Anglo-Saxon and Sharia legal climates. While acknowledging Kahn-Freund's perspective, this study not only distinguishes between the two environments but also shows how they exist in each community.

With reference to his continuum of success in terms of legal transplants, Kahn-Freund proposes that the least successful 'organic' transfers are those that deal with the allocation of power in programmes of administrative, legislative, judicial, or constitutional reform. He continues this line of reasoning to propose that transfers are exponentially less likely to be successful when there is greater distance between the social and political structures of the donor and the host nations. Kahn-Freund also perceives that 'successful transplanting' requires the support of the legal profession, as well as a similar judicial and court structure. In discussing this, he refers to the failure to import the British system of trial by jury into France and Germany, both of which still operate on legal systems based on Roman Law, rather than the Common Law. He reinforces his emphasis on resolving differing systems through the transplantation process, citing the lack of success in implanting British parliamentary democracy in African nations as evidence for his proposition that successful transplants require the resolution of differences between cultures. In both the European and African examples, Kahn-Freund does not discuss whether the legal profession from either the donor or the host country supported the intended transplants, making it impossible to assess why he perceives the transplants to have failed.

Edward's[215] results bear a strong resemblance to those of Kahn-Freund, especially given their concurrence that the success of legal transplants is compromised where the cultural divergences are wide and the legal profession resistant. Regarding the role played by the legal profession, Watson, Kahn-Freund, and Edwards all agree that the support of the legal profession (Watson's 'clever lawyers')[216] is a significant factor in the success of legal

[215] Edwards (n 29) 55-57. Edwards draws from his research on the World Bank programmes of legal transplant into specific Caribbean countries during the 1980s, which occurred a decade after Kahn-Freund's LSE lecture in 1974.
[216] Watson (n 134) 469.

transplants. Watson refers to analyses by Sebald[217] and Noda[218] that reference the successful transplanting of the German Civil Code into Japan, despite their significantly different social, political, and legal spheres, which took place with the support of their respective legal professions.

While voicing misgivings regarding transplants between dissimilar socio-political contexts, Kahn-Freund cites commercial law as an example of a trade custom that facilitates international borrowing. At the time of his Chorley Lecture in 1974, the United Kingdom had recently become a member of the European Communities. In relation to this development, Kahn-Freund struck an optimistic note regarding the success of the implementing laws relating to free trade among member states. In order to transplant laws based on Civil Law principles, Britain's accession to the EC resulted in treaties and their related legislation becoming part of British law (i.e. covering England, Scotland, Wales, and Northern Ireland). However, subsequent developments have changed the EC, leading it to expand its 'social dimension'. This has resulted in complicated legal transplants being incorporated into Western law through the introduction of concepts like 'good faith'. As this is not a principle of English law,[219] it provides an example of Kahn-Freund's analogy of attempting an unsuccessful transplantation of a component from one machine into a different model. The influence of EU law on English banking law is addressed in Chapter 4.

Kahn-Freund argues that legal transplants of substantive law tend to be more successful than those that attempt to transfer procedural rules across jurisdictions. As evidence of this, he cites the laws governing industrial relations in the United Kingdom and the United States as examples of power relations that concern politics, workplace organisation, and judicial responsibility, which can undermine successful transfers. In this regard, Kahn-Freund underlines his earlier proposition that substantive laws, in this instance those governing individual employment relations, are often more successfully transplanted than the procedurally grounded rules of union-management relations. Kahn-Freund emphasises the analysis of the political and economic climates of the parties to legal transplants, for which he acknowledges the contribution of Montesquieu's theory. To the list of factors that support transplantation he adds informal rules and tacit customs and practice, which he includes in

[217] WJ Sebald (tr), The Civil Code of Japan (JL Thompson and Co 1934).
[218] Yosiyuki Noda, Introduction au Droit Japonais, Vol 19 (Dalloz 1966).
[219] As Lord Justice Bingham put it in Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd, [1989] 2 QB 433 English law preferred to develop 'piecemeal solutions in response to demonstrated problems of unfairness'.

his summary of the ways in which the spirit as well as the formalities of an arrangement must be included in a successful transplant framework.

The context of Kahn-Freund's propositions[220] forms the basis for Watson's[221] contemporary classification of their respective sociological and historical grounds for their respective propositions. Referring to Kahn-Freund's categorising of 'political',[222] Watson challenges his broad classification because of the inclusion of powerful and organised interest groups, noting especially that the Catholic Church and the British Trades Union Congress are hierarchically organised bodies that wield authority. Therefore, Watson claims that Kahn-Freund's extended definition precludes any assertions that a new law can be successfully enacted once powerful interest groups have been excluded from the process. In particular, Watson supports Kahn-Freund's recognition of the importance of assessing the balance of authority between the actors in the donor and host states. As a result, he continues to acknowledge Kahn-Freund's relatively contemporary contribution to legal transplant theory by proposing the importance of the commitment of a host nation to the success of the transfer, as he perceives the case to have been in Japan.

In essence, Kahn-Freund argues that the majority of successful legal transplants necessitate questions to be asked regarding the intersection between the proposed rule for the transfer and its donor. He therefore suggests that it might be possible for such a proximity to be put on a continuum: an axis that extends from loose couplings, which herald a successful transplant, to tight connections in the donor, which suggest a poor prognosis for the fate of the transplant. In arriving at any decision on his categorisation, Kahn-Freund modifies Montesquieu's focus on the political context to extend the classification of political factors to include sociological aspects,[223] as well as attempting to include the power wielded by organised, recognised interest groups.[224]

Watson, Legrand, and Kahn-Freund were developing their theories during the 1960s and 1970s. At this time, a central focus of global politics was the Tokyo Round of the General Agreement on Tariffs and Trade, which sought to reduce international tariff barriers.[225] These programmes and the negotiated rounds included transplanting laws from a range of national hosts. The consequence is that these transplant theories should be recognised as

[220] Kahn-Freund (n 37) 4
[221] Watson (n 1) 335
[222] Kahn-Freund (n 37) 4
[223] Do (n 36) 56
[224] Kahn-Freund (n 37) 12; Watson (n 1) 335
[225] The Tokyo Round (1973–79) reduced tariffs and established new regulations aimed at controlling the proliferation of non-tariff barriers and voluntary export restrictions. 102 countries took part in the round.

having both practical and academic importance, illustrated in the assessment of applications by states to join the WTO. During this process, the WTO considers culture, religion and economic circumstances,[226] in relation to the propositions that are acknowledged as contributions from these transplant theorists.

The mirror theory of Montesquieu forms a significant strand of Kahn-Freund's comparative legal research concerning European transplants. In contrast with these culturally grounded theories, the following section provides an analysis and discussion of Teubner's systems-based theory of legal transplants.

2.2.4 Teubner's legal irritant theory

Rather than take an extreme stance on the transplant axis, Teubner's[227] position falls between the 'impossible' stance of Legrand[228] and Watson's claim that transplants are 'easy'.[229] In considering this axis, Teubner does not perceive that a transplant will fit into its host with only the support of the legal elite. Neither does he believe that adjustments should take account of differing cultures. Instead, in essence, Teubner proposes that when legal transplants have succeeded, they have acted as 'legal irritants',[230] reacting against the conditions of their host to create their own fit, before re-emerging in an adapted form.

Teubner argues that the concept of legal transplants is predicated upon the idea that the outcome of legal transplantation is either success or failure. However, in reality, the results are likely to be mixed.[231] In this sense, 'legal irritants' may be a superior concept, given that it focuses on what happens after the transplantation, rather than on the fact of transfer. In other words, during the imposition of a foreign rule, it is not transplanted but instead 'works as a fundamental irritation which triggers a whole series of unexpected events.'[232] In this sense, it is not possible to domesticate legal irritants, because 'they are not transformed from something alien into something familiar, not adapted to a new cultural context'.[233] Teubner argues that the consequence is that the transplanted rules 'will unleash an evolutionary

[226] For example, protection of new industries in a range of ways, including quotas, subsidies and tariff barriers.
[227] Teubner (n 21) 11
[228] Legrand (n 1) 111
[229] Watson (n 1) 95
[230] Teubner (n 21) 12
[231] ibid 10-13
[232] ibid (n 21) 12
[233] ibid

dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change'.[234]

Teubner elaborates his position by arguing that there are intrinsic flaws in the proposition that Kahn-Freund has made; more specifically, he claims that legal transplants are not analogous to transplants in a biological body or to mechanical parts. The justification of Teubner's position is that while surgical and mechanical transplants fulfil much the same role in their new hosts, legal transplants fulfil a different role. He therefore proposes that legal institutions cannot remain the same once they are imported into another environment, arguing that the transplanted law cannot be 'domesticated'[235] to fit its new home. Indeed, his term 'irritant'[236] suggests that the transplanted law will form schisms between itself and its new host and that the key to a successful transplant is the effective management of these disturbances. He divides these effects into two categories: the changes that will occur in the rule from an external perspective and the alterations to the rule itself.

Expanding his theme of the irritant and its resistance to domestication, Teubner argues that operational dynamics will effectively rub at the transplant and its host to facilitate mutation of the rule. According to Teubner, rather than being tamed, the rule will then settle into its host environment in a new form. As an example of a transplant that he considers creates cleavages rather than closeness, he cites the transplantation of 'good faith'[237] from the different cultures of Continental Europe to operate within the Anglo-Saxon legacy of common law developed in Britain.[238] However, Teubner's focus extends beyond transplants in Europe to the wider vista of globalisation. In this context, he emphasises that the irritant effect of legal transplants creates friction, rather than adhesion. He supports this proposition with the assertion that although globalisation has evolved in a world of varying cultures and issues, much of the global population has been excluded from direct involvement in the development and advance of globalisation. Thus, he suggests that following the decision to transplant laws into different cultures to deal with a diverse range of problems, fragmented systems develop, instead of unifying ones that nurture consolidation. These schisms then act to separate industrialised societies from one another, as well as to separate them from less commercially or industrially advanced nations.[239]

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[234] ibid
[235] ibid
[236] ibid
[237] ibid 12
[238] H Collins, Regulating Contracts (OUP 1999)
[239] ibid 13

Teubner further expands his transplant theory by acknowledging the contribution of Watson, but suggesting that it is incomplete in three areas.[240] The first is their shared assessment of the historical interrelationship between the various legal systems that are party to the transplant. From this historical perspective, Teubner argues that laws have become decoupled from their national cultures and that in the era of globalisation, the development of a contemporary worldwide system of legal communications has led to the corresponding development of a common legal discourse. As a result of this shared medium, the links between laws and their particular nations continue to exist, but are almost inevitably less closely and tightly interconnected than in previous eras.

Teubner's second point refers to the legal profession's support for successful transplants. Referring to Watson's comment on the role of 'clever lawyers',[241] Teubner is of the view that the approach of assessing the individual evaluations of the legal professions of the donor and host nations is inappropriate in the global environment in which legal transplants occur. In simple terms, Teubner proposes that globalisation has encouraged a normative fusion of national shared historical reliance on legal norms. He suggests that throughout history, every legal profession has shared a common system that is founded on recursive and self-referential conduct.

Teubner and Watson agree that the arguments of culturalist and contextual theorists are flawed and sterile in asserting that the law mirrors culture and society. However, Teubner proposes that Watson's work is unfinished, because his study of social and political interaction lacks the requisite depth. He recommends that further research should be conducted to examine the inherent links in the dialogue between these elements

The expansion of Teubner's theme is that law is a social system with discrete units between which inputs and outputs occur in the form of communications. He classifies this metamorphosis of the system into four categories, in terms of how the emergent bonds influence legal transplants. These considerations are dealt with in the following subsections.

2.2.4.1 Tensile strengths of the links between law and society on a spectrum

In contrast to the mechanistic perspective championed by Kahn-Freund with respect to the relations between law and society,[242] Teubner[243] refers to Ewald's[244] perception that it is

[240] Teubner (n 21) 14
[241] Watson (n 134) 469
[242] Kahn-Freund (n 37) 12
[243] Teubner (n 21) 17
[244] WB Ewald, 'The American Revolution and the Evolution of Law' (1994) 42 Am. J. Comp. L. Supp. 1

essential to intensively plumb the depths of the particular law that is to be transplanted, in order to establish it properly in the social system of its host. In this regard, Teubner holds that every legal culture is unique and that this phenomenon must be assimilated. In particular, he states that legal cultures differ in terms of their interconnectivity when conflicts arise during a transplant. Teubner compares what he perceives as the mechanistic form of legal reasoning regarding statutory interpretation under English law with the more abstract and principle-orientated culture of the legal systems of continental Europe which stem from Roman Law. He expands this theme to demonstrate how the introduction of 'good faith'[245] from continental into English Law results in a legal irritant caused by the tensile links that are formed in conflict.

2.2.4.2 Connections with fragments of society and law rather than with society as a whole

The second tenet of Teubner's argument again acknowledges the contribution of Kahn-Freund's 'mechanic-organic'[246] spectrum. Teubner follows this line of reasoning to describe the influence of external factors arising from a multiplicity of sources and discourses. His analysis suggests that political discourses are the most influential factors on legal transplants. This line of argument is then extended to include economics, technology, health, science, and culture, all of which are inexorably linked to political discourses in the modern context. In his analysis, his era therefore exhibits moral pluralism and social fragmentation, which form selective and fractured linkages within a diverse social environment. Its dynamic and unregulated patterns create cleavages which, when a legal transplant is involved, result in cleavages and irritants. In addition, Teubner posits that the dynamics of the coexisting systems are inherently hostile to any transplant that is intended to make the law uniform. In terms of the present research, Teubner's thesis resonates with the potential for legal irritants to be caused during the transplant of Western banking law into the Sharia system of Saudi Arabia.

2.2.4.3 Differences rather than similarities between the law and these fragments

Teubner terms the differences between law and the elements of the fragmented social model 'divergent production regimes'.[247] The elements serve to facilitate the organisation of production through economic markets and their support systems. From the perspective of

[245] Teubner (n 21) 18
[246] Ibid 17; Kahn-Freund (n 37) 7
[247] Teubner (n 21) 24

differences in incentives, Teubner compares the German model of corporate governance and finance with its long-term strategy against the shorter-term perspective of British business. He notes that irritation can arise if the professional, legal, and governmental regulatory agencies fail to consider the issues involved in transferring a law between countries that are highly regulated and more loosely regulated states. In terms of this research, the potential for the irritation that Teubner discerns as existing between the British and German systems must be assessed when transplanting Western banking law into the Sharia system of Saudi Arabia.

The operation of these systems determines the nature of the incentives and constraints, for instance in regulatory rules and codes. The relevance to the present research is that the rules and codes of banking and financial services in a national central banking system would be included in Teubner's category of production regimes to ensure that an imported law is not rejected.

2.2.4.4 Co-evolving trajectories – the dynamics of conflict

The earlier research of Teubner[248] is largely grounded in the fact that social systems are complex adaptive units. His perspective on legal transplants therefore functions to highlight the outcomes of the dynamics of conflict, rather than encouraging the joint evolution of independent tracks between the fragments of society and the law. In particular, Teubner[249] refers to the schisms between the two production regimes of economic and legal systems and their institutions, reasoning that it is essential for distinct systems to be compatible, rather than being pressed into the formation of new social systems. Teubner's view centres on his proposition that both systems will evolve in different ways, using diverse logics, making it expedient to recognise their differences rather than force them to merge. According to Teubner, failure to heed the differences is likely to result in permanent irritations that will then form a continuous circle of conflict and will ultimately alter the original concept fundamentally.

In essence, Teubner argues that successful transplants need to consider the influence of social and cultural groupings in the context of production regimes, rather than in terms of organic systems. From this perspective, the transferral of institutions without proper evaluation of the divergence between the donor and the host is likely to result in dual

[248] Teubner (n 21) 28
[249] ibid

irritation in discourses between the rules of law and the social groups. This will be likely to result in new cleavages and schisms that will then impede the operation of the transplant.

2.2.4.5 Teubner's later work

The foregoing review of Teubner's theory refers to systems and groupings. These were the focus of his earlier work,[250] which analysed law as an autopoietic[251] social system. This view originated in the late 1960s and early 1970s as a scientific theory that sought to evaluate living systems as self-reproducing mechanisms that are capable of maintaining their form, irrespective of the inflow or outflow of the system. Because of this, the basis for the system retaining the ability to maintain its form was its ability to self-regulate and be self-referential.[252] Whilst acknowledging the biological analysis of Maturana and Varela, in turning to social systems, Teubner proposes that they are open to external influences, rather than being closed biological models. He therefore suggests that Luhmann's[253] earlier analysis of closed social systems may actually be closer to the biological model than his own theory.

During the late 1990s Teubner extended this line of reasoning to accommodate the systems theory postulated by Luhmann,[254] which had fundamentally influenced the idea of law as an autopoietic social system. It is essentially this autopoietic model that Teubner follows when he suggests that a transplanted law constitutes an irritation in its host. In order to assess such exchanges, he takes the historical context of laws and analyses how previous ties between law and society re-emerge in new forms.

The essence of Teubner's theory is that the unpredictable, dynamic forces of social systems, including law, are continually evolving in order to be reproduced in other forms. The framework for this theory is founded on the following four propositions:

1. Society is functionally differentiated into its different worlds. Thus, law, politics and economics exist separately but influence each other
2. It is not possible to direct or control social systems towards predictable outcomes because each one is influenced by different external systems. For the present research, this means that a legal transplant could be influenced by politics, central banking regimes, religion, and economics.

[250] ibid 23
[251] Humberto Maturana (1928-) and Francisco Varela (1946-2001) in the late 1960s or early 1970s.
[252] Humberto R Maturana and Francisco J Varela, Autopoiesis and Cognition: The Realization of the Living (D Reidel 1980) 42.
[253] Niklas Luhmann, 'The Paradoxy of Observing Systems' (1995) 31 Cultural Critique 37.
[254] Niklas Luhmann, 'Closure and Openness: On Reality in the World of Law' in G Teubner (ed), Autopoietic Law: A New Approach to Law and Society (de Gruyter 1987) 335; Niklas Luhmann, 'The Coding of the Legal System' in Alberto Febbrajo and Gunther Teubner (eds), State, Law and Economy as Autopoietic Systems (A Giuffrè 1992) 145.

3. A creative dynamic process begins autopoietically to produce new systems that possess their own dynamics.
4. Social autopoiesis is predicated on communications emitted from discourses between institutions and people.[255]

In support of his theory that law is not a closed system, Teubner refers to the politicisation of contract law since the 1960s and to examples of good faith being transplanted into English law with its negotiations and accession to the EEC on 1 January 1973.[256] The influence of the 'structured coupling' of law and politics with law and economics combines in Teubner's model to form an autopoietic legal system that is profoundly influenced by its discourses with the other disciplines. Here, Teubner again acknowledges Maturana's influence, in his notion that 'structured coupling' is the multiple memberships of legal communications with other, autonomous domains (such as politics and economics).[257] Teubner notes the effects of discourses with economic and political systems in the enactment of legislation, which takes account the individual logic and meanings of different disciplines. For instance, an economist and a lawyer have different understandings of the word 'rent', thereby creating a 'creative misunderstanding' that develops a new discourse through autopoiesis. In this way, Teubner maintains that although direct translations may be impossible across functionally different worlds, the autopoietic response can still enable a workable system to be created that adapts to all these actors.

Another analysis of the law as an autopoietic system is proposed by Beck,[258] who refers to Teubner's original research on autopoiesis with respect to the primacy of communications in the overlapping discourses between different social systems. Beck criticises Teubner's view of communications on the basis that it is abstracted from both the senders and the recipients of discourses. Beck's also criticises his substitution of systems for subjects, suggesting that this approach fails to consider the law as a phenomenon in practice. With regard to perturbations, Beck argues that Teubner has oversimplified the nature of external influences and therefore suggests that a realist view of the law as simply 'what is enunciated by judges' is too limited. He notes that it is also affected by external disturbances, including the enactment of new legislation and an objective consideration of the world beyond trials in courtrooms. Nevertheless, whilst discerning flaws in Teubner's theory of the law and stressing his reassertion of Teubner's proposition that law is merely composed of

[255] Anthony Beck, 'Is Law an Autopoietic System?' (1994) 14 Oxford Journal of Legal Studies 401.
[256] Teubner's (n 21) 28
[257] Beck (n 255) 403-404
[258] Beck (n 255) 404

communications between social systems, Beck acknowledges Teubner's critical legal achievement in drawing attention to the law as a complex social phenomenon.

In his critique of these previous transplant theorists, Teubner offers three principal arguments. Regarding Watson's historical perspective, he emphasises the need to consider the legal systems of the donor and the host, in addition to transferring bodies of law. He also argues that the culturalist school of thought of Montesquieu[259] and Legrand[260] overemphasises the significance of social norms, arguing that these are actually insignificant in the results of historical studies. Finally, Teubner perceives that there is a relative paucity of evidence to support Legrand's claims, effectively challenging the claim of culturalists to explain the plethora of successful legal transplants between Western societies.

However, despite his divergences from the culturalist school of thought, Teubner accepts that a nexus exists between law and culture, albeit suggesting that similarities support interdependence between the law and other specific fragments of society, rather than simply mirroring them. Conversely, the culturalist school considers that the greater the autonomy between law and society as a holistic concept, the greater the prospect of a successful transplant. Nevertheless, Teubner and the culturalist school both hold that it is overly simplistic to propound that law mirrors society.

Therefore, the later development of Teubner's[261] thesis is that 'legal irritants', when autopoiesis is seen as a feature of the system, serve to enable communications between each of the systems of the host in the transplant frame. As a result, Teubner perceives that new discourse develops from 'creative misunderstanding'. His thesis of legal irritants provoking communications between the systems is therefore similar to Legrand's propositions regarding linguistics, as well as those of Watson regarding common understandings across boundaries.

The scientific trend of Teubner's systems-focussed theory of legal transplants is followed by the 'legal formants' theory of comparative law as a science, which was propounded by Sacco, who was also part of the legal transplant academic community during the 1970s. This important theory is discussed in the following section.

[259] Montesquieu (n 55) 55
[260] Legrand (n 1) 115-116
[261] Teubner (n 21) 23

2.2.5 Sacco's legal formants theory

Rodolfo Sacco contributed to a colloquium at Badia Fiesolana on a 'Common Law of Europe', in a paper entitled 'Droit commun de l'Europe, et composantes du droit'.[262] His theory of legal formants is that the legal landscape consists of components that are not necessarily coherent with each other, rather than of a pyramidal, hierarchical set of norms that derive from a 'sovereign at the top directed to the subject at the bottom'.

Sacco originally envisaged abolishing what he perceived to be the artificial frames of analysis that are utilised to create uniform, scientific models that function under uniform operative rules.[263] His opposition was based upon the perception that comparative legal studies typically failed to discern that the differences between legal systems were unimportant in assessing legal transplants. This assertion was based on the proposition that history provides no evidence of a rigorous basis of analysis in the study of comparative law.

This challenge to existing fields of comparative legal study was founded on the particular differences and similarities that existed between the systems. Sacco divides these into the following three precepts in studying comparative law:[264]

1) Involving linguistics by analogy with its use in other sciences, such as anthropology
2) Highlighting structural differences between comparative systems
3) Not limiting linguistics to practical applications

Despite his claims to eschew other comparative legal methodologies, Sacco's work is characterised by certain similarities to those of other preeminent legal transplant theorists. Regarding his first precept, the role of linguistics is a focal point of Legrand's hypothesis,[265] which Gillespie[266] attributes to the influence of anthropology.[267] This proposition correlates to Sacco's third precept, which holds that linguistics is a social science with both theoretical and practical aspects. Lastly, Sacco's second category shares profound similarities with Teubner's hypothesis, namely that law is an autopoietic system consisting of closed structures.

[262] R Sacco, 'Droit commun de l'Europe, et composantes du droit', in New Perspectives for a Common Law of Europe: 95 (Mauro Cappelletti ed., 1978)
[263] Sacco (n 261) 3
[264] Ibid 5
[265] Legrand (n 1) 116-117
[266] Gillespie (n 150) 671
[267] Innis, Robert E., ed. Semiotics: An introductory anthology. Indiana University Press, 1985. 110

Overall, Sacco posits that one should ideally view comparative law as a science that examines different laws and regulations, rather than simply as a mechanism to enable comparisons of legal systems. However, whilst advocating an objective approach to the analysis of all legal systems within comparative law, Sacco also suggests that comparative lawyers should strive to obtain an intimate knowledge of a single legal system.

Sacco advocates the use of linguistics as an empirical source for comparative lawyers.[268] In this, he acknowledges the contribution of Kiralfy's translation of linguistic concepts to denote legal concepts. The method for this translation involves posing questions to assess the accuracy of legal terms across different systems. Despite acknowledging the robust nature of Kiralfy's research, however, Sacco dismisses the possibility of all expressions being capable of translation. In order to illustrate his proposition that linguistic problems are a bar to accurate comparative legal assessment, he cites differences between France, the Francophone provinces of Switzerland, and French-speaking Canada. Although all have French as an official language, the word '*fiducie*' has different legal meanings in the three jurisdictions. Similarly, in the present research, the use of 'negligence' in English law is different from its use in the USA, or in the laws of the Canadian provinces, which are based on Common Law. Similarly, in Islamic law, different jurists in Saudi Arabia and Pakistan, for example, have developed and adopted separate meanings for the same word.

The role of linguistics in comparative legal studies is complicated by Sacco's assessment that words do not have absolute meaning, even within a single jurisdiction. Instead, he states that changes often arise between eras and even between speakers, leading him to propose that the difficulty of achieving accurate translation is caused by the fact that the relationship between a word and its context may differ. In this way, Sacco adds another facet to the complicated model that he proposes to utilise to represent the dynamic nature of legal meaning. For instance, he explains that a word used in a legal context may be objectively grounded, but the meaning it takes in political usage can change owing to value judgements. Sacco evaluates the dynamic nature of law as a constantly changing process, not only in itself but also in its interaction with social life, which he illustrates with reference to the way that judges have leeway to exercise their discretion in dealing with particular cases. However, in stark contrast to legal change, he observes that there are rules with no social variability, such as road traffic rules, which tend to be constant.[269]

[268] Sacco (n 262) 10
[269] Sacco (n 262) 392

In order to solve the conundrum of a word in a legal context, Sacco proposes that the language be stripped down to its basic constituents, to the equivalent of its linguistic DNA. By way of illustration, he notes that the language used by a legislator will have a particular official meaning that is germane to its context. According to Sacco, a scholar will take one of two approaches to a legal translation: either transferring, rather than changing, a word to its new host in situ, or tracing its linguistic roots to another language. For the purposes of the present research, the linguistic roots would be traced to an Arabic source. The outcome of Sacco's analysis of comparative legal translators is that their approach may be considered crude to the point of carelessness.

Having diagnosed this weakness of comparative legal study, Sacco uses 'legal formants' as his unit of comparison. He classifies legal formants into two substructures: synecdoches, which are obvious legal formants that can be perceived as metaphors; and cryptotypes, which represent a hidden, covert category that represents the social dimensions of meaning. In a synecdoche, the financial services sector in the UK is plainly denoted by the straightforward term 'the City'; whereas in a cryptotype, such as 'men in grey suits', the perception may be of an enduring ruling class that operates covertly in one setting and explicitly in another. Thus, Sacco reasons that a cryptotype is formed when a concept is implicit in one legal system, but explicit in another.[270]

His thesis starts by questioning the definition of a 'legal rule'.[271] He extends classification beyond collections of single rules, such as the regulations of constitutions, legislation, courts and the doctrines of jurists. Instead, he perceives rules to have numbers of meanings and thus the potential to conflict even within their own systems. As a consequence of this, he suggests that direct comparisons of single rules or associated systems can often be misleading, with the possibility for diverse applications of a single rule, which he illustrates with reference to the decisions of different judges. Sacco therefore challenges the concept that even within a given legal system, the application of a rule results from the application of pure logic and deduction, instead arguing that a subjective element is inevitably involved through its use by human beings.

Sacco's solution to the weaknesses in other comparative legal methods is to introduce a notion of 'historical science',[272] whereby phrases cease to have abstract definitions. He

[270] Ibid 386
[271] Ibid 31
[272] ibid 24

acknowledges Gorla's contribution in this arena,[273] with his distinction between a rule as stated in the court and the way in which the same rule is actually applied. In this, both experts believe that statutes or judicial precedents do not necessarily accurately reflect the living law, which may be affected by a wider vista of 'legal formants' that change with each case. In a later work, which provides more detailed analysis of particular comparative legal concepts,[274] Sacco proposes that researchers should examine the possible differences occurring in legal formants within a single system, as well as between different jurisdictions. He suggests that the greatest differences tend to appear in general legal definitions, whereas more similarities occur between specific elements in statutes or the ways that rules are applied by courts. Moving to the wider category of legal formants, Sacco proposes that scholarly findings are too abstract and unrealistic to view comparative law as a science.

Despite his misgivings over legal borrowing, Sacco suggests that it is central to understanding the course of legal change,[275] whether through legislative borrowing, direct judicial borrowing, or through the introduction of alien phrases, notably the EU concept of 'proportionality' which was not part of English law prior to the UK joining the European Union. He expands this line of study to consider imitation, arguing that this arises through imposition and a wish to appropriate another system, most frequently when that of the host is deemed to be somehow incomplete.[276] An example in the context of the present study would be the perceived prestige of the Western banking system, encouraging it to be transplanted to Saudi Arabia, with the objective of rationalising two different systems of banking law that exist in tandem.

This divergence of legal formants was studied by Schlesinger,[277] through factual cases, with identically formulated questions that required the responses to be self-contained. This approache strives to ensure consistency across the different jurisdictions by means of case studies that were subjected to identically formulated questions of a suitable type. According to Sacco, the factual approach removes the linguistic obfuscation inherent to studies that compare legal systems. Despite Sacco's support for Schlesinger's method, Tallon criticises the assumption that systems of civil law share their reliance on precedent with the Common Law.

[273] G Gorla, Il contratto (A. Giuffrè 1955)
[274] Sacco (n 262) 358
[275] Ibid 394
[276] ibid 400
[277] ibid 28

Using historical analysis in his critique of the legal formants school, Watson[278] concurs with Sacco and Teubner that law develops from narratives, such as those in the Ten Commandments, which have eventually evolved into binding legal rules,[279] or the rules of conduct in Rabbinic law which forbids working on the Sabbath. Watson adds that law develops from social realities, as is evident through the formation of Roman law. However, although Watson claims to espouse historical grounding, he fails to refer to Islamic law and this marks a flaw in his reasoning, since the influence of Islamic law is an important factor in the development of Roman law and therefore the legal systems of Continental Europe, so should be acknowledged.[280] According to Makdisi,[281] in addition to customary law, of which Canon law and Roman law are cited as examples, there are 'remarkable similarities' between Western Common Law and 'the more highly developed Islamic law' that influenced it.

In summary, Sacco's theory of comparative law as a science is promulgated from elements of other comparative theorists, such as Watson, Legrand, and Teubner, in addition to his reliance on the methodology of Schlesinger.[282] One of Sacco's key positions, namely that a successful transfer benefits more from the overall reception of the donor state's legal rules rather than merely imitating them, is acknowledged in the following section, which discusses Örücü's transposition theory.

2.2.6 Transposition theory

The transposition theory of legal transferral represents a reassessment of previous legal transplant theories. Essentially, Örücü (2002)[283] proposes transposition on the basis that legal transplant theory requires reassessing to ensure its continued relevance in the twenty-first century. In this regard, she discerns that the polar points of the transplant axis are represented by Watson,[284] who thinks legal transplants are 'easy' and Legrand, who perceives them to be 'impossible'.[285] She expands the basis for this comment with reference to Sacco, who

[278] Alan Watson; From Legal Transplants to Legal Formants, The American Journal of Comparative Law, Volume 43, Issue 3, 1 July 1995. 470
[279] Calum M Carmichael, The Origins of Biblical Law: The Decalogues and the Book of the Covenant (Cornell University Press 1992).
[280] This is historically evident in Spain (Alhambra) and France (Vesley).
[281] John A Makdisi, 'The Islamic Origins of the Common Law' (1999) 77 North Carolina Law Review 1635
[282] Sacco (n 262) 28
[283] Örücü (n 22) 206
[284] Watson (n 1) 95
[285] Legrand (n 1) 111

suggests that 'between two totally different legal systems, an overall reception is easier than wide-ranging imitation of particular rules and institutions'.[286]

Örücü argues that because laws and societies are in continual flux, the outcome of transferring law from a donor to a host is best reflected in 'legal transpositions'.[287] The evolution of Örücü's theory acknowledges the contribution of the foregoing theorists to her proposition that rather than moving a legal system from its source to a new host as a 'transplant',[288] it may be better to refine this to a 'transposition'.[289]

Örücü deploys the language of 'transposition' and 'tuning' of the transplanted law to suit the socio-legal culture and the needs of the recipient and notes other apposite metaphors: 'grafting', 'implantation', 're-potting', 'cross-fertilisation', 'contamination', 'infiltration', 'infusion', 'digestion', 'melting pot', etc.[290]

In this sense, the concept of legal transplants is a rather limited approach for understanding and discussing the transferral of law, such as in a situation where a population moves into uninhabited land and so is able to use their original laws without outside influence.[291] Örücü therefore recommends the use of the term 'transposition', more commonly used in musical analysis, to describe the borrowing and adaptation that occurs during legal transplantation. She argues that this term is particularly appropriate in instances of major changes based on competing models.

> In musical transposition, each note takes the same relative place in the scale of the new key as in the old, the 'transposition' being made to suit the particular instrument or the voice range of the singer. Similarly, in law, each legal institution or rule introduced is used in the system of the recipient, as it was in the system of the model, the transposition occurring to suit the particular socio-legal culture and needs of the recipient.[292]

In this sense, it should even be possible to 'tune' legal transplants that have not been successful, modifying them to better suit the new domestic context. This tuning process can occur due to particularly close similarities in terms of culture, structure, or substance. They

[286] Sacco, R. (1991). Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II). The American Journal of Comparative Law, 39(2), 400
[287] Örücü (n 22) 206.
[288] Watson (n 1) 21
[289] Örücü (n 22) 206.
[290] Ibid 217
[291] ibid
[292] Örücü, (n 22) 207

can also occur in response to the involvement of a ruling elite or the legal profession, who are the primary actors of the law and can therefore assist with 'fine-tuning'.[293]

This stance is predicated upon the belief that a legal transfer can be understood as analogous to sheet music, with the basic score being specifically refined to match each particular instrument in the orchestra. The second main proposition is that no single transplant theory is used to affect the transfer to a host; instead, a series of transpositions is used to accommodate the reciprocal influences that occur as the system proceeds. In this way, Örücü extends her musical analogy to argue that a succession of tuning exercises is performed by the actors within the group, which she perceives to be the 'key to the success'[294] of a transfer. Regarding the state of flux during the introduction of a legal system, Örücü agrees with Teubner,[295] who perceives the importance of the dynamics of the changing circumstances. She reasons that law exists in a state of flux within a domestic system and also across jurisdictions, for instance, through judicial decisions.

Teubner's classification of 'legal irritants'[296] regarding the effect of the application of a foreign rule represents the fulcrum of a series of unforeseen events. These change the status quo so much that the transplant must necessarily be rejected if it does not interact with its host. In refining her analysis of the effect of introducing a legal system into a host, Örücü refers to Grief,[297] who evaluates whether an adopted system corrects or contaminates, which she dismisses as being overly dependent on a particular subjective stance. The outcome of her assessment of these other propositions and her concurrence with Teubner regarding the fact that law is in a constant state of transposition is to formulate the proposition that transfers should involve an essential twofold question: 'What kind of transformation of meaning will the term undergo, how will the role differ?'[298]

Like Kahn-Freund,[299] Örücü considers that differences must be examined before there can be harmony between a new system and its host. She judges that legal transposition must therefore be seen to involve an unquestioned acceptance of diversity, acknowledging the impact of a series of two-way currents, rather than perceiving transposition as a single track to attaining uniformity. In particular, she asserts that it is necessary to monitor and adjust the

[293] ibid) 212
[294] ibid 207
[295] ibid 210 ; Teubner (n 21) 11
[296] Teubner (n 21) 1
[297] Nick Grief, 'The Pervasive Influence of European Community Law in the United Kingdom' in Thomas G Watkin (ed), The Europeanisation of Law (UKNCCL 1998) 110.
[298] Örücü (n 22) 210
[299] Kahn-Freund (n 37) 9

differences between legal and cultural points of confluence and divergence. She identifies the members of the legal profession as important facilitators who, to return to her musical analogy, tune the instruments to respond to changes and needs as they arise. This role for legal professionals recalls Watson,[300] who emphasises the significant role played by the 'legal elite' in effecting the transfer.

Örücü[301] refines her classifications of the transpositions where legal jurisdictions combine several transfers, taking the EU as the source of her examples. Diagram 2.3 shows the four overall groupings, denoting key types of transposition.

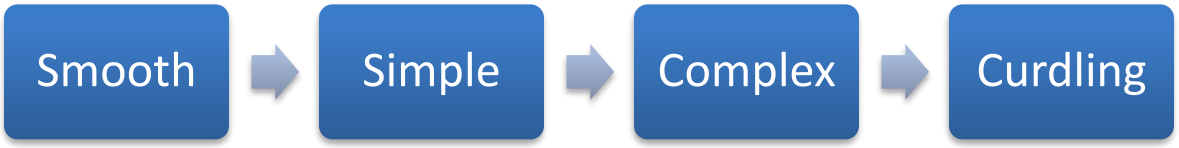

Diagram 2.3: Örücü's four types of transposition

- According to Örücü's analysis, a 'smooth' transposition occurs in situations when the donor and the host share similar structures, substances and cultures. The result is that only fine tuning is required, supported and facilitated by the ruling elite and the legal profession. She cites the EU as an example of such a transposition, with its absence of coercion encouraging the harmonisation of legal systems, despite their relative socio-legal plurality.
- The second division describes a simple mixed transition, in which the blending in the transmigration of the law involves a two-way continuum, such as occurs in Scotland. Here, the two-way movement can be seen in English law being influenced by Scottish rules, as well as Scottish laws being influenced by English. In refining the simple mixed structure, Örücü also refers to contemporary transmigrations between Hong Kong and China, where the legal and socio-cultural lines have become increasingly blurred.
- The complexity of legal transfers relates to their difficulties in Örücü's third category of 'complex mixed systems', wherein the emergence of socio-cultural and social-legal divergences require the management of internal conflicts engendered between the donor's system and that of the host. Algeria is provided as an example where internal

[300] Watson (n 59) 133
[301] Örücü (n 22) 213

conflicts within the states themselves have caused transfer problems. Similarly, the obstacles in both Zimbabwe and Sudan are based on the separation between their respective donors, plus the internal conflict within the host state. Finally, at the other extreme of her spectrum, Örücü describes dysfunctions, where no synergy exists between donor and host, which she likens to the curdling of sour milk. As an example of a dysfunctional state where no legal transfer was sustainable, she offers the experience in Burkina Faso.

The outcome of Örücü's evaluation of transpositions is her proposal that contemporary transfers represent a blurring of the demarcation lines between formally grouped legal families that are the outcome of voluntary reception of transplanted law, such as between Hong Kong and China, rather than those imposed in the past by colonial rule. She cites the English imposition of a codified system of Common Law on India as an example of an enforced transfer.

Ajani[302] agrees with Örücü concerning the need to align the donor's system to the conditions in the host. In discussing this point, Örücü considers that the failure to tune a transposed law to the legal system of the host is akin to creating an unworkable 'virtual reality'.[303] She then assesses how transpositions achieve their intended effect and agrees with Watson that lawyers play a crucial role, although she adds that factors including the presence of an independent judiciary and police force, or the transparent administration of justice, may also be significant.

Örücü's legal transposition theory evolved towards the end of the twentieth century, when she focused on the emerging democracies of Eastern Europe,[304] which had been enclosed within the centrally planned economy of the former USSR. During her investigations, she identified the existence of five elements, which are summarised below.[305]

2.2.6.1 Form and content

When transposition is economically urgent, Örücü cautions against the involvement of politicians, who are often incentivised by excessively short-term goals. According to Örücü

[302] Gianmaria Ajani, 'The Role of Comparative Law in the Adoption of New Codifications' (Italian National Reports to the XVth International Congress of Comparative Law, Bristol, 1998) 65.
[303] JM Smits, 'Systems Mixing and in Transition: Import and Export of Legal Models: The Dutch Experience' in E Hondius (ed), Nederlands Reports to the Fifteenth International Congress of Comparative Law (Intersentis Rechtswetenschappen 1998).55
[304] Örücü (n 43) 89
[305] Örücü (n 43) 89

and Scruton,[306] such hasty operations are more likely to result in a less than successful 'cut and paste'[307] exercise, rather than an effective embedding of the system into its new host.

Conversely, Örücü provides the example of the Russian transposition, which was successful due to a rigorous collaborative law programme, during which experts from the donor states liaised with the host to ensure a harmonious transposition of laws. She extends this collaborative theme to identify the cross-fertilisation between practitioners and academics from both the donor and host states in contributing to secure the successful transposition of the Dutch Civil Code into Russia.[308]

2.2.6.2 Chance and choice

After an interval of only three years, Örücü[309] acknowledged Watson's[310] finding that the choice of legal systems is predicated on the current availability of transposable legal systems, then fundamentally on their prestige.

Örücü's factor of choice involves the elements of the market and choice. In this regard, the market signifies the particular legal models that are available for transplantation. In contrast, choice describes the 'imposed reception'[311] if the host desires acceptance into a particular economic market. In terms of the emerging East European democracies, Örücü reasons that the European Union constitutes an especially attractive economic opportunity for these countries, which means their choice of legal transplant is necessarily limited by the range of systems of the EU member states.

In contrast to nations that have a choice, even when that choice is limited, Örücü notes that some countries may be forced into accepting legal transplants. Edwards's research into the World Bank's imposition of Western laws on certain Caribbean countries yields examples of enforced transplants, in contrast to transplants from some former USSR countries, which possess elements of free selection.[312]

[306] Roger Scruton, 'The Reform of Law in Eastern Europe' (1991) 1 Tilburg Foreign Law Review, Journal of Foreign and Comparative Law 8. 93
[307] Örücü (n 43) 98
[308] Örücü (n 43) 89
[309] ibid 89 and 90
[310] A Watson, 'Aspects of Reception of Law' (1996) 44 Am. J. Comp. L. 339-340
[311] Örücü (n 43) 90, Örücü (n 15) 5
[312] Edwards (n 29) 57

2.2.6.3 Prestige and efficiency

Örücü, Watson and Sacco all agree that nations typically select systems from which to transplant based on prestige and specific incentives. Sacco[313] and Örücü[314] both identify that the incentive for many countries to adopt Roman and Common law systems is the potential prospect of accessing the economic markets of the EU.[315] However, Monateri[316] is among other academics who argue that factors like the perceived efficiency of the donor nation are often more important than prestige.[317]

2.2.6.4 Culture, structure and substance

In her final classification, Örücü states that the structure and substance of a legal system are receptive if the 'socio-culture' is compatible.[318] Like Watson, Örücü likens the techniques and forms of a legal system to an easily moveable commodity. For this reason, both agree that law can transfer more easily than values, especially when the donor nation and the host possess profoundly different standards. In the present research, the transposition of Western banking law into Saudi Arabia poses at least one significant challenge in the conflicting matter of stance on the validity and legality of interest charges. It should be noted that whilst Örücü examines emerging democracies, the focal nation of this research is the Kingdom of Saudi Arabia, which is not likely to become a democracy in the foreseeable future. Thus, Örücü's classifications should be tested against the Islamic constitutional system in Saudi Arabia, which is neither democratic nor secular.

Örücü acknowledges Ajani's[319] contribution to the field through his assessment of four types of legal borrowing in the former USSR, which she refers to as 'hyphenated or layered systems'. Ajani's classifications are:

- Re-enactment of a pre-USSR code (Latvia)
- Preservation of an existing code gradually renewed by pre-USSR laws (Hungary, Poland, Lithuania)
- Adoption of a new code (Estonia borrowed its code from Germany)

[313] Sacco (n 262) 398
[314] Esin Örücü, 'What is a Mixed Legal System: Exclusion or Expansion' (2008) 3 Journal of Comparative Law 34
[315] Örücü (n 43) 89 - 90.
[316] Ajani (n 302) 69-70
[317] Örücü (n 43) 89-90
[318] ibid 91
[319] Ajani (n 302) 70

- Absorption of many new statutes from different sources (Russian Civil Code, 1995).

While acknowledging the success of such hyphenated systems, Örücü heeds Scruton's[320] note of caution that

> ... [Eastern European] countries do not need more laws but less. Or rather less pseudo-law, less codes, regulations, permissions, protocols and more real law. And above law they need to adhere to the ruling principle of legality, which is that everything is permitted unless the law says otherwise.[321]

Örücü therefore argues that the longevity of the hyphenated transpositions outlined above can only be assessed over future decades. For this purpose, she recommends using Jameson's[322] examination of progress from the perspective of the host state, a source-oriented approach that contrasts with Örücü's and Jameson's less favoured 'target-oriented approach', which focuses on the objectives rather than the effects of the transposition.

In outlining the most common incentives for transpositions in diverse environments, Örücü stresses the importance of extrinsic factors, particularly political and related forces. In this regard, she agrees with Watson, who states that the perception of the prestige of a legal system can be highly persuasive in encouraging a nation to borrow legal rules from elsewhere. She refers to Evans's description of external and internal influences operating on transpositions.[323] She also refers to Majone and Evans, who suggest that recipient states should develop a 'push and pull' selection policy. As an example of this, in 1996 Turkey was pushed by its wish to join the EU and also experienced internal pressures from its domestic traders to join the Union to gain access to new markets. To test her proposition, Örücü also cites Turkey as an example of a state within which socio-cultural and legal-cultural diversity exists, between itself and other members of the EU, as well as internally. Örücü proposes that religion and culture are two particularly important points of divergence that need to be reconciled if a transposition is to endure. However, in common with Legrand, she fails to address the implications of what she terms 'culture' and, as such, this concept would benefit from further research.

With regard to the adoption of laws, Örücü diverges from Watson's stance in her proposition that the Turkish experience dispensed with its legal history.[324] She attributes this to the

[320] Scruton (n 306) 13
[321] Scruton (n 306) 13
[322] Nigel Jamieson, 'Source and Target-Oriented Comparative Law (1996) 44 American Journal of Comparative Law 121
[323] Andrew Evans, 'Voluntary Harmonisation in Integration between European Community and Eastern Europe' (1997) 22 European Law Review 202.
[324] Örücü (n 15) 6

fragile nature of the Turkish legal system, which makes it more open to foreign transpositions. This fragility gives Turkey the opportunity, despite the cultural gaps, to incorporate and blend adopted rules from more than one donor. The efficacy of this is evident in the acceptance of transposed laws in both urban and rural areas of the country.

Returning to Watson's thesis that legal transplantation is 'easy',[325] with no cultural or related differences to form significant barriers, Örücü expands her theme to propose that local tuning can facilitate smooth transpositions even more easily in the twenty-first-century context.[326]

At the dawn of the twenty-first century, a line of practitioners, including Lord Goff,[327] as well as respected academics such as Örücü[328] and Koopmans,[329] predicted that within comparative law, the field of legal transpositions was about to become a critical discipline for practitioners and academics alike. The importance of this field can be seen in Ward's perspective,[330] which argues that transpositions are practical means of making the law function, rather than ways to find effective resolutions to constitutional, ideological, and philosophical convergences. In contrast, Koopmans suspects that while

> ... our problems in society increase as our certainties in religious, moral and political matters dwindle and more and more problems are common problems, the search for common solutions is only slowly beginning.[331]

It should be noted that Örücü, Koopmans and Ward are referring to Western legal transpositions with common roots. However, this research challenges the suggestion made by Koopmans that 'our certainties in religious, moral and political matters have dwindled' as an over-generalisation. This criticism is valid in the context of the present research due to the continued strength and far-reaching influence enjoyed by Sharia in contemporary Saudi Arabia. This characteristic is embedded not only in the religious and moral life of the nation, but also in its politics, its economics, and the administration of justice. Watson's proposition that differences in national rules do not restrict their transplantation therefore fails to account for the particular, distinctive structure of Saudi society. However, Berry[332] notes that while differences in legal cultures can be problematic, when divergences exist between a country's

[325] Watson (n 1) 95
[326] Örücü (n 43) 86, Örücü (n 15) 7
[327] Lord Goff, 'The Future of the Common Law' (1997) 46 International and Comparative Law Quarterly 745.
[328] Örücü (n 43) 95
[329] T Koopmans, 'Comparative Law and the Courts' (1996) 45(3) International and Comparative Law Quarterly 545.
[330] Ian Ward, 'The Limits of Comparativism: Lessons from UK-EC Integration' (1995) 2 Maastricht Journal of European and Comparative Law 23.
[331] Koopmans (n 329) 545
[332] David S Berry, 'Interpreting Rights and Culture: Extending Law's Empire' (1998) 4 Res Publica 10

culture and its law, for instance, through interpretation they can 'tap into each other and enmesh, bringing 'cultural conversation' into a broader narrative'. This proposition appears to resonate with the analysis conducted by Örücü of the transposition of the Dutch Civil Code into Russia, the success of which was predicated upon an extensive comparative legal study, followed by close collaboration between practitioners from the donor and host states.

Summarising her position in her model of 'critical comparative law',[333] Örücü suggests that the role of comparative lawyers is to build bridges between what she terms 'traditional cultures'[334] and Western norms. She claims that all law is in a state of change or transposition, both within and between legal systems. Therefore, the purpose of resolving divergences in the transposing of law can be perceived as being akin to the correction of distortions through sensitive local tuning and collaboration. In essence, Örücü[335] suggests that the thrust of legal reform comes from within the host state, which constitutes an expansion of Watson's historically grounded proposition that law has evolved within and across state boundaries with the support of a legal elite. This extension of the perceived ease of legal transplants is predicated on sensitive local tuning and the fostering of symbiosis between the donor and the legal practitioners and academics of the host state. Furthermore, her empirical studies also support the role of translations and linguistics, in accordance with the positions of Legrand and Sacco. In essence, Örücü's critical comparative law methodology represents the evolution of the breadth and depth of legal transplant theorists, on whom Watson is a notable influence.

2.3 The various theories compared

Table 2.1 classifies the attributes that are included in the legal transplant theories reviewed in this chapter. These various characteristics have been divided into thirteen principal factors that are represented in more than one theory, with two more being significant elements in a single theory.

[333] Örücü (n 43) 97
[334] ibid
[335] ibid 221-223

Table 2.1: Attributes of legal transplant theories

Attribute / Author & Theory	Legal elite	Society	Conditions in host	Culture	Linguistics	Economic incentives	Flux/ Dynamic	Scientific method	Politics	History	Long term	Communication	Unforeseen	Law as rules	Different types of transplant
Watson LEGAL TRANSPLANT	✓									✓					
Montesquieu MIRROR		✓	✓	✓		✓			✓						
Kahn-Freund MIRROR		✓	✓	✓					✓			✓			
Teubner IRRITANT	✓	✓				✓	✓	✓	✓			✓			✓
Sacco LEGAL FORMANTS		✓			✓			✓							
Örücü TRANSPOSITION	✓	✓	✓			✓	✓			✓	✓	✓			✓
Legrand IMPOSSIBLE				✓	✓									✓	

The top row of the table illustrates Watson's legal transplant theory, which holds that transplants are relatively straightforward, as evidenced by historical examples and implemented by lawyers in the host state. The bottom row presents the contrasting position of Legrand, that transplants are impossible, primarily due to the effect of cultural barriers. Between these two extremes, other theorists suggest that legal transplants are possible, subject to conditional elements in each of their individual theories. These hypotheses refer to the mirror theories that were first initiated by the study that Montesquieu undertook of the political climate, which included the reflective role of law, later developed by Kahn-Freund in his study of comparative law and its transplantation. The table also presents other key branches of research that have evolved, including Teubner's sociological view of law in which a transplanted law 'irritates' its host. His systems theory holds that a legal transplant evolves into another form in the host through dynamic processes driven by disturbance and conflict. More recently, Örücü has extended the range of study to develop her transposition theory, which effectively extends Watson's timeline of legal transplants to a longer-term local tuning. In contrast, Sacco diverges from the comparative law roots of legal transplant theories to propose a scientific examination, which he claims is based on empirical evidence.

The areas of common ground and difference in these theories are assessed in the table with regard to the list of attributes, which is arranged in no particular order of significance. The first attribute, the legal elite, is significant in the theories of Watson, Teubner, and Örücü, while the second, the role of society, is an important feature of all of the theories except those of Watson and Legrand. This suggests a common conditional factor in all of the diverse collection of theories that are not at either extreme of the transplant-possibility spectrum. The third attribute, namely having the relevant conditions in the host state, is shared by Montesquieu, Kahn-Freund, and Örücü. The fourth attribute is culture, which constitutes a key element for the mirror theorists, Montesquieu and Kahn-Freund, who share this perception with Legrand. Within the cultural ambit, both Legrand and Sacco refer to an anthropological basis and also strongly emphasise the importance of linguistics.

Montesquieu, Teubner, and Örücü specifically refer to economic factors, but only Montesquieu and Teubner share a belief in the relevance of political factors. The importance of politics is also recognised by Kahn-Freund. The primacy of history in legal transplant theory, which was originally advanced by Watson, is also significant for Örücü. While it is suggested that their shared long-term perspective is historical, Örücü extends this vista into the future. Events in the future are by definition unknown, meaning that she shares this theoretical element with Teubner.

In considering unknown or unforeseen developments, again both Teubner and Örücü have a similar perspective, proposing that the evolution of a legal transplant is in a dynamic state of flux. According to Teubner, this view has a scientific basis, as the nexus of law in society is manifested by the law as a social system within an autopoietic framework. Both Teubner and Örücü look to communications as a key factor in successful transplantation, although Teubner approaches this by means of systems theory, whereas Örücü approaches it via the musical analogy of transposition. Within their shared perspectives, whilst they concur that transplants take diverse forms according to their evolution, they diverge on typology once the transplant has been adopted by the host. Örücü distinguishes four general forms: from smooth to simple, complex, and curdling (Diagram 3). In contrast, Teubner proposes that a social system consists of production regimes, of which banking is one example. These regimes then divide into sub-regimes, such as banking law. When a transplant enters the system, it irritates the autopoietic framework of society until the resulting perturbations eventually enable the incorporation of an evolving legal transplant into its host.

In essence, Watson's legal transplant theory forms the fulcrum for all of the following evolutions, which emerge from his conclusion that legal transplants have been historically proven to be 'easy', provided that they are implemented by a legal elite comprised of 'clever lawyers'. In his evaluation of Watson's theory, Walton suggests that the significance of political, cultural and economic factors should not be ignored, as they are endemic to history and thus intrinsically a component of Watson's theory. Nevertheless, in his later response to criticisms of his legal transplant theory, principally by Legrand, Watson made no use of Walton's support and declined to offer a detailed discussion of what he considered could be taken for granted in the historical context of his theory.

2.4 Conclusion

In expanding the theme of Watson's seminal contribution to legal transplant theory, this review of the literature indicates that those theorists who have acknowledged the viability of legal transplants, subject to certain specific conditions, have extended his theory without making significant new contributions. The proposition that Watson remains the founder and bedrock of transplant theory therefore remains unchallenged, for whilst Legrand criticises Watson from the opposite end of the possibility-impossibility spectrum, he fails to offer new ideas or empirical evidence to support his critique.

This chapter has reviewed the salient literature on legal transplant theory. This assessment underpins the next chapter, which examines the specific history and contemporary context of legal transplants in the context of specific states in the Islamic world.

Chapter Three

The Historical Evolution and Contemporary Context of Legal Transplants in Islamic Law

3.0 Introduction

Following the above historical review of the various schools of thought on legal transplants from a Western perspective, the current chapter focuses on Islamic law. In so doing, it seeks to assess the role of Islamic law and its relevance to legal transplants, with particular reference to Islamic banking systems. It begins with a review of Islam as a holistic concept, both as a religion and as a daily code of behaviour by which all Muslims live their lives and conduct their business. In this sense, it is important to note that in addition to the law, the overarching influence of Islam governs religion, politics, finance, and economics. This assessment will be made from a Middle Eastern perspective, through a comparison of specially chosen countries: Malaysia, Pakistan, and Turkey. Some Gulf Arab countries neighbouring the KSA are also be cited, in order to clarify particular propositions where relevant. These nations have been chosen because they have all received legal transplants with varying degrees of success. The countries being compared can be grouped into different political structures: Malaysia and Pakistan were formerly under British rule, whereas Turkey was part of the Ottoman Empire before its foundation as an independent secular state. Accordingly, the laws that have been transplanted into these nations will be evaluated within the specific legal context of these groupings.

This chapter begins with a thorough assessment of the historical evolution and sources of Islamic law, from its foundations to its current iteration. An analysis is then provided of the inclusive foundations of Islam, noting its willingness to include selected customs and practices of other religions in its sphere. The second section then undertakes a detailed comparison of the Islamic countries mentioned above.

3.1 Sources and schools of Islamic law

According to Malik,[1] the roots of Islamic law can be traced back some 1300 years; throughout this period, the topics of morality and legality have been inexorably intertwined. This can be interpreted as meaning that:

> [The] law that governs adherents of the Muslims' religion […] provides rules to cover all aspects of a person's life, within a complete moral and ethical code of conduct.[2]

In supporting this proposition, Alkahtani[3] acknowledges the contribution that Malik and Chibli have made to the principle that immorality, according to Islam, is also inherently illegal. This position reinforces the belief that the Qur'an is the word of God and therefore forms the basic foundation of Islam, embodying the legal principles that govern the lives of all Muslims. The legal basis of the sovereignty, economics, and politics that Alkahtani expounds are the remit of the consultative council (*Shurah*), whose members govern and formulate all decisions on these matters and that of Islamic Law (Sharia) in general.

In essence, Muslims believe that Sharia principles regulate all aspects of their lives, including those in the social, political, economic, and personal arenas. The roots of Sharia are in the Qur'an and the *Sunnah* (otherwise known as the *Hadith*), with Sharia providing the arena for dispute resolution, as well as serving as the legal structure to define the relationship between Muslims and God.[4] In their examination of Sharia, Hasan and Lewis[5] explain that Muslims believe that all of Mohammed's (pbuh) revelations were communicated by God and thus must be obeyed. The consequence of this is the interpretation that the primary sources of these rules are divine, meaning that humans can only become secondary sources.[6]

The two principal sources of Islam, the Qur'an and Sunnah, are assessed in the following section. The Qur'an contains the principal revelations of God, as articulated to the Prophet Mohammed (pbuh), and is therefore the main source of, and guide to, Islamic law.

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[1] El-Malik, W., Minerals Investment under the Sharia Law, London: Graham & Tortman, (1993) p.3
[2] Chibli Mallat, Jane F. Connors,(1990). Islamic Family Law. Graham & Trotman Limited Kluwer Academic Publishers Group; Joseph Schacht. (1964). 33. Schacht, Joseph. *An introduction to Islamic law*. Vol. 71. New York: Oxford, 1964.
[3] Faisal Alkahtani, 'Legal Protection of Foreign Direct Investment in Saudi Arabia' (PhD Thesis, Newcastle University 2010). 29
[4] M Kabir Hasan and Mervyn Lewis (eds), Handbook of Islamic Banking (Edward Elgar Publishing Limited 2007) 404; Ali Saeed Al-Shamrani, 'Islamic Financial Contracting Forms in Saudi Arabia: Law and Practice' (PhD Thesis, Brunel University 2014).
[5] Hasan and Lewis (n 4) 38
[6] Al-Shamrani (n 4) 17

Meanwhile, the Sunnah narrates what the Prophet (pbuh) did or tacitly approved and is therefore next in importance to the Qur'an. This discussion is followed by an overview of the meaning and significance of other sources that influence the development or contemporary functioning of the four principal Islamic schools of legal thought. These sources are divided into primary and secondary foundations; they are reviewed in the subsections below and illustrated in Diagram 3.1, which delineates the divisions in the two main sections.

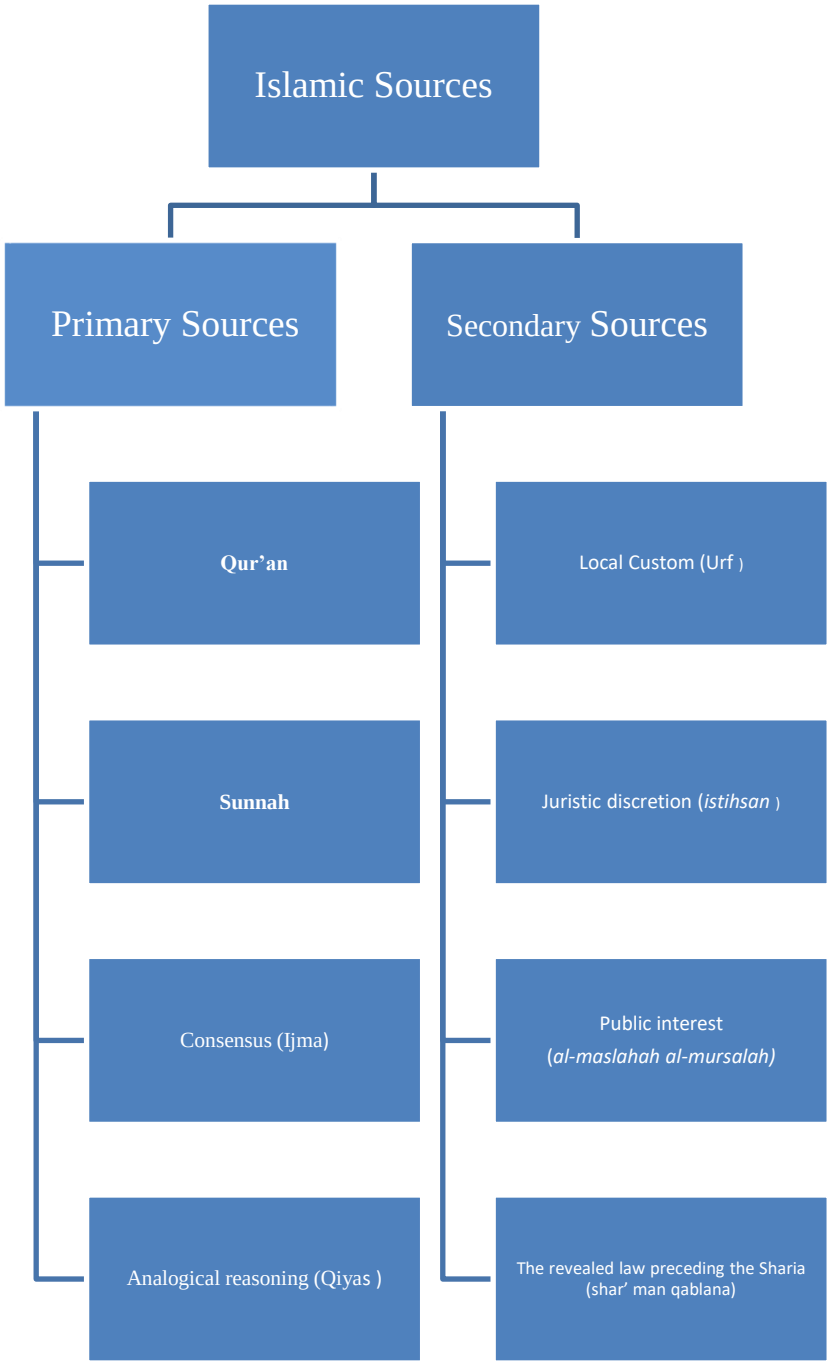

Diagram 3.1: Islamic sources

3.1.1 Primary sources

3.1.1.1 Qur'an

The Qur'an is the fundamental source of Islamic law, which was sent from God to Mohammed (pbuh) on the night of Ramadan (verse 89 of Surah 16, Qur'an). It is thus the main source of the legislation that governs public and private life, including Islamic banking and commercial contracts. The Qur'an is structured into 114 chapters (*Sura*), each of which is divided into verses (*Ayah*).[7] In its entirety, the Qur'an embodies seven fundamental characteristics: perfection, clarity, inclusiveness, balance, uniqueness, adhering to tradition, and provenances.

In contrast to other religions, Alkahtani[8] suggests that in Islam the Prophet's (pbuh) importance is unparalleled, as he epitomises human perfection. In support of this point, Alkahtani notes the construction of the society that was established and sustained by Mohammed (pbuh) during his lifetime. His equitable, welfare-grounded model of society is the pinnacle which all Muslims strive to attain in the modern context. In grounding the foundations of religion on the Prophet (pbuh), Alkahtani describes the Qur'an as a compass that directs all Muslims on their journey through life.

3.1.1.2 Sunnah

The second primary source of Islam is the Sunnah, which was originally established by Mohammed (pbuh) during his time in Mecca and Medina, a period of approximately two decades. Like the Qur'an, the Sunnah contains Mohammed's reporting of the words of God, in an attempt to explain the objectives and applications for the direction of all Muslims.

There are three categories of Sunnah: the Prophet's (pbuh) verbal actions (*qawli*), his actual actions (*fi'li*), and actions that he tacitly approved (*taqriri*). The sayings of the Prophet (pbuh) are contained in the words of the Sunnah, whereas the actual content refers to his deeds and the various ways in which he accomplished them. The Sunnah outlines the activities that God permits or limits. In this regard, parallels can be drawn between Kamali's[9] analysis of Islamic Jurisprudence and El-Gamal's[10] practical evaluation of its finance and

[7] Niaz A Shah, Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan (Taylor and Francis 2011). 17
[8] Alkahtani (n 3) 19
[9] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Text Society 1991). 52
[10] Mahmoud A El-Gamal, Islamic Finance: Law, Economics and Practice (CUP 2006) 27-28

economics, especially in terms of the general view that commercial and financial contracts continue to be governed by the principles of the Qur'an.

To explain the relevance of the Sunnah in contemporary society, Alkahtani[11] uses the analogy of distributing water to illustrate how Muslim scholars have articulated a number of different opinions in different eras, depending on the circumstances of the time in which a particular incident occurred. This has led Alkahtani to propose that Islamic law and its jurisprudence focus on the formulation of an exhaustive list of guidelines that are appropriate to the specific matter in hand. Alkahtani argues that at any moment in history, the role of the Sunnah is to address any and all current problems and changes that fall under Islamic principles. In this context, the Sunnah serves to explain and interpret a host of general problems in accordance with the guidelines laid down by the Prophet (pbuh), with its commentaries being employed to interpret the general provisions that are contained in the Qur'an.

The conduct of Muslims is directed by the Sunnah in terms of the actions (*alsunnah al fi'lihah*) of Mohammed (pbuh) that all Muslims are obligated to follow. The commentaries describe the activities of third parties who neither exerted any specific influence nor attracted the disapproval of the Prophet (pbuh). As such, their activities (*alsunnah al taqirriah*) are tacitly permitted because of the fact that they do not explicitly conflict with the primary sources.

3.1.1.3 Consensus (ijma)

The third source of Islamic law is *ijma*, which Ahmed and Gupta[12] explain as being a form of customary law predating Islam and considered to be an inferior source to the Qur'an and Sunnah. The roots of ijma are socio-cultural rather than religious, because they denote 'the unanimous agreement between the qualified jurists on a given point at any time in the past or in the future'.[13]

It is acknowledged that Mohammed (pbuh) recognised the validity of ijma.[14] Specifically, the Prophet (pbuh) explained that Muslims could never reach a joint decision that could be

[11] Alkahtani (n 3) 18-19
[12] Aqil Ahmad and PC Gupta, A Text Book of Mohammedan Law (Central Law Agency 1966).18
[13] Ndiva Kofele-Kale, International Law of Responsibility for Economic Crimes: Holding Heads of State and Other High Ranking State Officials Individually Liable for Acts of Fraudulent Enrichment (Springer 1995) 121.
[14] Kashi Prasad Saksena, Muslim Law as administered in India and Pakistan (Eastern Book Company 1963). 55

wrong,[15] stating: 'My community shall never agree an error'.[16] The Qur'an also refers to those 'who have responded to their lord and established prayer and whose affair is (determined by) consultation amongst themselves'.[17] For this reason, at least one school of Islamic thought recognises that ijma is an independent source of Sharia law.[18]

Despite being a primary source of Islamic law, one acknowledged line of thought[19] suggests that ijma has largely ceased to be of practical significance. This is primarily explained by the difficulty in achieving unequivocal agreement on ijma in the context of the contemporary Muslim world. According to Kofvele-Kale's analysis of Sharia law, because it reflects the will of God, any abstention in voting for a law means that the decision must be a mortal one rather than an Ijma matter, simply because of the fact that a unanimous view has not been reached. However, even when an Ijma is decided by scholars from a particular Islamic school, it is inherently unchallengeable because it has become the primary source of law after the Qur'an and the Sunnah. The consequence of this principle of precedence is that even when an outcome is unanimous, ijma is not valid if it conflicts with either the Qur'an or the Sunnah.[20] This is illustrated in Diagram 3.i above.

In contrast to the primary sources of the Qur'an and Sunnah, ijma is not a divine revelation from the Prophet (pbuh). However, Kamali[21] proposes that ijma is a binding and rational proof, despite being a secondary source of Islam. For this reason, it requires the consensus of Muslim scholars. According to this argument, scholarly agreement corresponds to the basic requirement for unity in Islam. This was originally required on political and religious grounds alone, but is now considered to be essential to the jurisprudential and legal bases of Sharia.

3.1.1.4 Analogical reasoning (qiyas)

Qiyas is the fourth source of law. It has evolved to inform decisions in situations when there is a close similarity between two matters. In effect, this means that one matter can act as the criterion for assessing the other. Thus, qiyas extends an original rule by regulating the development of a new rule with reference to its predecessor. As a natural consequence of

[15] Alija Izetbegović, The Islamic Declaration of Alija Izetbegović (SN 1991). 55
[16] Jami` at-Tirmidhi, Book 33, Hadith 10, Vol 4, Book 7, Hadith 2167 <https://sunnah.com/tirmidhi/33/10> accessed 12 May 2017.
[17] Qur'an 42; 38
[18] Saksena (n 15) 55; Izetbegović (n 16). 34
[19] Irshad Abdal-Haqq, 'Islamic Law An Overview of Its Origin and Elements' (2002) 7(1) Journal of Islamic Law & Culture 27. 32
[20] Kamali (n 10) 228
[21] ibid

this process, many features of the new rule will resemble those of the older one. This emphasis on similarities resonates with Legrand's legal transplant theory. This is especially true regarding his proposition that the introduction of any new law necessarily requires a prior examination of 'the existence of similar rules'.[22] In the Islamic context, this occurs provided that qiyas does not conflict with the three other sources of law, all of which take precedence.

Kamali[23] describes to the methodology of qiyas as being founded on analogical deduction, rather than interpretation. He infers that analogy extends the rationale of the case by discerning what is in common, rather than based upon what is explicitly stated in the two rules in question. This process culminates in extending the law to establish a new rule that provides legal certainty by conforming to both the letter and spirit of the Qur'an and Sunnah.

In summary, the pragmatic approach that underpins qiyas provides opportunities for Islamic law to evolve to accommodate the changing needs of Muslims in today's society. This is especially important given that Islamic Law must not conflict with the other three sources.[24]

The Qur'an, Sunnah, Ijma, and qiyas are the sources of law that bind together the entire global Muslim community. However, a number of secondary sources are open to debate among scholars. It should be noted that a particular type of conduct may be permissible in one Muslim country but prohibited in another, so long as no conflict exists with the primary sources of Sharia law. These peripheral categories or secondary sources of law consist of juristic discretion (*istihsan*), the public interest (*al-maslahah al-mursalah*), and local custom (*urf*). They are briefly explained and reviewed below.

3.1.2 Secondary sources

3.1.2.1 Juristic discretion (istihsan)

Juristic discretion is the basis for istihsan, defined as being a decision based on the personal choice of the jurist,[25] who must seek to apply the Sharia principles of fairness and justice to the case in hand. The jurist then devises an argument to achieve the requirements of Islam.

[22] Pierre Legrand, 'Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 112.
[23] Kamali (n 10) 180
[24] Abdal-Haqq (n 20) 32
[25] Farooq A Hassan, 'The Sources of Islamic Law' (1982) 76 Proceedings of the Annual Meeting (American Society of International Law) 65. 68-69

3.1.2.2 Public interest (*al-maslahah al-mursalah)*

al-maslahah involves the acquisition of benefit and avoidance of harm to the public, determined by the benefit or interest that will be enjoyed by the public. This consideration of public interest extends to a range of contexts, most notably those relating to the economy, law, medical procedures and medical care.

With regard to its precedence, Al-Ghazali[26] emphasises that the public interest (*maslahah*) must harmonise with the objectives of the Sharia. In other words, the application of the law must protect the five essential values of Islam: religion, life, intellect, family life (lineage), and property. From a legal perspective, Istislah constitutes a valid ground for legislation when maslahah can be identified.

3.1.2.3 The revealed law preceding Sharia (*shar'man qablana*)

The principle of shar'man qablana refers to rules that predate Islam, thereby illustrating the inclusive element that has been significant in the development of Islamic law. This element can be assessed in the following section on legal transplants, which refers to the adoption of certain Jewish and Christian customs by the Prophet Mohammed (pbuh). In effect, it has been proposed that the Prophet (pbuh) effected legal transplants in these instances, which would mean that there is an ancient precedent for the adoption of laws that are not from a Sharia root into contemporary Islamic law. However, it should be noted that while the inclusion of these laws from other religions certainly represents the transposition of a rule from a donor society to a recipient, this process has not actually been described using the precise term 'legal transplant'.

3.2 Schools of juristic thought (*maḏhab*)

The four principal schools of thought are reviewed in this section, with reference to the Sunnite Muslim world that includes 90% of the entire Islamic population.[27] These groups of highly respected elite jurists are organised into distinct schools of thought, known as Hanafi, Maliki, Shafi'I, and Hanbali. Each of these orthodox schools is particularly respected, and therefore influential, in one or more specific Muslim countries, which are identified in the relevant subsections.

[26] Al-Ghazali . (1997). Al-Mustasfa min 'ilm al-usul or On Legal theory of Muslim Jurisprudence. Vol.1. p. 416

[27] Diana Zacharias, 'Fundamentals of the Sunnī Schools of Law' (2005) 36 Georgetown Journal of International Law 947. 491

Before going further, it should be noted that academic confusion arose on this topic during the middle of the twentieth century. This uncertainty was caused by a conflict of opinion between two branches of research. One line of reasoning, principally proposed by Western researchers (e.g. Goldziher,[28] Bergstrasser,[29] and Schacht[30]), is that the rules developed after the Prophet (pbuh) and his Companions moved from Mecca to Medina during the eighth century are not law. In contrast, a branch of Islamic jurisprudence (Sezgin,[31] Rahmen,[32] Hasan, Azami[33]) agrees with Goldziher that Islamic law was founded on the Qur'an, the Sunnah and the opinions of Mohammed (pbuh) among his Companions. This position also contends that the law descended from the Successors to the Companions.[34]

Zacharias[35] claims that the diversity of legal opinions among the Islamic schools can often be confusing to Western lawyers, especially in comparison to the comparatively clear jurisprudence and legal practice in Western legal jurisdictions. While she does not expand on her proposition, Zacharias illustrates it with reference to the strict rules of procedure under English law that effectively limit the sources available to the judiciary as aids to statutory interpretation.[36] This principle was evoked in the decision by House of Lords in *Pepper v Hart* [1992],[37] stating that when ambiguity exists in primary legislation, the court may interpret meanings by referring to previous statements by either the House of Commons or House of Lords. In this sense, Zacharias contrasts Islam's referral to the role of secondary sources in the interpretation of Sharia with the relatively limited involvement of extrinsic sources, such as Hansard, in the interpretation of English law.

Finally, it should be noted that the four principal schools of Islamic jurisprudence are largely concentrated in specific geographical areas. As a consequence, it is not possible to select a different school of law in support of a particular case, if the school in that region is not favourable. For example, if a case is heard in a Saudi court, only the Hanbali School can be applied. The four schools of jurisprudence are briefly outlined below.

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[28] ibid
[29] ibid
[30] Joseph Schacht, The Origins of Muhammadan Jurisprudence (Clarendon Press 1967). 138 and 191
[31] Zacharias (n 28) 492-493
[32] Fazul Rahman, Islamic Methodology in History (Islamic Research Institute 1995). 76
[33] Ahmad Hasan, The Early Development of Islamic Jurisprudence (Islamic Research Institute 1970) 109. 88 etc seqq 109
[34] Allah's Apostle was asked who amongst the people was the best. He said: '(People) of my generation, then those next to them, then those next to them …' (Sahih Muslim 2533).
[35] Zacharias (n 28) 495
[36] See, for example: Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] APP.L.R. 01/28; Fisher v Bell [1961] 1 QB 394
[37] Pepper (Inspector of Taxes) v Hart [1992] UKHL 3

3.2.1 The Hanafi school (690-760)

According to Al-Shamrani,[38] the Hanafi School is the oldest and yet the most flexible of the four schools. Hanafi jurisprudence is well established in numerous countries, including India, Iraq, Egypt, the Levant, Morocco, Turkey, Pakistan, Afghanistan, and Bangladesh. The authority of this school is derived from the Qur'an and Sunnah, with reference to ijma, qiyas, urf, and certain other secondary sources. However, the founder of the School, Abu Hanifah, did not rely on tradition in his legal reasoning. As a consequence of this, the Hanafi School is more philosophical and theoretical than practical, not necessarily applying jurisprudence to actual cases at issue.[39] In cases of conflict between sources of law, Zacharias[43] explains that the Hanafis prefer to rely on the expert knowledge of jurists.

3.2.2 The Maliki school (711–795)

Malik Ibn Anas established this school in Medina, on similar foundations to the other three schools, at least in terms of its recognition of the sources of law. However, Al-Shamrani distinguishes it by noting that Maliki primarily diverges from the others when the reasoning in a particular part of the Sunnah or Hadith is not robustly underpinned in terms of sources. Importantly, pre-Medinan customs that were acknowledged by the Prophet (pbuh) are included in Maliki jurisprudence,[40] with the effect that this school supports the inclusive nature of Sharia, allowing laws to be transplanted from sources other than Islam.

In their focus on developing a scientific basis for legal evaluation, Dutton[41] explains that the Maliki scholars refer to a long catalogue of rules on conflict resolution. In practice, this means that they give priority to those practices that Mohammed (pbuh) either explicitly permitted or tacitly allowed, which they support with the introduction of customary sources if they consider this to be required in a particular case. Maliki jurisprudence is primarily practiced in Dubai, Abu Dhabi, Bahrain, Kuwait, Libya, Mauritius, Algeria, and Tunisia.

3.2.3 The Shafi'i school (767–820)

The Shafi'i school was originally founded in Baghdad by Mohammed Ibn Idris Al-Shafi'i. His jurisprudence is based solely on the Qur'an, the Sunnah, and the secondary sources of

[38] Al-Shamrani (n 4) 20
[39] Zacharias (n 28) 496
[40] Ibid 496-497
[41] Yassin Dutton, The Origins of Islamic Law: The Qur'an, the Muwatta' and the Madinan c Amal (Richmond 1999) . 36,38

ijma and qiyas,[42] because Shafi'i rejected other secondary sources as being unsound.[43] Approximately a decade later,[44] Shafi'i travelled to Egypt,[45] where he recognised that the local customs differed from those of Iraq, leading him to modify his jurisprudence in the context of the Egyptian society. Because of this, Muryani[46] identifies the existence of two strands in the Shafi'i school, with the more strict Egyptian followers dominating the scholars of the Baghdad school, whose influence has steadily waned.

The Shafi'i is the most prominent school after the Hanafi and is followed by approximately 29% of Muslim countries,[47] including Malaysia, Indonesia, Egypt, Ethiopia, Sudan, Yemen, and Somalia.

3.2.4 The Hanbali school (781–855)

Highly influential in Saudi Arabia and Qatar, the Hanbali School is similar to the Shafi'i School, in terms of both its doctrine and sources. This similarity can be at least partially attributed to the founder of Hanbali, Ahmad bin Hanbal, originally being a Shafi'i scholar.[48] The principal difference between the Hanbali and the other schools is that it eschews any human elements in legal reasoning and refers to qiyas only in cases of necessity. Zacharias[49] explains that this circumspection with regard to qiyas and human reasoning is that Hanbalis believe that any divergence from the primary sources of Islam would result in confusion and arbitrariness. In essence, the Hanbali approach involves ascertaining the texts that relate to the facts of the matter from the Qur'an and Sunnah.[50] Nevertheless, despite academics (e.g. Al-Shamrani) claiming that it is the most conformist of the Islamic schools of jurisprudence, the Hanbali is the most flexible in commercial matters.

3.3 Tracing the roots of legal transplants in Islamic law

An understanding of the history and development of Islam is critical to the evolution and analysis of Islamic law, as well as to any associated legal transplants. This resonates with

[42] Noel Coulson, A History of Islamic Law (Edinburgh University Press 2001) 59.
[43] Hans Visser, Islamic Finance: Principles and Practice (Edward Elgar 2013) 86
[44] Muhammad Abu Zahrah, Al-Shafi'i hayatuhu wa 'asruhu ara'uhu wa fiqhuhu (Dar Al-Fikr Al-'Arabi 1948).
[45] Malik stayed in Fustat, which is now Cairo
[46] Zacharias (n 28) 491
[47] ibid
[48] AUF Ahmad, Theory and Practice of Modern Islamic Finance: Case Analysis from Australia (Universal Publishers 2010). 103
[49] Zacharias (n 28) 504-505
[50] Ibid

Watson's historically grounded theory of legal transplants,[51] as reviewed in the previous chapter.

Islam began 1400 years ago in Mecca, when Talha Ibn Abdullah reported that the Prophet Mohammed (pbuh) had said:

> Certainly, I had witnessed[52] a pact of justice in the house of Abdullah ibn Jud'an that was more beloved to me than a herd of red camels. If I were called to it now in the time of Islam, I would respond.[53]

The relevance of the above message for this thesis is that it provides definitive authorisation for the practices and rules of other religions and societies to be embedded and integrated into Islamic legal systems, provided that they do not conflict with the primary sources of Islam. The sources of Islam and the role of elite Arabian individuals are reviewed in the next section.

Some one thousand years later, the social culture of the Arab peoples and modern Islamic society has been shown as one that consistently supports the poor, the vulnerable, and any who cannot help themselves. This essential tenet of Islam is evident in the words of Ibn Hisham, who states that:

> They are those that promised and pledged that they would not find any oppressed person among their people or among anyone else who entered Mecca except that they would support him. They would stand against whoever oppressed him until the rights of the oppressed were returned.[54]

The element of inclusion that influences Islam has been evident from the earliest records, such as when the Prophet Mohammed (pbuh) travelled to Medina, where he found the Jews fasting on the day of 'Ashura'. The Prophet (pbuh) discussed this practice with the Jews, who told him that it was the day when Moses had gained the victory over Pharaoh. As a consequence of this, the Prophet (pbuh) told the Muslims that, 'We are nearer to Moses than they, so fast on this day.'[55] This inclusion of the Jewish practice into Islam, based on their shared history, continues to this day. This transplant of the rules of Ashura supports Watson's finding on legal transplants.

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[51] Alan Watson, Legal Transplants: An Approach to Comparative Law (University of Georgia Press 1974).
[52] '...I had witnessed' refers to the Prophet Mohammed (pbuh), as one of the elites in the Arabic world.
[53] Imam al-Bayhaqi. al-Sunan al-Kubra.12114
[54] Sirat Ibn Hisham, Biography of the Prophet (pbuh). abridged by; Abdus-Salam M. Harun. Al-Falah Foundation 2000.134
[55] Sahih al-Bukhari 3397, Vol. 4, Book 55, Hadith 609 <http://sunnah.com/bukhari/60/70> accessed 07 April 2017

In contrast to the inclusive element of Islam, the Qur'an states that 'the people who work with usury say [that] 'commerce is like usury', but God has permitted commerce and has forbidden usury'.[56]

The above proposition from the Qur'an[57] of Al Baqarah supports the possibility of legal transplants being acceptable, as long as they represent rules that were laid down by previous generations. The Heifer supports this argument, as it states that: 'O you who believe fasting is prescribed for you as it was prescribed for those before you that you may become righteous'[58]. In other words, because Mohammed (pbuh) recognised the fasting tradition of another nation, it necessarily follows that Islam accepts the integration and transplantation of laws from previous eras that were promulgated in different geographical and social sectors.

The economic effect of Islam and its nexus of legal transplants can be traced to the time that Mohammed (pbuh) met a group of people who were grafting branches from the male to the female date-palm trees to make them yield more fruit. Mohammed (pbuh) judged that this was useless, so they abandoned this practice. However, when the Prophet (pbuh) was later informed that the yield of dates had dwindled, he distinguished his personal opinion, which in this case had led him to criticise the practice of grafting, from his reporting of the words of Allah. In so doing, he stated that the words of Allah must be obeyed unquestioningly, as the Prophet (pbuh) communicated them, but his own opinion should not.[59] In terms of economics, this means that Islam can accept any system in the world that advances commercial activity, as long as it does not conflict with any Islamic principles.

In summary, from the time of the Prophet (pbuh) onwards, the history of Islam has shown the willingness of the Muslim community to accept valid legal transplants. Precedent exists to demonstrate that other practices and systems have been willingly integrated into Islamic systems, provided that they do not conflict with its primary or secondary sources.

The next section compares the specific Islamic countries that have received legal transplants.

[56] Qur'an, (Chapter 2, verse 275).
[57] Qur'an, (Chapter 2, verse 275).
[58] Qur'an, (Chapter 2, verse 275).
[59] Sahih Muslim 2361, Chapter: The Obligation To Obey What He Says With Regard To Matters Of Religion, But Not What He Says With Regard To Worldly Matters, Book 30, Hadith 5830.

3.4 Islamic countries' experiences of legal transplants

This section commences with an examination of a group of Islamic nations, namely Malaysia, Turkey, Pakistan, and member states of the GCC, which have received legal transplants with varying degrees of success. This review of legal transplants focuses on the banking systems of these Islamic nations.

Within this research, the criterion whereby a country is defined as being Islamic is dependent on its membership of the Organisation of Islamic Co-operation. Each of the nations that are included in this thesis hold membership of this Organisation.

Malaysia is now viewed as the capital of the Islamic finance industry, with most Islamic banks having branches there. Also, Turkey the second biggest country in The North Atlantic Treaty Organization (NATO), has been a nominated candidate to join the EU since 1999. These two countries are the perfect examples to demonstrate successful legal transplanting.

However, In Pakistan, the Islamic banking industry was unsuccessful in 1980, and was rebuilt in December 2001 with the establishment of a national Sharia compliance system. Moreover, The Gulf Cooperation Council (GCC) includes the United Arab Emirates, Kuwait, Qatar, Bahrain, Sultanate Oman and Saudi Arabia These countries are all similar in regards of politics and religion's impact on the law. A country that is a part of the GCC is Saudi Arabia, which will be my case study.

The principal nations to be assessed are Malaysia and Turkey. Malaysia serves as an example of a country that was formerly colonised and has continued to accept the legal basis of its conqueror. In contrast, Turkey represents an established system that has adopted a secular perspective on transplantation, rather than expressly resolving conflicts between the premises of Islamic law and those of the laws of the donor nation. These two nations have been chosen for analysis and comparison because both have experienced successful transplants,[60] notwithstanding their different backgrounds. The legal transplants into Pakistan and the countries of the Gulf region are reviewed in less detail. Like Malaysia, Pakistan was colonised, but its experience of legal transplants has been unsuccessful. Meanwhile, the GCC trading bloc is reviewed because Saudi Arabia, which is the main focus

[60] The findings from Chapters 2 and 3 will be used to construct a definition of success in this regard.

of the present research, is a GCC member state and therefore broadly shares cultural, commercial and legal perspectives with others in the bloc. The next subsection goes into detail regarding Malaysia.

3.4.1 Malaysia

Before it became independent, Malaysia was the British colony of Malaya. The territories of the Malay Peninsula were originally colonised in 1756 and the introduction of English law was effected with the Charter of Justice (1807). Malaysia finally gained sovereignty with the Federation of Independence Act (1957). The transplanting of English law into Malaysia is founded on its statutory framework, which supports its reception of British and later Commonwealth law.[61] Malaysian law has also drawn from Australian law, which is itself informed by UK law. An example of this can be seen in the Malaysian Companies Act 1965, which was informed by the Australian Act of Victoria 1961, which was based on the earlier UK Companies Act 1948.[62] Malaysia has also followed other Commonwealth models,[63] with some legislation even having foreign assistance, as in the case of the Australian draftsmen who worked on Malaysia's 1965 Act.[64]

According to Mohamad and Trakic,[65] the precise basis for the reception of English law into Malaysia is under debate. Nevertheless, English law is firmly entrenched in Malaysian legislation and judicial reasoning, serving as the primary source of its national law, despite the influence of Islamic and customary law. Ibrahim[66] challenges the proposition that English law was introduced into the territory, citing as proof the findings of Winstedt[67] regarding the pre-existence of a fabric of laws that had been interwoven from those of the indigenous Malay races, including amalgamations of the laws of the Hindus, the Muslim Shafi'i School, and the maritime law of Malacca.[68] Mohamad and Trakic[69] assert that the Malay community was allowed an element of liberty in recognising its existing rules in civil matters (according to Sir Ralph Rice, First Recorder of Penang).[70] In essence, disregarding

[61] TAH Mohamad and A Trakic, 'The Reception of English Law in Malaysia and Development of the Malaysian Common Law' (2015) 44(2) Common Law World Review 124.
[62] Halsbury's Laws of Singapore
[63] Spamann, Holger. 'Contemporary legal transplants: Legal families and the diffusion of (corporate) law.' BYU L. Rev.(2009): 1813. 20
[64] Spamann (n 64) 22
[65] Mohamad and Trakic (n 62) 124
[66] Ibrahim A and Joned A (1987) The Malaysian Legal System. Kuala Lumpur: Dewan Bahasa dan Pustaka. 85-86
[67] Richard Winstedt, The Malays: A Cultural History (Routledge and Kegan Paul 1961). 91-92
[68] ibid
[69] Mohamad and Trakic (n 62) 125-126
[70] Wan Arfah Hamzah, A First Look at the Malaysian Legal System (Oxford Fajar 2009) 121.

the official recognition of English law in Malaysia with the Civil Law Act (1956), the question of whether or not the law was imposed by reception or voluntarily is largely dependent upon the general state of the Malaysian territory under analysis. Nevertheless, irrespective of the state under discussion, the combination of voluntary and received legal transplants in Malaysia as a whole has resulted in the formation of a dyadic system of English Law and Islamic law.

Despite the pre-eminence of English law, Islamic law is a substantial influence in Malaysia, as enunciated in *Shaikh Abdul Latif v Shai Elia Box*.[71] The historical basis of Islamic law was reinforced by the Court of Appeal in *Ramah v Laton*.[72] According to TunZaki,[73] the British recognised the enduring respect for Islamic law modified by Malay custom, enabling it to provide the basis for the development of two parallel court systems: one that applied English law and the other, Islamic law. Thus, Mohamed and Trakic[74] find that English law was transplanted voluntarily, rather than by coercion. With the formation of the Charter of Justice (1807) to impose the system on an ungoverned territory, English law was applied by colonial residents, who in turn influenced the ruling Sultans. This can be interpreted as the evolution of the de facto rule of the colonial residents over the territory, with statutes like the Contracts Act (1950) serving as evidence of the voluntary transposition of English law into Malaysia.[75]

Notwithstanding the legal recognition of two systems of law, the Common Law represents the contemporary foundation of the Malaysian legal system. The primary legal source for the application of Common Law is Article 160 of the Federal Constitution, supported by the Civil Law Act (1956). Section 3 of the 1956 Act provides the statutory authority for English Common Law and Equity, in addition to specific statutes, whilst Section 5 refers to the reception of English commercial law. It is particularly important to note that 'newly appointed'[76] Malaysian judges receive an English legal education and so have a natural tendency to apply English law. This tendency is illustrated in *Yong Joo Lin v Fung Poi*

[71] Shaik Abdul Latif and others v Shaik Elias Bux (1915) 1 FMSLR 204, Edmunds J at 214
[72] Ramah v Laton (1927) 6 FMSLR 128
[73] Tun Zaki, 'Singapore Academy of Law Annual Lecture—The Common Law of Malaysia in the 21st Century' (2012) 24(1) Singapore Academy of Law Journal. 6
[74] Mohamad and Trakic (n 62) 127
[75] ibid
[76] Ibid. They do not define 'newly appointed'; therefore it is presumed to have been from the twentieth century to the present date, as this was the period covered in their research.

Fong,[77] where the court held that the equitable principles of English law would be deemed to prevail in the absence of any pertinent statutory authority.

While conflicts between Islamic Law and English law occurred during the British colonisation of Malaysia, resolutions have generally been found to such problems through the passing of legislation. This has been supported by judicial recognition of the respective jurisdictions of the Malaysian civil courts, which apply English Law, and the Sharia courts, which apply Islamic law. In this context, Article 121 (1A) of the Federal Constitution states that Parliament has the duty to resolve any jurisdictional conflict that may emerge between the civil courts and the Islamic courts, in the case of any divergence between the two branches of law. An example of this kind of intractable issue began with a child custody case in 2004,[78] which was still reported as being unfinished in 2014. In this case, both the civil courts and the Islamic courts insisted that they held jurisdiction in the matter. As a consequence, the police requested parliamentary intervention, with the force being mandated by the civil court to recover the children from the father after having awarded custody to the mother.[79] In contrast, the Islamic court had awarded custody to the father, who refused to surrender the children. The result was that the father was complying with the law of one court while simultaneously flouting the judgment of the other.

With regard to the application of English law, section 3 of the Civil Law Act (1956) provides for the correct procedures to follow in three possible scenarios: when a) the jurisdiction of English law is overall and general; b) when it is specific to certain matters; or c) when it has no application or relevance to the case in hand. However, according to Mohammed and Trakic,[80] an influential caucus of Malaysian legal scholars and practitioners has challenged the relevance of law that was passed in the mid-twentieth century. For example, Ibrahim[81] and Shuaib[82] agree that Malaysian courts should examine the potential contribution of local national conditions and practices prior to the evolution of Malaysian Common Law, which is capable of addressing contemporary matters using English law as its basis.

[77] Yong Joo Lin v Fung Poi Fong (1941) 1 MLJ 63
[78] Balan Moses, 'Dewan Rakyat Should Address Custody Issue Fast' The Sun Daily (Kuala Lumpur, 13 April 2014) <http://www.thesundaily.my/news/1015486> accessed 6 September 2016.
[79] Mohamad and Trakic (n 62) 139 Note 3
[80] ibid
[81]Ahmad Ibrahim, 'Towards an Islamic Law for Muslims in Malaysia' (1985) 12 JMCL 37. 52.
[82] Shuaib FS (2009) Towards Malaysian common law: convergence between indigenous norms and common law methods. Jurnal Undang-Undang 167. 162

However, despite a convergence of opinion on the continued development of Malaysian law in conjunction with English law, few agree on the ways to achieve this.[83] By way of illustration, TunZaki[84] proposes that the evolution of Malaysian law includes an increasing element of codification, supplemented by the development of case law. Similarly, Mohamed and Trakic[85] have identified this trend in the commercial legal field. They note that the source of legal codes is Section 5 of the Civil Law Act (1956), which provides for the application of all English commercial law, rather than the more specific parameters in Section 3. Other scholars have argued that the development of Malaysian commercial codes will result in these sources becoming dominant.[86]

More recently, this perspective on English law has been challenged by number of experts including Alsagoff,[87] who have suggested that Malaysia should abandon its colonial legal history and develop its own Common Law system. Their radical view has been challenged by the Malaysian Bar Council,[88] which holds that the application of English Common Law provides certainty and predictability to the legal system, thereby encouraging international investors and businesses to become established in Malaysia. This position concurs with the academic perspective of researchers like Mohamed and Trakic,[89] Ibrahim,[90] and Shuaib[91]. In essence, this line of reasoning supports the status quo, with English law remaining a primary source of law and Section 3 of the Civil Law Act governing its applicability. Nevertheless, these scholars recognise the benefits of other Common Law jurisdictions in their proposition that Malaysian law would be enriched by their inclusion.

In this regard, Salim[92] analyses the case of *Soo Boon Stong & Saw Boon Stong v Saw Fatt Seong & Soo Hock Seang* and concludes that further legal transplants are impossible in Malaysia, because local lawyers are unable to apply the increasingly complex post-colonial law effectively. In contrast to Legrand's[93] proposition that cultural differences render

[83] Mohamad and Trakic (n 62) 137
[84] TunZaki (n 70) 10
[85] Mohamad and Trakic (n 62) 135
[86] SZT Azmi, 'Singapore Academy of Law Annual Lecture 2011 - The Common Law of Malaysia in the 21st Century' (2012) 24 SAcLJ 10
[87] Ahmad SA Alsagoff, Principles of the Law of Contract in Malaysia (LexisNexis 2010). 22
[88] Ambiga Sreenevasan, 'Common Law' (The Malaysian Bar, 23 August 2007) <http://www.malaysianbar.org.my/press_statements/press_release_common_law.html> accessed 24 August 2016; Ambiga Sreenevasan, 'Leave the Common Law Alone' (The Malaysian Bar, 24 August 2007) <http://www.malaysianbar.org.my/press_statements/press_release_leave_the_common_law_alone.html> accessed 24 August 2016.
[89] Mohamad and Trakic (n 62) 132
[90] Ibrahim (n 82) 52
[91] Shuaib (n 83) 162
[92] MR Salim, 'Are Legal Transplants Impossible?' (2009) 4 Journal of Comparative Law 182.1
[93] Legrand (n 23) 116

transplants impossible, Salim argues that Malaysian courts can reap the benefits of drawing upon the strong persuasive authority of judicial precedents from Common Law countries, most notably Britain and Australia. However, Salim's focus on company law leads him to suggest that the prevailing judicial practice is to 'gloss over'[94] important differences between Malaysian and foreign legislation on which the case in hand focuses.

In continuing the theme of the evolution of law subsequent to its original transplant, Salim argues that, whilst Britain possesses sufficient lawyers and law libraries to support a wide range of legislation, he discerns that these resources are lacking in Malaysia. Thus this deficit leads Salim to assess that Malaysia's company law is often confusing and uncertain. This reference to the ability to support legal transplants with the expertise of a 'legal elite' resonates with similar themes in the work of Watson[95] and Örücü.[96]

The context regarding the initial legal transplant and subsequent law reform to ensure that law resonates with a particular era is relevant to the schisms in Malaysia's company law. In this vein, it is suggested that whereas Watson's proposition was proven when the 1965 Companies Act was passed, he did not address its long-term efficacy. Nevertheless, in extending his theory, Örücü proposed a system of legal transposition that embodied the ability to effect legal tuning onto transplanted law in the recipient nation. Örücü's theme of adaptation is also supported in Teubner's autopoietic hypothesis of the law.

In illustrating the fragility of reliance on foreign judicial decisions, Salim notes that whereas other countries have reformed their company legislation, no such review has occurred in Malaysia. The Malaysian Companies Act (1965) continues to be the principal source of corporate law. The equivalent in English company law was the Companies Act (1948), which saw amendments following the enactment of the Companies Acts of 1986 and 2006. Salim cites these as authorities for his proposition that recent precedents from English courts interpret the 2006 Act, rather than earlier statutes. In contrast, the Malaysian legislation is based on the 1948 legislation that was passed during British colonial rule, being contemporaneous with England's 1948 legislation.[97] This conundrum suggests that Malaysian law requires review and modification to ensure that it remains relevant to contemporary business practice, given the changes that have occurred in commerce since the mid-twentieth century. This can be illustrated with reference to the recognition of the English

[94] Salim (n 93) 1-2
[95] Watson, A (1977). Society And Legal Change. Temple University Press. 8
[96] Esin Örücü, 'Law as Transposition' (2002) 51(2) International & Comparative Law Quarterly 205.212
[97] See the discussion in the opening paragraph above.

law that the reputation and financial trust of its commercial community was being put at risk by allowing the use of unpublished information that made share prices vulnerable to change. In other words, the financial credibility of Britain's financial sector was undermined by the ability of those buying or selling shares to utilise certain financially advantageous information before it became available to existing public shareholders. Recognising this as a threat, according to English law, insider dealing became an offence. This offence was absent from the earlier 1948 Companies Act because it had not been relevant at the time of drafting. However, the changing circumstances in the commercial world required corresponding changes in the law. This political and economic recognition that the law was inadequate to meet the demands of the financial market caused the English Parliament to designate "insider dealing", as a crime[98] also resonated with the evolution of electronic financial trading.

In applying this recognition to an evolving global financial services market, there have been no revisions to the 1948 Malaysian company statutes. Furthermore, no provisions have been incorporated to manage insider dealing, despite the global prevalence of the practice. Therefore, is proposed that O'Hara and Salim's concurrence for the need for insider dealing regulation should be assessed regarding Malaysia's requirements to adopt legal transfers enact reforms as part of an overall review of company law.

Salim's analysis also refers to the context of a precedent from a particular Common Law country, upon which the Malaysian courts are heavily reliant. In this respect, he suggests that the company law of every nation exists within a network of other legislation, including procedural rules, legal aid, employment, and competition regimes. Therefore, when a Malaysian court cites the precedent of another Common Law country, it necessarily does so outside its national legal context. In this sense, as Salim refers to a national legal culture, it is possible to argue that his proposition regarding the impossibility of legal transplants has limited resonance with Legrand's[99] claim that legal transplants are not possible due to cultural differences. Combining two major elements of his theory, Salim proposes that a review be conducted of Malaysian company law in order for it to be updated and brought into line with the contemporary legislation of other Common Law countries on whose judicial precedents it relies. However, if Malaysia reviews its company law, it will also need to ensure that the proposed reforms did not conflict with Islam as its governing religion.

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[98] Company Securities (Insider Dealing) Act (1985), Company Securities (Insider Dealing) Act (1985) as amended by the Financial Services Act (1986), followed by the Criminal Justice Act (1993).
[99] Legrand (n 23) 111

It is important to note that Salim's research is grounded in company law, whereas the focus of this thesis is on the legal transplant of Western banking law into Saudi Arabia. However, given that both studies concentrate on transplanting law that involves business and financial matters, their basic notions coincide, therefore Salim's findings remain highly valuable in the current context.

A comparative study of regulatory frameworks to ensure that laws do not conflict with Sharia principles is evaluated by Hasan.[100] He categorises Malaysia as a mixed legal jurisdiction[101] which takes a proactive approach to regulation.[102] This classification reflects the contemporary position that the nation has adopted in supporting Sharia governance since its independence. Hasan's examples of the significance of Sharia principles in postcolonial Malaysia include the following statutes, which have all been expressly stipulated as being as the sole authority regarding Islamic finance by the National Sharia Advisory Council (SAC):[103]

- Islamic Banking Act (1983)
- Takaful Act (1984) for Islamic-compliant insurance
- Banking and Financial Institution Act (1984)
- Securities Commission Act (1993)
- Central Bank of Malaysia Act (2009)

The authority of the SAC is buttressed by the central Bank Negara Malaysia's Sharia Governance Committee and Guidelines for Islamic Financial Institutions,[104] in addition to the Malaysian Securities Commission establishing a Register of Sharia Advisors' Guidelines (2009) in the capital sector. It is suggested that the SAC is an example of the use of Watson's 'clever lawyers' to effect an effective legal transplant.

As noted above, the Malaysian legal system utilises Common Law in the civil courts and Islamic ingredients in the Sharia courts. There are also some specialty bodies, such as the Muamalah Bench, which is a subdivision of the Commercial Division of the High Court that

[100] Zulkifli B Hasan, 'Regulatory Framework of Shar'ia Governance System in Malaysia, GCC Countries and the UK' (2009) 3(2) Kyoto Bulletin of Islamic Area Studies 82. 1
[101] Hasan categorises legal systems in this context as: mixed – Malaysia; Islamic + mixed – Gulf Cooperation Council (GCC); non-Islamic + mixed – United Kingdom.
[102] Hasan categorises the regulatory systems into reactive, passive, minimalist and proactive.
[103] SAC was established in 1997 as part of the harmonisation programme that began in 1983.
[104] ie BNM-GPS1.

was established by the central bank and the judiciary.[105] The Federal Constitution accords the Muamalah jurisdiction in all Islamic banking matters and so its Sharia rulings serve to bind together all matters relating to Islamic finance and *takaful*.[106]

An example of the role of the Muamalah court is illustrated in *Arab Finance Malaysia Berhad v Taman Ihsan Jaya and Others*.[107] In this case, the court held that the profit derived from the facility offered by the bank was unlawful as it involved interest charges. Consequently, the principal amount of the financing was forfeited. because it was deemed to be riba and thus forbidden according to Islam.

In addition to reflecting LeGrand's proposition that legal transplants are 'impossible'. However, Hasan argues that the decision of the judge was legally flawed, as he lacked the expertise required for the judgment to be credible. As a consequence, the judgment in this case offered a serious threat to the Islamic finance industry in Malaysia In continuing the relevance of the theoretical aspects of legal transplants to the Arab Finance case, the economic threats to Malaysia's finance sector reflects Kahn-Freund's necessary inclusion of economic conditions during the progress of legal transplants.

However, Hasan argues that the decision of the judge was legally flawed, as he lacked the expertise required for the judgment to be credible. As a consequence, the judgment in this case offered a serious threat to the Islamic finance industry in Malaysia.

Since 1983, the dual-phase approach has permitted any Malaysian or foreign banks to be established, so long as they are wholly compliant with the aforementioned legislation. The Bank Islam Malaysia Berhad (BNM) convened the first Sharia board in 1983 and then set up the first interest-free banking arrangements a decade later. The banking scheme licences non-Islamic banks to provide 'windows'.[108] These institutions are responsible to the SAC and governed by the Banking and Financial Institution Act. Every board must include approved Muslim scholars, to ensure compliance with Sharia principles, as well as verifying that the bank's articles of association accord with Islamic principles.

The Islamic Banking Act (IBA) (S55) addresses various issues of conflicts of law. The effect is that while the IBA prevails over company statutes, it is itself unclear regarding the status

[105] Hasan (n 97) 3-4. The implementation of this Muamalat bench shows a positive result in the increasing numbers of settled cases. The statistics show that from 2003 to 2005 more than 75% of its 656 cases were settled by the court.
[106] Hasan (n 101) 3-4
[107] Arab-Malaysian Finance Berhad v Taman Ihsan Jaya and Ors [2008] 5 MLJ 631.
[108] Hasan (n 101) 4-5

of other legislation. This results in confusion, since Sharia law clearly prevails over the Companies Acts. This has led scholars like Hasan to recommend that legal reforms should be carried out to clarify its superior status.

Hasan's scoping study shows that the Sharia governance system in Malaysia is regulated by legal and supervisory frameworks that are strongly underpinned by regulations. The resulting mixture of mainly British Common Law principles operates under the postcolonial umbrella of Sharia law, which a special division of the High Court is empowered to refer to in cases of conflict.

The body of research regarding the Malaysian legal system broadly supports the assertion that a review of the national legislative framework would increase legal certainty. This would enable Malaysia to bring its components into line with global practices in the world of business and finance. Despite minor differences of opinion, academics generally concur that the legal transplantation in Malaysia represents a successful fusion of transplanted laws, Islamic culture and established customs.

The following section continues the assessments of legal transplants that have become established in Islamic states with a review of the transplants that have been embedded in Turkey.

3.4.2 Turkey

The basis of legal transplants in Turkey differs from that of Malaysia, because of its historical evolution into a secular state. In making this comparison, it is important to note that Islamic law is classified as divine in origin, whereas Turkey relies upon a secular system that can be classed as 'men's law'.[109] It is possible to extend this comparison to consider the former as natural law,[110] giving the secular approach a positivist emphasis.[111]

Turkey's development is considered to be relatively unusual among Islamic states,[112] as it took the somewhat radical step of leaving the Islamic legal system and transplanting Western legal codes. The outcome of this is a 'secular Muslim'[113] state that is enshrined in Article

[109] John L Esposito, The Oxford Encyclopaedia of the Modern Islamic World, Vol 4 (OUP 1995).
[110] Freeman, M. D. A. 2001. Lloyd's introduction to jurisprudence. 7th edn. London: Sweet & Maxwell. 1
[111] Iqbal, Mohammad. The reconstruction of religious thought in Islam. Stanford University Press, 2013. 125.; Werner Menski. Comparative Law in a Global Context The Legal Systems of Asia and Africa. Cambridge University Press. (2005).354-355
[112] Esposito (n 111) 279.
[113] Werner Menski (ed), Comparative Law in a Global Context: The Legal Systems of Asia and Africa (CUP 2006) 354.

174 of the Turkish Constitution[114] (1924).[115] However, this was later repealed and reintroduced in another form in 1961 and 1982.[116] In order to place the contemporary Turkish legal system in its context, the following historical review begins by outlining the closing stages and the final demise of the Ottoman Empire.

The Ottoman Empire was ruled by Islamic sultans until 1839, when the embedded Islamic system was amended by Sharia governance and rules of administration. Customary laws were also an important source of judgment during the Ottoman Empire.[117] While some have argued that the reforms started as early as the seventeenth century,[118] Menski[119] notes that the more significant reforms of the system were introduced in the nineteenth century by a bureaucratic and military elite that sought to impress international opinion with its efficiency and progress.[120] Schacht[121] suggests that these reformers intended for the changes to Sharia to support and enhance the efficiency of an Islamic society, rather than to enfeeble its Islamic foundations.

Pursuing this argument, Starr[122] claims that a significant motivator for Turkey to emulate the West was the increase of Western influence, which served to bring about changes in the military, institutions, technological advances, and education. In addition, the corresponding growth in knowledge about Western laws ultimately led to the corresponding transplantation of Western legal codes.[123]

However, the Turkish elite doubted the efficacy of imprinting Western laws on its Islamic society. Thus, between 1858 and 1876,[124] a compromise evolved, by which the two legal systems would be allowed to operate in tandem. Referring to the private law and, especially, the commercial systems that are the focus of the present research, Hooker[125] cites examples

[114] Constitution of Turkey - The Grand National Assembly of Turkey <https://global.tbmm.gov.tr/docs/constitution_en.pdf> accessed 08 September 2016.
[115] The previous Constitution of 1921 was based on an Islamic state.
[116] Following a military coup, amendments to the 1982 Constitution were made in 2010 and 2011.
[117] Anderson, Jerome ND, and Norman J. Coulson. 'Islamic law in contemporary cultural change.' Saeculum 18, no. JG (1967): 13-92. 38
[118] Iqbal (n 112) 125
[119] Menski (n 113) 355 ; Starr, June. Law as metaphor: From Islamic courts to the palace of justice. SUNY Press, 1992. 127–36.
[120] See E Örücü, 'Turkey Facing the European Union Old and New Harmonies' (2000) 25 ELR 57, regarding Turkey's incentive to join the EU, being a similar incentive to that of the Ottomans' in expanding international trade.
[121] Schacht, Joseph. 'An introduction to Islamic law.' (1964). 90. Anderson (n 118) 38.
[122] Starr (n 121) 8-9
[123] Ihsan Yilmaz, Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan (Ashgate 2005). 83- 100
[124] ibid
[125] Michael Barry Hooker, Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws (Clarendon Press 1975). 363

of legislation that was transplanted from French codes, such as the Commercial Code (1850) and the Code of Commercial Procedure (1861). This secular law was the province of a new secular system called the Nizami courts.[126] However, the continued pre-eminence of Islam as the superior source of law, with the continuing influence of Sharia and customary laws, prevented these transplants from venturing into radical reforms, as compliance with the secular codes was merely optional.[127]

In his analysis of Turkey's legal culture and transplants, Özsunay[128] classifies the changes into the following three eras, which are discussed in greater detail below: the Ottoman Empire, from the nineteenth century to 1918, the Turkish Republic, from 1923 to 1989, and post-modern Turkey, after 1989.

3.4.2.1 The Ottoman Empire

According to Özsunay,[129] the era of legal transplants began during the nineteenth century with the Ottoman (1299-1918) legal system being founded on Islamic law. The early legal transplants of Western law started with the integration of French codes during the Reform Period (1839-1880), which was characterised by principal legislation that included the Commercial Code (1858) and Code of Civil Procedure (1880).

Özsunay[130] and Starr[131] argue that the legal codification of Islamic law began during the late nineteenth century. The source of this Islamic emphasis was the opposition to the influence of European law by the group known as the Young Ottomans, who countered this perceived European hegemony with a move to codify Islamic law, in an attempt to link modernity with Islam.[132] The resultant code, the *Mejele*,[133] was produced between 1869 and 1876 and was characterised by a Hanafi (Section 3.2.1) legal influence. The Mejele was repealed in 1926 with the transplant of the Swiss Civil Code.[134] Schacht[135] challenges the Islamic primacy of the former code, countering with the proposition that 'the experiment of the Mejele was

[126] Anderson and Coulson (n 119) 38
[127] ibid 38
[128] E Özsunay, 'Legal Culture and Legal Transplants Turkish National Report' (2011) 1(31) Isaidat Law Rev. 4
[129] Özsunay (n 130). 4
[130] ibid
[131] Starr (n 121) 10
[132] ibid
[133] Schacht (n 123) 92
[134] Menski (n 113) 375
[135] Schacht (n 123) 92

undertaken under the influence of European ideas, and it is, strictly speaking, not Islamic but a secular code'.[136] However, he accepts that:

> Ottoman Turkey is the only Islamic country to have tried to codify and to have enacted a law of the state part of the religious law of Islam ... which covers the law of contracts and obligations, civil and procedural, in the form of articles as was promulgated as the Ottoman Civil Code 1877.[137]

The gradual reduction of Islamic influence and the corresponding rise in secularism was promoted by a group called the Young Turks[138] from 1889.[139] Their ideas gained increasing traction between 1908 and 1918, with their proposed legal reforms being grounded in the diminishing traditional socio-cultural values, although they were not necessarily focused on commercial law.

According to Özsunay,[140] there were strong commercial and economic reasons for the transplanting of foreign codes, primarily in order to harmonise Turkey's national law with those of Western nations, particular in the wake of their economic growth after their industrial revolution.

3.4.2.2 The Turkish Republic, 1923-1989

The next phase of legal reform was promulgated by the 'Kemalists',[141] a group who supported the social engineering programmes of Mustafa Kemal Ataturk, using the law to continue the social transformation of Turkey. Following the War of Independence, won by forces under Ataturk after the demise of the Ottoman Empire from 1918 and the Treaty of Lausanne (1923), the Republic of Turkey was eventually formed in 1923.

The changes to Turkish society were examined by the Ministry of Justice, who established commissions with the specific remit of drafting legal codes to meet Turkey's political and social requirements. However, these initiatives were largely unsuccessful, the consequence of which is that Western codes were instead transplanted by lawyers who had been trained in Western Europe. This second wave of legal reform is collectively acknowledged by

[136] ibid
[137] ibid
[138] Starr (n 121) 10
[139] ibid
[140] Özsunay (n 130) 4
[141] Named after the founder of the Turkish Republic, Mustafa Kemal (1881-1938), who was also known as Kemal Ataturk. Yilmaz (n 125) 83,96

Starr[142], Örücü,[143] and Özsunay,[144] who refers to the preference of the Kemalist Turkish Minister of Justice for 'a good scientific Code. Why waste time trying to make something new when quite good Codes are to be found ready-made ... translate them wholesale ...'.[145] Among the transplants undertaken during this era, those most relevant to the current research include the Swiss Civil Code (1907) and the Code of Obligations (1911).

The Kemalist elite eschewed the Islamic basis of Turkey's law and culture, preferring to transplant Western laws and social norms. During the 1920s,[146] a 'positivist, culture-blind' ethos prevailed among the citizens of Turkey as a central state, leading to the Swiss Civil Code being transplanted into Turkey in 1926. Örücü[147] and Starr[148] agree that this elite group gave a modicum of consideration to ensuring that the transplanted law matched with Turkish society. This proposition is supported by the perception of the Minister of Justice that the Swiss Civil code was compatible with Turkish culture, as both the donor and recipient states were grounded in notions of equity and justice.

The influence of Western law increased with the establishment of a new law school to provide training in secular law, which had Ataturk as its Dean.[149] The government of the time announced its commitment to '*... create completely new laws and thus tear up the very foundations of the old legal system'*.[150] Indeed, the transplanting of Swiss law on legal education has continued influence in the contemporary syllabus in Turkish law schools. Turkish law students still learn about Swiss law, although the syllabus also includes German and French legal studies. Özsunay[151] notes that this nexus between Swiss and Turkish law is embedded in legal practice, with lawyers from both nations convening every four years to compare their codes.

The intervention of President Ataturk into legal education is in harmony with Montesque's and Kahn-Freund's consensus that political considerations constitute a major tenet of a successful legal transplant. Furthermore, prior to Ataturk's ascendance to power, the main

[142] Starr (n 121) 16
[143] Esin Örücü, 'Judicial Navigation as Official Law Meets Culture in Turkey' (2008) 4(1) International Journal of Law Context 35; Esin Örücü (2006). synthetic and hyphenated legal system: The turkish experience. Journal of Comparative Law1 (2), 261-281. Chicago. 264-165.
[144] Özsunay (n 130) 5
[145] Starr (n 121) 16
[146] ibid 13-14
[147] Örücü (n 138) 264
[148] Starr (n 121) 16
[149] ibid
[150] ibid
[151] Özsunay (n 130) 7-8

language of the country was Arabic. During the fundamental changes that he instigated, the introduction of Turkish as the principal national language was effected.

The gradual evolution of Turkey as a secular state took a major step in 1928, when Islam was officially abandoned as the state religion. The secular state was formally established later, in 1937.[152] Nevertheless, Yilmaz[153] describes how the Kemalists took a pluralistic stance, recognising that not every transplanted law would necessarily be meticulously obeyed. Adding to this proposition, Örücü[154] notes that individuals were still able to practice their religion in private or in places of worship, provided that religious affairs did not affect public life. This shows that there was not a revolutionary prohibition of Islam at that time.

In his analysis, Özsunay[155] proposes that the reception of the Swiss legal systems necessitated the voluntary reception of these codes in their totality, which was undertaken in order to support the Kemalists in their vision of the transformation of the country into a secular, Westernised state. The codes were amended in two stages: at the time of receiving the transplant and early in the twenty-first century (see below). According to Özsunay,[156] the initial changes were based on the different structures of the two states, in recognition of the fact that Turkey is largely centralised, whereas Switzerland is grouped into distinct semi-autonomous cantons.

Contrary to the objectives of the Kemalists, Islam and the customary laws have both continued to influence Turkish public life. An analysis of the effect of the transplanting of Western codes is proposed by Yilmaz in his model. Örücü[157] and Yilmaz (2005)[158] concur that despite the distaste that the Kemalists expressed for religion in public life, their acquiescence enabled Islam to persist as an individual creed and heralded the evolution of the 'living law'[159] of Turkey. These writers also agree with Chiba,[160] who claims that the legal system of the Republic developed into a triangle after the reforms, with Islam, secular state laws and customary laws at its three points, which had the effect of creating a national 'living law'.[161] This use of legislation as a basis for debate is also discussed by Glenn,[162]

[152] Hooker (n 127) 364
[153] Yilmaz (n 125) 83,96
[154] Örücü (n 145) 58
[155] Özsunay (n 130) 5-6
[156] ibid
[157] Örücü (n 145) 5
[158] Yilmaz (n 125) 104
[159] ibid
[160] Chiba, Masaji, ed. Asian indigenous law: In interaction with received law. Taylor & Francis, 1986. 180
[161] ibid
[162] HP Glenn, Legal traditions of the world (OUP 2004); I Goldziher, Introduction to Islamic theology and law (Princeton University Press 1981) 155

who describes the Turkish experience as using the law as a bargaining point to that of Islamic states in Asia and Africa, rather than an instrument to assert power. Continuing this theme, Örücü[163] and Yilmaz[164] support the earlier conclusion that Turkey's success in creating legal reform was 'at best only partial'.[165] It should be noted that although Örücü refers to the dynamics of Turkish law during the twenty-first century as 'a sophisticated culture-specific, socio-legal construct', she nevertheless distinguishes its system from similar Western European systems, on the basis of Turkey's Islamic roots, in contrast to those of Western societies which consist of 'closet Christians'.[166]

This phenomenon challenges the aim of the Kemalists, namely for Turks to universally abandon Islam and follow secular laws.[167] Other academics also agree with Hooker,[168] with experts like Starr[169] and Allot[170] noting that the abandonment of Sharia and customary laws was more prevalent in the cities than in rural areas during the 1950s and 1960s. Later, during the 1970s, Hooker found evidence to support the earlier assertions of the above writers that secular law had been only partially assimilated across Turkey. However, this proposition is challenged by Örücü,[171] who refers to the findings of Starr and Pool,[172] namely that the transplanted legal system in this period influenced a cross-section of society, including both rural and urban areas.

3.4.2.3 Post-modern Turkey after 1989

During the third wave of legal transplants, international and EU influences came into play to complement those of the particular Western European states that had previously been received into the Republic. Özsunay[173] situates this phase of increasing influence during Turkey's post-modern period. The legislation during this era was based on international treaties, including the UNCITRAL model laws of international arbitration in 2001, Competition Law in 1994, and specific intellectual property conventions, as well as European laws. Emerging from this exposure, the New Turkish Civil Code was passed in

[163] See general Örücü (n 144)
[164] Yilmaz (n 125) 84,95
[165] Hooker (n 127) 371
[166] Yilmaz (n 125) 84, 95
[167] Starr (n 121) 17
[168] Hooker (n 127) 365
[169] Starr (n 121) 17
[170] Allott, Antony N. 'The limits of law.' (1980). Vi.
[171] Esin Örücü, 'Turkey Facing the European Union Old and New Harmonies' (2000) 25 European Law Review 57. 8
[172] June Starr and Jon Pool, 'The Impact of a Legal Revolution in Rural Turkey' (1974) 8(4) Law Society Review 533.
[173] Özsunay (n 130) 18-19

2001, as a result of the collaboration between legal academics, the judiciary, lawyers, and the Ministry of Justice.[174] In essence, the reform was enacted to give effect to changes in Turkish society during the closing decades of the twentieth century. In terms of commercial law, the changes took account of those operating in neighbouring jurisdictions, particularly in France and Germany.

More recently, research suggests that the Turks in the early twenty-first century are attempting to resist what they consider to be excessive pressures from globalisation on their country.[175] This view has been supported by academics like Starr,[176] who also suggests that external pressures cannot suppress the importance of Turkey having a 'plurality-conscious'[177] outlook that compromises fundamentalist elements in its society. Yilmaz[178] expands upon this theme to suggest that in practice, Turkey has developed a hybrid of secular and Sharia law that combines the norms of Sharia with the requirements of contemporary secular law. In simple terms, this mixes the religious basis with natural law and the human creation of positivist law. It is this dyad that the Oxford Encyclopaedia proposes as being significant for comparative lawyers and thus for the legal transplant focus of the present research. The basis for this proposition is that contemporary Turkey operates under a system of 'living law',[179] which it arguably has in common with all legal systems around the world, as most systems adopts a dynamic triangular model.[180]

From the perspective of transposition and legal tuning, the later work of Örücü[181] analyses the role played by the courts in resolving conflicts between the Islamic culture of Turkey and the Western secular basis of its official law. Of particular relevance to this debate is the transposition theory of transplants, which effectively describes the process by which the courts tune the law to respond to contemporary social circumstances;[182] Örücü refers to this phenomenon as the 'synthetic-hyphenated system'.[183] This tuning also takes account of

[174] ibid
[175] Menski (n 113)
[176] Starr (n 119) 19
[177] Menski (n 113) 363-364
[178] Yilmaz (n 125) 104
[179] ibid
[180] Chiba (n 159) 180
[181] Esin ðru‹cu‹. Judicial navigation as official law meets culture in Turkey. International Journal of Law in Context, 4,1 pp. 35–61 (2008) Cambridge University Press. 46-47.and Esin Orucu, A Synthetic and Hyphenated Legal System: The Turkish Experience, 1 J. Comp. L. 261 (2006). 278
[182] Esin Orucu, (2006). A Synthetic and Hyphenated Legal System: The Turkish Experience, 1 J. Comp. L. 261
[183] Ibid; Esin Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4(1) Electronic Journal of Comparative Law 10.

Turkey's ambition to become a member of the EU, which necessitates the implementation of legal decisions and structures that resonate with EU law.

Örücü[184] returns to her theme of legal pluralism as a living phenomenon, in support of the proposition made earlier by Griffiths,[185] namely that legal centralism is a myth, whereas plurality is experienced in every state that Gessner[186] perceives as a cultural unit. Örücü combines these themes in order to examine whether the outcomes of the law meet the demands of the diverse cultures of Turkey. In order to do this, she assesses the country as a centralised monolith, in which power is devolved from the central government and cascades through all aspects of its culture. Örücü investigates the strains between Turkey's cultural pluralism and its unitary character, showing that the law effectively harmonises the discordant elements that aid transposition. She then extends this line of reasoning to suggest that since no single model can resolve the integration of transplanted law with a recipient society, various models should therefore be adopted and modified to suit the circumstances.

Örücü[187] moves from her musical metaphor of tuning to reconsider the act of transposing carried out by Turkish courts as a process of navigation. Utilising this nautical imagery, she visualises the judge steering a ship into smooth waters, meeting legal aims by way of Islamic norms. However, she notes that while a vast majority (98%)[188] of Turkish society is Islamic, a number of differing religious principles exist in the country.[189] These complicate the transposition role of the courts in using their 'discretion and creative interpretation'[190] to navigate between conflicts in terms of both legislation and contemporary Islamic norms, while observing the strong demarcation lines of the Turkish Constitution. Örücü concludes that successful tuning must include ensuring appropriately educated lawyers, appointing judges with a positive attitude, and encouraging the involvement of creative academics who support the transposition. This premise accords with the idea that an elite group will play a key role in embedding the transplant, as advocated by many academics and especially by Watson.

In her analysis of legal transplants in Turkey, Örücü[191] challenges then proceeds to extend Watson's historically based theory. She grounds her reply in the evolution of Turkey, as a

[184] Örücü 2008 (n 144) 36
[185] John Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism 1. 4-6
[186] Volkmar Gessner, 'Global Legal Integration and Legal Cultures' (1994) 7 Ratio Juris 132.
[187] Örücü 208 (n 133) 38-41
[188] Örücü (n 133) 41
[189] This is common to all Islamic nations.
[190] Örücü (n 133) 60
[191] Örücü 2008 (n 182) 37; Örücü 2006 (n 183) 280-281

secular state that has distanced itself from its Islamic history, which is a proposition that she supports with reference to Monateri.[192] This resonates with the suggestion made by Sacco that it is easier to effect an overall reception of the donor's laws than to imitate all of its unique rules and institutions.[193] This recalls the assertion of the Kemalists' minister of justice, who stated that drafting a new legal code would be a waste of time when functional codes were already in existence and could therefore be adopted and translated directly into Turkish.

In summary, the early twentieth century saw Turkey begin an evolution from an Islamic country following Sharia principles to a secular state that had adopted numerous laws drawn from a select group of modern Western European nations. These transplants have been supported by ongoing bilateral communications and training between Turkish lawyers and the judiciary, working closely with their counterparts in the donating states. Nevertheless, the Islamic roots of the population remain strong, with accommodation having been reached by tuning the ancient Muslim traditions and the positivist legal codes that have been transplanted. The consequence of this, the continually evolving nature of Turkey's legal system, is widely considered to be an example of successful legal transplant.[194]

It is proposed that Turkey's iterative programme of legal transplants resonates with Watson's theory of the ease whereby they can be introduced. In the context of the Turkish experience, complete legal codes from Western Civil legal systems were borrowed and transplanted, using Watson's elite of 'clever lawyers' to ease using Örücü's system of local tuning. The evidence flowing from Turkey's experiment refutes Legrand's perception of the impossibility of legal transplants.

The following section provides an examination of the Islamic foundations of Pakistan's law and its transplants. In contrast to Turkey, this analysis will concentrate on the difficulties experienced by the Pakistani experience of legal transplants in an attempt to discern why they have not succeeded.

[192] Pieguiseppe Monateri, 'The 'Weak' Law: Contaminations and Legal Cultures' in Italian National Reports to the XVI International Congress of Comparative Law (Giuffre Editore 1998) 83.
[193] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39 American Journal of Comparative Law 1. 394, 397.
[194] Orucu, Esin. 'Turkey facing the European Union-old and new harmonies.' European Law Review 25, no. 5 (2000): 523-537. 2; Yilmaz (n 125)100.

3.4.3 Pakistan

Pakistan gained its independence upon the partition of India on 15 August 1947. The country is predominantly Muslim, yet has a legal system grounded in Western law. In fact, the legal system is based on the English Common Law, which was introduced to the Indian subcontinent during the colonial era.[195]

According to Ahmed, Siddiqui and Immamuddin,[196] the banking law of Pakistan evolved in two stages: first, interest-free banking, then the charging of interest on all currencies other than the domestic one. Islamic banking began in Pakistan in 1980, with the transplanting of the Islamic system into a conventional banking system. The second phase of Islamic banking was established in December 2001, with the establishment of the national Sharia Compliance System. The objective of the state was to set Islamic banking on a progressive basis, with the first licence being granted to the Meezan Bank. The involvement of conventional banks was also encouraged, through measures that included opening 'Islamic windows'[197] in order to assist the regulators in promoting Islamic banking. This sector is popular in Pakistan, with customers' support for Islamic banking remaining robust despite the impact of the international banking and financial crisis of 2008. Ahmed suggests that this continued popularity is predicated on the view that the absence of interest provides stability in financial planning.

Despite relatively broad support for the notion of Islamic banking in Pakistan, Ahmed concludes that the failure of this transplant can largely be attributed to continued weaknesses in the governance of the country. Essentially, this line of thought suggests that the fragility of the system is largely due to excessive levels of corruption throughout all levels of the government and its administration. This corruption is compounded by a shortage of qualified people in the country, as well as a lack of standard systems across the state, differing structures in the Islamic boards of banks, and the complexities of the Sharia Compliance System. These factors have been compounded to provide empirical evidence that a

[195] Lau, Martin. 'Introduction to the Pakistani Legal System, with special reference to the Law of Contract.' YB Islamic & Middle EL 1 (1994): 3; Alavi, Hamza. 'Ethnicity, Muslim society, and the Pakistan ideology.' Islamic Reassertion in Pakistan: The Application of Islamic Laws in a Modern State (1986): 21-23
[196] Rukhsar Ahmed, Kamran Siddiqui, and Mufti Immamuddin, 'Islamic Banking in Pakistan – Problems and Prospects' (2013) 3(7) Asian Journal of Research in Banking and Finance 1. 11-12
[197] Ibid. Islamic windows not only assist in the regulation of Islamic banking, but also provide banks with the option to have a trial to discover whether it is a profitable venture and whether public demand exists.

significant proportion of the population (84% of the respondents surveyed by Ahmed[198]) do not believe that Islamic banking in Pakistan operates according to Islamic ideology.

Mansoor Khan's and Ishaq Bhatti's[199] analysis of the introduction of interest-free banking in Pakistan states that its failure can be attributed to its piecemeal implementation, compounded by the fact that the established culture of earning and charging interest is deeply embedded in politics and the state machinery. Mansoor Khan and Ishaq Bhatti attribute the failure of the legal transplant of interest-free banking in Pakistan to four factors: to a lack of commitment on the part of governments and their administrations, to weaknesses in the e-banking and financial sectors, to the overall business environment and socio-economic factors, and to the objectives of achieving globalisation and privatisation. These factors are discussed in turn in the following subsections.

3.4.3.1 Governments and their administration

Essentially, Mansoor Khan and Ishaq Bhatti[200] argue that the legal transplant of interest-free banking has been undermined by the endemic corruption and lack of political support in modern Pakistan. Other lines of research support this assertion, while Nomani and Rahnema argue that the failure of the transplant can be explained by the inconsistent application of Islamic rules.[201]

Since the 1980s, state commitment has been self-contradictory, with an established pattern of governments expressing their support for interest-free banking whilst simultaneously encouraging the continuation of interest charges. Khan cites the prominent example of President Ul-Haq, who undertook to eliminate interest,[202] while imposing a ten-year ban on the Federal Sharia Court's judgment against banks that charged interest on government transactions.[203] Later governments continued to undermine the legal transplant proceedings, most notably during the 1990s,[204] when the government stated that bank interest was not *riba* and therefore did not break Sharia rules. According to Ahmad,[205] this polity ignored the proposals of the Commission of Islam on the Economy, which recommended the

[198] Ahmed, Siddiqui, and Immamuddin (n 198) 19-20.
[199] M Mansoor Khan and M Ishaq Bhatti, 'Why Interest-Free Banking and Finance Movement Failed in Pakistan' (2006) 22(3) Humanomics. 145-146
[200] Ibid 156
[201] Mansoor Khan and Ishaq Bhatti (n 200) 146-147; Nomani, Farhad, and Ali Rahnema. Islamic economic systems. Zed Books, 1994.
[202] The Presidential Order No. 14 (1985); the 1991 FSC Judgment on riba, para no. 16
[203] Federal Sharia Court Judgement on Riba 1991
[204] Siddiqui, and MImmamuddin (n 198). 4 and Mansoor Khan and Ishaq Bhatti (n 200) 147
[205] K Ahmad, 'Consensus on riba: real hindrance is the lack of will' (Dawn, 11 August 1997). 7-8

reconstruction of the Pakistani banking sector in accordance with the principles of Islam. Ahmad argues that the government's emasculation of the idea of an Islamic banking transplant was compounded by its delay in appointing Supreme Court judges to hear appeals against the 1991 case on riba. This stance continued throughout the 1990s, with academics including Dawn[206] and Khan accusing the present government of failing to substantiate its claim to support a dual banking system by letting a transplanted Islamic banking model operate alongside the conventional one. Indeed, Mansoor Khan and Ishaq Bhatti propose that 'the weak and tardy legal system of Pakistan'[207] continues to the extent that the compounded obfuscation, exacerbated by years of delay and persistent bias, has discouraged many people from even applying to the courts to recover loans.

3.4.3.2 Banking and financial sectors

In essence, Mansoor Khan and Ishaq Bhatti propose that a combination of lack of professionalism in the Central Bank's management and a dearth of commitment from the governments militates against a successful legal transplant.[208] Furthermore, they opine that this is compounded by discrepancies in training: standards are high in the conventional banking system and extremely poor in the Islamic sector, where the minimum is done to ensure and demonstrate formal compliance with Sharia standards.

Furthermore, exacerbated by the absence of a robust system of accountability to a Business Recorder,[209] control of the financial and banking sectors is the privilege of an elite clique that supports the tacit arrangement in which bad debts and defaults on loans are ignored. A consensus[210] has attributed this failure to major corporations and politicians, which has led to major scandals, but has not yet provided solutions to the endemic corruption that permeates the system.

[206] Mansoor Khan and Ishaq Bhatti (n 200) 147
[207] ibid 155
[208] ibid 146
[209] Mansoor Khan and Ishaq Bhatti (n 201). 150
[210] Mansoor Khan and Ishaq Bhatti (n 201) 150-151

3.4.3.3 The overall business environment and socio-economic factors

The transplant of Islamic banking is not supported by the Pakistani public. A number of reasons have been given for this, with Saleem[211] and Sheikh[212] arguing that there is a paucity of incentives for general depositors to save, which is exacerbated by the extremely high rate of taxation levied against small-to-medium-sized businesses, which encourages them to conceal their true financial situation. The result of this is that private or business customers typically have little confidence in Pakistani banks. It follows that support for the legal transplant is not encouraging in its present form.

3.4.3.4 Objectives of achieving globalisation and privatisation

The quest for globalisation has led successive governments to argue that the introduction of interest-free banking could weaken international investment.[213] As a consequence of this position, while the banks were privatised in the drive for increased global competitiveness, Mansoor Khan and Ishaq Bhatti note that in practice, the institutions remained in the hands of the same owners and that nothing therefore changed meaningfully.

In considering the four factors that explain the failure of the legal transplant of interest-free banking in Pakistan, the consensus of research is that endemic corruption and continued support for the policy of charging interest are most to blame for the failure to transplant new rules. The effect of this is that the elite in Pakistan does not support the legal transplant of Islamic banking and has consistently acted against its successful adoption since the 1980s, in an attempt to ensure that it cannot take root in the national political or legal system. The negative attitudes of the national executive and administration are supported by a weak judiciary and the existence of executive powers to block judgments that are unfavourable to conventional banking. The general reluctance of the population to engage with Pakistani banks further undermines the success of potential legal transplants in this area.

In the Pakistani case, the failure of its legal transplant was predicated on the primacy of self-interested politicians. This opportunism suggests that Montesque's and Kahn-Freund's later suggestion that successful transplants were dependent of political elements should be

[211] Khan, Mohammad, and Muhammad Bhatti. Developments in Islamic banking: The case of Pakistan. Springer, 2008. 189-198

[212] F Saleem, 'How long can an independent state bank last?' Business Recorder (27 October 1993) and A Sheikh, 'Devising a new banking order' The News (27 April 1994). Mansoor Khan and Ishaq Bhatti (n 200). 151

[213] Mansoor Khan and Ishaq Bhatti (n 201) 157

assessed in both a positive and negative sense in terms of the corruption in Pakistan. Furthermore, Pakistan failed to include Watson's 'clever lawyers' or an allied concept of an elite is a common thread that binds other transplant theorists, notably Örücü and Teubner.

With regard to Legrand's theory and his focus on culture, his notion of the impossibility of legal transplants was bourne out by the corrupt culture of Pakistan preventing the establishment of the transfer.

As will be seen in the following discussion, in contrast to the eclectic system in Pakistan, the countries that form the Gulf Cooperation Council have legal systems which are their own, but which are still ordered and functional.

3.4.4 Gulf Cooperation Council

The GCC was formed on 26 May 1981, by the heads of Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates (UAE), and the Sultanate of Oman. The objective of the GCC is to encourage mutual cooperation between its member states,[214] in compliance with the guiding principles of the Sharia Governance System in Institutions Offering Islamic Financial Services. In this context, each Islamic financial institution within the overarching system has established its own board.[215] Hasan suggests that attention should be paid to the regulatory framework of Sharia governance in the particular jurisdiction that is the focus of the examination. As this research concentrates on Saudi Arabia, its banking law will form the focus of Chapter 4.

At this time, the GCC accounts for 41% of Sharia-compliant financing worldwide.[216] Indeed, the GCC has developed to the extent that it is experiencing global expansion, including the establishment of its members' banks overseas.[217] Furthermore, Wilson[218] proposes that this export is effectively establishing a new form of Islamic capitalism in contrast with that of the West, especially regarding the issue of interest, securities and financing capital projects. This is in keeping with Hasan's classification of regulatory approaches,[219] which notes that the minimalist approach enables every market to develop a governance system rather than

[214] Directorate General for Information, 'The European Community and the Gulf Co-Operation Council' (1987) 2(3) Arab Law Quarterly 323.-324
[215] Hasan (n 102) 8
[216] Rodney Wilson, The Development of Islamic Finance in the GCC (LSE Library 2009). 3
[217] Wilson (n 218) 5
[218] Wilson (n 218) 3
[219] Hasan (n 102) 2

requiring strong central regulation. In common with Malaysia (Section 3.4.1), most of the GCC states occupy this minimalist category, with the exceptions of Saudi Arabia and Oman.

Within the GCC states that rely on minimal regulation, there is general agreement among academics such as Wilson[220] and Hasan[221] that the constitutions of Kuwait, Bahrain, Qatar and the UAE express Sharia law as their legislative source. Hasan notes uncertainty regarding the degree to which the legislative sources apply to Islamic banking, while Wilson argues that statutes are important sources of Sharia banking regulation in the GCC as a whole. Nevertheless, Hasan proposes two subdivisions of the minimalist approach to regulation, such that all the members, with the exception of Saudi Arabia,[222] have the traits of a regulated and supervised approach to Sharia governance.

The impetus for the governance systems of the GCC countries originated from the banks that wanted to establish their credibility in Islamic financial matters. Wilson[223] claims that the rules are based on Islamic jurisprudence regarding any commercial (*fiqh muamalat*) or civil contracts that incorporate financial agreements. In the resulting framework, each bank has its own Sharia board that endeavours to provide constructive advice on financial products, rather than adopting a restrictive approach. However, El-Gamal (2006)[224] criticises the comparative lack of standardisation between the member states and even between the Sharia boards in individual territories. Wilson agrees that universal rules of governance are not applied, even though it is technically permissible for GCC regulators to sit on multiple boards.

In contrast to the profile of bank customers in Pakistan (Section 3.4.3), most salaries and all social benefits in these states are paid by bank transfer.

Since Bahrain is the principal banking nation within the GCC, an overview of its transplant situation is provided in the following subsection.

3.4.4.1 Bahrain

In its role as the principal financial centre within the GCC,[225] two influential international Islamic finance bodies have established their headquarters in Bahrain: The International

[220] Wilson (n 218) 1
[221] Hasan (n 102) 8 note no 8
[222] Passim Saudi prefers self-regulation; see Chapter 4
[223] Wilson (n 218) 10
[224] El-Gamal (n 11) 26-45
[225] Wilson (n 218) 26

Islamic Financial Market and the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI). Almost half (45%) of the board of AAOIFI are scholars from the GCC and its jurisprudence (*fiqh*) exercises the most influence over the jurisdiction of international Islamic finance.[226] However, Wilson expands the theme of the AAOIFI's global perspective, noting that this has resulted in its representatives exchanging views on a worldwide basis, which are shared, at a minimum, at its annual international conference in Dubai.

Created in 1973 as the Bahrain Monetary Agency, [227] the Central Bank of Bahrain is the sole financial regulator.[228] Hasan[229] and Saeed[230] note that its regulatory regime extends strong control over the entirety of the Islamic banking sector, in stark contrast to certain legislation that is not concerned with detailed intervention.[231] With regard to its regulatory regime, Al-Suwaidi[232] explains that Bahrain has a historical influence from English law because of its status as a former British Protectorate. Since independence in 1971, the constitution of Bahrain has maintained this influence, passing bodies of substantive and procedural law, while simultaneously establishing Sharia as its principal legislative source (Article 2). The tension between these sources creates strains between the Western and Sharia banking practices functioning in Bahrain, particularly with respect to the Islamic prohibition of interest charges. In seeking an effective resolution to these endemic conflicts, Al-Suwaidi suggests that Bahrain should consider the transplanting of law from Egypt,[233] which itself had previously transplanted law in this area from the French system.[234] In this scenario, especially in order to resolve any conflicts with its own Sharia laws, Bahrain could then amend Egyptian laws to allow interest to be legally levied as long as the charges were subject to the rate approved by the Bahrain Monetary Agency. In the event of disputes relating to

[226] Wilson (n 218) 10
[227] Decree No. 23 of 1973
[228] Wilson (n 218) 22
[229] Hasan (n 102) 9
[230] Abdullah Saeed, Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation (Brill 1999) 14.
[231] Wilson (n 218) 10-11
[232] Al-Suwaidi, A. (1993). Developments of the Legal Systems of the Gulf Arab States. Arab Law Quarterly, 8(4), 292.
[233] ibid 292
[234] Classically, the Shafi'i influence from Bagdad was legally transplanted to Egypt, although the term 'legal transplant' or 'transposition' was not applied to this jurisprudential evolution. The basis for these propositions is that legal transplants are easy, at least in relation to Watson's historically grounded theory; this transplant was established in the host when the Shafi'i School arrived in Egypt. The relevance of the transposition factor is suggested on the basis that Shafi'i reviewed his school of thought through a form of local tuning when he lived in Egypt, upon discovering that local customs and practices differed from those of Baghdad.

financial agreements, the civil courts of Bahrain have jurisdiction over all commercial matters, except Sharia disputes, which are referred to Sharia dispute resolution bodies.[235]

3.4.4.2 Financial free zones

In contrast to the successful transplant and transposition of banking rules in Bahrain, which have contributed to it becoming a thriving centre for Sharia finance, Qatar and Dubai have not been altogether successful. In Hasan's[236] assessment, a fundamental reason for this failure of Qatar and Dubai to develop a fully successful Islamic banking sector is the existence of conflicts of law. Divergences in the constitutional rules of the two countries, the precedence of Sharia law, and certain articles in commercial and civil law statutes have created a great deal of confusion over the governance of their financial sectors.

According to Wilson, both Qatar and Dubai have responded with the creation of legally separate jurisdictions within their respective borders, which are known as financial 'free zones' (FFZs).[237] These jurisdictions are regulated by specific laws which are based on the English system of Common Law. To this extent, both the Qatar Financial Centre and the Dubai International Finance Centre effectively operate outside the jurisdiction of Sharia courts and the civil laws of their respective countries.

On the basis that the GCC countries operate a legal system that is governed by Sharia, with the exception of certain FFZs that have evolved from a Common Law system, it is suggested that their legal transplants are a partial success. This modified approval is predicated upon the proposition that if the transplants were wholly successful, there would be no need for the operation of the FFZs.

In the GCC, the longstanding existence financial free zones in member states that have adopted a Common Law banking regime suggests that each GCC member's particular reception of foreign laws, transpositions were implemented using Örücü's 'local tuning' The success of this approach is affirmed by the current export of GCC financing systems, which represents further legal transplants wherein the GCC is the donor, rather than the recipient.

[235] Hasan,(n 102) 8-9
[236] ibid 18-19
[237] Wilson (n 218) 27-30

3.5 Conclusion

The review of Islamic law indicates that its inclusive element can be traced back to the Prophet's (pbuh) acceptance of certain Jewish and Christian customs, which were then integrated into Islamic practice. In the context of this thesis, there is no logical reason why English banking law cannot be transplanted into Saudi Arabia, given that Islam has benefited from legal transplants from its very inception and that Islamic nations have subsequently enjoyed success in transplanting Western laws. The experience of the countries examined in this chapter, including Malaysia, Turkey, and the GCC, indicate that resolutions ought to be available for any conflicts with Islam and that a legal transplant can therefore be successfully achieved.

In summarising the evaluation of the particular countries that share an Islamic foundation, five areas of comparison are proposed: changes in society and legal systems, elite groups, legal transplants following colonisation or voluntary reception, incentives to change including legal transplants, and the success, partial success, or failure of the transplants. This comparison is illustrated in Table 3.1 and supplemented by discussion in the text that follows.

Table 3.1: Comparison of legal transplant experiences

Areas of Comparison	Countries
Changes in society and legal systems	Malaysia
Elite groups	Turkey
Legal transplants from colonisation or voluntary reception	Bahrain
Incentives to change and thus transplant	Other GCC members (except KSA)
Categories: success; partial success; failure	Pakistan

In the case of Malaysia, the reception of the Common Law is rooted in its colonisation by the British. After having gained its independence, Malaysia retained its Common Law base in an attempt to encourage certainty and predictability, rather than developing its own legal system. Since that time, the legal system has been supplemented by transplants of legal precedents from other Common Law countries, in addition to certain changes in English judicial precedents. However, critics[238] note that the basis of Malaysian law has not changed since 1948, with its legislation failing to keep pace with many developments in global business. These shortcomings include limited development of the laws of employment and

[238] Mohamad and Trakic (n 63)

competition, as well as procedural and substantive rules in the wider business and banking law contexts. In essence, rather than achieving legal certainty, the cumulative research of Hasan[239] and Mohammed and Trakic[240] suggests that Malaysian courts have a tendency to minimise and ignore any differences and conflicts within its legal system, especially in terms of divergences within the Common Law framework. They have also shown a willingness to gloss over the tensions that may emerge between Common Law transplants and the more powerful basis of Sharia law.

Notwithstanding the absence of a contemporary review of the schisms that exist between its sources of law, the Malaysian experience continues to operate successfully. It is therefore suggested that Malaysia adopts an approach similar to Örücü's model of legal transposition and local tuning.[241] Thus, despite the fact that Malaysia transplanted its commercial statutory framework from the equivalent English law of the 1940s, the Malaysian courts practice a policy of legal transposition. This approach enables them to respond to emergent challenges and operate a flexible financial system that combines Sharia law with the existing mid-twentieth-century Common Law root. Effectively, Malaysian courts graft contemporary commercial judicial rulings onto what Mohamad and Trakic have criticised as outdated laws. This system exemplifies an existing example of Watson's[242] 'clever lawyers' developing the living law to modify legislation into a form that better relates to the contemporary environment.

In contrast to Malaysia's practice of smoothing over the uncertainties in legal interpretation of transplants, Turkey has developed a system of 'living law',[243] which effectively integrates its Islamic history and customary laws with the transplants of various legal codes from Western European countries, most of which were originally embedded in Roman Law. Another fundamental difference between Malaysia and Turkey is that the former retains its Islamic society, while the latter diverged from its history to implement an expressly secular state system. The primary incentive behind this specific intention was to present Turkey as a nation that was sufficiently synchronised with Western Europe to make it an attractive trading partner.

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[239] Hasan (n 102) 2-3

[240] Mohamad and Trakic (n 63) ; Bermann, G. A. (2017). Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts. In Recognition and Enforcement of Foreign Arbitral Awards. 1-78.

[241] Örücü, Esin. 'Law as transposition.' International & Comparative Law Quarterly 51, no. 2 (2002): 221-223

[242] Watson, Alan. Society And Legal Change 2Nd Ed. Temple University Press, 2010. 8

[243] Yilmaz (n 125) 95

Although Turkey's attempt to codify Islamic law in the late nineteenth and early twentieth centuries ended in failure, a number of changes were nevertheless made to establish a secular state and introduce Western laws during the Kemalist era. This period involved an extensive programme of transplanting civil legal codes from specific Western sources, supported by a new system of legal education that was promoted by the president to support the accompanying social and legal changes. In this way, the aim of changing both law and society was implemented by an elite comprising politicians and lawyers. This group effectively ensured the success of the Turkish experience of legal transplants, having been founded so that the common ground of equity and justice between Islamic and Roman law should continue to be embedded through local tuning. These periodic adjustments are in keeping with Örücü's overall legal transposition theory and particularly her research on Turkey.[244] In this manner, the triad of Sharia, customary law, and transplanted Western legal codes have combined to produce the current system operating in Turkey. According to Yilmaz,[245] this contemporary system of 'living law' allows the legal system to exist and function as a basis for objective argument, rather than operating as an assertive ruler. This means that the possibility of tension is dynamic: The early twenty-first century has seen the resurgence of Sharia law, which works in concert with the requirements of the secular state to produce a pluralistic legal system that does not relate to one single legal model or transplant theory.

In common with Turkey, the detailed operation of the financial laws of Bahrain has devolved from the state to the civil courts and Sharia boards in the banks. Despite the success of this approach, which is evidenced by Bahrain's preeminent position as a major global financial centre, conflicts nevertheless still arise between Sharia and the transplanted banking laws that were originally drawn from Western Europe.

Elsewhere in the GCC, the continued presence of financial free zones in other member states operating a Common Law banking regime suggests that transplantation of Western banking laws has been only partially successful in the GCC as a whole. It is also proposed that following each GCC member's particular reception of foreign laws, transpositions were effected with regard to what Örücü terms 'local tuning'.[246] The success of this approach is

[244] Esin Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4(1) Electronic Journal of Comparative Law 10; Örücü (n 145). Örücü (n 243) 42-43
[245] Yilmaz (n 125) 104
[246] Örücü (n 141) 221-223

affirmed by the current export of GCC financing systems, which represents further legal transplants wherein the GCC is the donor, rather than the recipient.[247]

In contrast to the foregoing Islamic countries, legal transplants in Pakistan failed to develop a Sharia banking system and therefore also failed to retain and attract further international investment. Perhaps the most significant factor in this lack of success is the endemic corruption that plagues the country, militating against overall confidence being placed in its financial sector. This corruption is practiced by an elite composed largely of politicians, senior government ministers and wealthy business owners. Therefore, despite the national espousal of the principles of Sharia Law, coupled with the transplant of Western laws, the subversion of court decisions and legislation remains possible, particularly in light of the paucity of adequately trained judges and lawyers, thereby ensuring the continued corruption of Pakistan's financial and fiscal systems. For this reason, the objective of attracting international investment, or even the support of local small and medium-sized enterprises, will also fail.

It is therefore proposed that the legal transposition theory, which Örücü[248] expanded from Watson's earlier thesis, is pertinent to both the history of Islam and the legal transplants between Islamic and Western systems. The perspective of the Prophet (pbuh) evolved with his experiences during his Mecca and Medina eras, during which he communicated with other religions, most notably Judaism and Christianity. Regarding the legal transplant theories that are grounded in Western societies, the inclusion of economic systems in Islamic society recalls the proposition of Kahn-Freund[249] that economies typically influence legal transplants.[250] It is also proposed that the Örücü's legal transposition theory serves to extend and support Watson's line of reasoning, namely that legal transplants are 'easy'.[251]

It is suggested that the review of Islam and the specific approach to Islamic banking adopted by the countries discussed in this chapter reveals no overall model to describe the transplant of a Western banking system into a society that has a history of Sharia law. This is evidenced by the fact that despite numerous experiences of transplants resulting from colonisation or

[247] Wilson (n 218) 25
[248] Esin Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4(1) Electronic Journal of Comparative Law 10; Örücü (n 145).
[249] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1. 8
[250] This is illustrated in Chapter 4 of AN Young, Saudi Arabia, the making of a financial giant (New York University Press 1983), which describes Young's role in the establishment of the Saudi Arabian Monetary Agency (SAMA) in 1948.
[251] Alan Watson, Legal Transplants: An Approach to Comparative Law (2nd edn, University of Edinburgh 1974). 95

voluntary reception, the constant recurrent theme is of the importance of the support of an elite comprising supportive national politicians and lawyers. However, the comparisons indicate that the lawyers and judiciary should be appropriately educated and trained in sufficient numbers to ensure that the successful operation of the transplant can be achieved. This requires local tuning and comprehensive reviewing to suit the socio-economic environment in which the law now exists. In particular, the Pakistani experience shows that the existence of widespread corruption within the state and financial sectors can fatally undermine the confidence of citizens and external investors, invariably resulting in a failed transplant.

This chapter has looked in detail at the history and present situation of legal transplants in the context of a number of Islamic countries. The next turns to the Kingdom of Saudi Arabia, the focus of the present study.

Chapter Four

The Context and History of Legal Transplants in Saudi Arabia

4.0 Introduction

This research focuses on a key period in Saudi history (1951-1974), beginning with the establishment of its central banking system. This chapter examines the impact of the Banking Control Law (BCL) on Saudi banking and reviews the evolution of the central system of banking, control and regulation that occurred after the legal transplant of the US central banking model in 1952. This decision transformed Saudi Arabia into an international financial centre, in addition to being a major global oil producer and exporter.[1] Practitioners[2] and academics[3] agree that the 1950s were an important time for the Saudi economy, with its national currency being pegged to the US dollar in the international market and the introduction of Pilgrim Receipts, a paper money system[4] that replaced the previous system of gold and silver coins.[5] The administration of the Saudi state was created in the 1950s by elites from the ruling class,[6] based on an individualistic perspective, rather than the Islamic collectivist stance.[7] This theme is expanded with the observation that 'form follows family',[8] meaning that institutional changes are orchestrated for the benefit of the elites and especially the Royal Family, rather than to modernise the state.

Initially, the sole commercial financial institution operating in Saudi Arabia was the Saudi Hollandi Bank,[9] followed by the National Commercial Bank (NCB) in 1954.[10] As noted

[1] Rolf Meyer-Reumann, 'The Banking System in Saudi Arabia' (1995) 19(3) Arab Law Quarterly 207. 211
[2] Arthur N Young, Saudi Arabia: The Making of a Financial Giant (New York University Press 1983).6-8
[3] Robert Lacey, The Kingdom: Arabia & the House of Sa'ud (Harcourt Brace Jovanovich 1983). 207
[4] Pilgrim Receipts were replaced by paper money in 1959 Currency Law 1/7/139H; 31/12/1959
[5] Young (n 2) 4, 17
[6] Steffen Hertog, 'Shaping the Saudi State: Human Agency's Shifting Role in Rentier-State Formation' (2007) 39(4) International Journal of Middle East Studies 539.555
[7] Ibid. 543-555
[8] Ibid
[9] Algemene Bank Nederland (ABN), otherwise known as Saudi Hollandi Bank, began in 1926 as a branch of the Netherlands Trading Society in order to serve the pilgrims from the Dutch East Indies (now Indonesia). It was the only bank in the Kingdom at the time and operated out of one office in Jeddah. http://www.sama.gov.sa/en-US/Currency/Pages/HistoricalInfo.aspx.
[10] Fouad Al-Farsy, Modernity & Tradition: The Saudi Equation (Routledge Taylor & Francis 2009). 135; Tschoegl, Adrian E. 'Foreign banks in Saudi Arabia: a brief history.' Transnational Corporations 11, no. 2 (2002): 130. Faisal Alkahtani, 'Legal protection of foreign direct investment in Saudi Arabia' (PhD thesis, Newcastle University 2009). 1

above, the Saudi Arabian currency (the riyal) was stabilised during the 1950s, by being pegged to the international value of silver, beginning at 'an average exchange value' of 3.4932 riyal per US$1'.[11] Declining confidence in the commercial banking sector in the 1960s led to the next major banking law reform,[12] namely the aforementioned the Banking Control Law 1966. Most Saudi sources[13] state that the BCL increased the profile of the Saudi Arabian Monetary Agency as a central agency. However, some experts argue that it actually eroded SAMA's independence,[14] as successful economic transplantations such as those that established SAMA require the support of parallel legal borrowings.[15]

The research period (1951-1974) is so important because the main events in Saudi Arabian banking and finance occurred during these years. The 1950s to mid-1960s saw the development of the banking system and associated control and regulation mechanisms. However, the most recent significant legal transplant was introduced into Saudi Arabian banking law in the 1970s.[16] Additionally, the 1960s and 1970s saw the formation of the Organisation of Petroleum Exporting Countries (OPEC), which had major global repercussions.

It is important to situate these developments within the context of Saudi Arabia, noting how the discovery of commercial quantities of oil enabled the Kingdom to develop from the undeveloped territory of Bedouin tribes to a wealthy modern society. Since the 1970s, successive governments have implemented legal and policy reforms in an attempt to diversify national investments and reduce their dependency on oil.[17] These initiatives led to the creation of the SAMA and enabled Saudi Arabia to become a 'financial giant'[18] and the recipient of extensive foreign investment[19]. In this context, the Arabian American Oil Company (Aramco) has been an incredibly influential player. The power balance between

[11] Arthur Young, 'Saudi Arabian Currency and Finance' (1953a) 7(4) Middle East Journal 539.
[12] Meyer-Reumann (n 1). 208-210 ; SAMA (2017) < http://www.sama.gov.sa/en-US/Pages/default.aspx> accessed 25 January 2017
[13] SAMA, 'Banking Control' (2017) <http://www.sama.gov.sa/en-US/BankingControl/Pages/AboutBankingControl.aspx> accessed 25 January 2017
[14] Meyer-Reumann (n 1). 209-211 ; Khalid Alshammari, 'Banking Control Law 1966 in Saudi Arabia, Shortcomings and Development: A Comparative Study in Banking Supervision between the Saudi Arabian Monetary Agency and the Bank of England' (PhD thesis, 2017).
[15] Faizal Manjoo, 'An Orientalist Perspective of Islamic Law: From Fossilization to Legal Transplant' (2011) 31(4) The Muslim World Book Review 6. 16; Timur Kuran, The Long Divergence: How Islamic Law Held Back The Middle East (Princeton University Press 2011) 405.
[16] In 2000, the Egyptian model was transplanted into Sharia courts for the purposes of banking disputes, rather than them referring them for Islamic dispute resolution. Abdulrahman Baamir, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD thesis, Brunel University 2009. 119
[17] Alkahtani (n 10). 1
[18] Young (n 2) 115-122
[19] Baamir (n 16). 112-120; see general Alkahtani (n 10).

Aramco and the Saudi government of Arabia, as well as the corresponding need for a central monetary agency, has been instrumental in the evolution of SAMA.

This chapter begins with an overview of the formative eras for the Saudi banking environment, including an assessment of how the national legal framework maintained loyalty to Islamic principles, while enabling the banking system to evolve from the original US iteration to its present state. The examination includes an analysis of the evolution of Saudi Arabia, its constitution, and the establishment of SAMA, concentrating on the factors influencing the enactment of the BCL 1966 and its impact on SAMA.

The investigation of the Saudi experience of legal transplants into banking law commences in the following section, with a brief review of the early history of Saudi Arabia.

4.1 Overview of Saudi Arabia and its constitution

4.1.1 Establishment and evolution of the Kingdom of Saudi Arabia

This section examines the progress and alliances that resulted in the formal establishment of the Kingdom of Saudi Arabia in 1932. The current status of Saudi Arabia is predicated on the exploitation of commercial quantities of its natural resources, with Britain initially supporting the exploration, drilling, refinement, and transport of oil, although America later supplanted the UK. The current research therefore argues that the initial links between the KSA, the USA and the UK have been particularly significant to its development. This process has been inextricably linked with the religious and cultural identity of Saudi Arabia. Even prior to its formal establishment, successive Saudi rulers have closely adhered to the principles and practices of Islam. The Qur'an continues to shape the character and nature of modern Saudi Arabian society and even serves as the Saudi Arabian constitution.[20] These factors have fuelled the commercial, social, and infrastructural evolution of the Kingdom into a 'financial giant'[21] that is recognised for its petroleum exports, its political influence, and its role as a significant financial centre.

4.1.2 Recognition of Saudi Arabia (1920s and 1930s)

The background of the Kingdom of Saudi Arabia provides an important insight into the later discussion, which is informed by the strict adherence of Saudi policies and practices to

[20] Ali M Al-Mehaimeed, 'The Constitutional System of Saudi Arabia: A Conspectus' (1993) 8 Arab Law Quarterly 30. 31
[21] Young (n 2) 115-122

Islamic principles. The Kingdom was established in its current form by King Abdul Aziz ('ibn-Saud', 1876-1953)[22] in 1932.[23] Recent studies into the development of the KSA tend to stress the role played by Philby and Twitchell.[24] The contribution of Young[25] is especially widely acknowledged among academics[26] and the business community.[27] In common with contemporaries, notably Philby,[28] Twitchell,[29] and later Lacey,[30] Young focused on the ways in which relations shifted between Saudi Arabia and its partners, in political terms, as well as its banking and petroleum sectors. In the context of the current research, it is important to note that the Kingdom of Saudi Arabia was formally recognised by Britain in 1910[31] and America in 1931.[32] However, both Young[33] and Lacey[34] state that the USA formed a closer bond with the fledgling nation.

The historical formation of Saudi Arabia has played an essential role in shaping its modern context. Of particular importance is that the unification of the country was enabled through the military support of the *Ikhwan* (the Brothers), Bedouin tribal warriors controlled by Mohamed ibn-Wahhabi (ibn-Wahhabi). The ancestors of ibn-Wahhabi agreed to support the line of ibn-Saud in 1733, as long as strict Muslim principles were upheld. The legacy of this collaboration continued into the early twentieth century, with the Ikhwan declaring a holy war (*jihad*) to ensure that Islamic principles were central to the emerging Saudi state. After a period of civil war, Saudi Arabia was declared a kingdom in 1932. King Abdul Aziz ibn-Saud then ended the jihad and sought peace with the colonial regional powers, angering the Ikhwan, whose resentment continues to affect contemporary Saudi Arabian politics.[35]

[22] The Kingdom was preceded by two previous Saudi states that were established in 1744 and 1824 respectively. Harry Philby, Arabian Oil Ventures (Middle East Institute 1964). 293
[23] The Kingdom was preceded by two previous Saudi states that were established in 1744 and 1824 respectively.
[24] Lacey (n 3) 57; Sir James Norman Dalrymple Anderson. The Kingdom of Saudi Arabia. Stacey International, 1983. 77
[25] Young (n 2) 30-54
[26] Gazi M Alam, 'Can Governance and Regulatory Control Ensure Private Higher Education as Business or Public Goods in Bangladesh?' (2009) 3(12) African Journal of Business Management 890. 896.
[27] Montagu, Caroline. Civil society in Saudi Arabia: The power and challenges of association. Chatham House for the Royal Institute of International Affairs, 2015. 3-4
[28] Philby (n 37) 74-75
Twitchell, Karl Saben. Saudi Arabia: with an account of the development of its natural resources. Princeton University Press, 1958.
[30] Lacey (n 39) 334
[31] HS Abedin, 'Abdul Aziz Al-Saud and the Great Game in Arabia, 1896-1946' (PhD thesis, King's College London 2002). 93
[32] US Dept. of State, 'A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Saudi Arabia' (Office of the Historian, 2017) <https://history.state.gov/countries/saudi-arabia> accessed 24 January 2017
[33] Young (n 2) 14-19
[34] Lacey (n 39). 267-269
[35] Al-Azma, Talal Sha'yfan Muslat. 'The role of the Ikhwan under'Abdul-'Aziz Al Sa'ud 1916-1934.' PhD diss., Durham University, 1999.202-203; Lacey (n 39). 145

Despite this position, the Saud-Wahhabi agreement of 1733 remains in force, with the Qur'an functioning as the Saudi Constitution, and all major political, financial and social decisions being informed by the Sunni School of Islam.[36]

Prior to the discovery of oil, Saudi Arabia obtained significant revenue from the annual pilgrimage of Muslims to Mecca (the *Hajj*),[37] which was only diminished by global events that affected travel. In the case of the World Wars, Britain and America compensated the KSA with financial aid because of the Saudi contribution to the war.[38] Recognising this vulnerability, the King sought to embed Saudi as an international economic force. His trusted finance minister pressed for business capital generation, especially in the promising petroleum industry.

With regard to its banking environment, the 1930s saw a continuation of banking by traditional money exchangers, the result of which is that Saudi Arabia inherited no formal banking law.[39] Expansion of the Saudi banking sector attracted foreign banks, the most influential of which was the pioneering Saudi Hollandi Bank. In response, the NCB was founded by Royal Decree in 1954.[40] Meyer-Reumann[41] classifies this institution as a partnership. The Riyad Bank and The Al-Watany Bank were then founded in the 1950s.[42]

In the context of this research, it is important to note that King Abdul Aziz drove the foundation of Saudi Arabia as an independent monarchy and financial power. His essential role is discussed later in this chapter.

4.2 The influence of the USA and UK on the central banking system of the KSA

In 1949, the USA implemented Article 4 of the Truman Program, its first governmental policy to provide aid to Eastern countries.[43] As a consequence of this political agenda, the US Embassy and Aramco pressed King Abdul Aziz to accept the assistance of American

[36] See Chapter 2.
[37] Elizabeth Monroe, Philby of Arabia (Quartet 1980) 212 ; Philby, Harry St John Bridger. Arabian jubilee. Day, 1953.167-172 ; Young (n 2) 1-7; Lacey (n 3) 190-200
[38] Young (n 11) 552
[39] Young (n 2); 57-59
[40] Royal Decrees issued on 25/7/1371H (20/4/1952)
[41] Meyer-Reumann (n 1) 213
[42] Saudi Arabian Monetary Agency. Development and restructuring of the Saudi banking system. https://www.bis.org/publ/plcy06g.pdf.; Saudi Arabian Monetary Agency. اعادDevelopment and restructuring of the Saudi banking system. https://www.bis.org/publ/plcy06g.pdf. Meyer-Reumann (n 1) 213-214
[43] Stephen Macekura. (2013). The point four program and US international development policy. Political Science Quarterly, 128(1), 127-160.

consultants in the development of a monetary system and central bank in Saudi Arabia. After helping the negotiations, Young[44] was assigned to constitute the Saudi Arab Finance Corporation.[45]

At the same time, the United Kingdom refused financial aid to Saudi Arabia in the field of oil exploration.[46] The chief Saudi diplomat, Fouad Bey Hamza,[47] informed the British that he had received a US report on the mineral resources in Al-Hejaz and Al-Ahsa, but that he had a preference for dealing with the British. The British declined the invitation, citing extenuating financial circumstances,[48] adding that 'British companies may hesitate in accepting a report not made by a British expert'.[49] In addition to a reluctance to bear the cost of speculating in a foreign country, British non-involvement was further encouraged by a Swiss geological report that deemed oil development in Al-Ahsa to be a 'pure gamble'.[50] This decision led the Eastern and General Syndicate of London to default on its concession rent to King Abdul Aziz in 1927, leading to cancellation of the concession.[51] Nevertheless, by the end of 1942,[52] the British were discussing founding a central bank in Saudi Arabia and admitting it to the sterling region. In response, the Americans applied US currency to prejudice American profits, by insisting on the application of the open-door policy to the Middle East.[53] This would have profound implications for the development of Saudi Arabia and its policies.

4.3 The era of King Abdul Aziz (1932-1953)

Despite previously having made intermittent forays into oil exploration,[54] the initiative for oil prospecting became a focus for both Saudi Arabian and American parties in 1932, with the discovery of vast quantities of oil in Bahrain. In the following year, the King granted a

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[44] James R Fuchs, 'Oral History Interview with Arthur N. Young' (Truman Library, 21 February 1974) <https://www.trumanlibrary.org/oralhist/young.htm> accessed 28 January 2017.
[45] ibid
[46] M Hobbs, 'Gulf History Specialist, British Library, Emir Faisal's Diplomatic Mission and Britain's Reluctance to Invest in Saudi Oil in 1932' (Qatar Digital Library) https://www.qdl.qa/en/emir-faisal%e2%80%99s-diplomatic-mission-and-britain%e2%80%99s-reluctance-invest-saudi-oil-1932 Accessed 07 July 2017
[47] Fuad Bey Hamza was charged with discussing the finer diplomatic points in a succession of meetings held with government officials in this tour.
[48] Hobbs (n 29). 3
[48] Fuad Bey Hamza was charged with discussing the finer diplomatic points in a succession of meetings held with government officials in this tour
[49] Hobbs (n 29). 3
[50] Daniel Yergin, The Prize: The Epic Quest for Oil, Money, and Power (Simon & Schuster 1990). 281
[51] Scott McMurray, 'Energy to The World: The Story of Saudi Aramco - Volume 1' (Aramco Services, 2011) <www.aramcoservices.com> accessed 17 May 2017.
[52] A Mustafa, United States and The Arab Orient (Aalam Al Maarifa 1978). 31
[53] McMurray (n 51) 21; Young (n 2) 36
[54] Lacey (n 3). 265

concession to Standard Oil of California (SOCAL),[55] which led to the immediate creation of the California Arabia Standard Oil Company (CASOC). This organisation later became Aramco.

The first oil well began operations in 1935, with commercial levels of petroleum being pumped by 1938 and the first oil tanker loaded a year later.[56] In 1939, immediately prior to the commencement of the Second World War, in the wake of a competitive tender that included American, British and Japanese bidders, SOCAL was granted expanded rights to oil concessions for sixty years. One of the principal reasons for the award to SOCAL was the personal confidence of the King in the United States.[57] It has also been argued that the King was reluctant to accept the British bid because of the political alliance that he had forged with Theodore Roosevelt,[58] as well as the historical relationship that he enjoyed with oil exploration organisations of the United States.[59]

Despite the new and promising source of income, Young's[60] practical advice and Lacey's [61] historical perspectives concur that the economic hardships of the previous decades meant that Saudi Arabia was still indebted after its first oil royalties, so the initial revenues were quickly spent. In response, the Kingdom signed a Stabilisation Agreement with the United States,[62] which was based on a lend-lease silver fund. Under the terms of this fund, Saudi Arabia paid silver coins in exchange for US dollars, with the US purchase of gold riyals being the equivalent of a fixed silver price ($0.725).

With the commencement of the Second World War, the flow of oil into the export markets was interrupted. However, although production stalled, geological examinations continued and wells were drilled for both oil and water.[63] Following the cessation of the war, the oil refinery of Ras Tannurah was founded.[64] This coincided with the King clarifying his policy

[55] Saudi Aramco's origins trace to the oil shortages of World War I and the exclusion of American companies from Mesopotamia by Great Britain and France under the San Remo Petroleum Agreement of 1920. The US Republican administration had popular support for an 'Open Door policy', which Herbert Hoover, secretary of commerce, initiated in 1921. Standard Oil of California (SoCal) was among those US companies seeking new sources of oil from abroad. This resulted in the creation of California Arabia Standard Oil Company (CASOC), which was later to become Saudi-Arabian Oil Co (Aramco).
[56] Young (n 2) 9
[57] ibid
[58] ibid 8
[59] Peter W Wilson and Douglas F Graham, Saudi Arabia: The Coming Storm (Routledge 2016). 92
[60] Young (n 11). 556
[61] Lacey (n 3) 499
[62] Young (n11). 540; Young, A. (1953b). Saudi Arabian Currency and Finance. Middle East Journal, 7(3), 361-380. 377
[63] Young (n 2) 8-9
[64] Ibid; McMurray (n 34) 90

that Saudi Arabia would not be identified with the British system of colonies and protectorates. Despite this independent stance, the nation needed foreign aid. Therefore, from 1941, the United States and Britain developed policies regarding the provision of aid to Saudi Arabia and the expansion of their own Middle Eastern interests. In fact, rather than being collaborators, these powers became rivals for the opportunity to play a prominent role in Saudi Arabia's evolution. This 'competition'[65] extended to a consensus that Saudi Arabia needed a sound and workable monetary system, although there were important differences between the US and British proposals. Both America and Britain sent financial advisors to the Kingdom to investigate the feasibility of establishing a United States or United States/ United Kingdom central banking system. However, these proposals made during the 1940s were never implemented.

According to Young,[66] Saudi Arabia's preference for the United States over the United Kingdom strengthened with the amicable meeting between King Abdul Aziz and President Roosevelt in 1945. This was exacerbated by the vehement disagreement between the King and Winston Churchill, then British Prime Minister, regarding the treatment of the Palestinian people in the establishment of an Israeli nation.[67] Combined with the King's 'faith in the United States',[68] the foundations for the political alliance between Saudi Arabia and the USA became firmer. One consequence of this is that a legal transplant of the US banking system became ever more feasible. Prior to the meeting between the two heads of state, as noted earlier in this chapter, the Saudi Arabian government had approached the British government for loans in 1938 and suggested British involvement in oil exploration. At that time, the British could see little advantage in supporting Saudi Arabia and thus declined these requests.[69] In fact, despite oil exploration beginning in earnest in 1932, a commercially viable site was identified only in 1938.[70]

In his assessment of the region, Lacey[71] suggests that the ascendancy of American influence in the Middle East coincided with Britain's shrinking presence, which came about as a result of its financial difficulties in the aftermath of World War II, the policies and priorities of the new Labour government, and the end of British imperialism. Thus, when the British Foreign

[65] http://www.saudiaramco.com/en/home/inaugurations/sa-cityzenship-efforts.html. Acces on 29/09/2017
[66] Young (n 2) 8
[67] Lacey (n 39) 275, 288
[68] Longrigg, Stephen Hemsley. Oil in the Middle East: Its History and Development. Oxford University Press, 1954. 132-133; Philby (n 22) xii
[69] Lacey (n 3) 134-137
[70] Young (n 2) 5
[71] Lacey (n 3) 231-233

Secretary, Ernest Bevin, announced that his government would 'leave behind forever the idea of one country ever dominating another',[72] it left the opportunity for increased US influence, aided by the USA's assumption of greater responsibility for security in the region from 1947.[73]

Despite the growth of Saudi Arabia, Young[74] and Lacey[75] agree that neither the members of the Royal Family nor other influential Saudi individuals were qualified to manage the consequences of the 'oil bonanza'[76] during this period. Therefore, given the rapid evolution of the Kingdom as an international oil exporter, especially with the issue of foreign currency and other fiscal matters involved in global trading, King Abdul Aziz perceived the need to establish a central banking system. This was to become SAMA, which took over responsibility for fiscal functions from the Netherlands Trading Society.[77]

In essence, Young[78] and Lacey[79] support the notion that the seeds of Saudi Arabia's development as a growing economy and increasing financial influence can be traced to the 1930s. This era saw the initial exploitation of its substantial oil reserves, in concert with the development of a national water system and improved agriculture. At this stage, it is important to note that there was an agreement between the Saudi Arabian government and Aramco for a fifty percent profit share.[80] By 1952,[81] as oil revenues increased, numerous public programmes were implemented to establish Saudi Arabia's infrastructure, quickly reaching $212.2 million. This value continued to spiral due to cumulative overspending on major projects, resulting in the nation being unable to balance its budget despite the very significant economic returns on oil.

During the 1950s, the currency of Saudi Arabia still comprised gold and silver riyal coins. The shift from metal coins to paper money was commenced by King Abdul Aziz, who recognised the unsuitability of metal coins within the context of the rapid economic development of the country and its increasing state revenues.[82] Accordingly, Pilgrims'

[72] Young (n 2) 17
[73] In addition to Saudi's oil and financial prospects, Young (n 2) 17 and Lacey (n 3) 261-267 concur that geographical and politically exposed position of the Kingdom within the volatile Middle-East renders its security and foreign policy crucial for international peace, in addition to its own affairs.
[74] Young (n 2) 8-9
[75] Lacey (n 3) 494
[76] Young (n 2) 9
[77] Young (n 11). 540, Young (n 62). 367.
[78] Young (n 2) 6-9
[79] Lacey (n 3) 494-497
[80] Young (n 11). 552-553, Young (n 62). 361-362
[81] Young (n 2) 125
[82] SAMA, 'Pilgrims Receipts' (2017) <http://www.sama.gov.sa/en-US/Currency/Pages/Pilgriams.aspx> accessed 21 January 2017; Young (n 2) 91-92

Receipts were introduced on 25th July 1953,[83] to assist pilgrims who made their annual journey to Mecca and Medina. These receipts would mean that pilgrims would no longer need to carry the heavy weight of the coinage. In fact, the notes were also adopted for exchange by Saudi Arabian citizens and merchants, leading to the widespread use of paper notes rather than metal coins,[84] although the national currency formally changed to banknotes only in 1959.[85]

According to Philby,[86] based on his extensive experience in the Kingdom during the post-second world war period, the royal family ruled Saudi Arabia with its Cabinet. When King Abdul Aziz died in 1953, his son assumed the throne and his blood relatives continued to occupy senior positions, a policy that continues into the twenty-first century.[87]

The Saudi Arabian government requested aid to fund an investigation into how best to improve its currency and fiscal system.[88] This request was granted in 1951-1952, under the American Point IV Program. Soon after, in 1951,[89] Arthur Young arrived at the head of the mission in which he would serve as Economic and Financial Advisor.[90] Given his experience in establishing other international monetary systems, Young was a respected expert recommended by the United States government. His role was to collaborate with King Abdul Aziz and his trusted Foreign Minister, Prince Faisal (later King Faisal, from 1964) and the Finance Minister, Shaykh Abdullah Al-Sulayman.[91] The King and his advisors accepted the findings of the United States mission and the recommendations contained in their report,[92] leading to the creation of the central monetary agency in compliance with Young's suggested by-laws and structure. However, Young notes that King Abdul Aziz objected to the inclusion in the title of the word 'bank', with its connotations related to interest (*riba*), which is anti-Islamic.[93]

[83] 14/11/1372H
[84] Young (n 11). 379-380, Young (n 62). 547 and http://www.sama.gov.sa/en-US/Currency/Pages/HistoricalInfo.aspx
[85] Meyer-Reumann (n 1). 207. And http://www.sama.gov.sa/en-US/Currency/Pages/HistoricalInfo.aspx
[86] Philby (n 22) 293-294
[87] Wilson and Graham (n 59) 46-48
[88] Young (n 11). 361-363, Young (n 62). 539-540
[89] Young (n 2) 29-31; JR Fuchs (1974). Oral History Interview with Arthur N. https://www.trumanlibrary.org/oralhist/young.htm
[90] http://www.sama.gov.sa/en-US/Currency/Pages/HistoricalInfo.aspx. ,JR Fuchs (1974). Oral History Interview with Arthur N. https://www.trumanlibrary.org/oralhist/young.htm. Young (n 2) 29-31.
[91] Young (n 11). 371, Young (n 62). 547, and Young (n 2) 65-72
[92] Establishment of the Saudi Arabian Monetary Agency, February 1952.
[93] Young (n 2) 61

Approximately eighteen months before his death in November 1953,[94] King Abdul Aziz issued two Royal Decrees: No 30/4/1/1046 and No. 30/4/1/1/1047[95] to approve the SAMA Charter.[96] Following these decrees,[97] SAMA commenced its operations on 14 October 1952,[98] with the exchange rate for the gold riyal being fixed to 40 silver riyals. These rates equated to $10.90 US.[99]

4.3.1 History of legal transplants in Saudi Arabia

When King Abdul Aziz succeeded in establishing the Kingdom, there was no legal history to inherit. Accordingly, he decided to adopt the existing legal system from the Ottoman Codes to supplement Sharia rules and develop a legal system for Saudi Arabia. This transplant pattern continued with the adoption of the French-inspired Ottoman Code of Commercial Courts (1850), which resulted in the inception of the Commercial Court Law in 1931. This statute was enacted in the Kingdom of Hejaz, prior to King Abdul Aziz unifying the kingdoms of Najd and Hejaz into the Kingdom of Saudi Arabia.

In fact, most public and private laws were transposed from the Ottoman codes and transplanted into the Saudi Arabian state in accordance with the constitution, the Qur'an, and the Sunnah. There are also numerous examples of Franco-Egyptian laws having been transplanted into Saudi Arabia. These laws have profoundly influenced the governance of company, commercial, maritime, and financial matters, including banking rules. The significance of French law was recognised in the decision in *Saudi Arabia v Arabian American Oil Company*,[100] which is discussed in detail in Section 4.5.3. Research has shown that the Franco-Ottoman legal heritage endured throughout the twentieth and into the twenty-first century.[101] This French influence is also present in the later adoption of Egyptian company law in 1965,[102] as this system can also trace its roots to French jurisprudence.

Following pressure from Islamic scholars, the King's attempt to codify the four Islamic schools failed (for more details on the Islamic schools, see Chapter 3). The purpose for this

[94] King Abdul Aziz died on 9th November 1953.
[95] Dated 20th April 1952 (25.07.1371H)
[96] Young (n 2) 64-66
[97] SAMA, 'Currency' (2017) < http://www.sama.gov.sa/en-US/Currency/Pages/HistoricalInfo.aspx> accessed 21 January 2017
[98] 14/1/1372H
[99] Young (n 2) 128
[100] Aramco Arbitration (Saudi Arabia v Arabian American Oil Company) (1963) 27 LLR 117.
[101] Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 272,288; Baamir (n 16) 112-118; Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2(3) Arab Law Quarterly 272 110-113
[102] Royal Decree M/6 22/03/1385H; 22/03/1965

kind of internal Islamic transplant was to avoid the courts being bound by the strict code of the Hanbali School that had been adopted in Saudi Arabia. Following the reasoning of academics like Baamir,[103] this disagreement was predicated on the concern among scholars that changes to civil procedure might jeopardise the Sharia foundations of the country, which contrasted with the royal position that Saudi Arabia needed to take whatever actions were necessary to ensure success as an international oil supplier.

4.3.2 The Arabian American Oil Company

Aramco has played a pivotal role in the evolution of Saudi Arabia and in the establishment of SAMA. Experts on foreign investment, such as Young, felt that Saudi Arabia would not require a central banking facility of the scope and nature of SAMA without the role played by Aramco in facilitating the drilling and international exporting of oil.

The origins of Aramco can be traced to the oil shortages of World War I and the exclusion of American companies from Mesopotamia by Britain and France, which occurred under the San Remo Petroleum Agreement of 1920. This resulted in the US Republican administration gaining popular support for an 'open door policy'[104] in 1921, initiated by Herbert Hoover,[105] then Secretary of Commerce. SOCAL was among those American companies seeking new sources of oil from abroad, which resulted in the creation of CASOC and thus of Aramco.

Originally, speculative explorations revealed potentially enormous quantities of oil in Saudi Arabia between in 1906 and 1923.[106] As a consequence of these discoveries, Saudi Arabia granted a concession for prospecting in its eastern region to the British Eastern and General Syndicate in 1923. However, the search was abandoned in 1927, as the British company reported no positive findings. Two years later, in 1933, with the discovery of oil deposits in Bahrain, the government of Saudi Arabia awarded its second concession, to SOCAL,[107] by Royal Decree no 1135.[108] The concession gave permission for SOCAL to explore a different and larger area, which yielded positive results after some three months,[109] with the first discovery being made at Well No.7 in Dammam. Within a year, oil was being exported.

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[103] Baamir (n 16). 118-119
[104] Young (n 2) 16-17 and 21-23; Peter Enav, The Saudi Oil Dilemma (Financial Times 2000); Helen Lackner, A House Built on Sand: A Political Economy of Saudi Arabia (Ithaca Press 1978). 91-102
[105] Later to become President of the US from 1929 to 1933.
[106] Young (n 2) 1-9
[107] SOCAL merged with Texas Company to form Californian Arabian Oil Company; SOCAL is now Chevron Oil.
[108] See Umm al-Qura, (official gazette in Saudi), 14 and 21 July 1933.
[109] The Aramco Handbook, Oil and the Middle East (Arabian American Oil Company 1968). 113-117

Anderson analyses the route whereby SOCAL's sole concession was transferred to Aramco.[110] He suggests that this can be explained by the requirement of the government for the concession to be shared with other companies. Stevens supports this assertion,[111] agreeing that the impetus for establishing Aramco was to merge all later concessionaires with SOCAL, thereby consolidating and exploiting exclusive access under the Aramco umbrella. A Royal Decree in 1948[112] granted exclusive rights from the 1933 concession to Aramco and extended them to encompass the entire offshore area of Saudi Arabia.

The oil concession agreements between Saudi Arabia and organisations in Britain and America were based on the original contract between D'Arcy of Britain and Persia.[113] The balance of this original agreement favoured the oil company, by devolving the powers of the State to the company, giving it the legal freedom to manage those territories covered by the concession.[114] These agreements included the obligations of the company to the government concerning the area of exploration, the duration of the agreement, and the payments that the company was obliged to make.[115]

Despite its growing wealth, Saudi Arabia was in its formative era. Given the extensive poverty of its population, a body of research[116] suggests that the socio-economic demands on the government required extensive investment of oil funds into infrastructure and education. According to Al-Samaan,[117] the oil companies exploited the vulnerability of Saudi Arabia, recognising that its bargaining powers were weak, enabling them to ensure the absence of significant terms and conditions in the concession agreements. Stevens[118] has suggested that the Saudi Arabian government recognised that the power of Aramco was tantamount to sovereignty, which created disquiet among the ruling class. The concession allowed Aramco total discretion over the exploitation, exploration and marketing of petroleum resources for 60 years, in addition to giving the company tax exemption. This

[110] Eckes Jr, Alfred E. 'Aramco, the United States, and Saudi Arabia: A Study of the Dynamics of Foreign Oil Policy, 1933–1950. By Irvine H. Anderson.(Princeton: Princeton University Press, 1981. xv+ 259 pp. Tables, appendixes, notes, essay on sources, selected bibliography, and index. $18.50.).' (1982): 988-989.
[111] Paul Stevens, Joint Ventures in Middle East Oil: 1957-1975 (Middle East Economic 1976). 17
[112] Royal Decree No. 6/5/4/3711 promulgated on the 1st day of Sha'aban, 1368, corresponding to the 28th of May, 1948. Yahya Al-Samaan, The Legal Protection of Foreign Investment in the Kingdom of Saudi Arabia (Dar Al Andalus 2000) 28 28
[113] Stevens (n 111) 1
[114] ibid
[115] Alkahtani (n 10) 167-168; Al-Samaan (n 112). 28
[116] These problems are still an issue in modem Saudi Arabia. C McNulty, 'An Evaluation of Saudi Arabia's Policies for Economic Diversification' (Unpublished Master's Thesis, University of Durham 1984); SAGIA, The Legal Background to Foreign Investment in Saudi Arabia (Saudi Arabia General Investment Authority 2003)
[117] Al-Samaan (n 112). 133
[118] Stevens (n 111). 17; Young (n 2) 11-17

gave the company unprecedented power in the fledgling kingdom, although Aramco was also instrumental in the transformation of Saudi Arabia into 'an international giant'.[119] Aramco established and operated 88 oil wells,[120] leading to a steady increase in exports. According to the World Bank[121] and OPEC,[122] this oil now represents two thirds of Saudi's national revenues. Despite its growth in global strategic importance,[123] Saudi Arabia was nevertheless subservient to the authority of Aramco in the 1940s.[124] However, this position shifted due to the geographical significance of Saudi Arabia during the Second World War and the supremacy of Aramco being challenged by US oil companies as new entrants into the sector. Furthermore, as an agreement with the Getty Oil Company delivered increased profits,[125] it has been suggested that Saudi Arabia proposed that Aramco would increase its contribution to the government, thereby enabling it to conduct the required economic and industrial development.[126] This attempt to redress the perceived imbalance[127] in the 1933 Concession and the obdurate stance of Aramco culminated in arbitration in *Saudi Arabia v Arabian American Oil Company*.[128] The effects of the decision, being of considerable significance, are discussed in detail in Section 4.5.3, summarised in the conclusion to the present chapter (Section 4.8), and reviewed in Chapter 5, Section 5.1.6.3.

At this stage, it is important to note that Saudi Arabia made its first move towards exerting its sovereignty over its natural oil resources in 1950, with amendments being made to the 1933 Concession terms by means of a profit-sharing agreement between the Saudi government and Aramco. Having repealed the original tax exemption clause, this agreement increased the profit sharing formula in favour of Saudi Arabia, in the form of a fifty percent tax.[129] By 1952,[130] as oil revenues increased, numerous public programmes were

[119] Young (2)
[120] The extent of this trajectory is illustrated with Saudi having 90 oilfields by 1999. For a detailed overview of the historical background of the oil discoveries in Saudi Arabia, see Ministry of Petroleum and Mineral Resources (2017) <http://www.mopm.gov.sa> accessed 30 April 2017
[121] The World Bank, 'Saudi Arabia Economics' (2017) <http://www.worldbank.org/en/search?q=saudi+arabia+economicandcurrentTab=1> accessed 23 February 2017
[122] OPEC (2017) <http://www.opec.org/opec_web/en/index.htm > accessed 13 February 2017
[123] R Mikesell, Petroleum Company Operations and Agreements in the Developing Countries (John Hopkins University Press 1984) 23
[124] Geographical position and oil.
[125] In the Neutral Zone, shared between Saudi, Kuwait and Iraq.
[126] M Bunter, An Introduction to Islamic (Sharia) law and to its effect on the upstream petroleum sector (CEPMLP(2003) 23; Al-Samaan, Y., Evolution of the Contractual Relationship Between Saudi Arabia and Aramco, JENRL, Vol. 12, No.2, (1994), p. 257
[127] Other significant absences included: Aramco regulating exploration and development; obligations to submit geological data, minimum expenditure, reinvesting percentage returns in Saudi; crude oil production; price; conservation of resources; also lack of government participation in decision making.
[128] Saudi Arabia v Arabian American Oil Company (n 108)
[129] Young (n 11). 550-553; Alkahtani (n 21).165
[130] Young (n 2) appendixes 1, table 1. 125

implemented to establish Saudi Arabia's infrastructure. Their value quickly reached $354 million and continued to rise, because of problems with overspending. Nevertheless, the rapid economic development of Saudi Arabia, which began with commercial oil production in 1938, continued to escalate during the 1960s and 1970s.[131] During this period and extending to the time of writing,[132] Aramco has maintained its primacy as the pre-eminent oil producer in Saudi Arabia.[133]

Despite the foregoing evidence that Aramco was given significant powers by the terms of the 1933 concessions, Young fails to emphasise the extent of the influence that Aramco wielded over the Saudi government.[134] From the 1960s, in common with other oil producing nations of OPEC, Saudi Arabia reacted to the imbalances in concession agreements by nationalising its oil industry.[135] This decision was based upon the consensus among the GCC countries that they had overpaid the American oil companies for their oil in exchange for the United States' experience in exploitation. The United Nations (UN) recognised this perception of inequity, which penalised Saudi Arabia and the other GCC states, in its Resolution of 1952.[136] This provided that oil companies should recover the cost ('cost oil') of extracting and other related activities, but that these values should be limited to negotiated annual maxima.[137] The UN reiterated its support for the oil nations in later resolutions between the early 1960s and mid-1970s,[138] which culminated in states with oil reserves being accorded the right to exercise permanent sovereign rights for the benefit of their national development. Therefore, in 1968,[139] the Saudi Oil Minister, Sheikh Ahmed Zaki Yamani, insisted that the oil producing companies must review their concession arrangements to enter business partnerships with the State.

The General Agreement on Participation (1972) General Agrement on Participation (GAP) between Saudi Arabia and foreign investors, including Aramco, reflected the practice throughout the GCC.[140] In other words, the GAP reflected the prevailing GCC practice that

[131] Alkahtani (n 21). 1 Yergin (n 33). 283-292
[132] Alkahtani (n 21) 1-2
[133] Since its nationalisation, Aramco has operated on behalf of the government.
[134] Young (n 2) 6-8
[135] Alkahtani (n 21) 170- 171
[136] Resolution No 626 of 21 December 1952. Keith Blinn, International Petroleum Exploration & Exploitation Agreements: Legal, Economic and Policy Aspects (Barrows 1986). 242.
[137] ibid
[138] Resolution No 1803, 14 December 1962, 'Permanent Sovereignty Over Natural Resources'; strengthened by Resolution 2158 (1962) and Resolution No 3281, 12 December 1974 'Charter of Economic Rights and Duties of States'
[139] Daniel Johnston, International Petroleum Fiscal Systems and Production Sharing (Penn Well 1994); 296; Alkahtani (n 21). 145-155 ; Blinn (n 136) 242.
[140] Charles Hamilton, Americans and Oil in the Middle East (Gulf Publishing 1962); Al-Samaan (n 126) 55-60; Alkahtani (n 21). 148-149

all forms of joint participation between a company and a state in the petroleum sector necessarily involved the representation of nations within the venture, even when they were not necessarily active participants.[141]

However, Saudi Arabia elected to remain a participant in its oil industry, rather than taking the role of proprietor. Bunter suggests that this decision was based on its lack of technological capabilities and a general unwillingness to compete with its state-owned competitors; given the experiences of other OPEC members following their oil nationalisation programmes, it has been proposed that the Saudi Arabian government feared that its direct involvement might threaten its relationship with the United States and other investors.[142] Therefore, Saudi Arabia only began its move to nationalise Aramco a decade later, from 1974.[143] This process was completed in 1980, with Aramco becoming Saudi-Aramco.[144] Nevertheless, Aramco concluded a service contract with Saudi-Aramco, which formed the basis of the relationship between the parties until 1989.

During the 1960s and 1970s, OPEC members became concerned about the fall in oil prices, which coincided with wider developments in the Middle East.[145] The culmination of these events was the Caracas conference between oil producing nations in 1970.[146] The Tehran Agreement[147] resulted in a 55% increase being levied on the sales tax of oil, as well as raising posted oil prices and limiting supply, which culminated in the practice of oil producing nations fixing posted prices to date.

In conclusion, it should be noted that Saudi-Aramco is a legal corporation that is wholly owned by the Government,[148] with the supreme decision-making being the remit of the President of the Council of Ministers, the King of Saudi Arabia.[149]

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[141] Hasan Zakariyah, 'New Directions in the Search for and Development of Petroleum Resources in Developing Countries' (1976) 9 Vanderbilt Journal of Transnational Law 545. 556; Bernard Taverne, Co-operative Agreements in the Extractive Petroleum Industry (Kluwer 1996). 79-100.
[142] Anthony Cordesman, Economics, Energy and the Future Stability of Saudi Arabia, Strategic Energy Initiative (Centre for Strategic and International Studies 1999) 30-44; Bunter n 126
[143] Ahmed Zaki Yamani, 'The Oil Industry in Transition' (1975) 8 Natural Resources Lawyer 391. Zakariyah (n 141). 545
[144] Aramco (2017) <www.saudiaramco.com> accessed 13 February 2017; Ministry of Petroleum and Mineral Resources. http://www.meim.gov.sa/arabic/Pages/default.aspx.
[145] AI-Samaan, (126) 137, http://www.opec.org/opec_web/en/about_us/24.htm. Alkahtani (n 10). 160. Adelman M., Is the Oil Shortage Real? Oil Companies As OPEC Tax-Collectors, Foreign Policy. No. 9.
[146] Morris Adelman, 'Is the Oil Shortage Real? Oil Companies as OPEC Tax-Collectors' (1972) 9 Foreign Policy 69;. 67-107; OPEC http://www.opec.org/opec_web/en/about_us/24.htm.
[147] Alkahtani (n 10), 160-161
[148] Aramco (2017) <www.saudiaramco.com> accessed 13 February 2017; Ministry of Petroleum and Mineral Resources.
[149] Aramco, 'Board endorses company's path' (2017) http://www.saudiaramco.com/en/home/about/who-we-are.html . accessed 13 February 2017

4.3.3 The Saudi Arabian Monetary Agency

The Saudi Arabian Monetary Agency was established in 1953 by Royal Charter,[150] following the advice of Arthur Young.[151] As a public service body, the Agency was not established to return profits.[152] A degree of concurrence exists between the experience of Young[153] on the subject of SAMA and the research conducted by Meyer-Reumann, which found that the principal functions of SAMA were to perform the following roles:

- **Custodian of the currency of Saudi Arabia**: SAMA should maintain the external and internal values of the Saudi Arabian currency, advise the Government, and ensure the issuance of currency. In this final role, SAMA was capable of stabilising dramatic fluctuations in currency using the proceeds from the Stabilisation Agreement with the United States that was made during World War II.[154] These currency exchange responsibilities also entailed the regulation of commercial banks and dealers.[155] In this context, SAMA was to encourage commercial banks to facilitate transfers by means of the adoption of checking accounts.
- **Government banker and fiscal agency:** SAMA should organise public finances, control the national budget by holding all governmental operating funds, including its fiscal and monetary reserves, effect the central management of foreign exchange, and build national reserves as a hedge against falling oil prices. Public finances were controlled within a budget, with a third provided for development and construction.[156] In this capacity, Meyer-Neumann[157] observes that SAMA received revenues and determined their allocation.[158]
- **Supervisory authority over private banks:** At its inception, Young[159] and Meyer-Reumann[160] agree that the mandate of SAMA included provision for overall control of commercial banks and money exchange organisations.[161]

[150] Young (n 2) 64; SAMA. http://www.sama.gov.sa/en-US/About/Pages/SAMAHistory.aspx..
[151] ibid
[152] Young (n 2) 55, Young (n 62). 373
[153] Ibib ; Meyer-Reumann (n 1) 207-208
[154] Meyer-Reumann (n 1). 207, Young (n 11). 547, Young (n 62).378
[155] Young (n 11). 547
[156] Young (n 11) 550, Young (n 62) 371); see Al-Madinah al-Munawwarah, 28 August, 1952: includes defence, airports, road, rail, ports, utilities, government buildings, hospitals, mosques
[157] Meyer-Reumann (n 1). 208
[158] Art. 3d SAMA Charter
[159] Young (n 2); 66-68
[160] Meyer-Reumann (n 1) 210-211
[161] Art. 1b,4 SAMA Charter

Despite their broad agreement on the three areas outlined above, Young[162] emphasises a function that contrasts with Meyer-Reumann's assessment of SAMA's fundamental tasks. This divergence of priorities likely arises due to Young's focus on SAMA undertaking financial and economic research, with the objective of establishing permanent systems to gather and analyse data to support national policy.

In essence, the payment of subsidies from public finds for national projects involves political as well as economic considerations.[163] This means that the distribution of these funds requires the direct involvement of those agencies that operate within the Ministry of Finance. In this context, it can therefore be suggested that SAMA does not have complete independence. A further diminution in the independence of SAMA is assessed in Section 4.5.6, which reviews the developments that occurred with the creation of the BCL 1966.[164]

Young[165] supported the position of the Saudi Arabian government that it was vital to maintain a steady value for the national currency. In order to ensure this objective, SAMA was given the discretion to convert the riyal into other currencies that could be deposited in US banks in the name of the Agency. Consequently, all coins were issued through SAMA, with the total monetary value being available in US dollars. Later, in October 1952, Young led another currency stabilisation initiative to implement a bold system of currency reform. The proposed approach essentially provided for SAMA to maintain the value of Saudi Arabian gold and silver coins against fluctuations in the global metal markets.[166] On 22 October, approximately two weeks after SAMA's establishment, Young's contribution to currency stabilisation was embodied in Decree No. 30/4/1/225.[167] At the same time, the United States Settlement Fund held $5,000,000 to support the riyal. The Finance Minister then issued Communiqué No. 1 on behalf of the Saudi Arabian Government to embody these currency arrangements in an official structure. The machinery for its operation was contained in Communiqué No 2. In order to enable SAMA to fulfil its task of maintaining the exchange rate and prevent fluctuations, the Ministry of Finance adopted Young's proposal to control the riyal against the world silver value.[168] This stabilisation was based on the value of one

[162] Young (n 2) 57; Young (n 62). 373
[163] Meyer-Reumann (n 1). 212
[164] Although the BCL has been expanded since its inception (Banking Control Law Issued by Royal Decree No. M/5 Dated 22.2.1386)
[165] Young (n 2) 74. Young (n 11). 547
[166] ibid
[167] Young (n 11). 547
[168] ibid

gold riyal being fixed to 40 silver riyals, at an equivalent of US$10.90.[169] Young[170] suggests that this currency policy was successful on the basis that the value of the riyal remained steady one year later, even under the pressure of the annual pilgrimage. This suggests that SAMA's prudent currency management was in harmony with its duty to act for the public benefit,[171] as well as in compliance with the tenets of Islam.

However, Young[172] remained concerned about the increased tendency of the public to amass gold and silver coins, which he attributed to the absence of a developed system of credit and investment in the Kingdom. This incentive to hoard was reduced from 23 July 1953, with the move towards monetary notes. These reduced the need to handle coins, as first occurred when SAMA initially issued paper money in the form of the aforementioned Pilgrim Receipts.[173] The initial move from metal coins was recorded in the journal of the IMF,[174] which noted that the system of receipts fulfilled the same role as travellers' cheques, except that the receipts required endorsement.

The primacy of the principles of Islam, given that the Qur'an serves as the Saudi Constitution, was clearly understood by Young,[175] who undertook the necessary steps to ensure that these constraints on SAMA's remit were contained in its Charter.[176] In essence, the prohibitions on SAMA's operations refer to those actions that contravene the teachings of Islam, namely:[177]

- Paying or receiving interest
- Receiving private deposits (being the remit of private, commercial banks with which SAMA cooperates, not competes)
- Making loans or other advances to government or private parties
- Engaging in any trade or business
- Refraining from the acquisition of real property unless for SAMA's use
- Ensuring that credit is not created by issuing currency notes for private parties: The only funds it deals with as loans are proceeds from public revenues for the

[169] Young (n 11). 548
[170] ibid
[171] Young (n 62).373, 380
[172] Young (n 11). 524 ;Young (n 62). 370
[173] Young (n 11). 550 Meyer-Reumann (n 1) 207 ; SAMA. http://www.sama.gov.sa/en-US/Currency/Pages/Pilgriams.aspx
[174] IMF, The International Finance News Survey (7 August, 1953)
[175] Young (n 2) 64-66 . 524 and Young (n 62). 380
[176] Royal Decree M/23 15 December 1957 (23.051377)
[177] ibid

government's use, e.g. developing water supplies and other infrastructure or public services.

One example of the Saudi Arabian commitment to Islam affecting the founding and operating of SAMA occurred prior to its launch.[178] During this period, extensive debate arose within the government concerning whether SAMA could charge for changing currency and if so, how this could be achieved within the confines of Islam. The outcome of this debate was that the prohibition against charging interest in Islam required there to be a fixed charge per coin, with the exchange itself being at par.[179] The fee reflected the time spent counting heavy coins rather than paper money.

As Aramco remains fundamental to Saudi Arabia's national revenue, the importance of its support for SAMA cannot be understated.[180] The reason for this nexus is that the performance of the Saudi Arabian currency is largely predicated on the primacy of its national oil revenues. This rapid growth in oil revenues is illustrated in Table 4.1.[181]

Table 4.1: Growth in oil revenue (millions of US dollars)

Year	Amount	Year	Amount	Year	Amount	Year	Amount
1938	0.1	1948	52.5	1958	297.6	1968	926.8
1939	3.2	1949	39.1	1959	313.1	1969	949.0
1940	1.2	1950	56.7	1960	333.7	1970	1214.0
1941	1.0	1951	110.0	1961	377.6	1971	1884.9
1942	1.1	1952	212.2	1962	409.7	1972	2744.6
1943	1.1	1953	169.8	1963	607.7	1973	4340.0
1944	1.7	1954	236.3	1964	523.2	1974	22,573.5
1945	4.3	1955	340.8	1965	662.6		
1946	10.4	1956	290.2	1966	789.7		
1947	18.0	1957	296.3	1967	909.1		

(Source: A Young, 'Saudi Arabian Currency and Finance' (1953) 7(4) Middle East Journal 539)

The table illustrates the extremely strong growth in Saudi oil revenues from 1938 to 1974.[182] The reason for the selection of this particular span of years is that it covers the reigns of the kings studied in this research, namely Abdul Aziz, Saud and Faisal, who oversaw the legal transplants that influenced the establishment of SAMA.

[178] Young (n 62). 373, 380
[179] Change of 2 quirsh per 1 x English sovereign being exchanged for riyals (Young 2, 548) Passim during the 1950s the exchange rate was 25 quirsh per 1 riyal
[180] Young (n 2) 125. Young (n 11). 547 and Young (n 62). 370
[181] ibid
[182] ibid

In summary, there is broad agreement that the stability of the Saudi currency would have been impossible in the absence of SAMA.[183]

4.3.3.1 Organisational structure of SAMA

At its inception, SAMA was controlled by a Board of Directors,[184] presided over by the Minister of Finance. According to Article 33 of the SAMA Charter, every director must act in the national interest. The directors are not Islamic scholars, instead being selected for their experience in central banking, finance, economics, and related disciplines. The Governor is an ex-officio member of the Board and the first was an experienced American central banker, George Blowers.[185] Young was a popular candidate, but made it clear to both the Saudi and US governments that his remit had been to establish the central banking and monetary system, but never to be its Governor.[186] Therefore, Young[187] and Meyer-Reumann[188] recommended to both governments that Blowers would be the most suitable choice for the first Governor of SAMA, whose hierarchy is illustrated in Diagram 4.1.

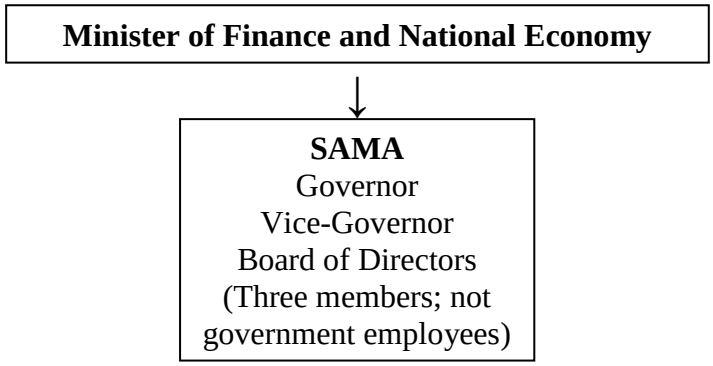

Diagram 4.1: Hierarchical authority of SAMA

The diagram shows that despite the purported independence of SAMA and its having been explicitly constituted to operate according to the principles of Islam, as an organ of the Saudi state, it is inferior in the hierarchy to the Ministry of Finance and National Economy.[189]

[183] Young (n 2) 98-100; SAMA annual report, 1977. i-ix.
[184] Commenced its duties on 04/10/1953 (14/1/1372); passim directors are subject to rules of conduct and retirement under BCL 1966.
[185] Royal Decree No 30/4/1/1743 date 30/4/1/1744 date 05/08/1952 (14/11/1371) provided for appointment of George A Blowers as first Governor of SAMA (who was formerly with the IMF and Governor of State Bank of Ethiopia).
[186] Young (n 2)57-58
[187] ibid
[188] Meyer-Reumann (n 1)
[189] Young (n 2) 63

The prudence of ensuring that Saudi Arabia was not solely reliant on the benefits of its oil resources resulted in the advice from SAMA to develop a 'well-adjusted customs tariff'[190] on imports. This would enable the establishment of its infrastructure, or provide revenue upon which Saudi Arabian citizens could depend for their welfare. In fulfilling this aim, the government requested that Young's mission should include experts in customs and tariffs,[191] then later an accountant.[192] The outcome was a national fiscal framework, with the introduction of income tax in 1950,[193] for both individuals and of profit derived from capital investments.[194] A tax was also levied on all profits from oil-producing companies and the Saudi Arabian Mining Syndicate.[195] These new systems enabled Saudi Arabia to benefit from tax and similar revenues from the operations of other corporations in the Kingdom, in addition to the continued returns from its oil revenues. It should be noted that in conjunction with increasing trade and the national revenue, the importance of Islamic foundations meant that the government was firmly committed to the idea that the tariff 'should be made less burdensome', that it should 'contribute to the general welfare', and that it 'should contribute to lower costs of living for the people as a whole'.[196]

The framework, roles and remit of SAMA were essentially the outcome of concurrence between King Abdul Aziz and the following monarchs, King Saud and King Faisal. No Islamic scholars or others in prominent positions within Sharia were directly involved in the establishment of the Agency, despite the Royal Family insisting on compliance with Islamic principles. Throughout the early 1950s, Young's team, SAMA and the Saudi government agreed that the Agency needed time to develop its own conventions and nationals as employees, despite heavy reliance on transplanting United States experience, systems and staff at its inception.

4.3.3.2 Commercial banks

Prior to the establishment of SAMA and the effect that this had upon the monetary stability of Saudi Arabia,[197] financial transactions involving pilgrims or traders were typically handled by traditional Saudi Arabian money changers or by a limited number of foreign

[190] Young (n 11) 553-554
[191] Ibid , Robert B Kennedy (later Attorney General to President John F Kennedy, his brother) and John A Dunaway.
[192] John Bode; after Young's departure.
[193] Young (n 18)
[194] With certain exemptions eg religious tithe (zakat), and application of specific formulas.
[195] Young (n 11) 553, Mined gold and silver.
[196] ibid
[197] SAMA, A Case Study on Globalization and the Role of Institution Building in the Financial Sector in Saudi Arabia (SAMA, 2003). 3

banks. However, once SAMA had been established in 1952, both foreign and domestic commercial banks were licensed to meet the demand for financial services created by the increase in oil revenues. During this era, the main foreign banks were the Banque Caire, Banque Liban, Banque Outremer, and First National Bank of New York. These were sufficient to create initial links with global financial markets to begin the development of Saudi Arabia into 'a financial giant'.[198] Of the domestic banks given licenses by SAMA, the NCB began operations in 1953, followed by the Riyad Bank in 1957 and the ill-fated Al-Watany Bank in 1958.[199]

In essence, Young[200] suggests that the involvement of the United States in establishing SAMA enabled the Kingdom to make substantial reductions to the national debt that had threatened it during the 1940s and early 1950s. During this era, the reduction of debt represented a significant proportion of the KSA's annual income. Nevertheless, the Kingdom enjoyed a sustained period of growth that lasted until the 1970s.[201]

In summary, SAMA is strongly rooted in Islamic law, in the forms of the Qur'an and Sunnah, later supplemented by transplants of Ottoman and Egyptian codes, both of which have their origins in Romano-French legal roots. Upon the recommendation of Young, these European sources were propagated with United States banking rules, with American law itself being the result of transplants from the French Constitution and the English Common Law.[202]

4.4 The era of King Saud (1953-1964)

The coronation of King Saud in 1953 saw a continuation of the overspending that had characterised the reign of his predecessor. Despite oil revenues exceeding pre-World War II levels by more than twenty times, the level of spending on public projects, together with the lavish lifestyle of the Royal Family, led to Saudi Arabia discounting future oil receipts in an attempt to redress its poor credit position. Young notes that in common with earlier European monarchs, the Saudi royal family took the traditional absolutist perspective of treating national revenues as its private purse. However, it should be noted that deviations from this

[198] Young (n 2) 115-122
[199] See section 4.5.1.1 regarding the insolvency of the Il-Watany Bank
[200] Young (n 11) 556
[201] ibid
[202] HF Stone, 'The Common Law in the United States' (1936) 50(1) HLR 4; R Pound, 'Influence of French Law in America' (1908) 3 Ill. LR 354

historical practice had already begun after the Second World War, with public budgets being published from 1952 under the influence of a US expert[203] from Young's mission.[204]

King Saud continued to support his father's commitment to the US central banking system, with the appointment of George Blowers as the first governor of SAMA from 1952-1954,[205] on the advice of Arthur Young, by Royal Decree.[206] King Saud also passed a Decree[207] that sought to reinforce the relationship between Saudi and US systems during the tenure of Blowers, as well as during that of the next governor, George Standish.

4.4.1 Second SAMA Charter (1957)

While continuing the objectives of SAMA that had been established in 1953,[208] a second SAMA Charter was passed by Royal Decree in 1957.[209] The new iteration of the Charter effectively broadened the remit of SAMA to include provisions for the protection of consumers during commercial banking transactions.[210] In essence, this Charter mandated SAMA to require commercial banks to produce monthly reports in a specified format, in addition to requiring that these institutions deposit stated minimum funds with SAMA. However, only the Ministry of Finance was authorised to either state or adjust these deposits.[211]

In addition to its advice to SAMA, as an agency for monetary and fiscal control,[212] Saudi Arabian relations with the United States were strengthened by the advice given by the US on defence, health, and education. The USA played an active role in facilitating the integration of Saudi Bedouin tribes to benefit from the nation's burgeoning prosperity. Saudi-US relations strengthened further in 1960, when the riyal was pegged to the US dollar.[213] However, during the 1960s, economic turbulence within the internal and external

[203] John A Stacey
[204] Young (n 1) 51; Young (n 8);page refs SAMA, 'Historical Preview' (2017) <http://www.sama.gov.sa/en-US/About/Pages/SAMAHistory.aspx> accessed 25 January 2017
[205] Young (n 2) 95-96; Meyer-Reumann (n 1) 209 . ; http://www.sama.gov.sa/en-us/about/pages/samahistory.aspx
[206] 30/4/1/1743 and 30/4/1/1744 (04/10/1952) 14/1/1372H
[207] Charter of the Saudi Arabian Monetary Agency, Royal Decree No 23 25/5/1377H: 15/12/1957
[208] Royal Decree dated (20/04/1952). Meyer-Reumann (n 1) 209; USA International Business Publications Saudi Arabia Central Bank & Financial Policy Handbook World Business, Investment and Government Library. Int'l Business, 2005. 145
[209] Royal Decree No 23 23/5/1377H; 15/12/1957
[210] Charter of the Saudi Arabian Monetary Agency – Article (3d), issued by Royal Decree No. 23. Dated 23/05/1377H (15/12/1957G)
[211] Royal Decree No.23 Dated 23-5-1377 (15/05/1957)
[212] Young (n 11). 555
[213] Al-Hamidy, Abdulrahman, and Ahmed Banafe. 'Foreign exchange intervention in Saudi Arabia.' (2013). 3

environments led to insolvencies in the banking sector and a corresponding decline in the independence of SAMA.[214] King Saud's reign was also the focus of increasing concerns regarding corruption in the national economy, with this unease being mirrored by the concerns of the Royal Family regarding the King's profligacy. Eventually, the arbitration of Muslim scholars and pressure from senior royalty resulted in the abdication of King Saud on 28 March 1964.

On the transfer of power, generations of scholars (e.g. Lacey,[215] Quandt,[216] and Kechichian[217]) agree that the power struggle between King Saud and Prince Faisal continued until 1962. Lacey omits to say that Prince Faisal formed a cabinet in the absence of the King, while he was abroad receiving medical treatment. Nevertheless, there is broad consensus[218] that King Saud's support for SAMA represented a significant step in the resolution of Saudi Arabia's financial difficulties.

4.5 The era of King Faisal (1964-1975)

King Faisal promised widespread legal reform, such as the drafting of a basic law, the abolition of slavery, and the establishment of a judicial council. His reign also saw the introduction of changes to the banking environment, including the requirement for banking claims to be under the jurisdiction of the commercial courts, rather than Sharia courts, and the enacting of the BCL in 1966. The BCL not only heralded a reduction in SAMA's independence; it also strengthened the regulatory regime for commercial banks.

The importance of these steps can be seen in relation to the unprecedented growth in the Saudi Arabian economy, which accelerated during the early-to-mid 1970s with OPECs decision to increase the price of oil on the world market, a decision that served to stimulate the economy of Saudi Arabia further.

[214] Alshammari (n 14) 65. Oxford Business Group, The Report: Saudi Arabia 2013 (Oxford Business Group 2013) 53
[215] Lacey (n 3). 325-327
[216] William Quandt, Saudi Arabia in the 1980s: Foreign Policy, Security and Oil (The Brookings Institution 1981). 76-78
[217] Joseph Kechichian, Succession in Saudi Arabia (Springer 2001). 45-50
[218] Young (n 2) 91

4.5.1 Saudi Arabian economy

During the reign of King Faisal, there was a growing surplus in the national budget.[219] Saudi Arabia saw a 490% increase in oil revenues between 1964 and 1975.[220] In 1973, as a member state, Saudi benefited from OPEC's decision to reduce the oil production of its members, whilst simultaneously increasing the price fourfold. This policy resulted in the oil revenue of the Kingdom increasing by an annual rate of 512% in 1974.[221]

4.5.2 The Saudi legal environment

The introduction to this chapter demonstrates that the constitution of Saudi Arabia is founded upon the primary sources of Islamic (Sharia) law, as detailed in Section 3.1.1. This means that the writings of the Qur'an and the Sunnah have precedence over any and all subsequent decisions made by Islamic scholars on secondary sources or regarding changes in society. Furthermore, no legal transplant must conflict with the primary sources of Islam. Therefore, the legal transplants of the regulatory forms of US banking law and the corresponding formation of SAMA were conditional on their being in harmony with Sharia. All subsequent transplants of laws with a Western origin have also been conditional upon their modification to fulfil the requirements stipulated by Islam.

The legal environment of Saudi Arabia builds upon the primary sources outlined above to recognise international law, through the treaties that the Kingdom has signed and the judicial decisions of the Permanent Court of International Justice.[222] The legal reforms undertaken in the Kingdom are enacted by Royal decrees from the King to address any perceived gaps in Sharia law, such as the oil concessions granted to Aramco in 1933.

Despite the similarity of the SAMA framework to those of other international central banks, albeit having been adjusted to remove and preclude any anti-Islamic factors such as riba, many international investors harbour concerns about the legal uncertainty of the laws and dispute resolution systems in Saudi Arabia. For example, in practice, contracts that have different considerations and subject matters are permitted in Sharia.[223] Such agreements

[219] JO Ronall, 'Economic Review: Banking Regulations in Saudi Arabia' (1967) 21(3) Middle East Journal 399-402; Young (n 2)
[220] SAMA Annual Reports: 1964 - US$ 523.2M to 1975 US$25,676.52M
[221] SAMA (n 230): 1973 – US$ 4,340.0 to 1974 US$ 22, 573.5: the increase rose again by 8.7 % in 1975 (US$ 25,676.2)
[222] T Al-Shubaiki, The Saudi Arabian arbitration law in the international business community: A Saudi perspective (Doctoral dissertation, London School of Economics and Political Science 2003); S Al-Ammari, AT Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) Arbitr Int 387; Aramco Arbitration (Saudi Arabia v Arabian American Oil Company) (1963) 27 LLR 117; Baamir (n 23). 124-127
[223] H Ramadan, Understanding Islamic Law from Classical to Contemporary (1st edn., Alta Mira 2006) 117

include foreign exchange transactions that involve the simultaneous exchange of currency, such as x riyals for y US$. This enables Islamic banks to avoid the forbidden riba as interest (*riba alnasi'ah*) and instead enables them to deal on the allowed basis of *riba alfadl.*[224]

It is important to reiterate that Saudi Arabia subscribes to the Hanbali School of Islam[225]. Under this paradigm, the State automatically owns the natural resources of the land, effectively serving as the guardian of the entire community. This concept is not dissimilar to the operation of petroleum rights in Western legal systems, such as the Petroleum Act (1968) within the Common Law legal system of England and Wales.[226] Furthermore, this perception of sovereign rights is an embedded principle of international law, which is provided under the General Assembly Resolutions of the UN.[227] The World Bank and a recognised body of academic thought have expanded on the UN's recognition of sovereign rights[228] to suggest that the Islamic concept is in concordance with the acceptance by international law of the right of a state to exercise its sovereignty over the mineral wealth within its borders.

On the topic of dispute resolution, commercial arbitration was established in the Code of Commercial Courts in 1931, during the early years of the formation of Saudi Arabia.[229] The Code recognised arbitration only for international disputes, however.[230] This reluctance to facilitate arbitration may have stemmed from the attempts of Islamic scholars to protect Sharia law from foreign influences,[231] which is supported by the perspectives noted in the previous chapter. Nevertheless, this limited application is still highly relevant in the current

[224] See Hadeeth 'the selling of gold for gold is riba (usury) except if the exchange is from hand to hand and equal in amount and similarly, the selling of silver for silver is riba (usury) unless it is from hand to hand and equal in amount'; T Alonaizan, 'Conciliation Before and After the Death of the Victim' (2000) 7 Al-Adl Journal 1; MA El-Gamal, Islamic Finance, Law, Economics and Practice (1st edn., Cambridge University Press 2006)
[225] Saud Al-Darib.(2011). Judicial Organization in the Kingdom of Saudi Arabia in Light of Islamic Law. Imam Muhammad ibn Saud Islamic University ; W El-Malik, 'State Ownership of Minerals Under Islamic Law' (1996) 14 Journal of Energy and Natural Resources Law 310; Baamir (n 23)
[226] M Bunter, 'The Islamic Shari'a Law and Petroleum Developments in the Countries of North Africa and the Arabian Gulf, (2004) 1(2) Transnational Dispute Management; PO Cameron, 'North Sea Oil licensing: Comparisons and Contracts' (1984/85) 3 OIL and GAS L. TAX'N REV. 99
[227] Saudi Arabia v Arabian American Oil Company (n 108)
[228] World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, 31 lLM (1992). Suleiman, A., The Oil Experience of the United Arab Emirates and its Legal Framework, 6 J.E.N.R.L., (1984), 43. See also, Wallace, C., The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalisation, The Hague: Kluwer Law International, (2002), p. 977.
[229] Code of Commercial Courts was amended by the Arbitration Code 1983; this is outside the scope of this thesis.
[230] Baamir (n 23). 105-106
[231] ibid

context. For example, it is the international element of this Code that allowed arbitration in *Saudi Arabia v Arabian American Oil Company*,[232] as discussed in the following subsection.

4.5.3 Effects of *Saudi Arabia v Arabian American Oil Company*

In the 1930s, as noted earlier in this chapter, many Middle Eastern nations sought to shift the balance of power away from private petroleum companies in order to address what they believed to be an inequitable distribution of power. However, the unsuccessful attempt by Saudi Arabia to renegotiate the original Concession Agreement of 1933 with Aramco led it to enter international arbitration. The essence of the dispute focused on Article 1 of the Concession of 29 May 1933,[233] specifically focusing on whether Saudi Arabia had granted Aramco exclusive rights over the stated oil zones in perpetuity, or whether it could grant concessions to other providers, notably the Onassis Corporation (SATCO). The arbitration proceedings commenced in Switzerland in 1954 and the decision was issued in 1958. These legal proceedings have been used by modern scholars to illustrate the way in which Aramco took advantage of the comparative lack of international legal experience in Saudi Arabia to negotiate the 1933 Concession in its favour.[234]

The facts in issue were based on Saudi Arabia's claim that the 1933 Concession did not grant exclusive rights in perpetuity to Aramco as a maritime transporter. By logical extension, Saudi Arabia argued that other concessions could be granted to different corporations in the future. This reasoning was based on Saudi Arabia's contention that it could withdraw any act that related to its sovereign power from the Concession. Furthermore, Saudi Arabia alleged that Aramco possessed no ownership of the oil deposits, arguing that they should be exercised for the benefit of the Saudi Arabian people as a whole. This proposition was supported with reference to international law and Sharia principles. As a consequence, on 20 January 1954, Saudi Arabia agreed that SATCO/Onassis would be given a 30-year priority over Aramco to ship oil.

The Tribunal was therefore tasked with answering the fundamental question of whether the 1933 or 1954 Concession prevailed in this context. The arbitrators recognised that the

[232] Saudi Arabia v Arabian American Oil Company (n 108); N Alsharrif, Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958 (PhD Thesis, University of Dundee 2000). 85-88; Y Al-Saman, 'Evolution of the Contractual Relationship between Saudi Arabia and Aramco' (1994) 12(2) Journal of Energy and Natural Resources Law. 257-258
[233] Trans-Lex, 'Saudi Arabia v. American Oil Company' (2017) <https://www.trans-lex.org/260800> accessed 28 March 2017
[234] H Moran, 'The Evolution of Concession Agreements in Underdeveloped Countries and the United States National Interests' (1974),7 Vanderbil J. Trans L 315-334 ; Alkahtani (n 21). 148

Hanbali School of Sharia law governed the agreement of 1933 and because it was the law of Saudi Arabia, it also governed the relationships that Saudi Arabia had forged with Aramco and SATCO/Onassis (the Onassis Concession). Nevertheless, the Tribunal explicitly stated in its arbitration decision (paragraph 172) that the dispute resolution should not be based solely on Saudi Arabian law, instead arguing that 'the common intention of the parties at the time that the agreement was signed [in 1933]' should be observed.[235] In order to reach this decision, the Tribunal considered the following main issues[236] (decision, paragraph 172):

- Terms at agreement
- Business practice
- [even] when the parties were silent on matters

The arbitrators sought to apply Muslim principles of legal interpretation, which encouraged them to recognise common elements within other national legal systems, as well as in international law. In ascertaining the common intention of the parties, the written agreement was therefore analysed in terms of its plain and ordinary meaning within the normal context of the oil industry. This linguistic and teleological interpretation (decision, paragraph 182)[237] was intended to enable the arbitrators to discern the particulars of the matter regarding the purpose, through consideration of observable facts and events, rather than focusing on the objective that the parties respectively claimed as the aims of the agreement. In order to enable linguistic interpretations of the issues in contention, the tribunal compared translations and definitions of phrases contained in the 1933 Concession. These lexical excerpts included 'exclusive rights to', 'deal with', 'export' and 'transport' (decision, paragraph 180).[238] In order to arrive at the decisive meanings, with reference to the three main requirements in the Concession (decision, paragraph 272; see above),[239] the arbitrators examined potential ambiguities in their translation.[240] In addition to grammatical sources, the tribunal also considered the meaning of the phrases in related Saudi Arabian legislation, most notably the Saudi Arabian Customs Law and Regulations (1951).[241]

[235] Trans-Lex (n 253) paragraph 172
[236] ibid
[237] ibid paragraph 182
[238] Ibid paragraph 180
[239] ibid) paragraph 272
[240] Ibid paragraph 204. In particular, the arbitrators referred to recognised Latinate dictionaries, being the English and French dictionaries. Saudi claimed that Webster's definitions are definitive, whereas Aramco pleaded for the Littre.
[241] Trans-Lex (n 253) paragraph 158

In making their decision, the panel of arbitrators rejected a consideration of public international law, on the grounds that it applied to disputes between states rather than between public and private parties. In spite of this, the tribunal referred to the international arbitration case of *Radio Corporation of America (RCA) v Czechoslovakia* (1933).[242] The facts of this case were similar to the facts of *Saudi Arabia v Arabian American Oil Company*, with Czechoslovakia stating a desire to introduce other broadcasters into an area over which RCA believed it had a monopoly. In applying internal reasoning in this case, the arbitrators discerned that the choice of law for interpretation was dependent on the circumstances of the particular case. This is important, because statutes in Saudi Arabia are enacted by the Royal Decrees of the King, which take precedence over contracts that are not embodied in this manner. As the 1933 Concession[243] was a special statute, formulated in accordance with the structure of the Saudi legal system, it prevailed over any general statutes, of which the Onassis Concession was one.

Using this logic, the arbitrators reviewed the 1933 Concession and the later 1947 enactments with Aramco. The panel also considered the more recent 1954 Onassis Concession.[244] Its findings were filtered through the known context, custom and practice that existed between Saudi Arabia and Aramco at the time of the agreement being signed. The arbitrators noted that the 1947 Concession to Aramco explicitly stated that it 'should not prejudice or derogate from any right or privilege created in any existing convention or agreement by which the Government is bound' (1947 Concession, for the trans-Arabian pipeline).[245] It followed that the post-1933 Concessions required the express intervention of the King to override any later agreements. Relating this position to the Public Interest Law Cases,[246] the Tribunal found further support for the notion that general principles continue to operate unless they are expressly overridden.

In conclusion, the arbitration panel decided that the primacy of the 1933 Concession was supported by the normal operation of the laws of Saudi Arabia, as well as the fundamental principles of international law and the national laws of 'most civilised states' (decision,

[242] 'Arbitration Case of the Administration of Posts and Telegraphs of the Republic of Czechoslovakia versus The Radio Corporation of America' (1936) 30(3) The American Journal of International Law 523
[243] Royal Decree No. 1135 of 7 July 1933, corresponding to 14 Rabie al Awal 1353.
[244] Royal Decree No. 5737, dated 9/04/1373 (1954)
[245] Rania Ghosn, 'Territorialities of a Transnational Oil Flow' (Colloque fondateur du CIST, 2011). See Trans-Lex (n 242) paragraph 204
[246] Badawi Hassan. Saudi Arabia v. Arabian American Oil Company (Aramco). Arbitration Tribunal.1958. 117-233; Hersch Lauterpacht, Annual Digest of Public International Law Cases: 1929-1930, Vol 5 (Longmans 1935).

paragraph 205).[247] This position was in concurrence with the judicial decisions published by the Permanent Court of International Justice in its judgement of 25 May1926.[248] Importantly, the wording of the agreement between Saudi Arabia and Aramco states that should an arbitration tribunal be held in the Kingdom, it should follow Saudi Arabian law.[249] In any other context, the Tribunal was empowered to decide on the most suitable law to deal with the matter. The parties agreed that the hearing should be conducted in Switzerland and the arbitrators therefore decided that Saudi Arabian law was not appropriate,[250] which met with Aramco's perspective.[251] However, Islamic scholars like Baamir[252] have argued that this reasoning illustrates a paucity of understanding of the Hanbali interpretation of Islamic law, wherein the *qiyas* (Analogical reasoning) allows other sources of law only in the event that they do not conflict with Sharia principles. In this, the arbitrator (Dr Badawi), a purported expert in Sharia, failed to demonstrate appropriate levels of understanding.[253] This was exacerbated by neither Dr Badawi nor the other arbitrator (Sauser Hall),[254] an authority on international law, having sufficient facility for either Islamic law or the Arabic language. Given that the dispute was resolved in English and Arabic, this would profoundly affect the ability of the arbitrators to appreciate arguments relating to the respective meanings of specifically contested words.[255] The arbitrators stated first that Saudi Arabia had no law that governed oil concessions and secondly that 'any contract between states in their capacity as subjects of international law, is based on the municipal law of some country'.[256] As an extension of its reasoning, the Tribunal rejected the application of Saudi Arabian law on the grounds that its laws were not those of a civilised nation. Instead, the Tribunal elected to govern the dispute using English law and Swiss law, thereby causing the decision to transplant elements of those two legal jurisdictions into Saudi Arabian law by virtue of the arbitral award. However, Baamir[257] notes further contradictions in the reasoning expressed by the arbitrators, who had based their arguments upon the fact that the agreement had been made and carried out in Saudi Arabia, using its natural resources, and published in the Saudi Gazette.

[247] Trans-Lex (n 253) paragraph 205
[248] German Interests in Polish Upper Silesia (Germ. v. Pol.) (1926) 7 PCIJ
[249] Saudi Arabia v Arabian American Oil Company (n 108) article 4
[250] ibid - articles 11 and 12 of Onassis Agreement
[251] ibid ; Baamir (n 16) 127
[252] Baamir (n 16) 130
[253] ibid 133
[254] Trans-Lex (n 253) Paragraph 1; Saudi Arabia v Arabian American Oil Company).
[255] Baamir (n 23) 133
[256] Trans-Lex (n 253) Paragraph 205; Saudi Arabia v Arabian American Oil Company. 116
[257] See in general Saudi Arabia v Arabian American Oil Company ; Baamir (n 23). 131

The Tribunal cited substantive authorities in support of its award, one of which was *Petroleum Development Ltd v Sheikh of Dhabi.*[258] However, it can be argued that this choice was unsuitable, as it was not a dispute in which a sovereign state was a party, unlike the situation in *Saudi Arabia v Arabian American Oil Company.* The decision was published in 1958, with the panel finding in favour of Aramco. This result caused Saudi Arabia to change its support for arbitration as a dispute resolution forum on two principal fronts. The first objection was that the decision failed to take account of the public policy change across the Middle East towards oil as a national resource.[259] The second issue was the perception that the arbitrators had failed to respect the status or context of Sharia law in business dealings. Some have even argued that the decision was based on illogical reasoning and contradictions regarding the choice of law.[260]

Concerning the second issue, namely the lack of respect accorded to Sharia law, an acknowledged body of research[261] suggests that the Tribunal paid no attention to Islamic values, despite Saudi Arabian law being the applicable law of the contract. In addition, the Tribunal members had an inadequate basic knowledge of the ways in which Sharia relates to commercial transactions. The Saudi Arabian perception of the diminution of the value of Islamic law from the perspective of the arbitrators is encapsulated in the law report that considers that the proper law of contract should be based on 'general principles of law of civilised nations'.[262] As a consequence of this argument, the decision of the arbitration panel was an offence to Saudi Arabia, which perceived that its law had been deemed 'uncivilised', requiring the adoption of other legal systems.[263] Nevertheless, the Kingdom eventually renewed its support for arbitration because of the pivotal role of this process in international trade. During the economic boom in the 1970s,[264] the government softened its attitude to arbitration in recognition of the need to accept international dispute resolution mechanisms to ensure its continued ability to exploit its natural oil reserves. In recognition of this

[258] At the time, Abu Dhabi was an English Protectorate. Petroleum Development Ltd. v. Sheikh of Abu Dhabi,(1951) 18 ILR 144
[259] Saudi Arabia v Arabian American Oil Company 117 ; Baamir (n 16). 131
[260] Baamir (n 16) 132
[261] Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi 'Petroleum Development Arbitration' 1I.C.Q.247 (1952). El-Ahdab, A., Arbitration with the Arab Countries, Kluwer Law International, (1990). 602-603
[262] Saudi Arabia v. Arabian American Oil Company (Aramco), International Law Reports, vol.27, (1963), 117-233. AI-Shareef, N., Enforcement of Foreign Arbitral Awards in Saudi Arabia: Groundfor Refusal Under Article (V) of The New York Convention of 1958, PhD Thesis, CEPMLP, University of Dundee, (2000). 85-88, and Al- AlSamman, (n 14). 257-258
[263] Alkahtani (n 10) 114-116
[264] Baamir (n 23) 135; Alkahtani (n 10) 114-116. El-Ahdab (n 261) 602-603

position, Saudi Arabia reaffirmed its support for arbitration by allowing appropriate clauses in international contracts to which the government is a party.[265]

In recognising the need for its internal dispute resolution to move towards those of international and Western models, in conjunction with its renewed recognition of international arbitral awards, Saudi Arabia effectively enabled instances of legal transplant. This shift reflects the Western influence on the banking environment of Saudi Arabia, which is examined in the following section.

4.5.4 The Saudi Arabian banking environment

The unstable banking climate of the 1960s resulted in reforms being made to the process of hearing cases of commercial fraud (see Sections 4.3.4 and 4.5.6). In 1961, official Regulations for the Control of Commercial Fraud were issued under Royal Decree No. 45 dated 14 Sha'ban 1381 H. (1961).[266] Under these regulations, when a commercial fraud is alleged, the Ministry of Commerce may set up a Central Tripartite Committee in one of the Saudi Arabian banking centres (Dammam, Jeddah, or Riyadh). These committees are then empowered to instigate investigations and issue the penalties that are provided for in the Regulations. However, the decisions of these Committees are binding only if they are confirmed by the Ministry of Commerce and parties have the right of appeal to the Ministry of Commerce within fifteen days of the decision.

4.5.5 SAMA

The governor of SAMA during the time of King Faisal was a foreign national called Anwar Ali,[267] a banking expert who had previous experience with the IMF. One of the roles of the new governor was to ensure the continued compliance of SAMA with the Islamic principles of the Qur'an, as practiced throughout the Kingdom. Ramady[268] explains that the consequence of this stance is that the banking environment has to comply with Islamic principles, its jurisprudence[269] and the findings of the scholars. Within these confines, the

[265] On 19 April 1995, Saudi acceded to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958); Alkahtani (n 21) 121.
[266] Royal Decree No. 45 dated 14 Sha'ban 1381 H. (1961)
[267] IMF, Saudi Arabia: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics, Monetary and Financial Policy Transparency, Banking Supervision, and Payment Systems (EPub.) (International Monetary Fund,2006): Anwar Ali, a Pakistani, originally visited Saudi as a member of the earlier IMF mission
[268] Mohamed Ramady, The Saudi Arabian economy: Policies, achievements, and challenges (Springer Science & Business Media, 2010). 23
[269] SAMA, Saudi Arabian Monetary Agency (SAMA, 2014)

supervisory powers of SAMA increased during the early 1960s, especially regarding its supervision of central banking and commercial banking operations.[270]

During the early 1960s, Saudi Arabian banking was the remit of private organisations that were unsatisfactorily managed, sometimes to the extent that the banks that were unable to repay their depositors were forced to declare their insolvency. A significant example of one such failure occurred in 1960, with the insolvency of Al-Watany Bank, which then merged with the state-owned Riyad Bank.[271] In 1961, following this reorganisation, SAMA acquired 38% of its shares on behalf of the government.[272] This acquisition was intended to steady the dwindling reputation of the Saudi Arabian banking system while enabling the Bank to continue in the private sector without interference from SAMA.

During this period, SAMA also supported the Saudi Arabian economic system by facilitating and ensuring the free flow of capital, continually attempting to buttress the effect of Saudi Arabia's dependence on the US dollar exchange rate. Young[273] suggests that this reliance on the value of the dollar[274] was almost entirely attributable to Saudi Arabia's oil-driven economy. It can therefore be argued that that the independence of SAMA was inherently compromised during the 1960s by fluctuations in the dollar rate for oil.

Since the early 1960s, in line with the policy implemented by Anwar Ali to protect the independence of SAMA,[275] any disputes concerning banking or negotiable instruments have been governed by the Negotiable Instruments Regulations (1963) Act.[276] The Regulations established committees in the major banking hubs of Saudi Arabia, namely Riyadh, Jeddah, and Dammam. Nevertheless, there are still elements of uncertainty and delay that are endemic to the judicial proceedings. This is largely attributable to the fact that the decisions of these committees are not binding, with either party having the right to appeal to the Ministry of Commerce within fifteen days. Either party can also refer the dispute to the

[270] Basel Committee on Banking Supervision. Regulatory Consistency. Assessment Programme. (RCAP). Assessment of Basel III. Liquidity Coverage Ratio regulations – Saudi. Arabia. Bank for International Settlements 2015. 7-11; Alshammari (n 11) 5
[271] Saudi Arabian Monetary Agency A Case Study On Globalization and the Role of Institution Building in the Financial Sector in Saudi Arabia. 2004. 3
[272] Ibid 3. Al-Suhaimi, J., Consolidation, competition, foreign presence and systemic stability in the Saudi banking industry. BIS Papers, 2004. 131
[273] Young (n 62) 370; Young (n 11) 556
[274] Al-Suhaimi (n 282). 129
[275] Telegram From the Embassy in Saudi Arabia to the Department of State. US State Department. Jeddah. 3 December 1969. Retrieved 11 August 2013.
[276] Council of Ministers Resolutions No. 692 dated 26 Ramadan 1383 H. according to Royal Decree No. 37. 11 Shawwal 1383 H. (1963), superseding Chapters VI, VII, VIII and IX of Commercial Court Regulations under Royal Decree No. 32 of 1350 H. (1930).

Chairman. This is exacerbated by the SAMA committees not being judicial institutions, which means that their decisions are subservient to those of the courts.[277]

The independence of SAMA was supported by its employment of foreign specialists, or 'technocrats',[278] who ensured the successful operation of Saudi Arabia's currency, exchange rates, and favourable balance of payment. In Faisal's reign, this success was overseen by the governor, Anwar Ali, who was in post from 1958 until 1974.[279] During his tenure, Ali ensured that the Ministry of Finance did not interfere with SAMA's independence.[280] He also oversaw the founding of the Banking Institute by SAMA in 1965, in an effort to move the banking sector from its reliance on foreign experts to the development of banking expertise among its own nationals.[281] However, despite SAMA's successful management of the economy, the banking environment changed during the 1960s, especially with the reduction of the powers held by the Agency through the passing of the BCL.

4.5.6 SAMA after the Banking Control Law (1966)

Following the insolvency of a succession of commercial banks, SAMA derived its authority from its 1957 Charter[282] and the BCL. The objective of the latter legislation was to prevent reoccurrences in the commercial banking sector from undermining the Saudi Arabian economy. In extending the ambit of its banking influence, the BCL also distinguished between 'national' and 'foreign' banks, with the emphasis being placed on practicing international banking principles. Therefore, despite this distinction within the BCL, Meyer-Reumann[283] perceives the BCL as perpetrating the Saudisation of foreign banks. In this context, in compliance with the doctrines of Sharia, any banking to be conducted within the Kingdom needed to eschew the practice of charging interest. Baamir[284] and Hanson[285] argue

[277] In 2008, the Board of Grievances concluded a two-year legal dispute over the legality of the SAMA Banking Dispute Settlement Commission. This process began with the confirmation that the Commission was not a judicial or quasi-judicial body and was purely a purely administrative body. Furthermore, the Royal Order establishing the Commission did not grant it rights in the separation of any dispute between the banks and their clients. Instead, they were assigned to only study these disputes and seek a settlement that satisfied the parties.
[278] S Hertog, Princes, Brokers, and Bureaucrats: Oil and the State in Saudi Arabia (Cornell University Press 2011). 255
[279] When King Faisal died.
[280] International Monetary Fund, Saudi Arabia: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics, Monetary and Financial Policy Transparency, Banking Supervision, and Payment Systems (EPub.)(International Monetary Fund, 2006). 34
[281] Meyer-Reumann (n 1) 209-210
[282] SAMA Charter Ray Decree No. 23; 23/5/1377H; 15/11/1957.
[283] Meyer-Reumann (n 1) 209
[284] Baamir (n 83) 219
[285] Hanson (n 83) 288

that under the governance of Anwar Ali, SAMA transplanted the BCL from the Egyptian Code, meaning that the new law was less likely to conflict with Sharia principles.

Despite the impact of the BCL, foreign banks continued to have external access to the Saudi capital market.[286] One route for access was through agency arrangements with Saudi Arabian banks and another required an application to be made to SAMA to become an approved bank. If the latter request was granted and all the SAMA Regulations were complied with, the bank was allowed to bid for capital projects, providing that the foreign entity submitted a statement, guarantees, and allied requirements to a Saudi Arabian bank. This regulatory policy suggests that SAMA and the Ministry of Finance used Saudi Arabian banks to audit foreign bank applications, demonstrating an element of the Saudisation to which Meyer-Reumann refers.[287]

Al-Homound[288] and Al-Shamaimi[289] explain that the enactment of the BCL caused both positive and negative effects on the independence and authority of SAMA. Meyer-Reumann[290] suggests that the BCL provided more specific instruments of control than the previous laws,[291] which had been passed during the 1950s. He argues that the amendments aligned SAMA's means of control with those of Western central banks, notably those of the UK, the USA and Germany. However, Al-Homound[292] and Al-Shamaimi[293] argue that these changes seriously diminished SAMA's independence.

The supervisory powers of SAMA were strengthened by the BCL. Other responsibilities were also broadened with regard to its functions concerning foreign assets and currency.[294] These amendments increased the alignment between SAMA and the other central banks. This extension of the remit of SAMA also represented the response of the government to the profound impacts across the banking environment earlier in the decade.[295] This manner of adjustment in the BCL resulted in SAMA being given greater supervisory jurisdiction over banks, which were now required to maintain specified ratios relating to liquidity, deposits and reserves.[296] However, the BCL also stipulated the limitation that only the Ministry of

[286] Meyer-Reumann (n 1) 209
[287] Meyer-Reumann (n 1) 209
[288] Hesham Al Homoud. Banking Overview in Saudi Arabia (Tamimi Magazine 2011). 1-3.
[289] Suhaimi (n 282) 128
[290] Meyer-Reumann (n 1) 209
[291] Royal Decrees No. 30/4/1/1046 on 25/07/1371H (20/04/1952)
[292] Al Homoud (n 298) 1-3.
[293] Al-Suhaimi (n 282) 128
[294] Ahmed Al Rajhi, Abdullah Al Salamah, Monica Malik, M and Rodney Wilson, Economic Development in Saudi Arabia (Routledge 2012). 59-62
[295] Ronall. (N 219) 402
[296] Al Rajhi (n 304) 55-60

Finance[297] would have the power to penalise those banks that violated the regulatory requirements. This supremacy of the Ministry of Finance indicates one of the areas in which the power of SAMA was undermined.

The BCL[298] caused SAMA to lose independence and resulted in a corresponding increase in control by the Ministry of Finance. Perhaps most significantly, SAMA became responsible to the Ministry of Finance, with the requirement for all of its decisions to be ratified by the Ministry.[299] Although the BCL broadened the remit of SAMA, the fact that this law facilitated political interference[300] served to undermine its independence in practice.[301] Another example of the loss of authority is provided by Al-Homound and Al-Shamaimi,[302] who claim that while the licensing and regulation of the Saudi Arabian banks is the explicit responsibility of SAMA, in practice the overall power of veto lies with the Ministry of Finance. In comparing the theoretical and practical remit of SAMA's independence, this suggests that the enactment of the BCL has effectively resulted in SAMA becoming redundant.

The BCL further eroded the independence of SAMA by limiting its flexibility to implement monetary policy by setting the liquidity and reserve levels of banks.[303] SAMA's Charter states that monetary policy is one of the three main roles of the Agency.[304] However, the decision to limit the ability of SAMA to establish reserve policies not only undermines its power to regulate the Saudi Arabian banking system directly, but also reduces its potential to benefit the national economy.[305]

In summary, in considering how the BCL reduced SAMA's independence and regulation of the banking sector, perhaps the most important point to note is that operations fundamentally changed when the Ministry of Finance was given powers of enforcement against banks, as well as against SAMA itself.[306] This represents an actual or potential conflict of interest between the government and the central banking system. The avoidance of such a conflict

[297] Saudi Ministry of Finance and National Economy.
[298] Art. 26 Banking Control Law 1966
[299] Info-Prod Research, 'Saudi Arabia: Currency and Banking' (1999) Info-Prod Research (Middle East) <http://www.infoprod.co.il/country/saudia2c.htm> accessed 10 January 2017
[300] F Al-Farsy, Modernity and Tradition (Taylor and Francis 2012). 19
[301] Al Homoud (n 298) 1-3; Al-Suhaimi (n 282) 130-131
[302] ibid
[303] The Economist Intelligence Unit, 'Market assessment - Saudi Arabia (January 2003)' (Country Finance, 2003) <http://store.eiu.com/index.asp?layout=show_sample&product_id=280000228&country_id=SA> accessed 24 January 2017
[304] Young (n 2) 57
[305] The Economist Intelligence Unit.
[306] SAMA, 'Development and Restructuring of the Saudi Banking System' (2012) <http://www.bis.org/publ/plcy06g.pdf> accessed 17 January 2017

was the very reason for the recommendations proposed by Young,[307] which were originally adopted by King Abdul Aziz and continued by King Saud and King Faisal, until the latter passed the BCL.

4.5.6.1 Conflicts of interest

To continue this discussion of conflicting interests, there are two significant sources of concern in the banking sector of Saudi Arabia.[308] First, the decisions of SAMA, including the licensing and regulating of banks, can be overridden by the Ministry of Finance. Secondly, this arrangement limits the flow of information between the Agency, the government, and the banks.

Saudi Arabian banks typically audit foreign bank applications on the basis that Saudi banks are subservient to SAMA, which is itself under the control of the Ministry of Finance. This means that domestic banks are inherently vulnerable to the 'machinations' of the Ministry. In addition, through the 'Saudisation of foreign banks',[309] the control of the Ministry of Finance extends to include overseas banks that operate in the Kingdom. The BCL stipulates that SAMA is answerable to the Ministry of Finance, which is headed by an Emissary of the King, meaning that all banking is effectively under the direct control of the monarch. As the government holds shares in commercial banks, this raises further questions regarding conflicts of interest. Whilst a shareholder must act bona fide for the benefit of the company, according to Saudi Arabian company law,[310] Islam requires that the Saudi Arabian constitution (being the Qur'an) be exercised for the general benefit of the public. During the creation of SAMA as a public agency, it was established that it must represent the interests of Saudi Arabia's Muslim community.[311] This Islamic principle conflicts with the Saudi elite, primarily in the form of the Royal Family and its entourage, possessing shares in commercial banks over which they have ultimate control, in terms of both operation and regulation.

[307] Young (n 2) 57
[308] International Monetary Fund, 'Saudi Arabia: Financial Sector Assessment Program Update – Detailed Observance of the Basel Core Principles for Effective Banking Supervision', IMF Country Report No. 13/213 (July 2013) 8
[309] Meyer-Reumann (n 1) 209
[310] Saudi Companies Law: Royal Decree M/6 20 July 1965 (22.3.1385) amended by Royal Decree M/5 19 May 1967 (12.1387) governs banks limited by shares (joint stock companies) According to Baamir (2010), Saudi company law is borrowed from Egyptian and thus French laws.
[311] Young (n 2) 61-63

A final example of a conflict of interests where some individuals unfairly benefit is the suggestion that both public and private Saudi banks and their government shareholders potentially profit from price-sensitive information.[312]

4.5.6.2 Saudi Arabian commercial banks

The BCL provides that domestic banks operate in accordance with the same principles as Western banks. Consequently, while the Saudi Arabian banking law does not penalise commercial banks for charging interest, compliance is not enforceable, because it contravenes Islamic principles.[313] Nevertheless, Meyer-Reumann[314] suggests that all Saudi Arabian commercial banks offer savings accounts in which 'commissions' are paid, under similar conditions to those under which Western banks pay interest. This supports the argument that such commissions are effectively interest in another guise.

4.5.6.3 Licensing and sanctions

Continuing the theme of conflicts of interest, this subsection considers how banks are licensed in Saudi Arabia, in terms of fairness, transparency, and interference from parties external to the central licensing agency (i.e. SAMA).[315] There is broad consensus among experts regarding the importance of applying a rigorous and consistent licensing system. This approach is essential for both the public and national economy,[316] because banks must hold the required resources and be qualified to conduct compliant commercial banking business.

SAMA's autonomy is illusory, as licensing authority is subject to that of the Council of Ministers and it is common for government officers to have shares in commercial banks.[317] Furthermore, the licensing system involves a network of agencies rather than being the sole remit of SAMA. According to Royal Decree,[318] licences are authorised by the Ministry of

[312] EU company law prohibits insider dealing by persons who have price sensitive information that is not in the public domain and from which s/he might profit.
[313] Meyer-Reumann (n 1) 215-216 and 219
[314] ibid 219
[315] Hedva Ber, Yishay Yafeh, and Oved Yosha, 'Conflict of Interest in Universal Banking: Bank Lending, Stock Underwriting, and Fund Management' (2001) 47(1) Journal of Monetary Economics 189. 198-218; International Monetary Fund, 'Saudi Arabia: Financial Sector Assessment Program Update – Detailed Observance of the Basel Core Principles for Effective Banking Supervision', IMF Country Report No. 13/213 (July 2013) 7.
[316] Munawar Iqbal and Philip Molyneux, 'Thirty years of Islamic banking: history, performance, and prospects' (2005), 37-39; Ber, Yafeh and Yosha (n 316) 198-218; Alshammari (n 14). 155
[317] SAMA (n 206) 4
[318] Royal Decree 25/07/1371(20/04/1952)

Finance, relegating the role of SAMA to merely endorsing the decisions of the Ministry.[319] The law on the licensing of banks is governed by Article 11 BCL, which stipulates that only SAMA may approve the rights of a foreign or domestic bank to operate in Saudi Arabia, in terms of establishing branches, subsidiaries or representations, or merging with existing banks. However, the actual decision is made by the Ministry of Finance. Since the BCL makes the Ministry of Finance the ultimate source of approval, it follows that the original regulatory authority of SAMA over commercial banks has been reduced. Furthermore, the fact that the government holds shares in commercial banks (including the Bank Riyad) creates a triangle of vested interests. The Royal Family's control of the Ministry of Finance and its ownership of commercial banks raises questions regarding the extent to which SAMA can remain independent, as well as the stability or reliability of the banking sector.

On this theme, Khan and Bhatti[320] suggest that the lack of disclosure regarding how a new entrant qualifies for a banking licence in Saudi Arabia constitutes a clear barrier to entry. Therefore, clear objectives should be published concerning the licensing and supervision of banks. Furthermore, if SAMA merely acts as a government agency, this should be specified.[321] The common thread of similar schools of thought (Hasan and Dridi;[322] Alkhathlan and Abdul Malik[323]) is that there is no real guarantee that the licensed banks can operate effectively in Saudi Arabia. These scholars consider that the banking system is undermined by the existence of conflicting interests of ownership, control, and regulation.[324]

In common with the inconsistencies and conflicts inherent in the licensing process for commercial banks, the imposition of sanctions is also unpredictable, despite regulations being enacted under the BCL. This is consistent with findings concerning licensing and analysis relating to the application of sanctions: that in reality it is the government, not SAMA, which has the ultimate power to decide whether and how penalties are applied to a particular bank according to the specific circumstances that arise.

[319] Ahmed Banafe, Rory Macleod. The Saudi Arabian Monetary Agency, 1952-2016 : central bank of oil. (palgrave macmillan 2017). 42-43
[320] M Mansoor Khan and M Ishaq Bhatti, Islamic banking and finance: on its way to globalization (2008) 34(10) Managerial Finance 708
[321] ibid
[322] Maher Hasan and Jemma Dridi, 'The Effects of the Global Crisis on Islamic Banks and Conventional Banks: A Comparative Study' (International Monetary Fund Working Paper 10/201, 2010). 23.
[323] Khalid A Alkhathlan and Syed A Malik, 'Are Saudi Banks Efficient? Evidence using Data Envelopment Analysis (DEA)' (2010) 2(2) International Journal of Economics and Finance 53. 53-55
[324] Fremantle, Adam. 'The regulation of banking in Saudi Arabia.' International Financial Law Review (1985). 29-30

In summary, the various lines of reasoning rehearsed in this section suggests that SAMA has limited power concerning licensing or sanctioning those commercial banks that have a preponderance of government officials as majority shareholders. Thus, the influence of the Ministry of Finance over SAMA's powers of licensing and regulations is based on the interests of the ruling elite.

4.5.6.4 Regulation of banks

The duty of SAMA to regulate banks is governed by the Banking Control Regulations, which operate in accordance with the BCL. This lawmaking role is embedded in the SAMA Charter (1957) which was reformed by the BCL.[325] The regulatory system extends beyond the need to ensure compliance of each institution with the law; Bolton[326] suggests that this system constitutes a mandate to ensure that even when a bank is operating in compliance with the letter of the law, its activities do not expose either the bank or the banking system to risk. This is achieved by SAMA issuing rules and guidelines, in addition to fulfilling its licensing and regulatory functions.

Hertog challenges the premise that the law must not conflict with Sharia, which prohibits demands for interest payments,[327] given the conflict of interests between SAMA, the Saudi Arabian government, and those banks in which the government holds shares, arguing that the regulation of banks is subject to similar pressures from the government, by the Ministry of Finance, to those concerning licensing and sanctions.[328]

Regulation includes SAMA's authority to ensure that banks provide the information required by the banking rules, in addition to its responsibilities for auditing. The consequence of this is that private banks must provide SAMA with a monthly report and publish a quarterly report, as stated in the original Charter,[329] as well as providing the biannual and annual reports stipulated under the BCL amendments. These reports must be provided by licensed auditors and submitted to SAMA prior to their publication by the banks.[330]

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[325] Basel Committee on Banking Supervision. Regulatory Consistency. Assessment Programme. (RCAP). Assessment of Basel III. Liquidity Coverage Ratio regulations – Saudi. Arabia. Bank for International Settlements 2015. 7-8; Ahmed Banafe, Rory Macleod (n 329) 43

[326] Patrick Bolton, X Freixas and J Shapiro, 'Conflicts of Interest, Information Provision, and Competition in the Financial Services Industry' (2007) 85(2) Journal of Financial Economics 297-300

[327] Basel Committee on Banking Supervision. (n 336) 6-8; Ronall, Joachim O. 'Banking Regulations in Saudi Arabia.' The Middle East Journal (1967): 399-402. 359; Bamakhramah, Ahmed S. 'Measurement of banking structure in Saudi Arabia and its effect on bank performance.' Economics and Administration 5, no. 1 (1992). 13-15

[328] Hertog (n 288) 256

[329] Banking Control Law, Royal Decree No. M/5 of 11 June 1968 (22.2.1386)

[330] Meyer-Reumann (n 1) 210-211

According to the BCL (Article 10), commercial banks are prohibited from wholesale or retail trading, as well as from import and export. Furthermore, control is exerted by the BCL Article 10(4), whereby commercial banks may only hold a maximum 10% shareholding in a range of commercial, industrial, and agricultural companies limited by shares.

In his assessment of the impact of the foregoing prohibitions and limitations, Meyer-Reumann asserts that Saudi Arabian commercial banks do not strictly follow Islamic principles.[331] In contrast, as a public agency governed by the Qur'an in accordance with the Constitution, SAMA has a legal obligation to follow all Sharia requirements. Although Meyer-Reumann acknowledges the wide extent to which banks have discretion in how they operate, overall consistency with the operations of SAMA is nevertheless overseen by the Banking Commission, which is chaired by the Agency and to which all commercial banks are invited to send representatives.[332]

Although the independence of SAMA is free from interference regarding information requirements, approval from the Ministry of Finance is still required prior to the request being made for each commercial bank to submit the required audit and allied information. Effectively, this means that SAMA's independence is curbed by its legal subservience to the Ministry of Finance and thus also by the government. According to Bolton,[333] if banks under majority government ownership are audited, the Ministry of Finance can intervene or even prohibit the audit. Bolton holds that this intervention reflects unfavourably on the reputation of Saudi Arabian banking.[334] Furthermore, SAMA may obtain only limited information from government-owned banks,[335] leading Bolton to argue that state-owned or majority controlled banks in Saudi Arabia are less rigorously audited than privately owned banks.[336] This analysis supports the proposition that the passing of the BCL has resulted in SAMA becoming subservient to the government, which is especially problematic when the interests of the ruling elite, who are senior government persons, are involved. Indeed, the enactment of the BCL and the corresponding diminution of the authority of SAMA raises serious concerns regarding the potentially competing interests between the ultimate control of the state and the interests of bank customers.[337] Arguably, the power granted to the Ministry of

[331] ibid
[332] ibid
[333] Bolton (n 337) 194-195
[334] This prohibition must only apply in special circumstances and for a limited period, subject to the MoF being permitted by the Council of Ministers. There are no statutory definitions of 'special circumstances' or 'limited period' in the Banking Control Regulations.
[335] Bolton (n 337) 194-195
[336] ibid
[337] Alshammari (n 11) 138

Finance under the BCL has emasculated SAMA, thereby shielding banks in government ownership from the effects of wrongdoing and the associated sanctions. This is compounded by the superior power of the Ministry of Finance to protect such banks from the effects of trading insolvently or perpetrating other fraudulent dealings.

It was suggested in Section 4.5.6.2 that the BCL had both negative and positive connotations for the independence and authority of SAMA. Assessing the overall position of SAMA as a central monetary agency, the application of the BCL (Article 26) enables SAMA's powers to be limited or even negated at the behest of the Ministry of Finance. It follows that SAMA has generally derived negative effects from the BCL. In examining the importance of rebalancing this weakness, some scholars (e.g. Iqbal,[338] Karbhari,[339] and Bolton[340]) have compared conflicts of interest in the banking sectors of Saudi Arabia, the USA and the UK. They agree that any person with a potential conflict of interests should be precluded from involvement in banking control and regulatory activity and that the BCL (Article 12) should be applied to ensure that the qualifications and experience required for holders of senior posts be in accord with international banking norms.

The process whereby Saudi Arabia became 'a financial giant',[341] operating in harmony with the global financial markets, was the subject of a recent analysis by the Bank of England.[342] Its report underlines the importance of including a requirement for bankers to have no opportunity to profit from any competitive advantage from holding a particular post.[343] Proposals to rebalance the potential for opportunism in Saudi Arabian banking and governmental organisations also formed the subject of recent recommendations by the IMF,[344] together with the research of Essayyad and Madani.[345] These practical and theoretical lines of reasoning concur on the importance of two principal aspects: to improve confidence in Saudi Arabian banking practice by removing conflicts of interest that arise from government holdings in banks and to amend the law to enable SAMA to reassert the level of independence that it enjoyed prior to the passing of the BCL. Both the practical and

[338] Iqbal (n 326) 39
[339] Karbhari, Yusuf, Kamal Naser, and Zerrin Shahin. 'Problems and challenges facing the Islamic banking system in the west: The case of the UK.' Thunderbird International Business Review 46, no. 5 (2004): 521-543.
[340] Bolton (n 337) 317-318
[341] Young (n 2) 115-122
[342] The Telegraph, 'The Prudential Regulation Authority: what it does and who is in charge', The Telegraph (London, 8 November 2011)
[343] This report also recommends all members of the Bank must possess the necessary experience and expertise to command respect within its national borders and the international environment
[344] IMF, Saudi Arabia Financial System Stability Assessment: Update (International Monetary Fund, 2012)
[345] M Essayyad and H Madani, 'Investigating Bank Structure of an Open Petroleum Economy: The Case of Saudi Arabia' (2003) 29(11) Managerial Finance. 73-92.

theoretical perspectives stress the need for law reform to allow SAMA to exercise its functions independently, without being subservient to the government. It is suggested that confidence in Saudi Arabian banks would also benefit directly from a legal transplant of law that regulates insider dealing based on price-sensitive information. This could take the form of the adoption of French law, such as the French Takeover Guide,[346] which would maintain consistency with legal transplants from French-inspired Egyptian law.[347]

Although Saudi Arabia and Egypt are both Muslim nations, by the 1940s Egypt had become a legally developed nation that benefited from the transplant of the French system of civil law. Later, other Arab states, including Syria and Iraq, adopted the system from Egypt. During the 1960s, King Faisal adopted the Franco-Egyptian codes, a logical choice for Saudi Arabia because Egypt had already transplanted the French codes to accord with Islam.[348]

The 1950s saw the first cohort of Saudis studying at Egyptian academic institutions. Later, during the late 1950s and 1960s, the emphasis changed, with Saudi students being encouraged to study in the USA. This transition towards the acquisition of substantive and institutional knowledge and practice coincided with the role that Young[349] fulfilled in establishing SAMA, managing its currency and international trading system. The success of this form of scholarly exchange concurs with Örücü's[350] assessment of legal transplants in Turkey, where European civil codes were embedded into Turkey. Watson[351] concurs with Örücü's analysis, whilst reverting to his original proposition that 'clever lawyers' ensure the longevity of legal transplants.

In an analysis of independence and conflicts of interest, Parker[352] recommends that those English banking regulations that control and deter anticompetitive activity should be transplanted into Saudi Arabia. According to Parker's assessment of the Saudi banking sector, a combination of the government's vested interests and its shareholding monopoly has tended to undermine the efficiency of the sector. This imbalance of market power within the sector, which is characterised by conflicting interests, serves as a barrier to new entrants.

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[346] M Parker, 'IMF advises KSA to give SAMA greater operational independence', Saudi Gazette (Jeddah, 29 April 2012) 1

[347] Alternatively, a transplant might be established using another recognised rule, such as those that govern English law, where insider dealing using unpublished, price sensitive information has been a criminal offence since 1985 and is currently set out in Part V of the Criminal Justice Act 1993.

[348] Meyer-Reumann (n 1) 218

[349] Young (n 2) 108

[350] Örücü, Esin. 'Law as transposition.' International & Comparative Law Quarterly 51, no. 2 (2002): 205-223.

[351] Watson, Alan. Legal transplants and European private law. Vol. 4. Maastricht: Metro, 2000. III; Örücü, Esin. 'Critical Comparative Law.' (1999): 61

[352] Parker (n 357) 1

Such monopolistic behaviour is fuelled by the high degree of government control exerted over bank licensing. Control of entry into the commercial banking market and the exercise of ultimate power over how SAMA regulates banks' activities effectively limit consumer choice.[353] If an established competition regime were transplanted into Saudi Arabia, the true financial state of banks might reveal weakness in these institutions' stability and governance. As such negative revelations could be problematic and cause conflicts, members of the government or the ruling elite would have to balance the risk of exposing banks' possible weaknesses and instability with their personal interests as bank shareholders.

In essence, Wilson[354] summarises the Saudi Arabian banking climate as an environment where competition regulation is discouraged, resulting in unfair discrimination being exercised against foreign-owned banks operating in Saudi Arabia.[355] This is because they are governed by their own nation's regulation and control of competition, which is designed to promote their stability and efficiency. In the Saudi context, Al-Muharrami[356] contends that the original purpose of erecting barriers to entry was to protect Saudi Arabia's embryonic oil industry from foreign domination and control. Subsequently, Boyd and Nicholo[357] have suggested that the current law should be reviewed in the context of post-BCL developments. The consensus of opinion among both academics and practitioners is that Saudi banking activities should be governed by competition law.[358] This form of transplant would entail the legal transplant of an internationally acknowledged system of competition law into Saudi Arabia to guard against unfairness arising from conflicts of interest, abuse of market power, and the dominance of cartels of commercial banks having a preponderance of shareholders whose interests are divided between bank dividends and governmental concerns.

Between 1966 and 1974, the BCL facilitated a banking environment that lost Saudi Arabia opportunities in both the domestic and international markets.[359] This was largely attributed

[353] T Beck, 'Bank competition and financial stability: friends or foes?' (2008) World Bank Policy Research Working Paper Series; 4-6
[354] R Wilson, The determinants of Islamic financial development and the constraints on its growth (Durham University Press 2004) 5
[355] ibid
[356] S Al-Muharrami, K Matthews, and Y Karbhari, 'Market structure and competitive conditions in the Arab GCC banking system' (2006) 30(12) Journal of Banking and Finance 3487
[357] JH Boyd and G De Nicolo, 'The theory of bank risk taking and competition revisited' (2005) 60(3) The Journal of Finance 1329.
[358] For a succinct overview of the UK competitions framework, including consumer protection and financial services legislation, see:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284428/oft911.pdf and
https://www.slaughterandmay.com/media/1515647/an-overview-of-the-uk-competition-rules.pdf
[359] Meyer-Reumann (n 1) 209

to the concentration of the ownership of domestic commercial banks in the hands of the government or allied Saudi Arabian individuals from powerful families. Bolton[360] recommends that when a conflict of shareholding interests occurs, the owner should be legally obliged to divest itself of the particular shares or to break its links with SAMA.

In summary, there are strong arguments that by requiring foreign banks to operate under the supervision of the Ministry of Finance through SAMA, the BCL is perpetuating the Saudisation of foreign banks.[361] This suggests the need for a legal transplant from Saudi Arabian banking law into the operation of foreign banks.

4.5.7 The development of commercial courts and alternative dispute resolution

4.5.7.1 Overview and context

The Saudi Arabian perspective on arbitration is governed by the precepts of Islam, which hold that only Allah can predict the future. The consequence of this position is that any clauses referring future disputes to arbitration will automatically breach Sharia[362] and specifically contravene the prohibition of *gharar* (risk or uncertainty).[363] In essence, this position interprets dispute resolution clauses as constituting a challenge to the Islamic requirement for certainty in dealings.

In evaluating and seeking balance in this traditional stance, Al-Sanhury[364] reasons that a contract exists in the present, which means that any associated dispute resolution clauses must necessarily conform to Sharia principles. Basically, in order to enable modern business to operate, it is possible to conclude that Sharia law validates arbitration clauses if on the facts of the case they are necessary for the performance of the contract, appropriate to its subject matter, and common practice in the particular area.[365] Ballantyne continues this Islamic line of reasoning,[366] with reference to the Constitution of Hejaz, a tradition of arbitration that predates the existence of Saudi Arabia.[367] This reference supports the validity

[360] Bolton (n 345) 317-320
[361] Meyer-Reumann (n 1) 209
[362] Alkahtani (n 10) 64
[363] AR Al-Sanhury, Masader Al-Haq, Vol 3 (Dar Al-Nahza Al-Arabia 1968). 101; A. Alkhenain, 'Contracts Involving Uncertainty', Ministry of Justice Journal, Saudi Arabia , 13 (2002). 170-173.
[364] ibid
[365] Abdul El-Ahdab, 'The Muslim Arbitration Law' (Proceedings of the First Arab Regional Conference, Tunisia, 1987) 1. 233
[366] W Ballantyne, The Bahrain Euro-Arab Arbitration Conference (1989): A Summing up Published with Proceedings in Essays and Addresses on Arab Laws (Curzon Press 2000). 206
[367] Hejaz is the Western Region of Saudi Arabia where the two Holy cities of Makkah and Madinah are located.

of arbitration clauses in Islam, despite their future perspective. Indeed, Ballantyne[368] proposes that this traditional stance ensures that such clauses are valid if they are necessary for performance, appropriate to the contract, and common practice in the sector, as long as the authority of the arbitrators has been defined. In fact, these requirements are similar to the rules regarding arbitration in many other jurisdictions.[369] However, it is recommended that in order to ensure clarity in dealings, both parties should sign the arbitration clause and the contract itself, thereby preserving the autonomy and thus the certainty of the arbitration clause.

While the main sources of law in Saudi Arabia are the Qur'an and the Sunnah (Section 3.1.1), these sacred texts do not specifically refer to commercial law or to the complex transactions that have evolved since the discovery and exploitation of Saudi oil. In addressing these difficulties, Alkahtani[370] proposes that greater attention should be given to the ijma (consensus) of Islamic scholars, as well as to the analogous perspectives of qiyas (Section 3.1.2).

It should be noted here that similarities exist between transactions that are governed by Western legal systems (e.g. English and US Common Law or Roman law systems, such as that of France[371]) and those governed by Sharia law. For example, both systems require adherence to a clear and unambiguous offer and acceptance formula, without the contract being in writing, yet with contractual obligations being completely performed. Indeed, the Hanbali school of Sharia law followed by Saudi Arabia takes the same approach to state ownership of minerals in the subsoil as do many Western legal systems.

4.5.7.2 Dispute resolution

Saudi Arabia accedes to the position and dispute resolution structures of the UN Commission for International Trade Law. The Saudi Arabian Arbitration Regulation (1931) recognises a foreign arbitral award only when it is mandated as being in concordance with Sharia principles. Since the Hanbali School does not require the explicit consent of parties for the

[368] Ballantyne, W., The Bahrain Euro-Arab Arbitration Conference (1989): a summing up published with proceedings in Essays and Addresses on Arab Laws. Curzon Press, (2000) 206

[369] Arbitration Act (1996) s1 English Law

[370] Alkahtani (n 10). 72

[371] See *Saudi Arabia v Arabian American Oil Company* in Section 4.5.3, where arbitrators referred to French and Swiss law.

enforcement of a decision,[372] Article 20 of the Code gives a foreign award the same binding status as its own judgments.

Additional evidence of the transplantations of law from international sources into Saudi Arabian law includes the Convention for the Recognition of Foreign Arbitral Awards, which is organised by the International Centre for the Settlement of Investment Disputes. Saudi Arabia accedes to this Convention provided that the awards do not contradict Sharia law, especially the prohibition of riba.

However, following its negative experience of the ruling in *Saudi Arabia v Arabian American Oil Company* (Section 4.5.3), the Kingdom prohibited its government bodies from participating in arbitration without explicit leave from the Council of Ministers, as stipulated in the enactment of the Council of Ministers Resolution No. 58 (1963) which restricted the acceptance of foreign arbitral awards.[373] These limitations were tightened in 1979, following the movement by Saudi Arabia to nationalise its oil industry.[374] Nevertheless, the 1963 Resolution strengthened the influence of arbitration in Saudi Arabia, with its principle that the applicable law shall be that of the place of performance, with no government agencies agreeing a contract that fails to recognise the governing law or forum of dispute resolution as Saudi Arabia.[375]

4.5.7.3 Reconciling Sharia law with international law and banking practice

The inclusive nature of Islamic law and its governing principles were established by the Prophet Mohammed (pbuh) (Chapter 3). According to his words, and even occasionally his own actions, the Prophet (pbuh) permitted the integration of rules from other groups, providing that they do not conflict with Islam. In support of this proposition, this subsection illustrates the consensus between Sharia law and those of international and Western jurisdictions.

It is significant to observe that both Sharia and Western (Roman Law and Common Law) legal systems recognise the concept of the ownership of private property, which they hold to be fully protected and free from expropriation. The nature of the natural minerals of a land,

[372] Abdul El-Ahdab, 'General Introduction on Arbitration in Arab Countries' in P Sanders (ed), International Handbook on Commercial Arbitration (Kluwer 1990). 2-7; Alkahtani (n 10). 130
[373] William Fox, International Commercial Agreements (3rd edn, Kluwer Law International 1998). 369
[374] This trend towards arbitration being held internally was buttressed by the Arbitration Code (1983), which stipulates that any dispute involving a government unit must have a Muslim arbitrator and be held in Arabic in Saudi according to Saudi law.
[375] See the Ministerial Resolution No. 58 dated 17/01/1383 (1963)

such as oil, is significant in Sharia law because it is automatically deemed to belong to the nationals of an Islamic state, with the sovereign acting as its guardian.[376] The Hanbali School of Islam, which governs Saudi Arabian legal matters, interprets this to mean that the King can grant oil concessions on behalf of his people, who own the resources.[377] These rights must be exercised bona fide for the benefit of the community and must fulfil the overarching proviso that any actions or laws are compliant with the scriptures of Islam.

The only exception to this rule, with respect to private property, is the limited instance in which the state may exert a right over an area of land for the common benefit of society as a whole, so long as fair compensation is provided to the proprietor.[378] In this sense, Islamic law perceives that compensation for overdue payments falls within the prohibition of riba, which means that foreign investors have developed clauses to provide for liquidated damages in situations where delays have arisen.[379] It is proposed that the adoption of clauses for liquidated damages reflect a legal transplant from the Common Law of Contract.[380] In accordance with the doctrine of English Common Law, liquidated damages represent a genuine pre-estimate of the loss, or particular classes of loss, at the moment that the contract was agreed.[381] This system can be contrasted with penalty clauses, which are illegal and therefore void. It could also be suggested that as they are a threat intended to deter non-compliance, penalties are akin to riba and therefore forbidden as un-Islamic.

Saudi Arabia has no civil or commercial code, instead embodying its rules of contract in Sharia principles that have been interpreted by Hanbali scholars. This means that in order to conform to Sharia, contacts must contain the following at the time of agreement: a subject matter, realistic performance, lawful objectives and performance, and clearly determined description, quality, and value. When examining contract law from Sharia sources, the principal object of the Islamic law of obligations precludes unjust enrichment (riba) and speculative transactions (as they often fail for uncertainty) and seeks to ensure equality of bargaining power between the parties. These three traditional principles bear some degree

[376] According to the Hanbali and Maliki scholars. This contrasts with the Shafi and Hanafi schools, who state that mineral ownership follows the guidelines in: E Kempson and C Whyley, Extortionate Credit in the UK (Financial Services Authority, 2000). The rules for proprietorship of land are similar to the Common law principle, see Bunter (n 236).
[377] Walied El Malik, Mineral Investment under Shari 'a Law (Graham & Trotman 1993).
[378] Alkahtani (n 21) 186
[379] Al-Samaan (n 125). 57-58
[380] AN Hatzis, 'Having the cake and eating it too: efficient penalty clauses in Common and Civil contract law' (2002) 22(4) International Review of Law and Economics 381
[381] Peter Benjamin, 'Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law' (1960) 9(4) International and Comparative Law Quarterly 600.

of resemblance to more recent statutory provisions that have sought to rebalance the English Common Law of Contract. For instance, the Consumer Credit Act (1974) prohibits a perspective of unjust enrichment, by forbidding 'extortionate credit bargains'[382] and the Common Law rules against 'economic duress'.[383] With reference to the second Islamic precept, which requires the preclusion of speculative contracts, English contract law has also made these kinds of 'exploitation clauses'[384] illegal. Finally, in comparison, the principle of equality of bargaining power is a longstanding focus of legal draftsmen[385] and academics[386] in Common Law systems, as it is in the law of Islamic contracts. Regarding other rules of contract, Sharia law shares the Western legal recognition of consideration (the price for the promise) existing in forms other than money. For example, the English Common Law of Contract perceives valid consideration through the traditional alternatives of 'horse, hawk or robe'.[387] However, Rayner[388] notes an important difference between Sharia and Western perspectives on consideration, which manifests itself in the Islamic prohibition against uncertainty. This principle precludes prices from being fixed at a later date, forbidding such actions as pegging a price against a future market figure, even when the method of determination is expressed in the contract.

The Islamic requirement for certainty may appear to be threatened by the fact that oil exploration and oil concession agreements do not have quantifiable outcomes. However, Alkahtani[389] suggests that while the Qur'an and Sunnah do not explicitly refer to mineral exploitation, the guiding principles of Islam can accommodate even the most complex oil agreements. These principles have evolved as secondary sources of Sharia law, the most relevant of which is qiyas (Section 3.2.2). This proposition is shared by others who refer to the influence of Hanbali jurists in the context of Saudi Arabian law.[390]

[382] Kempson and Whyley (n 395). 5
[383] John Adams and Roger Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 Modern Law Review 536
[384] Otto Kahn-Freund, The Institutions of Private Law (Routledge 1949) 38; Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts on Freedom to Contract' (1943) 43 Columbia Law Review 629
[385] Hans Erich Brandner and Peter Ulmer, 'Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28 Common Market Law Review 647
[386] Stephen Smith, 'In Defence of Substantive Unfairness' (1996) 112 Law Quarterly Review 138. 149-152
[387] James Ames, 'Two Theories of Consideration I: Unilateral Contracts' (1899) 12(8) Harvard Law Review 515.
[388] Susan Rayner, The Theory of Contracts in Islamic Law (1st edn, Springer 1991).
[389] Alkahtani (n 10) 71
[390] Imam Malik, (2006), Muwatta, translated by Rahimuddin, M., Kitab Bhavan, New Delhi, India. 325. Bunter, M., An Introduction to the Islamic (Shari'a) Law and its Effects on the Upstream Petroleum Sector, CEPMLP, University of Dundee, (2003), p. 17.

As to international law, Saudi Arabia accepts the fundamental principles of recognition in the Vienna Convention of the Law of Treaties (1969).[391] In essence, this provides that any law recognised by a nation must be performed in good faith.[392] This premise resonates with the Sharia principle of good faith, in terms of behaviour and respecting the rights of others. On this subject, the Qur'an states: 'O ye who believe, perform all contractual obligations'.[393] This ensures that the minimum legal standard for foreign investors is for them to be treated as if they were nationals,[394] which is a rule that is commonly recognised for foreign investors.[395]

These interpretations are clarified in the following section, which provides an overview of the Saudi legal system.

4.6 The Saudi legal system

The courts and judiciary in Saudi Arabia are responsible to either the Ministry of Justice or the Ministry of Commerce, in accordance with the directives issued by the King through royal decrees. A series of amendments were passed by the sovereign to reform the legal system; this research is concerned with an examination of the changes that were instigated prior to 2007. The following subsections deal successively with the responsibilities of the commerce and justice ministries.

4.6.1 Ministry of Commerce

The Ministry of Commerce is an extremely influential body in the Saudi Arabian legal context. Much of its power was bestowed upon the Ministry in response to the hearing of *Saudi Arabia v Arabian American Oil Company*,[396] which took place outside the borders of Saudi Arabia. In response to the trend for some businesses to seek dispute resolution outside Saudi Arabia, a committee and the Commercial Court was established in 1965 to encourage litigants to pursue their cases in the jurisdiction of Saudi Arabia.[397] As a result of this decision, the Ministry of Commerce was given the responsibility to supervise Saudi Arabia's

[391] Later expressly embodied in Articles 70 and 81 of the Saudi Constitution's General Provisions (1993)
[392] Munir Maniruzzaman, 'Choice of Law in International Contracts - Some Fundamental Conflict of Laws Issues' (1999) 16(4) Journal of International Abitration 141.
[393] Holy Qur'an, 5:1
[394] M Sornarajah, The International Law on Foreign Investment (2nd edn, CUP 2004). 266
[395] ibid
[396] Aramco Arbitration (Saudi Arabia v Arabian American Oil Company) (1963) 27 L.L.R. 117.
[397] Law of Companies, 1965 (Royal Decree No. (M/6) Dated 22/3/1385H (corresponding to 22/7/1965AD)

national forum for arbitration. The Commercial Court and National Arbitration Law are discussed here in turn.

4.6.1.1 Commercial Court

King Abdul Aziz created the Commercial Courts in 1932 (1350 H), through Royal Decree No. 32 on 1930. At its inception, the Commercial Court system included 132 articles (Articles 432 to 563) that were transplanted into Saudi Arabia. The roots of these laws could be traced to the Franco-Romano legacy of the Ottoman Empire. These articles included the formation and organisation of trade courts, their rules of advocacy, and assorted procedures for the regulation of commercial claims. The substantive and procedural regulation of the Commercial Court is governed by Article 432, which states:

> The trade court consists of a President and six members, three temporary and three permanent judges with salaries voted amongst those with complete experience in trade matters and known for their religion, uprightness and nobility as well as a seventh member aged no less than 30.

In 1954, the decision of the Council of Ministers No. 142 dated 27/10/1374 H abolished the Commercial Court. Although the reasons for this were not made explicit at the time, later research showed that with the Romano-French legacy of the Ottoman transplants had resulted in many judges believing that the Commercial Courts had strayed from the true path of Islam. These traditionally minded judges made continued demands for the abolition of this court and requested that its functions be reassigned to the Sharia courts. The pressure to abolish the Commercial Court peaked in the early-mid 1950s, after a fatwa by the senior scholars,[398] which stated: 'As for the laws, if any of them exist in the Hejaz, they should be removed immediately, and it should only be governed by the pure law of the Sharia'. Eventually, the government acquiesced to their demands in 1954.

When the Commercial Court was abolished, the judicial system did not work as the Sharia judges had envisaged, with the majority of companies and traders initially going to the Sharia court. These cases were considered in accordance with Sharia law, because the judges were wary of applying the Ottoman-based regulations of the former commercial court. These judges feared that the legacy of the Commercial Court would conflict with the Saudi Arabian constitutional foundations in the primary sources of Islamic law. Therefore, the Sharia courts

[398] This fatwa was issued in to February 11, 1928 (Shaaban 1345 AH). Hassan Al Fakhaani (1982) (The Modern Encyclopaedia of the Kingdom of Saudi Arabia, The Arabic Daar for Encyclopaedias, Part 3, Cairo.

dealt with all disputes according to the provisions of the fundamental prohibitions and permissions of Sharia, as Islam does not distinguish between commercial and civil work.[399]

However, following the abolition of the Commercial Court, problems arose in the registration of patents, with disputes arising both in technical fields and in the ordinary courts. It has been suggested that the Sharia courts did not consider commercial matters because the Islamic judges lacked experience in this type of dispute. Furthermore, as Saudi Arabia became an increasingly significant member of the international business and financial community, more numerous and complex matters relating to intellectual property rights arose. During the 1960s, these challenges led King Faisal to transplant the Egyptian code, with its Romano-French foundations, in order to protect intellectual property rights and ensure the continued commercial operation of the Kingdom.[400] However, the rules were regularly flouted, which threatened Saudi Arabia's reputation as a global trading force. In response to this behaviour, the Ministry of Commerce[401] requested that the Council of Ministers recognise the legality of patent protection and impose penalties for the violation of the patent registration of system in the absence of any other competent authority.[402] Accordingly, the Council of Ministers issued the following decision: 'The Commercial Court shall be vested in the Ministry of Trade and shall apply the penalty to the violators if their guilt is confirmed'.[403]

The Ministry issued the Decision, number 227, on 1962 (25/1/1382 H), to establish a new judicial body which would be called the Settling of Trade Disputes Authority (Commercial Court). This new judicial body bore distinct similarities to the trade courts that King Abdul Aziz originally established in 1932, as both dispute resolution forums were underpinned by articles that originated from Romano-French codes. The enduring nature of the trade courts that King Faisal established may be at least partially explicable by the fact that the Egyptian legal rules were more appropriate to the Saudi Arabian context than the Ottoman system used by the preceding courts. The Egyptian model represented a transposition[404] that

[399] M Al-Sheikh, 'The numerousness of commercial judicial committees in Saudi Arabia (Results, reasons, solutions)' (1999) 21 (37) Journal of Law
[400] Royal Decree No. (M/6) dated 22/03/1385 H. (1965) .Baamir (n 16) 119.
[401] Ministry of commerce's speech number 388 dated 1960 (15/3/1380 H) It is worth mentioning that the ministry of commerce has established under the decision of the council of ministers number 66 dated 1954 (6/4/1374 H) ie before the cancellation of the court of trade by 7 months.
[402] These punishments range from imprisonment of no more than 1 year to a fine of no more than 50000 Riyals. Refer to chapter 8 of the Saudi law of trade signs issued under the royal decree number M/5 dated 4/5/1404 H where the old law of patent registration was cancelled and issued under the high decree number (8762) dated 1939 (28/7/1358) trade systems group. Ministry of Commerce, 1989 (1409) page 139 and what follows.
[403] Decision of the council of ministers number 228 dated 1960 (2/6/1380 H)
[404] Esin Örücü, 'Law as Transposition' (2002) 51(2) International & Comparative Law Quarterly 203

harmonised Romano-French law and Islam. This legal transplant project was undertaken by Alsmarmorh,[405] leading to the creation of the Trade Court in 1955.

This court was given jurisdiction over commercial matters. Its organisation and specialisation was then formulated according to Article 443,[406] which determines its role as follows:

a) All that occurs between traders and those who have a business relationship with traders and all disputes arising from solely trade issues;
b) Cases resulting from financial exchange;
c) Disputes between ship owners;
d) Disputes arising from disagreements in contracts as well as financial guarantees specific to trade issues;
e) Cases that occur between business partners... in companies of all kinds, as well as between traders and money exchangers... and all who have a relationship with them;
f) Exercise and ownership of intellectual property rights (patents).

Article 444 added the specialisation of the Trade Courts to deal with each claim that involves a special order from the King. Such power is exceptional in the Kingdom, having manifested itself most notably in *Saudi Arabia v Arabian American Oil Company*,[407] when the government of Saudi Arabia took the decision to have its case heard outside the Kingdom.

4.6.1.2 National Arbitration Law

The form of arbitration in Saudi Arabia (sometimes referred to as 'conciliation law'[408]), is unspecific and relies on the precepts of Islam. It follows the advice of the Qur'an, which recommends conciliation as good practice in the settlement of disputes generally, stating: 'If a person forgives and makes conciliation, his reward is due from Allah, as Allah loves conciliators.'[409] It follows that arbitration must be permissible, except in circumstances where it entails un-Islamic practices, which are forbidden by the Hanbali scholars.[410] This has led Collier and Lowe[411] to claim that the existence of commercial arbitration predates the establishment of the courts. Indeed, this historical form of dispute resolution enjoyed a

[405] Nabil Saleh, 'Civil Codes of Arab Countries: The Sanhuri Codes' (1993) 8 Arab Law Quarterly 161.
[406] Mohammed Al-Jaber, Saudi Commercial Law (Al-Qanūn al-Tijārī al-Saudi) (Al-Dār al-Wataniah 1987) 18. Mohamed Al-Sheikh. (1977). The numerousness of commercial judicial committees in Saudi Arabia; (Results, reasons, solutions) 5.
[407] Saudi Arabia v Arabian American Oil Company.
[408] Baamir (n 16) 192-194
[409] Holy Qur'an 42:40
[410] I Alhamoud, 'Conciliation in Commercial Disputes and Its Applications'. (Conference on Arbitration and Conciliation, Taif, Saudi Arabia, 2004).
[411] J Collier and V Lowe, The Settlement of Disputes in International Law (Oxford University Press, 2000). 45

revival during the 1970s for two main reasons: the economic resurgence of Saudi Arabia and its disappointment with the outcome of *Saudi Arabia v Arabian American Oil Company*.[412]

In an attempt to deal with the increase in commercial disputes, Saudi Arabia enacted the Statutes of the Saudi Commercial Board ('SRCB Arbitration') in 1971.[413] However, a paradox exists in that these arbitral awards are recognised in Saudi Arabia only if they comply with its national laws.[414] In effect, this means that the very reason for their establishment, namely to prevent cases from being heard overseas in order to avoid the constraints of Sharia, is undermined by the application of Sharia principles in arbitral awards.

Disputes between Saudi Arabian nationals involving conventional (i.e. non-Sharia) banking practice can be heard within the independent arbitration system in Saudi Arabia. However, it is again important to note that no arbitral award that conflicts with Sharia law will be enforced. This means that in a situation where a litigant appeals to a Sharia court to rehear the case, any advantages of speed, lower cost, or privacy that are normally associated with arbitration are undermined by the more convoluted process of challenging or ratifying the arbitral award in the traditional courts.

Ultimately, it has been suggested that the overall quality of Saudi Arabian arbitration is relatively poor, given the shortage of arbitrators with the requisite experience or specialised knowledge necessary to hear commercial matters.[415] The basis for this proposition is that the Saudi Arabian High Institution of the Judiciary comprises judges whose education is grounded in classical Sharia treaties and informed by the decisions of scholars that are formulated upon outdated concepts, some of which can be traced to centuries prior to the advent of contemporary business practices. For this reason, Baamir suggests that qualifying as a judge should require the candidate to have a Sharia degree and '[some hidden requirements that are sought by] the old guard'.[416] In this sense, the traditional school of thought may even be perceived as obstructing any amendments of classical Sharia works, leading to a widening gulf between the reality of commercial life and the application of Sharia in Saudi Arabian courts and tribunals.

[412] Saudi Arabia v Arabian American Oil Company (n 108)
[413] No 32 of 15 Muhrram, 1350 H (1971). Later, Arbitration Regulation and Implementation Rules Royal Decree M46 (K p 124 98) (1983)
[414] Ibid
[415] Ibid 233
[416] ibid

4.6.2 Ministry of Justice

The Ministry of Justice is composed of two independent authorities, namely the general and administrative judicial authorities. This Ministry and its courts have not experienced legal transplants and therefore are not a focus of this thesis.

The Supreme Judicial Council then supervises and exerts general judicial authority over the Court of First Instance and the Court of Second Instance. The Board of Grievances (*Diwan Almazalim*) is independent of the Supreme Judicial Council, whilst remaining under the Ministry of Justice.

4.7 The courts

The structure of the courts has led to uncertainty for many litigants in those banking disputes that are heard before Saudi Arabian courts. The confusing web of dispute resolution bodies has resulted in a lack of unified rules of procedure or substantive legal guidelines and the creation of widening disparities among the decisions made by the various courts.

Given that the Ministry of Commerce and the Ministry of Justice are responsible for their respective courts, it is somewhat understandable that differing rules exist within each Ministry, although this should be rectified by clear universal guidelines. However, there is evidence that each court also has its own processes within these ministerial divisions. The result is that litigants become mired in conflicting and confusing rules of procedure. The failure to ensure unity and a coherent message across organisation extends to the substantive decisions that are made by individual courts, which is made somewhat worse by the conflict between the application of strict Islam in the Sharia courts and the more commercial approach of the trade courts.

The conflicting operation of these numerous judicial authorities has resulted in disrespect for the courts and in repercussions for the economy of the KSA, as explained in the following subsections.

4.7.1 Disrespect for the courts

Prospective litigants often harbour suspicion towards the independence of the courts, because the ultimate judicial decisions are seen to be controlled by the Minister of Commerce or the Minister of Justice. These ministers are answerable to the King and can therefore be influenced by the partisan elites operating within that rarefied arena.

Furthermore, doubts are harboured as to the independence of committees, including the Saudi Arabian Banking Disputes Committee within SAMA and the re-established Commercial/Trade Court of 1962, with the result that their decisions are often regarded with scepticism. This mistrust can even exacerbate the issue, causing the gap between Sharia courts and these committees to increase. In this case, the misgivings of the litigants can be attributed to these committees operating as merely administrative authorities, with no legal power over decisions. Consequently, many litigants prefer to turn to Sharia courts, seeing them not only as more reliable, but also as more capable of implementing decisions.

4.7.2 The impact of banking and commercial cases on the national economy

The diverse range of judicial forums available invariably results in conflicting and contradictory rulings. Frequently, the cases that are presented to judicial business committees are decided according to the laws of business. In contrast, other claims on the same topic may be presented to religious courts and are therefore subject to rulings according to Islamic law, rather than following business regulations. This is problematic, as these Sharia courts do not generally take into consideration the distinctions between commercial and other types of conflict.[417]

An important difference between the two approaches is that trade courts typically take a shorter time to deal with commercial matters than do the Sharia courts. Bodies like the Banking Disputes Committee and the Trade Court often reach decisions more swiftly than Sharia courts because they do not spend time ruminating upon distinctions concerning whether a case falls within the commercial or civil categories. However, as these committees do not exercise any judicial authority, any of their decisions can be overruled by the Sharia courts, which are in turn subservient to the Ministry of Justice. This negates much of the potential time-saving advantages offered by these bodies, irrespective of whether the matter should be classified as a banking matter or a commercial matter, because a dissatisfied litigant can always refer the case to a Sharia court. The involvement of the Sharia courts in these legal challenges brings one back the associated problems of delay, confusion and a focus on un-Islamic perspectives.

One of the most important reasons for having business committees is that religious courts reject those regulations that are not based upon the tenets of Islam. However, many of the complex commercial and banking matters in the modern world either did not exist or were

[417] In Saudi Arabia, there is no distinction between civil and criminal law, or even within these classifications. Instead, Saudi courts consider matters as being either commercial or 'civil'.

not discussed by the Prophet (pbuh) or his advisors. Therefore, Sharia courts avoid those regulations upon which Islamic sources are silent. This can be exacerbated by the discrete operations of many courts, irrespective of whether or not a decision concerns matters that are not specifically permitted or prohibited in Islam. This discretion regarding the perception and interpretation of unformulated issues raises problems stemming from the multiplicity of national laws, many of which are in contradiction.

A great deal of the confusion in Saudi Arabian law stems from the ensuing removal of business disputes from the ambit of Sharia legal judgements and the complicated processes by which cases are allocated to courts and committees. Many litigants therefore struggle to find the correct forum to file their particular commercial or financial dispute. These decisions are further complicated by the fact that the Saudi Arabian judicial structure accords supremacy to Sharia law.

This situation is made even worse by the multiplicity of judges, which in turn has caused confusion among members of the national executive when they are called to implement the decisions of these courts and committees. Given that the majority of the executive branches lack suitably qualified personnel or sufficiently robust systems of judicial precedent, the resultant difficulties are almost inevitable. The confusion between and within the various judicial committees and their plethora of different procedures, as well as the dissonance regarding the execution of decrees, serves to limit the rights and duties of all parties. Furthermore, litigants tend to suspect that decision-makers are less than transparent, with the basis for verdicts often depending on which particular school of thought an individual judge supports.

4.7.3 Summary of Saudi Arabia's Sharia court system

The Sharia courts form a four-tier structure over which the King presides as the final arbiter of appeal. The King is also empowered to grant pardons. However, given that each committee is chaired by a representative of the Ministry of Commerce and that appeals are heard by the same Ministry, the independence of these forums is questionable. Effectively, the government still wields a great deal of influence over the resolution of commercial disputes.[418]

[418] The Commercial Office of the Royal Embassy of Saudi Arabia in Washington, D.C. (see appendix II for address) mediates commercial disputes between Saudi and American companies only when both parties are willing to reach an amicable out-of-court compromise.

The driving force behind the role of the Ministry of Commerce presiding over non-Sharia courts was the procedure and judgment in *Saudi Arabia v Arabian American Oil Company*,[419] which was heard outside the Kingdom. The outcome of this particular case heralded a trend for filing commercial, company and banking disputes outside the Kingdom. This encouraged the Saudi Arabian government to establish the Commercial Court and Commercial Paper Committee in 1965,[420] in an effort to encourage litigants to have their cases heard under Saudi Arabian jurisdiction. This decision increased the jurisdiction of the Ministry of Commerce when it was given responsibility for the supervision of Saudi Arabia's national forum for arbitration

These reforms embody the legal transplants of certain aspects of Western judicial systems into the Kingdom. Indeed, when they are fully implemented, the structure of Saudi Arabian courts will be similar to those of prominent Western systems, such as the Common Law jurisdiction of the United Kingdom. The overriding objective of the reforms is to simplify and clarify the jurisdictions of the courts, which may result in the development of greater specialisation among members of the judiciary. This might then introduce higher levels of certainty into the dispute resolution process in Saudi Arabia. However, given that the Constitution of the Kingdom still explicitly requires legal cases to be interpreted through Sharia rulings, the concept of reform does not necessarily comply with all aspects of international law and Western legal perspectives.

To summarise the modes of dispute resolution that are available, comparisons indicate that both the Sharia and the more commercially-grounded trade courts are governed by the strict Sharia system of control that is intrinsic to the Saudi Arabian government and the sovereign. The consequence of this is that Saudi Arabia has no system of checks and balances to ensure the independence of its judiciary or its legal procedures. This means that international arbitration is frequently the preference of foreign parties in disputes with Saudi Arabian companies, rather than the option of having their cases heard within the Kingdom.

4.8 Conclusion

It is evident from the discussion in this chapter that without SAMA, which was founded on the advice of the United States delegation and with the support of the US government, Saudi Arabia would not have achieved the stability of its currency and would therefore not enjoy its current economic and social success. In other words, a major contribution to the wealth

[419] *Saudi Arabia v Arabian American Oil Company*
[420] Law of Companies, 1965 (Royal Decree No. M/6) Dated 22/3/1385H (corresponding to 22/7/1965AD)

of Saudi Arabia is its close relationship with the USA, which nurtured the establishment of its central banking system. This paved the way for Saudi Arabia to evolve into a 'financial giant',[421] through the growing international demand for oil and the steep increases in the petroleum price in the 1970s.

Although SAMA is strongly rooted in Islamic law, with the Qur'an providing the constitutional basis of Saudi Arabian law, the Kingdom has nevertheless accommodated a number of major transplants from the United States' central banking system. The framework within which domestic and international banking operates in Saudi Arabia has also been shaped and strengthened by transplants from the former Ottoman Empire and the Egyptian codes. These sources share a common origin, having evolved from Romano-French legal roots. The links with Roman Law and Common law are influential, given that American constitutional law results from transplants from the Roman roots of the French Constitution, although the system of judicial precedent has been adopted from England's Common Law.

Although SAMA was established as an independent central bank, along similar lines to that of the United States, its independence was effectively curbed by the BCL, which removed its power to license banks or sanction misbehaving commercial institutions. The basis of this reduction of authority is that the BCL represents the culmination of the Saudi Arabian government's attempt to meet the needs of its elite members, who are banking stakeholders seeking to protect their investments in commercial banks, as well as their government positions. These vested interests are underpinned by legal transplants that contributed to the BCL in 1966. The reforms that resulted from the enactment of this legislation placed SAMA firmly under the control of the government and the Ministry of Finance. It has been argued that these bodies used the BCL to bring about the 'Saudisation of foreign banks'.[422] This change of emphasis, from an independent central banking agency to one that is vulnerable to the authority of vested interests, indicates that legal transplants in the 1960s were used to manipulate Saudi Arabian banking law to control the foreign banks trading in the Kingdom, in addition to its own national financial institutions.

The overarching proposition emerging from this chapter is that Saudi Arabia is an absolute monarchy in which power is firmly retained by the sovereign and exercised through a network of members of the Royal Family and other favoured persons. These people are placed in influential posts in ministries and strategically important agencies, as well as

[421] Young (n 2) 115-122
[422] Meyer-Reumann (n 1) 209

through the courts, which are empowered to overturn the decisions of any other national dispute resolution tribunals by deeming awards to be un-Islamic. In addition to pervading the entire judicial system, these institutions include arbitration, conciliation and financial committee hearings. In focusing on legal transplants regarding banking, this chapter has established that the ruling elite of Saudi Arabia controls its commercial banks. This is likely to have occurred because the majority, or entirety, of the shares of these institutions is held within the sovereign's network.

The dominance of Sharia law has also been shown to cause problems for banks, given that vested interests represent a significant source of profit to these bodies. Therefore, both foreign and Saudi Arabian banks tend to operate corporations that are registered outside Saudi Arabia, which enables them to avoid prohibitions under Sharia law, most notably that against riba. This option to operate in Saudi Arabia as a foreign bank that is governed overseas is strengthened with legal drafting, with the ensuing documents expressing that the governing law, seat of dispute resolution and the state in which the award will be performed may be a named jurisdiction other than Saudi Arabia.

Turning to the effects of the decision in *Saudi Arabia v Arabian American Oil Company*, the tribunal held that the primacy of the 1933 Concession was supported by the fundamental principles of international law and the national laws of 'most civilised states'. This reasoning culminated in the decision being made for the arbitration to be governed by French and Swiss law, which concurred with previous decisions by the permanent Court of International Justice in 1926.[423] In terms of international arbitral decisions that affect businesses in Saudi Arabia, these decisions constitute legal transplants. In the context of arbitration or judicial decisions that are made internally or externally, any form that affects Saudi Arabian commercial banking necessarily represents a form of legal transplant. In practice, this is a fact irrespective of whether the transplants are applied in total or whether they have been amended to comply with Sharia law.

These reforms embody legal transplants of elements of Western judicial systems into the Kingdom. When they are fully implemented, the structure of the courts will bear similarities to those of Western systems, such as those of the English Common Law. However, the overriding objectives of these judicial reforms have been to simplify and clarify the jurisdictions of the courts and to enable the development of specialised judges and arbitrators to bring greater certainty into Saudi Arabia's dispute resolution system. However, as the

[423] In 25 May, 1926.

Constitution requires legal cases to be interpreted through Sharia rulings, the concept of reform does not resonate with international investors, international law or Western legal perspectives. Moreover, the stated intentions underlying the reforms are further undermined by the fact that judges continue to be selected by virtue of their Islamic scholarship and other subliminal criteria, rather than being based on their commercial, legal, or practical experience.

In summarising the modes of dispute resolution that are available, comparisons between the Sharia courts and more recent trade courts suggest that both are under the influence of the government and the sovereign, although Sharia courts have a religious perspective and trade courts have a more practical emphasis.

In summary, the fact that Saudi Arabia has no checks and balances to ensure the independence of its judiciary or legal procedures results in international arbitration frequently being the preferred resolution option for foreign parties to disputes that arise in Saudi Arabia. The evidence of this research suggests that despite Islam supporting certainty as a prerequisite for accepted practice, the Saudi judicial system has been hampered by the attempts of the elite to protect its own interests and the ongoing quest of traditional Islamic scholars to thwart those who wish to adopt Western practices. This embedded pattern of vested interests causes further problems because the central banking system and the commercial banks of Saudi Arabia have developed drafting and legal tactics to prevent contracts from being avoided on the grounds that the payment of interest is prohibited by Islam.

Chapter Five

Analysis

5.0 Introduction

This chapter draws together the threads of the arguments made in the preceding chapters of this thesis. The analysis provided here is classified according to the PESTEL model, which examines social systems in terms of politics, economics, social facets, technology, environment, and law.[1] Traditionally, social science is viewed as an analytic tool of the law that enhances the effectiveness of lawyers and hones the perceptions of the legal scholar.[2] This study uses the PESTEL framework to examine and analyse the social ramifications of the law pertaining to the transplantation of legal systems from one country to another. The six factors of the framework are also common to the aspects considered by legal transplant theorists, who formulate their frameworks based on consideration of facets other than law (as discussed in Chapter 2).

Even before the European legal transplant theorists of the twentieth century, early Arab schools of thought had made significant contributions to this field, as illustrated in the literature review in Chapter 2. Prior to the advent of Islam, this was preceded by ancient systems and theories, such as those proposed by Hammurabi.[3] Later, during the pre-eminence of Islam in the fourteenth century, extensive scholarship pertaining to legal transplants was conducted by the North African Arab historiographer and historian, Ibn Khaldun,[4] who has been widely proposed as the founder of the disciplines of sociology and demography. Centuries later, in Egypt in the 1940s, Al Sanhuri[5] was the first transplant expert to harmonise Western jurisprudence and laws with those of Islam.

In reinforcing the Arabic contribution to legal transplant theory and practice, Ibn Khaldun linked the law to social factors, stating that there could be ‘no society without law; no law

[1] Hartmut Bossel, Salomon Klaczko and Norbert Müller, Systems Theory in the Social Sciences (Bikhäuser 1976).
[2] John Monahan and Laurens Walker, Social Science in Law: Cases and Materials (Foundation Press 1990) 33.
[3] During the seventeenth century B.C.
[4] FM Hussein, Ibn Khaldun's Philosophy of Law: A Comparative Analytical Study of Ibn Khaldun's Legal Philosophy in Major Trends in the Philosophy of Law and the State (Dar Al Nahda Al Arabiya 1996). 66-69
[5] Nabil Saleh, ‘Civil Codes of Arab Countries: The Sanhuri Codes’ (1993) 8(2) Arab Law Quarterly 161.

without society'.[6] Despite broad agreement with the propositions of Ibn Khaldun, the French theorist Montesquieu,[7] in a treatise published during the eighteenth century, argues that laws are specific to the people that they govern and that any similarities between the laws of different nations are therefore merely coincidental.

It is a commonly held position that the development of any political system is accompanied by the establishment of legal tools to preserve its existence and historical legacy. This occurred in the case of the imposition of fascist laws in Germany, as the Nazis sought to manifest their philosophy and power through the creation of a new legal order. In return, America and its allies sought to support their capital project, which began formally with the adoption of the Truman Doctrine in 1947. This provision, named after the US President from 1945 to 1953, sought to combat the influence of communism by delivering military and economic support to those states that were friendly to America and at least potentially opposed to the principles of communism. The Doctrine is generally deemed to have been successful in preventing weaker, strategically important nations from succumbing to the influence of communism.[8] In this context, Watson's historical perspective states that social and economic factors are important, while scholars including Montesquieu and Kahn-Freund argue that politics and economics should be given proper consideration. These social facets are widened by Teubner's inclusion of religion. Another line of reasoning, which simultaneously supports and challenges the aforementioned theories, proposes the introduction of culture and linguistics into the legal transplant mixture. Both Legrand and Sacco refer to social factors, whilst adding an environmental dimension to the debate on legal transplants. Importantly, in the context of the present discussion, these theorists concur that skilled lawyers play a significant role in the success of transplants. Watson summarises this element of technical ability and experience as the skills of elite 'clever lawyers',[9] although it should be noted that the role played by the elite in legal transplants may also include those outside the legal profession. In the current study, the most prominent example of an expert recognised in other disciplines is the notable economist and central banker, Arthur Young, as well as the first two governors of the Saudi-Arabian Monetary Agency. Finally, regardless of the involvement of the elite, it is important to consider that the future functioning of a particular legal transplant is still typically highly dependent on the demand for the transplanted law and the process by which it is incorporated into the institutional

[6] Ie Ubi societas, ibi ius.
[7] Charles L Montesquieu, 'De l'Esprit des Lois' in Roger Caillois (tr), Oeuvres Completes (Gallimard 1951).
[8] Hans Kelsen, Pure Theory of Law (M Knight (tr), University of California Press 1960) 49
[9] Watson, A. (1995). From legal transplants to legal formants. The American Journal of Comparative Law, 43(3), 469

structure of the host country.[10] This final point is particularly germane in the context of Saudi Arabia, as will be illustrated by the PESTEL analysis below.

5.1 PESTEL Analysis

The legislation of a nation is intimately associated with its national character, as well as its social and political situation, as manifested through its particular ethics, traditions, and culture. In any discussion of legal processes in the Islamic world, it is therefore necessary to recognise the scope and universal applicability of Sharia Law. Among the most important functions of Sharia are to uphold the interests of Islam and humanity and to oppose evil, which it achieves through the protection of political, economic, social, legal, and environmental rights in all Sharia-compliant legislation.

In this study, the PESTEL model provides an appropriate, comprehensive way to examine these Islamic rights and the impact that their consideration has on the enactment of laws in any country that considers Islam as the source of its basic legislation, such as Saudi Arabia.

5.1.1 Politics

The commercial standards of Saudi Arabia have been profoundly affected by its trading history. As well as longstanding links with pilgrims travelling to Mecca, Saudi Arabia has strong trading histories with the United States, the United Kingdom and the Netherlands. The Dutch connection was forged with the establishment of Saudi Arabia's first bank, the Saudi Hollandi Bank, early in the twentieth century. Saudi Arabia also forged links with Britain in 1910, when the United Kingdom established formal relations with the future King Abdul Aziz after the discovery of oil. Later, the UK and the USA collaborated to support the fulfilment of Saudi Arabia's central banking aspirations. However, these bonds were significantly weakened after the Second World War, due to the inability of Britain to sustain its overseas interests in the aftermath of the conflict.

Prior to the Second World War, Britain had been a global power. With this in mind, on behalf of the King, Amir Faisal approached the United Kingdom government in 1932 to seek a loan in exchange for granting an oil concession to Britain in the east of Saudi Arabia. This proposition was refused by Sir Lancelot Oliphant on behalf of the British government,[11]

[10] Milhaupt, Curtis J., and Katharina Pistor. Law & capitalism: What corporate crises reveal about legal systems and economic development around the world. University of Chicago Press, 2008. 208

[11] Mark Hobbs, 'Gulf History Specialist, British Library, Emir Faisal's Diplomatic Mission and Britain's Reluctance to Invest in Saudi Oil in 1932' (Qatar Digital Library) <https://www.qdl.qa/en/emir-

because the survey that identified the presence of oil had not been performed by a British expert. The offer was also rejected on the basis that the United Kingdom considered Saudi Arabia to be of little international importance. Nevertheless, Saudi Arabia still attempted to form alliances with the United Kingdom and the United States during the 1940s. In 1942, the British discussed founding a central bank in Saudi Arabia and the admittance of the country into the sterling zone. However, these plans failed due to the insurmountable political differences between Winston Churchill and Abdul Aziz regarding the west of the Kingdom. This inability to establish common ground presented an opportunity for the United States to intercede and begin a period of collaboration with Saudi Arabia. This coincided with the rise in the international influence of America and the corresponding reduction in Britain's influence as a world power.

As a consequence of these events, the United States is the source of the most profound political influence on the legal transplants entering the Saudi Arabian system. The relationship between Saudi Arabia and the USA commenced during the 1930s and was later cemented by the close alliance between King Abdul Aziz and President Theodore Roosevelt. The legal transplant process commenced with the Point 4 Program, during which Saudi Arabia benefitted from the US policy of providing technical assistance and economic aid in an attempt to influence underdeveloped countries, rather than colonise them. Arthur Young was an extremely influential figure during this period. From 1951-1952, he served as the Director of the Point 4 Program in Saudi Arabia and was also was the driving force behind the development and establishment of SAMA in 1952, working closely with King Abdul Aziz to stabilise the Saudi Arabian currency. This collaboration between Saudi Arabia and the United States continued during the 1950s, with a succession of US central bankers governing SAMA.

As a centrally regulated Kingdom, the political impetus in Saudi Arabia centres on the ruling family, its heirs and the symbiotic interests that operate within the concentric circles of the elite classes. This ruling Islamic fiefdom was established in 1932, when Abdul Aziz formed the Saudi Arabian nation and devised a strategy to exploit its oil reserves, with the eventual goal of shaping Saudi Arabia into a 'financial giant'.[12] However, this ambition required the support of a nation that was more commercially and industrially competent than the tribal Arabian population of that era. The King therefore sought alliances with nations that could

faisal%e2%80%99s-diplomatic-mission-and-britain%e2%80%99s-reluctance-invest-saudi-oil-1932> accessed 7 July 2017.

[12] Arthur Young, Saudi Arabia: The Making of a Financial Giant (New York University Press 1983). 115-122

provide the skills and experience that would complement the potential offered by Saudi Arabia's natural resources. Over a period of twenty years, the King forged alliances with both the United States and the United Kingdom, ultimately culminating in an enduring, albeit occasionally discordant political alliance between Saudi Arabia and the United States. The relationship between the two nations was originally forged by the creation of an oil concession agreement on 29 May 1933. This agreement was signed between the Kingdom of Saudi Arabia and the Standard Oil Company of California. On 8 November 1933, a subsidiary company, California Arabian Standard Oil Company, was created in order to manage the concession.[13]

On the theoretical plane, Montesquieu's concept of law mirroring its political home[14] had a notable influence on the work of Kahn-Freund,[15] who agrees with the importance of assessing the socio-political context of legal transplants. Updating the mirror theory 'into his era', Kahn-Freund argues that the political climate and the impact of industrialisation had wrought unprecedented changes upon the political landscape since Montesquieu first proposed his theory in the eighteenth century. He argues that these effects were both national and international, although his work focuses on the growth of global trading during the mid-twentieth century.[16] Kahn-Freund has expanded his hypothesis to relate the evolution of communications to the development of common traits in global polity.

The importance of political influences on legal transplants is also recognised by Teubner,[17] who acknowledges the work of Watson yet considers it to be incomplete. The basis for this proposition is that research should reconsider the importance of politics in order to expand the focus of investigation beyond the legal elite propounded by Watson. In addition, he argues that Watson seems to be overly focused on the 'somewhat sterile alternative of cultural dependency versus legal insulation, of social context versus legal autonomy, an obsession which he shares with his opponents'. In response to this observation, Teubner suggests the use of 'legal irritant', rather than legal transplant, arguing that the latter is a misleading metaphor.[18]

[13] Abdulrhman Baamir, 'Saudi law and judicial practice in commercial and banking arbitration' (PhD Thesis, Brunel University 2009). 124
[14] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law. (1974) 37(1) Modern Law Review 1. 4-7
[15] ibid
[16] Alan Watson, Legal Transplants: An Approach to Comparative Law (University of Georgia Press 1974).
[17] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies' (1998) 61(1) Modern Law Review 11. 242
[18] ibid 243.

Whilst Legrand focuses on the study of culture in legal transplants, he does not expressly examine the role of politics. In contrast, in considering linguistics and culture, Sacco[19] compares the usage of language in a legal context with its political meaning, in terms of his 'scientific' [20] approach to comparative law.

The results of the empirical studies conducted by Örücü[21] support the notion that politics plays an important role in terms of both the choice of law to borrow and its successful establishment in the host. In this respect, her position is consistent with that of Watson, arguing that the perception that the borrower has of the political prestige of the donor will invariably influence the choice of law borrowed. Örücü[22] cautions against the involvement of politicians, noting that they invariably hold short-term views and therefore undermine legal transplants, which almost always require longer periods for effective adjustment and integration. In this, Örücü[23] supports Scruton,[24] who argues that the tendency for politicians to rush transplants typically results in unsuccessful 'cut and paste'[25] exercises, rather than the adoption of realistic perspectives that enable successful transposition of the law from donor to donee.

As noted above, it has been suggested that when any successful political system develops, it establishes legal tools in order to preserve its existence and historical legacy. As an example of this, Kelsen[26] argues that the fascist laws imposed by the Nazis served as a manifestation of their philosophy and power. This supports the analysis that Kahn-Freund[27] conducted of legal transplants in communist states, in which he found that environmental, socio-economic and cultural traits were inexorably linked with transplanting laws across socio-political boundaries. This resonates with the reference that Ibn Khaldun[28] made to the words of the Prophet (pbuh), who stipulated that people should follow the religion of their rulers. Interpretations of these words through the Islamic schools have been highly relevant in the interpretations of Sharia in many Islamic countries. In the context of Saudi Arabia, King Abdul Aziz and all of his sons after him have benefited from the edicts of the Hanbali School,

[19] Rodolfo Sacco, 'Legal formants: a dynamic approach to comparative law (Instalment I of II)' (1991) 39(1) Am. J Comp. L. 1
[20] ibid 389.
[21] Esin Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4(1) Electronic Journal of Comparative Law 10. 91.
[22] ibid 89
[23] ibid
[24] Roger Scruton, 'The Reform of Law in Eastern Europe' (1991) 1 Tilburg Foreign Law Review, Journal of Foreign and Comparative Law 8
[25] ibid
[26] Kelsen (n 8) 50-55
[27] Kahn-Freund (n 14). 7-11
[28] Hussein (n 4) 66-69

which give rulers full authority in political and economic work without the principle of belief. This perspective has enabled the development of Saudi Arabia through Aramco, SAMA, and other major organisations, on the basis that such development is purely economic and political. This approach has been able to persuade Hanbali scholars to give sufficient authority to the king, despite any objections that they might have.[29] The other consequence of this line of reasoning is that communist polity is perceived as being based on the imposition of a centrally planned economy by the legal elite of a country, whereas capitalism permits particular classes of individual to pursue their own interests, albeit within the framework provided by the ruling elite. The latter case applies to Saudi Arabia, as evident through the monopoly that the royal family holds over sovereign ministerial posts[30] and the fact that senior religious positions are limited to the family of Al-Sheikh.[31]

5.1.2 Economics

In a challenge to the mirror theory proposed by Montesquieu, Kahn-Freund introduces an economic facet to the transplant debate. As noted in the discussion earlier in this chapter, this line of reasoning is predicated upon an understanding that the mirror theory was formulated prior to industrialisation. Kahn-Freund argues that the transplant climate within the agrarian societies described in Montesquieu's era was utterly distinct from the modern context and therefore cannot be replicated in contemporary industrial communities. As a consequence, he is adamant that successful transplants must be preceded by a comprehensive analysis of the economic climates in which the laws will be embedded. In his analysis of the evolution of international trade, Kahn-Freund suggests that transplants between industrialised nations are typically successful because they share common conditions, such as employment and housing, despite potentially significant differences in detail.

In common with Watson, Kahn-Freund recognises the primacy of elite lawyers in effecting a legal transplant. He also underlines the importance of balancing the authority of the state with the balance of power between its actors. These actors include the influential religious classes, which is especially relevant and pertinent in the context of Saudi Arabia, where the power base is solidly in the hands of the Muslim scholars operating through the sovereign. Given their close relationship with the King, who rules the country and makes laws, any

[29] MA Cook, Commanding Right and Forbidding Wrong in Islamic Thought (CUP 2001)
[30] Examples of these posts include the Ministries of Defense, Interior, Foreign Affairs, and the National Guard.
[31] Examples of which include the Ministries of Justice, Presidency of the Senior Scientists, and Religious Schools.

assessment of legal transplants in Saudi Arabia must therefore consider these elite religious actors (i.e. Islamic scholars).

When oil was discovered in commercial quantities in the 1930s, Saudi Arabia immediately took the steps necessary to export this resource to the international market. This put the Kingdom on a social and economic trajectory from a tribal society to an international trading nation. However, it also created schisms between Islamic scholars, many of whom eschewed decadent Western principles, and the King, who perceived the need for Saudi Arabia to become a 'financial giant'.[32] These strains would continue throughout the rapid development of the Kingdom and into the modern era, with tension between the need for the ruling family to maintain strict Muslim standards, while simultaneously supporting and facilitating continued modernisation and globalisation. Thanks to the maintenance of this balance between development and adherence to Sharia boundaries, Saudi Arabian society enjoys improved living standards due to the economic gains that the country has made, while benefiting from corresponding developments in areas such as infrastructure and healthcare.

The profound and far-reaching developments that have occurred in Saudi Arabia, particularly in the wake of the successful exploitation of oil, have necessarily entailed the creation and enactment of numerous regulations. As the business sector has had the largest share of these commercial systems, many of these new regulations fall under the jurisdiction of the Ministry of Commerce. However, it should be noted that the regulations in this area were issued in a sequential manner, according to the need for such systems. Furthermore, these developments were typically accompanied by a corresponding need to establish a judicial committee to oversee each system and settle any disputes between conflicting parties in accordance with the provisions of the law. This approach can be seen in article 443, which fulfils the following specialised roles under the trade courts: to oversee all trade-related disputes that occur between traders, as well as any parties that enjoy a business relationship with said parties; and to govern the interactions and cases that arise from financial exchanges.

Between 1952 and 1957, Saudi Arabia worked solely with Aramco in exploiting its oil. During this period, SAMA was established to manage petroleum finances. This practice changed at the end of the 1950s, when the first commercial bank was licensed to operate under SAMA. The next significant milestone in the economic development of Saudi Arabia was the initial decision to peg the Saudi riyal to the United States dollar in 1960. Indeed, this

[32] Young (n 12) 115-122

aspect of the national financing framework continues into the modern era, with the KSA continuing to hold very large deposits in the United States Treasury. The economically motivated legal transplants that occurred in the 1960s and 1970s saw the formation of OPEC. The overriding objective in the formation of this consortium was to buttress the economic strength of its petroleum-producing members, including Saudi Arabia. The initial aim of protecting the petroleum profits of its members later extended to include oil industry nationalisation programmes, although Saudi Arabia did not nationalise Aramco during the period being studied in the current research.

Following the Islamic tenets which stipulate the need to benefit the community, public funds have provided the KSA with extensive development in terms of infrastructure, housing, education, and the health service.[33] This policy has been supported by the management of SAMA. Although SAMA was established as an independent central fiscal agency in 1952, the later enacting of the BCL in response to turmoil in the commercial banking sector effectively emasculated SAMA, because the distribution of public funds and regulation of commercial banks subsequently required the direct involvement of government departments and networks of agencies.[34] The effect of the BCL was ultimately to ensure the protection of the interests of the King and his elite networks, in terms of their political power and their shares in Saudi Arabia's commercial banks. The extent to which this arrangement has been beneficial to the national elite became evident in November 2017, when a newly formed anti-corruption committee ordered the arrest of a number of prominent, wealthy, and influential members of Saudi society, including business people, government ministers and even members of the royal family. That this level of corruption could flourish for such a protracted period demonstrates that the ruling class was insufficiently prepared to respond to the complex outcomes of the burgeoning petroleum wealth flowing into the country, despite, or perhaps because of, its growing wealth and influence. This situation ultimately reflects a lack of political will to enact and enforce sufficiently sophisticated competition law that would be able to discourage emergent conflicts of interest. It can be concluded that this may potentially have hindered, or at any rate slowed, the ability of Saudi Arabia to fulfil its potential as a political and economic global force.

[33] See general Scott M c Murray. (2011). Energy to the World: The Story of Saudi Aramco. Volume 1. Aramco Services Company.

[34] The Banking Control Law (BCL), instated on 11th June 1966 by Royal Decree No. Ml5, established the groundwork for banking regulations and has been subsequently.expanded multiple times. More information is available at: http://www.sama.gov.sa/en-US/BankingControl/Pages/AboutBankingControl.aspx

In terms of political intervention in the financial sector, Hassan[35] suggests that most GCC countries, with the exceptions of Saudi Arabia and Oman, typically rely on minimal political interference. As an example of this, Qatar and Dubai have established Financial Free Zones that utilise conventional rather than Islamic banking. The aim of these zones is to maximise profit through the use of conventional banking approaches in which investors are assured of a predetermined rate of interest, thus minimising restrictions in this domain while ensuring that traditional approaches to Islamic banking are followed for the remainder of the country. This means that business conducted inside the FFZs follows international norms, whereas business outside them follows the Sharia-compliant approach of sharing risks between the providers of capital (investors) and the users of funds.

5.1.3 Social

There is a strong link between the community and the law, as neither society nor law can exist without the other. This consideration is of paramount importance in any PESTEL analysis of Saudi Arabia. As established in Chapter 3, Saudi society is inextricably linked with Islam and therefore with the requirements of Sharia law. Islam is an all-pervading force in Saudi Arabia and profoundly influences every aspect of society, whether public or private, individual or communal. Experts such as Young have recognised and responded to the fact that the Saudi constitution requires strict compliance with the tenets of Islam. This has necessarily affected all legal transplants into the country, because no transplant may breach any principles of Sharia. Therefore, in preparing the harmonisation of United States banking law into Saudi Arabian law, Young stated the need for the first King to balance the diverse influences and contributions from the industrialised world of international trade with his ongoing allegiance to the scholars. This was an extremely delicate balance, because the brotherhood was, and remains, hostile to Western practices, which they perceive to be un-Islamic.

In recognition that the concept of banking was widely regarded as being an anathema to Islam, Young[36] avoided using 'Central Bank' in the title of the newly formed Saudi-Arabian Monetary Agency. This use of a linguistic device to encourage the public to accept the new organisation supports Legrand's identification of the importance of language in effecting

[35] Zulkifli B Hasan, 'Regulatory Framework of Sharia Governance System in Malaysia, GCC Countries and the UK' (2009) 3(2) Kyoto Bulletin of Islamic Area Studies. 83.
[36] Young (n 12) 60-61

legal transplants. However, his proposition that transplants are 'impossible' is clearly refuted by the success of SAMA and its enduring presence in the Saudi economic sector.

In a similar vein, Teubner perceives the law to be a social system and argues that successful transplantation therefore requires both donor and donee states to assess their respective levels of commercial and industrial advancement. The basis for the common position between Kahn-Freund and Teubner is that the transplanting parties should evaluate the extent to which there is divergence between their respective production regimes and the levels of state regulation, in order to prevent the erosion of the transplant by excessive 'legal irritat[ion]' should a particular transplant prove to be incompatible. This assessment of discrete social systems resonates with the basis of autopoiesis and complex adaptive systems theories, which hold that functionally different social spheres, such as law and economics, form new systems in the donee state during the abrasion. Kahn-Freund calls this process 'creative mistranslation'. Teubner suggests that the successful reception of a new law is unlikely when there are 'divergent production regimes',[37] including communications beyond the courtroom and legal community.

Nevertheless, the perspective championed by Legrand is valid, as illustrated by 'the adoption of usury' being forbidden by Islam. This position has resulted in a significant proportion of the public being hostile towards SAMA and Saudi scholars having issued fatwas against commercial banks. One significant example of this social entrenchment is that any Muslim employed by a commercial bank is forbidden to draw a salary, because it will be inherently tainted (i.e. *haram*). These prohibitions make it necessary for Muslims to confine themselves to those institutions following the Islamic approach to banking, in which profits and risks are shared between investors and entrepreneurs, in compliance with Sharia restrictions. This necessarily complicates any legal transplant predicated upon conventional banking expectations.

5.1.4 Technical

Technical considerations have been extremely important to the growth and development of Saudi Arabia, particularly in terms of those industries associated with the exploitation of oil. The importance of technical skills have also been explicitly recognised in Islamic law, with the Prophet (pbuh) stating: 'You should have better knowledge (of a technical skill) in the affairs of the world'. This Hadith provides clear and explicit recognition of the importance

[37] Teubner (n 17) 12

of technology in Islam and the corresponding need for Islamic law to ensure harmonisation of law and legal transplants to match developments in technology and ensure that nations do not succumb to stagnation.

In addition to the relevant technical skills of lawyers, economist and bankers, it is important to note that skilled linguists have played, and continue to play, an important role in the success of legal transplants in Saudi Arabia. As an example of this, the SAMA Charter (1952) was originally written in English before being translated into Arabic. This involved considerable skill and experience, with an understanding and mastery of the subtle nuances of Islam, rather than a verbatim translation of key words and phrases from one language into the other.

The involvement of experienced individuals who are recognised as authorities in their fields, illustrates the importance of having elites with technical expertise to facilitate and conduct legal transfers. This can be seen in classical examples in Saudi Arabia, such as the technical experts who facilitated the Kingdom's initial transplant programmes. For example, the delegation leader, Arthur Young, was a respected central banker and his team was composed of industry experts including Robert Kennedy, an experienced tax lawyer who established Saudi Arabia's system of excise duties. The specialist skills of this foreign team were complemented by the expertise of local experts, such as Sheik Abdulla Ibn Sulamin, the Saudi Minister of Finance during the 1950s, when SAMA was founded.

Teubner states that the law and its transplanting occurrences are complex social phenomena, in which both parties transfer parts of their law into the transplanted systems in the form of a complex new social system. This perception is rooted in the biological studies of Manturana and Varela,[38] who describe complex adaptive systems as applied to cells which mutate and renew in response to emergent stimuli. In terms of the current study, this adaptation can be seen in the gradual shift and evolution of opinion in response to the transplant of international banking systems. Initially, in the 1960s, Saudi clerics unanimously agreed that commercial banks were forbidden, because they were based on obtaining benefits through riba. There is ample support for this position in Islamic scripture, with texts stating that 'Allah has permitted trade and has forbidden interest'.[39] This position was echoed in the courts, as the Sharia Judges are invariably graduates of the Sharia schools,

[38] N Luhmann, 'The Paradoxy of Observing Systems' (1995) 31 Cultural Critique 37 <http://www.jstor.org/stable/1354444> accessed 22 May 2016

[39] Mohammed bin Ibrahim Al-Sheikh, Fatwas and messages of Sheikh Muhammad bin Ibrahim bin Abdul Latif Al-Sheikh. Collection, arrangement and investigation: Mohammed bin Abdul Rahman bin Qasim (part 7) (Government Press in Makkah 1978) 137

which are supervised by the Council of Senior Scholars and therefore echo the position of clerics.[40] At that time, the Supreme Council of Scholars did not have a coherent vision of an alternative Islamic banking system, despite having forbidden traditional commercial banks. When Mohammed Al-Faisal met with the Supreme Council to establish an Islamic bank, he noted that it lacked any members who had specialised in Islamic economics. Instead, it focused on the possibility of the exploitation of Islamic banks and the effect that this would have on the image of Islam, leading these kinds of banking ventures to fail.[41] Nevertheless, Al-Faisal was able to convey the importance of banking in international trade and therefore the development of the country, leading to the recognition that an alternative was required. The result was the development and adoption of the current Islamic banking system.

5.1.5 Environment

Unlike its neighbouring Middle-Eastern states, Saudi Arabia has never been colonised. Nevertheless, the Islamic roots of the law of Saudi Arabia have been supplemented by transplants from a wide range of jurisdictions, including laws with Romano-French roots from the Ottoman Empire and Egypt, and the banking rules of the United States and English law.

SAMA was first established in Jeddah, a major city on the coast of Saudi Arabia, because of its existing links with the former Ottoman Empire. Young also noted that coastal areas are typically more flexible and open to new initiatives than inland regions. This may be because ports habitually have better communications and trading alliances with other communities, making their populations generally more receptive to change and the integration of new ideas. Young also argued that Jeddah (formerly part of the Kingdom of Hejaz) was more liberal than Riyadh (formerly part of the more fundamentalist Islam Kingdom of Najd) and that it was expedient to introduce the concept of SAMA to a welcoming location where it could become accepted before exporting the Agency to more traditional regions of Saudi Arabia.

Örücü extends Watson's legal transplant theory through consideration of the environment in which legal transposition occurs. As discussed above, Örücü states the need for 'local tuning' to harmonise an incoming law into its new conditions. In the case of Saudi Arabia, general transferral of laws requires strict observance of Islamic law and a corresponding sensitivity

[40] A bin Manea, 'One of our scholars is Shaykh Muhammad ibn Ibrahim' (1987) 18.Portal of the General Presidency of Scholarly Research and Ifta 211
[41] KM Batarfi, Fayṣal, Muḥammad: Prince; Saudi Arabia; history; memoirs (Batarfi.2007) 40

to the tenets of the Islamic faith. The avoidance of the word 'bank' in the name of the Agency (Section 5.1.3) is an example of this, as is the fact that Young then consciously sealed the SAMA charter to ensure its explicit compliance with Islamic controls. This line of reasoning supports the general positions espoused by Kahn-Freund and Teubner, that the conditions of reality are dynamic rather than static. This means that the conditions for a transplant must be continually reviewed, because dependence on a fixed perspective that is inevitably subject to change will inevitably result in failure.

Nevertheless, Ewald and Chiba argue that migrating peoples transplant their laws as they travel. This is supported by a body of scholarship (e.g. Kyoslova, Chiba, Jupp) which states that common traits are unnecessary if transplants are concerned with private law. The inevitable embedding of a law into its host has also been recognised by Siedman, in his analysis of post-colonial states that have retained intact the institutions from their colonial legacies. An example of Siedman's 'neo-colonialism' continues in Malaysia.

It is evident that Legrand's proposition that legal transplants are impossible fails on the basis that successive legal transplants came from the original Hammurabi Code, which evolved into the Roman Civil Code. This Roman Code was then eventually promulgated throughout the European continent, the Middle East (e.g. Turkey, Egypt, and Saudi Arabia), the USA, and the constituent nations of the empires of many of these countries.

In terms of Islam, Sharia law has been transplanted and spread throughout the Muslim world since 1437 AD. The basic precepts of Islam stipulate an inclusive perspective, which has led to the adaptation of the primary sources of Sharia law in response to the local norms of the countries in which it is practiced. For example, Saudi Arabia follows its own strict versions of Islamic rules, whereas different interpretations have been taken by certain other GCC nations, as well as Egypt, Malaysia, and Turkey, although Turkey is now a secular state.

5.1.6 Legal

All legal transplants that are made into Saudi Arabia must comply with Islamic law, as the legal constitution of the Kingdom is the Qur'an. This can be seen in all official documentation, with the choice of law in both SAMA charters being unambiguously expressed as being 'under Islamic control', thus being explicitly governed by Sharia law. The ambit of Islamic law is such that while all laws that are established in Saudi Arabia must be allocated to specific courts, all of these courts must comply with Sharia law, as no decision is considered to be valid if it is held to conflict with Islam.

In turning to Watson's historical perspective on legal transplants, whilst Ewald discerns that Roman law is the core of modern legal systems, divergences should be assessed between Roman and Common Law jurisdictions.

Chapter 4 reviewed the influence of the French law in the court system of Saudi Arabia through elements of public and private law that include company laws, whereas the United States transplants focus on the 1950s. Although the involvement of the United States in Saudi Arabia began earlier in the twentieth century, the transplants of banking rules and their harmonisation with the requirements of Sharia occurred in the early 1950s, principally as a result of the actions of the delegation led by Young.[42] The involvement of the United Kingdom commenced in 1920, but waned in the wake of the Second World War.

In summary, the process of making a legal transplant into Saudi Arabia is potentially a highly complex issue, dependent on many interconnected variables. In the context of SAMA, the system was imposed by the political will of the King and the ruling class; however, the grounded, Westernised system of the United States still needed to comply fully with the tenets of Islam. The nuances of harmonising those banking concepts that are considered to be un-Islamic introduce a level of complexity and subtlety to all transfer processes. Örücü identifies the delicacy and ingenuity of making legal transplants in her classifications, i.e. 'smooth' and 'simple' to 'complex' and 'curdling' (Diagram 2.3, Section 2.2.6). In the context of Saudi Arabia, the long-term perspective regarding a ruler establishing a system like SAMA is founded on balancing complexity to avoid this 'curdling'. However, as Saudi Arabia is an autocratic monarchy, decisions are not dependent on public debate with a forum of elected representatives, meaning that the public is not party to the strategies or reasons for the Saudi government's policies, decisions or laws.

The SAMA Charter was modified by the Saudi Arabian BCL. Articles 8 and 9 of the Charter refer specifically to the prohibition of bank lending, which is considered contrary to the principles of Sharia Law. Article 10 forbids banks from participating in trading. It is possible to interpret this provision as forbidding the widely prevalent practice of *murabaha*,[43]

[42] Young (n 12) 52-54

[43] This term describes the Islamic version of a contract of sale. Under the terms of this agreement, a bank will purchase goods, which are then sold to their client at a price that incorporates a pre-agreed profit margin. The repayment of this contract can occur in a single transaction or on an instalment basis. Reference: Institute of Islamic Banking and Insurance, 'Murabaha on Shari'ah Ruling' <http://www.islamic-banking.com/murabaha_sruling.aspx > accessed 20 January 2017

although this interpretation has been questioned, as these transactions are integral to the functioning of Islamic finance.

Although these articles provide a regulatory basis for the opposition of anti-Islamic (haram) practices, SAMA has failed to ensure full compliance with Sharia Law. In fact, despite the focus on developing a maintaining a modern banking system in Saudi Arabia since the discovery of oil in the 1970s, SAMA has never issued a single official document on the subject of Islamic finance. This continues to be extremely frustrating for those wishing to establish Islamic banks, leading many Saudis to promote such businesses in other countries instead.

This discussion of the legal part of the PESTEL analysis continues in the next three subsections with consideration of the structure of Saudi law, gaps in the Islamic framework and international sources of legal transplants.

5.1.6.1 The structure of the law of Saudi Arabia

The structure of the law of Saudi Arabia from the perspective of banking law and legal transplants is illustrated Diagram 5.1. The numbered boxes in the diagram are elucidated in the text that follows.

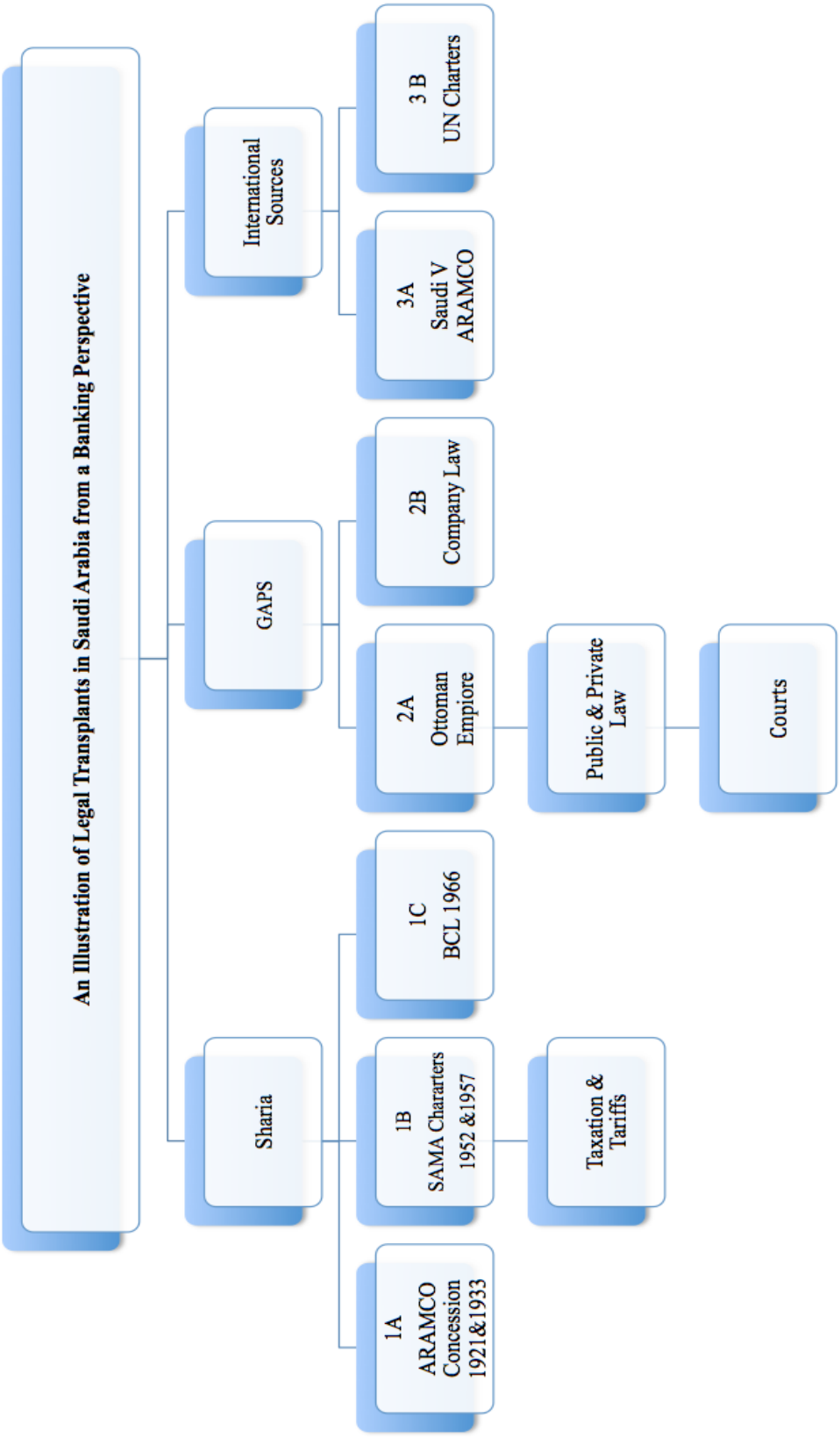

Diagram 5.1: An Illustration of legal transplants in Saudi Arabia from a banking perspective

The following discussion relating to the above diagram is organised according to the numbering structure: firstly, Islamic sources, then gaps filled by legal transplants, and finally international legal transplants.

Saudi Arabian legislation is promoted and made legal by royal decrees from the reigning monarch. From the perspective of this research, the three principal decrees are those relating to: (1A) Aramco concession agreements 1921 and 1933,[44] (1B) the SAMA charters of 1953 and 1957,[45] and (1C) BCL.[46] The Aramco agreements originated with British-Persian oil concessions. In contrast, the SAMA charters were founded on a US framework, which was adapted to ensure that no conflicts existed with Islam. This involved the exclusion of the two most notable breaches of Islamic law, interest and usury. The reception of the rules was also accommodated using Örücü's 'legal tuning', which was potentially facilitated by the cordiality of US-Saudi relations during this era, in accordance with Watson's perception of the ease of transplants. None of Teubner's 'legal irritants' were present in these instances. From the perspective of the law as part of a complex social system that adapts to external and internal forces, the creations of Saudi's oil industry and SAMA constitute valid examples of Teubner's metamorphosis through autopoiesis.

In contrast to the more harmonious process of legal transplants, during the following decade, the BCL contained elements of US and UK banking law that were transplanted in an attempt to mitigate the volatility in Saudi Arabia's banking environment. However, this effectively stripped SAMA of significant elements of independence, which were passed to the ruling elite via the Ministry of Finance. In this sense, the transplant is proposed as an example of Teubner's 'legal irritants'. The irritation factor was compounded by the missed opportunities to manage the conflicts of interest between the elite-owned commercial banks and simultaneously to exert authority over SAMA and its network of agencies and government departments. Despite the commanding position of the King, the royal family and others within this elite circle, SAMA had the right only to recommend the licensing, auditing, and regulation of banks, as the BCL moved the ultimate authority to the Ministry of Finance.

[44] Saudi Arabia v. Arabian American Oil Co. [1963] 27 I.L.R.117
[45] Young (n 11) 64-66
[46] The Banking Control Law (BCL), instated in 11th June 1966 by Royal Decree No. Ml5, established the groundwork for banking regulations. The BCL has been expanded multiple times since it was enacted. More information is available at: http://www.sama.gov.sa/en-US/BankingControl/Pages/AboutBankingControl.aspx

However, the company law that was transplanted in 1965,[47] which originated in Egyptian law, was similar to the earlier Ottoman transplants in that it had Romano-French sources.

5.1.6.2 Filling gaps in the Islamic framework

The common link in this grouping is that all of the legal systems involved were founded on Romano-French law. In the context of Saudi Arabia, the most important adoption from the legal structure of the Ottoman Empire (2A) was the system of Sharia courts, established by the Commercial Court Law (1931).[48] The other significant Romano-French transplant occurred some three decades later, with the Royal Decree (1965) that enacted Saudi Arabia's company law (2B) and established its international finance presence.[49]

The structure of Sharia courts bears certain similarities to that of the English Common Law courts. The first and second tiers of both the Sharia and English Common Law structures are courts of trial, with their jurisdiction being limited by financial sums in civil matters and the seriousness of offences in criminal cases. However, the English High Court hears appeals from the first-tier courts, including the Magistrates', County and Crown Courts.

The adoption of courts that are not fundamentally grounded in the religious findings of Islamic scholars represents official recognition in Saudi Arabia that inward investment and international confidence is predicated on the existence and functioning of efficient dispute resolution forums, presided over by judges with commercial experience. However, the recruitment of judges is still the remit of a closed community of traditional Islamic scholars, who are not subject to any published criteria or accountability concerning their selection. This adherence to the status quo suggests the continuation of the historical struggle between the success of Saudi Arabia in the context of international trade and the scholars' embedded mistrust of Western habits. Furthermore, the independence of these forums is still questionable, as each committee is chaired by a representative of the Ministry of Commerce and any decisions of the court must be ratified by the minister, with appeals being heard by the Ministry of Commerce and Investment. This demonstrates that the power of the elite

[47] Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 Arab Law Quarterly 272.
[48] Adapted from the Ottoman Code of Commercial Courts (1850), this statute was enacted in the Kingdom of Hejaz, prior to King Abdul Aziz unifying the kingdoms of Najd and Hejaz into the Kingdom of Saudi Arabia.
49 Royal Decree M/6 22/03/1385H; 22/03/1965

continues to be exercised, with the government wielding significant influence over the resolution of commercial disputes.[50]

5.1.6.3 International sources of legal transplants

The case of *Saudi Arabia v Arabian American Oil Company* (3A) had a significant effect on the attitude of the Kingdom and its acceptance of international dispute resolution. The arbitration declined to use the Saudi Arabian law as the governing law of the agreement, despite it being the explicitly stipulated choice of law for the Concessions. Instead, the tribunal utilised French and Swiss law, leaving Saudi Arabia to believe that its law had been excluded in favour of the laws of 'civilised' nations.[51] In effect, this implied that the Saudi Arabian system was unsuitable for the governing law of arbitration. Although the effect was to dilute Saudi Arabia's incentive to use arbitration, it nevertheless accepted the findings that were in favour of Aramco. In this way, the decision constituted a transplant of international private law.

However, the staunchly negative attitude of the Kingdom to arbitration was short lived, as the leaders of Saudi Arabia recognised that both international trade and inward investment could be compromised by a failure on its part to conform to globally recognised dispute resolution procedures, inside and outside its borders. Nevertheless, this policy remains subject to the overriding caveat that no decision that conflicts with Islamic principles will be ratified or implemented. Once again, the power of the elite in Saudi Arabia comes into play, with the decisions regarding whether judgements are Islamic being the remit of ministers, all of whom are ultimately answerable to the sovereign.

In addition to the acceptance of international dispute resolution structures, Saudi Arabia is a member of the UN, the World Bank and the WTO (3B). As a consequence of these memberships, the Kingdom has transplanted the resolutions of these bodies into its own laws. In terms of these transpositions, there are similarities between these international sources and Sharia, such as the World Bank, the UN and the Qur'an unanimously recognising the rights of a state to exercise sovereignty over the minerals within its borders.

[50] The Commercial Office of the Royal Embassy of Saudi Arabia in Washington, D.C. (see appendix II for address) mediates commercial disputes between Saudi and American companies, only when both parties are willing to reach an amicable out-of-court compromise.
[51] Abdulrahman Baamir, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD Thesis, Brunel University 2009). 130-136

5.2 Conclusion

The conclusions to be drawn from this analysis are grouped according to the supplementary research questions posed in the first chapter of this thesis

1. *How does the development of Islam include elements that were originally transplanted from other nations?*

From its inception, Islam has been an inclusive social framework that has absorbed those rules, customs and laws that do not conflict with the fundamental tenets laid down in the Qur'an and the Sunnah. This legacy of receptiveness to external sources of regulation continued throughout the twentieth century.

During the foundation and development of the KSA in the 1930s, 1940s, and 1950s, legal transplants were borrowed from the United States central banking model to form SAMA, as well as to stabilise the currency and formalise the transfer from a coinage system to the use of paper money. As the United States also made substantial loan agreements, provided guarantees and developed the petroleum sector of Saudi Arabia, its influence has evidently been more profound than the simple transplanting of banking rules. According to Lacey, this bilateral dependency is evidenced by Saudi Arabia and the USA being locked in a mutually dependent relationship.

2. *To what extent is Saudi Arabia receptive to legal transplants?*

Islam has an inclusive philosophy towards the adoption of other customs. Within this ethos, Islam has metamorphosed into a diverse range of different Muslim models in accordance to the particular state that is governed by Sharia law. As a consequence, Saudi Arabia accepts transplants only if they do not conflict with the fundamental Islamic sources of the Qur'an and Sunnah. However, other Islamic states, such as Bahrain, take a more flexible approach to accommodating certain banking practices, such as interest, which Saudi Arabia considers to be un-Islamic.

3. *How do transplants of Western banking law into Saudi Arabia harmonise with Islam?*

Western banking law is permitted in Saudi Arabia only if scholars or courts deem that it is not contrary to fundamental Islamic principles. In this vein, although SAMA was established on the model of US central banking, a complete prohibition was placed on the practice of charging interest. In fact, this prohibition is the reason why the word 'bank' never appeared

in the title, at the specific request of King Abdul Aziz. Similarly, commercial banks cannot practice un-Islamic activities because they are governed by SAMA, which is controlled in turn by the Ministry of Finance. In expanding this theme, even the courts and tribunals cannot ratify any judgement or award that the Ministry deems to be in conflict with Islamic/ Sharia law. The only way that prohibited activities and practices can be followed is in situations where the parties are registered outside the KSA and any award is also made outside the borders of Saudi Arabia.

From a positive viewpoint, the transplants have facilitated the Muslim tenet that monetary gains must be applied for the benefit of the community. These gains can be seen to have fulfilled this guiding principle through extensive national investment in establishing advanced systems for infrastructure, health, education and welfare of the Saudi people. In relation to legal transplant theory, these transplants refute Legrand's view that such legal integrations are impossible. Instead, the Saudi system supports Örücü's legal transpositions, Teubner's legal irritants, and Kahn-Freund's emphasis on interest groups in line with Watson's perspective of easy transplants. However, when focusing on Saudi Arabia as a recently established nation that was comprised of a primitive society of itinerant tribes only a century ago, it is possible to argue that the Saudi Arabian experience can be compared with a European agrarian society, given comparable lack of sophistication in modern terms. Therefore, while Montesquieu's mirror theory is generally viewed as inapplicable in the modern context, this thesis argues that the theory may still be relevant to describe the early emergence of the KSA and its construction by King Abdul Aziz to reflect the politics of Islam.

4. *How are these banking and other related rules transplanted?*

As noted above, legal transplants are generally introduced into Saudi Arabia by royal decrees that originate with the sovereign. In this sense, the elite line that controls the law extends directly from the King and royal family to the senior politicians, financiers and other authoritative figures who exert control across the key institutions of governance. In terms of banking, this elite body controls the courts and tribunals, SAMA, Aramco, and government departments, as well as holding majority shares in the commercial banks of Saudi Arabia. This elite therefore extends beyond Watson's elite group of 'clever lawyers' to include those groups and individuals that Kahn-Freund, Teubner and Örücü identify as wielding power, in accord with the views of Hoeflich discussed in Chapter 2.

5. *How does Saudi Arabia compare with other states with an Islamic history in terms of politics, economics, religion, and law?*
6. *How do Western transplants operate with the Islamic sources and guidelines that are woven into the fabric of Islam, in terms of governing the conduct of Islamic society and the lives of individual Muslims?*

Essentially, Saudi Arabia having developed as a sophisticated state, the way of life of its inhabitants continues to adhere to fundamentalist Islamic practices. This strict commitment to the primary sources of Sharia law governs the public and private lives of its citizens, as well as its external interactions as a 'financial giant'[52] and an influential member of the global trading community.

Other Islamic nations have adopted positions within Islam that are based on more relaxed perspectives on Sharia than Saudi Arabia. This is even the case with some GCC members, like Bahrain, which have banking zones that do not accord with Islamic banking rules. In contrast, Turkey has adopted a position that is entirely different from that of Saudi Arabia, as it has organised itself into a secular society. This means that Turkey is not constrained by Sharia finance and is positioned to play an effective role as a conduit between the Western and Middle-Eastern trading routes. Finally, Pakistan is mired in endemic corruption, with its decision to allow interest that is legally prohibited, enabling a policy of ongoing embezzlement by its privileged classes.

In summary, legal transplants into Saudi Arabia are controlled and manoeuvred by the elite in society, with the King as its centre. This approach is rooted in the foundations of Saudi Arabian society, with the enduring allegiance of the AlWahabia, ensuring that the all-encompassing social framework of Islam is not diluted by the adoption of Western laws and practices. This structure has remained strong while Saudi Arabia has developed to the extent that it now plays a significant role in globalisation, without succumbing to what the Hanbali scholars perceive as the weaknesses of Western society.

In light of the above analysis, the final chapter of this thesis now draws conclusions from the study and makes recommendations.

[52] Young (n 11) 115-122

Chapter Six

Conclusions and Recommendations

6.1 Conclusions

6.1.1 Theories of legal transplant

The literature review in Chapter 2 was predicated upon the existence of two polar theories of legal transplantation and the spectrum of opinion between these two positions. Watson considers that legal transplants are straightforward, as long as they are managed by the legal elite, whereas Legrand argues that transplants are never likely to be successful, especially if cultural differences exist between the donor state and the donee. This divergence of opinion may be partially explained by the eras in which their respective theories were promulgated. Watson first published his theory in the mid-1970s, at a time when globalisation was yet to become the subject of widespread academic debate. In contrast, Legrand wrote about the impossibility of legal transplants in 1997, when research into the factors influencing the growth of international business was prevalent.[1] The differences between the two decades reflect the growth of legal transplant practice during the 1990s. Significant research was undertaken during that period, focusing on important issues including the increasing adoption of EU law,[2] the collapse of the USSR (1990/1991),[3] and the efficacy of the initiatives of the World Bank.[4] As a consequence of these events, Legrand was able to rely upon evidence of the practice of legal transplants during an era when those transfers were rudimentary and often unsuccessful, as they lacked the refinement of later transfers informed by that decade.[5]

It is clear that Watson propounded his theory of legal transplant, first discussed by Frederik Parker Walton,[6] to describe the situation and variables at play in the twentieth century.

[1] For example, Betty Punnett and Oded Shenkar, Handbook for International Management Research (Blackwell Press 1995).
[2] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) Modern Law Review 1
[3] Ibid ; Esin Örücü, 'Law as Transposition' (2002) 51(2) International & Comparative Law Quarterly 205.
[4] G Edwards, 'Legal Transplants and Economics: The World Bank and Third World Economies in the 1980s – A Case Study of Jamaica, the Republic of Kenya and the Philippines' (PhD Thesis, University of London 2007).
[5] Esin Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4(1) Electronic Journal of Comparative Law 10.
[6] FP Walton, 'The Historical School of Jurisprudence and Transplantation of Law (1927) 9 Journal of Comparative Legislation and International Law, 183

Legrand criticises this theory, but without proposing measures for the effective resolution of his criticisms. Furthermore, while Legrand introduced the concept of culture into the debate, he fails to provide an effective definition of his use of the word or to suggest how this factor could be accommodated within legal transplants. Similarly, although Legrand notes the influence of language, he again fails to state how his concept of law as a rule might be affected by linguistic factors. In 1997, despite unequivocally stating that legal transplants were impossible, Legrand conceded that transplants might actually be possible under limited circumstances. However, these scenarios were arguably overly narrow and his propositions therefore failed to consider how legal transplants continued to operate successfully in contexts like Turkey and across the EU.

Kahn-Freund developed his perspective of legal transplants from the foundations of the mirror theory, which Montesquieu had proposed centuries earlier. Again, the era in which these theories were developed is significant, as the agrarian context of Montesquieu's theories was profoundly different from the industrial society that shaped the arguments of Kahn-Freund.[7] It is from this perspective that Kahn-Freund made comparative studies, such as comparisons of particular nations that had adopted EU law and how different ideologies (e.g. collective bargaining) could affect the transplantation of bodies of law. However, it is interesting to note that despite the differences in eras, both theories acknowledge the role of economic and politics for legal transplants.

In general, Sacco concurs with Legrand regarding the primacy of linguistics in comparative law and its transplants, although he prefers the expression 'legal formants'. In extending this theme, Sacco advocates that a scientific approach be utilised in ascertaining the dynamic perspective of legal meaning. Ultimately, however, he fails to ground his findings in verifiable research.

Edwards[8] undertook comparative jurisprudence within the programmes of the World Bank and concluded that the social context of a recipient-state is an important factor to consider. His criticism of these projects was primarily driven by the overall economic approach of the World Bank loans, which imposes law that is transferred from the donor to the donee without due consideration of the conditions of the indebted nation. This resonates with Teubner's model of legal irritants,[9] which stipulates that the laws of different nations cannot

[7] Kahn-Freund (n 2) 20-21
[8] Edwards (n 4) 20
[9] Teubner, Gunther. (1998). Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies. The Modern Law Review. 61. 11 - 32

automatically be assumed to fit together. In this vein, Teubner emphasises that legal concepts from the donor will not necessarily be subsumed smoothly into the donee's jurisprudence, which he supports with reference to the transplanting of EU laws into English law. In this example, a need arose to recognise and manage the doctrinal differences when the concept of good faith was introduced from the Roman law systems of continental Europe into the Common Law system of England.

In devising her legal transposition theory,[10] Örücü expanded Watson's theory to state the need for the adaptation of borrowed laws to the local environment, sensitising the donor's system to the needs of its host. She calls this process 'local tuning'.[11] This theory of the transposition of laws classifies the manifestations of transplanted laws into four distinct categories that describe how effectively the laws are integrated: smooth, simple, complex, and the least successful experience, which she refers to as 'curdling'.[12]

Essentially, the later branches of legal transplant theory concur with Watson's original theory and it is notable that the additions broadly represent criticisms (cf. Legrand), modifications, and additions.[13] Teubner offers an additional and less secular perspective to other legal transplant theories, with the introduction of social systems theory, which draws attention the significance of religion. This perspective is especially valuable in the context of the present thesis.

6.1.2 Legal transplants in Islam

Legal transplants form the bedrock of Islam, although they are formally referred to in different terms. These principles can be traced back to the words of the Prophet (pbuh), which were reviewed in Chapter 3.

In the context of Saudi Arabia, it is of particular importance to note that its foundations and all of its society is informed by the decision to adopt the Qur'an as its constitution. Three other primary sources are also subsumed into Saudi Arabian law, the four primary sources being the Qur'an, Sunnah, consensus, and anagogical reasoning. Among the derivative sources which were additionally introduced into Saudi Arabian law due to the structure of Islam, the most important are the revealed law preceding sharia, juristic discretion, the public interest, and local custom. The legal elite of Islam is represented by the group exercising the

[10] Örücü (n 3) 51
[11] Örücü (n 5) 91
[12] Örücü (n 3) 213
[13] Kahn-Freund (n 2); Örücü (n 3) 213; Teubner (n 9) 21-22.

aforesaid discretion, the schools of juristic thought. Each Islamic nation relies solely upon the interpretations of one particular School, which in the case of Saudi Arabia is the Hanbali School; it is thus the Hanbali elite which interprets and applies the law in the Kingdom.

These schools of jurisprudence are important, because the interaction between the religious doctrine and particular national environments alters in accordance with the stance of each school. For instance, Egypt and Iraq are governed by the Shafi School. When they make a legal decision, members of this group of scholars consider the local politics, culture and society in line with the strictness of their adherence to certain religious principles. The Hanbali School of Saudi Arabia takes a more liberal stance concerning some activities than the Shafi School, but it is stricter in terms of its requirements for religious observance.[14] This religious influence by the legal elite of Saudi scholars can be seen to operate in parallel with Watson's secular perspective, which holds that the success of legal transplants is largely dependent upon the influence of 'clever lawyers'.

The degree of success or failure of banking systems from an Islamic perspective has been examined in the comparative study in Chapter 3, which contrasts prominent examples of legal transplants in Islamic countries, and the focus on Saudi Arabia in Chapter 4. The comparison in Chapter 3 indicates that the relative success of legal transplants is largely dependent on the specific manner in which the transplant was applied. It is therefore suggested that successful legal transplants occur when the recipient gives proper consideration to the primacy of accommodating its religious requirements. Malaysia is a prominent example of this approach to ensuring successful legal transplantation, because of the robust research and planning that was undertaken to ensure the harmonious integration of foreign laws. According to the classification devised by Örücü, Malaysia's transplanting of laws was smooth and simple. It should also be noted that Malaysia complies with the example given by Örücü[15] of a voluntary reception of the transplant. From an Islamic perspective, Malaysia is a successful legal transplant, because neither the central nor the commercial banking institutions mix conventional funds (derived from riba) with those obtained from Islamic finances. Therefore, the basic rules of Islam are not contravened.

In contrast to the Malaysian experience, the legal transplant programme in Turkey was enforced following the military coup in 1960 which led to it become a secular state. In this new paradigm, the successful transposition was facilitated by Ataturk's exchange

[14] For instance, the Islamic observance of the Hajj. In Christianity, this would be comparable to keeping the Sabbath a day of prayer.
[15] Örücü (n 3) 213

programme,[16] in which cooperation between nations was characterised by the exchange of lawyers between Turkey and the donor states in an attempt to ensure local tuning.[17] The Turkish model also accommodated the recommendations from Teubner to minimise legal irritation in light of Kahn-Freund's observations concerning religious factors. The Turkish model sought to separate religion from statehood, while still permitting citizens to practice Islam in their private lives. These two experiences, the secular approach of Turkey and the religious approach of Malaysia, represent successful transplants that have given due attention to Islam in different ways.

In stark contrast, the Pakistani experience illustrates a failure in legal transplants from an Islamic perspective, despite their having a voluntary reception. This proposition is based on the fact that Pakistan was theoretically intended to establish interest-free banking in compliance with Islam. However, the reality is that conventional charging of interest was always permitted and even encouraged, because the role of religion was not seriously addressed. Indeed, it has even been suggested that Islamic banking and finance principles were ignored. The failure can also be partially attributed to the widespread corruption that pervades the highest levels of Pakistan's government and which filtered into commercial banks. These problems were compounded, according to the findings of Kahn and Bhatti, by a lack of professionalism in central banking, a lack of committee representatives from the government and a lack of training throughout the entire banking sector of Pakistan.

Finally, the comparative analysis in this thesis has shown that the other GCC member states have achieved partial success in terms of their legal transplants. Bahrain, Dubai and Qatar have managed their transplants through the creation of FFZs in which transplanted Western banking rules apply, while the remainder of their territories are governed by Sharia law. The outcome of this compromise is suggested as being a partially successful legal transplant, with the central banking system existing alongside Islamic transactions.

6.1.3 Saudi Arabia and legal transplants

In the fourth chapter, the focus of this research culminated in the analysis of legal transplants that have influenced banking in Saudi Arabia from the establishment of the Kingdom in 1932 to the death of King Faisal in 1974. This focal period includes the journey towards the establishment of SAMA in 1952 and the impacts of the passing of the BCL in 1966.

[16] ibid
[17] Örücü (n 5) 91

However, it should be noted that from its beginnings to the current day, Saudi Arabia has always been strongly Islamic, with the Qur'an acting as its legal constitution.

The three eras between 1932 and 1974 commenced with the progress of King Abdul Aziz's plan on three fronts: the initial coordination of the warring Bedouin tribes and the melding of the Kingdoms of Najd and Hejaz to the position where Saudi Arabia was formally recognised as a nation, the monarch's mission to exploit oil in commercial quantities, and the linked initiative to establish an internationally recognised central bank for the Kingdom. The second era was that of the legal transplant from the United States, which facilitated the first Charter for the establishment of SAMA. These developments led to Saudi Arabia becoming internationally significant as an oil exporter and as a financial centre. Following the death of King Abdul Aziz and the accession of King Saud in 1953, the latter built upon his predecessor's legacy to pass the Second SAMA Charter in 1957. During the reigns of both of these monarchs, the governors of SAMA were experienced US central bankers.

As noted above, the United States central banking model was transplanted in 1952 and led to the formation of the SAMA Charter. This body of rules also later facilitated the establishment of SAMA in 1957. This harmonisation of United States banking systems into Saudi Arabia was supported by ongoing consultations between King Abdul Aziz and the designated United States central banking expert, Arthur Young.[18] This cooperation, which was later completed by King Saud, reflected the reality that an operational banking system needed to accommodate Western banking within the constraints of Sharia.

King Faisal reigned from 1964 to 1975, when he was deposed. During this period, the governor of SAMA was Ali Anwar, a central banker from Pakistan rather than from the United States. It was during this period, in the early 1960s and following the Second Charter, that the reputation of the Saudi commercial banking sector became tarnished. These developments occurred in the wake of a spate of unpaid debts and allegations that the vested interests of the ruling elite, owners of large shares in the banks, were taking precedence over the interests of customers. As a consequence of this tumultuous period, the BCL was introduced in 1966, bringing a period of major reform and reorganisations that King Faisal introduced by means of royal decrees.[19] These changes profoundly affected banking in Saudi Arabia and effectively compromised the authority and independence of SAMA.

[18] Young (n 2) 28-30
[19] Royal Decree No. M/5 Dated 11.6.1966 (22.2.1386).

The following subsection summarises the assessment of the current state of legal transplants, as discussed in Chapter 4.

6.1.4 Influences of legal transplants in Saudi finance and banking

The influence of legal transplants in Saudi Arabia is of particular interest in the period from 1932 to 1974, which has been chosen as the focus of this study because it provides invaluable insights into the intertwining of the establishment of the KSA, the discovery of commercial quantities of oil, and the foundation and evolution of the Saudi banking system. Therefore, this research seeks to assess the ways in which legal transplants underpin the evolution both of SAMA, as the agency responsible for central financial control, and of the commercial banking sector in Saudi Arabia as a whole.

Despite the social and religious resistance to banking, Saudi Arabia's finances and legal regulation were fundamentally affected by legal transplants. This harmonisation between Islamic and Western laws commenced as early as 1932, with the adoption of the Franco-Ottoman codes that served to establish the Kingdom's first commercial courts. The King justified this adoption on the grounds of the harmonisation of Islamic-based rules, albeit conceding that these originated from an Islamic school of thought different from that of Saudi Arabia.

As in all legal contexts in Saudi Arabia, the ultimate source of legal regulation in central and commercial banking is the King. Within the hierarchy, the people of Saudi Arabia also prioritise the rulings and decisions of Islamic scholars, who issue fatwas to prohibit un-Islamic conduct and activities. One of these prohibitions relates to a core principle of banking, namely that of interest, which is banned under the Sharia prohibition against usury and riba. Consequently, traditional banks are considered to exist in conflict with the guiding principles of Shari'a and so no Islamic banks existed until 1990. Despite this widespread perception of banks and banking as being un-Islamic, with the corresponding avoidance of these conventional banks by the Saudi Arabian public, there exists the paradox that the national finances are governed by SAMA, which conforms to international banking norms.

The conflict between the views on one hand of Islamic scholars, who consider banking and usury to be un-Islamic, and of the other of the reality of the workings of SAMA following the transplant of banking systems from the United States created an unmanageable banking environment, because Saudi Arabian society continued to defer to the views of the scholars. In the earliest days of Islam, the Prophet Mohammed (pbuh) recognised the need for change

and flexibility in order to meet evolving economic circumstances. This basic concept provides for an inclusive social structure that can permit certain kinds of conduct, provided that they are not prohibited in the primary sources of Islam (the Qur'an or the Sunnah), as discussed in Chapter 3. However, the fact that different schools of Islam permit and prohibit different activities can lead to problems and contradictions. This obfuscation is often compounded when scholars disagree, which is integral to any comparison of the approaches to the concepts of Islamic finance in different nations. In Chapter 3 of this thesis, a comparison was drawn between Saudi Arabia, the GCC, Malaysia, Pakistan, and Turkey.

From a comparison of the banking models of these chosen nations, all of which share Islamic roots, an axis of typologies has emerged. At one end of the spectrum, Turkey has developed into a secular society that embraces the concepts of Western banking, including interest, and even the other GCC banking members have created methods to enable the accommodation of conventional banking. Saudi Arabia remains an exception to this rule. While the GCC countries have accommodated the fusion of Western and Islamic finances by means of the establishment of discrete banking zones, other options do exist, such as the approach followed in Malaysia, which retains its British colonial banking system.

As the commitment to Sharia has endured in Malaysia and the GCC member states, albeit in a less strict form, it is suggested that the Saudi Arabian banking system could amend its current approach, still strongly rooted in the 1950s. With the adoption of new legal transplants, many benefits could be reaped by Saudi Arabian society. This proposition could be facilitated through the assistance of specialists with experience in making legal transplants in the areas of banking and finance. This would also limit and even rectify the confusion that currently exists when cases are referred and appealed between dispute resolution bodies. This state of obfuscation, as pertaining to the complicated web of dispute resolution bodies, is addressed in the following section.

Chapter 4 focuses on the development of Saudi Arabia into an internationally significant member of the financial community. The beginning of this dramatic development can be traced to the establishment of SAMA in the 1950s, after which its role and influence continued to expand throughout the following two decades. The significant growth of such a relatively young country in comparison to the growth experienced by its global competitors is evidence of legal transplants harmonising with Western principles and with the effectiveness of the Saudi Arabian constitution, which embodies historical Islamic principles in its adoption of the Qur'an.

Saudi Arabia is an absolute monarchy and therefore has no republican or democratic model. This means that any law or financial product must be considered by official committees that operate directly under the auspices and supervision of the King before being permitted to enter the national structure. These committees principally consist of senior Sharia scholars and financial specialists. This fundamental control filtering down from the King percolates into the attitudes and powers of Saudi Arabia's courts. Perhaps as a consequence of this, the analysis of the sources of Saudi Arabian courts in Chapter 5 suggests that the national courts do not typically consider banking disputes on the basis that they are usurious manifestations that are inherently forbidden under all normal interpretations of Sharia. In this context, from the establishment of Saudi Arabia's courts in 1932, the Ministry of Commerce has exerted the control granted to it by the King to prevent banking cases from being heard. In fact, until the 1960s, the only forum from which aggrieved banking parties could seek redress was SAMA. It was only with the foundation of the Board of Grievances during the 1960s that the judiciary permitted banking cases to be heard in this court.

The first Commercial Court was established in 1932, from an Ottoman legal transplant, and was then abolished three decades later, in 1962. The result of this decision meant that banking disputes were remitted back to the Sharia courts. However, the Sharia judges followed the view of scholars that banking was un-Islamic, which invariably meant that litigants had no real means of redress. Although a form of commercial court was re-established in 1967, it did not have the same independence from Sharia, which seems to indicate that the government of the time did not genuinely support the establishment of a conventional commercial court. As a consequence of this limited support, both legal transplants to create commercial courts were only partially successful. Recommendations are made in Section 6.2 to address this issue.

The PESTEL analysis presented in Chapter 5 provided a conceptual lens through which to examine the rapid development of Saudi Arabia, from a disparate band of nomadic tribes to a modern, sophisticated state that is a global trading force in the financial and petroleum sectors. Nevertheless, throughout its history, Saudi Arabia has retained its all-pervading fundamentalist Islamic practices, which are embodied in its constitution and other laws.

The literature review has shown that legal transplants are influenced by a myriad of factors. In the context of the PESTEL framework, this study has focused on the political, economic, social, technical, legal, and environmental dimensions. As politics necessarily involves economics, the analysis of these two areas shares much common ground and has shown that

despite its shared Islamic legacy with other states, both historically (the Ottoman Empire) and in the present era (Egypt and the GCC states), the most influential political and economic factors in the legal transplants into Saudi Arabia have come from the United States. This is especially significant in terms of the creation and operation of SAMA, as well as in terms of its ongoing role in the central and commercial banking sectors of the Kingdom. These continue to be dominated by Islamic governance, albeit with some concession made to conventional (i.e. Western) banking practices. These foreign influences exist with the acquiescence of the ruling elite, despite continued hostility from influential Sharia scholars.

As with all facets of Saudi Arabian society, the governance of legal transplants is controlled and determined by a social elite headed by the reigning monarch. This is intrinsic to the core of the Saudi Arabian identity, which is predicated on the continued alliance between the King and the Al-Wahabi, which effectively ensures that the ubiquitous social framework of Islam is not diluted through the adoption of Western laws and practices. Despite the perceived weakness of Western society, from the perspective of Hanbali scholars, the Islamic structure of Saudi Arabia has remained strong and the country has grown to become a major player in the modern globalised environment. However, aside from this traditional section of society, another elite group also plays an important role in terms of transplantation. The technical contribution supporting Saudi Arabia's legal transplants includes the 'clever lawyers' whom Watson identifies as playing an important role in the process.[20] In addition, effective transplant policies are dependent on the specialism of experts across numerous fields, including central banking, taxation and financial products and economics. It is possible to perceive these experts as constituting the elite which enables and facilitates any enduring legal transplant in the Kingdom.

The Saudi Arabian environment has been subject to changes, as the emergent Kingdom has evolved to become a powerful member of the international finance and trading community. The profile of the population has similarly changed due to the investment of oil funds, with the Saudi Arabian people evolving typically from groups of itinerant Bedouins to a highly educated population that enjoys a high standard of living. As a consequence of these developments, the perception that Saudis have of banking has changed, with many shifting from a view of the sector as being haram (forbidden) because it contravenes the principles of Islam, to accepting that legal transplants should play a role in a modern, internationally effective banking sector.

[20] Alan Watson, Legal Transplants: An Approach to Comparative Law (University of Georgia Press 1974).

It can be concluded that the legal transplant climate of Saudi Arabia is represented by a complex terrain that seeks to strike a balance between the requirements of devout Islam and the desire to operate as an internationally important nation. In light of these needs, the following section makes a number of recommendations based upon the analysis conducted in this research.

6.2 Recommendations

6.2.1 The future of transplantation in Saudi Arabia

The success of legal transplants between the 1950s and 1970s established the viability of achieving harmonisation between Islamic and Western economic principles. However, since that time, the world of finance has experienced profound changes. It is therefore recommended that legal transplantations be re-employed to reconcile the Islamic roots of Saudi banking with the current status of global financing. The Islamic rules currently prevail to the extent that every bank works with all of its customers within either conventional or Islamic models. However, all activities are ultimately sanctioned by SAMA and strict Sharia rules must therefore prevail. Because of the contradictions and complexities inherent in such a system, it is suggested that the benefits of legal transplants be comprehensively reviewed for Saudi Arabia, in order to assess how other transplants may be able to enhance the global position of the Kingdom, while ensuring that its commitment to Islam is retained and protected. It is therefore recommended that in future research in this domain, the present analysis of the introduction of Western laws into Islamic societies should be extended to evaluate areas of conformity and dissonance in Saudi Arabia's adoption of Western banking law, without losing the Islamic identity of its society.

The legal element of transplants is not confined to what Legrand terms 'law as a rule'.[21] In the context of Saudi Arabia, a robust understanding of Shari'a law is also required, in addition to a high degree of expertise in the transplanted rules. Thus, for the effective harmonisation of rules in the Saudi Arabian context, it is necessary for resolutions to be found in terms of the Islamic legal grounding of Saudi Arabia and a number of important considerations, such as the divergences between Roman Law and Common law traditions, jurisprudence, and the legal training of the donor states. It is thus a prerequisite that it is not only Royal Decrees (statutes) that should be in harmony with the Islamic constitution of Saudi Arabia; it is also necessary for the structure and procedures of the court system to be

[21] Pierre Legrand, 'Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 112.

reviewed and supplemented by an appropriate revision and development of the current legal training and education systems. The following subsections therefore offer further specific and practical recommendations arising from this research in the field of legal transplants, dealing respectively with the establishment of specialist judicial bodies, of an independent advisory body, and of specialised commercial courts.

6.2.2 Establishing specialist judicial bodies

Specialist judicial bodies should be established to ensure the effective harmonisation of laws on banking and financial services in Saudi Arabia. These bodies should be populated by specialists in the field of law and Islamic finance, who are regulated and supervised by experts whose qualifications include academic and practical experience in Islamic finance. They should help to bridge the legislative and regulatory gap between Islamic banking and finance in Saudi Arabia, as this research has shown that successful implantation of proposed laws and regulations of Islamic banking and finance requires that they are consistent with the provisions and principles of Sharia. Importantly, the failure to develop a harmonised legislative and regulatory framework for Islamic banking and finance in Saudi Arabia has the potential to continue to generate confusion between Islamic and conventional finance.

This study recommends that legal transplants, or programmes of transplants, are assessed and the conventional (Western-sourced) and Islamic laws harmonised by a body of experienced specialists. These individuals should be experts in the fields of economics, finance, and law, in addition to including suitably qualified and experienced academics. This elite body would then follow Watson's[22] recommendations on successful legal transplants, while simultaneously performing the local tuning that Örücü recommends for successful transpositions. Örücü[23] based her observations of successful legal transpositions of Turkey's legal transplants of Western codes. In this context, the transplant programme involved Turkey becoming a secular state that still allowed its people to follow Islam, making this precise approach unsuitable for the context of Saudi Arabia. In the case of Turkey, the harmonisation of international laws into its Islamic society involved academic exchanges between the donor and donee states, as well as the involvement of elite advisors in specialist fields of practice. In another instance, Malaysia remained an Islamic state, but successfully retained the secular laws from its colonial history. Malaysia adopted a pattern of legal transposition during the 1990s, in order to review its laws in the context of contemporary

[22] Watson (n 19)
[23] Örücü (n 5) 91

practice. These initiatives follow a more restricted, albeit still workable harmonisation of Islamic and secular laws, akin to the process by which Al Sanhuri[24] melded Islamic and Romano-French laws in the establishment of the Egyptian commercial court that was later introduced into Saudi Arabia in 1952.

6.2.3 Convening an independent advisory body

It is recommended that an independent Sharia advisory body be convened to regulate and supervise all areas of Islamic banking and finance, serving to complement and cooperate with SAMA. The members of this new Sharia advisory council should be highly qualified in banking, finance, law and the application of Sharia, as well as in terms of conventional banking and finance. It should be the highest authority for the determination and application of Sharia for Islamic financial business in the Kingdom of Saudi Arabia. However, in practice, if the council is to have any practical power over the legal transplants and the harmonisation of Islamic and conventional banking, it must be accepted by Islamic scholars. Ultimately, the advisory council should be the final arbiter in the interpretation of Sharia principles on banking, finance, and dispute resolution in Saudi Arabia.

6.2.4 Creating specialised commercial courts and training the judiciary

There is a fundamental requirement for the government of Saudi Arabia to establish specialised commercial courts, with explicit jurisdiction over all commercial issues, including the fields of banking and finance. These courts must be impartial, fair and unbiased in order to fulfil their function properly, which means that they must also be independent of the ruling elite.

The structure of the courts should involve the rationalisation of multiple judicial business committees, in order to resolve confusion and unify the judiciary. These reforms should be pluralistic, reflecting the beliefs and standards of all Saudi Arabian society. Furthermore, the unification of the judiciary into one judicial body would effectively serve to reduce the number of cases involving a conflict of jurisdiction or the denial of a hearing, based on the argument by judges that the content is un-Islamic. To further this aim, the comprehensive education and training of lawyers and judges should be ensured in the areas of the Western sources of legal transplants, as well as in all areas of Sharia law. This level of expertise is essential if the courts are to be staffed by an independent judiciary, as litigants must have access to representation by lawyers who are objective and informed about both Sharia and

[24] Nabil Saleh, 'Civil Codes of Arab Countries: The Sanhuri Codes' (1993) 8(2) Arab Law Quarterly 161

conventional trading. In Saudi Arabia, the current qualification to become a judge is a certificate from the Sharia School. The syllabus of this school is solely based on Islamic jurisprudence, with scant reference being made to other sources, including Western laws. The limited scope of this study fails to give due recognition to the inclusive basis of Islam and its historical acceptance of legal transplants (as discussed in Chapter 3). If the Saudi Arabian economy is to expand, it is necessary for parity to be reached with other international states. It is therefore recommended that Saudi Arabian judges should be educated to understand important and relevant elements of Western law, such as how best to integrate and harmonise international commercial law with the tenets of Sharia. In embedding this concept, Saudi Arabia should establish university departments of Western law, as English universities have incorporated provisions for appropriate education about EU law in their syllabuses, into the structure of modern law degrees and even operating entire departments specialising in EU law.

6.3 Contribution to knowledge

The extant research in the field of legal transplant theory analyses how legal transplants work in Islamic countries. However, to date, no research has sought to assess the degree to which the transplanted law interrelates with the fundamentals of the practice of Islam. This is therefore the first doctoral research thesis to situate legal transplant theory within the fundamentals of Sharia law.

The work undertaken in the completion of this thesis indicates that a successful transplant of Western law into an Islamic country requires it to be established that no conflicts arise between the new law and the fundamental tenets of Islam. Once these basic elements have been resolved, a more detailed model for the legal transplant can be designed, thereby enabling the law to be successfully introduced and rooted in the host nation.

Bibliography

Articles and online resources

'Arbitration Case of the Administration of Posts and Telegraphs of the Republic of Czechoslovakia versus The Radio Corporation of America' (1936) 30(3) American Journal of International Law 523

Abdal-Haqq I, 'Islamic Law An Overview of Its Origin and Elements' (2002) 7(1) Journal of Islamic Law & Culture 27

Abel RL, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80(4) Michigan Law Review 785

Adams J and Brownsword R, 'Contract, Consideration and the Critical Path' (1990) 53 Modern Law Review 536

Adelman M, 'Is the Oil Shortage Real? Oil Companies as OPEC Tax-Collectors' (1972) 9 Foreign Policy 69

Ahmad K, 'Consensus on Riba: Real Hindrance is the Lack of Will' *Dawn* (11 August 1997)

Ahmed R, Siddiqui K and Immamuddin M, 'Islamic Banking in Pakistan – Problems and Prospects' (2013) 3(7) Asian Journal of Research in Banking and Finance 1

Alam GM, 'Can Governance and Regulatory Control Ensure Private Higher Education as Business or Public Goods in Bangladesh?' (2009) 3(12) African Journal of Business Management 890

Al-Ammari S and Martin AT, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30(2) Arbitration International 387

Alhamoud I, 'Conciliation in Commercial Disputes and its Applications' (Conference on Arbitration and Conciliation, Taif, Saudi Arabia, 2004)

Alkhathlan KA and Malik SA, 'Are Saudi Banks Efficient? Evidence using Data Envelopment Analysis (DEA)' (2010) 2(2) International Journal of Economics and Finance 53

Al-Mehaimeed AM, 'The Constitutional System of Saudi Arabia: A Conspectus' (1993) 8 Arab Law Quarterly 30

Al-Muharrami S, Matthews K and Karbhari Y, 'Market Structure and Competitive Conditions in the Arab GCC Banking System' (2006) 30(12) Journal of Banking & Finance 3487

Alonaizan T, 'Conciliation Before and After the Death of the Victim' (2000) 7 Al-Adl Journal 1

Al-Samaan Y, 'Evolution of the Contractual Relationship between Saudi Arabia and Aramco' (1994) 12(2) Journal of Energy & Natural Resources Law 1

Alshammari K, 'Banking Control Law 1966 in Saudi Arabia, Shortcomings and Development: A Comparative Study in Banking Supervision between the Saudi Arabian Monetary Agency and the Bank of England' (2016) 3(3) International Journal of Law and Political Sciences 274

Al-Sheikh M, 'The Numerousness of Commercial Judicial Committees in Saudi Arabia (Results, Reasons, Solutions)' (1999) 21(37) Journal of Law 1

Alshorbagy AA, 'On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law' (2012) 22 Indiana International and Comparative Law Review 237

Al-Suwaidi A, ‘Developments of the Legal Systems of the Gulf Arab States’ (1993) 8(4) Arab Law Quarterly 289

Ames J, ‘Two Theories of Consideration I: Unilateral Contracts’ (1899) 12(8) Harvard Law Review 515

Anderson JND and Coulson NJ, ‘Islamic Law in Contemporary Cultural Change’ (1967) 18(1-2) Saeculum 37

Aramco (2017) <www.saudiaramco.com> accessed 13 February 2017

Aramco, ‘Board Endorses Company’s Path’ (2017) <http://www.saudiaramco.com.sa/en/home/news-media/news/BoardEndorses.html> accessed 13 February 2017

Beck A, ‘Is Law an Autopoietic System?’ (1994) 14 Oxford Journal of Legal Studies 401

Beck T, Demirgüç-Kunt A and Levine R, ‘Bank Concentration, Competition, and Crises: First Results’ (2006) 30(5) Journal of Banking & Finance 1581

Benjamin P, ‘Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law’ (1960) 9(4) International and Comparative Law Quarterly 600

Ber H, Yafeh Y and Yosha O, ‘Conflict of Interest in Universal Banking: Bank Lending, Stock Underwriting, and Fund Management’ (2001) 47(1) Journal of Monetary Economics 189

bin Manea A, ‘One of our Scholars is Shaykh Muhammad ibn Ibrahim’ (1987) 18 Portal of the General Presidency of Scholarly Research and Ifta 211

Bolton P, Freixas X and Shapiro J, ‘Conflicts of Interest, Information Provision, and Competition in the Financial Services Industry’ (2007) 85(2) Journal of Financial Economics 297

Boyd JH and De Nicolo G, ‘The Theory of Bank Risk Taking and Competition Revisited’ (2005) 60(3) The Journal of Finance 1329

Brandner HE and Ulmer P, ‘Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (1991) 28 Common Market Law Review 647

Bunter M, ‘The Islamic Shari'a Law and Petroleum Developments in the Countries of North Africa and the Arabian Gulf’ (2004) 1(2) Transnational Dispute Management 94

Cairns JW, ‘Watson, Walton, and the History of Legal Transplants’ (2012) 41 Georgia Journal Of International & Comparative Law 643

Cameron PO, ‘North Sea Oil licensing: Comparisons and Contracts’ (1984/85) 3 Oil & Gas Law Taxation Law Review 99

Cohn M, ‘Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom’ (2010) 58(3) American Journal of Comparative Law 583

Cuniberti G, ‘Enhancing Judicial Reputation through Legal Transplants: Estoppel Travels to France’ (2012) 60(2) American Journal of Comparative Law 383

Dean M, ‘Legal Transplants and Jury Trial in Japan’ (2011) 31(4) Legal Studies 570

Directorate General for Information, ‘The European Community and the Gulf Co-Operation Council’ (1987) 2(3) Arab Law Quarterly 323

Do TMH, ‘Transplanting Common Law Precedents: An Appropriate Solution for Defects of Legislation in Vietnam (Part 2)’ (2014) 7(26) European Scientific Journal 1857

Eberle EJ, ‘The Method and Role of Comparative Law’ (2009) 8 Washington University Global Studies Law Review 451

Economist Intelligence Unit, ‘Market assessment - Saudi Arabia (January 2003)’ (Country Finance, 2003) <http://store.eiu.com/index.asp?layout=show_sample&product_id=280000228&country_id=SA> accessed 24 January 2017

El-Malik W, ‘State Ownership of Minerals Under Islamic Law’ (1996) 14 Journal of Energy & Natural Resources Law 310

Essayyad M and Madani H, ‘Investigating Bank Structure of an Open Petroleum Economy: The Case of Saudi Arabia’ (2003) 29(11) Managerial Finance 73

Evans A, ‘Voluntary Harmonisation in Integration between European Community and Eastern Europe’ (1997) 22 European Law Review 202

Ewald WB, ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’ (1995) 43(4) American Journal of Comparative Law 490

Ewald WB, ‘The American Revolution and the Evolution of Law’ (1994) 42 American Journal of Comparative Law 1

Forsyth A, ‘The ‘Transplantability’ Debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law (Centre for Employment and Labour Relations Law, 2006) <http://apo.org.au/node/6218> accessed 14 April 2016

Fuchs JR, ‘Oral History Interview with Arthur N. Young’ (Truman Library, 21 February 1974) <https://www.trumanlibrary.org/oralhist/young.htm> accessed 28 January 2017

Gessner V, ‘Global Legal Integration and Legal Cultures’ (1994) 7 Ratio Juris 132

Gillespie J, ‘Towards a Discursive Analysis of Legal Transfers into Developing East Asia’ (2008) 40 JILP 657

Goff L, ‘The Future of the Common Law’ (1997) 46 International and Comparative Law Quarterly 745

Griffiths J, ‘What is Legal Pluralism?’ (1986) 24 Journal of Legal Pluralism 1

Halpérin J-L, ‘The Concept of Law: A Western Transplant?’ (2009) 10(2) Theoretical Inquiries in Law 351

Hanif M, ‘Differences and Similarities in Islamic and Conventional Banking’ (2011) 2(2) International Journal of Business and Social Sciences 166

Hanson M, ‘The Influence of French Law on the Legal Development of Saudi Arabia’ (1987) 2(3) Arab Law Quarterly 272

Hasan ZB, ‘Regulatory Framework of Sharia Governance System in Malaysia, GCC Countries and the UK’ (2009) 3(2) Kyoto Bulletin of Islamic Area Studies 82

Hassan FA, ‘The Sources of Islamic Law’ (1982) 76 Proceedings of the Annual Meeting (American Society of International Law) 65

Hatzis AN, ‘Having the Cake and Eating it Too: Efficient Penalty Clauses in Common and Civil Contract Law’ (2002) 22(4) International Review of Law and Economics 381

Hertog S, ‘Shaping the Saudi State: Human Agency’s Shifting Role in Rentier-State Formation’ (2007) 39(4) International Journal of Middle East Studies 539

Hobbs M, ‘Gulf History Specialist, British Library, Emir Faisal’s Diplomatic Mission and Britain’s Reluctance to Invest in Saudi Oil in 1932’ (*Qatar Digital Library*) <https://www.qdl.qa/en/emir-faisal%e2%80%99s-diplomatic-mission-and-britain%e2%80%99s-reluctance-invest-saudi-oil-1932> accessed 7 July 2017

Info-Prod Research, ‘Saudi Arabia: Currency and Banking’ (1999) <http://www.infoprod.co.il/country/saudia2c.htm> accessed 10 January 2017

Iqbal Z, ‘Challenges Facing Islamic Financial Industry’ (2007) 3(1) Journal of Islamic Economics, Banking and Finance 1

Jackson VC, ‘Constitutional Comparisons: Convergence, Resistance, Engagement’ (2005) 119 HLR 109

Jamieson N, ‘Source and Target-Oriented Comparative Law (1996) 44 American Journal of Comparative Law 121

Jupp J, ‘Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation’ (2014) 3 Cambridge Journal of International and Comparative Law 381

Kahn-Freund O, ‘On Uses and Misuses of Comparative Law’ (1974) 37(1) Modern Law Review 1

Karbhari Y, Naser K and Shahin Z, ‘Problems and Challenges facing the Islamic Banking System in the West: The Case of the UK’ (2004) 46(5) Thunderbird International Business Review 521

Kessler F, ‘Contracts of Adhesion – Some Thoughts on Freedom to Contract’ (1943) 43 Columbia Law Review 629

Koopmans T, ‘Comparative Law and the Courts’ (1996) 45(3) International and Comparative Law Quarterly 545

Krygier M, ‘Is There Constitutionalism after Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law’ (1996) 26(4) International Journal of Sociology 17

Lee TV, ‘Risky Business: Courts, Culture, and the Marketplace’ (1993) 47 University of Miami Law Review 1335

Legrand P, ‘European Legal Systems are Not Converging’ (1996) 45(1) International & Comparative Law Quarterly 52

Legrand P, ‘Impossibility of Legal Transplants’ (1997) 4 Maastricht Journal of European and Comparative Law 112

Likhovski A, ‘Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling’ (2009) 10(2) Theoretical Inquiries in Law 619

Luhmann N, ‘The Paradoxy of Observing Systems’ (1995) 31 Cultural Critique 37

Makdisi JA, ‘The Islamic Origins of the Common Law’ (1999) 77 North Carolina Law Review 1635

Maniruzzaman M, ‘Choice of Law in International Contracts – Some Fundamental Conflict of Laws Issues’ (1999) 16(4) Journal of International Abitration 141

Manjoo F, ‘An Orientalist Perspective of Islamic Law: From Fossilization to Legal Transplant’ (2011) 31(4) The Muslim World Book Review 6

Mansoor Khan M and Ishaq Bhatti M, 'Islamic Banking and Finance: On its Way to Globalization' (2008) 34(10) Managerial Finance 708

Mansoor Khan M and Ishaq Bhatti M, 'Why Interest-Free Banking and Finance Movement Failed in Pakistan' (2006) 22(3) Humanomics 145

Markesinis BS, 'Bridging Legal Cultures' (1993) 27 Israel Law Review 363

Mattei U, 'Why the Wind Changed: Intellectual Leadership in Western Law' (1994) 42 American Journal of Comparative Law 195

Meyer-Reumann R, 'The Banking System in Saudi Arabia' (1995) 19(3) Arab Law Quarterly 207

Miller JM, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 American Journal of Comparative Law 839

Ministry of Petroleum and Mineral Resources (2017) <http://www.mopm.gov.sa> accessed 30 April 2017

Mohamad TAH and Trakic A, 'The Reception of English Law in Malaysia and Development of the Malaysian Common Law' (2015) 44(2) Common Law World Review 124

Moran TH, 'The Evolution of Concession Agreements in Underdeveloped Countries and the United States National Interests' (1974) 7 Vanderbilt Journal of Transnational Law 315

Moses B, 'Dewan Rakyat Should Address Custody Issue Fast' *The Sun Daily* (Kuala Lumpur, 13 April 2014) <http://www.thesundaily.my/news/1015486> accessed 6 September 2016

Mousourakis G, 'Transplanting Legal Models across Culturally Diverse Societies: A Comparative Law Perspective' (2010) 57 Osaka University Law Review 88

Nichols PM, 'The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code' (1997) 18 University of Pennsylvania Journal of International Economic Law 1271

OPEC (2017) <http://www.opec.org/opec_web/en/index.htm> accessed 13 February 2017

Örücü E, 'A Synthetic and Hyphenated Legal System: The Turkish Experience' (2006) 1(2) Journal of Comparative Law 27

Örücü E, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4(1) Electronic Journal of Comparative Law 10

Örücü E, 'Judicial Navigation as Official Law Meets Culture in Turkey' (2008) 4(1) International Journal of Law Context 35

Örücü E, 'Law as Transposition' (2002) 51(2) International and Comparative Law Quarterly 205

Örücü E, 'Turkey Facing the European Union Old and New Harmonies' (2000) 25 European Law Review 57

Örücü E, 'What is a Mixed Legal System: Exclusion or Expansion' (2008) 3 Journal of Comparative Law 34

Özsunay E, 'Legal Culture and Legal Transplants: Turkish National Report' (2011) 1(31) Isaidat Law Review 4

Parker M, ‘IMF Advises KSA to Give SAMA Greater Operational Independence’ *Saudi Gazette* (Jeddah, 29 April 2012)

Pierre Legrand, ‘Impossibility of Legal Transplants’ (1997) 4 Maastricht Journal of European & Comparative Law 111

Porges JL, ‘Development of Korean Labor Law and the Impact of the American System’ (1991) 12(3) Comparative Labour Law Journal 335

Pound R, ‘Influence of French Law in America’ (1908) 3 Illinois Law Review 354

Pringsheim F, ‘The Inner Relationship Between English and Roman Law’ (1935) 5 Cambridge Law Journal 347

Radetzki M, ‘From Communism to Capitalism in Laos: The Legal Dimension’ (1994) 34 Asian Survey 799

Ronall JO, ‘Economic Review: Banking Regulations in Saudi Arabia’ (1967) 21(3) Middle East Journal 399

Sacco R, ‘Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)’ (1991) 39(1) American Journal of Comparative Law 1

Saleem F, ‘How Long Can an Independent State Bank Last?’ *Business Recorder* (27 October 1993)

Saleh N, ‘Civil Codes of Arab Countries: The Sanhuri Codes’ (1993) 8(2) Arab Law Quarterly 161

Salim MR, ‘Are Legal Transplants Impossible?’ (2009) 4 Journal of Comparative Law 182

SAMA (2017) <http://www.sama.gov.sa/en-US/Pages/default.aspx> accessed 25 January 2017

SAMA, ‘Banking Control’ (2017) <http://www.sama.gov.sa/en-US/BankingControl/Pages/AboutBankingControl.aspx> accessed 25 January 2017

SAMA, ‘Currency’ (2017) <http://www.sama.gov.sa/en-US/Currency/Pages/HistoricalInfo.aspx> accessed 21 January 2017

SAMA, ‘Development and Restructuring of the Saudi Banking System’ (2012) <http://www.bis.org/publ/plcy06g.pdf> accessed 17 January 2017

SAMA, ‘Historical Preview’ (2017) <http://www.sama.gov.sa/en US/About/Pages/SAMAHistory.aspx> accessed 25 January 2017

SAMA, ‘Pilgrims Receipts’ (2017) <http://www.sama.gov.sa/en-US/Currency/Pages/Pilgriams.aspx> accessed 21 January 2017

Sardar Ali S, ‘Resurrecting *Siyar* through Fatwas? (Re) Constructing ‘Islamic International Law’ in a post-(Iraq) Invasion World’ (2009) 14(1) Journal of Conflict and Security Law 115

Scruton R, ‘The Reform of Law in Eastern Europe’ (1991) 1 Tilburg Foreign Law Review, Journal of Foreign and Comparative Law 8

Shah P, ‘Globalisation and the Challenge of Asian Legal Transplants in Europe’ (2008) 3 Annals of the Faculty of Law of Belgrade International Edition 180

Sheikh A, ‘Devising a New Banking Order’ *The News* (27 April 1994)

Smith S, ‘In Defence of Substantive Unfairness’ (1996) 112 Law Quarterly Review 138

Spamann H, ‘Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law’ (2009) Brigham Young University Law Review 1813

Spataru-Negura L-C, ‘Exporting Law or the Use of Legal Transplants’ (2012) 2 Challenges of the Knowledge Society 812

Sreenevasan A, ‘Common Law’ (*The Malaysian Bar*, 23 August 2007) <http://www.malaysianbar.org.my/press_statements/press_release_common_law.html> accessed 24 August 2016

Sreenevasan A, ‘Leave the Common Law Alone’ (*The Malaysian Bar*, 24 August 2007) <http://www.malaysianbar.org.my/press_statements/press_release_leave_the_common_law_alone.html> accessed 24 August 2016

Starr J and Pool J, ‘The Impact of a Legal Revolution in Rural Turkey’ (1974) 8(4) Law Society Review 533

Stone HF, ‘The Common Law in the United States’ (1936) 50(1) Harvard Law Review 4

Sufian Shuaib F, ‘Towards Malaysian Common Law: Convergence Between Indigenous Norms and Common Law Methods’ (2009) 13 Journal Undang-undangdan Masyarakat 162

Teubner G, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies’ (1998) 61(1) Modern Law Review 11

Teubner G, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ in Francis Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart 2000) 243

Teubner G, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’ (1998) 61 Modern Law Review 1

The Telegraph, ‘The Prudential Regulation Authority: What it Does and Who Is in Charge’ *The Telegraph* (London, 8 November 2011)

Tushnet M, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108(6) Yale Law Journal 1225

Ward I, ‘The Limits of Comparativism: Lessons from UK-EC Integration’ (1995) 2 Maastricht Journal of European and Comparative Law 23

Watson A, ‘Aspects of Reception of Law’ (1996) 44 American Journal of Comparative Law 335

Watson A, ‘From Legal Transplants to Legal Formats’ (1995) 43(4) American Journal of Comparative Law 470

Watson A, ‘Legal Transplants and European Private Law’ (2000) 4(4) Electronic Journal of Comparative Law <http://www.ejcl.org/ejcl/44/44-2.html> accessed 7 April 2017

Watson A, ‘Legal Transplants and Law Reform’ (1976) 92 Law Quarterly Review 79

Wise E, ‘The Transplant of Legal Patterns’ (1990) 38 American Journal of Comparative Law 13

World Bank, ‘Saudi Arabia Economics’ (2017) <http://www.worldbank.org/en/search?q=saudi+arabia+economic&currentTab=1> accessed 23 February 2017

WTO, ‘Saudi Arabia’ (WTO Member Information, 2016) <https://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm> accessed 11 June 2016

Xanthaki H, ‘Legal Transplants in Legislation: Defusing the Trap‘ (2008) 57(3) Int'l & Comp LQ 659

Young A, ‘Saudi Arabian Currency and Finance’ (1953a) 7(4) Middle East Journal 539.

Young, A, ‘Saudi Arabian Currency and Finance’ (1953b) 7(3) Middle East Journal 361-380.

Zacharias D, ‘Fundamentals of the Sunnī Schools of Law’ (2005) 36 Georgetown Journal of International Law 947

Zakariyah H, ‘New Directions in the Search for and Development of Petroleum Resources in Developing Countries’ (1976) 9 Vanderbilt Journal of Transnational Law 545

Zaki T, ‘Singapore Academy of Law Annual Lecture—The Common Law of Malaysia in the 21st Century’ (2012) 24(1) Singapore Academy of Law Journal 6

Zaki Yamani A, ‘The Oil Industry in Transition’ (1975) 8 Natural Resources Lawyer 391

Books and reports

Aal Darib S, *Al-Tanzeem Al-Qadaa'ee fi Al-Mamlakah Al-Arabiyah AL- Saudiyah fi Dua' Al-Sharee'ah Al-Islamiyah wa Nizam Al-Sultah AL- Qadaiyyah, AL-Ma'had AL-Ali Ie AL-Qadha'- (The Judicial System in KSA in the light of Islamic Shari'a* (University of Imam Mohammad Ibn-Saud 1983)

Abedin HS, ‘Abdul Aziz Al-Saud and the Great Game in Arabia, 1896-1946’ (PhD Thesis, King's College London 2002)

Abu Zahrah M, *Al-Shafi'i hayatuhu wa 'asruhu ara'uhu wa fiqhuhu* (Dar Al-Fikr Al-'Arabi 1948)

Ahmad A and Gupta PC, *A Text Book of Mohammedan Law* (Central Law Agency 1966)

Ahmad AUF, *Theory and Practice of Modern Islamic Finance: Case Analysis from Australia* (Universal Publishers 2010)

Ajani G, ‘The Role of Comparative Law in the Adoption of New Codifications’ (Italian National Reports to the XVth International Congress of Comparative Law, Bristol, 1998) 65

Ajani G, ‘The ‘Weak’ Law: Contaminations and Legal Cultures’ (Italian National Reports to the XVth International Congress of Comparative Law, Bristol, 1998) 84

Al Homoud H, *Banking Overview in Saudi Arabia* (Tamimi Magazine 2011)

Al Rajhi A and others, *Economic Development in Saudi Arabia* (Routledge 2012)

Al Sewilem M, ‘The Legal Framework for Foreign Direct Investment in the Kingdom of Saudi Arabia: Theory and Practice’ (PhD thesis, University of London 2012)

Al-Farsy F, *Modernity & Tradition: The Saudi Equation* (Routledge Taylor & Francis 2009)

Al-Ghazali A, *On Legal Theory of Muslim Jurisprudence*, Vol 1 (1997)

Al-Jaber M, *Saudi Commercial Law* (Al-Qanūn al-Tijārī al-Saudi) (Al-Dār al-Wataniah 1987)

Alkahtani F, ‘Legal Protection of Foreign Direct Investment in Saudi Arabia’ (PhD Thesis, Newcastle University 2010)

Allott AN, *The Limits of Law* (Butterworths 1980)

Al-Muqbil U, *The Four Schools of Thought in Islamic Law* (2012)

Al-Rasheed M, *A History of Saudi Arabia* (CUP 2010)

Alsagoff ASA, *Principles of the Law of Contract in Malaysia* (LexisNexis 2010)

Al-Samaan Y, 'The Legal Security of Private Foreign Investment in the Kingdom of Saudi Arabia' (PhD Thesis, University of Dundee 1993)

Al-Samaan Y, *The Legal Protection of Foreign Investment in the Kingdom of Saudi Arabia* (Dar Al Andalus 2000)

Al-Sanhury AR, *Masader Al-Haq*, Vol 3 (Dar Al-Nahza Al-Arabia 1968)

Al-Shamrani AS, 'Islamic Financial Contracting Forms in Saudi Arabia: Law and Practice' (PhD Thesis, Brunel University 2014)

Alsharrif N, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (PhD Thesis, University of Dundee 2000)

Al-Shubaiki T, 'The Saudi Arabian Arbitration Law in the International Business Community: A Saudi Perspective' (PhD Thesis, London School of Economics and Political Science 2003)

Al-Suhaimi J, *Consolidation, Competition, Foreign Presence and Systemic Stability in the Saudi Banking Industry* (BIS Papers 2004)

Anderson I, *Aramco, the United States and Saudi Arabia: a Study of the Dynamics of Foreign Oil Policy 1933-1950* (Princeton University Press 1981)

Anthony G, *UK Public Law and European Law: The Dynamics of Legal Integration* (Bloomsbury 2002)

Aramco, *Handbook: Oil and the Middle East* (Arabian American Oil Company 1968)

Arfah Hamzah W, *A First Look at the Malaysian Legal System* (Oxford Fajar 2009)

Baamir A, 'Saudi Law and Judicial Practice in Commercial and Banking Arbitration' (PhD thesis, Brunel University 2009)

Bagaresh A, 'Accession of Kingdom of Saudi Arabia's to World Trade Organization and its Benefits' (23rd International Business Research Conference, Australia, 18 November 2013)

Ballantyne W, *The Bahrain Euro-Arab Arbitration Conference (1989): A Summing up Published with Proceedings in Essays and Addresses on Arab Laws* (Curzon Press 2000)

Batarfi KM, *Fayṣal, Muḥammad: Prince; Saudi Arabia; History; Memoirs* (Batarfi 2007)

Bechtel W and Abrahamsen A, *Connectionism and the Mind: An Introduction to Parallel Processing in Networks* (Basil Blackwell 1991)

Beck T, 'Bank Competition and Financial Stability: Friends or Foes?' (World Bank Policy Research Working Paper Series 4656, 2008)

Bell J, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe' in Jack Beatson and Takis Tridimas (eds), *New Directions in European Public Law* (Hart 1998) 147

Berlin I, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Weidenfeld and Nicolson 1953)

Berry DS, ‘Interpreting Rights and Culture: Extending Law’s Empire’ (1998) 4 Res Publica 10

bin Anas M, *Muwatta* (M Rahimuddin (tr), Kitab Bhavan 2006)

bin Ibrahim Al-Sheikh M, *Fatwas and Messages of Sheikh Muhammad bin Ibrahim bin Abdul Latif Al-Sheikh. Collection, Arrangement and Investigation: Mohammed bin Abdul Rahman bin Qasim*, Part 7 (Government Press in Makkah 1978)

Blinn K, *International Petroleum Exploration & Exploitation Agreements: Legal, Economic and Policy Aspects* (Barrows 1986)

Bossel H, Klaczko S and Müller N, *Systems Theory in the Social Sciences* (Bikhäuser 1976)

Bunter M, *An Introduction to Islamic (Sharia) Law and to its Effect on the Upstream Petroleum Sector* (CEPMLP 2003)

Carmichael CM, *The Origins of Biblical Law: The Decalogues and the Book of the Covenant* (Cornell University Press 1992)

Chiba M (ed), *Asian Indigenous Law in Interaction with Received Law* (KPI 1986)

Chiba M, *Legal Cultures in Human Society* (Shinzansha International 2002)

Collier J and Lowe V, *The Settlement of Disputes in International Law* (OUP 2000)

Collins H, *Regulating Contracts* (OUP 1999)

Cook MA, *Commanding Right and Forbidding Wrong in Islamic Thought* (CUP 2001)

Cordesman A, *Economics, Energy and the Future Stability of Saudi Arabia, Strategic Energy Initiative* (Centre for Strategic and International Studies 1999)

Coulson N, *A History of Islamic Law* (Edinburgh University Press 2001) 53

Do TMH, ‘Evaluation of the Applicability of Common Law Approaches to Precedent in Vietnam’ (PhD Thesis, University of Wollongong, 2011)

Doi A, *Shar’ia: The Islamic Law* (Ta-Ha 1984)

Dutton Y, *The Origins of Islamic Law: The Qur’an, the Muwatta’ and the Madinan c Amal* (Richmond 1999) 178

Edwards G, ‘Legal Transplants and Economics: The World Bank and Third World Economies in the 1980s – A Case Study of Jamaica, the Republic of Kenya and the Philippines’ (PhD Thesis, University of London 2007)

El Malik W, *Mineral Investment under Shari 'a Law* (Graham & Trotman 1993)

El-Ahdab A, *Arbitration with the Arab Countries* (Kluwer Law International 1990)

El-Ahdab Abdul, ‘General Introduction on Arbitration in Arab Countries’ in P Sanders (ed), *International Handbook on Commercial Arbitration* (Kluwer 1990)

El-Ahdab Abdul, ‘The Muslim Arbitration Law’ (Proceedings of the First Arab Regional Conference, Tunisia, 1987)

El-Gamal M, *Islamic Finance, Law, Economics and Practice* (1st edn, Cambridge University Press 2006)

Enav P, *The Saudi Oil Dilemma* (Financial Times 2000)

Esposito JL, *The Oxford Encyclopaedia of the Modern Islamic World*, Vol 4 (OUP 1995)

Foster NH, *Transmigration and Transferability of Commercial Law in a Globalised World* (Kluwer Law International 2002)

Fox W, *International Commercial Agreements* (3rd edn, Kluwer Law International 1998)

Freeman M, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell 2008)

Glenn P, *Legal Traditions of the World* (OUP 2004)

Geertz C, *The Interpretation of Cultures* (Fontana Press 1993)

Ghosn R, 'Territorialities of a Transnational Oil Flow' (Colloque fondateur du CIST, 2011)

Goldziher I, *Introduction to Islamic Theology and Law* (Princeton University Press 1981)

Gorla G, *Il Contratto* (A Giuffrè 1955)

Gould W, *Japan's Reshaping of American Labor Law* (MIT Press 1985)

Graziadei M, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)

Grief N, 'The Pervasive Influence of European Community Law in the United Kingdom' in Thomas G Watkin (ed), *The Europeanisation of Law* (UKNCCL 1998) 110

Habermas J, *The Theory of Communicative Action. Vol 2: Lifeworld and System: A Critique of Functionalist Reason* (Beacon Press 1992)

Hall P and Soskice D (eds), *Varieties of Capitalism* (OUP 2001)

Hamilton C, *Americans and Oil in the Middle East* (Gulf Publishing 1962)

Hammersley M and Atkinson P, *Ethnography: Principles in Practice* (Routledge 1995)

Hanington B and Martin B, *Universal Methods of Design: 100 Ways to Research Complex Problems, Develop Innovative Ideas, and Design Effective Solutions* (Rockport 2012)

Hasan A, *The Early Development of Islamic Jurisprudence* (Islamic Research Institute 1970)

Hasan M and Dridi J, 'The Effects of the Global Crisis on Islamic Banks and Conventional Banks: A Comparative Study' (International Monetary Fund Working Paper 10/201, 2010)

Hertog S, *Princes, Brokers, and Bureaucrats: Oil and the State in Saudi Arabia* (Cornell University Press 2011)

Hooker MB, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975)

Hussein FM, *Ibn Khaldun's Philosophy of Law: A Comparative Analytical Study of Ibn Khaldun's Legal Philosophy in Major Trends in the Philosophy of Law and the State* (Dar Al Nahda Al Arabiya 1996)

International Monetary Fund, 'Saudi Arabia: Financial Sector Assessment Program Update – Detailed Observance of the Basel Core Principles for Effective Banking Supervision' (IMF Country Report No 13/213, July 2013)

International Monetary Fund, *Saudi Arabia Financial System Stability Assessment: Update* (International Monetary Fund 2012)

International Monetary Fund, *Saudi Arabia: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics, Monetary and Financial Policy Transparency, Banking Supervision, and Payment Systems* (International Monetary Fund 2006)

International Monetary Fund, *The International Finance News Survey* (7 August 1953)

Iqbal AM, *The Reconstruction of Religious Thought in Islam* (Iqbal Academy 1989)

Iqbal M and Molyneux P, *Thirty Years of Islamic Banking: History, Performance, and Prospects* (Springer 2005)

Izetbegović A, *The Islamic Declaration of Alija Izetbegović* (SN 1991)

Jackson VC, *Constitutional Engagement in a Transnational Era* (OUP 2013)

Jean-Marie Tremblay (ed), *Montesquieu (1748): De l'Esprit des Lois* (Self-Published 2002)

Johnston D, *International Petroleum Fiscal Systems and Production Sharing* (Penn Well 1994)

Kabir Hasan M and Lewis M (eds), *Handbook of Islamic Banking* (Edward Elgar 2009)

Kahn-Freund O, *The Institutions of Private Law* (Routledge 1949)

Kamali MH, *Principles of Islamic Jurisprudence* (Islamic Text Society 1991)

Kechichian J, *Succession in Saudi Arabia* (Springer 2001)

Kelsen H, *Pure Theory of Law* (M Knight (tr), University of California Press 1960)

Kempson E and Whyley C, *Extortionate Credit in the UK* (Financial Services Authority 2000)

Kofele-Kale N, *International Law of Responsibility for Economic Crimes: Holding Heads of State and Other High Ranking State Officials Individually Liable for Acts of Fraudulent Enrichment* (Springer 1995)

Kuran T, *The Long Divergence: How Islamic Law Held Back The Middle East* (Princeton University Press 2011)

Kyselova T, 'The Concept of legal transplant: Literature Review' (*Academia* 2008) <http://www.academia.edu/3371274/The_Concept_of_Legal_Transplant_Literature_Review_DRAFT_2008> accessed 30 March 2016

Lacey R, *Inside the Kingdom* (Hutchinson 2009)

Lacey R, *The Kingdom: Arabia & the House of Sa'ud* (Harcourt Brace Jovanovich 1983)

Lackner H, *A House Built on Sand: A Political Economy of Saudi Arabia* (Ithaca Press 1978)

Lauterpacht H, *Annual Digest of Public International Law Cases: 1929-1930*, Vol 5 (Longmans 1935)

Luhmann N, 'Closure and Openness: On Reality in the World of Law' in G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (de Gruyter 1987) 335

Luhmann N, 'The Coding of the Legal System' in Alberto Febbrajo and Gunther Teubner (eds), *State, Law and Economy as Autopoietic Systems* (A Giuffrè 1992) 145

Markesinis BS, *Engaging with Foreign Law* (Bloomsbury 2009)

Maturana HR and Varela FJ, *Autopoiesis and Cognition: The Realization of the Living* (D Reidel 1980)

McMurray S, ‘Energy to The World: The Story of Saudi Aramco - Volume 1’ (*Aramco Services*, 2011) <www.aramcoservices.com> accessed 17 May 2017

McNulty C, ‘An Evaluation of Saudi Arabia's Policies for Economic Diversification’ (Unpublished Master’s Thesis, University of Durham 1984)

Menski W (ed), *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (CUP 2006)

Merryman JH, Clark DS, and Haley JO, *The Civil Law Tradition: Europe, Latin America, and East Asia* (The Michie Company 1994) 50

Metz HC, ‘Saudi Arabia; Economic Policy Making’ (*Country Studies*, 1992) <http://countrystudies.us/saudi-arabia/36.htm> accessed 3 September 2016

Michaels R, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of European Private Law* (OUP 2006)

Mikesell R, *Petroleum Company Operations and Agreements in the Developing Countries* (John Hopkins University Press 1984)

Monahan J and Walker L, *Social Science in Law: Cases and Materials* (Foundation Press 1990)

Monateri P, ‘The ‘Weak’ Law: Contaminations and Legal Cultures’ in *Italian National Reports to the XVI International Congress of Comparative Law* (Giuffre Editore 1998) 83

Monroe E, *Philby of Arabia* (Quartet 1980)

Montesquieu C, ‘De l'Esprit des Lois’ in Roger Caillois (tr), *Oeuvres Completes* (Gallimard 1951)

Mustafa A, *United States and the Arab Orient* (Aalam Al Maarifa 1978)

Nelken D and Feest J, *Adapting Legal Cultures* (Hart 2001)

Nelken D, ‘Comparativists and Transferability’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transition* (CUP 2003) 329.

Nelken D, ‘Towards a Sociology of Legal Adaptation’ in David Nelken and Johannes Feest (eds),

Noda Y, *Introduction au Droit Japonais*, Vol 19 (Dalloz 1966)

Nomani F and Rahnema A, *Islamic Economic Systems* (Zed Books 1994)

Örücü E, ‘A Theoretical Framework for Transfrontier Mobility of Law’ in R Jagtenberg, E Örücü and A Roo (eds), *Transfrontier Mobility of Law* (Kluwer Law International 1995)

Pennington K, ‘Roman and Secular Law in the Middle Ages’ in FAC Mantello and AG Rigg (eds), *Medieval Latin: An Introduction and Bibliographical Guide* (Catholic University Press of America 1996) 254.

Perju V, *Constitutional Transplants, Borrowing and Migrations* (OUP 2012)

Philby H, *Arabian Oil Ventures* (Middle East Institute 1964)

Philby H, *The Heart of Arabia: A Record of Travel and Exploration* (Constable 1972)

Punnett B and Shenkar O, *Handbook for International Management Research* (Blackwell Press 1995)

Quandt W, *Saudi Arabia in the 1980s: Foreign Policy, Security and Oil* (The Brooking Institution 1981)

Holy Qur'an

Rahman F, *Islamic Methodology in History* (Islamic Research Institute 1995)

Ramadan H, *Understanding Islamic Law from Classical to Contemporary* (1st edn, Alta Mira 2006)

Ramady M, *The Saudi Arabian Economy* (Springer 2010)

Rayner S, *The Theory of Contracts in Islamic Law* (1st edn, Springer 1991)

Raz J, 'The Purity of the Pure Theory' in Anne Barron and others, *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (OUP 2005) 202

Rorty R, *Objectivity, Relativism, and Truth* (CUP 1991)

Saeed A, *Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation* (Brill 1999) 14

SAGIA, *The Legal Background to Foreign Investment in Saudi Arabia* (Saudi Arabia General Investment Authority 2003)

Saksena KP, *Muslim Law as administered in India and Pakistan* (Eastern Book Company 1963)

SAMA, *A Case Study on Globalization and the Role of Institution Building in the Financial Sector in Saudi Arabia* (SAMA 2003)

SAMA, *Saudi Arabian Monetary Agency* (SAMA 2014)

Schacht J, *An Introduction to Islamic Law* (OUP 1984)

Schacht J, *The Origins of Muhammadan Jurisprudence* (Clarendon Press 1967)

Sebald WJ (tr), *The Civil Code of Japan* (JL Thompson and Co 1934)

Seidl D, *Luhmann's Theory of Autopoietic Social Systems* (LMU 2004).

Seidman A and Seidman R, *State and Law in the Development Process. Problem-Solving and Institutional Change in the Third World* (Macmillan 1994)

Shah NA, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (Taylor and Francis 2011)

Smits JM, 'Comparative Law and its Influence on National Legal Systems' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2014) 3

Smits JM, 'Systems Mixing and in Transition: Import and Export of Legal Models: The Dutch Experience' in E Hondius (ed), *Nederlands Reports to the Fifteenth International Congress of Comparative Law* (Intersentis Rechtswetenschappen 1998)

Snyder F, *The Europeanisation of Law: The Legal Effects of European Integration of European Law* (Hart 2000) 243

Sornarajah M, *The International Law on Foreign Investment* (2nd edn, CUP 2004)

Starr J, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (State University of New York Press 1992)

Stevens P, *Joint Ventures in Middle East Oil: 1957-1975* (Middle East Economic 1976)

Sunnah

Taverne B, *Co-operative Agreements in the Extractive Petroleum Industry* (Kluwer 1996)

Teubner G, *Law as an Autopoietic System* (Blackwell 1993)

Truman HS, *The Truman Program: Addresses and Messages* (Literary Licensing 2011)

Twinning W, *Generalizing About Law: The Case of Legal Transplants* (Tilburg–Warwick Lectures 2000)

Twitchell KS, *Saudi Arabia: with an account of the development of its natural resources.* (Princeton University Press 1958)

US Dept of State, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Saudi Arabia* (Office of the Historian 2017)

Visser H, *Islamic Finance: Principles and Practice* (Edward Elgar 2013)

Wallace R, *International Law* (4th edn, Sweet & Maxwell 2002)

Wilson R, *The Determinants of Islamic Financial Development and the Constraints on its Growth* (Durham University Press 2004)

Watson A, *Law making in the later Roman Republic* (Clarendon Press 1974)

Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Edinburgh 1974)

Watson A, *Society and Legal Change* (Scottish Academic Press 1977)

Wilson PW and Graham DF, *Saudi Arabia: The Coming Storm* (Routledge 2016)

Wilson R, *The Development of Islamic Finance in the GCC* (LSE Library 2009)

Winstedt R, *The Malays: A Cultural History* (Routledge and Kegan Paul 1961)

Yergin D, *The Prize: The Epic Quest for Oil, Money, and Power* (Simon & Schuster 1990)

Yilmaz I, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Ashgate 2005)

Yin R, *Case Study Research: Design and Methods* (4th edn, Sage 2009)

Young AN, *Saudi Arabia: The Making of a Financial Giant* (New York University Press 1983)

Zweigert K and Kotz H, *An Introduction to Comparative Law* (OUP 1998)

Table of legislation

Arbitration Act (1996) (UK)

Banking Control Law Royal Decree No M/5 22/2/1386 (11 June 1968) (Saudi Arabia)

Carriage by Air (Supplementary Provisions) Act 1962 (UK)

Code Napoléon (1804) (France)

Code of Commercial Courts was amended by the Arbitration Code 1983 (Saudi Arabia)

Commercial Court Regulations under Royal Decree No 32 of 1350 H (1930) (Saudi Arabia)

Company Law Royal Decree M/6 22/03/1385H (22 March 1965) (Egypt)

Company Securities (Insider Dealing) Act (1985) (UK)

Constitution of Saudi Arabia

Constitution of Turkey

Council of Ministers Code (1954) (Saudi Arabia)

Law of Companies Royal Decree No (M/6) dated 22/3/1385H (22 July 1965) (Saudi Arabia)

Ministerial Resolution No 58 dated 17/1/1383 (1963) (Saudi Arabia)

Minister of Commerce's Speech No 388 dated 15/3/1380 H (1960)

Revival of the Constitution of 1973 Order, Presidential Order No 14, 1985 (Pakistan)

Royal Decree No 30 25/7/1371H (20 April 1952) (Saudi Arabia)

Royal Decree M/23 25/5/1377 (15 December 1957) (Saudi Arabia)

Royal Decree M/6 22/03/1385H (22/03/1965) (Saudi Arabia)

Royal Decree No 1135 14/3/1353 (7 July 1933) (Saudi Arabia)

Royal Decree No 23 dated 23/5/1377 (15 May 1957) (Saudi Arabia)

Royal Decree No 24836 dated 29/10/1386 AH (1966) (Saudi Arabia)

Royal Decree No 45 dated 14/8/1381 (1961) (Saudi Arabia)

Royal Decree No 5737 dated 9/04/1373 (1954) (Saudi Arabia)

Royal Decree No 729/8 dated 10/07/1307H (1967) (Saudi Arabia)

Royal Decree No M/5 dated 22/2/1386 (11 June 1966) (Saudi Arabia)

Royal Decree No Ml13/8759 dated 17/9/1374 H (1955) (Saudi Arabia)

Royal Decree No 6/5/4/37111/8/1368 (28 May 1948) (Saudi Arabia)

Law of Trade Signs issued under Royal Decree No M/5 dated 4/5/1404 H (1984) (Saudi Arabia)

United Nations General Assembly Res 1803 'Permanent Sovereignty Over Natural Resources' (14 December 1962)

United Nations General Assembly Res 2158 (1962) and UNGA Res 3281 (12 December 1974) 'Charter of Economic Rights and Duties of States'

Table of cases

Arab-Malaysian Finance Berhad v Taman Ihsan Jaya and Ors [2008] 5 MLJ 631

Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] App LR 01/28

Council of Ministers Decision No 66 dated 6/4/1374 H (1954)

Council of Ministers Resolutions No 692 dated 26/9/1383 H Royal Decree No 37 11/10.1383 H (1963)

Decision of the Council of Ministers No 228 dated 2/6/1380 H (1960)

Federal Shar'ia Court Judgement on Riba 1991

Fisher v Bell [1961] 1 QB 394

German Interests in Polish Upper Silesia (*Germany v Pol*and) (1926) 7 PCIJ

Petroleum Development Ltd v Sheikh of Abu Dhabi (1951) 18 ILR 144

Ramah v Laton (1927) 6 FMSLR 128

Saudi Arabia v Arabian American Oil Co [1963] 27 ILR 117

Shaikh Abdul Latif v Shai Elia Box (1915) 1 FMSLR 204

Yong Joo Lin v Fung Poi Fong (1941) 1 MLJ 63