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ANALYSIS OF THEORIES OF LEGAL TRANSPLANTATION
THROUGH THE EXPERIENCE OF TRANSPLANTATION OF ISLAMIC
FINANCE

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ABSTRACT

The past few decades have witnessed the introduction of legislative reforms in many countries around the world as law reform has become an end in itself to keep pace with economic, social and political development and legal transplantation is one of the means that has been used to achieve this as it has been used throughout history in legislative reform, Which necessitates exposure to the concept of legal cultivation as one of the issues that occupied its place is important in Western studies, while there is no Arab study in this regard to define it on the one hand and indicate the role it plays in the process of legislative reform on the other hand, and the financing is Salami, one of the industries that have spread globally after the global financial crisis in 2008, prompting many policymakers around the world to receive him through amendments to the legislation for the demonstrated efficiency in the face of financial crises, we have chosen as an experiment to prove the validity of the theories of legal transplantation. Among the countries that were planted by France, as the political will expressed its desire to include Islamic finance in its banking system and to ensure its reception on its lands, it made many legislative and tax amendments to contain this moral financing. As for Iraq, the experience of Islamic banks was on a small scale and expansion and expansion was only available. After 2003, where many obstacles are beset, which requires us to find and find appropriate solutions to develop Islamic finance in Iraq compared to Arab and Western countries.

Introduction

Law is a social phenomenon and can only be known by reference to the past. Legislations and legal systems did not exist from nothingness,

but each of them was established on its predecessor and is a basis for what is after it. This can only be done through the comparative law by combining laws and making a comparison between them in terms of principles and general characteristics.

Legal transplantation is one of the processes that have interpreted the similarity between legal systems by borrowing from one legal system to another so that one of the two systems is the recipient and the other is the donor, where scholars see that there is a similarity between the ancient and modern laws and jurists and legal researchers attribute this to legal borrowing through legal transplantation. The process of legal transplantation has benefits that are evident in that it is one of the means that is used to change the laws to reform them by relying on the best models of laws and transplanting them, and since the world lives in new era in light of economic liberalization, as Islamic financial institutions impose themselves in the global environment and Islamic finance became an added value to the global economy and a link between the Western world and the Islamic world. Islamic finance cannot grow and thrive in the presence of traditional (usurious) banks. Rather, there must be a new regulation of banks that differs in its characteristics and goals from the conventional banks by adhering to the rules of Islamic Shari'a in its financial dealings and this regulation is represented by Islamic banks as it gained global appeal after the global financial crisis in 2008 and its exciting consequences on the economic fabric, given that Islamic finance requires respecting some religious principles, which is urged by Islamic law, transplantation between divine law and secular law is more difficult than transplantation among similar legal systems, including Islamic finance, as a form of Islamic economic activity based on the rules of Islamic law.

Banks are one of the necessities of life in the current era, so no social and economic sectors can do without them. It is the right of the individual to have his banking institution that is compatible with his religion and values, so Islamic banks have emerged to achieve this and facilitate the exchange of wealth and money, so we must touch on the experience of Islamic finance in Iraq through explaining the history of the development of Islamic finance in Iraq and the obstacles that hinder it, which is what we will know in section (Weltman, 2015). on the other hand, we must compare it with Islamic finance in French law, which will be the focus of our research in section (Alharbi, 2016).

1. Effectiveness of Islamic Finance in Iraqi Law

Iraq has a history in the field of commercial banks, despite all that it faces such as the successive change of governments and the deterioration of political and economic situation. In addition, and with the approval of the state bodies in the Iraqi government represented by the Iraqi Central Bank of the existence of ingredients to embrace the experience of Islamic banks. Especially after the recent war on Iraq in 2003 and because the experiences are not without errors and at the same time this does not reduce its value or detract it from its position. Furthermore, the experience of Islamic finance is one of these experiences to translate principles into programs to find a legitimate

cover to Islamic activity due to the recent experience in Iraq. we will address the historical development of Islamic finance in the Iraqi law on the one hand and the obstacles encountered on the other hand.

1.1 The historical development of Islamic banks in Iraqi law

Banking is a new phenomenon in our country. Rather, it has historical roots since ancient times. Since the early civilizations, Iraqis have known and organized trade exchanges, so the experience of Islamic banks has historical roots in Iraq. When you return to ancient civilizations, we find that there are many signs that indicate the existence of principles that have an Islamic economic system, including ancient Babylonian civilization, represented by the Hammurabi **Shari'a (Code)**, the principle of sharing profits and losses in the text of Article (98) thereof, which includes (if a person gives money to another for the purpose of entering into a partnership, then they share the profits and losses are equally before God) ¹Although Hammurabi Shari'a was before the emergence of Islam, justice in distribution was present in ancient legislation, including Hammurabi Shari'a.

In addition, when Islam came it permitted the selling and **prohibited usury** ² completely as mentioned in the Holy Qur'an through the Qur'anic verses, ³ and the Sunnah or honorable/ prophetic tradition/ came and that confirmed the prohibition above and the first califs or the "rightly guided caliphs" after the Prophet Mohammed continued to apply the principles of Islam in the economic system and the first endowment was created during the time of the Caliph Umar bin al-Khattab (may Allah be pleased with him). The number of endowments increased during the Umayyad Caliphate to include in addition to helping the poor and needy, building schools, hospitals, mosques and public libraries (Khorshid, 2009), but at the time of the Umayyads usury was present (Causse, 2010).

The emergence of Islamic banks in Iraq in its modern form has been delayed as a result of wars, political turmoil and economic crises. Initially, it was limited to government banks, the most important of which is **al-Rafidain Bank**, which began its work on 19/5/1941 with a capital of (50) thousand dinars followed by **al-Rasheed Bank**, which was established in 1988 and has a branch number of 162 (A. H. Almagtome, Al-Yasiri, Ali, Kadhim, & Bekheet, 2020). The first experience of Islamic banks was in **1992**, which took place following the decision of the dissolved Revolutionary Command Council No. 205 of 1992 which resulted in the establishment of the first Iraqi Islamic bank (Causse, 2010), which is the Iraqi Islamic Bank on

¹ A group of authors, Shari'a Hamo Rabi and the Origin of Legislation in the Ancient East, translated by Usama Sraas, 2nd edition, Dar Aladdin, Damascus, 1993, p. 107

² Usury is a language of usury, and its meaning is the increase and in the terminology there is a difference in it and the meaning of the increase, i.e. lending money, provided that the lender returns more than the amount borrowed, and it is of two types, interest and usury interest for more. Beirut, 1996, p. 256, see also: B. Kettell, *Islamic Finance in a Nutshell, A Guide for Non-Specialists*, John Wiley & Sons Ltd, 2010, p.13.

³ Of the verses that prohibited usury, verse (39) of Surat Al-Baqara and verse (30) of Surah Al-Imran and verse (161) of Surah Al-Nisaa and verses (275-279) of Surat Al-Baqarah .

December 19, 1992 and started its work on April 29, 1993 it has been able to achieve success despite the fact that its establishment was under difficult economic conditions as a result of the economic blockade on Iraq and has increased its capital to reach (250) billion in 2014 (Khaghaany, Kbelah, & Almagtome, 2019).

In 2001, the Elaf Islamic Bank (formerly Al Baraka Investment and Finance Bank) was established (Skidelsky & Martin, 2014). As for the actual development of Islamic banks in Iraq, it started after the recent war on Iraq in 2003, when the Coalition Provisional Authority, which was governing Iraq at the time, issued the Central Bank of Iraq Law No. (56). On the first of March **2004**, which is the first amendment to the Banking Law No. 94 of 2004, which is a distinctive sign in the economic history of Iraq for the purpose of reforming the banking sector due to its imbalance by focusing on free markets and investments in the private sector (Looney, 2004). As a result of that was done the establishment of two Islamic banks in in 2005, the Kurdistan International Bank for Development. **In 2006**, three Islamic banks were established, namely the Tigris and Euphrates Bank for Development and Investment (with Iraqi and Gulf participation of 49%), the Islamic Regional Cooperation Bank for Development and Investment (with an Iraqi-Iranian contribution) and the Islamic country bank. **In 2008**, the Ceyhan Bank for Investment and Finance was established with its headquarters In Erbil, and **in 2011**, the International Development Bank for Islamic Investment and Finance was established, and in the same year (Kettell, 2011). The first legislation was issued to regulate the work of Islamic banks in Iraq, which is (Islamic Banking Instructions No. 6 of 2011) concerning the establishment of Islamic banks and windows (Kasim, 2012).

In the same context, the Federal General Budget for Iraq for the fiscal year 2011 stipulated in Article (34 / first) of it, obligating the Federal Ministry of Finance to open an Islamic window and in an amount not exceeding (25) billion dinars for each of al-Rafidain Bank and al-Rasheed Bank. Despite the issuance of the instructions above, no new Islamic banks were established in Iraq, as the number of Islamic banks **in 2012** remained (9 Islamic banks) out of the total number of Iraqi banks then amounted to then (45) banks only after the promulgation of Law No. 95 of 2012 (Dincer & Eichengreen, 2013). It resulted in the establishment of the first government Islamic bank in Iraq, the Nahrain Bank and Islamic banks remained unchanged without an increase in their numbers for the period 2013-2015 (Al-Durai & Atiya, 2019).

In 2015, Islamic banking moved to a new stage with the issuance of the Islamic Banking Law No. 43 of 2015, which resulted in the number of Islamic banks increasing to reach 19 Islamic banks out of 65 in 2016 (A. Almagtome, Khaghaany, & Önce, 2020). Then the number of Islamic banks increased to 24 Islamic banks in 2017 out of 69 (Han, Han, & Han Hv, 2011). In 2017 the second amendment to the Central Bank of Iraq Law No. 56 of 2004 was issued, which is the Banking Law No. 82 of 2017, which came with amendments to delete and add to some articles of the above-mentioned Law No. 56, but it did not result in any developments on the reality of Islamic banking. In Iraq.

1.2 Barriers to developing Islamic finance in Iraqi law

Islamic finance in Iraq faces many obstacles, which need to be clarified in order to be able to evaluate and find appropriate solutions. These can be summarized in the following points:

1.2.1 Multiple jurisprudence opinions

Belief in God and the five principles of doctrinal rulings that do not accept pluralism in contrast to Shari'a issues in banking transactions depend on fatwas to indicate what is permissible and what is not permissible of transactions and given that fatwas are not a binding legal opinion, therefore opinions differ and multiply, even in relation to a single banking transaction which results in turmoil and instability and this formed fear among those in charge of managing Islamic banks.

1.2.2 Limited financing formulas in Islamic banks

Islamic banks in Iraq provide many services and financing methods that are compatible with the provisions of Islamic Shari'a, but many of the formulations practiced by Islamic banks in the world are not used in Iraq as *peace* and *Istisnaa* as a result of lack of interest in contracts and transactions on the one hand and the lack of trust between customers and Islamic banks (Ammirato, Sofo, Felicetti, & Raso, 2019). On the other hand, the reason for poor economic performance is the low level of trust, given that trust is the most important element in Islam (Fahlevi, 2019).

1. 2.3 Problem of Laws

The biggest challenge facing the work of Islamic banks is the contradiction between the laws governing commercial and financial matters, and the laws on Islamic banks based on Islamic law provisions on the one hand and the lack of tax facilities for Islamic banks on the other hand. The first aspect of the conflict is that the Iraqi legislator equated the Islamic banks and other companies as mentioned above, it was better to reduce the capital required for its establishment in accordance with Article (4 / First) of the Islamic Banking Law No. 43 of 2015, which stipulated that the paid-up capital of any Islamic bank not be less than (250) billion dinars. This condition, while benefiting the bank and the depositors, weighs on the founders and thus leads to the shortage of Islamic banks instead of urging to increase them.

On the other hand, Article (13 / second) stipulates the for tax exemption of specific formulas, and this would lead to the trend of Islamic banks in Iraq to these formulas to benefit from tax exemption and abandonment of other formulas, thus losing the advantage of diversity in financing formulas, which Also among the contradictions is that in the Iraqi Civil Law the legislator stipulated that it should not be permitted to collect compound interest, and at the same time it is permissible in the Iraqi Banking Law No. 94 of 2004 in Article 27 paragraph (1 / b)(Grewal, 2013). At the same time, stipulates that no interest should be dealt with, taken or given in Islamic Banking Instructions No. 6 of 2011 in Article (1/1) corresponding to Article (1 / Second) of the Islamic Banking Law No. 43 of 2015 and this represents a legislative contradiction that must be removed from the Banking Law of 2004. As for the lack of financial or tax facilities, this can be found in the text of Article (2) of the Income Tax Law No. 113

of 1982 and its amendments, which included the imposition of income tax (Gueranger, 2009) on business profits or that have a commercial characteristic, as it equated between Islamic and traditional banks, while the first does not deal with interest by taking or giving, and consequently, its returns are low compared to traditional interest-based banks.

2. The effectiveness of Islamic finance in French law

The financial crises in the international financial system, the last of which was the global financial crisis in 2008, paved the way to show Islamic finance as a global financial system and a real alternative to usurious financing, as it has revealed the weaknesses inherent in the system based on benefits and France is one of the countries that has been attracted by this type of ethical investment. The political efforts to embrace this industry began by making numerous legislative and regulatory amendments and relying on other qualifications it possesses. This is because one of the factors of success of any economic system is creating the appropriate environment, so the process of removing obstacles is an integral part of that process of preparation, so we will test the transplantation of Islamic finance in French law through touching on the capabilities of France to transplant the Islamic finance and to indicate the extent of the success of the process of transplantation Islamic finance or not. So it is necessary to touch on the amendments made by the French government to contain Islamic finance.

2.1 France's capabilities to receive Islamic finance

2.1.1 An enabling environment exists in France

The collapse of the financial markets in Europe and America, and the bankruptcy of the main banks have resulted in increased confidence in Islamic banks and attracted the interest of Westerners to this experience (Venardos, 2012). The Islamic banks have shown relative stability that contributed to reducing the volatility of the global financial markets and the reason is due to the capital and liquidity reserves that they have, the profitability of Islamic banks in 2008, reduced the negative impact of the financial crisis and its performance was better than the traditional ones due to the great losses incurred by the last (Bousslama, 2009). In addition, the increase in oil prices and the competitive nature of Islamic financial products that attracted the attention of investors to this industry accompanied by global crisis in 2008 and its negative effects on the economy it highlighted the importance of the economy based on Islamic principles an integral part of the economy and is not a substitute for traditional financing (Al-Bulooshi, 2018).

As non-Muslim countries such as France see Islamic finance as some of the advantages that conventional financing lacks because it has many of the ingredients that qualify it to transplant Islamic finance in its laws (Al-Wattar, Almagtome, & AL-Shafeay, 2019). The number of Muslims in it compared to other European countries - especially England, which is the capital of Islamic finance in Europe. They represent about six million Muslims out of the total population of France and about sixty six million people (Ghassan & Krichene, 2017).

it is the home of the largest Muslim community in Europe according to the statistics of the Pew Research Center Muslims will represent about 10% of the French population by 2030 With the possibility (Hajjar, 2019). This number may increase at the rate of a Muslim among every five Europeans in 2050 to reach about 12%, and it is only South Marseille in France in which Muslims make up about 25% of its population (Ahmed, 2016). Therefore, this segment needs he provide with products compatible with the provisions of Islamic law, including the halal food sector and the means of achieving this is Islamic banks (Khaghaany et al., 2019). As they are one of the necessities of life at the present time, where the annual revenue for the halal food sector is estimated to be approximately 5.5 billion dollars (Zaki & Hussainey, 2015). Therefore, the establishment of a company capable of providing the above products represents a great opportunity for development and expansion in the local French market on the one hand, including the provision of financing and travel tickets for Muslims who want to go to the Hajj, where (4000) visas are granted each year in France (LEFÈVRE, 2008).

2.1.2 Availability of qualifications at the organizational level

Although there is no Islamic bank in France, some French banks have Islamic branches, which have played an important role since the eighties of the twentieth century and are still to this day and provide products compatible with the provisions of Islamic Shari'a (Belouafi & Belabes, 2010), including: -

- Bank PNB Paribas, which has been present in the Gulf region since 1985 and has opened a unit specializing in Islamic banking operations called (Najma) aims to provide Islamic products to its customers all over the world, especially the Gulf region and Southeast Asian countries and has opened a branch for it In Bahrain in 2003 (Bousslama, 2009).
- Calyon Bank, which is the financing and investment bank of Credit Agricole Group and branched by the Saudi French Bank, has won a \$ 2.9 billion Islamic financing contract on behalf of Mobily, representing one of the largest deals in the telecom industry in Saudi Arabia and the Middle East Between the years 2006-2007.
- Societe General Bank contains units specializing in Islamic finance in Bahrain and London and this is an important step to make Paris a western center for Islamic finance (Bousslama, 2009). This bank established a branch for it, the French Commercial Bank (Indian Ocean) in 2008 in the island of Reunion (French province) (Societe General Asset Mangement Alternative Investiment). On the other hand, it has agreed to two funds compatible with Islamic law in the French province of Reunion. We believe that the presence of French banks that provide banking services in the Arab Gulf countries and European countries in accordance with the provisions of Islamic Shari'a, and if not in France, would send strong signals of the lack of hostility to Islam and Muslims and thus improve the image of France and attract investments from those countries in the future to establish Islamic branches In France, too.

2.2 The amendments made by the French government to receive Islamic finance

Reforming the regulations related to trust in accordance with the instructions issued by the Ministry of Justice No. 112-2009 on January 30, 2009 whereby the provisions of the Civil Code were amended for articles from 2011-2030 and articles 2372-2373 and article 2844 regarding the possibility of assigning property as a guarantee in credit contracts. The articles of the Tax Law were also amended in the same context, especially Articles 50, 54, 102, 150-151, and 238 to reduce tax friction (Prüm & Mattout, 2009). In addition, Decree No. 1627-2009 in December 23, 2009 related to the exercise of trust by lawyers as well as Decree No. 95-2020 on February 5, 2020 which stipulated in Article (1) of it to add an item to the text of Article 221-111 of the monetary and financial code 221-111-1, which included setting a minimum level of costs related to savings plan and equity savings to facilitate financing for SMEs (Boutora & Megherbi, 2020).

2.2.2 European Directive No. 61/2011, which came in response to the proposal submitted by the European Commission and the European Central Bank's opinion to overcome difficulties in the way of alternative investment funds, the most important of which are collective investment pledges for convertible securities that have not been covered under Directive 65/2009 and legal regulations, including Regulations No. 1060/2009 And 1095/2010 (Han et al., 2011). According to the European directive above, UCITS has the freedom to set specific rules regarding the distribution of income and purify the non-halal portion of their profits by donating to organizations that provide services for public benefit such as the Arab World Institute and in 10% limits, and on the condition that this does not affect the independence of the company's management (Brack, 2008). On the basis of which the instructions for the management of capital were issued in France on 7/25/2013 (Storck, 2013). Also, Decree No. 673-2019 of 2019 was issued for collective investment projects that included amendments to many articles of the French Monetary and Financial Law in this regard.

2.2.3 Issuing tax instructions No. 78 on 24 August, 2010 by the French General Directorate of Public Finance, especially paragraph (15) of which the taxpayer was exempted from the tax if he was from outside France and the value added was calculated according to the system of the country to which the taxpayer belongs, as well as paragraph (16) In which the taxpayer's income is excluded from the depreciation deduction when the value of the asset falls, and in the same context it is possible to take advantage of the conditions described in paragraph (11) of the above instructions.

1.2.2.4 Issuing tax instructions on 23 July 2010, which took upon itself the special nature of Islamic financial leasing operations, as the above instructions have taken into consideration the specificity of the above contract, as it indicated the possibility of separation between the lease contract and the purchase option in two separate documents, but at the same time it required the availability of some Conditions, including that the two contracts be concurrent in their signing, so that

they are one contract and the necessity of the lessor being licensed to practice finance business, given that the latter is exclusively within the jurisdiction of the financial institutions (Geslot, 2010).

French banks have benefited from the financial adjustments made by the French government to make Islamic finance successful in them and by 2012 there were seven Islamic funds compatible with the provisions of Islamic Shari'a. There is currently one bank which is the People's Bank it is a European branch of the Moroccan bank. It was announced that the launch of the first French retail banking products on June 25, which provides Islamic finance operations spread throughout France (Alharbi, 2016). The French officials expect that France will attract one hundred and twenty billion US dollars through lending and investments in French companies by 2020 in order that France can compete with European countries and the world (Ali, Almagtome, & Hameedi, 2019). It is clear from the above that the implantation of Islamic finance succeeded in France on all levels and was assisted in that by the desire of political parties that worked to adapt laws and issue instructions for the success of receiving Islamic finance on French soil as a complementary moral funding and not an alternative to traditional financing. It does not exist for Islamization of France and it is Not only for Muslims, because Islamic law does not bring its rules to non-Muslims, and this is what distinguishes the Islamic religion and the tolerant Islamic law.

Conclusion

Despite the novelty of Islamic banking activity in Iraq, it has recorded a distinguished presence and tangible development at the legislative and financial levels, and there is a contradiction between Iraqi legislation, including the Iraqi civil law, and legislation related to Islamic banks regarding the prohibition of interest, which needs to be resolved in other side The transplantation of Islamic finance in France is not intended to convert Islamism to the French system, but rather to promote this kind of moral investment based on the provisions of Islamic Shari'a and thus the publicizing of Islamic religion and its principles and spread in the whole world and not only France, therefore ,We recommend the Iraqi legislator to eliminate the conflict of interest in Iraqi legislation by stipulating the abolition of Article 27, paragraph (1 / b) of the Iraqi Banking Law No. 94 of 2004 ,And finally we recommend the Iraqi legislator to amend the text of Article (13 / Second) of the Islamic Banking Law for the year 2015 by amending the text of the above article after the formulas covered by the exemption, for example but not limited to saying: (Murabaha and Ijara ending with ownership, speculation, participation and other formulas that are consistent with the provisions of Islamic land and propose to the Iraqi legislator to amend Article (4 / First) of the Islamic Banking Law No. 43 of 2015 regarding the capital of the Islamic bank by stipulating a reduction of the capital required to (200) billion dinars to help expand the base of Islamic banks in Iraq on the one hand and satisfy the desire of the largest segment of society on the other hand.

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