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The Status of Islamic Commercial Law: Discoursing the Past and Present

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ABSTRACT

Almost all aspects of human behaviours are covered by Islamic law. Islamic law has a wider understanding than any other law including western law. It almost governs the way of the Muslim's life and regulates every commercial transaction in the Muslim's life. However, Christian law is based on secularism and Sharia law's framework is quite different and based on the principles of the Quran and Sunnah. As in Christian law, there is no specific law of property; likewise, there is no particular law of contract while in Islamic law there is specific Islamic law of contract and law of property which is derived from legal principles enshrined in the Quran and Hadith. Islamic law deals with every single circumstance of Muslim life. However, the main issue is that unfortunately Islamic law has been substituted and overcome by Western law. Hence, this article primarily focuses on whether Islamic law can be revived, considered, and adopted by the modern world.

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1 Introduction

The concept of the Islamic law revival shows that the world's scholars are interested to know about Islamic law and its importance and effectiveness. The terrorist attack on Twin Towers in New York on 9/11, and attacks on Beli, Madrid, and London in recent years, have dragged the scholar to learn about Islamic law. Their goal is to show how important law is to Muslims and what role it plays in their lives. When we say that Islamic law covers every part of a Muslim's life, we mean just that. Then it means every minute thing comprising human behaviour from political aspect to war, "from hunting to etiquette on the dining table, from a sexual relationship between husband and wife to prayers and worship of Allah, all these aspects of humankind are covered and dealt by Islamic law" (Hallaq, 2003). Consequently, no aspect of human life remained untouched as all are covered by Islamic law. This article inspects the basic concept and scope of Islamic commercial law. This article describes that Islam has its ethics in commercial dealings while there is no refined commercial law in Christianity. However, in Christianity, all the laws are secular. This article after comparing Islamic commercial law with Christian Commercial law pinpoints that Islamic commercial law is well-defined, well-established, and more reasonable. This discussion ends with a conclusion.

2 Implementation of Islamic Law in the Modern Age

It is necessary to have a conversation on the core principles that underlie Islamic law, often known as Sharia law. The phrase "Sharia law" is incapable of being translated into Arabic due to the fact that a coherent and fair translation of "Sharia law" does not exist in the Arabic language. Sharia and Fiqh are the two terms that are included in this phrase. The verses of the Holy Quran and the Hadiths are the components that make up the Sharia. The word Sharia comes from the Arabic word for the course or flow of water. Sharia, or Islamic law, guides individuals down the correct path, which is outlined in both the Quran and Sunnah. The interpretation and scholarly study of fiqh is the responsibility of the jurist. The jurists establish and develop their perspective, which is referred to as fiqh, based on their interpretation of the Hadith and the Quran. The doctrines and legal system of Islam are collectively referred to as Islamic Jurisprudence, and jurists are the primary individuals responsible for its construction. The Sharia encourages a certain kind of interpretation like this (Bedir, 2004). The meanings of these two terms are separate, despite the fact that there are naturally no such things as borders that are clearly defined. Islamic scholars have issues with the name Sharia because it does not differentiate between different types of occurrences. In Muslim-majority countries, Sharia is clearly different and distinct subject from the State law but the State laws must conform with Islamic laws and the laws of the state must not be repugnant to the injunctions of Islam or Islamic law. In some Muslim countries, there is a provision that Sharia will be the principal and foremost source of law. Moreover, such states oblige that their constitutions and statutory enactments must be based on sharia. However, this does not make Sharia the law of the state. Saudi Arabia is the only country where Sharia law is implemented but needs some regulation as supplementary which is enacted by the government. Likewise, in Pakistan, the domestic laws must rest well with Sharia law.

3 Defining the Scope and Concept of Islamic Commercial Law

The word "commercial law" is not very specific. The first thing that strikes us as different when we put it next to the western system is the language difference. In common law, the phrase "commercial law" often refers to the transaction that takes place between the parties, as opposed to the institution, such as a partnership or company, which is analogous to any of those terms in civilian law. Formally, there is a difference between commercial law and non-commercial law. There are also laws that don't make a difference between the two, and you can't put them in a category based on the difference between common law and civil law. This is an example of an important difference. In Sharia, considerations are not applicable. Even the distinction between transaction and institution is not relevant but Sharia Law does have contracts that have compatibility with the western partnership. Sharia law practically has no concept of legal personality. Sharia characterizes commercial and non-commercial law on the basis of their nature. This main division is based on morals, religious rules, and business deals. Some jurists recognise and admit that there is a difference between commercial transactions and other kinds of transactions (Hassan, H 2002). The western side lacks such perfect and reasonable division. In Sharia, the principle of morality applies in all situations. Sharia is accurate and deeply rooted and it reflects many years of experience. It is a well-established principle of the Islamic law that everyone should behave ordinarily the same whether performing any transaction or after performing any transaction. This uniformity in treatment has importance and significance as it creates the difference between Sharia and Western legal regime.

4 The Evolving Trends of Sharia and Islamic Commercial Law

Prophet Muhammad (S.A.W) was a highly respected merchant and arbitrator before he got his first divine message in 610 AD. The message was Quranic verses and was gathered in the collection after his death known as Quran which means “reader, from the root, to read.” Wehr, 1976 says that the Koran has a lot of verses that have a legal meaning, but it is by no means a complete set of laws. It is accompanied by short stories called hadith, which means "tradition" in English. These stories tell about the Prophet's words and actions, which are called his "practise" or "sunna." Even with this combination, though, there isn't enough information to handle all common problems. So, jurists used methods like qiyas (analogy) and

ijma to come up with rules to fill in the gaps. Other ideas were important, and 'urf (custom) was a very important one in business.

The other is ijtihad which means effort and legally it is considered a jurist's independent judgment on any legal or theological issue based on the interpretation of the sources of sharia and is opposed to *taqlid* which is established rule and doctrine (Wehr, 1976). In other words, the jurists figure out what Allah wants based on what he says in the Quran and what he says in the Sunnah. They do this by using ijtihad, which is a well-known method for doing this. This activity is only taken up by a person who has deep knowledge of the Quran and Sunnah who is called *Mujtahid.* The mujtahid donates creativity in the sharia and especially adopts the sharia according to modern times (Cowan, 1976).

According to Hallaq (2004b), the law that evolved was the law of the body politic; nonetheless, it was to a great part conceived, and virtually fully governed and interpreted by jurists working inside madhahib. The madhahib were very substantially autonomous from the ruler, who was subject to the law, not its generator or controller, both in concept and in most actual practises. The monarch was subject to the law in principle and most actual practices. Never throughout the history of Islam was the governing class, often known as the body politic, able to decide what the law was. The political system was thought of as corrupt. If Islamic law had been the highest point of religion and living a holy life for Muslims, the state would have been the lowest point of worldly corruption and seduction. Of course, the jurists and the king did talk to each other and agree, but the shari'a's independent and dominant position is still a big difference from how we think of law in the West today. If we discussed the commercial side of Muslim rulers then there was a large area in which great dealing of trade took place. Many products were manufactured, exported, and imported and large quantities of gold coins were circulated. Wealth was circulated during that time (Ashtor, 1972). Industries were present and many goods were manufactured in them. Once Western Sudan was the main hub of gold and it was being circulated freely. Bankers performed all their functions like banking operations, exchange of money, loan, and sale of assignment credit in this country. But soon after its hub was transferred to the Muslim lands where the Muslim jurist developed a system that served humanity (Ashtor, 1972).

The Islamic world has expressed a desire to progress toward modernity. The institution of Europe was embraced by the Arab world as a result of its adoption of modernisation. This modernity eliminated the need for Sharia law in all areas of the Arab world, with the exception of family law (Hourani, 1983). And the same thing occurred with Sharia law for business transactions; it has nearly been eradicated from the whole area, with the exception of the Arabian Peninsula; and lately, Saudi Arabia is the only country that is attempting to put it into reality. Despite this, the western commercial style was the most popular across the whole area. It can be seen in Islamic history that there was separate commercial law but why did Islamic scholars look towards Europe for commercial law instead of pre-existing Sharia traditions (Asad, 2003)? But it seems that when Napoleon conquered Egypt he separated the commercial and non-commercial law. He introduced separate special courts for the settlement of commercial disputes. Goldberg (1999) also says that the Ottoman Empire's adoption of the French commercial code in 1850 was part of a long, complicated, and important process of secularisation.

"*European dominance of trade;*

- *the desire of European merchants to avoid local courts and local law;*
- *the perception that an obligation to use the shari'a disadvantaged local merchants against their European counterparts, who could use Western law, which was viewed as more efficient;*
- *the practice of European traders of using the French Commercial Code as a kind of customary law to aid the resolution of their disputes;*

- *familiarity with the idea and practice of secular legislation in certain fields;*
- *the influence of the Ottoman elite, who stood to gain from trade with Europe, and the governmental desire to please them; and*
- *a perception that commercial matters were of less religious significance than, say akhlaq (morals), a perception which may have been influenced by the Egyptian experience (Asad, 2003)."*

French Commercial Code of 1807 played an important role and it has been extracted from well-established the Ottoman Commercial Code of 1850. State law also followed the division of commercial and non-commercial matters after the advent of this Code.

5 Finding the Status of Islamic Commerical Law in Modern Times

The system of Sharia law "was dismantled many years ago so we cannot exactly know what the Sharia was or how it worked." We can see the texts written by some jurists but they are controversial as well to a degree when such texts reflect the law in action (Ray, 1997).

The conclusion drawn from the study of Tyan and Abraham Udovitch who were two eminent scholars is that there are controversies about commercial laws as well. From the study of Tyan, it is concluded that "Hanafi rules on *hawala* (rights and obligation transfer) were significantly different from the law in action" (Tyan, 1946) On the other hand when we study the Cairo Geniza documents of Udovitch, it can be concluded that there is almost a one-to-one relationship between how important a problem is in the Geniza papers and how much space and attention it gets in the law books. Hanafi commercial law, especially the part about institutions of commercial association, was very close to everyday life. Maybe they were both right about the documents they looked at in their own time and place. As Mallat points out, there haven't been many tests of how law and reality worked together in the classical period. (Mallat, 2003)."

Last but not least, there is the problem of whether or not Sharia and Islamic commercial law are appropriate for use in today's modern world. The application of western law, as was just said, is quite accurate. The committee that said that western law would be able to cope with the complexity of contemporary trade in that century provided the reason for Majalla, which was "the ottoman codification of the Hanafi School for the implementation of the 1850 commercial code." Because Turkish law was unable of dealing with the new challenges that were emerging in commercial domains like bill exchange and bankruptcy, the country required specific codified legislation that deals with these concerns in a contemporary fashion (Onar, S 1955). In this particular system of law, commercial law was characterised primarily by its adaptability, pragmatic orientation, and emphasis on absolutes (Mallat, C 2000). The Islamic world has expressed a desire to progress toward modernity. The institution of Europe was embraced by the Arab world as a result of its adoption of modernisation. This modernity eliminated the need for Sharia law in all areas of the Arab world, with the exception of family law (Hourani, 1983). And the same thing occurred with Sharia law for business transactions; it has nearly been eradicated from the whole area, with the exception of the Arabian Peninsula; and lately, Saudi Arabia is the only country that is attempting to put it into reality. Despite this, the western commercial style was the most popular across the whole area. The Muslim world has now adopted western commercial law and there is no possibility of considering Islamic commercial law unless they revive Islamic sharia including commercial law and all aspects.

6 Conclusion

Many non-Muslim researchers have no concern with Islamic Law or Islamic Commercial Law. They do not have an interest in the revival of Islamic Commercial Law that was a precise, accurate and reasonable law. They usually do not read or recognize this law. Similarly, many Islamic states do not implement this fair law. Until this view has been recently justified for all jurisdictions but some people took interest in this subject. The revival of Islamic law and Islamic Commercial law will effectively change the scenario.

The most influential manifestation of Islamic Commercial law is needed. Commercial law and other types of law are very different. However, it is impossible to completely separate commercial law from the rest of the systems. Sharia may be relevant to the field of international legal harmonisation, and international harmonisation is possible if the Muslim-majority state wants to change its policies to be more in line with sharia.

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