SHARI'A COMMERCIAL LAW IN THE MODERN WORLD

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Since the shari'a commercial system was dismantled many years ago, we cannot be entirely sure what the shari'a was nor how it was practiced. We have texts which were written by the jurists, but controversy surrounds the issue of the degree to which they reflected the law in action; our best source of information, the participants in the system died many years ago; records relevant to practice are sparse for most periods, and where they do exist only a few of them have been researched [1]. An example of the controversies can be seen in the differing conclusions drawn by two eminent scholars, Emile Tyan and Abraham Udovitch. Tyan concluded from a study of notarial documents that the Hanafi rules on *hawala* (the transfer of a right or obligation) were significantly different from the law in action [2]. Udovitch, on the other hand, after studying the Cairo Geniza documents, wrote: 'There is an almost one-to-one relationship between the importance of problems as reflected in the Geniza papers, and the amount of space and attention they receive in the law books', and: 'Hanafi commercial law, especially that portion of it dealing with institutions of commercial association, had a very close relationship to actual practice' [3]. Perhaps both were right as regards the documents they studied in the context of their time and place. As Mallat observes, 'the exact interaction between law and reality in the classical age has not been tested in any significant manner'.

However, this difficulty may be less problematic than it seems. Without going into the complexities of the debate, we can probably say with some assurance that, in many places and for long periods in most areas of commerce, the law in the books mostly reflected the law in action [4]. Hanna's extensive study of court records, for example, clearly demonstrates that commercial law played a vital part in the daily professional life of merchants in Egypt at that time.

There is a further difficulty. The madhahib, although in accord with all fundamental principles, did disagree, and the differences between them can, in certain circumstances, have significant consequences. For example, the mechanisms called '*hawala*' varied so much that it is better to regard them as different institutions with not much more in common than a name and their source. In other words, one can argue that there is no such thing as '*the* shari'a', but that there are various '*shari'as*'; or looking at the situation another way, that the shari'a is far from unified in significant respects [5]. This situation poses considerable difficulties, some consequences of which are discussed in the

conclusion. Unlike state-based systems, there is no authoritative body that can tell us what the shari'a is, no legislature, and no equivalent to the Judicial Committee of the House of Lords in England or the Court of Cassation in France [6].

Finally, there is the issue of suitability for the modern world. As already noted, the reasons for the adoption of Western law are not entirely clear. The justification given by the drafting committee of the Majalla (the Ottoman codification of the Hanafi school) for the enactment of the 1850 Commercial Code was that only Western law could deal with the complexities of modern commerce: 'During this century trade relations have expanded to so wide an area and have acquired so complex a character that Turkish law cannot settle problems concerning matters such as bills of exchange or bankruptcy, and there is need for a new and special Code of Commerce to apply to these cases.' [7]. The notion dominated thinking until quite recently, and many lawyers still believe it. However, the implied conclusion that any attempt to adapt the shari'a was futile is prima facie somewhat surprising. It was a legal regime with many of the elements considered essential for the proper functioning of a commercial law system, i.e., 'certainty, flexibility, and pragmatism'. It seems to have been more than adequate for the circumstances of the time, and to have played a significant role in the facilitation of commerce, with a sophisticated law of sale, financial instruments, different kinds of partnership, pledge law, guarantee law, and so on. 'International' (long-distance) networks existed serviced by commercial law mechanisms, particularly those concerned with payments. Flexibility and pragmatism seem to have been at least partly provided by custom which, despite its lack of general formal status, was recognized as a de facto source. Sarakhsi, in his *Book of Sale* written in the 11th century AD, wrote that 'What matters in all things is usage.' [8]. According to Mallat, the custom was 'decisive', and the strict rules of the books of *fiqh* were abandoned 'in favor of the merchants' customs', a position justified by two Prophetic Traditions: 'Everything that Muslims regard as good is good in God's eyes' and 'My community will not agree on an error'. Whatever the real reasons, the result of that attitude, and the adoption of Western commercial law, was that the possibility of adapting the shari'a to the modern world was not considered until very recently when, as a result of the Islamic revival, there was a call for a return to the totality of the shari'a, including its commercial aspects. The consequences of this trend are seen most notably in the context of Islamic finance but are also manifested in the positive legislation of some Muslim-majority jurisdictions.

References:

1. On the 'restoration' issue generally, see HALLAQ, WB (2004) 'Can the Sharia Be Restored?' in HADDAD, YY and STOWASSER, BF (eds) Islamic Law and the Challenges of Modernity AltaMira Press.

2. YAN, E (1946), pp.31-37. Views such as this are considered by some scholars to be a means of 'relegat[ing] Islamic law to the status of a relic of the past' to make it seem 'archaic, rigid, primitive, and incapable of change', enabling colonial adminstrators 'to rationalize their empires' domination and imposition of new legal and other structures': Hallaq '"Muslim Rage" and Islamic Law', p.1710.

3. Udovitch, AL (1970B), p. 290.

4. RAY (1997), p. 45.

5. EL-GAMAL, MA (2003), p.111.

6. On the nascent efforts to resolve this problem in Islamic finance, see FOSTER, NHD (Forthcoming) 'Islamic Finance Law as an Emergent Legal System' Arab Law Quarterly.

7. Cited in ONAR, S (1955), p.294. See generally LAFON, J (1997). See also NADOLSKI, DG (1977)

8. SARAKHSI (11th century) The Book of Sale, cited in Mallat 'Commercial Law in the Middle East', p.48.