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The overview of Islamic commercial law

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ABSTRACT

'Islamic law' covers all aspects of human behavior. It is much wider than the Western understanding of 'law', and governs 'the Muslim's way of life in literally every detail and, of course, it also regulates commercial transactions. It follows that the Islamic conceptual framework is quite unlike that of Christianity in which law is secular. There is no Christian law of contract, for example, no Christian law of property, whereas bodies of law dealing with such matters do exist in the shari'a – the 'legal' verses of the Koran and the traditions of the Prophet. The shari'a has long been abandoned and substituted by Western law. However, as a result of the Islamic revival, the possibility of adapting the shari'a to the modern world has been considered recently.

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Islom tijorat huquqini sharhlash

Kalit so'zlar:
Islom,
Qur'on,
shariat,
fiqh,
sunnat,
axloq,
muamalat,
ijmo,
qiyos.

ANNOTATSIYA

"Islom huquqi" inson xulq-atvorining barcha jabhalarini qamrab oladi. Bu g'arbning "qonun" tushunchasidan ancha kengroq bo'lib, "musulmonning turmush tarzini tom ma'noda har bir detalda tartibga soladi va, albatta, tijorat operatsiyalarini tartibga soladi". Bundan kelib chiqadiki, islom konseptual tuzilishi qonun dunyoviy bo'lgan xristianlikdan tubdan farq qiladi. Masalan, nasroniylik shartnoma qonuni, nasroniy mulk huquqi yo'q, shariatda esa bunday masalalarga oid qonun kodekslari – Qur'onning "qonuniy" oyatlari va Payg'ambar urf-odatlari mavjud. Shariat uzoq vaqtdan beri tark etilgan va o'rniga G'arb qonunlari kiritilgan. Biroq islom uyg'onishi natijasida so'nggi paytlarda shariatni zamonaviy dunyoga moslashtirish imkoniyatlari ko'rib chiqila boshlandi.

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Обзор исламского коммерческого права

Ключевые слова:
Ислам,
Коран,
шариат,
фикх,
сунна,
ахлак,
муамалат,
иджма,
кийас.

АННОТАЦИЯ

«Исламский закон» охватывает все аспекты человеческого поведения. Оно гораздо шире западного понимания «закона» и регулирует «образ жизни мусульманина буквально во всех деталях и, конечно же, регулирует и коммерческие сделки». Из этого следует, что исламская концептуальная структура совершенно отличается от христианской, в которой закон является светским. Например, нет христианского договорного права, нет христианского права собственности, тогда как своды законов, касающихся таких вопросов, существуют в шариате – «юридических» стихах Корана и традициях Пророка. Шариат уже давно отброшен и заменен западным правом. Однако в результате исламского возрождения в последнее время стала рассматриваться возможность адаптации шариата к современному миру.

INTRODUCTION

The numerous tragic events, such as the terrorist attacks on the Twin Towers in New York, Bali, Madrid and London, the invasions of Afghanistan and Iraq, the ongoing violence in those two countries and the attack on Lebanon, have created an interest in Islam generally, and more particularly in the phenomenon known as the 'Islamic revival'. One result of this new interest is an awareness of the role and importance of law in the life of Muslims. 'Islamic law' (in inverted commas because, as explained below, the term itself is problematic) covers all aspects of human behavior. It is much wider than the Western understanding of 'law', and governs 'the Muslim's way of life in literally every detail, from political government to the sale of real property, from hunting to the etiquette of dining, from sexual relations to worship and prayer.' [1]. Notably for our purposes it also regulates commercial transactions. It follows that the Islamic conceptual framework is quite unlike that of Christianity in which law is secular [2]. There is no Christian law of contract, for example, no Christian law of property, whereas bodies of law dealing with such matters do exist in the shari'a. So, although it would make no sense to refer to 'Christian commercial law', it is meaningful to speak of 'Islamic Commercial Law'.

Various issues need to be explored before we proceed to a consideration of that law.

The Background

'Islamic Law', Shari'a and Fiqh As already indicated, the expression 'Islamic law' necessitates some discussion. It is not a translation from Arabic: it cannot even be meaningfully translated into that language, which in fact uses two words, 'shari'a' and 'fiqh'. In one sense of the word (and it must be said that usages vary and opinions differ), the shari'a is constituted by the 'legal' verses of the Koran and the Traditions of the Prophet, fiqh is the learned study and juristic interpretation of those sources; it is often described as 'Islamic jurisprudence'. In a broader sense, the word shari'a also includes such interpretation [3]. The concepts are normally regarded as distinct, although naturally, the boundaries between them are not absolutely clear-cut. Muslim scholars rightly criticize the term 'Islamic law' for its failure to distinguish between the two phenomena. In this article, therefore, the term will be avoided from now on. The shari'a

must be clearly differentiated from the state law of Muslim-majority jurisdictions. Some jurisdictions do have a provision in their constitution that the shari'a is a or the principal source of law [4], and some have enacted statutes based on the shari'a. However, this is different from the shari'a being the law. In the first case, it is no more than the source; in the second, one of its essential attributes, its ultimate authority, has been altered, from Allah to the state. The one exception is Saudi Arabia, where the shari'a is the law, but even there it is supplemented by numerous 'regulations' enacted by the government.

Shari'a Commercial Law

'Commercial law' is an imprecise term. In comparisons between Western systems, the primary linguistic difference is that the common law term tends to cover transactions rather than institutions such as partnerships and companies, whereas civilian law equivalents encompass both [5]. Another striking difference, which cannot be categorized according to the common law/civilian law divide, is that between systems that have a formal distinction between commercial and non-commercial law and those which do not*.

The considerations do not apply to the shari'a. The distinction between transactions and institutions is not relevant because, although the shari'a does have contracts that resemble our partnerships, it has practically no concept of legal personality*. As regards the distinction between commercial and non-commercial law, the jurists did, naturally, categorize the shari'a, but the principal divisions were akhlaq (morals), ibada (religious observance) and mu'amalat (transactions) and, although they did recognize the difference between commercial and non-commercial transactions to some extent, this acknowledgment did not have anything like the same nature or significance as the Western divide. In the shari'a, the same principles of morality apply to all situations; one should not behave in one way at home and another way in the office. The shari'a attitude has deep roots, for it reflects the Prophet's many years of experience as a trader before his prophetic mission. This uniformity of treatment is a particularly important aspect of the subject because it gives rise to some major differences between the shari'a and Western commercial law regimes. The latter, whether or not they contain a formal distinction, work on the assumption that different attitudes are needed for commercial as opposed to non-commercial transactions since business people need less protection than ordinary individuals and different moral standards apply. Accordingly, any definition of 'Shari'a commercial law' (one might be: 'all those parts of the shari'a relating to the exchange of goods and services with the aim of profit'), must be read in the light of the considerations outlined above.

The Shari'a:

Development and Eclipse But what is the shari'a? The question is perhaps best answered by a brief historical overview. The Prophet Muhammad received his first divine message in approximately 610 AD, having up to that date been a highly respected merchant and arbitrator. The message was followed by other revelations, which were gathered together after his death in the collection now known as the Koran, literally 'reader', from the root 'qr'', to read. The Koran contains a considerable number of verses

* *Italy, for example, does not have a formal distinction. United States jurisdictions do not fit into this categorisation, as they have statutes based on the Uniform Commercial Code, but do not make a formal distinction in the same way as, say, French law.*

* *There were a few instances of phenomena which were similar to legal entity ideas, but they were not developed or used to any significant extent.*

with legal significance but is far from being a comprehensive code. It is supplemented by accounts of the Prophet's words and deeds, his practice or 'sunna', recorded in short narratives called 'hadith', the English translation of which is 'Tradition'. Even this combination, though, does not provide enough detail to deal with all commonly occurring problems, so the jurists devised rules to fill the gaps using various techniques, notably qiyas (analogy) and ijma' (consensus; at first that of the whole community, then that of the jurists). Various other concepts were of relevance, of these 'urf (custom) was of great significance in commercial transactions. One concept in particular, 'ijtihad', should be mentioned here. Literally 'effort', in a legal sense can be defined as 'independent judgment in a legal or theological question, based on the interpretation and application of the [sources of the shari'a], as opposed to taqlid [following established rules and doctrine]' [6].

In other words, it is a human activity that interprets the will of Allah as manifested in the Koran and the Sunna by the use of established juristic techniques. That activity can only be properly undertaken by someone with a deep knowledge of the shari'a, someone who is 'mujtahid'. It is also used to denote creativity in the shari'a, as in the (now somewhat discredited) idea of the 'closing of the gate of ijtihad', and more especially in recent times, the adaptation of the shari'a to modern conditions. The law which emerged was 'the law of the body politic' [7], but it was to a significant extent devised, and almost entirely managed and interpreted, by jurists working within madhahib (singular madhhab, rendered in English as 'school'). The madhahib were largely independent of the ruler who was, in principle and usually in practice, subject to the law, not its generator or controller. 'Never could the Islamic ruling elite, the body politic, determine what the law was.' [8]. Indeed, the body politic was regarded as corrupt. 'If Islamic law had represented to Muslims the best of religion and religious life, then the state stood for the worst of worldly temptation [and] corruption'. Naturally, interaction and accommodation did occur between the jurists and the ruler, but nonetheless, the independent and dominant position of the shari'a does constitute a major difference between it and the modern Western idea of law. On the commercial side, the Muslim conquests created a vast area in which and out of which a great deal of trading activity took place. It was crossed by important trade routes and, for most of the very long period of classical Islam, there was a favorable economic environment. 'Industry was developed, manpower consisted of free workers, many goods were produced for export and large quantities of coins were in circulation.' [9]. Gold from Western Sudan came into the Muslim world and circulated freely and there was: 'intense [banking] activity', in which bankers: 'performed all banking operations: the exchange of money, loans, and the sale of assignments of credit'. As a consequence, the jurists developed a system which, it seems, (although, as we shall see, the issue is disputed) served the needs of participants well. However, the Muslim world was eventually overtaken by the West in areas such as technology, warfare, and commercial techniques. This new superiority was forcefully brought home by a long series of events, including notably the conquest of Egypt by the French in 1798, the European domination of trade (symbolized for many commentators by the Treaty of Balta Liman in 1838 between the United Kingdom and the Ottoman Empire) [10] and generally the political domination of the region by European powers. One of the consequences was a wish to 'modernize', in other words, to imitate and adopt those ideas and institutions which seemed to have given Europe the advantage.

The modernization movement led to the shari'a being 'abandoned with astonishing speed and completeness' in all areas except family law; shari'a commercial law disappeared from almost the entire region, the one exception being, for a considerable period, the Arabian peninsula and, more recently, Saudi Arabia alone, and Western commercial law was adopted in its place.

The full history of the adoption, involving notably the separation of commercial law from other legal topics, has yet to be written. In particular, commentators still argue about 'why the reformers looked to Europe rather than build on pre-existing shari'a traditions', but it seems that Napoleon brought with him to Egypt, by way of an unthinking assumption, the French idea of separating commercial and non-commercial law, and that special courts were set up to deal with commercial disputes [11]. The influential adoption by the Ottoman Empire in 1850 of large parts of the French Commercial Code was made as part of a long and complex secularization process in which the following factors, inter alia, seem to have played a part:

1. European dominance of trade;
2. The desire of European merchants to avoid local courts and local law;
3. 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;
4. The practice of European traders of using the French Commercial Code as a kind of customary law to aid the resolution of their disputes;
5. Familiarity with the idea and practice of secular legislation in certain fields;
6. The influence of the Ottoman elite, who stood to gain from trade with Europe, and the governmental desire to please them;
7. 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.

However, this may be, what is certain is that major parts of the French Commercial Code 1807 were imported as the Ottoman Commercial Code 1850. Subsequent developments in state law followed the pattern of a divide between commercial and non-commercial matters, this format was the progenitor of the basic attitude towards commercial law, and its un-Islamic separation from civil law seen in the legal systems of many other countries such as Egypt, Iraq, Libya and Kuwait. In drafting the civil codes of these countries, the approach of the noted Egyptian jurist, Dr Abd al-Razzaq alSanhuri, even in his second, more 'Islamic revival', phase of drafting 'was premised on the view that Shari'ah cannot be reintroduced in its totality'.

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