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Islamic Commercial Law (II): An Overview

Some principles and rules

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Abstract

Shari'a commercial law is a complex system and covers numerous areas. Accordingly, only a selective and general overview can be given. This includes a look at some general principles, followed by an examination of some aspects that are characteristic of the regime, markedly different from those to which Western lawyers are accustomed, or both. In addition, it should be borne in mind that it is not possible to provide an account that is at the same time brief and wholly accurate. What follows, therefore, can be an approximation only.

Summary

1. The Islamic attitude towards Commerce and Commercial Law

Shari'a[1] commercial law is a complex system and covers numerous areas. Accordingly, only a selective and general overview can be given, comprising a look at some general principles, followed by an examination of some aspects that are characteristic of the regime, or markedly different from those to which Western lawyers are accustomed, or both. In addition, it should be borne in mind that it is not possible to provide an account that is at the same time brief and wholly accurate. What follows, therefore, can only be an approximation.

According to one author: 'Islam is perhaps the one great religion which affords the merchant a highly honoured place in society' (LIEBER, 1968, p. 230). According to another:

> There are religions whose sacred texts discourage economic activity in general, counselling their followers to rely on God to provide them with their daily bread, or, more particularly, looking askance at any striving for profit. This is certainly not the case with the Koran, which looks with favour upon commercial activity, confining itself to condemning fraudulent practices [...] It is reported that the Prophet said: […] 'Merchants are the messengers of this world and God's faithful trustees on Earth' [...] Umar is alleged to have said: 'Death can come upon me nowhere more pleasantly than where I am engaged in business in the market, buying and selling on behalf of my family' (RODINSON, 1987, pp. 70-71).[2]

One reason for this positive attitude may have been the Prophet's merchant activities before his mission, another the social and economic importance of trade in the Muslim Middle East, particularly in desert areas in which additional sources of income were vital, yet another the involvement of jurists in trading activity -largely as investors (COHEN, 1970).

2. General principles

2.1. Generality and Specificity

As in any commercial law regime, the foundation is the law of contract. Or, more accurately, the law of *contracts*, for, as in Roman law, the shari'a contained an array of contract types, the 'nominate contracts', each with its own rules. A list of some of the commonest varieties is unsurprising:

- Sale (*bai'*)
- Pledge (*rahn*)
- Guarantee (*kafala*)
- Agency (*wakala*)

[1] Transliteration of Arabic words has been simplified for ease of reading; the transliteration is not necessarily consistent. Thanks to Michael Foster Vander Elst for comments on a previous draft; the usual caveat applies.

[2] RODINSON also makes the point that Islam does not challenge private property. See also Koran 78:11.

- Hire (*ijara*)
- Partnership (*musharaka*)
- (Limited) partnership (*mudaraba/qirad*)[3]
- Gift *(hiba*)

It is of some interest to the comparatist that, as in civilian and unlike common law, the category of ''*aqd*' (contract) includes both unilateral and synallagmatic relationships. Other contract types are more intriguing than those on the basic list, but since they evolved in accordance with/were recognised in response or as exceptions to the principles discussed below, they are not comprehensible without an understanding of those principles, and will not be mentioned here.

The conclusion is often drawn from the existence of the nominate contracts that there is no general law of contract in the shari'a. In a sense, this is true. The jurists did not discourse about 'contract' in the same way that, for example, Treitel, Carbonnier or Gordley do. There was no 'explicit general theory' (HASSAN, 2002, p. 257). Discussions of 'contract' in modern books are often in fact discussions of sale. However, general principles do exist and it is these, and some of the consequences which flow from them, which we will look at in the following sections.

The fundamental general principle is obedience to God, entailing the respect of the principles of Islam. So we see Islamic precepts, Islamic morality informing the rules in a detailed, substantive way which is quite different in nature from the general Christian background encountered in Western systems.

2.2. Freedom of Contract[4]

The first, perhaps unexpected, consequence is the nominate contract system itself, which is intimately linked to the shari'a notion of freedom of contract. The latter is commonly misunderstood. The shari'a contains a principle of respect for the sanctity of contractual obligation. The Koran 5:1 provides: 'O ye who believe! Fulfil your undertakings' (the word translated as 'undertakings' is '*uqud*, which is the modern Arabic for 'contracts'). This looks very much like *pacta sunt servanda*, and it is true that there are similarities between the two principles. In addition, what is not forbidden is allowed, a principle described by the jurist IBN TAYMIYAH: 'men shall be permitted to make all the transactions they need, unless these transactions are forbidden by the Book or by the Sunna' (IBN TAYMIYAH, 1948, p. 167).

However, this does not mean that there is complete contractual autonomy. The Koranic injunction only applied to those obligations entered into pursuant to a recognised contract type that respected

[3] The term 'commenda' is quite often used as the equivalent of *mudaraba/qirad*.
[4] See Rayner, SE (1991) *The Theory of Contracts in Islamic Law* Graham & Trotman, Section 4.2; Saleh, N (2001) 'Freedom of Contract: What Does it Mean in the Context of Arab Laws?' (16) *Arab Law Quarterly* 346, pp 346-47.

the precepts of Islam. In other words, the Islamic nature of a contract is assured by its conforming to a type which has been verified as adhering to the requirements of religion. One can picture the nominate contracts as different types of electric light, determined in advance as providing an acceptable type of illumination. Parties are 'free' to turn on any of the light switches, but they cannot change the bulb or the wiring, nor can they construct new types. In other words, the nature and the essential terms of the particular contract are laid down in advance in order to ensure compliance with the shari'a. According to RAYNER (1991, p.91): 'the parties to a private transaction are only free to determine the terms and object of their agreement subject to the strictures placed upon them by the *Shari'a*.' And in Schacht's words: 'Islamic law does not recognise the liberty of contract, but it provides an appreciable measure of freedom within certain fixed types. *Liberty of contract would be incompatible with the ethical control of legal transactions*' (SCHACHT, 1965, p. 144).

2.3. Equity and Equality

Other consequences of the fundamental principle in the field of contract law include the principles of equality and equity. The Koran 5:58 provides: 'God doth command you to render back your Trusts to those to whom they are due; and when ye judge between man and man that ye judge with justice.' A well-known Tradition has become a statement of principle: 'There shall be no unfair loss nor the causing of such loss (*la darar wa la dirar*)' (Islam, 1998, p. 340).

These principles have various consequences in their turn.

3. Extensions to the general principles

3.1. Equilibrium

Unlike English-based common law, for example, which does not recognise a principle of inequality of bargaining power, the shari'a 'emphasises the idea of balance of counter values' (ISLAM, 1998, p.341)[5].

3.2. Certainty of Contractual Obligation

We have already seen that the shari'a contains a principle of the binding nature of the contract which is, however, subject to limitations set by the nature of the nominate contract system. It is also limited by notions of fairness. For example, the judge has considerable power to 'reconstruct or readjust an existing contractual obligation' (RAYNER, 1991, p. 93), notably to redress an imbalance of obligation

[5] On English law, see *Lloyds Bank Ltd v Bundy* [1975] QB 326, Lord Denning's unsuccessful attempt to import a principle of inequality of bargaining power into English law; for the reaction of his senior judicial colleagues, see *Pao On v Lau Yiu Long* [1980] AC 614, PC at 634-35 and *National Westminster Bank plc v Morgan* [1985] AC 686 at 707-08.

(*istighlal*). The schools differ here. The Hanafis and the Shafi'is require fraudulent imputation. The Malikis and Hanbalis apply the doctrine in the case of innocent or inexperienced victims of disproportionate contracts. A statutory enactment of the Maliki/Hanbali approach can be found in Art. 159 Kuwaiti Civil Code:

> "if [...] this contract contains gross inequities between the obligations to be executed and the spiritual or material profit to be gained, such that the ratification is plainly offensive to the honour of the transaction and to the requirement of good faith, then the judge shall be empowered [...] to reduce the obligations of the exploited party; or to increase the obligations of the other party; or to nullify the contract" (cited in RAYNER, 1991, p. 225).

Such judicial capacity to adjust the terms of the contract results in a level of uncertainty and a level of protection which are quite different from, say, that thought necessary in English-based common law.

3.3. Certainty in Contract Formation

The need for equality and equity results in a regime for the formation of contracts which is also markedly different from those found in Western systems, the idea being that the risk to the parties must be reduced to an acceptable minimum, notably by the provision of adequate information regarding all the relevant circumstances of the potential transaction. The contrast is stronger with the common law than with the civilian systems, but still present as regards the latter. Indeed, one can (very roughly) picture the three traditions as occupying different points on a spectrum of certainty, with English-based common law at one end (with minimal certainty requirements), civilian law somewhere in the middle, and the shari'a at the other end (with very high requirements).

In this connection, the shari'a requires:

- The contract to be made in an uninterrupted 'contractual session' (*majlis al-'aqd*) (ZYSOW, 1985-86), a time when the parties are potentially leading up to a contract. If the session is interrupted, any acts that might have become legally significant are nullified, and another session must be started.

- The asset to be certain in the sense that it must exist and must belong to the seller. It is not possible to sell an unborn foetus or a fish that has not yet been caught (there are special types of contract for the future provision and the manufacture of goods, called respectively *salam* and *istisna'*).

- The asset to be precisely described at the time of the contract both in terms of its physical appearance, its type, its quality and its value. So 'I am selling you a ewe from this flock' is not valid (COMAIR-OBEID, 1996, p. 27).

- The price to be fixed at the time of the contract.

3.4. The Prohibition of *Gharar*

What has been expressed here as a certainty requirement is closely linked to, indeed largely overlaps with, another general rule deriving from the need for equity and equality, the prohibition of *gharar* (SALEH, 1992; BUANG, 2000; EL-GAMAL, 2000). Roughly speaking, gharar denotes excessive risk, but any attempted translation would be misleading, so the Arabic word will be used herein (ZAHRAA and MAHMOR, 2002).

The relationship of the prohibition to what has just been discussed is indicated by Comair-Obeid: 'Transactions comprising an element of uncertainty relating to the object of sale, its price, or the delay allowed for delivery of the goods, are considered by the moralists to be tainted by *gharar* (risk uncertainty, speculation) and so to be prohibited by *shari'a*' (Comair-Obeid, 1996, p. 57). However, gharar is broader than uncertainty, it covers all kinds of undue risk. So derivatives transactions, for example, are tainted by gharar. The prohibition is linked to the prohibition of gambling (*maysir*) in the Koran 2:219, and the Koranic injunctions 5:93 in that regard are often viewed as its legal source (the word gharar is not itself mentioned), but the rules were in fact largely developed by the jurists on the basis of Traditions.

The effect of the prohibition of gharar is perhaps most strikingly seen in the development of Islamic insurance (*takaful*)[6]. The degree of risk inherent in a Western contract of insurance is considered to be unacceptable by Sunni jurists (Shi'a jurists allow it), so a structure is used which resemble Western mutual insurance, effectively pooling monies using a system of joint guarantees (BILLAH, 1998 and 2003).

3.5. The Prohibition of *Riba*

By far the most well known rule is the prohibition of *riba*. It has been described as 'unlawful excess or deferment' (SALEH, 2001, p.353). Commonly translated, and treated, as 'interest', in fact riba is much wider than that; even if there is a clear consensus that interest is included in riba. The prohibition seems to have started life as a ban on interest, was extended to barter, and then was enlarged to cover 'all transactions involving the exchange of counter-values' (SALEH, 2001, p.353). The prohibition is mentioned on several occasions in the Koran (2:275, 2: 278 and 4:161).[7] A longer description is that riba is:

[6] It also seems to contravene the prohibition of riba, as an insurance policy provides for predetermined returns to the insurance company.

[7] See also the Last Sermon of the Prophet: '"Every form of interest (Riba) is cancelled; capital indeed is yours which you shall have; wrong not and you shall not be wronged. Allah has given His Commandment totally prohibiting interest (Riba). I start with the amount of interest which people owe to Abbas and declare it all cancelled". He then, on

> An unlawful gain derived from the quantitative inequality of the counter values in any transaction purporting to effect the exchange of two or more species […] which belong to the same genus, and are governed by the same efficient cause. Deferred completion of the exchange of such species, or even of species which belong to different genera but are governed by the same (efficient cause) is also *riba*, whether or not the deferment is accompanied by an increase in any one of the exchanged counter values (Saleh, 1986, pp. 12-13).

Professor Mohammed, after citing this passage, writes that:

Usurious transactions were classified by the jurists into two classes: (1) *riba al-fadl*, which produced unlawful excess in exchange of counter values in a contemporaneous transaction and (2) *riba al-nasi'a*, which produced unlawful gain by deferring the completion of exchange of countervalues, with or without an increase in profit. A third category was also added by some scholars called *riba al-jahiliyya* or pre-Islamic *riba* exemplified by the lender asking the borrower at maturity date if he will settle the debt or increase it. Increase occurred by charging interest on the debt initially accrued.

Riba al-Jahilya [sic] relates to pre-Islamic *riba* also described as usury. But *riba al-fadl* and *riba al-nasi'a* apply to the exchange (whether concurrent or deferred) of two precious metals (gold or silver) and four commodities (wheat, barley, dates and salt). The application of the doctrine of *riba* to these articles is based on the Prophet's tradition. It was further extended by analogy (*qiyas*), to the products of these six articles if their present or future exchange could have the smell or taint of *riba*.[8]

The reasons behind the prohibition are commonly stated to be: (i) the protection of the disadvantaged from exploitation by the wealthy and knowledgeable; (ii) the corrupting effect on the lender of making money from money, rather than from honest toil; and (iii) the Islamic contention that money is solely a means of exchange, not a commodity. Explanations (i) and (ii) seem plausible as regards riba al-jahiliyya and many instances of riba al-fadl, but are less satisfactory, and somewhat controversial, in the case of the exchange of commodities and riba al-nasi'a. A strict application of the rule results, for example, in jewellers being unable to charge for their labour, as they must sell by weight (RAYNER, 1991, p. 272)[9]. Despite the consensus of Islamic jurists to the contrary, the minority

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behalf of his uncle, Abbas, cancelled the total amount of interest due on his loan capital from his debtor.' Cited in *Mahmood-ur-Rahman Faisal and Others v Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan and Others* PLD [1992] FSC 1 at 70-71.

[8] Mohammed 'Principles of Islamic Contract Law', p 119. On origins, see Yanagihashi, H (2004) *A History of the Early Islamic Law of Property: Reconstructing the Legal Development, 7th-9th Centuries* Brill, Chapter 3.

[9] Professor EL-GAMAL (2000, pp. 2-4) argues that 'the prohibition of *Riba* cannot be fully explained by a simple appeal to exploitation of the poor' and that the words used in the Koranic verse cited in support of this explanation have been misinterpreted. He also writes that 'classical jurists of all major schools' did accept the notion of a time value of money. His explanation is founded on the idea of fair compensation and the discounting of losses and gains. The most detailed examination of the historical origin of riba is contained in Yanagihashi *A History of the Early Islamic Law of Property*, Chapter 3, see particularly the summary of conclusions, pp 294-97. The author argues that the various types

opinion that a reasonable rate of simple interest is acceptable has been enacted into the legislation of many states. One example is Art 399 UAE Commercial Code.[10]

Whenever the shari'a is mentioned in a commercial context, the immediate reaction of the newcomer to the field is something along the lines of: 'Oh, they don't allow interest, do they.' The implication is that this is the only relevant difference between the shari'a and other, particularly Western, commercial legal regimes.

It should be clear even from the brief introduction herein that there is far more to the study of shari'a commercial law than that. Riba itself is not just interest, it is a far-reaching, controversial and complex topic; and the particularities of shari'a commercial law go far beyond the prohibition of riba.

3.6. Ancillary Conditions

A rule that strikes the modern lawyer as strange is that relating to the number of conditions in the contract. A contract should have only one condition, for example the sale of an object. In principle, no other provisions ('ancillary conditions') are allowed, because more conditions upset the balance of benefits between parties (RAYNER, 1991, p. 305-351; COULSON, 1984, pp. 56-74). The following prophetic Tradition is quoted in this regard:

> What do they think of, those men who lay down conditions not to be found in the Book of God? Any stipulation not to be found in the Book of God is null and void. Were there a hundred such conditions of this sort, the one rule of God will be more equitable and surer (COMAIR-OBEID, 1996, p. 32).

COMAIR-OBEID explains the reasoning thus:

> Allowing individuals to freely arrange the effects of their juridical acts according to their whims brings the risk of their committing abuses by perpetuating aleatory contracts […] This will have the effect of an imbalance of the benefits of the contracting parties, evidently going against the principles of equity and justice that the Koran […] and the *sunna* of the Prophet have laid down for the contract to be concluded with concern for the perfect equilibrium of the reciprocal advantages (COMAIR-OBEID, 1996, pp. 32-33).

Natural and essential ancillary conditions are allowed such as a condition allowed for down payment if the price is not to be paid immediately. A lender can require a pledge or a guarantee. Other ancillary conditions are invalid. So a condition that the seller may keep the article for a week after the sale is ineffective. However, the madhahib diverge. For Zahiris, the ban is total, it is only

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of riba were introduced for various historical reasons, including resistance to exploitation by the Umayyad regime of its monetary reforms, attempts to deal with problems arising from the insolvency of buyers, and share-cropping contracts.

[10] On minority opinions to this effect, see EL-GAMAL '"Interest" and the Paradox of Contemporary Islamic Law and Finance', pp 109-10.

partial in the Hanafi, Shafi'i and Maliki schools, the Hanbalis allow them within the limits of shari'a morality.

The modern legislator has adopted the Hanbali position in order to accommodate commercial practice.

4. Options

This regime has been described as 'perhaps one of the most complex areas of Islamic law', but also as 'dominant and crucial for the study of the sale contract' (RAYNER, 1991, ch. 7; the option of the majlis -*khiyar al-majlis*- is not dealt with here: see id, pp 109-10; MALLAT, 2000, p. 94). As will be seen in the conclusion section, various issues arise in this area of considerable interest to the legal historian and the comparatist.

The rules give the parties to the contract various options. In Rayner's words: 'If the option is to cancel, the effect is to render the situation as if the contract had never existed, although these acts are not void *ab initio* as in the case of contracts tainted with nullity. The *Fuqaha* simply categorised them as valid legal acts subject to ratification' (RAYNER, 1991, p. 305).

The options are of two main types: those that arise by the will of one party (which one can therefore designate as 'expressed'), and those that arise by operation of law (which one can designate as 'automatic').

The expressed options are the option of condition (*khiyar al-shart*) and the option of designation (*khiyar at-tay'in*).

4.1. Expressed Options

a) Option of Condition

Either party is allowed a period during which he or she may annul the contract (Mallat, 2000, pp. 309-319). The length of the period varies according to the madhhab. The option must be declared either during contracting or just afterwards. It is a clear example of the law ensuring that parties contract with full information, protecting them from hasty decisions.

As an aside, its existence accounts for the apparently rigid, and otherwise difficult to understand, attitude of the shari'a to fraud and error. These topics are not of particular importance, because the party has already had the opportunity to consider and, if he or she thinks it best, to annul, the transaction. The Hanbali and Shafi'i madhahib also recognised the option of the session (*khiyar al-*

majlis), which allows one of the parties to rescind a formed contract while the parties are still in session. It is not recognised by the Malikis and the Hanafis (SALEH, 2001, p. 348).

b) Option of Designation

The buyer may designate one of several objects offered for a fixed price. Effectively, once the parties agree, suspended contracts are made. When the buyer makes the designation, one suspended contract comes into force, the other suspended contracts are regarded as never having existed. This option protects the inexperienced party, allowing him or her time to choose the article best suited to them (RAYNER, 1991, p. 319-326).

4.2. Options Arising by Operation of Law

Many exist, but only two need be mentioned here:

a) Option of Defect (khiyar al-'ayb/khiyar al-naqisa)

If the purchaser finds a defect in the object of the sale transaction, he or she has the option of cancelling the contract (SALEH, 2001, pp. 327-343). The option is based on two prophetic Traditions: 'A Muslim is not allowed to sell his brother anything with a defect unless he points it out to him.' 'He who deceives us is not one of ours' (COMAIR-OBEID, 1996, p. 82). The jurists developed a set of rules concerning degrees of defect in order to preserve equity between parties.

Four conditions are necessary for the option to be exercisable. The defect must: exist before the sale; still exist when the buyer cancels contract; not be known to the buyer when he/she took possession; and not be subject to an exclusion clause (such clauses are not permitted by some schools).

b) Option of Inspection (*khiyar ar-ru'ya)*

Strictly speaking, an option of inspection should not be necessary, as the sale of something not present does not concord with the requirement of certainty. However, exceptions to the rule did occur in practice. Therefore the schools differ concerning this option. The Hanbalis admit it as legal. The Malikis require it to be expressed by the party wishing to benefit from it; if the object is not defined, the option is not valid and the contract is binding. The Shafi'i position varied. They used to reject it categorically, but in modern times they taken a stance similar to that of the Hanafis, who allow it, on the basis that it prevents *gharar* (RAYNER, 1991, p. 343-351).

4.3. Force Majeure

Force majeure (*quwat al-qanun*) is widely defined, far more widely than in English-based common law (COMAIR-OBEID, 1996, ch. 6.6). In addition to dealing with impossibility of performance, it also covers circumstances in which performance has become materially different from that contracted for. '[A]ny contract should cease to bind when:

- A wholly unforeseen fundamental change has occurred in events;
- The contract has become especially onerous on the obliging party as a result;
- There is a requisite duty to impose a just and reasonable solution' (COMAIR-OBEID, 1996, ch. 6.6).

So 'a contractor in a Muslim jurisdiction hired under a contract of service to dig a well may rescind the contract should he strike rock after the first few feet of digging' (COMAIR-OBEID, 1996, p. 260).

5. Legality of Cause, Object and Consideration

The need to respect the precepts of Islam also results in rules concerning the cause (*sabab*) of the contract, as well as assets that are its objects and the consideration payable in respect of them.

5.1. Legality of Cause

The underlying cause must be lawful. A useful definition of cause can be found in Art 207(1) UAE Civil Code: the 'direct purpose aimed at by the contract'. So a contract to buy grapes is invalid if the underlying cause of entering into the transaction is to make wine.

5.2. Legality of Object

The object of the contract must be legal (*mubah*), ie:

- Beneficial; examples of assets which are not beneficial include vermin and animals not useful for hunting;
- Capable of being traded; examples of assets not in this category include public property (a mosque, or assets subject to a *waqf*), and birds not yet caught;

- Capable of being delivered; an asset not capable of being delivered is a beam in the roof of a house which cannot be removed without harming its structure;

- Lawful; wine, pork, blood and idols are examples of forbidden commodities (most schools prohibit the sale of dogs, apart from hunting dogs).

5.3. Legality of Consideration

The consideration must also be legal. For example, one cannot pay for goods with wine.

5.4. Necessity and Exceptions

The strict application of some of the above rules would cripple commerce. Therefore some notable exceptions were allowed, on the basis of the overriding principle of necessity (*darura*). *Salam* and *istisna'* have already been briefly mentioned. *Salam* 'involves purchase of a fungible good, described precisely, for delivery at a specified future time against full payment at the time the contract is entered into. The good does not have to exist at the time of the contract' (VOGEL and HAYES, 1998, p. 249; YANAGIHASHI, 2004, pp. 163-209). It is 'an exception to the rule that prohibits someone from selling an object that does not belong to him' (YANAGIHASHI, 2004, p. 165). *Istisna'*, regarded by some jurists as a sub-category of *salam*, is a contract of manufacture. One example is the contract entered into by an artisan and his customer to make a shoe from leather in the artisan's possession (RAYNER, 1991, p. 137-138).

5.5. Good Faith

The numerous references above to such notions as equity and equality may well have raised a question in the Western lawyer's mind: What about good faith? Good faith is the concept which is used par excellence in civilian systems to ensure that justice is done, that the need for certainty and efficiency in law does not override the need for fairness.[11]

The Koran 2:224-25, 5:89 and 83:1-5 clearly enjoins honest and fair dealing:

- And do not allow your oaths in the name of God [frequently and hastily pronounced to thus] become an obstacle to acts of virtue and righteousness and reconciliation of people; surely God is All-hearing, All-knowing. God will not hold against you a slip in your oaths, but He will hold you responsible [only] for what your hearts have earned [intentionally] and God is All-forgiving, Forbearing.

[11] The Koranic references and the Traditions cited in this section come from Akaddaf 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries', pp 31-34.

- God will not hold against you [an unintentional] slip in your oaths; but He will [only] hold you responsible for such oaths, which you have earnestly.

- Woe to the fraudulent dealers, who exact full measure from others, but give less than due to others in weight and measure, do they not know that they will be called to account, on a mighty day.

As far as Traditions are concerned, it is recounted that the Prophet said: 'Abu Sayed reported that the Messenger of Allah said: the truthful trustworthy merchant will be with the Prophets, truthful and martyrs.[12] 'The merchants will be gathered on the Resurrection day as transgressors except those who were fearful of Allah, pious and truthful.' More specifically, there is a duty to disclose defects in sales: 'Uqba bin Amir said: It is illegal for one to sell a thing if one knows that it has a defect, unless one inform the buyer of that defect.'[13]

We might therefore conclude that the shari'a contains a duty of good faith. This is not entirely wrong, but it is misleading unless carefully qualified and viewed in a way which takes the different context into account. 'Good faith' is a culturally rooted concept which derives from a Western tradition in which 'hard' certainty can be counterbalanced on occasion by 'soft' or 'fuzzy' justice, in which certainty is given primacy because it leads to economic efficiency over a sense of morality only tenuously linked to religion.[14] In the commercial shari'a, economic efficiency has to be viewed in the context of religious values, one of which is fair dealing. Those values inform the entire system, generating rules intended to lead to a fair result, so there is no need for a concept to remedy harshness, no explicitly enunciated principle of good faith.[15] It is much more accurate, therefore to view all principles and rules which deal with issues relevant to morality, in other words all principles and rules discussed so far, as the material to be compared with Western 'good faith', not just material such the Koranic verses and Traditions set out above which, to a lawyer with a Western mindset, seems to be the most appropriate for such comparison.

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[12] *Mishkatul Masabih, Kitab al-Buyu*, Karim, al-Haj Maulana Abdul, (trans), Book II, no 4, p 269, cited in Billah, M 'Regulatory Framework of Doctrine of "Utmost Good Faith" In *Takaful* (Islamic Insurance)', available at: Hhttp://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.docH.

[13] Cited in Akaddaf 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries', pp 33.

[14] But note the difference between the attitude of English common law concerning transactions between commercial parties, in which economic efficiency is paramount and civilian law that is more influenced by ideas of fairness.

[15] An intriguing instance of the influence of European law on the enacted shari'a is to be found in Art 159 Kuwaiti Civil Code quoted above, which specifically mentions good faith: 'if […] ratification is plainly offensive to the honour of the transaction *and to the requirement of good faith*' (emphasis added.)

6. The Practical Side

This conclusion has far-reaching consequences for those areas of practice for which the shari'a is relevant, such as Islamic finance and the Islamically-grounded law of some Muslim-majority jurisdictions. The danger of the attitude just described is that it leads to the Pooh Bear phenomenon. Pooh Bear is well intentioned, but not well informed, and the successful results he obtains derive more from luck than judgment.

6.1. The 'Enacted Shari'a'

Let us take the example of the *hawala* in the 'enacted shari'a'. Recall the difficulties associated with ascertaining exactly what the shari'a was and how it functioned. These difficulties result in a situation in which one cannot be sure that the rules and mechanisms are employed in the 'correct' way, ie as they were in the classical period. Moreover, even when knowledge of the law in action is theoretically available, it is found in academic publications that will in all probability not be read by those responsible for the state of the law as practised.

As stated above, the basic function of the *hawala* was to transfer obligations. It then developed in different ways in different madhahib. In most (the Hanafis had different rules) it could only be used to transfer rights where the transferor was using it to satisfy an obligation owed by him to a third party.[16] It was enacted into the UAE Civil Code in this form (Arts 1106–1132). However, the Islamically conservative Abu Dhabi Supreme Court, despite the presumably intentional omission of a Western-style transfer of rights, nonetheless found that UAE law allowed such transfers (FOSTER, 2004). The result may well be attributable to the civilian law mindset of the judges, all of whom were Egyptian, and who were therefore trained in an environment in which such transfers are normal (see Arts. 303 and 315 Egyptian Civil Code).

Does this matter? If the law works, especially in such a technical area, should one care what it was in the past? The answer to this question depends on the aims which one wishes to achieve. The main two goals seem to be (i) to 'return' to the shari'a, which might imply that one should recreate it in as historically authentic a way as possible; and (ii) to establish a religiously appropriate law. There may be a conflict between these aims, since historically well-attested mechanisms such as the *hiyal* (fictions or stratagems, devices which respect the letter but not the spirit of the law) are now viewed as dubious at least. Should they be part of the modern shari'a? We return to the problem of differences between the madhahib (the *hiyal* were largely a Hanafi phenomenon), the authority to determine what the shari'a is/should be, and so forth.

[16] See Foster, NHD (2003-2004) 'Owing and Owning in Islamic and Western Law' in Cotran E and Lau M (eds) *Yearbook of Islamic and Middle Eastern Law* Vol 10 Brill, pp 87-88.

6.2. Islamic Finance Law

The same considerations arise in Islamic finance law, but are manifested in different ways and in different fora.

A recent Malaysian case, *Affin Bank Berhad v Zulkifli Abdullah*,[17] has highlighted the problem of adaptation to the modern world. An 'Islamic mortgage' (*Al-Bai Bithaman Ajil*). In this type of transaction, A wishes to buy Blackacre for $100; Bank buys Blackacre for $100; Bank sells Blackacre to A for $150, payable over 20 years. In the instant case, the purchaser defaulted early in the term, but the bank claimed the entire amount. PATAIL J refused to enforce the contract as drafted on the ground that it caused injustice to the purchaser. The judgment has created a considerable stir, with some people viewing it as illegitimate interference by a secular court with an Islamic transaction. The better view, it is submitted, is that the judgment is no more than a necessary step in the development of a new system, a development necessitated by the 19th century decision to adopt/imposition of Western law in preference to the adaptation of the shari'a.

More generally, the judgment raises the general issue of the best way to develop Islamic finance law. Should one adapt the nominate contracts, as has been done so far, or should one strike out beyond them on the basis of general shari'a principles? (EL-GAMAL, 2005, p. 127).[18]

7. The Intellectual Side

On an intellectual level, there is much to be gained from the study of the subject. For the comparatist and the legal historian, for example, there are many issues of considerable interest.

One example, already mentioned, is the substantially non-state nature of the system, relevant to contemporary discussions concerning such phenomena as the modern *lex mercatoria*.

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[17] [2006] 1 *Current Law Journal* 438, Kuala Lumpur High Court, Commercial Division, Bernama, December 29, 2005. Summary available at: Hhttp://www.malaysianbar.org.my/content/view/2174/2/H (last visited 23 August 2006). The case is to be the subject of a study by Dr Ahmad Hidayat Buang, Department of Shari'ah and Law, Academy of Islamic Studies, University of Malaya. Many thanks to Dr Buang for bringing it to the author's attention and for allowing sight of the draft paper. It is also discussed in Hassan, MH and Daud, MH (2006) 'Bank's Claim in a Bai Bithaman Ajil Facility: The Flaws of the Affin Bank Case: A Commentary on *Affin Bank Berhad v Zulkifli Bin Abdullah*' (3) *Islamic Finance News* and Foster, NHD (Forthcoming) 'Encounters between Legal Systems: Recent Cases concerning Islamic Commercial Law in Secular Courts' *Amicus Curiae*.

[18] Contra: 'An appeal to maqasid al-shari'a (objectives of shari'a) is not as easy as it may initially seem to the uninitiated. It involves an understanding of Islam as a way of life, a process of social reconstruction, and a mission with humanity—an understanding far deeper than what one would normally expect from a contemporary legal expert.' Siddiqi, MN (2005) 'Social Dynamics of the Debate on Default in Payment and Sale of Debt' in Ali *Islamic Finance: Current Legal and Regulatory Issues*, p 116.

Another intriguing topic is the apparent parallel evolution of terms imposed by law on the contracting parties to protect the weaker person. The underlying similarity of legal thinking between the options and English common law's implied terms and some aspects of modern consumer legislation is uncanny, even taking into account the inevitable differences between the two systems.

A third example is the comparative analysis of the rules deriving from the principles of equity and equality with the Western notion of good faith. It is a classic example of the need to look beyond appearances. The fact that there is no equivalent to the good faith principle does not necessarily mean that there is no good faith in the system. As we have just seen, in the case of the shari'a the opposite is the case. The apparent absence of the principle indicates that it is omnipresent. In addition, consideration of this part of the subject raises questions about the comparability of legal systems based on different sets of values. One cannot compare them on the basis of efficiency, for instance, without committing the error of trying to measure incommensurables against a standard only applicable to one system. It is impossible to say which is 'better', as there is no *tertium comparationis*, no common standard against which the two systems may be assessed. Western commercial regimes can be compared as among themselves, as they all aspire to efficiency, but the shari'a aspires primarily to respect for Islam.[19]

Finally, consider the rewards that derive from a comparative study of riba/gharar and the equivalent attitudes in Western system. Most people new to the topic automatically assume that interest and speculation are normal, even 'natural' and that the Islamic prohibitions are therefore strange. At the very least, it is assumed that the approval of interest and speculation is typical of Western culture, and that the shari'a prohibition is typical of Islam. This is untrue. The Bible forbids interest, as does Jewish law (between Jews).[20] Money has been seen as sterile for thousands of years, a viewpoint repeated and given additional force by Aristotle: 'The most hated sort (of wealth getting) and with the greatest reason, is usury, which makes a gain out of money itself and not from the natural object of it. For money was intended to be used in exchange but not to increase at interest.'[21] The Catholic Church outlawed it, declaring in 1311 that secular laws allowing it were void. The ban was only lifted in Europe at a relatively late date. It is European Christians, therefore, who departed from the common tradition, so it is just as legitimate to view Western attitudes as 'strange' as the reverse.

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[19] For examples of this sort of comparison taken to the extent of numbers and tables, or 'leximetrics', see Siems, MM (2005) 'What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al's Methodology' (16) *International Company and Commercial Law Review* 300.

[20] See, eg, Exodus: 22:25; Ezekiel: 18:8; Luke 6:34; although it must be added that there is a way around the prohibition in Jewish law. For accounts of the history, see Ireland, P 'Company Law and the Myth of Shareholder Ownership', (1999) 62 *Modern Law Review* 32, pp 34-38 and Zarlenga, S (1999) 'A Brief History of Interest', available at Hhttp://www.monetary.org/interest.htmH.

[21] *Politics*, 1258b quoted in Zarlenga 'A Brief History of Interest'.

More generally, it is this author's experience that a study of the shari'a is often the turning point for students of comparative law. Divergences between the civilian and the common law traditions are interesting, but are not so striking as to convince them that differences between legal systems can be fundamental. The shari'a, though, allows the student to grasp this fact. In addition, the numerous similarities of legal thought and legal rule teach another valuable lesson, the role of the mediation of difference and similarity in comparative legal studies.

8. References

BILLAH, MM (1998) 'Islamic Insurance: Its Origins and Development' (13) *Arab Law Quarterly* 386

BILLAH, MM (2003) *Islamic Insurance (Takaful)*, 2nd Ed Ilmiah Publishers.
VOGEL, FE and Hayes, SL (1998) *Islamic Law and Finance: Religion, Risk and Return* Kluwer Law International

BILLAH, M, 'Regulatory Framework of Doctrine of "Utmost Good Faith" In Takaful (Islamic Insurance)',
http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc.

BUANG, AH (2000) *Studies in Islamic Law of Contracts: The Prohibition of Gharar* International Law Book Services

COHEN, HJ (1970) 'The Economic Background and the Secular Occupations of Muslim Jurisprudents and Traditionists in the Classical Period of Islam (until the Middle of the Eleventh Century)' (13) *Journal of the Economic and Social History of the Orient* 16, cited in KURAN, T (2001) 'The Islamic Commercial Crisis: Institutional Roots of Economic Underdevelopment in the Middle East' Vol C01-12 Center for Law, Economics and Organization, University of Southern California Law School at 7 (available at http://papers.ssrn.com/abstract=276377, subsequently published as KURAN, T (2003) 'The Islamic Commercial Crisis: Institutional Roots of Economic Underdevelopment in the Middle East' (63) *Journal of Economic History* 414.

COMAIR-OBEID N. (1996), *The Law of Business Contracts in the Arab Middle East,* Kluwer Law International.

COULSON, N (1984) *Commercial Law in the Gulf States* Graham & Trotman.

EL-GAMAL, M (2005) 'Limits and Dangers of Shari'a Arbitrage' in Ali, SN (ed) (2005) *Islamic Finance: Current Legal and Regulatory Issues* Islamic Finance Project, Islamic Legal Studies Program, Harvard Law School.

EL-GAMAL, MA (2000) 'An Economic Explication of the Prohibition of Riba in Islamic Jurisprudence' *Proceedings of the Third Harvard University Forum on Islamic Finance* Center for Middle Eastern Studies, Harvard University (http://www.ruf.rice.edu/~elgamal/files/islamic.html)

FOSTER, NHD (Forthcoming) 'Encounters between Legal Systems: Recent Cases concerning Islamic Commercial Law in Secular Courts' *Amicus Curiae*

FOSTER, NHD (2004) 'An Unstoppable Force Meets a Movable Object? Assignment of Rights in the UAE' (19) *Arab Law Quarterly* 169.

FOSTER, NHD (2003-2004) 'Owing and Owning in Islamic and Western Law' in Cotran E and Lau M (eds) *Yearbook of Islamic and Middle Eastern Law* Vol 10 Brill.

HASSAN, MH and DAUD, MH (2006) 'Bank's Claim in a Bai Bithaman Ajil Facility: The Flaws of the Affin Bank Case: A Commentary on *Affin Bank Berhad v Zulkifli Bin Abdullah*' (3) *Islamic Finance News*

IBN TAYMIYAH, A (1948) *Le traité de droit public d'Ibn Taimiya* Laoust, H (trans) Institut français de Damas, p 167, cited in AKADDAF, F (2001) 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (13) *Pace International Law Review* 1, p 26.

IRELAND, P 'Company Law and the Myth of Shareholder Ownership', (1999) 62 *Modern Law Review* 32.

ISLAM, MW (1998), 'Dissolution of Contract in Islamic Law', (13) *Arab Law Quarterly* 336.

LIEBER, A.E. (1968), 'Eastern Business Practices and Medieval European Commerce', (21) *Economic History Review* 230.

MALLAT, C (2000), 'Commercial Law in the Middle East: Between Classical Transactions and Modern Business', (48) *American Journal of Comparative Law* 81.

RAYNER, SE (1991) *The Theory of Contracts in Islamic Law,* Graham & Trotman,

RODINSON, M (1987) 'Islam and Capitalism' in Ghai LS (ed) *The Political Economy of Law: A Third World Reader* Oxford University Press.

SALEH, N (2001), 'Freedom of Contract: What Does it Mean in the Context of Arab Laws?', (16) *Arab Law Quarterly* 346

SALEH, N (1992) *Unlawful Gain and Legitimate Profit in Islamic Law - Riba, Gharar and Islamic Banking*, 2nd Edition Cambridge University Press

SALEH, NA (1986), *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Garar and Islamic Banking* Cambridge University Press, pp 12-13 cited in MOHAMMED, N (1988) 'Principles of Islamic Contract Law' (6) *Journal of Law and Religion* 115, p 119.

SCHACHT, J (1965), *An Introduction to Islamic Law,* Oxford University Press.

SIDDIQI, MN (2005) 'Social Dynamics of the Debate on Default in Payment and Sale of Debt' in Ali *Islamic Finance: Current Legal and Regulatory Issues*, p 116.

SIEMS, MM (2005) 'What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al's Methodology' (16) *International Company and Commercial Law Review* 300.

YANAGIHASHI, H (2004) *A History of the Early Islamic Law of Property: Reconstructing the Legal Development, 7th-9th Centuries,* Brill.

ZAHRAA, M and MAHMOR, S (2002) 'The Validity of Contracts when the Goods Are Not yet in Existence in the Islamic Law of Sale of Goods' *Arab Law Quarterly* 379

ZARLENGA, S (1999), 'A Brief History of Interest', http://www.monetary.org/interest.htm.

ZYSOW, A (1985-1986) 'The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law', (34) *Cleveland State Law Review* 69.