

ISLAMIC FINANCIAL OUTLOOK AND THE INFLUENCE OF RELIGION ON THE LAW

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- General Points on Influence of Religion on the Law and the Relevance of Religion for Law
- Sharia-based (Islamic) Finance
- Concluding observations

Influence of Religion and the Relevance of Religion for Law

- Religion, the place of religion in public & private life – one of the contested areas in international & national laws
- International Law – Religion remains contested & controversial
 - (i) Inability on agreement over definition ‘Religion’ or ‘Belief’
 - (i) Religious based discrimination one of the difficult areas to monitor & prevent

Religion & Law – National level

- Relevance of Religion cannot be overstated:
- Considerable influence of religion on society and Law in everyday life – evident in e.g.
 - Public holidays and observance of religious holidays;
 - Closure of businesses (e.g. on particular days) or generally (e.g. gambling and horse racing etc) or prohibition of sale of goods (e.g. alcohol, pork etc)
 - Role of Religion in society and Public life:
 - Freedom of expression, freedom of the media (c.f. Blasphemy laws in Pakistan)
 - The position of women in society,
 - The wearing of religious symbols; the wearing of veil, headscarves and religious symbols;
 - Religious obligations during employment (exemptions e.g. time-off for Friday prayers etc)
 - Religious education in Schooling (Content of education, role of faith-based schooling);

Religion & Law – National level

- Lichtenstein (Roman Catholic Church): State Church,
- Costa Rica (Roman Catholic religion): State religion.
- Greek Orthodox Church (official Church) & Greece's official State religion.
Lutheran Church (State religion) Denmark, Iceland, Norway and Finland.
- Islam (State Religion): Afghanistan, Algeria, Bahrain, Brunei, Comoros, Jordan, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Pakistan, Qatar, Saudi Arabia, Somalia, Tunisia, UAE, Yemen, Iran, Iraq, Oman etc.
- Buddhism (State Religion): Bhutan, Cambodia, Sri Lanka, & Thailand.
- Israel, without officially proclaiming Judaism (State Religion), supports Jewish institutions.
- France (separation of State & religion) religion continues to have weight.
- India: religion carries weight and significance in laws e.g. application of personal laws.
- United Kingdom: Role & significance of (Anglican church).

Relevance of Religion for society

- ***Religion and application of Personal and family law:***
 - (i) specialist regimes in e.g. marriage (formalities and capacity to enter a marriage validity of arranged or forced marriages, recognition of polygamous marriages)
 - (ii) divorces,
 - (iii) inheritance,
 - (iv) custody etc.
- ***Law and Religious organisations and Religious institutions***
 - (i) Requirements of Registration
 - (ii) Tax breaks: tax exemptions for (register) religious organisations & institutions
 - (iii) Failure of recognition or to register (illegitimacy); possible characterisation as illegal or terrorist organisation (followers prevented for raising money)

Influence & Role of Sharia

- *Sharia*: Islamic law, (but not confined to law) **note** holistic concept of *Shaira*: meaning – ‘road to the watering place’
- *Sharia*,
- (i) covers wide range of secular laws and ordinances, & moral & ethical behaviour.
- (ii) based upon the *Quran* and *Sunna* (tradition & practices) as primary sources, and upon *Ijma* (consensus), *Qias* (analogy/deduction) & *Ijtihad* (independent legal reasoning) secondary sources.
- (iii) not monolithic system– remain substantial differences interpretation & application of the *Quran* and the *Sunna*.
- The development of a body of positive law task of time & effort – *Sunni* and *Shia* Schools.

Sharia and Islamic Finance

- Value Driven Business Practice
- Values?
 - regulation of all aspects of public & private life
 - Human actions (either objectively good or inherently bad)
 - Visualise Islam as a religion & civilization
 - General principles laid down, with specific instruments for regulation of commercial life

Values of Islamic Finance

- Doctrine of Fairness in commercial law and enterprise
- help develop ethical economic model (with market forces being protected from unfair manipulation)

Prohibitions:

1. *Riba* (interest)
2. *Gharar* (uncertainty)
3. *Qimar* (Gambling)

Prohibition on *Riba*

- In Arabic meaning ‘increase’ commonly translated ‘interest’
- - underlying principle: any excess amount over the principle amount that a creditor has agreed to receive from debtor (merely for the time) is *Riba* and *Haram*.
- *Quranic* references to *Riba* (as *Usury*) – all four passages concerned (less with purposes of usage) but conditions on which money made available to counterparty.
- Purpose clearly must be *halal*
- Types of Prohibition:
- (a) ***Riba al-Jahiliyya*** (continuous multiplying debt, where maturity on debt swapped with bigger debt for longer maturity): Pre-Islamic

Innovations/variants

- (b) ***Riba Alfadhl*** (Riba of excess) – exchange of units of same merchandise allowed, but must be equal in quality and quantity
- (c) ***Riba Alnisiyah*** (Riba of delay) – (deferred payment in money or kind)

Prohibition on *Riba*

- Underlying principle:
- Distribution of wealth based on the doctrine of fairness: Islamic system prohibits making of profit/benefit (monetary or otherwise Prohibited).
- Loans are purely charitable.
- Asset Sales and leases substituted for interest-bearing loans (parties share profit and loss fairly).
- Return of capital tied to success in venture – similar to venture-capital & partnership in modern commercial world (note difference as *Riba* would impact, e.g. profit & loss; liquidation preference provisions).
- Sale of debts (including e.g. discounting of bills, securitization etc.) prohibited as Unjust enrichment
- Fee charged for business practice must not be variable – increase of fee with size of transaction is *Riba*

Prohibition of *Gharar* (uncertainty)

- *Gharar* (uncertainty) impermissible.
- Existence of (excessive) uncertainty in commercial transactions may lead to unjust enrichment
- Individual cases – as some uncertainty inevitable part of commercial agreements (c.f. difficult for Courts to decide – level of uncertainty)
- E.g. Sale of an object that did not exist or not yet in control of the seller??
- E.g. Gambling??

Prohibition of *Qimar* (gambling)

- Note: Overlap with principle of *Gharar* (excessive uncertainty)
- *Qimar* – exemplified: trading in financial risk (see as form of gambling, & prohibited by Islamic law)

Conclusions:

- Highlighted:
- Considerable influence of Religion upon law
- Place of religion in society remains contested & controversial
- Essential principles of *Shaira*-based finance: underlying ethos –
- (a) fairness, equity
- (b) Prohibitions based on ‘unjust enrichment’.