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, Jordon, 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:**
  1. specialist regimes in e.g. marriage (formalities and capacity to enter a marriage, validity of arranged or forced marriages, recognition of polygamous marriages)
  2. divorces,
  3. inheritance,
  4. custody etc.

- **Law and Religious organisations and Religious institutions**
  1. Requirements of Registration
  2. Tax breaks: tax exemptions for (register) religious organisations & institutions
  3. 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 *Shairah*: 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’.