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ARAB COMPARATIVE & COMMERCIAL LAW

The International Approach

VOLUME 1

The Shari'a and its Relevance to Modern Transnational Transactions

The Settlement of Disputes Through Arbitration

Joint Ventures

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PAPER 1

THE SHARI'A AND ITS RELEVANCE TO MODERN TRANSNATIONAL TRANSACTIONS

by

William M Ballantyne
London, England

SHARI'A SPEECH - CAIRO - February 1987.

My Co-Chairmen, Your Excellencies, Ladies and Gentlemen:

It is a great honour for me to be here. Having said that, please appreciate the diffidence which I, one of the People of the Book, feel at appearing with these noble and learned colleagues on a platform devoted to the Islamic Shari'a. We are sitting here in Cairo, one of the very citadels of jurisprudence in the Arab world, not least in the field of the Shari'a; one mentions of course the name of Al-Azher with the greatest of respect. It is impossible to overestimate the debt which the world of Arab jurisprudence owes to Egyptian jurists. We look at the Codes of many other Arab countries, and that debt is immediately apparent; while at the right hand of every judge and practitioner lies the monumental 'Al-Wasit' of the late Abd al-Rizzaq al-Sanhouri.

A glance at the synopsis of this paper will show roughly the course which I wish to pursue here this morning. I have written rather a long paper - you will be relieved to hear that time does not permit of my delivering all of it. As I see it, my task here is to set the stage, the backdrop, for discussion. Please therefore regard me as putting forward suggestions rather than intending to be in any way didactic. You will note that I quote several Western precedents and authorities; this is deliberate: I want to show how, on occasion, Western legal thinking has reacted to the Shari'a - this again to provoke discussion.

We have simultaneous translation into Arabic. I do so admire anyone who can do that. I shall try to help by speaking slowly. If I go too fast, the interpreters must let me know. Also, when I quote my translation from an Arabic text I will in general give the Arabic original. I suggest that the translators do not try to retranslate these passages from my translation back to the original, or confusion will inevitably result.

When we open the hall for discussion, I anticipate questions to the panel from my Western colleagues; interventions and criticism from my Arab colleagues. Really, you know, we Western lawyers need help in this subject; so I hope that we can begin to build bridges here.

The first and last time the I.B.A. convened a conference on Arab laws was in Hamburg in 1980. I had the honour to sit on the panel on that occasion. The conference was a small one, but a great success. However, one lesson was learnt: the great value of that conference lay in the question and answer sessions and in the interventions from the floor which followed the speeches. Unfortunately, those were not recorded. This time, we shall not make that mistake. Everything will be on tape, and we shall concentrate on interventions.

A glance at my curriculum vitae will show you that I am essentially a practising commercial lawyer, having spent nearly 40 years now concerned exclusively with Arab laws. The School of Oriental and African Studies has recently done me the honour of

according me a visiting professorship in Arab laws, and that is really my first incursion into the academic world. I will unashamedly advertise what we aim to do. In the academic year 1987/88, it will be possible to take a Master of Laws at London University exclusively in Arab law options, consisting of two Shari'a papers, a dissertation, and (my own particular concern) a paper on Arab Comparative Commercial Law. The latter will be organized so that outsiders (i.e. non-students), in particular practising lawyers, may attend the lectures in that subject alone. In doing all this, I shall repeatedly try to cross the boundary between the world of the practising lawyer and that of the academic. In the United Kingdom, unlike the continent, that boundary is marked by a valley which must be bridged.

I may say with sincerity that I come here not so much to contribute as to learn. I certainly do not stand here as an expert in the substance of the Shari'a. In nearly 40 years practice in the Gulf States, the incursion of the Shari'a into commercial law has in practice been minimal. May we mentally underline the words 'in practice'. It has always been necessary to bear firmly in mind that in all the Arab countries, the Shari'a stands constitutionally as the, or one of the, main sources of legislation. In an Arab jurisdiction, therefore, the first essential and often difficult task of the practising lawyer is to ask himself: To what extent is the Shari'a relevant in this matter? The answer may vary from "Not at all" in Egypt or Kuwait in a commercial matter: to "Essentially" in Saudi Arabia. In various jurisdictions there are varying shades. It is my view that consideration of the Shari'a will very rapidly assume increasing importance, even dramatically in the immediate future. Anyone who ignores the possible role of the Shari'a in a transaction does so at his peril.

So! We are not by any means dealing with an academic subject. In my view the Shari'a is the most important topic at this Conference. Yet, when I suggested it as such at our initial meetings in London, there was opposition; Arab opposition at that. "Everyone wants to hear about joint ventures and arbitration, not the Shari'a." I simply do not agree.

In practice, I have found a lamentable, if understandable, ignorance, even non-adversion to the Shari'a among Western lawyers. This is understandable for several reasons:

a) The importance to which I have referred is in no way appreciated - even many Arab colleagues tend to play down the Shari'a as old-fashioned or passé. This is a dangerous attitude. In the current reassertion of the Shari'a which we are witnessing, and shall witness in ever-increasing momentum, the Shari'a will, as I have said, be ignored at our peril.
b) The economic circumstances: the euphoric conditions which have existed in the oil States over the last years, where the profit motive has outweighed all others, and lawyers trying to get the thing right have relly been rather a nuisance to the men of business. Well, times have changed and are changing.
c) Reluctance to advert to the unkown: A centuries-old religious law? The ostrich puts his head in the sand. In any event,

insert a proper law clause into your contract, and if possible a foreign jurisdiction or arbitration clause, and all will be well. I am sure that I do not have to spell out to this audience the folly of such an attitude in general. Let us take a practical example. A syndicated loan agreement will invariably contain such a jurisdiction and proper law clause; but a "Closing Opinion" must be sought as to the validity of the agreement according to the law of the borrowing country. One has given dozens of such Opinions. Every one contains a proviso that if the Shari'a were to be applied, the loan agreement would be assailable at the Shari'a for many illegalities. The most obvious one is, as we all know, the prohibition of interest on monies lent. We shall refer to that in a moment. But it really goes further than that.

It is trite to say here that in dealing with the Arab world, we are dealing with all Islamic states. It is not so trite to point out that this is not at all the same as saying that in dealing with the Western world, we are dealing with all Christian States! For the Arab, his religion is inextricably interwoven with his life. The precepts of al-Islam are ever-present in his thoughts and speech. The Qur'an says, "Oh ye who believe, mention (remember) God often, praise him both early and late", and the cry of the muaththin rings out five times daily calling the faithful to prayer. The Shari'a is the law of that religion. In looking at the strong reassertion of al-Islam which we are witnessing in the Arab world, we are looking also at a reassertion of the Shari'a law. That word 'reassertion' is important, and I originally culled it from some articles which appeared in the Sunday Telegraph in 1979. We are not facing a revival or revivification of Islam, because Islam has never been dead or even quiescent. I have not been able to think of a suitable Arabic word for "reassertion".

Now, I have referred to the fact that the Constitutions of the Arab States prescribe the Shari'a as a source of legislation (Kuwait, Bahrain, the U.A.E.); in some (Qatar, and since 1980, Egypt)- it is the main source of legislation. In Saudi Arabia and Oman there is no written Constitution (this is not strictly so, in that Saudi Arabia has the old written declaration of the Hijaz, but this is not a Constitution in the modern sense). We do not have time here to look into all these niceties, although we may do so in discussion afterwards.

I have already referred to the obvious example of illegality at the Shari'a of interest on monies lent, and shall do so again in a moment. We take this only as a burning practical example - there are many other incidents of the modern commercial contract which could be indicted for illegality were the Shari'a to apply.

Let me suggest at once that the only way in which these doubts arising from a possible application of the Shari'a may be dispersed is by express secular legislation. It is obviously politically very difficult, if not impossible, for an Arab State to promulgate such legislation, and here again we find, in many cases, uncertainty - the whole subject matter is evaded and the position is again blurred. Even where incisive legislation exists

(and it is rare), who can say that it may not be challenged before a Constitutional Court as being contrary to the Shari'a as prescribed in the Constitution? Of the Gulf States, it is only Kuwait that has legislated incisively in this respect. Whereas the 1981 Civil Code of Kuwait, as might be expected, forbids the charging of interest on loans, the Commercial Code of the same year, a 'special' legislation, expressly permits it. In other countries, the issue is swept under the rug but it nonetheless exists. In general, it has not been allowed to arise in practice. I can evidence many recent cases in the U.A.E. where the position is changing, and where it has been allowed to arise; it has also arisen in Saudi Arabia; it could arise in the other jurisdictions. May I suggest again that we take this as an example: I repeat: there are many other incidents of the modern commercial contract which could be assailed at the Shari'a.

It is always somewhat invidious to quote from oneself, but I will nonetheless do so from a book which I wrote in 1980:
"It is often said that the Qur'an (and hence the Shari'a) provides all the principles necessary for the regulation of relationships even in the world of commerce. As with Christianity or other major religion, that would be true in the context of the ideal society, wherein every member accepted and obeyed its dictates under spiritual sanction; in the modern commercial world, this would envisage also such obedience in general, internationaly, by members of other cultures including States. This is unfortunately at the moment unthinkable, and in the context of society as it exists, the lesser merits of man made law must obtain. It is in the latter context that the Shari'a must be viewed, and, in its very nature, necessarily found inappropriate. It may be said that it is the material world that is a fault in this, and that either Islam or Christianity, restored to their essential validity amongst us, would do a better and more adequate job. Be that as it may, the inherent immutability of the Shari'a militates against its suitability in the system of international commerce which man has created. Acceptance of this truth is reflected in the publication by most of the States of the Muslim world of Commercial and other Codes in replacement of the Shari'a which is now in many cases limited to matters of personal status."

I have referred already to the profit motive, which has in the past tended to obscure all else. Now, we all know there has been a change of scene. As part of that change, the Arabs are above all looking to al-Islam in the field of jurisprudence, and have for some time been questioning the rectitude of having, in many cases, adopted legislation stemming from occidental non-Muslim sources, instead of basing it upon the Shari'a. I would refer in this context to studies which are in progress, under the auspices of the Islamic Conference, by the learned Academy of Jurisprudence - I have not yet seen any material emanating from the most recent conference at Kuwait, but no doubt one of my colleagues will be able to enlighten us in this respect.

We thus have overall a scenario where in many Arab States the Shari'a could be applied in a commercial transaction, even if in general it is not so applied. This obviously makes for basic uncertainty. Well - does this matter? The answer is, yes, it

does, and in order to understand that, we have to turn to a short description of the Shari'a itself, and an even shorter consideration of some of the incidents which distinguish it from occidental jurisprudence. The Shari'a is, of course, the sacred law of Islam, an all-embracing body of religious law (to coin an expression involving an impossible paradox in itself!) regulating, in theory, the life of every Muslim in every aspect. Essentially, the Shari'a is derived from and has its roots in the Qur'an and the customs of the Prophet as incorporated in recognized Muslim traditions. I think that the accepted and not-too-orthodox view must be that these two sources are immutable. Where there is an express provision (nuss) at this level, then it is mandatory and absolute. I believe there are those contemporary authors who pretend that even such express provision may be diluted or shaped to contemporary needs, but I do not believe that this is a view which would find other than very limited acceptance. It is based upon the requirements of 'maslaha' or benefit to the community.

May I quote a recent writing by my colleague here, Professor Abu Majd:
"The sanctity of the word of God and the guidance of his Prophet does not derive from a tie with the past, recent or distant.... Come, let us call things by their names and say that we are bound by the Book, following the true Sunna.... But this does not involve sanctifying the opinions of men and devotion to following the ancients... indeed, that is a heresy which is abhorrent, as related for us by the Qur'an, and most forcefully to be eschewed by its adherents."[1]

Here, the learned author is, as I understand it, opening the door to a new ijtihad, but not, of course, laying express provisions of Qur'an and Sunna open to change. But - can the overall position be ameliorated within this framework? This is the real problem, surely. Coming downstrean, as it were, from these basic precepts, we find the Shari'a developed over centuries by the consensus of Muslim scholars, and reasoning by analogy. Let us make a further generalization by adopting the Arabic word 'ijtihad', which I will translate for present purposes as logical and reasoned deductions and developments emanating from the basic principles to which we have referred. Given the immutability of the basic precepts, it is in the field of a new ijtihad that the necessary flexibility to interpret the Shari'a according to the needs of modern international commerce rests. We shall consider in a moment whether that is legally possible to the extent necessary to satisfy those needs.

As a body of religious law, the Shari'a has been and is applied in different parts of the Muslim world in different ways, and particularly in different degrees of strictness. The deductive processes were established by the doctors of law by the Middle Ages. There are four main schools, or trends of doctrine: the Hanafi, the Maliki, the Shafi'i and the Hanbali, the latter being the school applied in Saudi Arabia. I find the Shari'a and its application extremely complex, not least because its main lines of thought were established so long ago. It is for this reason that some Islamic States, as I have already said, have been obliged to provide, by modern legislation, for the needs of contemporary

commerce. It is also the reason why, in major international arbitrations, it was decided that the pure principles of the Shari'a must be replaced or supplemented by modern concepts. I may quote three which I have no doubt are well-known to all of you: as I have said, I quote them to illustrate some of the difficulties that have arisen in Western thought:

In Petroleum Development (Trucial Coasts) Ltd. -v- the Shaikh of Abu Dhabi,[2] the Arbitrator, Lord Asquith, rejected the Islamic law as applied in Abu Dhabi as not being competent to regulate a modern commercial instrument. He accordingly applied, and I quote, "principles rooted in good sense and common practice of the generality of civilized nations - a sort of modern law of nature", as the yardstick in the award. (Incidentally, the learned Lord entirely overlooked the fact that at that time in Abu Dhabi there was British extra-territorial jurisdiction, but we need not dwell on that here.)

Again, in Ruler of Qatar -v- International Marine Oil Company Limited,[3] the Arbitrator, while considering the law of Qatar to be the proper law of the Cencession Agreement, declined to apply it. The Shari'a law in the Shaikhdom of Qatar was (and indeed is) Islamic law of the Hanbali school, which the Arbitrator held to be inappropriate to govern a modern oil concession. To quote from the Award: "... There are at least two weighty considerations against the view (i.e. the adoption of Islamic law). One is that, in my opinion, after hearing the evidence of the two experts in Islamic law, Professor Anderson and Professor Milliot, there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments". The learned Arbitrator then referred to the Award of Lord Asquith of which I have made mention, and went on to say: "I have no reason to suppose that Islamic law is not administered there (i.e. in Qatar) strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract"; and he continued: "... Both experts agreed that certain parts of the contract, if Islamic law were applicable, would be open to the grave criticism of being invalid. According to Professor Milliot, the principle Agreement was full of irregularities from end to end according to Islamic law applied in Qatar. This is a cogent reason for saying that such law does not contain a body of legal principles applicable to a modern commercial contract of this kind". (I should say that that is not now the position in Qatar, which has for some twenty years had a Civil and Commercial Code based upon the Kuwaiti 1961 Commercial Law.)

Lastly, in this context, in the famous Aramco Arbitration, Saudi Arabia -v- Arabian American Oil Company,[4] the Arbitrators, Professor G. Sauser Hall (Referee), Sir Saba Habachy (Arbitrator appointed by Aramco), and Muhammed Hassan (Arbitrator appointed by Saudi Arabia), while holding that the proper law of the Concession Contract was the law of Saudi Arabia, which they found to be Muslim law as taught by the Hanbali school, and while adverting fully to the rule of pacta sunt servanda, which they correctly found to be fully recognized in Muslim law, yet held that the

regime of oil concessions had remained embryonic in Muslim law,

and found it necessary to fill "the gaps in the law of Saudi Arabia" by resorting to world-wide custom and practice in the oil business and industry, world case law and doctrine and pure jurisprudence.

Sir Norman Anderson and Professor Noel Coulson put the matter with their usual lucidity: "... a system of law which attained its formal perfection centuries before the demands of modern technology, finance and marketing were dreamed of"... "But, as we see it, it is preferable to recognize the typical economic development agreement (such as an oil concession) of today, with the detailed terms which the exigencies of the trade and the needs of the two contracting parties commonly dictate, as sui generis". And in turning to the modern international corporation: "... a phenomenon of the modern world for which there is no adequate precedent in the experience of the past. This conclusion is reinforced by the consideration that the foreign corporation concerned will, in the vast majority of cases, be entirely non-muslim in its national and cultural origin, for it is of the nature of the Shari'a that it should be regarded as addressed, in its technicalities, to Muslims alone."[5]

Now, the learned authors suggest that the lacunae in the Shari'a in the world of modern commercial contracts might be dealt with by treating such contracts as sui generis. This might well have validity in international arbitration; indeed, this approach has virtually been adopted in the three arbitrations to which I have referred. It must be stressed, however, that such an approach would have no place whatever before a tribunal, be it court or arbitral, in an Arab jurisdiction where such tribunal found itself directed to apply the Shari'a. In those circumstances, the Shari'a would have to be applied, and there is no baulking the fact that its application would occasion grave difficulties, even impossibilities, in considering a modern international commercial contract.

May I now turn and, at the risk of dangerous over-simplification, indulge in some generalities concerning the differences between the Shari'a and the occidental systems. In so doing, may I dare to say this: occidental laws assume a fair degree of immorality and try to counteract it; the Shari'a par excellence, having its roots in religion, assumes a high degree of religious rectitude, and legislates accordingly. The main sanction is, after all, hell-fire in the hereafter. In an extreme case, the oath may be administered, but jurisprudentially the possibility of perjury is really unthinkable.

Well, that it all very well; but it makes the Shari'a really inconsistent with what modern man has made of commerce. We cannot here enter into philosophical discussion as to which theory is right, although a glance at the existing Western banking system would seem to provide an immediate argument in favour of the Shari'a!