ARAB COMMERCIAL LAWS

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The title of this lecture encompasses material I normally teach over the course of an entire year in a programme I deliver at SOAS entitled "Arab comparative commercial Law". Despite its breadth, I will nonetheless do my best to give as adequate an outline as possible within the 45 minutes available, mixing in, along the way, and at the request of Khawar Qureshi QC, a number of my own personal reminiscences!

I want to revert to the title of the lecture for reasons which will become apparent. Arab - we do not try to define this in detail, but note that the Arab jurisdictions going from West to East, comprise Morocco, Algeria, Tunisia, Libya, Syria, Egypt, Sudan, Jordan, Lebanon, Iraq, Saudi Arabia, Kuwait, Bahrain, Qatar, UAE and Oman.

My own experience has been with the states of the GCC - from Kuwait through to Oman. Fortunately, a study of the jurisprudence of the GCC provides all that we need in microcosm. It is upon this area, therefore, that I shall focus in what follows.

I first went to Bahrain in 1948 to deal with a boundary dispute between Bahrain and Saudi Arabia. Then in 1951 I opened an office at Bahrain.

At that time, and until 1960, in the case of Kuwait, and 1971 in the case of the rest of the Gulf (with the exception of Saudi Arabia and Oman) the British Crown exercised extra territorial jurisdiction through ancient treaties and the Foreign Jurisdiction Act. The termination of that occurred in Kuwait ten years ahead of the others - in the 1950s. The Prime Minister Musaddaq of Iran, who used to appear in his pyjamas, nationalised Anglo Iranian Oil Company (now BP). That created an oil vacuum which had to be filled by Kuwait crude oil - and Kuwait took off! It also created a legal vacuum - and Kuwait (and subsequently the others) needed quickly to import alternative laws.

People say to me "Oh you are an Islamic lawyer". But this is not the case. The Arabic States, faced with a choice between their Islamic identity and their need for secular laws, have in the main evaded the Shari'a by enacting Commercial Codes which legislate against it. The extent to which that tactic is constitutionally validated in each case must be considered.

I recall Shaikh Abdullah Salim the very wise ruler of Kuwait, agonising over whether Kuwait should continue to rely exclusively upon the Shari'a, the Quran and the Sunna, or whether it should also enact modern secular laws. In the event he was persuaded to adopt the latter course and invited the great Egyptian Jurist Al Sanhoory to come up and write codes. Those codes eventually formed the bases for the ensuing codes of Bahrain, Qatar, and the UAE and its emirates.

To deal a little more with "Arab" - We shall see that all Arab jurisdictions do have laws in common but they do not have a common law. I think we must right at the outset get this into perspective. If we asked ourselves the question, is there a lex Arabica, is there a lex mercatoria Arabica, we must return a negative answer at the present time. In many cases in practice in the Arab world, there is a transnational approach between the various jurisdictions: in all of them, the comparative approach has, as we shall see, a peculiar relevance because of the common features which exist between them. These common features exist (notably of course the Shari'a itself, the law of Islam) to an extent which is not discernable in other jurisdictions, but that is very far from saying that there already exists a lex Arabica. To assume that there is a body of law which can be so entitled would be a dangerous error at the present time. The comparative processes which are so relevant may in the future lead to a truly common body of law, but such a designation would only truly be safe to assume, in my view, if there occurs common legislation by the Arab States to justify it. Unfortunately at the moment there are few signs of this and thus each jurisdiction must be taken as individual. Now, as in other non-Arab jurisdictions where authority is not available within the particular forum, it may be relevant to adduce authority, doctrine and jurisprudence from similarly placed Arab jurisdictions in priority over other sources, but this is at present as far as it goes. However, among the common processes which we can deduce form an overall study there is of course the one element which is unique to the Islamic States and that is the Shari'a law. The role of the Shari'a and its extent in the jurisprudence of the Arab States is of course one of our main topics and let there be no mistake: in today's climate – political, economic and social – this is a subject of overwhelming importance. I don't think any student of contemporary history could doubt that for a moment: the increasing reassertion of the Shari'a is apparent.

Reverting to our title with the foregoing firmly in mind, we can deal at this stage briefly with 'comparative law'. We might say even more briefly that there is no such thing. Professor Gutteridge (a Trinity Hall man) put it very neatly: *'It is a method of study, not a distinct branch or department of law'*. However, it is a method of study which is peculiarly apposite to a study of Arab laws. Indeed, in my view, the comparative approach is achieving very increasing significance in the study of law generally and this is particularly so in the Arab jurisdictions and we shall see the reasons for that in a moment, but we shall be continually seeking for points of concordance between the systems. This brings us on to:

Commercial Law

In commercial law we shall quintessentially be considering contract. May I be forgiven for quoting again at some length from Professor Gutteridge because he puts it better than I ever could:

"Commercial law is, strictly speaking, merely one aspect of the law of contract, but its volume, and the importance of its subject-matter, have elevated it to the rank of an independent branch of the law in general. The value of comparison seems to be beyond doubt in this instance. Diversity of law affects commerce more sensibly than any other form of human activity and constitutes an impediment to the free interchange of goods which is the life breath of trade. International commerce is ambulatory in nature, and transactions may often range over a very wide area, thus rendering them subject to several different systems of law. Private international law has failed to provide a remedy for this state of uncertainty, and men of business have been driven to seek their own remedies. These generally take the

shape of either the use of standardised forms of contact designed to supersede or modify the legal situation or the communication to the business world of details of the foreign rules of law which give rise to difficulties. In either case, the value of comparative investigation of commercial law is so obvious also to make it unnecessary to labour the point. Commercial law also offers the most favourable opportunities for the process of unification which necessarily involves comparison of the relevant laws."

Of course he was not dealing with Arab laws, but this is even more relevant in the Arab jurisdictions.

As to *'law'* - we shall be dealing with the Shari'a up to the extent to which it applies, and the *civil law*system. There is alas little relevance left to the common law in the Arab jurisdictions. It may ultimately contribute in the comparative process as one of the general principles of law recognised by civilised states (ICJ38) but, such occasions are rare.

Now, what are the features which we find to be common to the Arab jurisdictions overall? I think these must be distinguished as follows:

1. Al Islam
2. The Shari'a - the law of Islam
3. The Arabic language
4. The Constitutions
5. Civil and Commercial Codes on a common model
6. An interchange of judges
7. The influence of Egyptian writings and judgements

We must consider each of these factors in turn. Taken in the aggregate they represent a powerful cohesive force which dictates a degree of propinquity between the various Arab jurisdictions which it may be said does not exist elsewhere. It is of course true that some of these features are equally common as between Western jurisdictions - in the West we find common constitutional models; we find of course common origins for the great European Codes; we find where there are *lacunae* in the law of a particular forum that it may be relevant to invoke authority from another jurisdiction. However, for reasons which will become apparent to us, where such common features exist in the West they in no way provide the cohesive force which they constitute in the Arab world; and of course, in addition we have the unique features of Al Islam, the Shari'a and the Arabic language.

We must now consider briefly each of these sources.

Al Islam - The Shari'a

We can bracket these two together: the Shari'a is of course the canon law of Al Islam.

It is surely unnecessary to inform this audience that in dealing with the Arab world we are dealing with all Islamic States.

Just as the Constitutions of the Arab States prescribe Al-Islam as the religion of the State, so do they, in greater or lesser degree, prescribe the Shari'a as a source of legislation. The

extent to which the Shari'a does in fact apply as a source of legislation must always be one of *the* main objects of study and there is diversity: for example, in Egypt, the Shari'a is constitutionally *a* main source of legislation. Similarly, in Kuwait, Bahrain, Qatar and the UAE, the Constitution prescribes the Shari'a as a main source of legislation. In the Constitution of Jordan, although, as would be expected, Al-Islam is clearly stated to be the religion of the State, there is no mention of the Shari'a as a source of legislation. In Oman, the Shari'a is prescribed as the source/origin ('asl) of legislation. In Saudi Arabia it is the sole source of jurisdiction.

Thus, in dealing with any particular jurisdiction in the Arab world, the practising lawyer must ask himself at the outset the degree to which, if at all, the Shari'a is applicable to the problem which he is considering. In some jurisdictions (e.g. Kuwait, and now, since the new Commercial Codes, the others in commercial cases) it may have no relevance; in others, such as Saudi Arabia, it is omnipotent. The lawyer who does not undertake this preliminary investigation is acting very much at his peril, for, as we shall see, from the point of view of Shari'a many modern commercial contracts would simply be illegal and void. This essential element is often neglected even by Arab lawyers.

The Arabic language

One cannot possible over-emphasise the importance of the language in the study of Arab laws. There can be no doubt that the availability of the original Egyptian Codes as drafted by that great jurist Al-Sanhouri in the Arabic language played a large part in their being adopted, as adapted by Sanhouri, by many other Arab jurisdictions - Iraq, Syria, Libya, Kuwait, Qatar - and as models for many others. Allied to the exigencies of the language, the genius of Sanhouri spread the format of these Codes throughout the Arab world. However, the matter goes much further than that: the official language of all these countries is Arabic, the courts accept pleading and documentation only in Arabic, as would be expected, and the thought processes involved in and reflected in the Arabic language introduce an additional element into interpretation and construction.

I believe the most difficult task which I always have to instil in non-Arabist lawyers some understanding of the atmosphere inherent in Arab thought as reflected in the language: concomitant with this will be to instil some idea of the thought processes involved in the Shari'a. In the classical writings on the Sharia's we find what the Western lawyer would regard as an obsession with grammatical analysis of language. This approach must be appreciated, and I will endeavour to give examples of it. That brings us immediately to a consideration of the Quran.

I think it could be put this way: that the thought processes which create the Arabic language in order to convey them then become subject to the control of the actual language and the sound of the language itself. I cannot dwell on this, but as a matter of construction, let me take a short example: the hallowed precept in the continental codes, the civil codes: *"less conventions legalement formeés tiennent lieu de droit à cieux qui les ont faites"*. Now this, or something like it, can be found in the French Code, the Italian Code, the German Code - really wherever we look in the civil law. It of course reflects the basic maxim *pacta sunt servanda*, and we can usually translate it that contracts legally concluded constitute the law of the parties. It is not surprising to find that because of the civil basis of the Arab Codes, it is common to them also - al-aqd shari'at al-muta'aaqidin. Translated literally that means that

the contract is the law of the parties, but, of course, left at that in the Arabic it is meaningless. In searching further for a meaning, in interpreting that provision, Arabic comes into play, another element in construction. The word for contract - "'aqd" - straight from the Quran. Similarly, "Shari'a'" - The Quran - awfu bil 'uqud - so, exactly, *"ye who believe honour your contracts"* and such obligations are the law, the Shari'a law, of the parties.

On this question of sanctity of contract, let us make a short excursus: it illustrates, as we go along, one of the distinctions which we shall have to make between the Shari'a and the secular laws.

The Shari'a recognizes in full the sanctity of contract. I quote from a modern decision, the remarkable award of Professor Reneé Dupuy in the Texaco arbitration. *"The observance of contact is proclaimed by the Quran and the practice of the Prophet, which is the second source of laws in Islam (Bukhari III 187). The writings of Muslim jurists, uphold the same principle, in particular Ibn Qudama, a jurist of considerable authority in the Hanbali School, which is predominant in Saudi Arabia…This principle applies not only to agreements completed by private persons, but also agreements entered into by the sovereign. Thus, under the Shari'a nobody, neither the sovereign nor any official is exempt as a matter of privilege".*

Well, as a general principle that is fine: but when we look into it more deeply, we find the basic differences which distinguish the Shari'a philosophies from those of modern Western systems. May I translate a passage from 'Masaadir Al-Haqq' of Sanhouri: he puts it, in Arabic of course, better than I can and he is an outstanding authority. He does not follow the usual course and put the main difficulty on the basis that the Shari'a knows no general theory of contract per se, but only types of nominate contract: although that is of course the case. However, he is of the opinion that we can, in our time, go far to extracting, by analogy from the specific examples of nominate contract given by the Shari'a, a general theory. No, he does not put the difficulty there, i.e. in the matter of nominate contact, he highlights the matters somewhat differently:

"Thus, these nominate contacts mentioned by the doctors of law are only those contracts which most frequently occur in the transactions of the time. If civilisation has evolved other contracts which satisfy the conditions laid down in the jurisprudence, such contacts are lawful. It is on this legal (shar'i) policy that the new Iraqi civil legislation is based" (let us recall in passing here that it was al-Sanhouri who drafted the Civil Code in Iraq, among others).

A general provision, Article 75, follows (al-Sanhouri quotes):

"The contract may embrace anything else in respect of which the obligation is not forbidden by law or contrary to public policy or morals."

However, the scope of public order in the Islamic jurisprudence is wider than that in Western jurisprudence. The prohibition of contracts contrary to riba or gharar greatly extends such scope in the Islamic jurisprudence: so also does the theory of condition as applied to the contract increase the extent of such scope to a large degree.

Thus, the principle in the Islamic jurisprudence is freedom of contact within the bounds of public order; *but the multiplicity of the principles which are considered to go to public order narrow such freedom.*

The Constitutions

It suffices to note at this stage that where there are written Constitutions, these are more or less based on a common form. As the reason for this is basically the same as the reason why there are common Codes, I shall now pass immediately to:

Civil and commercial Codes on a common model

I have already briefly alluded to this in reference to the genius of al-Sanhouri and the subsequent availability of the basic Codes in Arabic.

In 1949 Egypt promulgated its new Civil Code. This was drafted by al-Sanhouri, and has survived virtually unamended for nearly 40 years. In 1942, when he was working on the Code, al-Sanhouri announced that he had used comparisons of more than 20 modern Codes, the jurisprudence fthe Egyptian Courts, and the Islamic Shari'a.

However, it was quite apparent that al-Sanhouri's preoccupation and main difficulty in drafting the Egyptian Code was to try to build a bridge between the Shari'a and the dictates of modern commerce. I shall try to point up the conflict between the immutable tenets (i.e. the Quran and Sunna) of the Shari'a, and in particular the modern economic scene. In 1980, I wrote:

"The problem is that the Arabs have to a greater or lesser degree, in wishing to adopt the existing international world of commerce, comes face to face with the classic situation: an irresistible force against an irremovable object. As is not uncommon in these circumstances not by any means only in the Arab world) the question has been begged on all sides. It will be, to say the least, interesting to see for how long and to what extent this apparent anomaly can continue."

Well, the anomaly does continue, and increasingly the position is accentuated by current political circumstances; one must assess these anomalies along with the importance of this conflict between the Shari'a and Western (and, indeed, modern Arab) legal concepts. The dream of al-Sanhouri was that the Shari'a could be increasingly adapted to such needs, and that modern Codes could be increasingly made to conform more with the Shari'a, so that by some kind of compromise the two could meet. There is no sign of that happening, and indeed, I regard it as in the ultimate analysis, probably impossible.

The Interchange of Judges

One aspect of the overwhelming influence which Egypt, its laws and lawyers had upon the other jurisdictions of the Arab world lies in the supply by Egypt of judges for their courts. This is particularly true of the courts in the Arabian Gulf which on the cessation of the British Extra-Territorial Jurisdiction (Kuwait 1961, Persian Gulf 1971) had no trained lawyers with which to staff their courts. They were thus obliged to import judges and, for reasons which will already have been apparent to us, they looked in particular to Egypt. This

was a natural process - the first Gulf Code to be promulgated was the Kuwaiti Commercial Code of 1961 written as we have seen by al-Sanhouri and it was fairly obvious that in these circumstances Egyptian judges would follow. It must be evidence that this situation again makes for uniformity, a transnational approach to the interpretation of the Codes.

The Influence of Egyptian Writings and Judgments

This is almost a sequitur from what we have been saying. Jurisprudential writings in many of the Arab jurisdictions are simply not to be found: in particular again, the Gulf area. It is not surprising that the one work which is certain to be found at the right hand of every judge sitting in an Arab court is the monumental Al Waseet of Al Sanhouri, his 10-volume Commentary on the Egyptian Civil Code. The other book which is almost present somewhere is the Majellat al Ahkam Al'Adliya, commonly know as the Majella, the Ottoman Codification of the Shari'a which was put together in the 19th Century. Most judges have this available just in case a Sharia's point comes up!

So we have all these unifying factors; let us remind ourselves of what they are:

1. Al Islam
2. The Shari'a
3. Arabic
4. The Constitutions
5. Civil and Commercial Codes
6. An interchange of judges
7. Influence of Egyptian writings and judgments.

This situation encourages us, particularly where there are lacunae, where there are gaps in any particular system, to adopt the comparative approach and look for points of uniformity, for points of concordance in order to fill them. But, due to the factors which I have briefly outlined this is a much more potent consideration in the Arab jurisdictions than in Europe.

It is with this general background in mind that we embark upon our comparative study - comparative to a certain extent between the jurisdictions: comparative to a certain extent with European law: comparative above all as between the Shari'a and secular law, which, I stress again, obtains in greater or lesser degree according to the jurisdiction concerned.

The Shari'a

I cannot of course assume that my audience must have any knowledge of the Shari'a and it will be necessary therefore to give a short introduction to the subject. I stress that this must be short and will aim in the first instance to paint once more with a broad brush. I think that it would be useful if I were to anticipate the main difficulty in all this right at this initial stage, and I would like to quote from Noel Coulson's book in which he puts the difficulty with his usual incisiveness:

"Muslim jurisprudence…is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim State, controlling and not controlled by Muslim society."

Now, this is really concentrated. Let me elaborate a little. In considering the adaptation or the modernization of the Shari'a to fill the needs of contemporary circumstances, we are immediately dealing with an essential contradiction: the whole essence of the Shari'a as a religious law is that it is not intended to develop according to the dictates or needs of society; quite to the contrary, society and its circumstances are to be controlled, circumscribed, by the Shari'a. Society is supposed to evolve according to the dictates of the Shari'a. Now, clearly, if that happened, then there would be no conflict and no irresistible force against an irremovable object. But it did not happen, and there is now much talk of new ijtihad, new emerging doctrines based on the Shari'a which will, so to speak, update it and bring it into line with modern conditions. This, of course, involves a basic conflict, an essential floundering around trying to surmount *immutable* provisions of the Shari'a. It is in this, to my mind, that we encounter the whole insurmountable problem in seeking to adapt the Shari'a to some concepts of Western commercial law which offend basic and immutable provisions of the Shari'a. *Vide* for example Islamic banking.

It must be recognised that if the Shari'a applied per se, most modern commercial contacts would offend it and be illegal. Such concepts of Shari'a in particular as RIBA (the charging of interest) GHARAR (risk) and extraneous contracts (SHURUT) would achieve that. Faced with that, how have the Arab states (again with the exception of Saudi Arabia) sought to avoid that situation. Here the essential difference between "commercial" and "civil" becomes paramount. As a general rule the Commercial Codes have been promulgated whose provisions, notably with regard to interest evade the Shari'a. When the Shari'a is prescribed by the Constitution as a source of legislation, can the Commercial Codes (as special laws) themselves be attacked as illegal?

The Kuwait Constitutional Court dealt with this in Case No. 1/1985 and ruled that by the Constitution the Shari'a was only "a" and not the "sole source of legislation, thus the Kuwaiti legislator was free to legislate even if contrary to Shari'a.

However these principles must always be borne in mind. A current example -

As we have seen the constitution of Oman provides, uniquely that the Shari'a is the "basis" origin of legislation ('ASL'). Article I of the new Oman Civil Code (Law 29/2013) provides

"….if no provision is found in this law the court shall decide in accordance with the provisions of the Islamic FIQH (jurisprudence) and if not found in accordance with the general principles of the Islamic Shari'a…."

What then of the Commercial Code?

In a recent case in the High Court in London the defendants very senior Shaikhs in Saudi Arabia, members of the ruling family, *Apex Global Management Ltd. V. FI Call Ltd.* [2013] EWCA Civ 642 pleaded diplomatic immunity; as members of the family they were issued with diplomatic passports. They also pleaded that the action should be held in private. I was asked to file an opinion on the position at Saudi law (which it was ultimately held did not apply) and said that the law of Saudi Arabia was the Shari'a and that at Shari'a neither the King himself nor any member of his family was exempt from Saudi jurisdiction. The opinion filed by a Saudi lawyer contested, entirely wrongly, that the law of the Kingdom was not the Shari'a.

The Court of Appeal rejected both of the defence pleas.

I hope that I have made it clear that faced with a problem in an Arab jurisdiction, a lawyer must first ask himself "does the Shari'a apply?" The late Iman Badawi stated "Anyone who addresses a problem without considering the Shari'a, does so at his peril.

The next question is, whether the case is commercial or civil - if commercial, it is probable that the appropriate Commercial Code will have evaded the Shari'a, yet at the same time the opening provisions of the Civil Code must be considered.

To end with a personal note on the UAE.

I had a very good friendship with the late Shaikh Zaed, the President. In the early days I learned that a group of banks were trying to lend him money. I advised him that such was the liquidity which Abu Dubai was about to achieve that he should not borrow - he himself was the banker - we had in fact set up the Abu Dubai National Bank (another interesting story!) He said they tell me that I can use their money more cheaply than my own - an illusion which I corrected. I did not have the temerity to refer him to his own Islam, the Quran strictly forbidding interest on money - more to the fact that it was also indicted in Jewish law, Roman law, Christian law as well as Islam. I could have quoted to him a passage from that remarkable jurist Ibn Al Qayyim written in the 12th Century -

"Money only reflects the value of goods….money should not be created just because its very existence should create a demand for it, but rather it should be used for the procurement of other goods….

Money has been created so as to be a measure of values and an instrument for exchanges. Money itself has no intrinsic value. Had it an intrinsic value, it could be not have played its role as money, and would have become like other commodities…Every commodity can be desirable by itself because it meets some need or the other; but, money should not be desirable by itself it should only play its role of a medium.

Hoarding of money as well as collecting usury on money means man has turned money into something desirable for its own sake. "Usury" denotes that man is trying to "create" money through the medium of money itself. Earn bigger with smaller money. This amounts to denying the blessing of Allah and the use of material for purposes other than what it has been created for….."

But there, particularly in modern economic circumstances, hang many other tales! Not bad for the 12th Century.

12th November 2013