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SHARIAH COMMERCIAL LAW: NATURE, PROSPECTS AND CHALLENGES FOR SOCIETAL DEVELOPMENT

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Abstract

The paper looks at the nature of the Shariah commercial law, prospects and challenges for the development of societies. It is noted that the Islamic law –commercial law inclusive is unique and comprehensive. This deals with all aspects of human life including the commercial life. In this paper the commercial life of man is emphasized with specific consideration of exchange of goods and services. Basing on the general objective of Shariah, a number of rules and regulations are presented in Qur'an and Sunnah and the other sources of Islamic law in order to ensure justice and fairness between the participants in the exchange of goods and services. It is expected that if the Shariah commercial law governing exchange is fully implemented a number of benefits will accrue to the participants and the community at large – and hence a faster rate of societal development.

Introduction

This paper deals with the nature of Shariah commercial law, prospects and challenges for societal development. In the first place there is need to cherish the position of law and order in the development of any society. It is expected that a society where there is no law and order the rate of development of such a society will be limited. Thus the enforcers of law would play a paramount role in the development of the different societies of the world today. This position is emphasized in a way that “The legal profession is a body of persons who are trained and qualified to practice law in the courts of a country. The legal profession is an indispensable institution for the promotion and maintenance of a free and democratic society based on justice and the rule of the law. Therefore, the role of the profession is not only to promote respect of the human rights and the rule of law, but also to play a dynamic role in the social economic and political development in the country”¹. Thus in this paper a presentation is made on the

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Shariah laws governing exchange of goods and services. This is done due to the fact that on a number of occasions some participants in the exchange contract have wrongfully gained much more than others and others have lost their due benefits of exchange. These consequences are due to a number of factors that relate to lack of justice and fairness among the participating members in the exchange and the laxity in the courts of law to enforce the contracts of exchange.

Development of the Society: The Islamic Point of View

One of the major objectives of any society is attainment of descent level of economic welfare. From the traditional economic point of view, development is an improvement both qualitatively and quantitatively in all aspects of human. This can be measured in a number of ways for example using the GDP per capita and other social welfare indicators. From the Islamic point of view development would be considered as “a balanced and sustained improvement in the material and non-material well-being of man, and development as a multidimensional process which involves improvement of human welfare through advanced, reorganization and reorientation of the entire economic and social systems in accordance with the norms and values of Islam”²

From the above one gets to know the meaning of development under the Islamic perspective and the societal development indicators. It is expected that for a society to attain development exchange of goods and services must take place following the rules and regulations as laid down in Qur’an, Sunnah and the other sources of Islamic law. This aspect of development of the society is analyzed in the following sub-section that deals with the prospects and benefits of Shariah commercial law.

¹Odoki B.J (2009), “Promoting Ethical Standard in the Legal Profession in Uganda” in the Islamic University in Uganda, Journal of Comparative Law, Vol.3 January 2009 pp 3

²Sadeq (1995:12) Islamic Economics Some Selected Issues Naushaba Publication New Delhi

The Nature of the Shariah Commercial Law

Looking at the nature of Islamic Commercial Laws, it is observed that the Islamic commercial laws possess an inbuilt mechanism and ability to develop to level of incorporating all emerging commercial issues in the world today. Furthermore, the Islamic commercial laws are valid for all periods. And at the same time these laws are derived from the general Islamic law (Shariah) – which are the dictates of Allah contained in Qur'an, Sunnah and other sources based on Ijtihad, Ijima and Qiyas.

The characteristics of the Islamic commercial laws are directly linked to the inherent features of the Islamic laws in general terms. Therefore, it is imperative for one to first understand the characteristics of Islamic law, before appreciating the nature, prospects and challenges of the Islamic commercial laws and how these laws would affect the welfare of the masses. The features of the Islamic laws as presented by Mannan (1980) include the following;

Generally, the element of uniqueness of the Islamic laws is put affront in the explanation of the characteristics of the Islamic laws including also the commercial laws. This is based on the nature of the Islamic law where it is proved to be comprehensive and being valid for all the time periods. Qur'an and Sunnah and Hadiths form the primary sources of the Islamic laws. The Islamic laws provide the guidance of mankind in all aspects of human life – economic and commercial life inclusive. Implementing the Islamic laws in all the human activities would enhance the welfare of mankind perpetually and this would be a case of sustainable development. And from the Islamic perspective focus is put on both material and spiritual development.

Prospects and Benefits of Shariah Commercial Laws in Developing Societies

In general terms the Islamic law is comprehensive in the sense that these laws cover all aspects of human life – commercial life inclusive. Under the commercial life the terms and conditions of exchange of goods and services are

under scored given the Shariah principles. The expectation is that if the Shariah commercial laws especially regarding exchange are implemented fully the rate of development will be high.

There are three major distinctions of the Islamic law – (Shariah). The three distinctions are; akhlaq (morals), ibada (religious observance), and mu'amalat (transactions) (Foster, 2006). This means therefore that the Shariah, commercial law would govern all exchange of goods and services with the objective of obtaining profit. The Islamic commercial laws are contained in four key sources, which are the Qur'an, Hadith/Sunna, Qiyas and Ijima. In the understanding and applying the legal aspects as derived from the above sources Ijtihad is highly needed. Ijtihad considered as an independent judgment in a legal or theological question, based on the interpretation and application of the four sources of the Islamic law³

The relationship of Islamic law and exchange is greatly linked to the economic theory –dealing with both micro and macro-economic aspects of the society. Shariah has laid down detailed laws of exchange of goods and services between individuals and groups of individuals and the operations of the market. It is expected that exchange of goods and services basing on Shariah commercial law would enable the society to overcome a ray of problems related to exchange of goods and services and thence enhance societal development (Zarqa, 1992).

Any given society would benefit from the exchange of goods and services under clear terms and conditions. These conditions are laid down in Qur'an Sunna and other sources of Islamic law. Zarqa (1992) points out that there are mainly two forms of commercial rule or law that govern exchange – they are; guiding rules and binding rules and the courts of law are available to assist in the enforcement of

³ Foster N. H.D (2006), Islamic Commercial: An Overview (I), School of Law and School of Oriental and African Studies University of London

these laws for the society to fully benefit from the exchange of goods and services.

The prospects of Shariah commercial law are further seen in the objectives of Shariah regarding exchange among two or more parties. The focus of Shariah in this case is to minimize the cost of exchange. The cost of exchange would be parameterized by three major variables and they include:

- i. the information cost
- ii. transaction cost
- iii. implementation cost

On the other hand, Shariah commercial law would also aim at maximizing some variables for the participating parties. This is mainly the benefit of exchange that needs to be maximized by the participating parties. It is clear from the two fronts that all parties involved in the exchange try as much as possible to minimize the costs of exchange and maximize the benefits of exchange but subject to the Islamic laws governing exchange. The participating parties thus are faced with the optimization problem in one way or the other. Thence, where the cost of exchange is greater than the benefit then the best choice would be to drop the contract of exchange between the parties involved.

The emphasis of the Shariah law of exchange is that, the rules of Shariah on commercial exchange aim at mainly two potential outcomes. These outcomes are first of all minimizing the cost of exchange on one hand and on the other, maximize the benefit of exchange for the parties involved in the exchange.

It can be recalled that from the traditional economic theory of exchange some assumptions are assumed. However, these assumptions do not hold under the Islamic commercial law of exchange. The assumptions under the traditional theory of exchange for example provide that;

information is full and available to all the parties involved in the exchange at zero cost and information about variables such as quality, price and the location of the merchandise is also available at zero cost.

The above assumptions are perceived differently under the Shariah law governing exchange. For example, it

is assumed that every party involved in the exchange is assumed to be truthful and not to tell any lie. This means therefore that one of the parties could be having more information about the exchange than the other. This is a scenario that calls for honesty among the participants in the exchange and that they should not tell any lie.

Accordingly, Shariah has an expectation that there could be some elements of dishonesty in the implementation of commercial contracts. In order to protect the participants in the exchange and for ensuring existence of justice and fairness between the participants, a number of rules have been stipulated by Shariah. In the same vain more realistic attitude has been developed by Shariah law to run the aspect of exchange on the principle of justice and fairness from each party involved in the exchange.

Under the Shariah law governing exchange there are three major issues of concern in the management of exchange and include⁴

Recognition of the existence of inequality of information among the players in the exchange (participants in the exchange).

Transaction costs are positive rather than negligible; this is totally different under the traditional perfect competitive system of management of exchange. All the parties involved in the exchange cannot protect their interests equally.

A number of goals and basic rules of Shariah regarding exchange have been presented⁵. Two major aims of Shariah regarding exchange are provided. Shariah in the first place aims at facilitating and encouraging exchange and at the same time reduce the cost of exchange to the lowest feasible level, and secondary remove any event that would breed animosity and dispute among the participants in the exchange.

⁴ See Zarqa M.A Islamic Jurisprudence (Fiqh) and Economics of Exchange, in the Lectures on Islamic Economics, Islamic Development Islamic Research and Training Institute Jedah pp 93-100

⁵ Ibid

It is further observed that Shariah does not only provide the goal for harmonious exchange between parties but goes a step ahead to provide the mechanism through which the identified goals could be attained and become beneficial to all the participants in the exchange and the society at large. According to Zarqa (1992) there are three major rules of Shariah which are binding in the exchange and by which the identified goals can be attained.

Rule I: Under this rule it is stated that each and every transaction ought to be based on knowledgeable consent of the two parties. This is a binding rule under the Shariah commercial law of contracts. Given this rule consent is amalgamated with awareness of the reality of the transaction. The implication of this rule is the fact that if someone is forced into a contract of exchange without his or her consent then the contract is not binding under such circumstances. Imam Malik as quoted by Zarqa (1992:97) says that “If an oath of allegiance (Bay’ah) is taken under duress it is not binding”

The additional prospect of Rule I is that of acknowledging consent. This implies that if an exchange or transaction is conducted the participants must have full information about the quality and quantity of the commodity being exchanged. Some good examples have been given to delineate exchanges that are nullified under the Shariah rules of exchange. For instance, (see Zarqa 1992:97), where it is stated that “If a man has a few sheep and a person says he wants to buy one of them this is an invalid contract in Shariah. This purchaser has to specify which sheep he wants to buy because all sheep are not alike. Furthermore, if one rents a house on the understanding that rent will be agreed upon later. This is null and void. The amount of rent and period of lease has to be specified at the time of the contract”

It is also vivid from Rule I that in case of any dishonesty by any one party, to hide the defects about the product of exchange in terms of the true attributes of the product, the aggrieved party has the right to call for

cancellation of the contract. Shariah gives a clear provision and at the same time insist that all the parties must have full information about the quality and quantity of item involved in the exchange.

In the operationalization of Rule I, it is expected that two aspects of price of the product should be made distinct to the parties involved in the exchange. These are one, the concept of contractual price known in Fiqh as *Thaman* (price) and the market price known as *Qimah* (value). The two types of prices are used by jurists in their bid to decide on the matters concerning justice and fairness in specific exchange contracts. To portray the importance of the distinction between the two prices reference is made to the Sunnah of the prophet where it is reported that the prophet (pbuh), taught that if goods are being bought from outside the city it is forbidden to purchase them before they reach the central market place. This is based on the premise that if the person bringing the items into the city lacks information about the market price, and someone enters into a transaction with him outside the city the seller may lose the benefits of the actual/true price of the merchandise. It is observed that if after the transaction the seller manages to reach the central market and finds that he had entered into unfavourable contract because of misinformation, he can nullify the contract (Zarqa, 1992).

A number of challenges stand in the way for the full implementation of Rule 1 as explained above. The challenges are mainly linked to the availability of correct information concerning the market conditions in regard to the supply and demand and the resultant situation value and price of the merchandise. Most of the farmers more especially tend to face this challenge. It is upon governments to assist the farmers to have full and easy access to information regarding demand, supply and the value of their agricultural merchandise. This challenge is prevalent in the Ugandan market operations. It is expected that the revival of cooperative movement may help the farmers out of the unfair exchange.

Rule II: The second rule states that the benefits of exchange should be reasonably divided between the contracting parties. This rule is presented from the Shariah position where Shariah aims at balance and justice between the parties involved in the exchange. One major principle of Fiqhis that if a person is under duress (Mudtar) i.e. a person is in calamitous conditions, the seller is not allowed to overcharge the buyer over and above the market price. According to Ibin Taymiyah as quoted by Zarqa (1992), “If a people are in dire need to buy cloth and food from someone who has it, he must sell it at the standard price, he has no right to ask for more and they should not give him more” This rule puts forward the rationale of the prohibition of monopoly – which usually culminates into dead weight loss to the society.

The high poverty levels especially in the least developed societies pose a big challenge in the implementation of Rule II as presented and explained above. It is found out the poor normally have a very weak bargaining power and most of the rounds of bargaining struggles are won by the rich. This calls for justice and fairness in the exchange of goods and services.

The aspect of justice in the management of exchange has been further emphasized under the consideration of a Safih – a Safih this is a person who is irrational in his or her behavior when transacting and disposing off his or her property. Such a person cannot protect his own interests. And other parties find it easy to manipulate the scenario for their sole benefit. Likewise, a Safih would buy something of no value (Zero or negative utility). Some scholars indicate that a Safih may spend money on the construction of a mosque, when his family is suffering from lack of some provisions. Such transactions of a Safih would be stopped by the courts of law. This is all done in order to protect the irrational people with their families⁶.

⁶ Ibid

In the management of exchange under the second rule, there is an additional principle that needs also to be enforced under the Shariah commercial law. This is the principle where there would be cancellation of the exchange contract if the outcome is uncertain (Aqd –al-Gharar) (Zarqa, 1992). The example that can be derived from Sunnah is where a buyer would tell the fisherman that I will pay you now a given price for whatever will be your net catches. In this case the catch outcome is uncertain – it may zero, or small or large yet the buyer has already paid the money. This kind of exchange contract is prohibited on the ground that it is more likely to generate animosity and conflict in the society. Thus the maintenance of balance and justice between parties is paramount and where there is lack of justice and balance Shariah has provisions for the institution of balance and justice to prevail in the management of exchange.

Rule III: Under the third rule of exchange, contracts are to be enforced and honored. One should note that the objective of Shariah in this case is to minimize upsetting contracts after they have been endorsed with full consent from the parties concerned. It is further observed that contracts of exchange cannot be revoked at the pleasure of either party involved in the contract. Courts of law are to be involved under the circumstance of dishonouring the contract. The obligations to the contractual terms are fully entrenched in Qur'an 5:1 in which it is stated that “O ye who believe! Fulfil (all) obligations. ...” This means therefore that whenever one enters into a contract it is an obligation for him to fulfil the provisions therein.

Enforcement of the contract is also clearly embedded in the third rule. This means therefore that some costs are to be incurred in the enforcement process. The cost incurred would be determined by a number of factors that include the social capital (social value) level of the society – that looks at the ethics and integrity of the members of the concerned community. It is thus expected that if a community is full of dishonesty and deceitful people it will

imply that each contract of exchange signed would carry a high cost of implementation. Minimal costs of enforcing contracts would be incurred when the judicial system of a given society is incorruptible, efficient and honest. Under such a system exchanges will generate more total utility to the participants and the society at large. This scenario is a crucial parameter effectiveness of the exchange of goods and services

Given the rules presented above there are some additional orders that are supposed to be respected in the exchange of goods and services. In this regard five categories have been identified and presented by Nadwi (1998), and include generally relating to exchange for items that used, or sold on spot or under barter system of exchange. The five categories specifically relate to the following items:

- i. Gold and Silver (including items made from them)

The order or condition that must be fulfilled in the exchange of gold for gold or silver for silver is that the items to be exchanged must be of the same weight. In all cases the exchange must be made on cash basis and the exchange must be on spot. Devoid of meeting these conditions the exchange would be involving *riba*⁷.

- ii. Goods which are sold by weight

In regard to goods which are sold by weight apart from gold and silver, commodities that are sold by weight and for money, thence whatever price agreed upon between the seller and the buyer will be legitimate⁸. On the other hand, however, if one of the commodities or some item is made of them is being exchanged directly for another, there are two scenarios that are likely to be experienced. These are, in the first place, the two commodities are both of the same kind or secondary, the two commodities are of different kinds. Thus, if the exchange is involving commodities of the same kind for example maize flour for

⁷For detail See Nadwi M.M (1998), Commercial Law of Islam, Translated by Abdur Rahman O'Beirne, Madarasah Arabia Islamia, Azaadville South Africa (Pages 6-45)

⁸ Ibid page 18

maize flour then equality in weight and mutual agreement in the handover is a condition that must be ensured. It is noted that if someone wants to exchange poor quality item for good one say good quality wheat flour for poor one neither difference in weight nor credit is permissible. Additionally, such an exchange is impermissible even when the two parties agree to a difference in weight.

It is argued that if one party would like to exchange poor quality for good quality, such an exchange has to be done on a condition of equal weight and mutual handover, and on spot⁹.

iii. Goods which are sold by volume

It is observed that for the goods that are sold in volume, same conditions apply as those that apply to the goods that are sold by weight. However if different items are to be exchanged for example maize flour exchanged for rice, and then the difference in volume is permissible. What must be ensured is the condition that the exchange must be done on spot.

iv. Goods that are sold by length and Goods which are sold by number

In this case order number iv and v are presented together. What should be noted today is the fact that much of the exchange is done involving monetary terms. This means that the prices set would be reflective of the quality of the items being exchanged with the money. This must be accentuated by mutual agreement between the buyer and the seller.

Some Commonly Prohibited Exchanges

A number of exchanges are prohibited under the Shariah commercial law. This is done with the major goal of ensuring fairness, justice equity and harmony among the participants in the exchange. In this section some examples are provided to illustrate the prohibited exchanges under Shariah commercial laws.

⁹ Ibid page 18

For example, it is prohibited to have an exchange of merchandise under the condition of increasing cost as per the delays in the settlement of the outstanding payment. This prohibition is derived from the answers given to a question asked – relating to someone who sells cars for instalments with a fixed rate of interest on deferred payments which increases on the delay of payment. The specific answer to this question is that such a transaction is prohibited under Shariah commercial law. The detail of the answers to this question is provided by El-Ghazali (1994:52). It is provided in this case that “If the one who sells the car or other merchandise over a fixed period of time, for a price that is to be paid on a fixed future date or dates and does not increase the value of the deferred amount, then there noting wrong in that. The transaction is legal”. This is based on the Qur’an 2:282, in which Allah commands that:

“O ye who believe! When ye deal with each other in transactions involving future obligations in a fixed period of time reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write as Allah has taught him so let him write. Let him who incurs the liability dictate but let him fear his Lord Allah and not diminish aught of what he owes. If the party liable is mentally deficient or weak or unable himself to dictate let his guardian dictate faithfully. And get two witnesses out of your own men and if there are not two men then a man and two women such as ye choose for witnesses so that if one of them errs the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period whether it be small or big: it is juster in the sight of Allah more suitable as evidence and more convenient to prevent doubts among yourselves; but if it be a transaction which ye carry out on the spot among yourselves there is no blame on you if ye reduce it not to writing. But take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm) it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things”.

A number of pertinent issues concerning the management of exchange can be deduced from the above verse. For instance, there is need to write down the exchange contract in case the exchange is involving future

obligations. This must be accompanied with honouring the contractual terms and witnesses.

It is further reported by Ghazali (1994), that, the prophet bought something for a payment deferred to the future date. However, if the deferred payment is increased by a fixed portion as a result of the delay in paying the instalments, this is forbidden according to the consensus of Muslim. Such a practice was also common during the pre- Islamic Arabia. This is when during the time the debtor could not settle the debt when it was due; the extension was made with an increment of the outstanding debt. This is linked the riba which exchange is forbidden under the Islamic commercial law. (See Qur'an 2:275) "Those who devour usury will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: "Trade is like usury but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord desist shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (the offence) are companions of the fire: they will abide therein (forever).

Conclusion

Shariah commercial law governs the exchange of goods and services under a number of rules. With these rule of exchange of goods and services mutual benefits are expected to be enjoyed by both the buyers and sellers. The mutual benefits enjoyed are expected to enhance the rate of societal development. The Shariah commercial laws are contained in Qur'an and Sunnah and other sources of Islamic law. Failure to implement the Shariah commercial law will cause a number of negative consequences in the society.