EMERGENCY OF SHARI'A IN BUSINESS TRANSACTIONS IN THE EARLY 1970s

Shortly after the oil crisis in 1973 the Shari'a, which hitherto had lain dormant except in family law, started to re-emerge in the area of mu'amalāt or business transactions. This renaissance followed a long period during which most Arab countries had been losing their legal identity: the Civil Codes of Syria, Lebanon, and Egypt, closely modelled on colonial patterns, paid lip service to the Sharī'ā and in the Gulf States a series of ad hoc statutes prepared in the 1960s by Egyptian and Syrian legal advisers to US and British oil companies were drafted along Western models, chiefly for the convenience of foreign business. In Saudi Arabia, Bahrain and the Gulf States (then called the Trucial States), the civil codes and ad hoc legislation (combined with detailed contractual instruments drafted according to Western techniques), often defeated the application of the Shari'a with respect to the law of contract and business transactions. The Shari'a's profile began to heighten in the early 1970s when many Arab constitutions declared Islamic law to be a primary source of law, e.g. Egypt (Art. 2 of the Constitution of 11 September 1971), Bahrain (Art. 2 of the Constitution of 6 December 1973), Qatar (Art. 1 of the Provisional Constitution of 2 April 1970), and the UAE (Art. 7 of the Provisional Constitution of 18 July 1971). The old Constitution of the Yemen Arab Republic (Constitution of 28 December 1970) had gone so far as to refer to the Shari'a as the source of all laws. Meanwhile, the ownership and management of oil wealth were gradually transferred to Arab hands. The awareness of their economic power probably contributed to cause certain states, e.g. Saudi Arabia, to...
exclude foreign law from international contracts.4

SYMPTOMS OF DECLINE IN THE 1980s

It is submitted that the influence of the Shari‘a now appears to be declining following the descending curb of oil prices and in the aftermath of the two Gulf Wars (Iran–Iraq, Iraq–Kuwait). Without entering into the complexity of the reasons for this decline in influence, at the socio-political level Middle Eastern countries (including the Gulf States), are allegedly classified into three groups as follows: the “mischievous” states, e.g. Iraq, Iran; the “soliciting” states, e.g. Syria, Lebanon, Jordan, Egypt, Yemen; and the “fearful” states seeking Western military support despite their oil wealth, e.g. Saudi Arabia, Kuwait, Oman, and the UAE. Nowadays the Western mind often associates the Shari‘a with terrorism and fundamentalism; its application is no longer the noble and euphoric secretion of oil power. The causes and effects of the Shari‘a’s decline remain to be studied by sociologists.

LEGAL LITERATURE AND SHARI‘A

There is still a well defined line of demarcation between the Shari‘a and statute: while the majority of Shari‘a writers, predominantly Arabs, remain entrenched in a closed world expounding Shari‘a tenets in a monolithic fashion and insulating Shari‘a from secular laws, other writers, predominantly Western practitioners implanted in Saudi Arabia and the Gulf States, focus on the commercial statutes and pay scant regard to the Shari‘a. These extreme positions do not reflect the duality of legal sources, nor do they give a complete picture of the dual reality in which the Shari‘a and secular law do not necessarily exclude but often complement each other. Thus the honest writer’s task is not to give an ossified description of the Shari‘a, indulging in the minutiae of the views of various schools, nor to paraphrase modern statutory provisions, but to show realistically, if, when, and how, Shari‘a applies where there is a statutory and/or contractual hiatus. The instances where the Shari‘a scriptural tenets impose themselves notwithstanding the provisions of a contract should also be studied.

PRACTITIONERS AND SHARI‘A

With a few exceptions, often associated with a thorough knowledge of the Arabic language, Western jurists practising in the Gulf States tend to underestimate the importance

4 Traditionally, under strict Shari‘a rules and with respect to financial matters, the dhimmis (the protected people of Dār-al-Islām, i.e. Christians and Jews) and the Musta‘minin (aliens, other than the dhimmis) cannot avoid the application of Shari‘a rules in Dār-al-Islām (Islamic territory). This may explain the reluctance of Saudi Arabian courts to apply foreign law to international contracts wholly or partly performed in Saudi Arabia even though, in practice, only Saudi secular law would conflict with foreign law.