THE TRANSFORMATION OF ISLAMIC LAW: FROM CLASSICAL FIQH TO FINANCIAL FIQH

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Considered to be one of the fastest growing segments of the financial industry, Islamic finance is increasingly viewed as a key component of the financial services sector. But the emergence of Islamic finance in today's globalised world economy has conversely led to limited research on the legal foundations of this new industry.

This publication aims to assess the legal aspects of this alternative banking and financial system known as Islamic finance. It intends to demonstrate that Islamic finance is actually based on a modern Islamic law since the *classical fiqh* – Islamic law in force from the Qur'anic revelations to the early 19th century – is no longer the sovereign law of most Muslim-majority jurisdictions. Whilst the legal foundations of Islamic finance originate from *classical fiqh*, the latter had to be converted progressively over the course of history to meet the needs and realities of societal evolution.

Therefore, the transformation of *classical fiqh* into *financial fiqh* makes the law of Islamic finance *sui generis* as it has emerged without an underlying legal system contrary to *classical fiqh* that used to govern Islamic legal systems towards the end of the 19th century. It would then be interesting to assess the methods of implementing the law of Islamic finance – as a non-state law – to a modern legal system.

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1. THE QUR'ANIC REVELATION TO PROPHET MUḤAMMAD

It would be misleading to characterise the divine revelations made to Prophet Muḥammad – the Messenger of God (Allah) – and recorded in the Qur'an – the sole scripture of the Muslims – as only the beginning of a new religion. More than a religion, Islam is also a faith, a spirituality, a civilisation and, more specifically, an all-encompassing way of life. The Qur'anic revelation also marks the construction of a new law – the classical *Islamic fiqh*[2] – together with the construction of a new legal system – the Islamic legal system – that was in force towards the end of the 19th century.

The Qur'anic revelation to Prophet Muḥammad is divided into two periods: the Meccan revelation (612 CE–621 CE), in which the Prophet's predication was of limited success, and the Medinan revelation (622 CE, after the *hijra*,[3] the emigration of Prophet Muḥammad from Mecca to Medina), symbolising the evolution of Prophet Muḥammad's mission. It is interesting to note that the Meccan verses mainly refer to the fundamental principles of faith since the prime mission of Prophet Muḥammad was to call people to Islam, whereas the Medinan verses convey legal references to the benefit of the *ummah* (the Islamic community), reflecting a new development in Prophet Muḥammad's career. This evolution is noticeable through the rise of legal verses revealed to Prophet Muḥammad in Medina, although they remain a minority in the Qur'an as they are estimated to be around 500 out of 6,236 verses.[4] Far from being a comprehensive legal code,[5] the Qur'an contains relatively few verses with legal significance that *fuqahā'* (legal experts in Islamic law) could readily apply as the foundation for an emerging body of Islamic law.[6]

2. THE EMERGENCE OF CLASSICAL FIQH

The emergence of classical *fiqh* probably occurred around the end of the fifth year of the *hijra*, when the Prophet's mission had gained new momentum.[7] The

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2 Literally, *sharī'a* means the way, often interpreted as the highway to good life. In a broader sense, *sharī'a* refers to the legal verses of the Qur'an and the sayings and doings of Prophet Muḥammad (the *sunnan*). It is distinct from the *fiqh* which refers to the understanding and juristic interpretation of the *sharī'a* or of the holy sources of Islamic law, usually described as '*Islamic jurisprudence*'.

3 The emigration of Prophet Muḥammad and his followers from Mecca to Medina in 622 CE also marks the beginning of the Islamic calendar.

4 W.B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge: Cambridge University Press, 2005, p. 21. See also E. Geoffroy, *L'Islam sera spirituel ou ne sera plus*, Paris: Seuil, 2009, p. 100.

5 N.H.D. Foster, 'Islamic Commercial Law: An Overview (I)', *InDret Revista para el análisis del derecho*, No. 4, 2006, p. 5.

6 J.G. Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets*, Cambridge: Cambridge University Press, 2015, p. 23.

7 W.B. Hallaq, *The Origins and Evolution of Islamic Law…*, p. 20.

legal subject matter grew increasingly larger and his revelations, containing additional verses of legal significance, marked the beginning of substantive legislation in the Qur'an for the benefit of the *ummah*. The prohibitions of *maysir* (gambling), *gharar* (undue risk), *riba* (interest/usury)[8] and alcohol are probably the most significant prohibited practices as they contrast with the initial Arabic rules in force in pre-Islamic Arabia.

3. THE EMERGENCE OF THE ISLAMIC LEGAL SYSTEM

The emergence of classical *fiqh* led to the development of a legal system, the Islamic legal system, which can be defined as the necessary infrastructure supporting this body of rules.[9] Classical Islamic law had its own legal infrastructure, that is, its own means of making law, amending law, interpreting law, applying law, enforcing law and resolving disputes, and its own *fuqahā'* and doctrinal literature.[10]

For instance, the emergence of Islamic law led to the development of a judicial system in Islam that reflects the growth of an Islamic legal ethic;[11] after all, Prophet Muḥammad himself was raised as the first *qāḍī* (judge) in Islam, the ideal *qāḍī* seen as an example for the *ummah*.

The first century of the *hijra* saw the expansion of Islam through *proto-quḍāh*, the earliest quasi-judges of Islam, who were representatives of the judicial institution. Far from being limited to a legal function, their role included also administrative, financial,[12] religious and military aspects. The fact that some *proto-quḍāh* were illiterate reveals the primitive nature of their legal reasoning and their limited influence '*in terms of both geography and jurisdiction*'.[13]

The expansion of Islam increased the role and the gradual specialisation of the *qāḍī*, which became of central importance from the second year of the *hijra*. Specialisation enhanced the *qāḍī*'s dependence on emerging legal experts advising and assisting the judge prior to rendering a decision.

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8 Notably Surah 2, Verse 275: '[…] *Allah has permitted trade and has forbidden interest*'; verse 276: '*Allah condemns usury and blesses charities*'.

9 N.H.D. Foster, 'The Emergent Islamic Finance Legal System: A Practical Method or a Dead End?', *New Horizon*, 182, 2011, pp. 36–37.

10 N.H.D. Foster, 'Moving Forward in the Study and Practice of Islamic Finance: Makhlouf's L'émergence d'un droit international de la finance islamique: Origines, formation et intégration en droit français', A lecture delivered at the Collège des Bernardins, Paris, 19 November 2015, *SOAS Law of Islamic Finance Working Papers Series*, Centre of Islamic and Middle Eastern Law, No. 1, 2015.

11 W.B. Hallaq, *The Origins and Evolution of Islamic Law…*, p. 34.

12 *Ibid.*, p. 37: Some of them '*were also charged with the collection of taxes*'.

13 *Ibid.*, p. 37.

4. THE CONSTRUCTION OF CLASSICAL FIQH AND THE DEVELOPMENT OF USUL AL-FIQH

The *fiqh*,[14] that is the collection of Islamic legal opinions regarding the application of the *sharī'a*, acquired its final form approximately two centuries after the *hijra*. *Fiqh* is, first, based on the Qur'an, which is unanimously considered as both the primary and supreme source of Islamic law. It is then supplemented by the *sunnan*, referring to the sayings and doings of Prophet Muḥammad that have been established as an exemplary model for the *ummah* to follow[15] and recorded in short narratives called *ḥādīth*. Muslim jurists refer to the *sunnah*, the secondary source of Islamic law, when a solution cannot be found in the Qur'an because either it is silent or it bears only indirectly on specific matters.

However, even the combination of Qur'an and *sunnah* does not provide comprehensive solutions to every issue.[16] While establishing the substance of an embryonic law, these two sources of Islamic law still leave many open questions and, to some extent, ambiguous guidance. The *fuqahā'* have, therefore, created techniques to develop the *sharī'a* through the establishment of a legal methodology called *uṣūl al-fiqh*[17] based on the four formal sources of Islamic law in Sunni Islam: the primary and secondary sources (the Qur'an and *sunnah*), together with the *ijmā'* (consensus of the scholars) and the *qiyas* (analogical reasoning) that derive validity from the Qur'an and the *sunnah* and are used by jurists to develop nascent law.

In addition, it is worth noting that *'urf* (custom or local established practices) is another concept, though unofficial, that significantly influenced the construction of *fiqh* and, more specifically, commercial *fiqh*.[18] Though not one of the classically recognised sources of *fiqh*, and therefore inadequately mentioned in contemporary literature, *'urf* is a major source of Islamic law.[19] Local practices

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14 Literally, *fiqh* means 'in-depth-understanding'.

15 See for example Surah 3, Verse 132: '*Obey Allah and His Messenger so that you may come to be recipients of His mercy*'; Surah 4, Verse 59: '*O you who believe! Obey Allah and obey the Messenger and those in authority among you*' and Surah 4, Verse 80: '*Obeying the Messenger is Obeying Allah*' [English translation of Arabic version of the Qur'an].

16 N.H.D. Foster, 'Islamic Perspectives on the Law of Business Organisations I: An Overview of the Classical Sharia and a Brief Comparison of the Sharia Regimes with Western-Style Law', *European Business Organization Law Review*, 11 (1), 2010, pp. 3–34.

17 Developed from the second century of the *hijra*.

18 A. Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of 'Urf and `Ādah in the Islamic Legal Tradition*, New York, Basingstoke: Palgrave Macmillan, 2010, 246 p.

19 J.G. Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets…*, 2015, p. 40. Ercanbrack indicates that '*early Muslim legal literature underscores the supremacy of the concept of "custom" in commercial exchange as a decisive feature of the laws of commerce*', p. 41.

are usually the basis of resolving conflicts, forming contracts and drafting contractual provisions.

The *uṣūl al-fiqh* (sources of Islamic law) allow only *mujtahidūn* (qualified jurists) to practice *ijtihād*,[20] namely, to perform legal reasoning when new cases arise by interpreting the will of Allah as established in the Qur'an and the *sunnah*. *Mujtahidūn* were organised into interpretive communities called *madhāhib*, or schools of law, to wit in sunni Islam, the *maliki*, *hanafi*, *shafi'i* and *hanbali* schools.[21] In that sense, it is interesting to note that whilst in the civil or common law legal systems the state was empowered to legislate, as well as to promulgate law, and constituted the centre of legal authority, it was the doctrinal *madhhab* that produced law in the Islamic legal system and provided its axis of authority.[22] Therefore, legal authority in the Islamic legal system did not emerge from the body politic but from the collective doctrinal work of the *madhhab.*[23]

5. THE EMERGENCE OF COMMERCIAL FIQH

Undoubtedly, the tradition of Islamic commerce features the originality of Islam as a monotheistic religion.[24] Prophet Muḥammad and his Companions were themselves traders, as well as the eponyms of the *madhāhib*[25] who, despite being jurists, heavily influenced the commercial practice and, thus, the commercial aspects of Islamic law.

Over the course of history, the use of unofficial sources of *fiqh* (such as *'urf*) allowed the *fiqh* to be more flexible to meet the needs and realities of societal evolution. The supremacy of *'urf* in commercial exchanges significantly impacted the development of *fiqh al-mu'āmalāt* (Islamic law of transactions).[26]

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20 On the controversy of the gate of *ijtihād*, see C.T. Chehata, *Études de droit musulman*, Paris: Puf, 1971, p. 40 and W.B. Hallaq, 'Was the Gate of Ijtihad closed?', *International Journal of Middle East Studies*, Vol. 25, No. 4, 1993, pp. 587–605.

21 Four legal schools survived in sunni Islam.

22 W.B. Hallaq, *The Origins and Evolution of Islamic Law…*, 2005, p. 167. See also N. Feldman, *The fall and rise of the Islamic state*, Princeton: Princeton University Press, 2008, 189 p., who considers that '*legal institutions like the schools do not develop in a political vacuum. (…) Although Islamic law was 'jurist's law' in that its content was determined by the jurist-scholars, and not the state, it was also state law in that it had a mechanism for being enforced by the state. That mechanism was the judiciary, appointed by the caliph and serving under his direct authority*', p. 27.

23 *Ibid*.

24 Presentation of J.G. Ercanbrack, 'The Role of Context in the Transformation of Islamic Law in Global Financial Markets", Conference organised by the Chair for Ethics and Financial Norms (Université Paris 1 Panthéon-Sorbonne & King Abdulaziz University, Jeddah), 8 June 2016.

25 Abu Ḥanīfah, Mālik Ibn Anas, Al-Shāfi'ī and Ibn Hanbal.

26 C. Mallat, 'Commercial Law in the Middle East: Between Classical Transactions and Modern Business', *The American Journal of Comparative Law*, Vol. 48, No. 1, 2000, pp. 81–141.

The initial source of the Islamic law of contracts seems to derive from Surah 1, verse 5, which insists on the fulfilment of commitments by stating: '*O you who believe! Fulfill your undertakings*'.[27] This suggests a duty of good faith in Islamic law. Muslims are, therefore, requested to act in accordance with their commitments before entering into an agreement. In addition, the *sharī'a* contains a series of principles governing Islamic commercial law: Parties to a contract are notably required to follow the prohibitions of *riba*, *gharar* and *maysir*; the underlying cause of the contract must be lawful;[28] and the object of the contract must be permissible (*mubah*).[29]

Several commercial transactions were used by traders prior to the revelation of Islam, but Islam ultimately reformed them to follow Islamic criteria, thus allowing Muslims to use commercial transactions throughout the classical period. This is the case for:

- The *mudaraba*, which is a partnership contract, commonly used by the Prophet Muḥammad with his first wife, Khadijah, prior to their marriage. Whereas she acted as a *rab al-māl* (investor) by providing capital, Prophet Muḥammad acted as a *mudarib* (business manager) by investing his skills and efforts. In this structure, profits are shared on a pre-agreed ratio, and losses, if any, are born by the investor alone, unless negligence of *mudarib* is proven.
- The *murabaha*, which is certainly the most popular and most common mode of Islamic financing. The *murabaha* is used today in Islamic finance essentially to circumvent the prohibition of *riba*. It refers to a cost-plus sale contract whereby the seller sells specified assets or commodities to a customer, generally involving an immediate delivery with a deferred payment.[30]
- The *salam*,[31] which is a sale in which the agreed price is paid fully in advance, while delivery of goods is deferred. In order to comply with Islamic contract rules, notably the prohibition of *gharar*, which '*covers all kinds of undue risk*',[32] this agreement must specify the quality and quantity of the goods to be delivered, as well as the date and place of delivery.

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27 See for example Surah 5, Verse 89: '*Allah will not impose blame upon you for what is meaningless in your oaths, but He will impose blame upon you for [breaking] what you intended of oaths*'.

28 N.H.D. Foster, "Islamic Commercial Law (II): An Overview", *InDret Revista para el análisis del derecho*, No. 1, 2007, p. 12 explaining that '*a contract to buy grapes is invalid if the underlying cause of entering into the transaction is to make wine*'.

29 For instance, the subject-matter of the contract should not imply forbidden commodities such as wine or pork.

30 W.B. Hallaq, *The Origins and Evolution of Islamic Law…*, p. 25.

31 *Ibid*. Hallaq notably explains that '*The ancient Near Eastern contracts of sale, dating back to the second millennium BC, and involving immediate delivery with a later payment, or immediate payment for a later delivery, were prevalent in the pre-Islamic Hejaz and wholly incorporated (under 'arāyā and salam) into Islamic law*'.

32 N.H.D. Foster, 'Islamic Commercial Law (II): An Overview'…, p. 7.

– The *musharaka*, which is a profit-and-loss-sharing contract involving two or more parties that provided capital for the financing of a project or business. In a modern sense, this may refer to a joint enterprise[33] in which all partners share profits on a pre-agreed ratio, but losses, if any, are shared in proportion to the amount invested.

6. THE DECLINE OF THE ISLAMIC LEGAL SYSTEM AND THE DISAPPEARANCE OF COMMERCIAL FIQH

The collapse of the Islamic legal system, together with the disappearance of commercial *fiqh* in the Middle-Eastern world,[34] is intrinsically related to the decline of the Ottoman Empire and its efforts of modernisation through the *Tanzimat* period (6.2) followed by the French colonisation of Algeria (6.3) in the 19th century. Prior to providing an overview of those two historical events, it is worth mentioning the impact of Napoleon's conquest of Egypt on the Egyptian legal system (6.1).[35]

6.1 THE NAPOLEONIC CONQUEST OF EGYPT

After its invasion of Egypt in 1798 under the command of Napoleon and occupying this territory from 1798 to 1801, France influenced the Egyptian law and legal system through, notably, the establishment of commercial courts[36] that were '*composed of Muslims and non-Muslims in equal numbers*'.[37] Though the French invasion of Egypt did not abolish the Islamic legal system, the establishment of commercial courts in Egypt deprived the *qāḍī* of his competence in commercial matters.[38]

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33 M.T. Usmani, 'The Concept of Musharakah and Its Application As an Islamic Method of Financing', *Arab Law Quarterly*, Vol. 14, 1999, p. 203.

34 This study does not provide an exhaustive analysis of the fall of the Islamic legal system and therefore does not refer to the collapse of that system in India, Malaysia and Indonesia which is intimately intertwined with the British and Dutch colonial empires.

35 Though formally part of the Ottoman Empire, Egypt had a separate legal history from the time of its conquest by Napoleon.

36 J. Goldberg, 'On the Origins of Majālis al-Tujjār in Mid-Nineteenth Century Egypt', *Islamic Law and Society*, Vol. 6, No. 2, 1999, pp. 193–223. Goldberg refers to the introduction of special '*commercial courts in Cairo, Alexandria, Rosetta, and Damietta on 10 September 1798*', p. 198.

37 *Ibid*., p. 198.

38 *Ibid*. For a better understanding of the French interference into the Islamic legal system in force in Egypt, see J Goldberg, 'L'Europe au-delà de l'Europe. Réflexions sur l'entrée de l'Egypte dans la famille française du droit' *in* G Boetsch, B. Dupret and J.N. Ferrie (eds),

As with the current French judiciary, the appointed judges were merchants and, therefore, '*recruited from the native merchant communities*'.[39] In addition, the dichotomy of the Egyptian private law, also divided between civil law and commercial law, reflects the French influence into Egyptian law since this distinction was unknown in the *sharī'a*.[40] This distinction is of significant interest because '*it was later used, in the Ottoman Empire and systems influenced by the Ottoman Model, to facilitate the introduction of Western style commercial law*'.[41] In the Middle-Eastern and Northern African regions, this distinction seems to have encouraged the broad phenomenon of legal selectivity by importing European law into those legal systems while confining the *sharī'a* to family, inheritance and personal status matters.[42]

6.2 THE DECLINE OF THE OTTOMAN EMPIRE

6.2.1 The Ottoman case

By the mid-19th century, the rise of Western imperialism from military, political, economic and scientific standpoints prevailed over the Muslim world, which led to a series of rapid reforms (known collectively as the *Tanzimat*)[43] undertaken by the Ottoman Empire to reinforce its relative position.

The *Tanzimat* period led to significant legal reforms that influenced the decline of both Muslim scholars and the *sharī'a* through, notably, the establishment of commercial courts in 1840 and the codification of law, namely, the promulgation of a Commercial Code, in 1850.

The codification of the Ottoman Commercial Code was intended to be a replica of the French Commercial Code of 1807, introduced by Napoleon, but it remained insufficient because the provisions of French law were inadequate to the commercial activity of the Ottoman Empire, which at that period was governed by the *sharī'a*. Moreover, Ottoman legislators failed to notice that various regulations of commercial companies were not contained in the French Commercial Code but in the French Civil Code.[44] Absent implementation of the

Droits et sociétés dans le monde arabe (Perspectives socio-anthropologiques), Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 1997, 229 p.

39 *Ibid*.

40 N.H.D. Foster, '*Commerce, Inter-Polity Legal Conflict and the Transformation of Civil and Commercial Law in the Ottoman Empire*' *in* E. Cotran and M. LAU (eds.), *Yearbook of Islamic and Middle Eastern Law*, Vol. 17, 2011–2012, pp 1–49.

41 *Ibid*., p. 23.

42 See parag. 6.2.2 below. H.A. Hamoudi, 'The death of Islamic law', *Georgia Journal of International and Comparative Law*, Vol. 38, 2010, pp. 322–326.

43 From 1839 to 1876.

44 C. Mallat, 'Commercial Law in the Middle East: Between Classical Transactions and Modern Business'…, p. 102.

French Civil Code into the Ottoman Empire, the Ottoman Commercial Code faced several legal gaps; for instance, it contained several provisions in relation to company law but no definition of 'company' itself. It also contained '*a skeletal chapter of 10 articles on the société anonyme, which was rapidly becoming the most financially important vehicle in company law in France*'.[45]

The enactment of the Ottoman Commercial Code was followed by the enactment of the Penal Code in 1858, the Code of Commercial Procedure in 1861 and the Code of Maritime Commerce in 1863, which were all based on French law. The next step in Ottoman codification was the Mejelle (*Majallat*), which was intended to be a comprehensive codification of both civil law and civil procedure based on the *sharī'a*, mainly influenced by the hanafi madhhab and produced by a distinguished committee of scholars from 1869 to 1876.[46] Such codification contradicts the inherent nature of the *sharī'a*, which is intrinsically an '*uncodified body of legal doctrines, principles, values, and opinions*'[47] and which led to the decline of scholars as '*keepers of the law*'.[48] Indeed, the enactment of the Mejelle deprived the juristic class of its initial role because it was designed not for the *qāḍī* but for secular courts.[49]

The *Tanzimat*, meant to strengthen the relative position of the Ottoman Empire towards European States, appears to have been an expensive undertaking for the Empire that failed to generate enough revenue to pay for all the initiatives. From 1876[50] to 1914, the Ottoman Empire was significantly weakened towards European States, and its defeat in World War I led to the fall of the Ottoman Empire.

6.2.2 The Egyptian case

The legal transplantation of French law also occurred in Egypt, which gained judicial and administrative independence from the Ottoman Empire during the reign of Isma'il Pasha by virtue of the *Khedive Isma'il*, issued in 1874.[51]

The Mixed Courts were introduced in Egypt around 1875, along with the promulgation of a series of codes based solely on French law meant to resolve disputes between Egyptians and foreigners. These were, namely, the Civil Code, the Penal Code, the Commercial Code, the Code of Maritime Commerce, the Code of Civil and Commercial Procedure and the Code of Criminal Procedure.[52]

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45 *Ibid*., p. 102.
46 N. Feldman, *The fall and rise of the Islamic state*…, p. 62.
47 *Ibid*.
48 *Ibid*., p. 63.
49 Schacht Joseph, 'Islamic Law in Contemporary States', *The American Journal of Comparative Law*, Vol. 8, No. 2, 1959, pp. 134–135.
50 Promulgation of the first Constitution of the Ottoman Empire.
51 N. Saleh, 'The Law Governing Contracts in Arabia', *International and Comparative Law Quarterly*, XXXVIII, 1989, p. 767.
52 W.B. Hallaq, *An Introduction to Islamic Law*, Cambridge: Cambridge University Press, 2009, pp. 104-105.

With the Montreux Convention of 1937, the Mixed Courts of Egypt were abolished after a 12-year transitional period. The Mixed Court system was indeed terminated in 1949, and its area of expertise was transferred to the National Courts. This transition prompted the drafting of new codes, to wit, the new Egyptian Civil Code, which was enacted in 1948 and came into force in 1949. Based to a large part on French law, the new Egyptian Civil Code was drafted by a commission headed by 'Abd al-Razzāq al-Sanhūrī, a distinguished Egyptian jurist. This code was used as a model in the Arab–Muslim world, notably in Syria, Iraq and Kuwait.[53]

It is worth noting that '*the totality of provisions based on the sharī'a probably comes to no more than five to ten percent of the whole*'[54] Civil Code. Article 1 of the Egyptian Civil Code of 1948 enjoins a judge to issue judgments in accordance with the letter and spirit of the provisions of the Civil Code itself; failing that, in accordance with custom; and in the absence of custom, in accordance with the principles of Islamic *sharī'a*. In the absence of custom, the judge should apply the principles of natural law and the rules of equity. Therefore, '*for probably the first time in the modern legal history of the Arab Middle East, the sharī'a was officially to back up an important piece of secular legislation. Sharī'a principles were to fill lacunae found in the statutory provisions and in custom*'.[55]

However, such transformation of the Egyptian law and of the judicial system could not conceal the fact that Egypt, as with several Arab-majority countries, practised Islamic law selectively by implementing a secular law based mostly on French law while confining the *sharī'a* to family, inheritance and personal status matters.[56]

6.3 THE FRENCH COLONISATION OF ALGERIA

The French colonisation of Algeria, from 1830 to 1962, is another factor in the decline of the Islamic legal system since a hybrid Islamic French law, known as *droit musulman algérien*,[57] was produced by jurists, most of whom were

53 I. Edge, 'Comparative Commercial Law of Egypt and the Arabian Gulf', *Cleveland State Law Review*, Vol. 34, 1985, p. 129.

54 *Ibid*., p. 133. For a similar view, see also C. Chehata, 'Les survivances musulmanes dans la codification du droit civil égyptien', *Revue internationale de droit comparé*, Vol. 17, n° 4, octobre-décembre 1965, pp. 839–840.

55 N. Saleh, 'The Law Governing Contracts in Arabia'…, p. 768.

56 H.A. Hamoudi, 'The death of Islamic law'…, pp. 322–326.

57 Developed on the same model as the Anglo-Muhammadan law in British India but Hallaq writes that the "*droit musulman algérien*" was '*somewhat cognate to, but larger in scope and academic interest than, the British colonialist notion of Anglo-Muhammadan Law*', W.B. Hallaq, *An Introduction to Islamic Law*…, p. 111. It is also worth mentioning that the French intended to codify Islamic law through the so-called *Code Morand* of 1916 which was mainly based on the maliki *madhhab* but was never enacted due to Algerian resistance.

French.[58] In addition, French judges started to replace the *quḍāh* (judges) and religious courts. This reduced the influence of the *qāḍī*, whose function was to interpret the *sharī'a* as a body of legal doctrines and principles. It also '*led to a dramatic reduction in the number of Muslim courts in the country, from an already reduced 184 in 1870 to 61 in 1890*'.[59]

By the independence of Algeria in 1962,[60] the scope of the *sharī'a* was reduced and confined to family law. This selectivity of Islamic law, prevalent in Muslim-majority countries and criticised by several authors,[61] led to the promulgation in 1984 of a family code distinct from the Algerian Civil Code of 1975.

In 1962, Algerian law became a hybrid or *sui generis* law mostly inspired by French law, notably in the fields of commerce, banking and finance.

7. THE EMERGENCE OF FINANCIAL FIQH

The 19th century is of particular significance in the history of Islamic normativity: the change of commercial activities, together with the need to compete with European States, marked the progressive decline of both the Islamic legal system and Islamic commercial law.[62] While initially being governed by classical *fiqh*, Muslim majority jurisdictions were henceforth governed by a hybrid law based on French law, with only reference to *sharī'a*. As conventional banking and finance systems were introduced into Muslim-majority countries in the contemporary era, it is interesting to assess the law on which Islamic finance is based, as well as the implementation of the law of Islamic finance – as a nonstate law – into a modern legal system.

In today's globalised world economy, Islamic finance is based on the commercial parts of the *fiqh*, which had to be converted into financial *fiqh* to meet the needs of Islamic finance.[63] It notably means to make the commercial contracts initially used in the classical period suitable for financial transactions, that is, to convert them into financial contracts.

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58 M. Morand, *Introduction à l'étude du droit musulman algérien*, Alger: Jules Carbonel, 1921, 213 p.

59 W.B. Hallaq, *An Introduction to Islamic Law*, Cambridge: Cambridge University Press, 2009, pp. 104-105.

60 *Ibid.*, p. 114.

61 Such as H.A. Hamoudi, "The death of Islamic law"…, pp. 293–337.

62 Ercanbrack states that '*the almost complete secularization of Middle Eastern legal systems other than in areas of personal status seems to confirm the notion that the state is now seen as the only viable source of central legal authority*', J.G. Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets*…, p. 112.

63 N.H.D. Foster, 'Moving Forward in the Study and Practice of Islamic Finance: Makhlouf's *L'émergence d'un droit international de la finance islamique: Origines, formation et integration en droit français*'…, p. 4.

Absent an Islamic legal system, financial *fiqh*, therefore, constitutes an emerging body of rules that may be qualified as a law of Islamic finance, regulated by conventional legal systems and relying on them for its effectiveness:[64] '*no Sharia legal system was, nor could be, produced to make Islamic finance operate and it has to function within national legal systems*'.[65]

Yet, the exponential growth of Islamic finance over the last several decades in the modern globalised world economy has contributed to the emergence of a nascent legal system through several initiatives.

One such initiative deals with the standardisation of Islamic financial transactions, which is a historical continuation of the codification of law undertaken in the 19th century in Islamic legal systems.[66] Legal standardisation of financial transactions intends to provide, notably, predictability, certainty, stability, and market transparency and to preserve confidence among legal practitioners.

Another initiative is the development of *sharī'a* standards by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), consisting of uniform rules and principles governing the Islamic financial industry. Those *sharī'a* standards help to standardise and facilitate the drafting of Islamic finance transactions and have been adopted by Islamic financial institutions across the globe. Additionally, in an attempt to foster and to promote the development of Islamic finance in France by finding a possible combination of French and *sharī'a* law requirements as well as suggesting a comprehensive transcription of *sharī'a* law concepts into French law concepts, the AAOIFI main 20 *sharī'a* standards have been translated into French by Paris Europlace, the organisation in charge of promoting and developing Paris's financial marketplace.[67]

The compilation and issuance of *fatāwa* (Islamic legal opinions) by national *sharī'a* boards,[68] such as in Malaysia and Sudan, may also reduce the risk of uncertainty in legal documentation. However, those legal opinions do not bind other scholars or Courts of law. They are essentially persuasive due to the moral authority of the signing *fuqahā*'.

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64 N.H.D. Foster, 'Dispute Resolution and Insolvency in Islamic Finance: Problems and Solutions' in N.H.D. Foster, D. Neo (eds) Dispute Resolution and Insolvency in Islamic Finance: Problems and Solutions – Workshop 19 September 2013: Report of Proceedings, *SOAS Law of Islamic Finance Working Papers Series*, 2014, p. 12.

65 N.H.D. Foster, 'Moving Forward in the Study and Practice of Islamic Finance: Makhlouf's *L'émergence d'un droit international de la finance islamique: Origines, formation et integration en droit français*'…, p. 5.

66 J.G. Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets*…, p. 112.

67 Organisation de comptabilité et d'audit des institutions financières islamiques (2013), *Finance islamique: les normes de conformité de l'AAOIFI*, Vol. 1, Paris, Eska, 352 p.

68 Though *sharī'a* scholars are no longer considered as keepers of the law since the *sharī'a* was initially exclusively interpreted by the scholars whilst it is now '*a set of rules defined and applied by authority of the state*', N. Feldman, The fall and rise of the Islamic state…, p. 81.

Thus, despite the existence of several initiatives which can be regarded as the first signs of the formation of a legal system for financial *fiqh*, there is still a long way to go before a true system will emerge, if it ever does. Therefore, the potential challenge of an Islamic finance transaction because it does not comply with *sharī'a* remains problematic. A recent example of the serious problems which can arise, and the effect on the market, is the ongoing litigation regarding the Dana Gas *ṣukūk* issues.[69]

69 Dana Gas PJSC v Dana Gas *ṣukūk* Ltd & Ors [2017] EWHC 2928 (Comm) (17 November 2017).