# The Surprising Irrelevance of Islamic Bankruptcy

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# THE SURPRISING IRRELEVANCE OF ISLAMIC BANKRUPTCY

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## I. THE IRONY OF THE IRRELEVANCE

By any standard of logic, the influence of the *shari'a*, that body of overlapping and oft conflicting rules derived by medieval jurists from Islam's sacred texts,[1] should be far more relevant in the area of bankruptcy than it is. Understanding the sources of the broad marginalization of *shari'a* as it relates to modern bankruptcy law in the Muslim world tells us much about the sharply limited scope of Islamic revivalism, as concerns economic and commercial matters, and perhaps even a little bit about Islamism's limited legal ambitions more generally.

For some time, we have been told that the rise of Islamism presages a series of states that will be governed primarily by *shari'a*.[2] Yet after an Islamic revolution[3] and Islamic coups,[4] Islamist electoral victories[5] and Islamist-driven constitution making,[6] we have seen very little *shari'a* in modernity except in the area of personal status, which generally encompasses family law and the law of inheritance.[7] Islamized states have generally preferred to retain their transplanted legal codes though at times with slight, although important, modifications and adjustments.[8]

Still, bankruptcy should be different. After all, in the world of Islam, there is in place a global practice of financing specifically branded as "Islamic finance" which

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[1] For simplicity's sake, I shall use this as my working definition of *shari'a. Compare with* Frank Vogel, *An Introduction to the Law of the Islamic World*, 31 INT'L. J. LEGAL INFO. 353, 356–357 (2003) (adopting a more conventional division between *shari'a* as divine, infallible and unchanging Divine Will and *fiqh* as human understanding of will, somewhat akin to my definition of *shari'a*).

[2] *See In the Arena: Gadhafi Reality Check; Middle East in the Balance; The Tea Party Effect; Rejecting the Muslim Brotherhood* (CNN television broadcast Feb. 25, 2011), *available at* http://inthearena.blogs.cnn.com/2011/02/25/former-member-rejects-muslim-brotherhood/ (interviewing A. Hirsi Ali, who contends Muslim Brotherhood desires society based on *shari'a*).

[3] The reference, of course, is to the Islamic Revolution of Iran which took place in 1979. Abdullahi Ahmed An Na'im, *Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives*, 57 DRAKE L. REV. 829, 829 (2009).

[4] Sudan and Pakistan offer the most convenient examples of this phenomenon. *See, e.g., id.* (noting 1989 Islamic military coup in Sudan).

[5] Hamas is perhaps the clearest example of this, having won the Palestinian elections of 2006 and subsequently seized control of the Gaza strip in June 2007 after an outbreak of fighting between it and the other primary faction within the occupied territories, Fatah. *See* Nathan J. Brown, *The Hamas Fatah Conflict: Shallow but Wide*, 34 FLETCHER F. WORLD AFF. 35, 42–43 (2010).

[6] Shi'a Islamists played a central role in the drafting of Iraq's 2005 Constitution. *See* Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOMAS L.J. 692, 698–701 (2010) [hereinafter *Ornamental Repugnancy*].

[7] Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT'L & COMP. L. 293, 323–27 (2010) [hereinafter *The Death*] (discussing the obsolesence of *shari'a* in all areas except personal status questions).

[8] *See id.* (identifying instances where legal code has been adapted).

is expanding at dizzying rates of speed, from embryonic origins in the 1970's[9] to a broad and varied global practice encompassing something on the order of $1 trillion worldwide.[10] It clearly does not represent all of Muslim financial activity, it may not even represent a particularly large portion of the devout, but it is of a size and significance that is difficult to dismiss easily. As such, the relative lack of concern with what Awad and Michael might describe as the "loss side" of the financing equation,[11] what it is that these institutions are supposed to do when they are found to be insolvent, requires some consideration.

The relationship between financing and insolvency is rather obvious as a general matter—clearly no creditor or debtor would enter into any sort of credit agreement, secured or otherwise, without some consideration of what might ensue should insolvency proceedings arise. However, there is a particularly close connection in the Islamic context, for two reasons. The first has to do with the *genesis* of Islamic finance and the source of its *shari'a*-derived prohibitions, at least as understood in modernity, which are supposed to render it distinct from what is generally regarded as the cruel rapaciousness of the West.[12] This is the principle of *profit sharing*, endlessly touted as a core defining feature of the practice by its proponents.[13]

Under the idealized understandings of Islamic finance, gains to a venture should be distributed among its partners in a manner agreed among them, and losses shared in precisely the same proportion.[14] "With the gain comes the loss" is the oft quoted phrase of the Prophet Muhammad[15]—a reason, proponents of Islamic finance argue, that interest on a money loan is prohibited. Interest, after all, permits the creditor to receive its fixed gain irrespective of the debtor's gain or loss.[16] The same might well be said of the Islamic objection to *gharar*, forms of speculation such as the sale of a

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[9] IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 73 (1st ed. 2000) (Indicating Islamic finance started in the 1970s).

[10] Respecting the current size of the industry, see Agence France-Presse, *Islamic Finance Assets May Top One Trillion Dollars*, HÜRRIYET DAILY NEWS, June 14, 2010, *available at* http://www.hurriyetdailynews.com/n.php?n=islamic-finance-assets-may-top-one-trillion-dollars-2010-06-14 (predicting Islamic finance will top one trillion dollars in total assets this year.in 2010); *see also* Mushfique Shams Billah, *Arab Money: Why Isn't the United States Getting Any?*, 32 U. PA. J. INT'L L. 1055, 1075 n.109 (2011) (suggesting GE Capital's sale of five-hundred million dollars Islamic bond shows strength of Islamic financial sector). It is difficult not to take such commonly cited figures with a grain of salt, however, given the lack of centrally, publicly available data respecting large numbers of Islamic finance transactions.

[11] Abed Awad & Robert E. Michael, *Iflas and Chapter 11: Classical Islamic Law and Modern Bankruptcy*, 44 INT'L LAW. 975, 976 ( 2011).

[12] *See* Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423, 453–54 (2008) [hereinafter *Muezzin's Call*] (describing Islamic economics as maintaining that Western use of interest permits the rich to become richer).

[13] *See id.* at 454 (describing underlying principles of Islamic economics as being "social justice, mutuality, and sharing").

[14] *See id.* (indicating that leaders in Islamic economics movement called for financial institutions based on "social justice, mutuality and sharing").

[15] *See* Umar F. Moghul, *No Pain, No Gain: The State of the Industry in Light of an American Islamic Private Equity Transaction*, 7 CHI. J. INT'L L. 469, 470 n.5 (2007).

[16] Hamoudi, *Muezzin's Call*, *supra* note 12, at 453 (describing Islamic economics objections to Western method of charging interest as involving no risk to lender).

runaway slave, to use a Prophetic example (anachronistic and of dubious provenance, but illustrative nonetheless).[17] As the owner of the slave is bound to sell the runaway at a fraction of his cost, the purchaser will either profit at the owner's expense by finding the slave and returning him to bondage, or (more satisfactory under our modern sensibilities) the purchaser will never find the slave, thereby losing where the owner has gained.[18] Islam will have none of this, replacing such competitive destructiveness with a more brotherly and generous form of capitalism wherein parties gain together and lose together, in equal proportion.[19]

In keeping therewith, the original Islamic bank was envisaged as a sort of silent partnership (*mudaraba* to use the Islamic term), wherein one party (the bank) supplied the capital and the other (the borrower) supplied the labor and managed the venture.[20] Profits were shared between them based on an agreed proportion, and losses divided also equally in the same proportion, except that the bank's liability ended with its capital investment.[21]

To the extent that the principle of profit sharing is taken even the slightest bit seriously, the urgency of Islamic insolvency, or at least Islam-influenced insolvency, to accompany Islamic finance should be obvious. Anything else would permit substantial violence to the principle of profit sharing at the crucial moment of insolvency, when it mattered most. To see why this is so, let us assume a portfolio company A, which has entered into *shari'a* compliant financing arrangements (premised on profit sharing, we shall assume for now), receiving loans from three different Islamic banks to support its business activities under a single joint credit agreement. All parties are thus part of the same venture, and should be sharing in the profits of Company A's activities in the same proportion that they suffer its losses. Bank B, for example, might agree to receive 20% of the profits, Bank C 35% and Bank D 15%, leaving the Company itself with 30% of profit for its work. Similarly, losses would be shared according to the same percentages. Yet suppose Bank B were somehow permitted to declare a security

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[17] FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN 88 (1998).

[18] *See id.* at 89 (detailing Islamic objection to contracts with uncertain and potentially unrealizable outcomes).

[19] *See* Hamoudi, *Muezzin's Call*, *supra* note 12, at 453–54 (illustrating that Islamic economics proponents prefer social justice achieved by balancing each party's risks by agreeing to distribute gains and losses proportionally).

[20] In fact, and for purposes of completeness, the bank would be a two tiered *mudaraba.* The first tier would be the depositors acting as silent partners as against the bank, which undertook the operations. The second tier was then the bank itself as silent partner (using the capital supplied by the depositors), acting as silent partner vis-à-vis portfolio companies. *See* VOGEL & HAYES, *supra* note 17, at 130–31 (describing Islamic financial institution's earliest approach to capital depositing and investing through two-tier *mudaraba* model, as opposed to conventional Western bank model).

[21] *See id.* (noting that bank's liability was limited to its capital investment). This limitation on the silent partner's loss is a limited derogation, admittedly, from the principle of loss sharing, though it is one that has been long established in the *mudaraba*. *See id.* at 109, 130–31 (indicating that partner's losses (and profits) were limited by predetermined proportions based on their share of capital investment).

interest, generally disallowed if non-possessory under the *shari'a*,[22] in Company A's physical assets, perhaps in exchange for receiving a lower percentage of profits. Under such a scenario, if the arrangement is permitted to stand in insolvency proceedings, then the principle of proportional loss distribution would go unrealized precisely at the time when the losses were greatest, at insolvency. B would be permitted a return on its capital through a sale of Company A's assets, and the other creditors would be left with comparatively little. Needless to say, if this is the case for security, it is even more so as to liquidation preferences, which make a mockery of the principle of profit sharing in insolvency.

The second reason that the relationship of finance to insolvency is particularly tight in the Islamic context is that *Islam's central financing prohibition, respecting money interest on a loan, derives from a broadly prohibited practice known as* riba, *which is at its core a rule of insolvency.*[23] The reference to *riba* in the Qur'an addresses primarily the matter of debtors in financial distress.[24] In that context, the prohibition relates to a creditor agreeing with a debtor on an extension for repayment of the latter's debt beyond the maturity date in exchange for more money to be paid at the later date.[25] Instead of such practices, condemned in strident terms, the Qur'an requires either forgiveness of the debt, or a delay in the repayment until the debtor returns to solvency.[26] The other forms of *riba*, including the prohibition on money interest more broadly, are not specifically referenced in the Qur'an.[27] Indeed, this was the basis upon which some Muslim reformers, including the most influential Arab legal scholar of the twentieth century, Abdul Razzaq al Sanhuri, were able to argue that interest on a loan may be permitted in times of need because it is not as central, but that interest on debt coming due could never be countenanced, a conclusion that has found its way into both the Egyptian and Iraqi Civil Codes.[28] Whether or not Sanhuri's position can be sustained among a Muslim population suspicious of current modalities of economic and commercial order is hardly our subject, though there are reasons to be skeptical.[29] Still, it would be

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[22] *See* Michael J.T. McMillen, *Contractual Enforceability Issues: Sukuk and Capital Markets Development*, 7 CHI. J. INT'L. L. 427, 455 (2007) (stating that security interests are generally required to be possessory). *But see* Mark J. Sundahl, *Iraq, Secured Transactions, and the Promise of Islamic Law*, 40 VAND. J. TRANSNAT'L L. 1301, 1315–23 (developing an ingenious argument based on Islam's sacred text for an alternative understanding).

[23] *See* Mohammad H. Fadel, *Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts*, 25 WIS. INT'L L.J. 655, 655–56 (2008) (stating that original *riba* prohibition related to debtor in insolvency).

[24] *See id.* at 658 (providing that *riba* is referenced in Qur'an in connection with debtor's failure to pay debts).

[25] *See id.* at 658 (indicating that "the Qur'an categorically condemned" agreements to defer debtor's repayment past maturity date in exchange for increased debt liability).

[26] *See id.* at 659.

[27] *See id.* (observing that other forms of *riba* transactions are prohibited despite no explicit prohibition in the Qur'an).

[28] *See* Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failure of Islamic Finance*, 40 CORNELL INT'L L.J. 89, 128–29 (2007) [hereinafter *Muhammad's Social Justice*] (describing Sanhuri's methodology in more detail).

[29] Islamic finance advocates routinely denigrate approaches such as that adopted by Sanhuri as being an exercise in apologetics. *See, e.g.*, Mohammad Uzair, *Impact of Interest Free Banking*, 1 J. ISLAMIC

passing strange if the obsessions respecting the prohibition of *riba* were taken so seriously as concerns *ordinary finance* to create an entire Islamic alternative, but ignored as concerns *insolvency*, where by all accounts it retains even more salience given its explicit mention in the Qur'an in that context alone.

And yet, this is precisely what has occurred. The interest in reforming bankruptcy laws is in fact astonishingly low, and bankruptcy is among the broad gamut of once Islamic legal regimes that have been, as a general matter, "totally replaced" by transplanted counterparts.[30] To take one salient example, Qatar, which has begun a serious Islamization of its finance sector through issuing bank directives designed to expand Islamic banking within the country,[31] initiated a bankruptcy regime in a 2006 law that bears all the hallmarks of a Western transplant.[32] Indonesia and Malaysia have both recently reformed their bankruptcy laws as well, and despite ample growth in the practice of Islamic finance in both places, these laws are largely Western transplants as well.[33] Even Iran, whose law should presumably be closely related to *shari'a* after the 1979 Islamic Revolution,

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BANKING & FIN. 39, 40 (1984) ("By this time, there is a complete consensus of all . . . schools . . . and among Islamic economists that interest in all forms, of all kinds, and for all purposes is completely prohibited in Islam. Gone are the days when people were apologetic about Islam, and contended that the interest for commercial and business purposes, as presently charged by the banks, was not prohibited by Islam.").

[30] Wael B. Hallaq, *Juristic Authority vs. State Power: The Legal Crisis of Modern Islam*, 19 J. L. & RELIGION 243, 257 (2004) (acknowledging that many areas of law, including bankruptcy and commercial law, traditionally controlled by Islamic law have been "uprooted" and "replaced by their European counterparts"). This is not to say that all remnants respecting the *shari'a* rules concerning bankruptcy have been entirely removed from the globe. The main text discusses an Islamic remnant in Iran's bankruptcy code respecting the cause of insolvency. To take a related example, the notion of debtor's prison, quite common *shari'a* practice in the classical era as this article demonstrates, remains not only on the books in the United Arab Emirates, but very much the rule for *personal* bankruptcies, even as common law governs the higher end financial market in Dubai. *See* Simeon Kerr, *Insolvency Laws Face Test*, FIN. TIMES, Jan. 7, 2009, http://www.ft.com/cms/s/0/3d3f88f4-dce5-11dd-a2a9-000077b07658.html#axzz1WAQlnFY8 (comparing United Arab Emirates insolvency laws for financial institutions and business, which are based on UK common law, to UAE personal bankruptcy laws which are grounded in criminal law). Nevertheless, such remnants do not derogate from the generally accurate assertion that bankruptcy regimes throughout the Muslim world are not Islamic in origin but very much western transplants.

[31] *See Stable Outlook for Qatari Banks, says Fitch Ratings*, CPI FINANCIAL, June 26, 2011, http://www.cpifinancial.net/v2/News.aspx?v=1&aid=8423&sec=Commercial%20Banking (highlighting directives to expand Islamic banking and financing in Qatar).

[32] Qatar Law of Trade, No. 27 of 2006 arts. 606 et seq., *available* (in Arabic) *at* http://www.qcb.gov.qa/Arabic/Legislation/Documents/law-27-2006.pdf; Mahesh Uttamchandai, *"No Way Out": The Lack of Efficient Insolvency Regimes in the MENA Region* 4 (World Bank Policy Research Working Paper, No. 5609, 2011) [hereinafter *World Bank Report*], *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2011/03/24/000158349_20110324093837/Rendered/INDEX/WPS5609.txt (stating that Qatar adopted Western influenced bankruptcy laws in 2006).

[33] *See, e.g.*, Claire A. Hill, *Whole Business Securitizations in Emerging Markets*, 12 DUKE J. COMP. & INT'L L. 521, 522 (2002) (describing Malaysian bankruptcy regime as having been inherited from the United Kingdom); Stacey Steele, *The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime?*, 23 MELB. U. L. REV. 144, 144–49 (1999) (describing adoption of new bankruptcy laws in Indonesia as heavily influenced by Western laws). *See generally* Bankruptcy (Amendment) Act 2003 (Malay.), *available at* http://www.chaps.com.my/Publication/Act.pdf (revealing modest amendments to bankruptcy regime and virtually nothing by way of Islamization).

has managed to keep the very same pastiche of bankruptcy laws that have been in place since the rule of the Shah's father, in 1932, despite their obvious and desperate need for improvement.[34]

I submit that there are two primary bases for the discrepancy as between the increased interest as to Islamic finance and the near total lack of interest in Islamic insolvency, each of which demonstrates the rather marginal relevance of law in Islamic revivalism. The first reason relates to the fact that the *shari'a* insolvency rules are not terribly useful or relevant to the ordering of modern commercial societies, and inevitably when this is the case, as it is with company laws and commercial codes, the tendency within the Islamic world is *not* to seek to reform these codes through new interpretive efforts, a reopening of the gates of *ijtihad* to use the colorful Islamic metaphor.[35] Rather, the preference has been to enact the transplant, and more or less ignore the traditional Islamic rules.[36]

The second reason is more specific to the nature of Islamic finance. While at one time the practice may have been interested in the creation of entire state systems operating on its basis, at this point Islamic finance has transcended national boundaries to develop rules, standards and modalities of operation that conform remarkably well across national boundaries, beyond the scope of any single national jurisdiction.[37] As a result, far from seeking to regularize the practice through *law*, Islamic finance specifically *disclaims its legal nature* through a variety of mechanisms, most prominently choice of law clauses that establish a law other than

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[34] Ardeshir Atai, *Investor Protection In Iran: A Bankruptcy Approach*, *in* BANKRUPTCY LAW CLIENT STRATEGIES IN THE MIDDLE EAST AND AFRICA: LEADING LAWYERS ON EXAMINING LOCAL BANKRUPTCY SYSTEMS, ANALYZING RECENT AND PROPOSED CHANGES TO LAWS, AND PREPARING SUCCESSFUL CLIENT STRATEGIES (2011) (stating that Iranian bankruptcy laws need reform since they "no longer meet present-day business needs").

[35] Respecting the reopening of the gates of *ijithad* and the reinterpretation of sacred text, see Hamoudi, *Muhammad's Social Justice*, *supra* note 28 at 127, n.225 (detailing ongoing debates among Islamic scholars over applicability and acceptability of Islamic law reform to solve modern societal problems while "still remaining . . . faithful to the Qur'an . . . .").

[36] To be clear, this is not to say that the insolvency regimes throughout the Muslim world are particularly well run, transplanted or not. In fact, throughout the Middle East and North Africa, this hardly seems to be the case. There are places, among them Yemen, Iran and Jordan, where there is no single comprehensive bankruptcy code, as opposed to a pastiche of laws that deal with matters related to insolvency. *World Bank Report*, *supra* note 32, at 12 (stating that these countries are without comprehensive bankruptcy laws). There are other places where laws exist but are either poorly conceived, poorly implemented, or some combination of the two. *World Bank Report*, *supra* note, 32 at 1 (discussing the inefficient implementation of existing laws). The situation is better in other parts of the Muslim world beyond the Middle East and North Africa, such as Malaysia, which ranks slightly ahead of China respecting the effectiveness of its regime. World Bank Doing Business Report (Malaysia) 2011, p. 67, *available at* http://www.doingbusiness.org/~/media/fpdkm/doing%20business/documents/profiles/country/db11/mys.pdf. (noting that Malaysia is globally ranked at fifty-five, while China is ranked at sixty-eight). In any event, the point here is not to outline the relative success, or lack thereof, of the insolvency regimes in the Muslim world but only to point out the lack of interest in Islamizing them even in a context where all too many such regimes are in desperate need of reform.

[37] *Governance and Islamic Finance*, HAWKAMAH NEWSLETTER (9th Newsletter) (Hawkama: The Institute for Corporate Governance), Jan.–Feb. 2009, at 7, *available* at http://www.hawkamah.org/news_and_publications/newsletter/index.html **(**noting the operation of Islamic banking institutions in over seventy-five countries).

the *shari'a* to govern the contract, vesting private *shari'a* review boards rather than independent regulatory agencies with the power of determining Islamicity and specifically disallowing reference to *shari'a* as a means to invalidate or indeed even interpret the agreement.[38] The practice, that is, has developed into one based and policed (as to Islamicity) *entirely on private and internal contractual arrangements.*[39] As such, being divorced as it is from any sort of Islamic legal practice, it is also necessarily uninterested in ensuring parallel rules of insolvency, which are necessarily made and administered by the separate national states.

I will discuss each of these reasons for the comparative lack of interest in Islamic bankruptcy in turn, and conclude with considerations of broader implications as they concern the rise of Islamism and its effect on national law in Muslim states.

## II. ISLAMIC INSOLVENCY AS NATIONAL LAW

### *A. The Rules of Islamic Insolvency*

To be absolutely clear, my belief that Islamic insolvency is not well suited to be the national law of modern Muslim nation states is not meant as criticism of the system of administering bankruptcy proceedings as developed by the medieval jurists who established rules not entirely dissimilar to those of modernity in order to handle problems of insolvency.

As described in an admirable and exhaustively researched piece by Jason Kilborn on the subject, under the Sunni classical rules, insolvency proceedings generally began with a creditor hauling a debtor before a judge in order to substantiate the debt.[40] No distinction is made as between an individual debtor or that of a commercial enterprise, largely because no conception of corporate personality existed.[41] Once convinced of the debt, the judge could confirm the debt, and quite likely, order the debtor imprisoned.[42] While it is true that, as Awad and Michael point out, a debtor could escape prison by demonstrating an inability to pay debt,[43] in fact jurists tended to read this requirement rather restrictively.[44] If there was so much as a suspicion that the debtor had assets, he or she was imprisoned.[45]

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[38] *See* discussion *infra* Part III. (discussing privatization of Islamic Finance).

[39] *See* Umar F. Moghul & Arshad A. Ahmed, *Contractual Forms in Islamic Finance Law and* Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & Ors.*: A First Impression Of Islamic Finance*, 27 FORDHAM INT'L. L.J. 150, 189–90 (2003) (describing the reliance on English and New York law to support the notion that contracts should be upheld as written).

[40] Jason Kilborn, *Foundations of Forgiveness in Islamic Bankruptcy Law: Sources, Methodology, Diversity* 17, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstractid=1908896.

[41] Awad & Michael, *supra* note 11, at 985 (stating that in classical Islamic bankruptcy no distinction is made between individuals and companies because companies did not have legal personality).

[42] Kilborn, *supra* note 40, at 17–18.

[43] Awad and Michael, *supra* note 11, at 997.

[44] *See* Kilborn, *supra* note 40, at 19–20 (stating that imprisonment is only avoided when there is no suspicion of non-essential assets).

[45] *Id.* at 19.

Witnesses that testify as to the existence of assets on the part of the debtor are given preference over the debtor's testimony denying it, at least in the Maliki school.[46] The result is effectively a reversal of the burden of proof, placing upon the debtor a rather onerous obligation to demonstrate insolvency until he may be released from prison. Because of this and the general preference for corporal punishment for crimes under the *shari'a,* the predominant basis for imprisonment in the classical era was the alleged existence of unpaid debt on the part of an individual.[47]

Thus, while the *shari'a* appears to mitigate the harsh effects of debtor's prison by adopting the Roman distinction as between bankruptcy that arises because of a party's negligence and that which arises through no fault of the debtor, a distinction that has managed to find its way into Iran's penal law as well[48], in practice, at least in the classical era, the respite afforded debtors was not frequently ordered.

Moreover, even when ordered, the result was not necessarily to the debtor's benefit. Via a form of judicial order initiated by creditors,[49] the debtor could be treated as incapacitated, equivalent to an insane person or a minor, while her assets and affairs were temporarily administered by a trustee of sorts to handle the liquidation.[50] An orderly liquidation proceeds in which, for the reasons elaborated above, there are no liquidation preferences with certain specified and limited exceptions.[51] While this practice was not universal, it was nearly so, with only a minority of scholars opposing it.[52] Finally, there is simply no possibility of a court ordered discharge of debt after all of this. The creditor retains the right to pursue the debtor for all debts owed for the balance of his life, even if the creditor is urged to forgive the debt out of charity.[53]

The system is thus orderly and careful, and yet in some fundamental ways, medieval. The notion of debtor's prison is particularly difficult. While incapacity to pay does theoretically result in release, and while modern judges might well on this basis order release more liberally than their classical counterparts did, it seems difficult to discount the chilling effect that the mere possibility of prison would have upon potential entrepreneurs.

Even more difficult is the lack of any sort of distinction as between personal and commercial bankruptcy.[54] This problem has at its root the lack of the corporate form within classical Islam, a point upon which Kuran has placed a great deal of

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[46] *Id.* at 22–23.

[47] *See* Irene Schneider, *Imprisonment in Pre-classical and Classical Islamic Law,* 2 J. ISL. L. & SOC. 157, 169 (1995) (explaining that imprisonment for debtors was common both before and after commencement of proceedings).

[48] *See* Atai, *supra* note 34, at 36–37 (suggesting no criminal liability for no-fault bankruptcy and describing a penalty of six months to two years imprisonment for "negligent bankruptcy").

[49] Awad and Michael, *supra* note 11, at 988–89 (allowing for creditor to initiate judicial action).

[50] *Id.* at 989.

[51] *Id.* at 997.

[52] Kilborn, *supra* note 40, at 23–24 (noting Abu Hanifa's opposition to debtor interdiction, but also noting the near universal support by other scholars, even some within his own school, of the practice).

[53] *See id.* at 20 ("Discharge of a debt without payment or creditor consent is simply not an option . . . .").

[54] Awad & Michael, *supra* note 11, at 985 (noting no difference between personal and commercial bankruptcies in Islamic bankruptcy law).

emphasis.[55] In a sense, therefore, the unwillingness to adopt Islamic bankruptcy law might well relate closely to the unwillingness of Islamic states to revert to partnership forms directly authorized by the *shari'a*.[56] Yet given the close relationship as between credit on the one hand and bankruptcy on the other, one might imagine this is a difficulty that could have been bridged through adjusting the Islamic bankruptcy rules to accommodate the transplanted corporation, precisely as, say, Islamic finance embraces the corporate form without difficulty. After all, it would be natural to expect that the rules of *shari'a* as they concern insolvent debtors are not incorporated wholesale—the classical era after all was very different from our times as an economic matter. The more important question, the one that this paper seeks to address, is not so much the failure to adopt wholesale as why the *shari'a* seems to have no influence at all.

Most difficult of all of the rules without doubt, however, are those concerning the permanency of debt and the lack of a court ordered discharge, anticipated by the Qur'anic prohibitions on *riba* described above and developed more fully in the *shari'a*. As has been shown, the means by which debtor relief is achieved is through the strong ban on increase on the debt of an insolvent, along with a recommendation that the creditor forgive the debt owed to her out of charity.[57] To ensure that debtors do not themselves exploit such rules, the Qur'an likewise also makes it something of a premier moral injunction for the believer to honor his contracts,[58] which would necessarily include those resulting in the creation of debt.

But therein lies the rub, for if the debtor is under a moral obligation to pay her debt, and it is the creditor who is urged to forgive it when the debtor is in hardship and unable to pay it back (or at the very least forbidden from charging interest for the delay in repayment), this could be understood to leave little by way of power to a third party, such as a judge, to offer the debtor any sort of discharge.[59] Thus, much as under the Islamic rules of homicide and maiming it is the victim (or her family)

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[55] TIMUR KURAN, THE LONG DIVERGENCE 97–116 (2011) (explaining absence of corporation in *shari'a* as understood by medieval jurists).

[56] *See* Hamoudi, *The Death*, *supra* note 7, at 324 (describing general unwillingness of Muslim state to adopt traditional Islamic partnership forms).

[57] *See supra* Part I.

[58] *See* Qur'an 5:1 (Mohammed Marmaduke Pickthall trans.) (stating importance of believers fulfilling their contracts).

[59] To be clear, I do not mean to suggest that it is *impossible* to understand the provisions otherwise, much less that forced discharges are necessary violations of Islam's sacred texts. Surely one could conclude that urging the creditor to forgive does not *necessarily* strip a third party of authority to reduce the debt unilaterally. Kilborn in fact offers a scintillating example from the Prophet that would seem to suggest precisely that forced discharge is possible. *See* Kilborn, *supra* note 40, at 10 (writing that Prophet told creditors they will have nothing beyond the debtor's assets, even if they are insufficient). My only point here is that if a debtor is obligated to repay, and a creditor is urged to forgive debt, as well as forbidden from collecting interest on outstanding debt, it seems natural to conclude, as medieval jurists generally seemed to notwithstanding the Prophetic example described by Kilborn, that a court could not unilaterally at the request of the debtor reduce the debt any more than it could at the request of the creditor permit an increase in the loan amount.

who may offer forgiveness but not the state,[60] so the bankruptcy proceedings within Islam provide for orderly payment, but do not involve the forced discharge of excessive debt that is, in many ways, the very point of the bankruptcy proceeding in modernity.[61] The debtor, rather, is obligated to pay for the balance of his life, though of course the creditor may not increase the debt due and remains under permanent advisement to forgive debt as moral good.[62] It is hard to imagine that such a system would be one that would be of any interest to Muslim individuals, let alone large corporations (including Islamic financial institutions of one sort or another) which would prefer to take advantage of something more closely resembling a chapter 11 reorganization.

### *B. The Mimicry Function of Islamic Finance*

Making it all the easier to dispense with the Islamic bankruptcy rules has been the fact that Islamic finance does not in reality take its own rhetoric respecting the purposes of its existence terribly seriously. Rather than engage in anything resembling profit sharing, Islamic banks routinely offer vehicles to borrowers which are designed to mimic, both in legal consequence and economic effect, their conventional counterparts.[63] Indeed, their success has been premised on the use of such vehicles rather than any sort of true "profit sharing" sort of structure, which, when used in the earliest days of Islamic finance, generally led to miserable failure.[64]

Accordingly, given the mimicking function Islamic finance has adopted for itself, bankruptcy rules *are* important in Islamic finance, but *not*, importantly, so as to properly Islamize the system but so as to ensure that the Islamic finance mechanisms that are invented do, even in insolvency, end up fulfilling their mimicking function as closely as possible. An excellent example of this arises in the case of the *sukuk*, which are often used as the equivalent of an asset securitization by means of a debt instrument.[65] The principle of such a securitization is to isolate particular revenue generating assets of any given enterprise and give potential bondholders a secured interest in them, thereby reducing the risk of default

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[60] RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW 39 (2006) ("[T]he plaintiff is the *dominus litis* . . . . [T]he prosecution, the continuation of the trial and the execution of the sentence are conditional upon his will. . . . The judge cannot interfere and acts merely as an arbiter who supervises the procedure, assesses the admissibility of evidence, and finally pronounces judgment on the basis of the plaintiff's claim and the evidence produced by him.").

[61] Awad & Michael, *supra* note 11, at 997 (stating that there is no final discharge in Islamic bankruptcy).

[62] *Id.* at 999.

[63] *See* Haider Ala Hamoudi, *You Say You Want a Revolution: Deviationist Doctrine and the Origins of Islamic Finance*, 48 VA. J. INT'L. L. 249, 292 (2008) [hereinafter *Revolution*] (describing the premier artifice, known as the *murabaha*).

[64] VOGEL & HAYES, *supra* note 17, at 135 (explaining the extraordinary losses suffered by the earliest Islamic banks, which were based on profit-sharing arrangements).

[65] *See* Michael J.T. McMillen, *Asset Securitization* Sukuk *and Islamic Capital Markets: Structural Issues in These Formative Years*, 25 WIS. INT'L. L.J. 703, 731–32 (2008) [hereinafter *Asset Securitization*] (describing *sukuk*).

and lowering the cost of borrowing.[66] For example, if Company A as part of its operations owns Blackacre, on which it is receiving regular lease payments, it might seek to separate and segregate those lease payments into a special purpose vehicle, and then issue bonds relating to that segregated vehicle alone, with security interests running to the bondholders, because to do so would result in a lower coupon on the bond issued than would exist if Company A were to issue bonds on the whole of its operations.

In order for this to work, however, it is of fundamental importance that the special purpose vehicle is "bankruptcy remote," meaning that it cannot be brought into bankruptcy by Company A or its creditors (excluding, of course, the bondholders in the asset backed securitization itself).[67] In my experience, the structuring of such matters is complex and deeply jurisdiction dependent.

In Islamic finance, such a debt instrument would not be permitted, and instead the bondholders would have to own the assets in question rather than merely hold security interests in them.[68] Yet their rate of return would be manipulated to reflect the coupon rate of a conventional bond through a variety of gimmicks. These equity holders, for example, would have to "return" equity proceeds received in excess of the coupon rate as a "reward" to the venture, paying them into a reserve fund, and the reserve fund could be used to raise equity proceeds in any subsequent year to the coupon rate to the extent that they were less than the coupon rate.[69] Manipulate the funds being paid to the equity holders to assure a sizable reserve fund in the early years, and a coupon rate is largely assured.

Importantly, however, the bondholders are not, as a formal matter, secured creditors of the asset backed special purpose vehicle. They are its owners. Depending on the jurisdiction, this formal recognition of ownership could raise tax concerns, but it could also raise bankruptcy concerns relating to remoteness. It is therefore quite important to Islamic finance practitioners that the bankruptcy matters are addressed such that bankruptcy remoteness in the context of the Islamic vehicle is no different than it would be for a conventional vehicle. Much consideration of bankruptcy law and its effects therefore arises in this context.

The example is, admittedly, somewhat technical, as all examples of Islamic finance operating in insolvency tend to be. The point, however, is not an insignificant one. To describe it again and elaborate further, Islamic finance is not

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[66] *See id.* at 732–33 (describing principle and purpose of asset securitization and defining securitization).

[67] *See id.* at 734 (describing ways of creating "bankruptcy remote" special purpose vehicles).

[68] *See id.* at 739 (describing requirement of ownership of assets in Islamic bond structures).

[69] While taking exception to some forms of *sukuk*, the influential cleric Taqi Usmani did declare acceptable a practice whereby the *sukuk* holder would give back any annual equity returns over the coupon as "reward" to the issuer, to be placed into a reserve fund and paid to the *sukuk* holder if in subsequent years the equity return dipped below the coupon rate, with the understanding that the reserve fund goes to the issuer at the end of the sukuk's term. *See* MUHAMMAD TAQI USMANI, SUKUK AND THEIR CONTEMPORARY APPLICATIONS 5–6, *available at* http://www.kantakji.com/fiqh/Files/Markets/f213.pdf (providing examples of what is done with excess profits); *see also* McMillen, *Asset Securitization*, *supra* note 65, at 741 (describing the issue in the context of a directive from the Accounting and Auditing Organization of Islamic Financial Institutions).

designed to profit share but to mimic as closely as possible conventional finance vehicles in both legal and economic effect while at the same time retaining sufficiently distinctive Islamic veneer and vernacular as to be credibly referred to as "Islamic".[70] Bankruptcy rules must be designed so as to permit that mimicking purpose, or the Islamic finance vehicle cannot survive. As such, bankruptcy rules are important to Islamic financiers, and to the influential Islamic Finance Services Board, which has commenced an initiative in 2006 specifically relating to the creation of an effective legal infrastructure for Islamic finance, of which bankruptcy law is a key part.[71] This is not, however, meant to ensure "Islamic" bankruptcies, but rather to ensure that Islamic finance transactions are treated appropriately in insolvency, as functional equivalents of conventional transactions.[72]

*C. The Resulting Problem of Islamic Bankruptcy*

Yet to all of this an objection can be made. While *upon cursory inspection* (all I can claim to have done in these few pages), the rules of insolvency in the *shari'a* are ill suited to create a modern bankruptcy regime, certainly the same thing could have been said of Islamic finance in its infancy, with its dependence on the unsustainable *mudaraba* form. Yet just as modern Muslims (and modern non-Muslim practitioners of Islamic finance) have managed to create structures to meet Islamic finance objectives through manipulation of the medieval forms to achieve the mimicking function, the same could be possible as concerned Islamic bankruptcy. Put differently, *even if* Islamic finance is more concerned with achieving mimicry than establishing genuine profit sharing, and *even if* Islamic insolvency rules on their face do not seem helpful, why not massage and manipulate Islamic bankruptcy rules as Islamic finance rules have been so as to achieve the same result, at least in Muslim majority societies?[73]

A major problem, I suspect, would arise as to complexity that would be difficult to bridge. That is to say, it is one thing to create and build upon a series of elaborate structures to mimic conventional *finance*, relying for all else upon conventional institutions whose functions are well established and whose operations are predictable (among them the corporation, the insolvency regime and the tax collection mechanisms). It would be quite another to attempt to create alternative Islamic institutions for each of the above through similar attempts at mimicry. At some level and at some point, the transaction costs, and the uncertainty and

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[70] Ibrahim Warde, *The Relevance of Contemporary Islamic Finance*, 2 BERK. J. MIDDLE E. & ISLAMIC L. 159, 168 (2009) (acknowledging basic thrust of Islamic finance as mimicking conventional finance).

[71] The other parts of the initiative relate to *shari'a* review boards (discussed in the next section), capital markets laws, trust creation and *shari'a* enforceability issues. Michael J.T. McMillen, *Islamic Law Forum*, 42 INT'L. LAW. 1017, 1024 (2008).

[72] *Id.* (including treatment of Islamic financial transactions under bankruptcy and insolvency regimes as important factor in creating effective legal infrastructures for Islamic Finance).

[73] Naturally, to the extent Islamic finance thrives in non-Muslim societies, it would have to rely on different bankruptcy structures than those envisioned by Islam.

unpredictability of some of the institutions in their early phases would be so daunting as to make the entire enterprise nearly commercially unsustainable. It has proven far easier to limit the mimicry innovation infrastructure to finance than to attempt to expand it beyond that, an undertaking that could lead to potentially disastrous complicating effect.

There is, however, an even more important reason that bankruptcy regimes remain transplanted and ignored by proponents of Islamic finance, and it is described below.

## III. THE PRIVATIZATION OF ISLAMIC FINANCE

The credibility of Islamic finance goes down hard among those more committed to the rhetoric of an alternative system of financing that is supposed to be attuned to profit but also rooted more deeply in profit sharing, humanity, fairness and social justice. The time honored means that Islamic finance uses to bridge this gap as between its rhetoric and reality are that it is but an infant in a gargantuan world of conventional finance vehicles and is therefore forced to compromise its idealistic visions, but only temporarily, until it grows sufficiently large as to make its own rules.[74] Its compromises, to use Usmani's term as concerns the most popular artifice, the *murabaha*, are thus but a "transitory step" toward an "ideal Islamic mode of financing."[75] Yet with nearly a half century having passed since its substantial rise, with $1 trillion in assets and with Islamic banking desks opening even at financial giants such as HSBC,[76] profit sharing as replacement for debt financing seems as far away as ever, and the restlessness and discontent only grows.

Given such discontent among the laity, which one can only assume affects the flesh and blood individuals who compose the judiciary and any potential arbitration panel, a problem arises. To use the words of the eminent Kilian Bälz, who has put it best, Islamic law, to the Islamic financier, is less law than risk, something of an enforcement liability to the industry.[77] It would be a disaster, after all, if judges or arbitrators could disallow particular, elaborate forms of artifice as violative of the *shari'a* because they are interest in disguise.[78] Much of the industry is built on the manufacture of interest in disguise. Some have argued, as a partial solution to this,

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[74] *Cf.* Steven T. Taylor, *Growth of Islamic Finance Activity Fuels Dynamic Legal Practice That Demands Special Skills*, OF COUNSEL, Jan. 2010, at 2, 18 ("The conventional finance sources are getting more comfortable with the idea of entering into transactions with Islamic finance sources and structuring their transaction in a Shari'ah-compliant way.").

[75] MOHAMMAD TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE 106–107 (1988) (detailing the concession of deferred payment within *murabaha* as evidence of its use as a workability device rather than the purest form and intent of Islamic finance).

[76] *See* HSBC Amanah (Islamic banking desk of HSBC), www.hsbcamanah.com (last visited Oct. 30, 2011).

[77] Kilian Bälz, *Shari'a Risk?: How Islamic Finance Has Transformed Islamic Contract Law* (Islamic Legal Studies Program, Harvard Law School 9), Sept. 2008, at 8.

[78] *See* USMANI, *supra* note 75, at 168 (noting current reliance by Islamic banks on traditional banking systems and their attachment of "open or camouflaged interest").

standardization within the industry so as to distinguish permissible transactions from impermissible ones more clearly,[79] and indeed certain groups have issued standards, most prominent among them the Accounting and Auditing Organization of Islamic Financial Institutions ("AAOIFI").[80] Nevertheless, the AAOIFI rules are without question nonbinding on decision makers and practitioners alike.[81] As such, the threat that in enforcement proceedings, before court or arbitral panel, a *shari'a* violation might be found and might be rendered the basis for nonenforceability of the contract remains real.

Islamic finance has adapted to minimize this threat that has arisen through broad discontent of its formalism largely through privatizing its practice. A decade ago, the choice of law provisions of Islamic finance contracts might potentially go so far as to include reference to *shari'a*, perhaps along with English law, though in such a confounding manner that in at least one case an English court decided to ignore the *shari'a* reference as hopelessly vague and difficult to administer.[82] Such references, however, have largely disappeared, with choice of law clauses clearly not making any reference to *shari'a* but rather to the state law of a jurisdiction, such as New York or England, where it can be reasonably assured that a contract will be interpreted according to its terms.[83] Moreover, the recent trend has been to further marginalize any *legal* effect to *shari'a* by including a clause *forbidding* the parties to resort to it during enforcement proceedings as a basis for disallowing the contract.[84] That is to say, not only may the court not consider *shari'a*, but nobody may raise its violation as a defense. To do so would constitute a breach of contract.

Therefore, rather than being achieved through mechanisms of law, Islamicity arises through the blessing of the transaction by a group of external figures paid by the parties to the transaction, known as the *shari'a* review board.[85] Its determination respecting compliance with *shari'a* is therefore final and nonreviewable, or at least the contracts are drafted as to make the board's compliance determination as final and nonreviewable as possible. While in theory this could mean that *anything* could be sanctioned as "Islamic" without legal consequence so long as one could get three people together to call themselves a board and declare it so, in fact it is rather silly

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[79] *See* Pierre M. Gaunard, Hdeel Abdelhady & Nabeel A. Issa, *Islamic Finance,* 45 INT'L. LAW. 271, 279 (2011) ("Many industry participants and observers have called for binding standardization to promote predictability and transparency in Islamic Finance.").

[80] *See* Frederick V. Perry, *The Corporate Governance of Islamic Banks: A Better Way of Doing Business?*, 19 MICH. ST. J. INT'L. L. 251, 266–67 (2011) (noting the AAOIFI's standards have been voluntarily adopted in Islamic finance transactions in many Western and Muslim countries).

[81] *Id.* at 267 (explaining accounting standards as guidelines do not carry weight of law).

[82] *See* Beximco Pharm. Ltd., et al. v. Shamil Bank of Bahrain E.C. ([2004] EWCA (Civ) 19 ¶30), 2004 WL 62027, at *1, 8–9 (Eng.) (holding that a choice of law clause requiring the agreement to be governed by English law "subject to the principles of the Glorious Sharia'a" could only be governed by English law, as the reference to sharia'a was too vague to be applicable).

[83] *See* Moghul & Arshad, *supra* note 39,at 189–90 (noting parties' preference for English or New York choice of law due to higher probability of enforcement).

[84] *See* Bälz, *supra* note 77, at 23–24 (explaining use of waiver of shari'a defense clauses).

[85] *Id.* at 24 (noting practice of acquiescing to contract validity when approved by bank's Shari'a review board).

to imagine such inanity. As with religious practice more generally, adhered to as it is by a community of committed believers and enforced as it is through shaming, and through references to divine reward and punishment, modalities of practice in finance have achieved remarkable convergence (at least among those not disillusioned with the industry entirely). There is no realistic access to the substantial capital committed to Islamic finance by inventing unrecognized artifices and gaining their acceptance by an unknown and therefore insufficiently respected *shari'a* review board. *Some* adherence to prevailing practice is necessary, even if made considerably more flexible (some might say inappropriately so) than it would be if the industry were standardized.

Needless to say, this evolution does not lend itself well to the creation of an Islamic bankruptcy regime to complement it. Bankruptcy is anything but a private contractual matter, it is intimately connected to the judiciary of one or more states, and involves state regulation and oversight of the highest order, whose very purpose is to *modify and ameliorate* contract provisions respecting repayment that the debtor is unable to meet.[86] Indeed, bankruptcy rules are often mandatory and not generally subject to variation by contract.[87] Thus, as Islamic finance drifts on its continued, determined path *away* from state recognition and enforcement of its arrangements on the basis of their Islamicity, its dependence on other parts of Islamic law—whether they be Islamic rules of bankruptcy, Islamic partnership forms or Islamic rules respecting compensation for private wrongs—largely dissipates. Rather than being the object of clerical revival, everything is instead designed to be handled adequately by, among other possibilities, the selection of New York law,[88] per an agreement drafted by lawyers in top New York law firms which would be adjudicated by a judge in Manhattan with no experience in or background respecting Islamic law.

## IV. REFLECTIONS ON IMPLICATIONS FOR SHARI'A AND LAW

While Islamic finance may have had its own material reasons to avoid excessive entanglement with Islam as a form of legal regulation, in fact the privatization of *shari'a* appears to be broader than merely the privatization of Islamic finance. If the searing image of Islamism has been roving morals police ensuring proper Islamic behavior (still a regular feature of the landscape of both Iran[89] and Saudi Arabia[90]) it is notable that Moqtada al-Sadr, the leader of by far the

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[86] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (describing one of the central policies of U.S. bankruptcy law as being to give "the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt").

[87] *See, e.g.*, 11 U.S.C. § 1123 (2006) (codifying mandatory plan requirements).

[88] *See* Moghul & Ahmed, *supra* note 39, at 189–90 (explaining recent trend toward New York choice of law provisions).

[89] In Iran, enforcement of women's dress by police extends so far as the proper clothing of mannequins. *Iran Bans Curves: Police Order Shop Owners to Cover Mannequins Up*, DAILY MAIL (U.K.), Sept. 24, 2009, *available at* http://www.dailymail.co.uk/news/article-1215604/Iran-bans-curves-Police-order-shop-

most Islamist of Iraq's current Islamist movements, denounced any legal ban on the *niqab*, or face veil, such as that adopted in France, as being an unacceptable repression of freedom, and suggested the same would be the case if the face veil were required.[91] To be sure, Sadr's comments referred to a veil over the face, [92] which as he himself indicated is not an Islamic requirement according to the rules of the Shi'i sect to which he belongs, and not a headscarf, which is.[93] It is hard to imagine that Sadr would explicitly describe the right of a woman to walk the streets with her hair entirely uncovered as an "expression of freedom."

Yet as one who has spent years in post Saddam Iraq, it is a fact that women *do* so walk the streets in Baghdad, and it is notable that in this environment, Sadr has fallen silent on legal enforcement of women's dress entirely *except* to describe particular, potential legal prohibitions as repression of freedom. At the very least, using the law to enforce even core aspects of *shari'a* seems to have fallen from his list of priorities. This was not the case years earlier when his Mahdi army functioned in Basra largely as a morals police.[94] The dramatic unpopularity of the Mahdi army at the time, and the concomitant lack of interest among Iraqis of all sorts for morals policing, no doubt had something to do with his recalibration.[95]

In so seeking to distance himself from the overt use of legal or quasi-legal mechanisms to give force to the *shari'a*, Sadr seems (belatedly) to have adopted the position of the Najaf clerics who are the final authority on matters of Islamicity within Iraq's Shi'i community.[96] They rarely involve themselves in political matters except as to issues of broad popularity whose relationship to *shari'a* is indirect.[97] They may well have something to say about the consumption of alcohol, or the taking of money interest, but tend to direct such matters internally, and not with expectation of legal state enforcement thereof.[98] Certainly if the *shariafication* of

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owners-cover-mannequins-up.html (reporting Iranian police ban on exposed curves of mannequins in boutique windows).

[90] *Cf.* Abeer Allam, *Saudi Morality Police in Segregation Dispute*, FIN. TIMES, May 24, 2010, http://www.ft.com/intl/cms/s/0/b0302ba8-674e-11df-a932-00144feab49a.html#axzz1bjZclNOA (reporting that "morality enforcement squads" herd men to mosques).

[91] *See* Tim Arango, *Bottoms Up for Democracy*, N.Y. TIMES, Apr. 17, 2011, at WK.1 (describing Moqtada al-Sadr's position on face veils as "remarkably like an embrace of democratic tolerance").

[92] *See id.*

[93] Within Shi'ism, Islamic rules are decided by the living high clerics of Najaf, known as *mujtahids. See* Hamoudi, *Revolution*, *supra* note 63, at 268. There is no doubt that among such jurists, the covering of a woman's hair in the presence of adult males is an absolute requirement, to which strict adherence is expected. *See, e.g.*, Sistani Website: Questions and Answers, Hijab (92), http://www.sistani.org/local.php?modules=nav&nid=5&cid=124 (last visited July 6, 2011) (in response to a question respecting permissibility of a woman riding a bicycle, indicating that it is permissible but only so long as the woman is able to maintain her headcovering "entirely").

[94] *See* Hamoudi, *The Death*, *supra* note 7, at 304–05.

[95] *Id.* at 305; Sabrina Tavernise, *Violence Leaves Young Iraqis Doubting Clerics*, N.Y. TIMES, Mar. 4, 2008, at A1 (providing an account of Iraqi sentiments towards moral policing).

[96] *See* Hamoudi, *Revolution*, *supra* note 63, at 268 (explaining that followers of each Najaf cleric were required to follow the cleric's rulings without question).

[97] Hamoudi, *Ornamental Repugnancy*, *supra* note 6, at 703 (observing that Najaf are reluctant to intervene in state matters directly involving shari'a but focus instead on popular measures such as anticorruption).

[98] *See id.* at 704.

Iraq's largely secularized legal system were a priority for the clerics, one would have expected more by way of activity by now.

The same might well be said of more lay Islamic movements in the Sunni world. It is looking increasingly ridiculous to portray Turkey's AK party as dissembling in its commitment to secularism, conspiratorially ready despite its vociferous denials to the contrary to unveil its *shari'a* program as soon as it is given the opportunity. AK has been winning elections for nearly a decade, after all, and no such program has arisen.[99] Its recent efforts are designed to expand democratization, not implement *shari'a*, hardly a surprise given its popularity relative to other spheres of influence in Turkey, among them the judiciary and the military.[100]

Moreover, AK *has* repeatedly sought to reverse a ban on headscarves in public universities, yet it has attempted this using language concerning religious freedom that sounds positively liberal.[101] In other words, it seeks greater space for Islam to develop beyond the law, precisely what Sadr was attempting to articulate in his own remarks concerning the *niqab*. The Muslim Brotherhood of Egypt (along with not a few clerics and veiled women) likewise is easily exercised by dismissals of the headscarf as regressive and primitive.[102] However, it overtly and strongly indicates, *in contradistinction to its position more than a decade ago*, that the headscarf is from a legal perspective a personal choice, albeit a religiously mandated one.[103] The law, under these formulations, should be designed so as to *permit*, perhaps even *support*, the prominent and public strengthening of *shari'a*, but not to *enforce* or *require* it.

Even more conservative communities follow the same pattern. The jurist to whom members of Hezbollah turned for spiritual guidance until his death, Muhammad Hussein Fadlullah, spoke positively of a religiously neutral state law to

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[99] *See* Scott Peterson, *Turkey Referendum Shows Secularism Fading But Still a Potent Force*, CHRISTIAN SCI. MONITOR, Sept. 13, 2010, *available at* http://www.csmonitor.com/World/Middle-East/2010/0913/Turkey-referendum-shows-secularism-eroding-but-still-a-potent-force (commenting on AK party's commitment to secularism).

[100] *See id.* (reporting on AK party's recent victories at the polls).

[101] *Turkey's PM Hints at Repeat Bid to Lift University Headscarf Ban*, CALGARY HERALD, Sept. 30, 2010, at A14 (quoting AK Leader Erdogan's statement that the ban was "interventionist" against "freedom of belief"); *see also* Sabrina Tavernise & Sebnem Arsu, *Turkish Official With Islamic Ties Wins Presidency*, N.Y. TIMES, Aug. 29, 2007, at A1 (quoting industrial leader as indicating that "the headscarf is not a gun to be frightened of, but a personal choice to be respected"). Parliament did repeal the ban once in 2008, but the repeal proved unsuccessful when the Supreme Constitutional Court struck it down as an affront to secularism. Sabrina Tavernise, *Reform Stalls, and Liberals Can No Longer Hold Their Fire*, N.Y. TIMES, Nov. 25, 2008, at A10. There are suggestions another attempt will be made. *Turkey's PM*, *supra*, at A14 (noting headscarf issue is back on government's agenda).

[102] Megan K. Stack & Noha el Hennawy, *The Blinders Have Come Off in Egypt*, L.A. TIMES, Feb. 16, 2007, at A5 (reporting on Brotherhood's response to Culture Minister's statement that the head scarf was a sign of "backwardness" and "regression").

[103] *See* Ibrahim El Houdaiby, *The Muslim Brotherhood Will Stand Up for All Egyptians*, JEWISH DAILY FORWARD, Sept. 26, 2007, *available at* http://www.forward.com/articles/11704/ (noting that a woman was not asked to wear a headscarf while inside the Muslim Brotherhood's headquarters, as was the case when she visited ten years earlier).

which all religious communities could be bound within a framework within which personal adherence to religion dictate could be realized.[104] One major effort of the hard-line Salafi movement, or at least elements of it, in the post Mubarak upheaval in Egypt has been the creation of a "one-million-beard campaign," an effort to urge Egyptians to grow their beards as mandated by (the Salafi understandings respecting) *shari'a*, specifically on the grounds that "[n]o one should stand in the way of (religious) commitment."[105]

To be clear, I do *not* intend to suggest that these figures, any one of them in fact, is a liberal. Many would almost certainly endorse the illiberal idea that a *father* could compel (at least through nonviolent means) his nineteen-year-old daughter to wear a veil. Many live in societies in which religious instruction is a required school subject and would seek to keep it that way. Certainly attempts to secularize family law are regularly denounced by Islamist groups, and indeed they often wage campaigns to Islamize such rules more thoroughly.[106]

What I do mean to suggest is that to some extent the rise in interest in Islamism has been *privatized*, such that priorities are less to reform the legal sector and more to increase the personal and communal piety of the believers. For a variety of material reasons, this may have taken a more extreme form in Islamic finance, through its specific *disclaiming* of the use of Islam as law, but it is on the rise well beyond it. Islamists are no less committed to the *shari'a* than they have been, but they are considerably less committed to its realization through the mechanism of state law.

Seen through this lens, there is nothing at all surprising about the lack of interest in Islamic bankruptcy. The institutions of bankruptcy are after all so closely tied to the state and its institutions that to Islamize it would involve a detailed legislative enactment and the creation of appropriate Islamic regulatory mechanisms. If Islamists are reluctant to engage in matters as varied as dress codes and banking, they certainly are not interested in dealing with it as concerns insolvency. Such matters, in the end, to a growing number of the world's Islamists, are best left to Caesar.

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[104] *See The Principles of Co-Existence*, BAYYNAT, http://english.bayynat.org.lb/Issues/coexistence.htm (last visited Nov. 1, 2011) (interview with Muhammad Hussein Fadlullah discussing Qur'anic principles of co-existence).

[105] Ramadan Al Sherbini, *Battle of Bikinis and Beards*, GULF NEWS, June 23, 2011, *available at* http://m.gulfnews.com/news/region/egypt/bikinis-beards-battle-it-out-in-egypt-1.824557 (quoting Salafi leader Mohammad Hassan).

[106] *See* Hamoudi, *The Death*, *supra* note 7, at 325–26 (discussing immediate attempt by Islamist groups to repeal the Personal Status Code to replace it with something even closer to *shari'a*).