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ISLAMIC LAW AND FREE TRADE: COMPATIBILITY AND CONVERGENCE

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1. Introduction

As for the sea, we hold it is as the way of dry land. Allah said: Allah it is who subdued to ye the sea that vessels may sail thereon by his command and that ye may seek of his bounty. Therefore, he has given permission that he who wills may trade thereon and I hold that no obstacle shall be placed between it and any of the people. For the dry land and sea alike belong to Allah. He has subdued them for his servants to seek of his bounty in both of them. How then should we intervene between Allah's servants and their means of livelihood?¹

Muslims believe that Islam is the last religion. Islam is sometimes called the seal of religions. Islam, unlike the Talmud for Orthodox Judaism or Bible in Christianity, not only covers moral or spiritual teachings but also every aspect of life such as trade. Islamic *shari'a* places religion as well as economics in the consciousness of Muslims. Therefore, Islam is comprehensive in coverage. Some rules in Islam may be stretched out to meet current issues while maintaining certain core principles as static.² Indeed, Islam is a living force for any time and any place.

Free trade is about people selling and buying as they want without barriers or obstacles. Free trade has links in Islam. The proposition in this article is to refute any doubt that free trade is alien to Islamic countries and a response to the myth that Islamic law is passé or just does not apply to modern trade law. This proposition is also an

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¹ Sermon delivered by the Caliph 'Umar Ibn 'Abd Al-'Az'iz. See AL-KHAL'IFAH AL-'ADIL 'UMAR IBN 'ABD AL-'AZ'IZ, KH'AMIS AL- KHULAF'A' AL-R'ASHID'IN [THE FIFTH RIGHTLY-GUIDED CALIPH 'UMAR IBN 'ABD AL-'AZ'IZ]; LI-AB'I MUHAMMAD 'ABD ALL'AH IBN 'ABD AL-HAKAM; RIW'AYAT IBNIHI AB'I 'ABD ALL'AH MUHAMMAD; TAHQ'IQ AHMAD 'UBAYD, MUR'AJA'AH WA-TA'L'IQ AHMAD 'ABD AL-TAWW'AB 'AWAD 101 (1994). A caliph is a Muslim religious/political leader, successor of the Prophet Muhammad (s.a.w).

² These core principles are stated in the discussion of sources of law in Islam, p. 15.

opportunity to discuss matters beyond interest, the centerpiece of Islamic economics.³ However, Islamic law and economics do not adopt free trade as the single theorem *per se* or economic code of Islam. There are limitations on free trade in Islam such as prohibition on trade in pork and alcohol. International trade in Islam is trade with an Islamic “purifier”. This is an Islamic market economy.

According to the teachings of the Prophet Muhammad (s.a.w), the pursuit of trade and profit is not inferior but honorable.⁴ Allah’s choice of prophet, who was a trader by profession, from a trading society highlights the importance of trade.⁵ The dominant tribe in Mecca, *Quraysh*, earned its livelihood for decades selling commodities at a profit.⁶ Camel caravans, originating in the Middle East, are well known in history for travel along major trade routes.

The holy Qur’an is filled with numerous verses using the language of trade. For instance, it states, “O ye who believe! Eat not up your property among yourselves in vanities; But let there be amongst you traffic and trade by mutual good will”.⁷ This verse signifies trade on the basis of mutual consent free from undue interference. Qur’an also states, “For the covenants (Of security and safeguard Enjoyed) by the Quraysh, Their covenants (covering) journeys by winter and summer- Let them adore the Lord of this

³ See Timur Kuran, *The Discontents of Islamic Economic Morality*, 86 AM. ECON. REV. 438, 439 (1996) (Islamic economics is dedicated to restructuring economic thought and practice on the basis of fundamental Islamic teachings. Its founders were Indian Muslims in the 1940s. Sayyid Abu ‘l-A’la Maududi coined the term “Islamic economics” around the time of India’s partition. Afterward, Pakistanis have made the largest contribution to the literature. The blanket prohibition against interest became the centerpiece of Islamic economics. Attention then turned to issues such as rules of barter, rights of slaves, and transactions. The intended effect of Islamic economics is to reform human nature. The goal of Islamic economics is to transform selfish and acquisitive Homo economicus into a paragon of virtue, Homo Islamicus). Although interest and Islamic banking is the first and perhaps the most interesting application of Islamic economics relevant to modern times, interest and Islamic banking has been written about to death.

⁴ S.A.W letters are abbreviations for the Arabic words “*Salla Allahu ‘Alaihi Wa Sallam*”. It is an Islamic term of respect typically following a reference to the name of the Prophet Muhammad. “Peace be Upon Him” is used by English speaking Muslims. However, “Peace be Upon Him” does not give full meaning to “*Salla Allahu ‘Alaihi Wa Sallam*” words. Therefore, the words “*Salla Allahu ‘Alaihi Wa Sallam*” should be used. See *Glossary of Islamic Religious, Banking & Financial Terms*, 6 J. ISLAMIC L. & CULTURE 135, 148, 150 (2001). To determine if profit is profiteering, there must be an analysis of prevalent market prices and trading practices among similar merchants.

⁵ See Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81, 92 (2000) (a long-standing tradition of Islamic civilization is its association with and the centrality of trade. The tradition relating to the other great monotheistic epigones in the figures of Abraham and Jesus does not acknowledge the centrality of trade and commerce in any similar way. In the case of Jesus, the episode of the Temple merchants even points in the opposite direction, with the mercantile pursuit of wealth depicted in a derogatory manner. Neither classical Christianity or Judaism seems to have extolled the virtues of commerce in such a detailed or enthusiastic argument for the commercial professions as did *Dimashqi* in his *Mahasin al-tijara*, *The Virtues of Commerce*).

⁶ See GENE W. HECK, *THE ECONOMIC DYNAMIC OF THE EARLY ISLAMIC STATE*, 43-44 (1995).

⁷ See Qur’an 4:29. See also Qur’an 2:282, 17:66, 24:37, 35:28, and 62:11.

House, Who provides them With food against hunger, And with security Against fear (of danger)”⁸.

Discussion of free trade and its relevance will be limited to Islamic law.⁹ However, before discussing Islamic law and its relation to free trade it would be helpful to provide a background of Islamic law, one of the world’s major legal systems along with Jewish law (Halacha), civil law, and common law. The Discussion of Islamic law and its sources is essential to understanding the importance of these sources on the relationship between free trade and Islam.

1.1.1 Sources of Law in Islam

The law or *shari’a* in Islam may be thought of as being composed of at least two parts: revealed and non-revealed.¹⁰ The revealed form of *shari’a* has two proper sources: the Qur’an (the holy book) and the *sunna* (traditions based on the *hadith*, the sayings and actions of the prophet).¹¹ Non-revealed sources of *shari’a*, developed by Muslim jurists after the revelation of the Qur’an and the *sunna*, include *ijma* (consensus of Muslim scholars on a point of law) and *qiyas* (a sub-*ijtihad* species of strict analogical reasoning). These are the authoritative sources of jurisprudence (*usul al-fiqh*).¹² *Usul al-fiqh* incorporates both deductive (from broad general principles in the law to a particular case) and inductive (from a particular case to general principles) methods of reasoning. Other sources of non-revealed *shari’a* include *ijtihad* (individual intellectual effort and wider independent reasoning), *istihsan* (equity or juristic preference), *istishab* (presumption of continuity), *istislah* or *maslaha* (opinion based on public interest),

⁸ *Id.* 106:1-4. The historical background of these verses is that *Quraysh*, the dominant tribe in Mecca, conducted international trade by setting out two caravan journeys, one from Mecca to the warmth Syria in summer and the other to the cooler Yemen in winter, to sell cheaper leather and clothing than those made in Syria and Yemen. Thus, trade provided them with living. However, for the safety of these caravans, trade agreements were concluded with the tribes on the routes. In return, *Quraysh*, agreed to collect these tribes’ goods to sell, and on the way back hand them over other goods. See PATRICIA CRONE, *MECCAN TRADE AND THE RISE OF ISLAM* 109, 205-209 (1987).

⁹ For a Christian biblical and theological themes on international trade see DANIEL RUSH FINN, *JUST TRADING: ON THE ETHICS AND ECONOMICS OF INTERNATIONAL TRADE* 47-87 (1996) (stating that it would be a serious mistake to expect to find in the biblical sources a neatly transferable ethic of international trade for Christians today. At the same time, however, it would be a mistake to presume that international trade is a purely modern phenomenon).

¹⁰ *Shari’a* is an Arabic word meaning way. The *shari’a* was compiled during the first three centuries after Muhammad’s (s.a.w) death. See Ahmed Zaki Yamani, *The Eternal Shari’a*, 12 N.Y.U.J. INT’L L. & POL. 205, 205-06 (1979).

¹¹ The Qur’an is divided into 114 chapters, known as *surahs*. Each *surah* is divided into verses, called “*ayas*” which mean “signs”, referring to signs from and of Allah. There are roughly 6000 verses. See Bhala, *infra* note 21, at 680.

¹² See WILLIAM M. BALLANTYNE & HOWARD L. STOVALL, *ARAB COMMERCIAL LAW: PRINCIPLES AND PERSPECTIVES* 28-30 (2002). See also John Walbridge, *Logic in the Islamic Intellectual Tradition: The Recent Centuries*, Vol. 39 No. 1 ISLAMIC STUD. 55, 68 (2000) (Islamic law is divided into two disciplines: *fiqh*, which the content of the sacred law, and *usul al-fiqh*, the principles by which it is deduced. *Usul* is a system of rules by which new law is derived from a fixed body of source materials. It deals with such problems as how to derive a general rule from a known particular case, how words can legitimately be interpreted, and so on).

darura (necessity), *urf* (custom), and *fatwa* giving (*responsa*) of *muftis* (jurisconsults) such as the Egyptian grand *mufti* Muhammad ‘Abduh.¹³

To establish direct support for a legal proposition a Muslim legal scholar should be able to pinpoint to a verse of the Qur’an, or at least a tradition or *hadith* of the Prophet Muhammad (s.a.w). While the Qur’an provides the written law, the *sunna* supplies a sort of case law, consistent with the Qur’anic text. The *sunna* embodies the application of the Qur’an’s written law to concrete disputes and hypothetical questions that arose during the prophet’s life. Some *sunna* cases simply explain the Qur’anic principles and rules. Some cases interpret the Qur’anic text by providing new insights into the written law. Some provide new principles and rules, supplementing the Qur’an’s protected knowledge.

If direct support of a legal proposition in the Qur’an and *sunna* is not possible, then Muslim legal scholar seeks an instance when all legal scholars or jurists agree on a particular point of law or interpretation. Consensus may be relied upon as a valid source of law. Use of analogical reasoning, *qiyas*, is quite strict. First, one must find a verse in the Qur’an, a *sunna* of the prophet, or a rule on which consensus was achieved as the point of departure. Then the direct cause, purpose or rationale, narrowly conceived, must be determined, and the relationship between the two concerns, the one in which there is a rule and the one to which one is considering extending the rule, must be elucidated in such a way as to demonstrate that the rule should be extended. For example, the Qur’anic prohibition on drinking wine extends to other alcoholic beverages without concern about grey areas. On the other hand, the relaxation of the duty to fast in cases of illness and traveling cannot be extended so easily.¹⁴ Applying the concept of hardship to the deliberation is not helpful because travelers would not always find fasting a hardship. Moreover, *hardship* is a very broad and fuzzy concept. The divine purpose or cause of the rule is not mere hardship, and so extension of the relaxation would not be discrete or defined.

All Muslim scholars agree the Qur’an is the core of Islamic law. However, there is disagreement among them about the rank of other sources of Islamic law. Consequently,

¹³ See Hasbullah Haji Abdul Rahman, *The Origin and Development of Ijtihad to Solve Modern Complex Legal Problems*, Vol. XLIII No. 2 The ISLAMIC Q. 73, 75-76 (1999) (*ijtihad* must not be exercised as to the existence of Allah, the truism of the prophets of Allah, and the authenticity of the Qur’an. To exercise *ijtihad* a Muslim has to be knowledgeable of the Qur’an, *sunna*, and *usul al-fiqh*. A Muslim also must be a good Muslim, pious and law-abiding, not influenced by heresy, just, and reliable). See also ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 4-32, 286-296 (Muhammad Khalid Masud et al. eds., 1996) (*a fatwa* is a nonbinding advisory opinion to an individual questioner (*mustafti*) in connection with ongoing human affairs. A *fatwa* may cover issues concerning mosques, intergenerational transmission of property, and child marriage, and banking operations and interest. *Fatwa* began as a private activity that was independent of any state control before being transformed into a mechanism of religious legitimization. The formulation of *fatwa* is patterned after a question-answer model. Important *muftis* in the pre-modern era were *Mu’adh b. Jabal*, *Ibn ‘Abbas*, and *Ibn Rushd*. Modern era *muftis* include *Muhammad Sayyid Tantawi*, grand *mufti* of the Egyptian Republic and head of *Dar al-ifta’*, *Makhluuf (Fatwa Office)*, *al-Qaradawi*, and ‘Abd al-‘Aziz b. ‘Abd Allah Ibn Baz.). An example of the use of *fatwa* as a mechanism of religious legitimization is the plan of Egypt’s Ministry of Religious Affairs in 2004 to connect all 5,000 of Cairo’s mosques to a city-wide wireless network, so that five times a day the Muslim call to prayer [*adhan*] could be broadcast in a single voice, in the same instant. To counter criticism for the idea as *bid’a* (irreligious innovation), the Ministry obtained several *fatwas*.

¹⁴ See Gamal M. Badr, *Islamic Law: Its Reaction to Other Legal Systems*, 26 AM. J.COMP.L. 187, 189 (1978).

there have arisen four main schools of law in *Sunni*: the Hanafi, Maliki, Shafi'i, and Hanbali.¹⁵ Hanafi scholars rely on reason and opinion, using analogy and equity as sources of law. The Maliki School requires strict application of the *sunna* of the Prophet and minimizes the role of opinion. The Shafi'i school has tried to reconcile the Maliki and Hanafi principles.¹⁶ The Hanbali School is well known for its strict adherence to the text of the Qur'an and the *sunna*. Analogy is recognized as a source of Hanbali law.

The *shari'a* tries to describe all possible human acts, classifying them as obligatory, recommended, neutral, objectionable, or forbidden by Allah (s.w.t), the supreme legislator.¹⁷ Islamic law addresses matters ranging from the timing of daily prayers and prohibitions against eating certain foods to marriage, inheritance, and commerce. The Qur'an speaks much more explicitly and completely about personal status (marriage and inheritance), morality, and an individual's relationship with Allah (s.w.t) than it does about commerce.¹⁸

With respect to the daily, private lives of all Muslims, Islam has five pillars that are the essential obligations. These are: (1) the profession of faith (the *Shahada* which affirms monotheism in its first part, and the authenticity of Prophet Muhammad (s.a.w) in its second part as it states that "There is no God but Allah; Muhammad is the messenger of Allah") (2) regular prayer (called *salat* which is performed five times a day) (3) compulsory charity (called *zakat*) (4) fasting during the month of Ramadan (called *sawm*), and (5) pilgrimage (the *Hajj*).¹⁹

¹⁵ Islam embraces two principal branches: Sunnism, the majority faith, and Shi'ism. The most important group in Shi'ism is the Twelvers. Other Shi'ism schools include Ismailism and Zeydism. See YANN RICHARD, *SHI'ITE ISLAM: POLITY, IDEOLOGY, AND CREED* 1, 5-9 (Antonia Nevill trans., 1995) (Shi'ites are Muslims, like the Sunnis, but there are differences between them. Unlike Sunnism which insists on the arbitrary will of Allah, Shi'ism proclaims that Allah can only act within the bounds of justice. The Imam in Shi'ism plays a fundamental role in the relations between Allah and man. Moreover, Shi'ite doctrines are based on collections of traditions quite distinct from those of the Sunnis. Shi'ite doctrine varies noticeably from Sunni as regards inheritance and marriage). See David Bonderman, *Modernization and Changing Perception of Islamic Law*, 81 HARV. L. REV. 1169, 1174 (1968) (schools of law in *Sunni* appeared in the first and second centuries of Islam. They developed initially due to geographical separation—one at Medina, one at Kufa in Iraq, one in Syria—for example. After a few centuries, each school became personalized and took the name of its leading scholar. Each school developed its own body of legal doctrine, but they were similar in broad precepts. They disagreed as to particular points of law).

¹⁶ Al Shafi'i, the founder of al-Shafi'i law school, has been known as the founder of Islamic jurisprudence. He was the first jurist to compile and systematize Islamic sources of law.

¹⁷ S.W.T letters are abbreviations of the words "*Subhanahu Wa Ta'ala*" which means that *Allah* is purified of having partners or sons. When the name of Almighty Allah is pronounced, a Muslim is to show his respect to him by reciting these words. See *Glossary of Islamic Religious, Banking & Financial Terms*, *supra* note 6, at 153.

¹⁸ For an interesting discussion of Islamic law see M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 149 (2002) (the Qur'an and the *sunna* contain the greater number of norms applicable to the areas of criminal law, family law, contracts and obligations, procedure, and inheritance law as compared to other subjects within the *mu'amalat* category (societal relations and individual interactions). Being a book [Qur'an] of spiritual guidance and not a legal code, it is not surprising to find only 500 verses with legal content).

¹⁹ See Raj Bhala, *Theological Categories for Special and Differential Treatment*, 50 U. KAN. L. REV. 635, 677 (2002). Muslims, Sunnis and Shi'ites, are under the ritual obligation to accomplish *hajj* to the holiest sites in Mecca at least once in their lifetime. Shi'ites give importance to visiting the tombs of saints.

1.2 The Role of Islamic State

Medina, known previously as *T̄'abah*, was much poorer than Mecca because its people were not merchants. *Medina* had no pilgrimage destination like the Ka'ba. *Medina* also experienced deep-rooted enmity between groups of its citizens.²⁰ After his arrival in *Medina*, Prophet Muhammad (s.a.w) established a Mosque (*Masjid*) for worship and education. His next act was to create a new set of trade regulations. These were based on the principles of no restrictions.²¹ Neither Prophet Muhammad (s.a.w) nor the four Rightly-Guided Caliphs (*Al-Rashidin*) who succeeded him, directly engaged in trade and competition.²² They regulated trade so as to prevent unfair trade, deception or fraud.²³ However, later Islamic governments, tempted by profitability, competed with enterprises to the detriment of their societies.

In Islamic society, like in most others, some have more resources than others and some are gifted with more abilities than others.²⁴ In other words, people are not equal in terms of resources and abilities. The role is for the individual himself to make an effort in the direction of increasing his share.²⁵ Many Muslim jurists agree that a Muslim must do

The great centers of Shi'ite pilgrimage in Iraq are Karbala, Najaf, Samarra, and Kazemeyn. The great center of Shi'ite pilgrimage in Iran is Mashhad. See RICHARD, *supra* note 17, at 8-9.

²⁰ See MUHAMMAD AL-GHAZALI, UNDERSTANDING THE LIFE OF THE PROPHET MOHAMMAD 155 (1997). Due to the sanctuary of Mecca, trade created an environment where rivalry was foregone even among enemies. Qur'an states, "Nor wickedness, Nor wrangling In the Hajj. It is no crime in you If ye seek of the bounty Of your Lord (during pilgrimage)". See Qur'an 2:197-198.

²¹ After the persecution of the newly Muslims at the hand of the people of Mecca became unbearable, Allah ordained the Muslims to migrate, *Hijra*, to *Medina*. See ABD ASSAMII AL-MISRY, AL-MASRIF AL-ISLAMĪ 'ILMĪYAN WA-'AMALĪYAN [ISLAMIC BANK IN THEORY AND PRACTICE] 7 (1988) (ranking free trade as the first characteristic of the new regulations in *Medina* followed by justice, avoidance of cheating, and monopolies).

²² Caliph *Umar* said that the ruler should not trade because when he involves himself in trade he has it entirely for himself and to the detriment of others, even if he does not like to do so. See 'UBAYD, *supra* note 3, at 103.

²³ Prophet Muhammad (s.a.w) objected to some cases of deception, known in Islam as *Najsh*, when one raises the prices of goods, in an auction, without the intention of buying. He considered the practice improper. See KHAN, *infra* note 42, at 198. Other example of objections involved alteration of measure and weight in goods. The Qur'an commands that full measure and weight given fairly in trade. The Qur'an states, "Woe to those who when they have to give by measure or weight to men, give less than due". See Qur'an 83:1-3. Prophet Muhammad (s.a.w) acted in determining the measures upon verse 83:3. A special institution was established in Islam, known as *al-hisba*, to regulate standards and measures of goods to prevent deception for consumers. Additionally, Islamic jurisprudence prohibits selling below market price. For example, Caliph *Umar bin al-khattab* directed another person, who sold goods below the price available in the market, and demanded him either to raise the price or to leave the market. See MUNAZZMAT AL-MUTAMAR AL-ISLAMĪ, *infra* note 48, at 118, 163.

²⁴ The Qur'an states, "It is He Who hath made You (His) agents, inheritors of the earth: He hath raised You in ranks some, above others". See Qur'an 6:165. The Qur'an also states, "Allah has bestowed His gifts Of sustenance more freely on some Of you than others". See Qur'an 16:71, 4:32. See also SAYYID ABU 'L-A'LA MAUDUDI, TOWARDS UNDERSTANDING THE QUR'AN, VOL.IV 344, 345 (TRANS., ZAFAR ISHAQ ANSARI 1988).

²⁵ See Qur'an 62:10.

his utmost to earn a livelihood.²⁶ They assert the negative effects of subsidies. Muslim jurists tend not to support the arguments made for subsidies that they alleviate poverty and increase equality and efficiency.²⁷ By the same token, infant industry should not depend on state subsidies. Subsidies should be temporary. Nevertheless, the Islamic state has the role of addressing social injustice through available mechanisms such as *Zakat*, Islamic rules of inheritance, and taxes. These mechanisms can be used to redistribute wealth.

The role of the early Islamic state was confined to providing necessities such as public services and law enforcement.²⁸ The state should be a minimal state in terms of involving in trade.²⁹ The state should not be in the business of making profit. When the Islamic state relaxes its grip on trade, prosperity may flourish for society.

Out of the legal principles enjoining fair trade the institution of “Hisbah” emerged. Hisbah is an Islamic legal and commercial institution that was entrusted with the task of supervising and enforcing market and public morality.³⁰ The institution of Hisbah exemplified the preciousness of equitable environment for the exchange of goods. The office of “Mohtaseb” (head of the Hisbah) was created carry out the duty of quality control over a host of traders, crafts and professions such as bakers, blacksmiths, and silk manufacturers. The Mohtaseb duties extended well beyond the mere inspection of weights and measures to carry out different functions.

The Mohtaseb had jurisdiction over “Dar alIyar” (House of Measurements) where standardized weights and scales were manufactured. Despite the fact that the Mohtaseb was an officer of the Islamic State, he could exercise his duties independently and take actions against errant traders. The independence of actions allowed the Hisbah institution to carry out its functions of enforcing justice and fairness and more so of enhancing consumers’ interests.

1.2.1 The Administration of Tariffs in the Early Islamic State

The most visible barrier to trade is tariff, a tax imposed on imported products at the border.³¹ Islam recognizes a number of taxes. These taxes fall into four main categories.

²⁶ The Qur’an stresses “Will Allah change the condition Of a people until they Change their own inner selves”. *Id.* 13:11. Caliph *Umar* emphasized that no one should refrain from seeking a livelihood and say, O Allah! Give me sustenance, for the sky will certainly not rain gold and silver. For more on opinions of jurists see M.UMER CHAPRA, ISLAM AND THE ECONOMIC CHALLENGE 232 (1992).

²⁷ *Id.* 292.

²⁸ Government may need to deliver public services because of free-rider problems, otherwise these services would not be produced.

²⁹ For discussion on the role of the government see Muhammad Akram Khan, *Public Finance in Islam*, 40.2 ISLAMIC STUD. 227, 231, 251 (2001) (public expenditure in Islamic economy will follow hierarchy of needs giving priority to essentials, followed by complementaries, and desirables. The government should refrain from performing all the functions that the private sector can perform. On the whole, *shari’a* is tilted toward free trade).

³⁰ Al-Shaykh AlImam Ibn Taymiyyah, *Public Duties in Islam: The Institution of the Hisba* (Muhtar Holland trans., The Islamic Foundation 1982).

³¹ *Ibn Khaldun* explained that tariffs, *maks* in Arabic, seem to come from custom or habit. Tariffs are imposed by the state degree by degree to the extent that they exceed the just limit and they become a custom. See IBN KHALDUN, MUQADDIMAT IBN KHALDUN [INTRODUCTION OF IBN

The first is *Zakat*, an obligatory religious tax, calculated annually on a minimum of possessions at fixed rate paid to assist the poor as commanded by the scripture.³² The second is *Sadaqa*, a voluntary tax on every Muslim.³³ Each Muslim, if he agrees to pay *Sadaqa*, pays from his own money according to his capacity and for the benefit of the eligible such as the poor.³⁴ The third is *Ghanima* which is the share of the Islamic government from the proceeds of war.³⁵ In modern times, where war may be rare, *Ghanima* is inapplicable. The last tax is known as *Jizya*, a tax imposed on the people of religions other than Islam for their protection.³⁶ Beyond these four main religious taxes, no other taxes formed any source of public revenue for the early Islamic state.

The question that comes to mind next is, if *Zakat*, *Sadaqa*, *Ghanima*, and *Jizya* were the only taxes imposed in the early Islamic state how the subsequent expenditures of the Islamic state were financed, especially after its enlargement? An Islamic state has the right to impose other taxes according to Prophet Muhammad (s.a.w) *Hadith* “in your money, there are taxes besides *Zakat*”.³⁷ However, a tax system ought to be based on equity, efficiency, and simplicity.³⁸

The prophet Muhammad (s.a.w) condemned the imposition of tariffs in the strongest words. He said in a *Hadith*; “One who wrongfully takes an extra tax (*Sahib Maks*) will not enter Paradise”.³⁹ The *Hadith* addresses customs duties specifically as well as *Zakat* taken by the tax collector on above what is due. Moreover, the *Hadith* places a blanket prohibition on tariffs regardless of the citizenship, or religion of a trader, or local content of Muslim goods.

The *Hadith* of prophet Muhammad (s.a.w) regarding tariffs not only set out the doctrine, it was also practiced. Trade in *Medina* remained duty-free for nearly seventy

KHALDUN], MAHHADA LAH^{^-}A WA-NASHAR AL-FUS^{^-}UL WA-AL-FAQAR^{^-}AT AL-N^{^-}AQISAH MIN TAB^{^-}ATI^{^-}H^{^-}A, WA-HAQQAQAH^{^-}A WA-DABAT KALIM^{^-}ATAH^{^-}A WA-SHARAHAH^{^-}A WA-^{^-}ALLAQA ^{^-}ALAYH^{^-}A WA-^{^-}AMILAFAH^{^-}ARISAH^{^-}A ^{^-}AL^{^-}I ^{^-}ABD AL-W^{^-}AHID W^{^-}AF^{^-}I, VOL. II, 668-669 (1957). For an English translation in three volumes of *Ibn Khaldun's Muqaddimah* see IBN KHALDUN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY LIV (Franz Rosenthal trans., 1958) (*Ibn Khaldun* wrote his masterpiece, *Muqaddimah*, in 1377. *Ibn Khaldun's Muqaddimah* is the first volume of seven volumes which comprise his book “*Kitab al-‘Ibar*”. In *Kitab al-‘Ibar*, *Ibn Khaldun* discussed events of the pre-Islamic world and Arab and Eastern Muslim history. He also discussed the history of the Muslim West).

³² See Qur’an 2:43, 83, 110, 177, 277, 4:77, 9:5, 11, 18, 60, 71, 73:20, and 98:5.

³³ *Id.* 2:263, 264, 271, 280, and 57:18.

³⁴ *Id.* 2:267, 65:7, and 9:60. The eligible for *Sadaqa* are the poor, the needy, workers of charity, newly converts, slaves, debtors, warriors, and travelers. In some instances, *Sadaqa* is mandatory for example, in the case of non-fulfillment of an oath. *Id.* 5:89.

³⁵ *Id.* 8:41.

³⁶ *Id.* 2:29.

³⁷ Taxes are not the only source of revenue for the government. The government can impose user fees for delivering its service, fines for violations, and charges for renting its buildings. Moreover, the government can raise money through borrowing, domestically or internationally.

³⁸ Toward the end of the *Umayyad* ruling of the Islamic world (661-750 C.E), rulers overburdened Muslims through taxes. See S. M. HASANUZ ZAMAN, ECONOMIC FUNCTIONS OF AN ISLAMIC STATE: THE EARLY EXPERIENCE 115 (2nd ed. 1991).

³⁹ See AHMAD HASAN, SUNAN ABU DAWUD, Vol. II, Chapter 1095, 830 (1984). *Maks*, an Arabic word, is defined as toll or customs duty. See H.A.R.GIBB & J.H.KRAMERS, CONCISE ENCYCLOPEDIA OF ISLAM 317 (4th ed. 2001).

years until customs duties were levied during the reign of Caliph *Mu'awiyah Abi Sufyan*. Customs duties were abolished in the reign of Caliph *Umar Abd Al-Aziz*. However, later in time, when it came to his knowledge that Muslim goods were subject to duty in other states, Caliph *Umar Abd Al-Aziz* imposed *ushur*, 10 percent duty, on their imports.⁴⁰ Today, by way of analogy, if other countries impose tariffs on trade of Muslims, Muslims may impose tariffs on them. The early Islamic state tariff policy was one based on reciprocity.

1.2.2 Market Agents and Forces in Islam

After the expansion of the Islamic state beyond *Medina*, vast lands came into the hands of Muslims. Prophet Muhammad (s.a.w) and his followers recognized individual entrepreneurship, the basic premise of free trade. They encouraged the maximum utility of barren land (*Mawat*).⁴¹

Islam also cherishes the inviolability of private property.⁴² Private property is limited only by the realization of others' rights and public interest. Some argue, correctly, that economics of Islam is based on mixed ownership.⁴³ Since Allah (s.w.t) owns all natural resources, the Islamic state can exercise control over *anfāl* such as land, water, and mineral deposits.⁴⁴ Thus, Islamic economics embraces a dual ownership concept. In other words, even though private ownership is guaranteed, the owner of such property acts as a trustee or agent for Allah (s.w.t), the ultimate owner.

Interestingly, Islamic law lacks clear substantive rules on the protection of intellectual property.⁴⁵ Perhaps because of the nature of ideas as incorporeal objects, there

⁴⁰ See AL-MANHAJ AL-IQTISADĪ FĪ AL-ISLĀM: BAYNA AL-FIKR WA-AL-TATBĪQ/ AL-MUTAMAR AL-ILMĪ AL-SANAWĪ AL-THĀLITH [THE ISLAMIC ECONOMIC SYSTEM BETWEEN THEORY AND PRACTICE] 436 (1983). Verse 2:193 of the Qur'an authorizes retaliation, in kind, if Muslims are subject to actions. Some old books treat the term *Ushur* the same as *Maks*, though, *Maks* is more indicative as a customs duty. *Ushur* is defined as the tenth or tithe levied for public assistance, frequently used in the sense of *Zakat* and *Sadaqa*. See GIBB & KRAMERS, *supra* note 40, at 611.

⁴¹ Prophet Muhammad (s.a.w) is reported to have said, "Who revives dead land, it is for him". See ZAMAN, *supra* note 39, at 33. Caliph *Umar Al-Khattab* is quoted saying, "He who restores dead land, owns it". See also HECK, *supra* note 8, at 122. Prophet Muhammad (s.a.w) said, "There is none amongst the Muslims who plants a tree or sows seeds and then a bird, or a person or an animal eats from it, but is regarded as a charitable gift for him". See MUHAMMAD MUHSIN KHAN, SAHĪH AL-BUKHĀRĪ, vol. 3, 295 (4th ed. 1985).

⁴² The Qur'an states, "And do not eat up Your property among yourselves For vanities, nor use it As bait for the judges, With intent that ye may Eat up wrongfully and knowingly A little of (other) people's property". See Qur'an 2:188. Prophet Muhammad (s.a.w) in his farewell pilgrimage said, "No property of a Muslim is lawful to his brother except what he gives him from the goodness of his heart, so do not wrong yourselves". See AL-GHAZALI, *supra* note 22, at 457.

⁴³ See Sohrab Behdad, *Islamization of Economics in Iran Universities*, 27 Int. J. Middle East Stud. 193, 201 (1995). The Qur'an states, "Unto Allah belongeth whatsoever is in the heavens and whatsoever is in the earth". See also Qur'an 3:129.

⁴⁴ See Behdad, at 202.

⁴⁵ See Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV 1079, 1082, 1093 (1992) (protection of intellectual property in Islamic law is neither mandated nor prohibited. There is lack of any express statements about it). See Amir H. Houry, *Ancient and Islamic*

can, according to Islamic law, be no absolute legal rights to intellectual property. The Islamic state is not obliged to protect intellectual property. Protection of intellectual property would fall into the category of permitted action. The Islamic state, based on its discretion, can “honor” intellectual property.⁴⁶ Islamic law concentrates first and foremost on material objects property thus reducing incorporeal objects to second or third degree of importance.

Prices in Islam should be determined solely on the basis of the market, the law of supply and demand. The cheapness or dearness of prices is in the hand of Allah (s.w.t), who fixes the prices. Prices should not be fixed, but left to divine guidance.⁴⁷ In an anecdote, Prophet Muhammad (s.a.w) refused to interfere in market prices, which had risen abnormally in *Medina* even though the people asked him to. However, the available Islamic literature reveals some cases in which Prophet Muhammad (s.a.w) exercised his authority as head of the Islamic state, and interfered. In one case, Prophet Mohammad (s.a.w) knew that people met the caravans away from the market to buy the goods and then sold them at a higher price in the market.⁴⁸ This case was considered at the time a kind of deception or illegal trading practice.⁴⁹ The obligation not to interfere in setting

Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks, 43 IDEA 151, 187-202 (2003) (Islamic law does not directly address the issues pertaining to intellectual property rights. The possible hurdles to intellectual property protection within Islamic law appear to emerge from a moral and ethical basis in Islam. Intellectual property rights grant a monopolistic benefit to their owners while the "Maslaha" (public good or interest) doctrine is Islam calls for distributive justice. The prevailing Islamic approach to copyright has been that there should be no obstruction to the duplication of original materials since the most widespread dissemination of knowledge is for the good of all). See also Ali Khan, *Islam as Intellectual Property "My Lord! Increase me in Knowledge"*, 31 CUMB. L. REV. 631, 632-635, 649-650 (2001) (Islam itself as protected knowledge is a unique form of intellectual property. The Qur'an, the *Sunna*, and the unique marks and symbols of faith such as mosque and the greeting of *assalam-u-alaikam* (peace be upon you), together constitute the protected knowledge of Islam. However, there are differences between the well-known kinds of secular intellectual property rights such as copyrights, patents, and trademarks, and knowledge-based Islam. The former is the product of human intellect, innovation, and effort. In contrast, Islamic assets cannot be created by human. Intellectual property is often commercial in nature and protected for a short duration. Unlike intellectual property, the protected knowledge of Islam is not for sale or commercial exploitation and it is timeless. The protected knowledge of Islam is universal free for the benefit of all. Copies of the Qur'an may be freely made and published without any prior permission and without paying royalties to any person, family, or nation. It has been copyrighted in perpetuity as Allah's authentic work. No individual, no family, and no nation can claim proprietorship of these assets. In fact, no concept of ownership applies to the knowledge-based assets of Islam, as it does to intellectual property).

⁴⁶ The state can protect intellectual property under its powers to regulate human activity in a manner consistent with Islamic law. See Jamar, at 1083.

⁴⁷ See MUNAZZMAT AL-MU'TAMAR AL-ISLAM¹, ISLAM WA AL-NIZAM AL-IQTISADI AL-DAWLI AL-JADID [ISLAM AND THE NEW INTERNATIONAL ECONOMIC SYSTEM] 118, 161 (1982).

⁴⁸ Prophet Muhammad (s.a.w) said “Do not go ahead to meet the caravan (for buying the goods) (but wait) till it reaches the market”. See KHAN, *supra* note 42, at vol. 3, 207.

⁴⁹ *Al-Majallah* (The Book of Rules of Justice) introduced the concept of deception in several of its articles. See AL-MAJALLAH, arts. 18, 30, 165, 286 (1879). The *Majalla* was part of the reform movement in the Ottoman Empire that started in 1839. The *Majalla* is based, in part, on the *Hanafi* school of law. The *Majalla* codified, rather than modified, the Islamic rules which served as the civil law of the Ottoman Empire. It consists of an introductory section and sixteen books each treating a different subject: sale, hire, guarantee, transfer of debt, pledges, trust and trusteeship, gifts, wrongful appropriation and destruction,

prices is not unfettered. There are situations in which government involvement is needed to remedy market failures when the market does not operate efficiently because of informational deficiencies.

1.3 Limitations on Free Trade in Islamic Law

Freedom of trade in Islam is not absolute. There are some moral or religious strictures. The first limitation in Islam is the prohibition of illegitimate goods, those that are *haram* (forbidden), such as pork, alcohol, and gambling.⁵⁰ In other words, the source of goods in Islam must be permissible and not harmful or corrupt. The other limitation to free trade in Islam is *riba*. *Riba* is translated into English as usury.⁵¹ It involves unjust profit or advantage.⁵² Islamic law and modern trade come into conflict when addressing *riba*.⁵³ Islamic theory holds that money should be used in a financial system only to facilitate the purchase or sale of goods and services, but should not be “commoditized” by depositing money with banks for a guaranteed return over time, for example. In other words, Islamic law encourages enterprise rather than the hoarding of money.

The debate is squared on the issue of whether Islamic law should assign quantity value or time value for money. An example of the quantity value would be when one person lends \$100 in singles to another for three months. When the money is due, then the second person ought to return the \$100 in singles without regard to its value. On other hand, according to time value or pure time preference theory, the second person ought to return the \$100 in singles as well as a bit more. Charging a “bit more” could be justified on the basis that if the first person did not lend money he could have invested the money

interdiction, constraint and preemption, joint ownership, agency, settlement and release, admissions, actions, evidence, and administration of oath and administration of justice by the court.

⁵⁰ See Qur’an 5:3, 90, 2:219. Islamic law prohibits gambling because it is form of unjust enrichment in which someone gets something for nothing. Islamic law encourages hard-work and effort in obtaining something. In gambling, there is no effort. Gambling is a form of gratuitous.

⁵¹ The Qur’an states, “Allah has made buying and selling lawful and usury unlawful”. See Qur’an 2: 275-278. From a comparative viewpoint, Judaism and Christianity have prohibited *riba* as well. See Jean-François Seznec, *Ethics, Islamic Banking and the Global Financial Market*, 23-SPG FLETCHER F. WORLD AFF. 161, 165 (1999) (interest and usury are discussed in the Bible in Ezekiel 18:8 and Deuteronomy 23:19. These paragraphs, which apply to Jews and Christians, clearly forbid the use of usury in dealing with people. For centuries, Christians had a very strong prejudice against interest, which they used however reluctantly. The Catholic Church only lifted the ban on interest in the mid-nineteenth century. Today, there are banks in Israel that cater to Jews who refuse to take or pay interest). There is an exception to the prohibition of usury in Judaism which permits Jews to charge and pay interest to non-Jews.

⁵² *Riba* is of two kinds: *riba al-fadl*, in which a person acquires an unlawful, excessive profit, and *riba al-nasi'a*, in which a person gains an unlawful advantage by speculating on uncontrollable risks. *Riba al-nasi'a* is form of *gharar*.

⁵³ Great amount of literature is devoted to *riba* as to its definition and impact. The core of the debate is what constitutes *riba*. Some classical Muslim jurists define *riba* broadly to include any interest or increase. Other modest jurists define it narrowly to include excessive interest or doubling beyond the real value of money if the borrower defaults during specific time. In the latter view, excessive interest should be prohibited and not any mere increase. Prohibition of *riba* is applied variably in Muslim countries such as Iran, Pakistan, Saudi Arabia, and Sudan. For more see Barbara L. Seniawski, *Riba Today: Social Equity, the Economy, and Doing Business under Islamic Law*, 39 COLUM. J. TRANSNAT’L L. 701, 707-720 (2001).

in something profitable. Alternatively, during the three month period, the currency may be devalued. Therefore, \$100 three months ago may worth \$50 three months later after indexation.⁵⁴

To avoid the issue of *riba*, new alternatives have developed to make trade possible and finance international trade. These alternatives are *mudaraba*, *musharaka*, and *murabaha*. All these alternatives include the concept of sharing profit and loss.⁵⁵ *Mudaraba* (trust finance) is a business undertaking in which a person participates with his money and another with his effort and skill.⁵⁶ The owner of the capital is known as *rab'ilmal* and the other partner is known as *mudarib*. In other words, it is a contract in which an investor (Islamic bank) entrusts his money to another party called an entrepreneur for making profit.⁵⁷ Therefore, it is a form of a business association.

Musharaka can be defined as a partnership between two or more persons. It can be divided into two forms: contractual partnership and non-contractual partnership. Non-contractual partnership comes into existence when two or more persons get joint ownership of some asset without entering into a formal relationship, when two persons receive an inheritance for example. On the other hand, in a contractual partnership parties enter willingly into a partnership. Contractual partnership includes four kinds. First, contractual partnership could be a partnership whereby two persons pool their physical and/or mental labor without sharing capital investment. Any profits will be shared according to their agreement.⁵⁸ Second, contractual partnership could also involve partners who use their reputation and goodwill rather than capital. The third kind of contractual partnership enjoys equality in the areas of capital, management, and right of settlement.⁵⁹ All profits and losses are shared equally among the partners. The fourth kind of contractual partnership involves partners that need not be equals in their contribution of capital or management. However, an additional share of the profit will be granted to the partner who manages the enterprise.⁶⁰ In this kind of partnership, there is no set

⁵⁴ The “bit more” presumes devaluation of currency. However, there could be a scenario where the price of the currency increases. As such, the lender would receive perhaps double the amount he gave. In this case the terms of the agreement between the parties ought to be adjusted to insure fairness.

⁵⁵ Islamic finance is based on the concept of profit and loss sharing with Islamic banks being willing to take on risks associated with title and to participate in the financial structures established for their clients. It is not based on the concept of guaranteed return without any notion of risk or participation. AHMED A.M.S. AL-SUWAIDI, FINANCE OF INTERNATIONAL TRADE IN THE GULF 42-43 (1994) (trade finance represents the majority of Islamic banking transactions. More specifically, *murabaha* (cost-plus financing) accounts for 70 percent of Islamic finance transactions). Some Muslims believe that these alternatives are interest-based devices but under different names.

⁵⁶ *Mudaraba* is a pre-Islamic custom used to finance the caravan trade in Arabia. It is an example of a commercial arrangement identical to the economic and legal institution which became known in Europe as the *Commenda*. *Id.* 73.

⁵⁷ The investor will have his capital and a predetermined profit between himself and the entrepreneur. The profits, if any, are shared upon in advance, but not as a guaranteed return. Thus, the profits are uncertain in this case. The loss, if any, is borne only by the investor and must not exceed the amount of capital, unless the loss is due to negligence by the *mudarib*. If the loss is equivalent to the capital, the Islamic bank will receive nothing. *Id.* 75.

⁵⁸ *Id.* 79.

⁵⁹ *Id.* 80.

⁶⁰ *Id.* 81.

formula for profit sharing and each case is dealt with on its own merit. The amount of liability is limited to the percentage of his share in the enterprise. Again, *musharaka* is a form of a business association.

Murabaha can be defined as the purchase price of goods plus a fixed profit.⁶¹ It is a kind of sale contract in which the final price includes the cost plus profit, which is known to the parties in advance without any deception. An example of this type of Islamic finance is a form of auto finance. If a person wants to buy a car, he can request an Islamic bank to purchase it from a supplier and resell it to him at the original purchase price plus a negotiated profit on agreed terms. The negotiated profit, or mark-up, would compensate the bank for its time and effort spent for communication, currency exchange, etc. One downside for *murabaha* is if the bank ends up with the car because the person defaults on payment or refuses to accept the car. The Islamic bank, as a title holder, will bear any risk to the goods during the time of its ownership up to the time the person examines and accepts it.

Murabaha is the main product of Islamic finance compared with *mudaraba* and *musharaka* instruments. The reason for this is that in conventional lending a bank is concerned about the creditworthiness of a borrower. On the other hand, in *mudaraba* type of lending, an Islamic bank would be concerned with more than creditworthiness. It would be concerned with profitability since the Islamic bank would enter into profit/loss sharing arrangement. An Islamic bank would be careful to double-check the profitability of an enterprise before putting its capital in it. Therefore, it would be difficult for an Islamic bank to check bookkeeping of an enterprise or for an entrepreneur to declare himself as less profitable which might be true as a matter of fact.

Another limitation to trade in Islamic law is *gharar* (uncertainty or speculation).⁶² *Gharar* involves future contracts in which the goods are not determined at the time of contracting such as the sale of fish in the sea before being caught, day trading, or life insurance. To give an example, suppose that a person purchases life insurance to secure his family's well-being in case of an unexpected event. In Islamic law, some would argue that life insurance is kind of betting on that person's life.⁶³ Allah (s.w.t) has the control over and knowledge of that person's life.⁶⁴ From time immemorial, Allah (s.w.t) pre-determined each person's fate and destiny. On the other hand, other Muslim scholars would argue that modern life in society is complex and unpredictable, which makes life insurance important to individuals.

To secure a person's family in case of an unexpected event, alternatives to life insurance exist in Islamic society such as laws of inheritance, *Zakat*, and social security.

⁶¹ *Id.* 98.

⁶² See AL-MANHAJ AL-IQTISADĪ FĪ AL-ISLĀM: BAYNA AL-FIKR WA-AL-TATBĪQ, *supra* note 41, at 616.

⁶³ See Samir Mankabady, *Insurance and Islamic Law: The Islamic Insurance Company*, 4 ARAB L. Q. 199 (1989) (some Muslim scholars differ on the legality of insurance. *Abu Zhra*, a *Hanafi* scholar, believed that cooperative insurance is legal. Other types of insurance could not be placed under the groups of contracts known in Islamic law: sale, donation, and hire). See Mohd. Masum Billah, *Life Insurance? An Islamic View*, 8 ARAB L. Q. 315-319 (1993) (other grounds against the validity of life insurance include *riba* since the beneficiaries of the assured will gain more than the assured has paid to the insurer. This additional gain is *riba*). See also Ahmad A. Al-Ghadyan, *Insurance: The Islamic Perspective and its Development in Saudi Arabia*, ARAB L. Q. 332-335 (1999).

⁶⁴ See Qur'an 31:34.

Moreover, Islamic insurance, known in Arabic as *takaful*, as opposed to conventional insurance, can operate in line with Islamic concepts.⁶⁵ Aside from the life insurance debate, if the theory of *gharar* were applied narrowly, it would make economic life impossible.⁶⁶ After all, there is an element of speculation and uncertainty in everything. It would be appropriate to develop a benchmark against which “excessive” speculation is considered *gharar*.

1.4 Ibn Khaldun and the Theory of Commercial Policy

The wealth of nations, according to Adam Smith, is derived from specialization and trade. Nations can gain economically from specializing in production and trading the surplus produce. Specialization and trading in surplus produce would generate multiplier effects, known as the doctrine of mutual gains from trade, in the form of increased national income, higher consumption, and an improved standard of living. British political economist David Ricardo expounded, in his 1817 publication of *Principles of Political Economy and Taxation*, by stating that specialization and trade were based on comparative advantage (relative costs) rather than primarily on absolute advantage (production costs) as had been thought earlier.⁶⁷

Similarly, it is a source of pride that *Ibn Khaldun* (1332-1406 C.E), Adam Smith of the Arabs and the great Islamic sociologist-cum-economist, was among the pioneers who analyzed the economic problem scientifically and tried to resolve it.⁶⁸ However, if he had discussed his economic ideas in a separate treatise rather than in a scattered manner,

⁶⁵ Islamic insurance functions like conventional cooperative insurance. In cooperative insurance, resources in insurance companies are pooled whereby policyholders are considered shareholders sharing in profits. However, in a *takaful* company, policyholders and shareholders are distinct in which both own capital and share in annual profits. *Retakaful* insurance also functions like conventional reinsurance.

⁶⁶ For more on this matter see Sajjad M. Jasimuddin, *The Stock Exchange and Islamic Finance: Some Thoughts for a Reconsideration*, Vol. XIV No.2 THE ISLAMIC Q. 105, 108 (Second Quarter 2001) (some Islamic scholars found stock exchange objectionable because Islamic law does not permit the sale of an article until one has the physical possession of it. Trading in stocks is usually done without their physical possession and there is an element of chance. Therefore, trading in shares, bonds, and debentures is objectionable. Stock exchange is further objectionable for its elements of speculation. On the other hand, other Islamic scholars argue that speculation in the stock exchange is a process that involves the intelligent forecasting of future prices. This is not the same as tossing dice).

⁶⁷ See JAGDISH BHAGWATI, POLITICAL ECONOMY AND INTERNATIONAL ECONOMICS 3-34 (Douglas A. Irwin ed., 1991) (classical free trade theory rested on a number of crucial but questionable assumptions. These include that there is perfect competition, perfect information, labor and capital are not mobile internationally, production process exhibits constant returns, market prices will accurately reflect relative real costs, and absence externalities. Over the years, the traditional model of international trade has been supplemented and to some extent supplanted by new models. These models include neo-classical theory [Pareto superiority and optimality and its follow-up criterion of Kaldor-Hicks compensatory principles], Hecksher-Ohlin model, endogenous growth theory, factor price equalization theorem, and Stolper-Samuelson theorem. Free traders acknowledge some divergence from free trade such as optimal tariff, infant industry, second best, and externalities arguments).

⁶⁸ The researcher uses the terms Adam Smith of the Arabs and sociologist-cum-economist in referring to *Ibn Khaldun* to highlight the contributions made by *Ibn Khaldun*. The economic problem consists of man-against-nature struggle, scarcity of resources, and the inability of individual in his limited capacity to satisfy all of his needs.

among many other subjects in his masterpiece *Al-Ibar*, he could have been recognized as the father of free trade.⁶⁹ *Ibn Khaldun*, nevertheless, deserves to be listed as one of the great economists of all time along with Adam Smith, David Ricardo, and other great thinkers.

Ibn Khaldun stated that Allah (s.w.t) created man in a form that can live only by food. Allah (s.w.t) guided man to a natural desire for food and enabled him to obtain it.⁷⁰ *Ibn Khaldun* also called for specialization. For example, if a tailor has the skill necessary for his job, he has neither the necessary skills nor the time to be a carpenter or builder. Even assuming that he could be skilled in crafts, he would not be efficient in both of them at the same level.⁷¹ Specialization and social organization of labor would allocate resources to their most efficient uses.

Specialization and division of labor would lead to a surplus of production which can be used for trade. Therefore, international division of labor can also be applied to trade among countries. The basis of trade is to make a profit by producing goods at a lower price and selling them at a higher price. Profits could be accrued by supplying goods to other countries where demand for these goods is greater than in the home country.⁷²

There is disagreement among Muslim scholars on the role of state. *Ibn Khaldun* was suspicious of the state.⁷³ He maintains that commercial activity on the part of the ruler is harmful to his subjects and ruinous to the tax revenue. The ruler has the job of protecting

⁶⁹ One of the differences between *Ibn Khaldun* and Adam Smith is that *Ibn Khaldun* discussed different topics in his *Muqaddimah* such as the rise and fall of state, dynasty, and Bedouins while Adam Smith focused on economics in his book, *The Wealth of Nations* of 1776. When *Ibn Khaldun* discussed division of labor he did so in chapter one (titled human civilization in general) of *Muqaddimah* not in chapter five (titled on the various aspects of making a living such as profit and the crafts) which deals with economics. The other difference between *Ibn Khaldun* and Adam Smith is the concept of human nature. For Adam Smith, harnessing human nature means every man working for his own selfish interest will be led by an invisible hand or spontaneous order to promote the public good. See Abdol Soofi, *Economics of Ibn Khaldun Revisited*, 27:2 HIST. OF POL. ECON. 387, 391-400 (1995) (discussing the coherent Khaldunian economics theory of production based on human labor, theory of value based on labor input, theory of distribution based on optimum of salary, profit, and taxes, and theory of population and public finances cycles). Although Adam Smith is considered the father of free trade, his work did not escape criticism. See also Robert A. Blecker, *The "Unnatural and Retrograde Order": Adam Smith's Theories of Trade and Development Reconsidered*, 64 *ECONOMICA* 527, 529 (1997) (stating that Adam Smith for nearly two centuries has been considered a poor trade theorist for failing to discover the law of comparative advantage. He had some interesting but disconnected ideas about the benefits of free trade. Adam Smith has three separate theories of trade based on absolute advantage, market-widening, and vent-for-surplus).

⁷⁰ *Ibn Khaldun* stated that the power of the individual human being is not sufficient for him to obtain the food he needs, and does not provide him with as much food as he requires to live. Even if we assume an absolute minimum, that is food enough for one day, for example a little of wheat, that amount of food could be obtained only after much preparation such as grinding, baking, and cooking. Each of these three operations requires utensils and tools than can provided only with the help of several crafts such as blacksmith, carpenter, and potter... Through cooperation, the needs of a number of persons, many times greater than their own number, can be satisfied. *IBN KHALDUN*, *supra* note 32, at VOL. I, 272, VOL. III, 859.

⁷¹ *Id.* VOL. III, 884, 930.

⁷² *Id.* VOL. III, 915.

⁷³ See Syed Farid Alatas, *Introduction to the Political Economy of Ibn Khaldun*, Vol. XLV No. 4, *THE ISLAMIC Q.* 307, 320 (Fourth Quarter 2001) (*Ibn Khaldun* theory is founded on the assumption that the state is a problematic entity that acts in a way that creates the very conditions for economic misfortune).

citizens from aggression of other nations.⁷⁴ In contrast to *Ibn Khaldun*'s "government hand-off" approach, *Ibn Hazm*, a Muslim scholar, has called for government intervention.⁷⁵

Islamic economic ideas may seem not to have a systematic methodology. However, one can argue that each of these Islamic jurists had a different approach to the economic problem of the Islamic state in their respective eras. Second, they approached their solutions within the parameters of the Islamic *shari'a*. Hence, there could be no difference in the substance of their positions, but a difference in the form. Therefore, it is possible for Muslim jurists to develop different views of the same rule within the overall framework. Even assuming that each of Islamic jurists lived at the same time would not obscure the fact that their ideas are neither completely right nor completely wrong. The question is not to allow one approach, state control of means of production, to encroach aggressively on the other, free trade. In the current time, countries adopt elements of both approaches, third way approach, in their trade policies. Therefore, there is no such thing as pure free trade.

Islamic economics have called for avoidance of *israf* (waste or extravagance). Indeed, the term *iqtisad* (economics) implies the concept of moderation. Islamic economics is not against materialism *per se*; rather, it is "excessive" materialism that Islamic economics shuns. *Ibn Khaldun* also warned of the "obsession" of excessive materialism. Excessive materialism breeds a culture in which the typical individual becomes materialistic and luxury-oriented.⁷⁶ In this kind of culture, the animalistic side of the human being takes precedence. Based on materialism, a growing individualistic egoism is bound to be born with the society's social solidarity undermined.⁷⁷ In other words, individualism, characterized through actions of autonomous and separate persons within a state, undermines collectivity in which an individual is positioned within a social context of family or community.

Conclusion

Not only does Islam cover morality and individual's relationship with Allah (s.w.t), but also trade. Islam regulates every aspect of life including trade. The fact that the Prophet Muhammad (s.a.w) started his career as a merchant is unique to the Islamic Prophecy. Islamic law is inclined toward free trade. Islamic law condemned imposing tariffs on trade with other states. Even when tariffs were imposed, they were imposed based on reciprocity. Moreover, Islamic law provided thought on free trade in areas such

⁷⁴ See IBN KHALDUN, *supra* note 32, at VOL. I, 273. Some Muslim scholars could argue on the basis of *Ibn Khaldun*'s statement in which he stated that the ruler has to protect his citizens from aggression of other nations that the ruler could also exercise unlimited authority in regulating trade. However, *Ibn Khaldun* statement must not be interpreted because it is used in referring to military rather than economic affairs.

⁷⁵ See AL-MANHAJ AL-IQTISAD I F I AL-ISLAM: BAYNA AL-FIKR WA-AL-TATBIQ, *supra* note 41, at 104.

⁷⁶ See Mahmoud Dhaouadi, *An Interpretation of the Implications of Human Nature for Ibn Khaldun's Thinking*, Vol. XXXII No. 1, The ISLAMIC Q. 10, 20 (First Quarter 1988) (*Ibn Khaldun*'s position seems to be in line with the outlook on development in the third world. The emphasis is on human development instead of only on economic development).

⁷⁷ *Id.*

as price mechanism. In general, prices in Islam should be determined on the basis of market forces. Islam also protects private property. Early Islamic governments did not directly engage in trade because they understood profitability and competition as self-serving. The role of early Islamic governments was limited to prevent unfair trade, deception or fraud. Additionally, the role of the early Islamic states was confined to providing necessities such as public services and law enforcement.

Although Islamic law is inclined towards free trade, there are certain limitations. These limitations include the prohibition on trade in illegitimate goods such as pork, alcohol, and gambling. In other words, goods and services that are in conformity with Islamic teachings are acceptable. Otherwise, these goods and services are prohibited. The other limitation to free trade in Islam is *riba*. To avoid the issue of *riba* and finance trade, new alternatives have developed. These alternatives are *mudaraba*, *musharaka*, and *murabaha*. All these alternatives include the concept of sharing profit and loss. Islamic law also sets out limitation to trade concerning *gharar* (uncertainty or speculation). In sum, international trade in Islam is trade with an Islamic “purifier”. Islamic law embraces Islamic market economy.

Ibn Khaldun, Adam Smith of the Arabs, examined and explored specialization and social organization of labour. *Ibn Khaldun* explained that man in his individual capacity could not satisfy all his needs. However, through division of labour man can maximize his satisfaction. Division of labor can also be applied to trade among countries. Specialization and division of labor would lead to increase in production. Goods could be traded with other countries where demand for these goods is greater than in the home country. As *Ibn Khaldun* put it, commercial activity on the part of the ruler is harmful to his subjects and ruinous to the tax revenue. The role of the ruler is to protect citizens from aggression of other states. In addition, *Ibn Khaldun* warned of excessive materialism whereby the individual becomes materialistic and luxury-oriented. Excessive materialism leads to individualism which weakens the social solidarity of society.

Enough resources exist in Islamic jurisprudence than can help Islamic countries integrate into the modern multilateral trading system while abiding by Islamic teachings. Trade among Islamic countries is relatively low. Intra-Islamic countries trade represents only 12 percent of their total trade. Islamic countries should strengthen and promote trade links among themselves. For example, Islamic countries, through the Organization of the Islamic Conference (OIC), can establish a fund that will subsidize private sector efforts to export goods and services to the international market. Islamic countries must work toward an Islamic common market so that Islamic countries will have bigger voice in the international arena. Islamic countries must effectuate the trade preferential system for OIC members.⁷⁸ Islamic countries should tariff and non-tariff barriers. The dimensions of the multilateral trading system must be recognized as an opportunity and challenge. Islamic countries will not steer away from the multilateral trading system.

⁷⁸ There are several OIC agreements which include the General Agreement for Economic, Technical and Commercial Cooperation approved in 1977 and the Agreement for Promotion, Protection and Guarantee of Investments approved in 1981. See Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States* (1987).