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Moving Forward in the Study and
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Makhlouf's *L'émergence d'un droit
international de la finance islamique :
Origines, formation et integration en
droit français*

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ABSTRACT

In this lecture, delivered at the celebration of the publication of Dr Makhlouf's book, I claim that it makes a significant contribution towards establishing the foundations of the Law of Islamic Finance as a specialist sub-field of Islamic finance, and that it therefore makes a significant contribution towards the making of further progress in the study and practice of Islamic finance generally. It does this mainly by filling significant gaps in a largely unsatisfactory body of literature on the Law of Islamic Finance. It also makes all the benefits of the book available to the francophone world, provides access for that world to an entire body of anglophone scholarship, and lays the foundations for a 'doctrinal substrate' of the Law of Islamic Finance in France.

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Chaire Éthique et Normes de la Finance / Chair for Ethics and Financial Norms

In Celebration of the Publication of Amel Makhlouf's *L'émergence d'un droit international de la finance islamique : Origines, formation et intégration en droit français*

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Collège des Bernardins, Paris, 19 November 2015

Moving Forward in the Study and Practice of Islamic Finance: Makhlouf's *L'émergence d'un droit international de la finance islamique : Origines, formation et intégration en droit français*

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Introduction

Ladies and gentlemen, it is a great honour and a great pleasure to be here this evening before such a distinguished audience. I am most grateful to Université Paris I, Panthéon-Sorbonne, its Chair for Ethics and Financial Norms, the Chair's Director, Professor François Ameli, the Chair's Coordinator, Professor Pierre-Charles Pradier, Miss Sophie Gouardo and Dr Amel Makhoulouf for their kindness, their generosity and the great deal of work they have undertaken in order to make my visit, and this lecture, possible.

Curiously enough, it is five years, to the very day, that Amel wrote to me and asked me to help her with her PhD. The result of that correspondence was, in Professor Pradier's felicitous turn of phrase, a degree of 'intellectual parentage' in Amel's project which I have never experienced before. During that time, we became, on a professional level, colleagues and fellow enthusiasts and, on a personal level, good friends. I was, therefore, deeply touched when Amel asked me to speak.

When I asked what the subject of the lecture should be, Amel gave me a completely free rein. 'Speak about anything you like', she said. Such freedom is, in the words of an eminent English and comparative law academic, Otto Kahn-Freund, 'the most dangerous of all [the gods'] gifts'. After some reflection, I chose an initial route which is quite obvious, that of discussing the significance of Amel's contribution to the academic literature. The subsequent part of the journey is perhaps less obvious, when I claim that Amel's book is a very important part of a new phase in the development of Islamic finance, because it forms part of a body of scholarship concerned with a new sub-field, the Law of Islamic Finance.

From Childhood to Adolescence in Islamic Finance

It has become almost a tradition to start a talk on Islamic finance by saying how much, and how quickly, it has grown in recent years, and to cite figures concerning such matters as the total amount of financial assets in the Islamic system and the number of countries in which Islamic finance is used.

There is nothing inherently wrong with such an approach, and the figures are certainly impressive. For example, the total amount of Islamic financial assets is commonly said to be presently over a trillion US dollars. However, as is also commonly said, Islamic finance has a long way to go, for it is still dwarfed by the conventional variety. It is an aspect of the latter issue which I will consider tonight. How might lawyers contribute to further, constructive and efficient progress in Islamic finance? And, in particular, what is the role of Amel's book in this process?

Frank Vogel, one of the great experts in the field, remarked a few years ago that Islamic finance is growing up. He was quite right. It went through what seemed like a rather long childhood. We might say that it is now in its adolescence and, like any other teenager, it needs careful guidance and nurturing if it is to become a fully fledged member of adult society.

One thing which is needed if Islamic finance is to achieve the sort of progress required to reach this state is greater sophistication. Carrying on with the metaphor, Islamic finance is still a rather callow youth, and needs quite a lot more polish. This is partly because, as a small, young discipline, those involved in it necessarily have had to be jacks-of-all-(or at least many)-trades, and anyone who is obliged to cover such great breadth does not have the capacity, or the time, to go into great depth. Sophistication,

therefore, needs a greater level of specialisation, which in turn requires the development of sub-fields.

The Law of Islamic Finance

A notable such sub-field is that of the legal aspects of Islamic finance, a domain I call the *Law of Islamic Finance*. To put it another way, we need a *Law of Islamic Finance approach*, a way of looking at Islamic finance in which we recognise the significance of its legal aspects, and in which we use legal ideas drawn and adapted from, notably, Islamic law, comparative law and legal history.

In order to understand why I make this claim, we need to look at the nature of Islamic finance itself. One starting point is this evening's event, which is, of course, being held under the aegis of the Chair for *Ethics* and Financial Norms. I invite you to consider the implications of the inclusion of the word 'Ethics' in this name. For its study in a prestigious university, and for this lecture, Islamic finance has been classified as one of a variety of 'ethical' financing methods. This is a perfectly defensible approach. However, it can also be misleading, for the basis of Islamic finance is essentially *legal*. It is a truism, but one that needs to be stressed, that Islamic finance is based on Islamic *law*, and in order to function it needs another type of law, the law of modern nation states.

You may be aware that, by uttering that last sentence, I have touched on the very controversial issue of the nature of Islamic law and the terms used when referring to it. What we call Islamic law is actually the combination of the *sharia* (ie the normative parts of the Holy Kuran and the Sunna of the Prophet) and the *fiqh* (the learned study, juristic interpretation and application of those sources). These elements are in many ways very different from what is usually understood to be law in the modern world. Islamic law is divinely inspired, Western law is temporal, Islamic law is much wider in its coverage than Western law, and so forth. So some would claim that the use of the word 'law' when referring to the *sharia* and the *fiqh* is at best misleading, at worst wrong.

However, it is, in my view, perfectly legitimate to use the word 'law' to denote those elements of the *sharia* and the *fiqh* which underlie Islamic finance. Those parts of Islamic law relating to such matters as sale, business associations, guarantee, agency and pledge are all recognisably *legal* in terms of modern, Western-based jurisprudential thinking. Indeed, detailed comparative study reveals all sorts of similarities in approach and substance, and the apparently wholly technical exercise of comparing items of Islamic and Western commercial law can turn into a surprisingly inspiring experience when one realises what a commonality of thought there is between Islamic jurists living several centuries ago and contemporary Western lawyers.

Islamic law, however, has had to be adapted and developed in order to meet the needs of Islamic finance. And by saying *that*, I have just touched upon another sensitive issue. The usual line taken in the Islamic finance literature, especially that designed to market the industry, is that the Islamic law used in Islamic finance is the law of the classical period, which had everything needed for modern financial transactions. This is not true. The classical law, although, it seems, it was adequate for the needs of the time, has to be adapted to make it work in the modern world. Moreover, the classical Islamic law used in Islamic finance is based, not on the financial parts of classical law, but on its commercial elements. This means that another transformation process has had to be undertaken, that of making commercial law elements suitable for financial transactions.

And, as just noted, Islamic finance also has to function within *Western* law. Classical Islamic law had its own legal infrastructure, ie its own means of resolving disputes, its legal experts, legal education systems, doctrinal literature, and so on. This infrastructure was different from its Western equivalents. Notably it did not have a legislature, for example. The combination of Islamic law with its infrastructure did, however, constitute a functioning legal system.

As a result of the legal transformation movements of (mainly) the 19th century, this infrastructure wholly disappeared. It was replaced by an international and national legal architecture entirely based on the nation state and Western legal ideas. So Islamic finance needs the law of nation states in order to function, and the law of nation states regulates it.

One consequence of this situation is that a great breadth and depth of legal and other knowledge and expertise are required for the Law of Islamic Finance approach. In order to progress the study and practice of this specialist sub-field, one has to be familiar with the basics of Islamic law, Islamic commercial law of the classical period and its history, Western financial law, comparative law and the way in which Islamic financial law interacts with the legal systems of nation states. Ideally, one should also have at least a reasonable knowledge of Arabic and of the working language of Islamic finance, English.

However, the available level of resources is nowhere near sufficient to meet the need. Notably for our purposes this evening, one of the principal places one would look in order to acquire the necessary knowledge, the academic and practitioner literature, is generally deficient.

The State of the Literature

A useful comparison which can be made is between, on the one hand, the quantity and quality of literature on financial law and its underlying subjects in any reasonably sophisticated legal system, such as that of England and Wales, and, on the other hand, the equivalent situation in the Law of Islamic Finance.

In the former, one finds, as one would expect, a good range of monographs (principally books, but also PhD theses), from the basic topics such as the law of contract and the law of property, through more specialised areas such as commercial law, to highly specialised tomes on various aspects of financial law and regulation. Roughly speaking, the literature can be seen as a pyramid, containing a great deal of works on basic topics, with the number diminishing as the subject matter becomes more specialised. One also finds numerous articles and other types of publication. There is a great variety in the type of literature available, from simple introductions to highly specialised volumes for practitioners. This literature is no more problematic to find and access than any similar resource.

However, when looking at the literature on the legal aspects of Islamic finance, one finds a very different, and largely unsatisfactory, picture.

There are a reasonable number of books on Islamic finance itself, including some on specialist areas, plus a great deal of other material, of very variable quality. There are very few monographs on the law of contracts, although it must also be said that there is a reasonable amount of other types of material, mostly of fair to good, with some of excellent, quality. There is only one, introductory, general book on commercial law, produced by the author for teaching purposes in frustration at the absence of general treatises.

In other areas there is only a very small amount of good work, produced by a very small number of scholars such as Frank Vogel, Haider Ala Hamoudi, Michael McMillen and, dare I say it, myself, along with a few younger authors. There is little material on some essential aspects, such as the history of Islamic commercial law, the history of the legal development of Islamic finance, or the interaction of Islamic financial law with the legal systems of nation states such as that of France. So there is, for example, no ‘doctrinal substrate’, as Professor Parléani puts it in the Preface to Amel’s book, in such legal systems. On the history of Islamic commercial law, we do have Heck’s book, *Charlemagne, Muhammad, and the Arab Roots of Capitalism*, my own work and some other, very good, but mostly older and background, material. On various aspects of the substance of Islamic commercial law, there is very little available. The only book on Islamic finance in which the Law of Islamic Finance approach has been used until the publication of Amel’s book is Ercanbrack’s recently published *The Transformation of Islamic Law in Global Financial Markets*. (However, I must also mention Eisenberg and Nethercott’s *Islamic Finance: Law and Practice*.)

The deficiencies just outlined are accompanied by significant problems in the accessibility of the literature. Books are often expensive, they may be out of print and may be available in only a few libraries. Other literature is dispersed and it is, therefore, even in the electronic age, difficult to find, especially for the non-specialist. There are hardly any specialist academic publications in which such literature might be concentrated and there are hardly any incentives to encourage the founding of such publications.

The shape of this body of literature is also quite different. Rather than being a pyramid, solidly grounded on extensive scholarship concerning basic subjects, and progressing smoothly upwards through levels of greater and greater specialisation, the literature on the legal aspects of Islamic finance lacks any describable shape. It is patchy and top-heavy, with far more specialist items than works on foundational aspects.

The problems are further compounded by the dynamics of the PhD ‘market’, if I might call it that. One obstacle is the very small number of knowledgeable supervisors. In the United Kingdom, for example, there are only a handful of people with the requisite expertise. Another difficulty is the financial motivation underlying so many PhD applications. The prime motive of these applicants is (quite understandably, from their point of view) not to contribute to the foundational knowledge of the sub-field of the Law of Islamic Finance, but to get a job in the industry. Practically all the applications I see are either too general or concern technical issues rather than foundational topics. So, although there are useful PhDs being produced in the field, particularly, in the UK, under the supervision of my colleagues at Durham, but also elsewhere, there is very little work on the basics of the Law of Islamic Finance. Nobody ever writes to me suggesting that they undertake doctoral work on the history of Islamic commercial law, for example. That is not regarded as ‘useful’, when in fact it is just the sort of research we really need.

Also notable is the lack of specialist legal expertise, which means that many academic authors writing on the Law of Islamic Finance are not legally trained. Although there are some notable exceptions (and those who produce them are to be congratulated, given that they are venturing outside their specialist area), much of the literature produced by such authors is below standard, or at least lacks a certain something.

And finally in this list of deficiencies there is the fact that, with a very few exceptions, what literature does exist is in English. One’s first reaction to this fact

might be that it is not particularly significant, for English is the undisputed international language. However, such a reaction ignores the reality of the way in which a *lingua franca* works. It is the nature of language that only a small elite really masters a *lingua franca*, and only a small minority of that elite can ever do so absolutely perfectly. Other people can only attain one of a range of lesser degrees of competence.

Contributing to the Foundations of the Law of Islamic Finance: Makhlouf's *L'émergence d'un droit international de la finance islamique : Origines, formation et intégration en droit français*

This list of issues brings me to the book the publication of which we are here to celebrate this evening.

Simply put, the publication of Amel's book is a notable event because it makes a significant contribution towards establishing the foundations of the Law of Islamic Finance as a specialist sub-field of Islamic finance, and therefore it makes a significant contribution towards the making of further progress in the study and practice of Islamic finance generally. It does this in various ways.

It fills numerous gaps in a literature which, as you have heard, is full of holes and, in terms of quality, is highly problematic. Much of this aspect of the book is, as is the case with all such works, a synthesis of existing scholarship, but there is great value in the synthesis itself and in its availability in one easily accessible place, promoting awareness of the groundwork and providing the means to find it much more easily than before. There is also a great deal of original work, especially that relating to the encounters of International Islamic Finance Law with, and its 'acculturation' and 'integration' in, France, a section of the book which is not just significant for France but is also of considerable interest as a case study for the integration of International Islamic Finance Law in other jurisdictions.

Amel's book also provides evidence of the benefits that derive from a lawyer researching and writing about law, including Islamic law, in Islamic finance. This point, put as I have expressed it, may seem blindingly obvious, but recall the controversy mentioned earlier regarding the categorisation of Islamic law as 'law' and the problems which occur when non-lawyers turn their hands to the legal aspects of Islamic finance. Indeed, for someone used to attending Islamic finance events, it is a rather strange feeling to be speaking to an audience of lawyers about a book published by the Institut de recherche *juridique* de la Sorbonne.

In addition, the work demonstrates the value of specialisation and, in particular, the utility of a specific sub-field, the Law of Islamic Finance. The conceptual tools of that field were essential elements in the creation of the idea of International Islamic Finance Law and in the creation of the idea of its integration into French law. And, I hope, the fact that, within the space of one calendar year, two monographs have appeared using the Law of Islamic Finance approach (Amel's and Jonathan Ercanbrack's (both of them, I must confess, with a substantial input from me)) will generate the sort of interest necessary to start more widespread discussion and use of the approach.

And, vitally, the book is in French and much of it is about France. It makes all the benefits noted above available to the francophone world, it provides access for that world to an entire body of anglophone scholarship, and lays the foundations for a 'doctrinal substrate' of the Law of Islamic Finance in France.

To sum up, and reiterate, this excellent work is notable because it fulfils a remarkable range of valuable functions, and thereby constitutes a significant part of the foundations for further progress in the study and practice of Islamic finance.

So much for the academic contributions of Amel's book. In the final stage of this assessment, I invite you to consider a more general aspect.

After the tragic attacks in Beirut and Paris last week, we may well feel that we are powerless in the face of such violence. In fact, though, we all have a considerable amount of power, a sort of 'soft power', which affects those around us and those with whom we communicate. Amel's book is powerful in this sense. A vital part of the reduction of conflict is understanding, and understanding can only arise out of accurate information, presented both critically and respectfully. That is what Amel does in her book which, therefore, is notable not just for its academic aspects. It also contributes to peace and understanding.

I will finish, if I may, on a personal note. When Amel gave my wife and me the news that she had not just passed her viva, but had received the '*félicitations du jury*', mixed in with our delight at her success was a tinge of regret. We would no longer have her regular visits to our home, her company around our dinner table, nor her wonderfully funny stories. But this is a small price to pay for such a great achievement.

Ladies and gentlemen, thank you very much for your kind attention.