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Islam, Islamic Countries and Competition Law: From Past Glory to Modern Day Challenges

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I. HISTORICAL NOTES ON THE LINK BETWEEN ISLAM AND COMPETITION

The link between Islam and competition law is a very old one. It dates back to the early years of Islam. The idea of having a healthy process of competition in the marketplace and guaranteeing the freedom of market operators to compete is well articulated within Islam. This can be seen in light of the emphasis Islam gives to encouraging trade and business activity. Islam gives individuals the right (as well as the freedom) to engage in trade. However, Islam recognizes a limitation on this right, namely that it must not be abused; such abuse is prohibited.

For this purpose, Islam provides some form of intervention in the marketplace in order to give expression to such prohibition. Originally, this intervention occurred using an institutional mechanism called *Hisba*. This was a socio-economic approach to preventing abusive conduct on the part of merchants and traders. As an institution, *Hisba* consisted of one person only, namely the head or director of *Hisba*. This person was widely known as *Amil ala l-suq* meaning the market agent; sometime also referred to as *Sahib al suq* (market inspector) and *Wali-l suq* (market governor). The duties of the *Amil* were wide-ranging and included, among other things, ensuring that markets operated well by being well-supplied and that the prices charged by merchants were not excessive. In some cases, the *Amil* acted as an arbitrator or a judge for the purposes of adjudicating disputes arising between different persons.

The institutional division and structure of *Hisba* became developed over the years with additional positions being created to support the role of the *Amil*. In particular, a specialist position of a *Muhtasib* (market inspector) was established. The *Muhtasib* was responsible for some of the functions of the *Amil*. In fact, the position of *Amil* was later replaced by that of *Muhtasib*, with the latter conducting the main functions of the former, in particular ensuring fair-play in the marketplace and fighting economic exploitation.

The *Amil* (or *Muhtasib*) enjoyed the power to launch investigations into the market. The powers of *Amil* were wide and they included administrating a punishment where relevant, such as imprisonment, and issuing injunctions of different types, including ordering a particular harmful practice to be brought to an end. For the purposes of ensuring transparency and safeguarding procedural fairness and the rights of those subject to the investigation, it was mandated that the investigations launched by the *Amil* could not be secretive. Remarkably, the first person appointed as *Amil* was in fact a woman (Samra bint Nuhayk al Asadiyya, who was responsible for Mecca); not long afterwards, a second woman was appointed as *Amil* for Medina: Ash Shifa bint Abdullah.

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What this brief historical account shows is this: Islam had a glorious past in economic regulation and in recognizing the right to trade and the need to protect competition. The glory here is all the more important to note, especially with the role of *de facto* competition regulator—in existence in the early stages of Islam—being carried out by two women successively.

II. PROVIDING A FRESH PERSPECTIVE TOWARDS COMPETITION

Despite this rich history and past glory, Islamic countries did not carry the mechanism of economic regulation, in the form of *Hisba*, into modern times. Indeed, there has been inadequate recognition given by these countries to the importance of *Hisba* as an institution for market regulation. More generally, these countries have been among the latecomers to arrive properly at the competition law scene. And in doing so, they have not made use of their Islamic identity, but rather have—quite comfortably—become part of the generic category known as "developing countries" or "emerging economies" in the field of competition law.

While for some people it may be quite difficult to understand why—in light of the past Islam had in economic regulation—Islamic countries have been such latecomers, this development is understandable because, since their inception, competition law and policy have been dominated by particular political, economic, and legal forces. These forces have mandated that certain changes and evolutions ought to occur for "modern" competition law and policy to become relevant in a given economy.

Nonetheless, this does not mean that Islamic countries should take a backseat in the development of competition law and policy globally. Indeed, with these countries increasingly turning their attention to competition law, they are in a good position to contribute to the debate on global competition law and policy and to offer a fresh perspective that can help put competition law into its proper cultural and socio-political context.

Such fresh perspective is particularly welcomed in light of the fact that—in many ways—we have allowed ourselves to become too obsessed with economics in the field of competition law and have, as a result, given insufficient attention to the important cultural dimension that runs through competition as a process, and competition law and policy as framework for this process. Islamic countries are in a good position to make such contributions given that Islam is an extremely rich source on the economic thought and socio-political analysis that are of direct relevance to competition law.

This does not mean that Islamic countries should advocate a religious approach to competition law. The idea is different: in light of the huge scope that exists for enriching the global debate on the fundamentals of competition law, the cultural and socio-economic and socio-political experience of Islamic countries can be interesting to discuss within this global debate. This is particularly so given that, in today's world, competition authorities are not supposed to be only enforcement bodies—investigating, regulating, and punishing anticompetitive situations in their local markets. Competition authorities are also key players in debating competition law and policy and advocating competition law standards at a global level.

Some people, however, might be skeptical about such comments in relation to Islamic countries on the ground that we are talking mostly about fairly young and small competition authorities in these countries that are looking to learn, and so it is doubtful they can play a big role at world stage. While it is possible to fully appreciate this skepticism, evidence on the ground

paints an interesting picture. The work of organizations such as the OECD (notably the global forum on competition), the ICN, and UNCTAD shows that competition authorities of developing economies (which is what Islamic countries are) can make a significant contribution to the debate on many key issues in the field of competition law, especially when it comes to discussing competition issues of a cross-border nature and global standards in the field.

III. CHALLENGES TO ISLAMIC COMPETITION LAW AND POLICY

Thus, in principle, the scope and the opportunity are certainly there for Islamic countries to make a contribution in the world of competition law and policy, especially one based on Islam's long tradition in relation to competition. In practice, however, realizing this ideal is surrounded with key challenges. A number of these challenges will be mentioned here.

Starting, first, with the prospects of a collective approach by Islamic countries, it should be noted that there is a limit to the viability of such a collective approach. Even in relation to Islamic countries where the commonalities are striking, there is still a need in many cases for a country-specific approach, some kind of tailored approach. This is so because the experience of two countries in the field of competition law can vary considerably. Islamic countries are not an exception here; some of these countries have had far greater exposure to competition law and policy than others.

Thus, a country-specific, tailored approach is, in many cases, necessary because the social, economic, and political realities of countries are different. For example, as we know, many Arab countries are united by important factors, including language, culture, tradition and (of course!) religion. Nonetheless, they diverge significantly in relation to matters relevant to competition law. For example, consumers across Arab countries do not share the same habits and this is important because it means that the approach in competition cases even in relation to the same business phenomena might differ from one country to the next.

Moreover, even in relation to one and the same country, the patterns of competition do diverge quite sharply because of the geography of the country concerned, its level of economic development, and the way in which the population is concentrated in certain areas. This is especially so for many Islamic countries. A country like Pakistan (which has made admirable progress in the field of competition law) is a good example in point. This means that competition can easily be local or regional and not national in relation to certain products and this can, for example, translate into significant price differentials across the country in relation to the same product.

Furthermore, the involvement of the government in the marketplace is not identical across countries and this is particularly true for Islamic countries. Government involvement is more extensive in some countries than in others. And within one and the same country, there can be extremely divergent government involvement: from a position of complete government monopoly in one market to that of having tens of firms—private and public—operate in another market.

The issue of government involvement is the most serious challenge facing Islamic countries and developing countries more generally. From experience, it is not easy at all to convince politicians and decision-makers in these countries to embrace a shift towards the market mechanism in many sectors of the economy. Moreover, in many of these countries

certain commodities tend to be price-regulated. Replacing government control with forces of competition and price-regulation with deregulation carries considerable discomfort because this is seen as likely to lead to an increase in prices which market forces may not be able to deal with.

The concern over price-increases is in some cases quite legitimate while in others it is misplaced. On the one hand, the concern is legitimate because many Islamic countries are not popular destinations for all foreign firms, and where such firms do participate in the local markets, their existence may not be strong enough to put pressure on the conduct of local firms with market power. So, a powerful local firm can enjoy great freedom of action over its pricing and how it deals with local customers and consumers. Incidentally, this is also true for many non-Islamic developing countries.

On the other hand, the concern of decision-makers over the outcomes of privatization and the reliance on market forces can be seen as misplaced because these forces and competition can have positive impacts on businesses and consumers. A competitive environment can be more attractive to foreign direct investment than a situation of monopolization and it can push local firms to deliver better and cheaper products.

Usually, there should not be any confusion about which is the better alternative: privatization or public control and planning. This can be seen from the experience of the developed world. Yet, in several Islamic countries such confusion remains. And this is very puzzling because the evidence on the ground can be so clear-cut as to why public control is problematic.

One case that could be mentioned here concerns the postal services sector in Kuwait, which is in a state of government monopoly by virtue of a law adopted in 1970. The existence of such monopoly has led to a serious deterioration in the level and quality of postal services in the country to an extent that a number of foreign countries submitted serious complaints to the government of Kuwait about the situation and one country even warned at some point that it would cease all postal services dealings with Kuwait. The situation became this bad: a monopoly which is 41 years old and the victims of which are consumers in Kuwait.

IV. THE ROLE OF COMPETITION AUTHORITIES

Such situations, where there is significant government control in the economy, enhance the importance of the role of competition authorities and the need for an effective operation by these authorities, especially in terms of advocating competition and competition-related benefits. This role is seen as crucial in ensuring that particular market structures are maintained which would guarantee that competition would flow and anticompetitive behavior and abusive practices would be harder to devise and implement. These competition authorities, therefore, need to enjoy important tools and powers in order to be able to execute their tasks effectively.

Examples of effective competition advocacy in the context of privatization and liberalization can in fact be found in the work of a competition authority of an Islamic country, namely the Turkish Competition Authority ("TCA").

One of the notable contributions made by the TCA on the advocacy front can be found in the privatization of Türk Telekom ("TT"), a former state monopoly in the conventional telephony services, infrastructure, and wholesale internet services market. In its pre-privatization

opinion, the TCA recommended several measures be adopted aimed at ensuring a competitive market structure following the privatization of TT. A key measure revolved around creating structural separation between the infrastructure of cable TV and fixed lines, with the privatization extending to the latter but not the former. Apart from the desire to guarantee the existence of competition following privatization, these measures were also intended to make it easier for the TCA and the sector regulator to monitor and detect anticompetitive practices.

Another useful example illustrating the TCA's good advocacy can be found in relation to the enactment of the Law on Restructuring of the General Directorate of Tobacco, Tobacco Products, Salt and Alcohol Enterprises and on Manufacturing, Domestic and Foreign Purchase and Sale of Tobacco and Tobacco Products. This Law came to separate the roles of market operator and market regulator enjoyed by TEKEL, a public monopoly in the alcoholic beverages and tobacco markets. The TCA saw the need to create a competitive market structure and solve the problem of conflict of interest resulting from bundling the roles of operator and regulator, which had existed for many years. Additionally, the TCA was concerned about and wanted to eliminate any hindrances to competition and competitors by transferring the regulatory powers of the firm to a specific regulatory body.

Such examples show the importance of competition authorities being pro-active and not just reactive or responsive. This is especially so in Islamic countries. In many situations in these countries, we are talking about not protecting effective competition but rather about the need to facilitate this level of competition.

V. CONCLUSION

Thus, there are serious challenges facing many Islamic countries in the field of competition law and important work will need to be done to overcome these challenges. Several Islamic countries have been making important efforts on this front and these ought to be recognized and appreciated. These efforts give legitimate grounds for hope of a bright future for Islamic countries in the field, especially when looking at the experience of Turkey, Pakistan, Tunisia, Morocco, Egypt, Jordan, and more recently Malaysia, which, at present, is the youngest competition law regime in the Islamic world.