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Property as a Comprehensive Institution of Modern Muslim Law

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Abstract:

The relevance of the study is due to the fact that Russia's relations with the Islamic theocratic states are developing more and more, so it is important for Russian investors to understand the specifics of property relations in these countries in order to minimize risks and expand their economic presence. In this context, this article aims to analyze the positive experience of regulating of legal property regime in the Islamic countries. Leading approach to the study of this problem is *the descriptive method* that has afforded revealing peculiarities of regulation of the concept of property under consideration within Muslim states. The materials of the paper imply the practical significance for the university teachers of the legal specializations.

Keywords: Global market economy; Islamic law; Sharia; Muslim legal doctrine; the concept of property.

JEL Classification: K11; K39; K15.

Introduction

After September 11, 2001, attitudes toward Islam changed significantly, it began to be perceived almost exclusively as an ideology of fundamentalism and terrorism. Under these conditions, an opposition, an understanding of the incompatibility of Islam, its rights, practices and ethics with the values of Western society and a market economy, was formed (Thomas 2015). At the same time, it is noteworthy that the Islamic threat in the West is seen exclusively for 'freedom in the Western style,' that is, for 'freedom of religion, freedom of conscience, freedom of expression, women's rights, equality before the law.' All this, according to West (2008), 'requires vigilance and protection in the era of Sharia. And there is nothing special or 'strange'. Note that the Sharia 'threatens' all the values of the West, except for property. In this sense, 'one of the main legal systems of our time' (Syukiyainen 2006) is not dangerous for the global market economy.

Islamic law was formed taking into account the experience of ancient and early medieval European law, was developed and acted in the conditions of market relations, was always focused on them, and accordingly, protected property and protected the owner. It is precisely property that has firmly occupied a central place among the basic values of Islamic law. It is guaranteed and protected by sharia as well as life and faith (Esposito 2014). It is not by chance that the Sharia law provides for the cutting off of a hand for the theft of private property.

What is the relevance of the study of legal property relations in the framework of the analyzed model? Russia's relations with Islamic theocratic states, according to the President of Russia, 'are developing effectively in the sphere of politics, in the sphere of economic interaction' (Meeting with Crown Prince, Minister of Defense of Saudi Arabia Mohammed Ben Salman Al Saud 2018). It is important for Russian companies and investors to understand the specifics of property relations in these countries in order to minimize risks and expand their presence. In addition, Russia itself has economically developed Muslim regions. In this regard, the incipient, but

still extremely insufficient interest of Russian lawyers in the legal regime of property in Islamic countries is not accidental (Akhmetova 2014).

In the Muslim legal doctrine, Allah is recognized as the sole legislator, whose will is either fixed in the rules of conduct or revealed by jurists and theologians. Islamic law is based on four sources of law: The Qur'an (divine revelation), Sunnah, set forth in the Hadith (traditions) of the prophet's thoughts, *ijma* - the consensus of reputable lawyers on issues not regulated by these sources of law and *qiyas* - legal conclusions based on the analogy (Brunschvig 2019). At one time, Smith accurately noted: 'What is theology for Christianity, then for Muslims it is the law' (Smith 1977). In a strictly legal sense, the main formal source of Islamic law remains *fiqh* - religious and legal doctrine, reproduced by Islamic lawyers belonging to different schools.

1. The Main Features of Modern Islamic Legal Doctrine

Islamic law cannot be identified with Sharia law, since the latter contains both the rules of conduct and purely religious dogmas, as well as the basis of Islamic ethics. At the same time, for the inter-sectoral comprehensive analysis of the institution of property we are undertaking, this is extremely important. The Islamic legal doctrine developed an original concept of ownership, reflecting the religious values, traditions and lifestyle of the Muslim society.

The traditional interpretation of the Sharia does not put property issues in the center of attention, they are considered by Islamic lawyers in parallel with the questions of canon law (zakat is an obligatory religious donation), military law - *ganima* (order of appropriation and division of military booty) agreements on the transfer of property, etc.), criminal law, etc. Also, property issues, starting from the Middle Ages, were considered in Islamic legal thought in the works on state property (caliphate), finance and tax relations, the legal status of classes and classes. Thus, in the Islamic political and legal doctrine, property was initially considered as a complex inter-sectoral institution.

Modern Islamic legal doctrine, responding to the challenges of economic globalization, pays increased attention to the problems of property. Based on medieval canonical dogmas, she adapts them to the current legal situation. This also applies to the main categories of property: 'mal' (property), as well as 'mylk' (property). The Quran does not define the first definition in any way, which does not prevent its mentioning in more than 90 verses. In this regard, the interpretation of 'mal' is debatable. So, the Hanafi school (the Islamic doctrine of the Russian Volga region) understands by 'mal' the natural need of a man, due to his nature, in fact, thus adjoining to the theory of natural rights. In this sense, 'mal' in the Islamic legal doctrine is interpreted as something natural and usually preserved and owned and used. Often, these classic civil legal characteristics are added to the ability of the property to turnover, the availability of value and the need for compensation for improper damage or destruction. In general, today, 'mal' should be interpreted as a natural set of material values. At the same time, 'mal' is not only material things, but also their useful properties, which can also be considered as a type of property (Krachkovskiy 1990).

These properties are important for determining the legal status of property, since the Sharia recognizes the value only of property permitted for the use of the faithful, i.e. possessing certain religiously conditioned qualities. In this regard, alcohol, playing cards, dice or pork have no value, as prohibited by the sharia. Indicative is Kuwait's law enforcement practice, where the manufacture, import, sale and use of alcohol are prohibited in accordance with Sharia, only diplomatic importation is permitted for the needs of foreign missions. In the 1990s, the Sharia and Legislation Council of the Ministry of Waqf and Islamic Affairs prohibited Kuwaiti Customs from selling confiscated alcohol to embassies, transferring funds to the budget. The Council pointed out the impossibility of selling alcohol, as a property prohibited for turnover, the income from which cannot be received by the state. Alcohol was destroyed, and practice became the norm (Kuwait seizes 4,000 bottles of alcohol 2017). In this case, an analogy is traced with the property prohibited to civil circulation in secular legal systems (Forte 1978).

The legal assessment of property in Islam is dependent on religious dogma: the content of the Quran and Sunnah (the legal position of the Prophet Mohammed set forth in Hadith), through which the religious interpretation of property goes back to Allah as the supreme owner: 'He owns everything that is in heaven and earth, and also between them and under the earth' (20: 6) (Krachkovskiy 1990). Within these limits 'He has authority over all things' (5: 120) (Krachkovskiy 1990).

Islamic legal doctrine does not consider Allah legally the owner of everything created by him, but only the supreme owner and distributor of all worldly goods. Islamic dogma comes from the fact that Allah not only created everything that exists on earth (2:29), but also controls the flow of life, including natural and economic circulation (14: 32-34). The statement that all the blessings that mankind has – from God (16:53) is not an exclusive feature of the Quran, but is characteristic of monotheistic religions (Krachkovskiy 1990).

Giving the laity material wealth, Allah also formed a legal understanding of property (as well as property rights) as a relationship between people and material wealth fixed by sharia. Here, the rightful owner has the right to ban anyone from claiming it. In a religious-philosophical context, property can be considered a derivative of the

will of Allah, however, from a legal point of view, this right arises when a subject enters into possession of specific property allowed by sharia for circulation and use. With this approach, natural objects in the legal sense – property devoid of value. The emergence of ownership of them is associated with the time of their appropriation by man.

According to Sharia, the competence of Allah with regard to property is that he simultaneously acts as the supreme manager of all property, the legislator, determining the limits and conditions for obtaining the right of ownership, as well as the supreme judge. Thus, Allah, having supreme power over property, transfers to people the right to property. In Arabic, the word 'power' is one-root, the word 'property'. In this regard, the above powers are closely related, which does not detract from the right of ownership as a legal category. It only refracts the religious and ethical dogmas of Islam in the legal plane (Krachkovskiy 1990).

Thus, the division of property into valuable (more precisely, subject to appraisal) based on the instructions of the Quran and not assessed has its legal meaning, because transactions with valuable, i.e. the properties allowed by Sharia are valid, and those with unauthorized property are legally void, since such property is taken out of circulation and has no legal protection. In the context of globalization, these provisions are in conflict with the interests of national and international business, which gives rise to legal conflicts in those legal regimes where Islamic fundamentalists are influential.

The provisions of the Qur'an on the endowment by Allah of people with material wealth does not mean a guaranteed divine endowment of certain property. Allah only provides equality of opportunity to receive such property. This is the rule of Sharia: everyone who has taken possession of anyone's property and allowed Sharia to trade in property also acquires the right of ownership. In the tradition, this right goes back to the institution of 'reviving the dead earth', corresponding to the labor theory of property. It is believed that Mohammed himself pointed out the priority of receiving the land of the one who tilled the virgin lands as property.

Sharia recognizes several options for the emergence of property rights: inheritance, donation, marriage redemption, etc., but priority paths are recognized, again, corresponding to the labor theory of property, personal work and entrepreneurship. The Prophet pointed to these positions, having in view of acquisitions from 'the labor of his hands' and from the 'good trade'. In this aspect, there is a clear resemblance to the Protestant economic and legal ethics. In Islam, personal work is considered equal to the worship of Allah. Labor theory involves not only the initial work, but also the labor maintenance of property. According to Sharia, the preservation of property rights is directly dependent on the work effort. Accordingly, the land not used for three years can legally move to another owner, to the one who will use it for its intended purpose. Sharia does not recognize acquisitive prescription.

Here we must agree that Islamic law was traditionally market oriented, and accordingly oriented to the protection of the rights of the owner. The Koran prohibits illegally appropriating someone else's property, bribing judges for this (2: 188). The prophet put in one line blood (meaning life), property and honor. Religious dogma transformed into basic principles of Islamic law, securing the stability of the institution of property. There are also prohibitions to order to dispose of someone else's property and dispose of it without the sanction of the owner and possession of property without a legal basis. Thus, property has firmly taken a central place among the basic values of Islamic law. It is guaranteed and protected by sharia as well as life and faith.

Islam does not oppose property and service to Allah. Along with children, the Qur'an refers to wealth as the 'decoration of life' (18:46). The Prophet pointed out that it is possible to envy those to whom Allah not only gave significant property (wealth), but also the ability to give it for the sake of law, as well as those to whom Allah gave wisdom to teach others. Thus, the ownership of property is not for her, as such, i.e. acquisitions, and 'for the sake of law', this is precisely its Islamic-legal purpose. Property is needed not for the hoarding of treasures, but for personal consumption and help to those in need. The Koran strictly warns money-givers who accumulate gold and silver and do not spend them 'on the cause of Allah' about 'painful punishment' (9:34). Thus, property is not the goal of a faithful Muslim, but only a means of satisfying his vital interests limited to Islam. This position basically coincides with both the Protestant entrepreneurial ethics and the economic and legal position of the Russian Orthodox Church.

In the regulation of property relations strongly religious and ethical beginning. Ownership in the Islamic world can be limited on the basis that Allah, as the supreme owner, manages property within certain limits, as, for example, the principal does, defining conditions. In this case, Islamic law restricts the acquisition of property rights due to the prohibition of its occurrence on objects prohibited by sharia, as well as on property derived from loan interest, from gambling, selling alcohol, betting and lotteries (El-Gamal 2006).

In addition, according to Sharia private objects cannot be located that have an important (strategic) public interest of the state and society: infrastructure facilities, cemeteries, etc. This list is not defined, the prophet pointed out only public use of pastures, water and fire. The legal regime for the use of property, which should not cause harm to anyone, is subject to limitation. Sharia provides for liability for damage, regardless of the degree of fault of the causer. At the same time, Islamic law permits the infliction of damage to the owner, the inviolability of his rights

can lead to more substantial damage. In this case, private harm is subordinated to the idea of preventing common (public) harm according to the well-known principle 'of two evils ...'. These provisions formed the basis of the Muslim-legal institution of the forcible seizure of private property in public law interests for a fair remuneration, which in general is consistent with modern generally accepted international norms.

Restrictions on the property regime are also seen in the ban on monopolism, which follows from the times of the market rules of the times of the Prophet, who sharply criticized those who bought goods and held them up for price inflation. Also, restrictions on the property regime apply to sharia and to the transfer of property. Thus, the testator is entitled to dispose of only a third of his property, while the rest is distributed according to Sharia law between heirs.

Charities of property in the Sharia should include not so much the ethical principles of condemnation of acquisitiveness, as L. Syukiyaynen (2006) does, but special institutions of Islamic law, such as zakat, a compulsory donation of wealthy Muslims to all who need it. In this case, Sharia fully echoes the Protestant and modern liberal concepts of socially responsible owner and antitrust laws.

At the same time, the social emphasis of the Islamic legal concept of property does not make it socialist, Islam has never called for the abolition of private property. In Islamic countries, it is not customary to regulate prices. The Prophet rejected proposals to limit price increases, pointing out that Allah sets the prices, but he restrains them or lets them go. Thus, the Prophet considered the price requests as an unfair request that affects life or property. Sharia does not determine the priority of public ownership, but only limits private rights, emphasizing the role of the state in the economy, orienting it to social and market development. Here, state regulation should always be directed to the common interests and the common good. It is in this vein that the theocratic state has the right to seize private property. In the XX century. The Islamic concept of property showed some flexibility, justifying the often opposite socio-economic reforms. Thus, the 1950–1970s public interest, approved by the Sharia, was the basis for the ideology of agrarian reforms and the nationalization of land in a number of Arab countries that followed the 'socialist' path. Not long after, the same religious and legal principles substantiated the 'third way' of the Arab countries. Today, the Arab states justify the concentration in their hands of strategic infrastructure facilities. The state monopoly on hydrocarbon production, formally prohibited by sharia, is explained from the standpoint of Islamic law by the 'nationwide' nature of such property.

In the Islamic world, large state property coexisted with market freedom, where business based on small and medium-sized property flourished, especially in small-scale production and trade. Sharia should be considered a higher degree of protection of property rights than adat, where, for example, theft does not apply to serious crimes.

2. Constitutional Norms and Property Guarantees in Islamic Countries

The constitutional acts of Islamic countries can be differentiated into directly based on the Sharia and recognizing its source of law (Stahnke and Blitt 2005). The first are the acts of theocratic states, the second - where Islam is the state or the predominant religion.

The Iranian Constitution (Article 4) explicitly states that any legal provisions and institutions are based on Islamic norms. In accordance with this provision, all other articles of the Constitution of the Islamic Republic are built, as well as all legislation and rule-making. The compliance of laws with the norms of Islam is determined by Islamic jurists of faqih, of which the Council for the Protection of the Constitution and Islamic Norms is composed.

The Iranian Constitution indirectly recognizes four forms of ownership - state, cooperative and private (art. 44), as well as personal (art. 47). In the first case, in Iran it is large-scale industry, foreign trade, banks, insurance, energy, dams, radio and television, as well as postal services, telegraph and telephone, civil aviation, etc. In the status of public property (public domain The Constitution) is owned by all the state. Cooperative property in Iran is similar to world practice, and private plays a supporting role in relation to the first and second (Islamic Republic of Iran Constitution).

The Iranian Constitution does not contain a definition of property, but interprets it from the position of labor theory. Thus, in accordance with Art. 46 of the Iranian Constitution, property is the product of exclusively legitimate labor. The law prohibits, on the pretext of ownership of the product of one's labor, from depriving someone of the opportunity to work and earn income. Accordingly, in accordance with Art. 45 of the Constitution, not cultivated land, not exploited objects and escheated property, are transferred to the public domain. The Iranian Constitution (Art. 49) puts in one row the income derived from crimes and from usury, appropriation of property, gambling, abuse of waqf property, organization of dens.

In the constitutional act of Saudi Arabia, basically the power of the Nizam, the Koran and Sunna are enshrined as the supreme law in accordance with which all normative legal acts are developed and adopted. In accordance with the specified Nizam legal system of Saudi Arabia includes three subsystems: non-codified and

existing in the form of theological and legal doctrine, Islamic law, legislation that enshrines the norms of this doctrine and regulations that govern exclusively secular issues.

The legislator in Saudi Arabia is Allah, whose will is expressed in Sharia law, within which the state realizes its rule-making functions. In this regard, legal acts are considered Nizam, i.e. no more than regulations, respectively, the authorities that host them are only regulatory authority. Under these conditions, property issues are fully determined by Islamic law.

Strict compliance with Islamic law by state bodies and subjects is controlled by the Ulema Council, headed by the General Mufti and the Sharia Compliance Committee. At the same time, being the main exporter of hydrocarbons and a developed state, Saudi Arabia actively accepts the norms of international law in terms of regulating business turnover and finance, as well as intellectual property. (In 1994, Saudi Arabia ratified the Universal Copyright Convention). Here the property relations (investors) are securely protected. Private property in the country has comprehensive protection, including, including the principle of the inviolability of the contract. At the same time, non-residents and foreigners cannot buy real estate in the Kingdom, which, to a certain extent, limits ownership, as does the quota for the Saudi partner's share in foreign enterprises (at least 25% of capital). A direct prohibition in the Kingdom is valid only on interest on loans, which, however, in business practice costs by presenting the property to the lender with options.

Despite the fact that Islam (the Sunni version) is the state religion of Jordan, the Constitution of the Kingdom does not contain the mandatory harmonization of the norms of the law with the Sharia. The 1952 Constitution of the Hashemite Kingdom of Jordan also contains no definition of property, only its legal guarantees are given (Article 11) in the spirit of the Anglo-Saxon model, according to which property cannot be alienated except for public benefit, fair compensation and according to law. In the same spirit, the Jordanian Constitution (Article 12) prohibits the forcible seizure of property in the form of loans or confiscation.

The Constitution of the Yemen Arab Republic (1991) also does not link the functioning of the institution of property, as well as the entire legal system, with Sharia norms, with the exception of Article 23, which defines the right of inheritance, which the state guarantees, relying on the principles of Sharia. At the same time, the rest of the Constitution of Yemen has a completely secular character. Assuming the protection and respect of private property as a priority and protecting it in the spirit of generally accepted international regulations (public interest, judicial procedure, fair remuneration) (Articles 7 and 20). The Yemeni legislator does not define the concept of property, including in it natural resources and their derivatives, energy sources, subsoil, territorial waters, shelf. All this is used in the public interest. It is noteworthy that, as in the German Constitution, but more generally, the Constitution of Yemen (Article 22) prescribes the owners (depositors of banks) to improve and develop their potential and use it exclusively for legitimate purposes.

In the Constitution of the Republic of Turkey (1982), Chapter XII is devoted to property relations. Property rights and inheritance are guaranteed (Art. 35) and may be limited by law in the public interest. At the same time, the realization of the right of ownership itself cannot conflict with public interests. The norms of Sharia in this case are not bound by the rule of law.

Property, as well as the right to property under the modern law of Muslim countries is guaranteed by law, is protected not only by constitutional and legal, but also by civil, administrative, and criminal law means. In the judicial practice of Muslim countries, the practice of substantiating a judicial decision is considered trivial as a reference to the theological and legal doctrine, i.e. works of Islamic jurists (Taymasov 2018). At the same time, the courts of Islamic states leading active foreign trade also proceed from international norms, extensively interpreting them in judicial practice, including regarding the right to property. In the spring of 2015, the Danish vessel Maersk Tigris was detained in the territorial waters of Iran for the debts of 15 years ago. The Iranian court recognized the old debts of Maersk Tigris to the Iranian company, which in the case of non-payment was supposed to repay the sale of the vessel (Iran's Cargo Ship Seizure Tied to a \$3.6 Million Court Judgment 2015). At the same time, the Iranian side went far beyond the limits of international law, seizing the vessel on the high seas. International law of the creditor's claim allows for the arrest of a ship in port or at anchor.

In litigations on property abroad, Islamic countries adhere to the laws and customs of the country of jurisdiction. This is well illustrated by the example of many years of consideration of the case of mutual claims by State Duma Deputy V. Lebedev and Iraq regarding real estate in the Center of Moscow, transmitted by the respondent for his father's shares (Zhirinovskiy's son sued a kindergarten from Iraq and a school in the center of Moscow 2013).

In the Republic of Turkey (a secular state with a strong influence of Islam), the issues of enforcing property are taken in a separate industry – enforcement proceedings, which are not, as in Russia, a stage of a civil or arbitration process, but are independent as a branch of procedural law (Basic Debt Collection Concepts in Turkey).

Since 2017, court decisions in Uzbekistan have increasingly begun to see cases of decisions to return former state-owned real estate objects privatized over the past 25 years. At the same time, the courts are not guided by the law and not by the rules of Sharia, but by 'decrees or an oral decree of the president,' which contradicts the constitutional guarantees of the inviolability of private property (Uzbekistan began to select private property privatized under Karimov 2017). A similar picture is observed in other post-Soviet states of Central Asia.

In general, in the jurisprudence of Islamic countries (and states where Islam is the predominant religion), the institution of property does not receive firm constitutional guarantees and is rarely viewed as an inter-sectoral institution. To a greater degree, property is assumed to be state (including from a divine principle), and from here the courts see the priority of the state in property relations.

Considering property as an interdisciplinary institution, in the previous paragraphs we focused on its understanding and application in criminal, civil and administrative legal relations. With respect to Islamic law, this is much more difficult to do, since the process, both criminal and civil (primarily in Saudi Arabia and Iran), is generally based on the norms of Islamic law, formalized in the lower classes. Following the Sharia, these acts do not differentiate between civil and criminal proceedings (Duderija 2014).

In the Russian literature, the problem of criminal law protection of property in Muslim law is presented as far from being resolved (Elayan 2000). Offenses against property remain the most widespread of criminal acts in the Islamic world. Approximately a quarter of the norms of criminal legislation of Arab countries, one way or another, refers to crimes against property (Petrovsky 2013).

The concept of ownership in the Islamic legal doctrine is not developed, since the theft and robbery here are classified as *hadd* and the responsibility for them is established by the Qur'an. In this regard, the definition of the object of criminal encroachments (property) in the *hadd* crimes is considered a dogma emanating from Allah and the Prophet and thus not subject to any correction, which prevents the development of criminal law doctrine and thought in accordance with the requirements of modern times.

Indirectly, in terms of the composition of theft in traditional Muslim criminal law, one can construct an understanding of 'property' as legal ownership and disposal (Powers 2005). At the same time, the value of the stolen must reach the amount established by the Sharia, otherwise the act, even intentional, loses public danger and does not qualify as a *hadd*, which is punished in the form of clipping.

Sharia differentiates crimes against property into two groups: those who encroach upon the 'right of Allah' and, accordingly, the interests of the Muslim community and therefore are especially dangerous (theft and robbery). The second group includes other property crimes ('*tazir*' – fraud, etc.) (Mohammed al Orimi 2002).

Conclusions and Further Research

Note that the impact of Sharia is most pronounced in the theocratic states: Iran, Saudi Arabia, Kuwait, while the influence of traditional Muslim law on the criminal law of Jordan, Turkey, Algeria or Palestine is minimal. These countries adopted continental (mostly French) legal traditions. At the same time, the intensification of Islam, including radical ones, stimulates the trend of the Renaissance of the principles and norms of traditional Muslim criminal law (Libya, Mauritania, Abu Dhabi, etc.).

The civilistic understanding of property is basically stated by us above. Sharia became a source including the civil law of the Arab and Central Asian states. At the same time, the processes of globalization and the connection with the world market are forced to transform the civil legislation of these countries. Thus, in the Civil Code of the United Arab Emirates in 1985 in the regulation of property relations there is a clear influence of the continental model (Napoleon's Code) in combination with Islamic law. The code, in accordance with the Sharia, provides for the gradation of property on having value and its deprived it. In general, in the civil-legal plane in matters of property, the traditional Islamic on the one hand and the continental and Atlantic legal models, on the other, do not contradict each other, but rather interact.

Thus, property, being a comprehensive legal institution of Islamic law, is defined in the Islamic doctrine as a set of rules that establish, in accordance with the Sharia, the right to possess, dispose and use property to extract useful properties from it, allowed by the religious canon and law.

Consequently, property is characterized by freedom, but not absolute power, which is limited by sharia and law. The Islamic legislator has the right, referring to the Supreme Legislator, to restrict this right or to deprive it in public interests, if possible by agreeing on private and public interests and compensating the owner for damage. This understanding echoes the existing norms of international law, which also do not recognize the owner of a full and absolute right when there is a need to protect the public interest.

In Muslim doctrine, the right of ownership arises on strictly defined things, the concept of which is the subject of discussion. In Muslim law, the status of several forms of ownership is fixed: individual (private), most often labor or commercial. It includes items that meet the needs of the first level: food, shelter, etc., which brings this form

closer to personal property. In addition, private property in Islamic law includes the means of production, land, enterprises, money, etc. This reflects the dual nature of private property, which makes a profit, but also performs certain social functions. Islam is not neutral to property, it does not just stimulate, but forces property owners to use their property productively, which makes modern Islam quite market-oriented.

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