THE U.S. CONSTITUTIONAL CASE "LOCHNER' IN THE EYES OF ISLAMIC LAW:
Similarities, differences, Employment Law Values

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Abstract

This Article aims to answer two main research questions. The first examines the similarities and differences between the Lochner case and Islamic law to determine whether Islamic law has any counterparts or parallels to Lochner jurisprudence.

The second research question focuses on examining the core values of the employment relationship, as viewed in both the Lochner case and Islamic legal thought.

To clarify the first question, this Article discusses two themes in Islamic law: government intervention in pricing and its ability to enforce taxes. It additionally considers Al-Hisba legal system as a complementary part of the "pricing" theme. Similarly, the waqf (endowment) system is a fundamental part of discussing the rule of taxes. Regarding the second question, this Article references various Islamic law rulings to illustrate the different core values from both the Lochner case and Islamic law perspectives. Islamic law shares some similarities with Lochner case philosophy and other economic philosophies. However, it also has its own peculiarities and characteristics, based on different aspects of Islamic law jurisprudence.

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I. Introduction: the legal context of Lochner Case

In 1897, the New York legislature enacted what is known as the "labor law of the State of New York."[1] It states in its 110th Section of Article 8, Chapter 415 that "[n]o employee shall be required, or permitted, to work in a biscuit, bread, or cake bakery, or confectionary establishment, more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make average of ten hours per day for the number of days during such week in which such employee shall work."[2] Joseph Lochner, who had a Utica bakery, violated this law by employing some bakers to work more than the permitted hours and was convicted.[3] Thereafter, Lochner appealed, arguing that "the law unconstitutionally burdened his right of contracting with employees in violation of the Fourteenth Amendment's Due Process Clause."[4] The Supreme Court ruled that this statute was an arbitrary interference with the freedom to contract guaranteed by the Fourteenth Amendment of the U.S. Constitution which could not be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare. The Court also added that "[t]he right

1. I sincerely thank and pray for the soul of my father, Abdelgawad Magdy, who passed away during the final editing stage of this paper. His life, values, and endeavors have been a constant source of guidance for me. I also extend my gratitude to Professor William Forbath at the UT Austin Law School for his invaluable and comprehensive discussions during the writing of this paper.

2. 1897 Laws N.Y. 118, c. 415, art. 8, § 110.

3. Lochner v. New York, 198 U.S. 45 (1905).

4. Noah R. Feldman & Kathleen Sullivan, Constitutional Law 489 (20th ed. 2019).

to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."[5] Therefore, the restrictions imposed by the statute were unconstitutional.

Years later,[6] Egypt witnessed one of the largest strikes in its modern history. This strike continued for almost three months, from December of 1899 to February of 1900. The number of strikers was 30,000 workers when the Egyptian population was over 9.7 million persons at that time.[7] The majority of the strikers were employed by colonial-administered tobacco companies.[8] They asked for two things: better wages and fewer working hours.

The striking workers raised a request to Lord Cromer, the British Controller-General, asking for governmental interference and arbitration between them and the companies' owners.[9] Cromer declined the request, justifying his refusal with an assertion that the role of government is restricted to protecting the freedom of industry, labor, and public safety unless the two parties (employers and employees) accept the arbitration together.[10]

The main cause behind this strike was the principle of "individualism" that relies on "the freedom of labor, trading, [and] industry."[11] More importantly, calls for the required role of the state in the market, economy, and advocation for workers and their rights started to increase.[12]

During that debate, Farah Anton[13] trialed the reasons for this social injustice in the Arab world and even in the U.S and Europe.[14] Anton clearly mentioned that the original reason for the current dispute in the U.S., Europe, and the Arab World is the principle of *laissez-faire*.[15] According to Anton, workers in this system have the right to strike, and employers have the entire right to ignore their calls, continue with their practices, and replace them with other workers.[16] Additionally, Anton criticized the assumption that political authority (government) is neutral in this conflict. In fact, the governmental role ends up protecting

5. *Lochner*, 198 U.S. at 53.

6. The Lochner case began in 1897, and the hearing was on February 23, 24, 1905. The decision was given on April 17, 1905.

7. Farah Anton, *Mohamed Abdou wa Rayah fi Al-masala Al-ijtima'ya* [*Mohamed Abdou and His Opinion on the Social Question*], 4 Majalat Al-Jam'a [The University Magazine] 177 (Sept. 1906) https://archive.org/details/arabic-aljamyat-magazine/-205%مجلة20%الجامعة–04/page/n31/mode/2up.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Farah Anton*, Arab Philosophers, http://arabphilosophers.com/English/philosophers/modern/modern-names/E_F_Anton.htm.

14. Anton, *supra* note 7, at 29.

15. *Id.*

16. *Id.*

the interests of the elite and the capital economic system.[17] Anton assigned three tasks to the government during any conflicts between employees and employers: 1) Protecting the order and security in the streets if workers make breaches; 2) Protecting manufacturers and business units if there are any threats; and 3) Protecting other workers who refuse to join the strikes and decide to work during their colleagues' strike. Anton concluded that the government is in the same loop as the economic elite in protecting their interests against the workers' rights.[18]

Anton sent a question to Muhammad Abdu, the Islamic Legal Chief Jurist, asking him about the legitimate role of the government in the relationship between employers and employees.[19] Abdu replied to the legal question in detail, assuring that the state has a mandatory role in intervening in the economic life to establish and administer the fundamental industries, improve the conditions of the workers (either the working hours or their payment), or determine a fair price in the market.[20] The state intervention's aim, according to Abdu, must be to enforce justice in the employer-employee relationship.[21] Abdu mentioned that during the times of a strike, the government has a role in intervening and looking into the dispute to determine who has the right and fix the situation.[22]

The two cases, the *Lochner* case in the U.S. and the workers strike in Egypt, occurred approximately at the same time. However, the legal reasoning and jurisprudence both cases had were different. They had analogies and affinities. Both had paradoxes and differences, as presented in this Article.

II. Lochner Case and Islamic Law: Analogies or Affinities

A. Does Lochner share similarities with Islamic law?

Abdu's opinion is the opposite of the majority opinion in the *Lochner* case. However, the question is whether Abdu's legal opinion prevails in Islamic law, or whether it presents a moment of interruption in Islamic legal thought. Does *Lochner*'s case philosophy have analogies or affinities with Islamic legal thought other than Abdu's school? In fact, it is difficult to argue that this is an individual opinion in Islamic legal thought. The Article introduces below a debate regarding two main questions in Islamic legal jurisprudence that could exemplify the apparent similarities. The first question concerns the rule of government intervention in pricing in the market. The second is the government's taxation rule.

17. *Id.*
18. *Id.*
19. Anton, *supra* note 7, at 131.
20. *Id.*
21. *Id.*
22. *Id.*

1. Does the government have the right to fix market prices?

Islamic schools have different legal thoughts in this regard. *The Shafi'i* and *Hanbali* schools forbade the government's role in pricing. In contrast, the *Maliki* and *Hanafi* schools permitted that role.[23] Before elaborating on the answer to this question, four points should be clarified.

First, the *Lochner* case reflects an economic theory that relies on *lais-sez-faire* and anti-redistributive principles.[24] However, achieving justice is the main aim of forbidding government intervention in market prices by Islamic legal schools.[25] The purpose of Islamic law is to prevent government oppression towards employers or employees.[26] This is why there are many exceptions and details within legal schools that forbid any governmental role in pricing in the market. In contrast, in the *Lochner* case, the Court had fears that if it upheld or allowed this law, the legislature would pass more laws in other occupations, thereby restricting freedom to work.[27] Islamic legal schools that might appear to align with *Lochner*'s principles do not share the *Lochner* Court's doctrine fears. Their concern is that government intervention could lead to oppression and injustice.

Second, economic theory in Islamic law is not isolated from social theory (family and society), political theory, or religious theory. These systems are consistent in terms of their main principles and objectives. This is why the main principles and objectives (including core values) are present across all branches of theory: social, political, and economic.[28] While the specific objectives and

23. The most prevailing and prominent Islamic legal schools across Islamic history are four: Shafi`i, Hanafi, Maliki, Hanbali. There were other Islamic legal jurists and schools across Islamic history, however, these four schools are the ones that continued and succeeded to form very solid structures through coherent methods and tools. *See* Wael Hallaq, A History of Islamic Legal Theories (1997).

24. Joseph Fishkin & William Forbath, The Anti-Oligarchy Constitution: Restructuring the Economic Foundation of American Democracy 138–84 (2022).

25. Mohamed Al-Tahir ibn Ashur, Usul Al-nidham Al-ijtima'y fi Al-Islam [The Rudiments of the Social Sciences within Islam] 202–04 (1965).

26. *Id.*

27. Feldman & Sullivan, *supra* note 4, at 491.

28. *See* Muhamed Al-Tahir ibn Ashur, Maqasid Al-shari'a Al-Islamiyeh [The Objectives of Islamic Law] (1970), where he classifies the Islamic Law principles into three levels, each level complementing and achieving the one above it; specific principles, sector principles, and the general principles. In application, it is not allowed that specific principles contradict sector principles, or general principles. The same applies for the sector principles as none of these principles can violate the general principles. This could be surprising, from the perspective of U.S. legal thought. In the U.S., most legal thinkers, no matter whether "liberal" or "conservative" or "left" or "right," are legal "realists," they are persuaded by the arguments first set out by figures like Justice Holmes and later honed by figures like Walter Cook and Karl Llewellyn and other realists (*see* Morton Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1992)). These arguments in a nutshell are as follows. It is impossible for general principles and general objectives, whether legal, social,

goals for each branch may vary according to different economic, political, and social contexts, their underlying core principles remain the same. Furthermore, these principles do not contradict one another. They interact and complement each other in intertwined methods, both intellectually and practically.

Third, the main reason for the disagreement between Islamic legal schools regarding the role of the government in the market is based on the interpretation of one of the prophetic sayings (*Hadith*). The narration states that people came to Prophet Muhammad complaining about an increase in prices (which was not due to any exploitation or the merchants' desire to maximize their profits) and asked him to fix the prices in the market to make them more affordable.[29] Prophet Muhammad said, "God is the one who fixes the prices, I do not want to meet God in the Day of Judgment while carrying any oppression towards any person as a result of injustice in pricing."[30]

The Islamic legal schools that classified this saying (*Hadith*) as one of the Prophet's sayings in his capacity as a political character -political leader and governor-[31] approve the governor's ability to adjust pricing in the market. Methodological jurists in Islamic law approved that all rulings under the classification of a political character capacity are subject to change according to the public interest and objectives of Islamic law. On the other hand, other Islamic legal schools, which classified this saying as one of the Prophet's sayings in his capacity as a prophetic character (not a political or administrative one), refused any governmental intervention in pricing goods in the market. All methodological

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or political, to be consistent with one another and "not contradicting in any way." As a matter of analytic logic, they showed, when you go about applying the general principles to particular cases, there will inevitably be clashes and contradictions, and judges or jurists inevitably will be able to apply the rival principles (freedom of contract versus the security of property rights, for example) in ways that will reach opposing results. And one can always logically defend and justify both opposing results, as being a proper derivation from the general principles. That is what Holmes meant in saying general principles cannot decide concrete cases or the life of the law is not logic (and he thought the same thing with regard to social or political principles); it is experience. For Holmes that meant the judge or jurist simply chose which side he was on, in a given contest. It was more or less pure choice, not commanded by the general principles or any general scheme of values or law, which were always indeterminate in relation to particular controversies. Instead, it was a political or policy or a value choice among competing principles.

29. Muhammad Ibn Daqiq Al-Edi, Al-Iqtirah fi Bayan Al-Istilah 113 (1996).

30. *Id.*

31. This is a very fundamental point in the Islamic legal theory. Jurists differentiated between different actions taken by the Prophet based on the 'intent' of the Prophet himself. "There is a difference between the Prophet's actions in the capacity of a conveyer of the divine message, a judge, and a leader . . . The implication in the law is that what he says or does as a conveyer goes is a general and permanent ruling . . . [However,] decisions related to the military, public trust, . . . appointing judges and governors, distributing spoils of war, and signing treaties . . . are specific to leaders." *See* 1 Shihāb al-Dīn al-Qarāfī, al-Furūq [The Differences] 357 (Khalil Mansour ed. 1997).

jurists in Islamic law agree that all rulings of a prophetic character are stable, continuing, and not subject to any change across different times and places.

Fourth, and most importantly, all Islamic legal schools, whether they agree or disagree with pricing intervention, base their opinions on avoiding any kind of oppression or injustice according to religious and ethical principles, not solely materialistic ones.

a. The schools which forbade pricing items:

i. Shafi`i school

The first school that forbade government intervention in pricing is the Shafi'i School. Al-Mawardy explained the Shafi'i school's legal opinion that forcing people to sell their property at a certain price presents a real arbitrary intervention over their right.[32] This policy will cause real oppression.[33] Al-Shawkani, from the Zaidi School, had a close legal opinion to the Shafi'i one. He reasoned his refusal to governmental intervention in pricing items in the market by saying that the role of government is to care upon the entire interests of all its people, both the sellers and the buyers. The interests of buyers, by decreasing the price of items they will buy, must not be more important in the eyes of the government than the interests of the sellers to keep the price higher. At this point, the government should leave both parties to agree. Enforcing/obliging the seller to sell his good at a price he/she does not accept, or like, presents a breach of one of the main principles of Islamic law, which is the "full acceptance of selling and buying."[34] This principle is extracted from the Quranic text, "O you who have believed, do not consume one another's wealth unjustly but only (In Lawful) business by mutual consent."[35]

ii. Hanbali school

The second school that forbade that role as well is the Hanbali school. They adopted such an approach aiming to avoid any oppression, coercion, or injustice. Ibn-Qudama, one of the prominent scholars in the Hanbali School, said that the government intervention in the market to fix the prices is prohibited and illegal. He reasoned that, as the Prophet mentioned in his saying, this intervention to fix prices is oppression and injustice. Additionally, government intervention to prevent anyone from selling his goods (his property), except at fixed prices, presents an illegitimate breach if the two parties (buyers and sellers) explicitly or implicitly agree.[36]

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32. 5 Abo AL-Hassan Al Mawardi, Al Hawi Al Kabeer fi fiqh Madhab Al-Shafii 409 (1999).
33. *Id.*
34. Muhammad bin Ali Al-Shūkānī, Nīl Al-Awṭār, Al-Risālah, 248.
35. Al Quran, Surah An-Nisaa [The Women], 4:29.
36. āibn qaddāmah, Al-Mughnī 312 (1969).

b. The Schools which permitted pricing items

i. Maliki School

Maliki School is the most influential school that advocates governmental intervention in pricing as a legitimate power for the governor. Imam Malik, the founder of the Maliki school, permitted pricing whenever there is a need for that. He allocated this tool as one of the legitimate powers of the governor. However, he asked, as a mandatory requirement, that this intervention has to be for the interest of all people: buyers and sellers. Additionally, it should be reasonable to consider both fair profit for sellers and justifiable price for buyers.[37]

Additionally, in 250 BC, Maliki legal scholar *Yahya ibn Omar* had been asked about the governor who needed to fix the price for slaughters and food industries for people in the market because merchants could increase prices in a way that could affect buyers. Additionally, what is the role of merchants who insist on buying goods at lower prices? He answered in his book, *The Rulings of the Market*, that the governor has the right to fix the price for merchants in a way that keeps a fair profit for them and keeps the interest of the buyers as well. In the same fatwa, he approved the prevention of some merchants (if they are only a few merchants) who sell their goods at a lower price in a way that could affect the market and the majority of merchants.[38]

Ibn Omar mentioned that the governor must achieve justice in the markets of the state. Additionally, he should oversee them to ensure that there is no corruption, exploitation, defect in weights, or currency.[39]

One of Medina's Jurists *Rabia Alrai'* (136 BC) stated that: "Market is one of the fundamental infrastructures for the Muslim Society that achieve and keep their interests and needs. For this reason, the governor should not let merchants do whatever they wish to take control of the market in a way that could harm either buyers or other weak merchants." He added that "the governor has to do that even if it reaches to expel those merchants outside the market and replace them." *Rabia* also "favored fixing prices at a fair rate." However, he observed "the necessity of balancing this process to prevent merchants from leaving the market".[40]

ii. Hanafi School

Hanafi school is in a middle position. They are not principally in favor of government intervention in pricing. However, they legitimized it for the public interest if the absence of this role would harm the people. Hanafi scholar

37. Abū Al-walīd Al-bājī, Al-muntaqá [The Abridgement] 18 (1913).

38. This could be similar to the concept of protecting competition prevailing in most capitalist economies nowadays. Yaḥyá Ibn 'Umar, Aḥkām Al-sūq [Guidelines of the Market] 107 (1975).

39. *Id.* at 104.

40. Yusuf Ibn 'Abd Al-Barr, Al-Istidhkār [The Memorization] 411–12 (2000).

Al-Kamal Ibn Al-Humam mentioned that they do not prefer setting prices in the market. He reasoned that this is because the price is the mere right of the contracting party. Thereby, they have the right to determine and evaluate the rate. According to *Ibn Al-Humam*, the governor should not intervene in this right, except in case his abstention causes harm to the people. *Ibn Al-Humam* mentioned clearly that if the merchants raised their prices in a way that would overly burden people in the market, the justice has the right to intervene to set a fair price after consulting different experts who are specialists in this business. *Ibn Al-Humam* assigned that right to the justice, not the governor.[41]

Another prominent scholar in the Hanafi School, *Ibn Nujaim*, mentioned that justice intervention in pricing when merchants unreasonably raise their prices relies on jurisprudential norms. This norm states that limited and specific harm should be endured in order to avoid unlimited and general harm.[42]

Jurists extended these discussions and many of these rulings to the wages of the fundamental and infrastructure of industries in Muslim society. If the workers in one of the industries refuse to work and meet the needs of the people without reasonable causes or justifications, the governor has the right to oblige them to work at a fair price or rate. The governor has the same right to make sure that people will not buy their goods at a lesser price. It has to be fair for both sides.[43]

c. New reformers of the Hanbali School: Ibn Taymiyya

Ibn Taymiyya [44] went further than all the four Islamic legal schools by upgrading the ruling from being only permissible to being a mandatory obligation over the Governor in certain cases. He interpreted the prophetic saying by specifying its scope and authority in certain situations and cases that occurred at his time. Therefore, this prophetic saying was in the capacity of a leader. Most importantly, he distinguished between two pricing types. He classified pricing into two types: The first is forbidden when it carries oppression and injustice. The second type is permissible when justice is carried out. He introduced an example for the first way when pricing includes oppression over the people and pushing them to sell their goods unreasonably at a price they do not accept or like. As for the second way, he presented examples where if the governor

41. Al-Kamāl āibn Al-Humām, Fatḥ Al-Qadīr [The Almighty Opening] 59 (1970).

42. Ibn Najīm, Al-Ashbāh Wal-Nẓā'r [Similarities and Analogies] 74–75 (Al-Kotob Al-Ilmiia ed.).

43. *See Hikm Al-tas'eer 'ind Ghila' Al-asa'r*, Dar Al-ifta' Al-masrya (Feb. 28, 2017), https://www.dar-alifta.org/ar/fatawa/13527/حكم-التسعير-عند-غلاء-الاسعار.

44. Ibn Taymiyyais one of the remarkable scholars in the Hanbali school. More importantly, he is considered as one of the founders of a new legal school that exceeded the classical Hanbali school.

obliges the merchants to sell with an equivalent fair price, and restrains them from increasing this price, this is not only permissible but is a mandatory obligation over him.[45]

Ibn Taymiyya addressed the anti-competitive practices with the example that if the merchants agreed on restricting selling and buying these goods exclusively in the hand of some merchants that means no one will either buy the raw materials of these goods from the main supplier or sell them in the market other than those limited merchants. If other merchants try to sell these goods or join this loop, they will be affected even indirectly. *Ibn Taymiyya* forced the governor to enforce a certain price to buy and sell these goods at an equivalent fair rate.

Ibn Taymiyya mentioned the case as well when the buyers altogether agree not to buy a certain good from the merchants except for less than the fair price, or the merchants agree not to sell a certain good for the buyers except for an unreasonable price. In both cases, the governor has a mandatory role to intervene by fixing a fair price in both cases to avoid the oppression, injustice, and harm over both buyers and sellers.[46]

B. Commentary and another complementary form

Even though the pricing theme in Islamic law could have the same logic as in the *Lochner* case, which is the refusal of government intervention in pricing goods and services or fixing working hours, the core philosophy is completely different. *Lochner's* philosophy aims at keeping the state outside business and contracts (anti-paternalism) to avoid the "aggrandizement of capital by law" and designs the market to depend on "demand and supply".[47] In addition, it aims to avoid redistributing bargaining power or the workplace authority.[48] On the contrary, Islamic legal schools forbade government intervention in pricing to avoid injustice or oppression. All Islamic legal schools -in both opinions- agreed on one of the fundamental Islamic principles that presented a holistic principle in Islamic law. This principle is mentioned in the Quranic text -the most authentic legal resource in Islamic law- which is avoiding making money "a perpetual distribution among the rich from among [all people]."[49] This principle is mentioned in the context of the obligation for Muslims to pay *Zakat*, which is an annual portion of their wealth that has to be paid to certain and specific persons in society, such as the poor and others. As mentioned, Islamic legal philosophy is coherent, consistent, and works as part of the whole.

45. Ibn Tīmīyah, Majmū 'Al-fatāwá 76 (2004).
46. *Id.*
47. *See* Lochner v. New York, 198 U.S. 45 (1905); discussions regarding the Judicial origins of Lochner legal philosophy.
48. *Id.*
49. Al Quran, Surah Al-Hashr [The Exile], 59:7.

1. The complementary form: Hisba (The administrative and societal overseeing)

Despite that Islamic schools discussed and disagreed on pricing, they all recognized and approved one fundamental principle that could be considered as a religious, doctrinal, legal, and administrative system: *Al-Hisba*.[50] This principle represents a complementary part of a comprehensive reading of Islamic law philosophy based on the Quranic order to "command rights and forbid wrongs."[51] In Islamic thought, all Muslims are obliged to follow this order with specific jurisprudence to protect the public interest and secure private life. To enhance the applications and objectives of Islamic law in the public sphere, especially in economic life, Islamic legal schools developed an administrative system to practice this role in the market.[52] The *Hisba* system has broad roles that include advocating for the rights of orphans, protecting the rights of animals[53], avoiding harm to public roads, and assisting women whose families restrain them from the fundamental right to marriage. The Hisba system's administrative role in the market is crucial.[54]

All Islamic schools, including those that forbade governmental intervention in pricing and those that approved it, agreed to establish an administrative system that led to the overseeing of the market. In the Shafi'i School, the strongest school in its opinion against governmental intervention in pricing, many prominent scholars authored fundamental legal books on the role of the state and government in overseeing the market. They also organized how the state should intervene in the market to ensure that every industry and working class follows quality standards. Most importantly, they have a mandatory duty to keep the market following the guidelines of public health and meet buyers' interests by avoiding corrupt commodities, manipulating or cheating with scales' weights, assuring the validity of the currency, and consumer protection. *Al-Mawardy*[55] authored his book, *Al-aḥkām Al-sulṭānīyah*. Additionally, the chief justice in the *Shafi'i* School, *Al-Subaki*, authored another book,*Mu 'īd Al-nu 'm Wamubīd*

50. *See* Cl. Cahen et al., *Hisba, in* Encyclopedia of Islam, Second Edition (P.J. Bearman ed., 2012). Hibsa is a "non-Ḳurʾānic term which is used to mean on the one hand the duty of every Muslim to 'promote good and forbid evil' and, on the other, the function of the person who is effectively entrusted in a town with the application of this rule in the supervision of moral behaviour and more particularly of the markets; this person entrusted with the *ḥisba* was called the *muḥtasib*."

51. *See* Michel Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001).

52. *See* Mohamed Kamal El-Deen Imam, Usul Al-hisba fi Al-Islam [The Principles of Hisba in Islamic Law] (1986).

53. For example, the owner should not put additional weight on the back of a horse or additional effort on any other animals beyond what they can stand.

54. Al-bājī, *supra* note 37.

55. One of the prominent scholars in the Shafi`i school.

Al-niqam, clarifying the duties and obligations of all parties in the market and provided legal and ethical guidelines. Similarly, in the *Hanbali* School, *Ibn Taymiyya* and *Ibn-Al-Qayyim* wrote a very brilliant book in this regard. Likewise, *Maliki* scholar *Yahya ibn Omar* authored his book about the rulings of the market clarifying similar obligations and outlines.

This could be a central similarity between the *Lochner* and Islamic legal orders. Both legal orders somewhat share this feature. In *Lochner* judicial doctrine, there is a crucial constitutional distinction between the state's "police power" on the one hand and the rights of freedom of contract and the rights of property to be secured against governmental redistribution on the other hand. However, similar to the Islamic legal order, there is an undisputed sphere of governmental regulation that the state government may undertake which is concerned with the general rubric of public health, safety, and morals. This kind of governmental intervention is cast as being not "class legislation" and not redistributive in any forbidden sense. Instead, it serves the general interest of the public. The kind of cases has just been mentioned as falling under these principles are more or less of the same genre of regulation as the "police power." That's why the *Lochner* court did not uphold the statute in question as the constitutional right to freedom of contract prevailed over the state's "police power." The court prioritized the former right over the latter as "there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislation to interfere with the right to labor, and with the right to free contract on the part of the individual, either as employer or employee."[56] Therefore, "unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."[57] the constitutional right of freedom of contract must prevail. It is striking how the parallel/resemblance fits, even at least a level of generality, between the *Lochner* outlook on the one hand and what the Shafi'i school states on the other hand.

2. Examples of Hisba's roles in the market

All Islamic legal schools wrote about the obligations and duties of the "*Muhtasib*,"[58] the one who implements the acts of *Hisba*. Those obligations varied from industry to industry. Jurists discussed different types of industries.[59] The following part of the Article gives example by clarifying the rulings and

56. Lochner v. New York, 198 U.S. 45, 59 (1905).

57. *Id.* at 61

58. *Muhtasib* is the public employee who practices the role of Hisba in the society, ensuring the compliance between the societal practice and the state regulations.

59. *See* Mohmaed Abdelaziz Morshid, Nidham Al-hisba fi Al-Islam [Hisba in Islam: Comparative and Systematic Approach] 115–50 (1985).

guidelines of the baking industry[60]. Some of these regulations of bakeries, from my point of view, would be upheld by the majority opinion of the *Lochner* court, especially the second point. Others would be different from what *Lochner* would allow. They would seem to the *Lochner* Court as interference with freedom of enterprise, as the last point mentioned here.

1) *Muhtasib* must register all bakers and the locations of their bakeries.[61] 2) *Muhtasib* has to compel bakers to raise the ceiling of their shops, create wide windows in their ceilings, open shop doors to avoid harming people when they buy bread, and so on other commodities.[62] This point is significantly similar to the judicial doctrine of the *Lochner* Court, as it comes under the state's "police power" serving public health. 3) The baker must wipe the oven with a clean rag after heating and before baking. 4) *Muhtasib* must compel bakers to ensure the cleanliness of the water containers they use in baking, cover it, and clean the entire used materials in the baking process.[63] 5) *Muhtasib* must oversee them, assuring that they sift the flour with dense sieves, and repeat the process until the flour is free of bran.[64] 6) During the baking process, the bakers must wear a clean dress. The dress must be without sleeves. 7) Baker must wear a mask over his/her face to guarantee that nothing from his mouth will mix with the dough.[65] 8) He must pull/wear a white band on his forehead so that his sweat does not descend into the dough. Additionally, he must shave his arms so that nothing falls into the dough. 9) He must not knead with his feet, knees, or elbows, because that is an insult to the required appreciation of the value of food.[66]

At the same time, the governor or whoever is deputed by the governor must completely oversee the process of baking to restrain them from cheating the bread, like mixing the flour of the bread with rice flour or any other material that would make its weight heavier.[67] In addition, the governor or the *Muhstasib* must oversee the process of selling bread to ensure that the quality of bread is as high as it should be and not mixed with false flour. Most importantly, and that which represents an explicit difference from what the *Lochner* Court would allow as representing in their judicial doctrine a significant interference with the freedom of enterprise, the governor or the *Muhtasib* must limit the amount that each baker should bake every day to ensure the sustainability and sufficiency of

60. I extracted those rulings from two main Islamic legal resources who had been authored 850–1000 years ago.

61. *See* Abdelrahman bin Basām, Nihāyat Al-rutbah fī Tilab Al-ḥasabah 21–22 (2003).

62. *See* Muḥammadun Bn Al-ukhūwah, Ma ʻālim Al-qirbah fī Aḥkām Al-ḥasabah 91 (Al-kutub Al- ʻilmīyah 2003).

63. *Id.* at 23.

64. *Id.* At 43.

65. Anton, *supra* note 7, at 107.

66. *Id.*

67. *Id.* at 24, 34, 97.

bread in the state. For the Lochner Court, there is no "material danger to public health or the health of employees" to justify this interference with the freedom of contract.

Additionally, the assistant bakers who deliver the bread and take the flour must be young because they enter the homes of the people and breach their privacy.[68]

C. What is the rule of governmental taxation?

The second theme in Islamic law that could present apparent similarities on its face with *Lochner's* philosophy of anti-redistributionism and anti-paternalism is taxation. Islamic law did not witness a typical term for taxes at the beginning. The Arabic term for taxes is = "Dara'ib." However, Islamic law has known the term (mukus). Mainstream thought in Islamic law agreed that mukus is approximately equivalent to (Taxes/Dara'ib). There are many forms of mukus in the history of Islamic society, particularly in the market. Governors sometimes imposed them on all transactions. At other times, they were levied on certain industries. More importantly, there was a consensus in Islamic jurisprudence on the prohibition of taxes. Maliki, Hanafi, Shafi`i, and Hanbali schools critically forbade the Mukus/Taxes. They considered it to take people's money wrongfully, without their consent. Even though some governors were ordering collecting taxes/mukos, Muslim jurists refused to legitimize those orders and disclosed that those rulings were critical forbidden sins.[69]

This ruling could be interpreted on its face as "anti-distribution" theory, or "anti-paternalism" philosophy. Conversely, there are many discrepancies between these theories and the core philosophy of Islamic law behind this ruling.

First, Islamic law obliged "Zakat" upon the Muslims on their wealth: money, gold, silver, earth metals, crops, fruits, and cattle (camels, cows, and sheep). All Muslims who own wealth in these forms beyond a certain portion are obliged to pay an amount of their property every year. Paying Zakat is one of the pillars of Islam. The one who willingly and knowingly neglects the obligation of paying zakat will not be considered a true Muslim.[70] The Quranic order of paying zakat reasoned it by avoiding making money "perpetually distributed among the rich from among [all people]."[71]

Second, the prohibition of mukus/taxes in Islamic law was for any amount beyond the obligatory portion of zakat. Governors have the duty,not only the right, to collect zakat from Muslims. Any amount more than the obligatory portion of zakat was forbidden and had been considered as mukus. Moreover, if

68. *Id.*
69. *See* Abdelkarim Jalol, *The Rulings of Mouks*, 29 Arab J. of Sci. Publ'n (2021).
70. Mahmoud Shaltūt, Al-Islam, Aqida wa-Shari'a [Islam: Doctrine and Law] (1991).
71. Cook, *supra* note 51.

any person pays mukus/taxes to the governor, it will not release him/her from the duty of zakat. This denotes the extent to which jurists delegitimize mukus/taxes.

Third, Muslim legal jurists reasoned this prohibition, stating that the principal rule was that the wealth and property of people are to be secured. No one has the right to force people to pay money other than zakat. They clearly expressed their fears of injustices and the corruption of governors, who would gain and gather that money from the people without any transparency. This is why many jurisprudential debates regarding the ruling of taxes observed the wealth and welfare status of those governors. Additionally, these debates asked the governors to sell their luxurious property before enforcing taxes on the property of Muslims. They considered allowing this tool as the legitimization of taking people's money wrongfully and unlawfully.

Fourth, Muslim jurists in the first four centuries of Islamic law were somewhat less strict regarding the legitimization of asking wealthy people to pay more than zakat (taxes). However, from the Mamluk period until the prominent legal jurist *Shaik Ulyash* became more restricted and less flexible. It could be easily understood as a reflection of the degree of political legitimacy of the political branches and the lack of jurists' confidence in rulers.

Fifth, Islamic schools approved asking people to pay money (even by taxes) in major calamities or real critical necessities.[72] However, they called for many restrictions and criteria to guarantee that money will be paid in the right way and that society is in critical need of them.[73]

The exceptional examples that Islamic schools have approved are:

a) The *Hanafi* School introduced some examples of these needs. *Ibn Abidin* mentioned examples like "creating the big rivers that serve the public interest of people, assigning guards to protect the markets and homes especially during the nights, preparing the army for defending Muslims' territory and sovereignty, and freeing prisoners of war".[74] He also stated explicitly that this "should be restricted only in cases where the public

72. This is the majority contemporary Islamic legal opinion. The chief legal jurist in Egypt presented a legal opinion regarding the relation between taxes and zakat on Mach 10, 1980. Jurist Gad Al-Haq in his opinion distinguished between both terms following the common opinion in the legacy of the Islamic law that "taxes" cannot replace paying zakat. He purposed the role of zakat as spiritual function mixing with a societal solidarity purpose. However, taxes shall be legalized for the purpose of advocating and enabling the state in the defensive and administrative roles. Additionally, to build the infrastructure for the sold health system and other public entities that aim to sever the public interest especially in the contemporary times that state has responsibility to intervene in a very complex realm. *See* the complete works of fatwas of Dar Al Ifta at 2831. Likewise, the contemporary legal chief justice presented a very detailed opinion in this regard distinguishing between the prohibited form and the permissible one.

73. *Id.*

74. Ibn 'ābidīn, 2 Hāshiyat Al-dur Al-mukhtār 336–37.

treasury does not have enough money to afford that."[75] If the public treasury has enough money, it will not be legitimized to force people to pay.

b) Likewise, the *Maliki* school approved some sort of asking wealthy people to pay in similar situations. *Al-Qurtubi said*: "*Maliki* jurists agreed that if Muslim communities critically endure necessities after paying Zakat, they are obliged to fulfill and meet these needs from their money."[76]

c) The *Shafi'i* School presented more specific examples and criteria in this regard. *Al-Ghazali* approved taxing only the wealthy people when the nation suffers from financial shortage, and the public treasury cannot afford the army needs in a way that could lead to the soldiers leaving the armed service and go to work to gain their needs which would eventually lead to invasion of the Muslim countries' borders by enemies. In such a situation, the governor can force wealthy people to pay as much as the army needs.[77] Another *Shafi'i* Scholar, *Al-'izz āibn 'Abd Al-slām*, mentioned the same example of the army as a legitimate purpose where the governor can ask the people to participate in funding it. However, he specifically mentioned many requirements by which it will be assured that there is a critical need to interfere with people's property. He said: "If the public treasury does not have "any enough money, "the governor -himself- sell all his golden property (leather belts embroidered with gold) and fancy belongings, the soldiers in the army have only their defensive weapons and become in the equal status similar to the public people as for the benefits, it will be permissible to ask the public nation to pay (can be taxed). If any of those requirements are not fulfilled, it will be prohibited."[78]

Most importantly, all Islamic law schools have agreed on rulings in which Muslims are religiously and voluntarily, without state compulsion,– obliged to pay money to poor people as atonement for their sins. Additionally, all Muslims are encouraged to pay money as (charity), not as obligations, yet as a motivation for religious rewards. The main principle that governs this order and action is the qur'anic text (. . . and give them from the wealth of Allah which He has given you . . .),[79] (. . . . and spend out of that in which He has made you successors . . .).[80] These rulings help shape the view of the redistributed power between the state and the nation/society roles in Islamic legal jurisprudence.[81]

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75. *Id.*
76. Al-Qurṭubī, Al-Jāmi' Li'aḥkām Al-Qurān 242 (Al-Risālah).
77. Abū Hāmid Al-ghazzālī, 1 Al-Mustṣfá 426 (Al-kutub Al-'ilmīyah 1993).
78. Yūsf bn tugharrī, 7 Al-nujūm Al-zāhirah fī Mulūk Muṣirr Wal-qāhirah 72–73.
79. Al Quran, Surah An-Noor [The Light], 24:33.
80. Al Quran, Al-Hadid [The Iron], 57:7.
81. What supports and adds to this argument is the discussion that the Shafi`i and Maliki

D. The complementary form: Al-Waqf/The endowment[82]

Even though this previous theme sounds to be advocating for the "anti-distributive/paternalism" theories, recalling other parts of the rulings helps a lot to portray a panoramic view of the philosophy and theories of Islamic law. For example, the *Waqf* rulings in Islamic law.[83]

Marshall Hodgson considered *Waqf* in his book, *The Venture of Islam*, as the material foundation of the Islamic world after the fifth century.[84] The *waqf* institution reflected compensation as a balancing power for minimizing state power in the eyes of some Islamic law opinions. As Islamic law jurists refused the intervention of the state to collect *mukus* or taxes, except in the case of absolute necessities and under certain restrictions, they assured the importance and foundational role of *Waqf* in Islamic society.[85] It could be argued that they designed this institution with appropriate regulations as an alternative tool instead of being sensitive to the government's role. Through the systematic role of the *Waqf*, Islamic society will be able to secure its needs and develop its infrastructure for education, health, well-being, roads, etc. Additionally, wealthy people would be able to pay their money to the people who are most in need directly and in full transparency with a guarantee that the government has no hand in this loop. All schools of Islamic law forbid governmental intervention

jurisprudence witnessed regarding the duty of the rich people to support the poor if they are not satisfied after paying zakat. However, the poor people must let the rich know about their needs. Consistently, after this introduction, if the rich refuse to provide them with the necessities, and that results in the death of the poor, the rich people will be charged criminally for this death. Shafi'i school promised poor people to take their needs from the rich by force. If a rich person faces a poor person with violence, and the poor in defending themselves kill the rich, they have no charge. But the opposite is not the case. *See* AL-NAWĀZIL AL-ṢUGHRÁ 338–40.

82. *See* Astrid Meier, *Waḳf, in* ENCYCLOPEDIA OF ISLAM, SECOND EDITION (P.J. Bearman ed., 2012) for the definition of "Wakf."

83. All the Islamic law books and resources in all Islamic legal schools include in each book chapters on contracts, transactions, endowment (*waqf*), pre-emption (*shufa*), foreclosure (*rahn*), family law, criminal law, and worship rulings. Including those chapters together reflects the consistency of the rulings and their objectives together in the way that all of them work as one unit on the regulation map. This unity of the regulations represents a guarantee that the implication of these rulings will not lead to any contradictions. That's why memorizing the regulation map in the mind of jurists all the time is mandatory. Islamic law branches do not function separately. Therefore, the Muslim jurist's mind has been required to approach the issues and interact with them in a comprehensive manner.

84. MARSHALL G. S. HODGSON, THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION 124 (1974); This book was recently translated to the Arabic language by the Arab Network for Research and Publishing in Beirut.

85. The first Islamic law book authored on waqfs jurisprudence *(waqfs rulings) was* written by the Hanafi Legal Scholar Abu-Bakr al-khasaf who passed away 874. *See* Ibrahim Albayomi Ghanem, *Jadaliat Al-fiqh Wa Al-qanun fi Tashrieat Al-awqaf Al-mueasira [Dialectics of Jurisprudence and Law in Contemporary Endowment Legislation]*, IDHA'AT [ILLUMINATIONS] (Feb. 17, 2021), https://www.ida2at.com/dialectic-of-fiqh-and-law-in-contemporary-endowment-legislation/.

in *Waqf*. It must be subject only to the owners of the endowment and the main outlines, goals, and scopes for which they willingly and initially designed their *waqf*. The government cannot intervene in changing the working scope of *Waqfs* or transfer it to a public institution.[86] The terms of *waqf* owners cannot be modified even after their death. The immunity to *Waqf* is absolute. The dynamics of *Waqf* were influential and interactive within the internal public policies according to the aims of the owners of the *Waqf* who were merely rich and wealthy families. They established their *Awqafs*[87] to provide services to society regarding medical treatment, education, housing, food, etc. The external policies that represent the state sovereignty were exclusively in the hands of the state.

What supports my analysis is how modern Arab states, especially those that could be classified as dictatorships in modern times, dealt with the *Waqf* institution in the modern era.[88] In Egypt, Gamal Abdul Nasser enacted a popular act that revoked the independence of *Waqf* making its status fall under the authority of the government.[89] By creating the Ministry of Waqf, the institution lost one of its important characteristics.[90] Nada Moumtaz, a specialized scholar in the Waqf institution, summarized the general overview and reading of the Waqf according to many scholarships' views. "The scholarship has shown how waqfs were political, economic, and symbolic projects aimed at public policy,[91] planning property devolution and family relations,[92] diverting state revenues to private pockets,[93] colonizing newly conquered land,[94] establishing political and

86. *See* Ibrahim Albayomi Ghanem, Al-awqaf wa Al-mujtama' wa Al-siyasa fi Masr [Endowments, Society, and Politics in Egypt] (1999).

87. *Awqaf* refers to a societal support system was established by the Muslim society across its history and was supported by Islamic law jurisprudence to enable Muslim society to establish its own "trusts/endowments". The Islamic law jurisprudence provided very strict rulings to keep the hands of rulers and governor far away from intervening in the process of these *Awqaf*. *See* Meier, *supra* note 82.

88. Nada Muomtaz mentioned the example of the Ottoman reforms that happened in Beirut in 1850. She mentioned that this process included "seizing the administration, supervision, and revenues of many of the *waqf*s and subjecting them to a systematized regime of accounting and reporting, under the banner of "good administration" (*ḥüsn-i idâre*)." *See* Archive of the General Waqf Directorate, Ankara, Turkey (*Vakıflar Genel Müdürlüğü* 300.82).

89. *See* Ibrahim Albayomi Ghanem, Tajdid Al-wa'ey bi Nizam Al-waqf Al-Islamii [Renewing Awareness of the Islamic Endownment System] (2016).

90. Professor Ibrahim Albayomi Ghanem explained in detail in his article how the government of July 1953 affected the Waqfs institution and dismantled the origins of the endowment in the late fifties and sixties.

91. Amy Singer, Constructing Ottoman Beneficence: An Imperial Soup Kitchen in Jerusalem (2002).

92. Beshara Doumani, Family Life in the Ottoman Mediterranean: A Social History (2017).

93. Carl F. Petry, *Fractionalized Estates in a Centralized Regime: The Holdings of Al-Ashraf Qāytbāy and Qānṣūh Al-Ghawrī According to Their Waqf Deeds*, 41 J. Econ. & Soc. Hist. Orient 96 (1998).

94. Rıza Yıldırım, *Dervishes, Waqfs, and Conquest: Notes on Early Ottoman Expansion*

religious legitimacy,[95] controlling education and law,[96] among many others."[97] Then, Moumtaz, concluded the same argument I advocate by stating that " . . . in these relations that we can better understand the reasons why modern states have attempted to eradicate the waqf and the particular form the waqf revival has, and has not, taken today." [98]

Moumtaz presented very clear examples of how the French colonial administration with the late times of the Ottoman Caliphate reshaped the *Waqf*. The reason behind this "modernization" that Moumtaz mentioned was clearly "ensuring the free circulation of waqf immovables, whose inalienability constituted an obstacle to the economic development of the country."[99] These new "reforms" succeeded in breaking the crucial and influential characteristics of the model of Waqf in Islamic law that aimed to keep it out of the hands of the state. What happened reflects the insistence of colonialism under the "administrative reformations" of the Ottoman caliphate to rebuild the model of "state-centered society". Similarly, in Zanzibar, the way in which the British colonial forces intervened in *Waqf* reflected their state's vision, which completely contradicted Islamic classical and original vision and the social order of *Waqfs*.[100] That order prescribes the colonial system's perspective that "a society should be structured and who holds which roles, rights, and responsibilities."[101] The Waqf system presents a corner stone balance between the state and society in the Islamic legal philosophy. More importantly, it reflects how the Islamic law jurisprudence works comprehensively and collectively as a concrete map that has a very interactive dynamic.

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in Thrace, in Held in Trust: Waqf in the Islamic World 23 (Pascale Gazaleh ed., 2011).

95. Ana María Carballeira Debasa, *The Use of Charity as a Means of Political Legitimation in Umayyad Al-Andalus*, 60 J. Econ. & Soc. Hist. Orient 233 (2017).

96. George Makdisi, The Rise of Colleges. Institutions of Learning in Islam and the West (1981).

97. Nada Moumtaz, *Calling All Waqf Haters*, Islamic Law Blog (Apr. 9, 2021), https://islamiclaw.blog/2021/04/09/calling-all-waqf-haters.

98. *Id.*

99. Nada Moumtaz, *Waqf and the Modern State, Capitalism, and the Private Property Regime*, Islamic Law Blog (Apr. 22, 2021), https://islamiclaw.blog/2021/04/22/waqf-and-the-modern-state-capitalism-and-the-private-property-regime.

100. Norbert Oberauer, *'Fantastic Charities:' The Transformation of Waqf Practice in Colonial Zanzibar*, 15 Islamic L. and Soc. 315 (2008).

101. Moumtaz, *supra* note 99.

III. B. Employment Law Values between Lochner Philosophy and Islamic Legal Theory

A. The second question is: What are the core principles and values in the employment relationship between Islamic law and Lochner philosophy?

The second question of this Article relates to the core principles that govern the employment relationship between employers and employees. The first possible way to approach this issue is asking to what extent can the rules of employment in Islamic law achieve a redistribution of wealth among the society? In the following part, this Article will mainly focus on addressing this question.

Another deeper way to tackle this issue would be by asking: what is the set of values and principles that the legal legislation in Islamic law aims to achieve in the relationship between employers and employees? The question here is broader and has less bias towards any economic school. Additionally, this Article analyzes these principles in their conceptual and methodological tools, considering the similarities that these tools could share with the *Lochner* case.

1. The Governing Principles and Values

Islamic law jurists stated that Islamic law at its very beginning aimed to restrict bad phenomena in employment law. Regarding employment relations, Islamic law aimed to cut the slavery discourse that portrayed workers as slaves and deprived them of their workers' rights. That is why the prophetic sayings regarding the rights and the worker's treatment were very sensitive.[102] To achieve these aims, Islamic law encompassed a nexus of values and objectives that represented a complete divorce from old systems and entailed certain rulings leading to those values.[103]

1. The instructions for treating servants that Prophet Muhammad ﷺ preached represent the ethical and principal framework that must be considered in Islamic employment law. Prophet Muhammad ﷺ said: "[Your servants are] your brothers, your trusts, [but] God has made them under your authority. Therefore, if one has his brother under his authority, one should feed them what one eats and clothe them of what one wears. Do not overburden them with what they cannot bear, and if you do so, help them in what you burden them with."[104] This prophetic statement represents the core values that must be followed by all employment laws and contracts. These values exceed the mere materialistic benefits that extend to the spiritual, psychological, and social aspects. The values of brotherhood, kindness, justice, and equality, combining and framing with religious motivations, represent

102. *See* Al-Tahir ibn Ashur, *supra* note 25.

103. *See* Mohamed Al-Tahir ibn Ashur, Usul Al-nidham Al-ijtima'y fi Al-Islam [The Rudiments of the Social Sciences within Islam] (1960).

104. Al-Kamāl āibn Al-Humām, Fatḥ Al-Qadīr [The Almighty Opening] 386.

the framework that must guide any laws, justice, and policymakers. Thus, the foundations and establishment of employment contacts or contractual relations are based on these ethical and spiritual values in Islamic law, even though they appear in materialistic implications and procedures.

2. *Accommodation of Labor/Work:* In *Lochner*, the court used the terms "sell" and "purchase" to describe the action between the "employer and employee." "The right to purchase or to sell labor is part of the liberty of the individual protected by this amendment . . . ."[105] Islamic law does not deal with "work/labor" as a commodity that can be bought or sold, as in the *Lochner* case. Labor in Islamic law is an ethical and religious value that is correlated with other objectives and goals in the Islamic approach, starting from the direct ends that satisfy the personal needs, satisfying the other needs and necessities of other people, reaching the religious mission to construct and develop the land of humankind, and enhancing and strengthening the meanings of brotherhood, cooperation, justice, and solidarity. Work in Islam is considered a kind of worship that aims to eschew life from poverty and the exploitation of needs. This is why there are many orders to do one's best in the performance of one's work. These values exclude work/labor from being mere "commodity" or "good" that would be governed by the "rules of supply and demand."[106]
3. *The set of values and ethical principles were articulated in the form of contractual and business behaviors.* In the *Lochner* case, the court raised the value of liberty (contractual liberty) as a fundamental right that could not be interfered with by state power. The court's doctrine was clearly against labor law regulation to keep this contractual liberty between the employers and employee unless the intervention falls within the traditional "police power" purposes in the rubric of health, safety, and morals. Justice Peckham raised a crucial and influential question that had the most significant influence on the court's decision. The question was "Is this a fair, reasonable, and appropriate exercise of the police power, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his liberty or to enter into these contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"[107] Justice Peckham answered the question saying that "there is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker[108]". In Justice Harlan's dissenting opinion, he referred to the reason (values) and the goal behind the New York Labor Law that

105. Feldman & Sullivan, *supra* note 4, at 489.
106. *See* Muḥammad Bāqir Al-ṣadr, Iqtiṣāduna (1982).
107. Feldman & Sullivan, *supra* note 4, at 490.
108. *Id*.

> the Lochner Court invalidated. He said, "It may be that the statute has its origins, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength."[109]

Islamic law considers another order of values in its rulings. Jurists articulated forms of eligible contracts to meet and achieve these values and goals. Most importantly, the contractual will and liberty of the "contracting parties" must fulfill the requirements and prerequisites of these forms to legitimize their agreements. Islamic law jurists discussed many forms of transactions, contracts, companies, and kinds of commercial behaviors that resulted from the values and interactions in Muslim societies agreeing or disagreeing with the decisions regarding these forms. Even though Islamic law has one of its main rules that govern the business field which states that "the main ruling of the contractual forms and transactions is the permissibility unless they will include any forbidden action or contradict one of the Islamic principles"[110], Islamic legal schools articulated and created many specific forms. These forms articulated ethical and principal values from the Islamic law perspective.

For example, *Shrkt Al-bdān* (the company of bodies/vocational partnership): This form of a company means that two persons or more participate in forming a company that relies on working skills, not money, and they share their profits separately between them.[111] For example, if two doctors jointly open a medical center and agree to work together, the profits of the business will be divided between them.[112] Similarly, in the sewing industry. From the perspective of Islamic law, the basis of this company is not money, but the labor of those two partners. Although one of the partners may do more labor than the other, the basic principle is that they both earn approximately the same profits at the end. The Hanafi, Maliki, and Hanbali schools approved of the Al-bdān company, provided that certain sets of Islamic ethics are observed, most notably the ethics of tolerance between partners, trust, good faith, cooperation, brotherhood, and honesty. Therefore, unequal labor share is tolerated on this premise.[113] On the contrary, the Shafi'i school forbade this kind of company, arguing that partnerships must be based on money, not on labor, to avoid any kind of injustice between the partners by virtue of lacking exact measures of shares.[114] Therefore, for the protection of the values of brotherhood, solidarity, tolerance, prevent conflict and bickering between parties in the company, and therefore the entire people in

109. *Id.* at 549.
110. Al-Iz Ben Abd Elsalam, Qawa'd Al-Ahkam Fi Masalih Al'Anam 74 (2013).
111. Ibn Rushd, Bidāyat Al-mujtahid Wanihāyat Al-muqtaṣid 252 (2004).
112. *Id.*
113. *Id.*
114. Abū Bikr Al-ksānī, 6 Bdā' 'Al-ṣanā'i' fī Tarā'iq Al-sharā'i' 57 (2003).

society, thereforethey forbade this type of company. These two differing views embody part of the core values that Islamic employment law relies upon.

4. *Contractual labor design*. In the *Lochner* case, the design of labor relations is a mere labor relation between the employer who owns the bakery and the employees who work as bakers in the employer's business for certain hours every week. In contrast, the situation is quite different in the history of labor relations in Islamic law. Islamic law witnessed many versions of the contractual labor versions that in their core are different from a mere employer-employee relation. Additionally, their rulings reflected a comprehensive philosophy of the concept of "work/labor" and the ethical and principle outframe of the employment or labor law in Islamic legal thought that could be revisited and recalled to nowadays debates.

First, historically, Muslim societies have not recognized the current labor concept in which employees work every day with a certain company in a very strict, systematic, and contractual way. However, it witnessed multiple designs of contractual labor, which are wider and broader than contemporary ones, with different contractual characteristics.

Second, the closest version in the Islamic law to the current labor concept like the one in *Lochner* is "Leasing." Leasing means that a person leases or hires someone to do something. It has two kinds of implications: 1) *Private employees*, that someone who needs any kind of assistance in their life or work comes to hire this person for a certain time to assist them. This means that this employee will be hired for a certain time based on specific working skills or to achieve specific work. This employee is hired exclusively by that person. 2) *Common employee*, when someone needs specific assistance in a certain type of work, and they agree with one employee to achieve this working task. This employee can be hired at the same time by different people based on a specific task.[115] More importantly, Islamic law jurists discussed the rule of compensation if this employee damages the item which the employer has entrusted him with. They said that the employee must not be asked to reimburse or compensate for damages as long as they did not cause that harmas a result of deliberation or negligence. This is reasoned as a way of supporting the weaker party of this contractual relation. Simply put, the employer can withstand this damage.[116] However, employees are critically affected if they are asked to reimburse their employers. In the second case, some Islamic schools of law agreed to replicate the previous rule for this case. The rest of the Islamic schools, like the Shafi'i School, disagreed on analogizing or attaching the common employee with the private employee. They reasoned that the common employee here is a separate part of the relationship and is stronger than the private employee. Additionally,

115. *Id.* at 50.
116. *Id.* at 86.

this ruling represents a very influential function to protect people's property and money, especially with the ethical transfer of the people (they became careless and less honest); the ruling should be transferred as well to charge them.[117]

Third, Islamic law designed a contractual relation named "Contract of farming and irrigation."[118] In this relation, the owner of the agricultural land (the capital owner or the employer in the capitalist system) and the farmer (the employee/worker) agree to cultivate the land, and the profits (i.e., land crops) will be divided between them according to their initial agreement. It is illegal to agree in advance between the owner and farmer on a specific profit (e.g., a certain amount of money or crops). It must be an overall percentage portion of the crops, such as a quarter, half, or third of them. All legal schools agreed on that to avoid any kind of injustices or clashes/conflicts that contradict the fundamental meaning of brotherhood and solidarity. The owner and farmer could agree on $1,000 for example as a profit for the farmer, and after the harvest, they could be surprised that the previous-mentioned profit $1,000 equals the entire crop. In this way, the owner of the land will be critically affected. And vice versa, they could be surprised that the crops after the harvest are much larger than the agreed profit amount. In this way, the worker will be critically affected by taking much less than his efforts. In addition, the Shafi'i school mandated that the main seeds for planting land must be the responsibility of the owner, not the farmer. The farmer is clearly a partner by their work/labor. Therefore, the owner must be a partner in the land and seeds. More critically, the owner is forbidden to require or ask to isolate an equivalent portion of the seeds from the final crops and consider the rest of the crops as mutual and common profits between them and the farmer. The entire crop will be mutually profitable and must be divided between the two parties. In this way, Islamic law concepts and rulings consider the farmer (the worker and the weakest part in this relationship) as more than a mere worker. They have been considered as a partner.

Even though Islamic law rulings considered a farmer as a kind of partner, it had still realized that the farmer is still the weakest part. This was explicitly shown in rulings regarding damage to crops or land. For instance, in this situation, the owner may wish to terminate an agreement with the farmer. All legal schools agreed that, in the case of total crop damage, the farmer should not endure any losses. The farmer does not jointly endure this loss with the owner. Conversely, the owner of the land has to compensate the farmer with an approximately equal amount or half of the equal amount of the portion of crops they had agreed on at their initial agreement. Islamic law considers the interests of the farmer as the weakest part who will stand this loss, not the owner of the

117. I extracted the majority of these rulings from an unpublished manuscript named: *Sharḥ Al- Jami 'Al-ṣaghīr*, authored by Al-Sarkhasy at Al-Solaimania library in Istanbul, Turkiye.

118. *Id.*

land, who can generally stand this loss. On the other hand, Islamic law did not approve the concept of equal or similar working hours or daily wage to compensate the farmer. This would affect the owner because this compensation scheme could result in more than the entire crop as a profit. Lastly, if the owner wants to terminate the agreement with the farmer before harvest, they must reimburse the farmer with an equal daily wage for the time they spend in farming[119].

5. *The conceptual and legislative tool of "class legislation"*. In the *Lochner* case, the court stated that the legislature must have the purpose of public interest to benefit or burden certain groups of people (legislative classification) compared to others. Additionally, the legislature cannot do so for so-called arbitrary or invidious reasons, and it cannot do so simply to create advantages or burdens because the group happens to be favored or disfavored by lawmakers. However, the reasons must pertain to the public interest, such as public health, safety, and morals.[120] Applying to *Lochner*, the court commented regarding the relative safety or health concerns that pertain to bakers that the baking trade is no more or less dangerous than dozens of others. "We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades and is vastly healthier than others. It might be safely affirmed that almost all occupations more or less affect the health."[121]

In Islamic law, the "class legislation" is considered a conceptual and legislative tool. The examples previously mentioned in this Article support this argument. Islamic law jurists specified and customized different working classes and occupations based on suitable statutes. These statutes differ and vary from occupation to occupation according to their challenges and harsh circumstances to achieve the end values and principles of the overall ethical approach in Islamic law. Similar to the rulings of farmers, manufacturers, and bakers that this Article mentioned, Islamic law continued to specify other occupations with obligations and benefits that required interference in the labor contract and restricted the liberty of the contract as well. For example, workers in construction must not exceed certain pounds of weight and a specific distance and must avoid working under extreme weather conditions, even when animals are used to loading goods. Below I discuss an example of statutes that regulate workers in the construction

119. *See* Abdulrahman Al-Nagdi, *Hāshiyat Al-rawd Al- Murb 'Sharḥ Zād Al-mstqn* (Ibn Hazm 1984).

120. *See* Professor Forbath's personal teaching notes for the Lochner case.

121. Lochner v. New York, 198 U.S. 45, 49 (1905).

industry. Islamic law specifies regulations regarding religious minorities to protect their rights.

First, Shafi'i Chief Justice Al-Subki outlined the employment relations between employees and employers in the construction industry. He said that employers must be kind and gentle with the workers. Additionally, employers do not have the right to ask workers to work for additional hours, which would affect their ability and health. In addition, employers must pay for workers in the construction wages they deserve according to their hard efforts and work. In addition, employers must keep workers fed well. According to Al-Subki, workers during their daily work have the right to rest during daily prayers to perform them. Al-Subki said that any employment relation in the construction industry that contradicts those statutes would be illegal and could be held to account in a court of law. He described those breaches as the most critical and major sins in the eyes of religion as well.[122]

Second, Islamic law considers the purpose of protecting the rights of religious minorities as a reasonable reason to intervene in the labor contract as a kind of class legislation. According to the rulings of Islamic employment law, employees have the right to have their religious day off as a day of rest. Employers are legally obliged to obey and enforce this standard.[123] This right is non-negotiable. Even if this right is not explicitly included in the employment contract, it is determined as a custom that the employer cannot suspend or refuse it. However, if the employer refuses to apply this right at any time, the employee must practice this right, and the employer does not have any right to apply any financial punishment or fines. What is profoundly striking is that if the employer includes in the contract that the employee does not have the right to practice any kind of religious holiday and the employee signs the contract, this term would be null and void . This would not restrain or limit the employee from practicing his rights.[124] There is an agreement on rulings between all schools of thought in Islam. They also require that religious minorities' rights, especially Christians and Jews, need to be protected in employment relations.[125]

6. *Architecture of redistribution bargaining power.* According to Professor Forbath, the court's doctrine in the *Lochner* case clearly expresses new legal liberalism.[126] This legal liberalism "led state and federal courts to strike down labor laws whose purpose they saw as redistributing bargaining

122. 'Ubid Al-whāb Al-Sabakī, Mu 'īd Al-ni 'm Wamubīd Al-niqm 127.

123. Zakaria Al-Ansari, 2'Usná Al-muṭālib fī Sharḥ Rawḍ Al-ṭālib 436 (Al-kutub Al-'ilmīyah).

124. Shihāb Al-dīn Al-Ramlī, 5 Nihāyat Al-muḥtāj Ilá Sharḥ Al-minhāj 279 (Al-kutub Al- 'ilmīyah 2003).

125. *Id.*

126. *See* Fishkin & Forbath, *supra* note 24.

> power- and with it, wealth or workplace authority."[127] In *Lochner*, the state aimed to protect the health of bakers by limiting their working hours under hard circumstances as a part of its police power. However, from the court's point of view, the statute aimed only to redistribute bargaining power to enhance and strengthen the ability and position of workers' rights. The statute, from the court's perspective, was nothing more than "a labor law, pure and simple," meaning redistribution "pure and simple."[128] Neither could state or federal measures be aimed at enhancing workers' bargaining power by protecting workers from being fired for joining a union, or by modifying the harsh common law restraints on strikes and boycotts.[129]

Islamic Law went completely to the other side regarding articulating and enhancing the redistribution of bargaining power. Islamic law designed many forms of achieveing this such as a built-in redistribution bargaining power. The previously mentioned examples introduce this principle in detail. However, this principle is considered as one of the fundamental principles of the Quranic text. In the Qur'an, the rule encourages the weakest party to ask and mandate its requirements and terms in the confrontation of the strongest party. The Quranic text orders the strong party to fear God, do justice, and avoid any injustices. Additionally, if the other party is weak or cannot mandate their terms, Quranic texts require external support from an external third party to support the situation of the weak party. The Quranic text asked stronger external third party (could be state, judge, or lawmaker) to enforce these terms or prerequisites by the full justice for the two parties (the weaker, and the stronger). " . . . . let him write and let the one who has the obligation dictate. And let him[130] fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice."[131]

Islamic legal jurists relied on this Quranic text to establish the legitimacy of unions and articulate justice as a centralized and crucial object and the principle of the functionality of unions. The majority of manuscripts and publications on unions in Islamic legal jurisprudence relied on this principle. The history of Islamic societies witnessed the establishment and organization of work unions based on the type of trades and jobs. Islamic jurists from all schools of thought were involved in writing about the ethical and legal approaches of these unions. These unions aimed to organize the performance of each job and advocate the

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127. *Id.*

128. Lochner v. New York, 198 U.S. 45, 57 (1905).

129. *See* William E. Forbath, Law and the Shaping of the American Labor Movement 52–60 (1991).

130. In the Arabic language, the usage of masculine pronouns denotes both males and females.

131. Al Quran, Surah Al-Baqara [The Cow], 2:282.

rights of its workers. Undoubtedly, unions were an integral part to the life of Islamic societies.[132]

Islamic jurists defined workers unions as one of the crucial tools that must be used to apply the Islamic law objectives.[133] According to their approach, this will occur in two ways: 1) The fundamental role of unions in erasing injustices and oppressions in work conditions and contracts. 2) The role of unions in establishing effective conditions and enshrine justice. Jurists also mentioned that workers in their contracts are weaker parties that could be coerced and exploited by employers and capital owners. Therefore, they have the right to ask for and apply fair conditions based on the criterion of justice. Islamic law strengthens workers' status by enhancing their bargaining power. However, these conditions must be limited and controlled by principles of justice.[134]

IV. Conclusion

To sum up, I conclude at the end of this Article that Islamic law shares some values with other economic philosophies. However, there are differences in how these values are reflected in the applications of Islamic law. Examples of governmental intervention in pricing and taxation, along with the administrative bodies of *Hisba* and *Waqfs*, demonstrate how the integral parts of Islamic law work coherently to achieve its comprehensive objectives. Islamic law implemented these comprehensive objectives in the rulings and contractual forms of business relations, especially employment. Employment relations are built on ethical values, such as solidarity, support, brotherhood, cooperation, and justice. Examining the details of rulings in Islamic law clarifies this perspective. The values and ethical framework embody a comprehensive integration of the ethical, materialistic, spiritual, and religious dimensions.

132. *See* Gamal Al-Bana, Al'Islam wa Al-harakat Al-niqabia [Islam and the Trade Union Movement] 43–66 (1981).

133. *Id.* at 77–79

134. 'Abd Al-qādir 'Awdah, Al-tashrie' Al-jinayiye Al'Iislami Maqarana Mae' Al-qanun Al-wadeii [Islamic Criminal Law Comparison with Positive Law] 60–69 (1956).