

WORKSHOP ON CREATING ISLAMIC LAWYERS AND JUDGES: ISLAMIC LAW IN
THE LAW SCHOOLS AND JUDICIAL TRAINING ACADEMIES OF MUSLIM SOUTH
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EAST AND WEST HAVE MET?

by

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Introduction

Perhaps, until about four decades ago, most people, including lawyers and judges, thought that common law and Islamic law represented the East and the West that would never meet. No one would have thought that toward the end of the twentieth century, there would be a revival of the interest in Islamic Law, not just in Islamic jurisprudence as an academic exercise. I think, two factors have contributed to this development. First, the creation on the *Shari'ah* courts and, secondly, the rise of Islamic banking, Islamic finance and *takaful*.

Actually, the creation of the *Shari'ah* courts did not have the kind of impact on the interest in Islamic law as the rise of Islamic banking, Islamic Finance and *takaful*. The reason is obvious: the *Shari'ah* courts were established to administer Islamic family law to Muslims only and there was not much money in family law. It is different with Islamic banking, Islamic finance and *takaful*. It is a multi-billion dollar business. Hence, it is not surprising that the interest is shown not only amongst Muslims but also amongst non-Muslims, not only in Muslim majority countries but also in Muslim minority countries in the East and in the West. What is interesting is that, in this area of Islamic law, countries that declare themselves to be Islamic States and are most stringent in the application of what they consider as "*Shari'ah*" are not the ones taking the lead. Instead it is the "more liberal" ones that are taking the lead. This is not forgetting the financial capitals of the world where Islam is, quite often, associated with terrorism. It is equally interesting that the interest is particularly in what is traditionally known as "*mu'amalat*" which had been left in the cold storage for centuries and replaced by its modern counterpart. What has led to this change? To the Muslims, it may, to a certain extent, be an endeavor to "do what is good and avoid what is evil". The "evil" here is "*riba*" or usury. To the others, it is simply business. Who would have thought that it is money and not piety that would have caused the revival in the interest in and the implementation of, Islamic law?

Effect of creation of *Shari'ah* Courts

The creation of *Shari'ah* courts was seen as the creation of a special court, subordinate to, though separate from, the civil courts to administer Islamic family law to Muslims only. Most people thought that the law to be applied was purely Islamic law. Therefore, knowledge of the *Shari'ah* was the only requirement needed. Most common law lawyers were not interested in it because, as I have said, there was not much money in matrimonial cases and such cases were usually very messy. In fact, in the early days common law lawyers were less than welcomed in the *Shari'ah* courts as they were considered ignorant in Islamic law.

But, what most people failed to realize is that the court that was established and the law that was legislated are not the kind of court and law of Abu Yusuf's period. The court that was established follows the model of the existing civil courts, from the name, the hierarchy, the designation of judges and officers, the dress code of the judges and even the manner of addressing them. Administratively and procedurally, the whole civil court judicial system was adopted, from arrest to conviction, from the filing of a suit to execution. The trial is no different from that in the civil courts. Judges have to record the evidence, write their judgments and so on.

The law that was legislated and to be administered by the *Shari'ah* court and *Shari'ah* judges was a mixture of the *Shari'ah* (I am using the term to include *fiqh*) and common law principles. (I am referring to Malaysia which I think is quite relevant to Singapore too). This is more so in procedural law. Take a look at the *Shari'ah* Criminal Procedure Act or Enactments, the *Shari'ah* Civil Procedure Act or Enactments or even the Evidence Act of Malaysia, one will find that many provisions are similar to their counterparts used in the civil courts. The reasons for that are, a court, including the *Shari'ah* court requires procedural laws. The *Shari'ah*, having been neglected for along time, had not developed its procedures the way the common law procedures had developed. So, the drafters of the law who were themselves common law lawyers, assisted by the *Sharia'ah* scholars (who could not produce the needed law), had to adopt the existing procedural laws which were being used in the civil courts, with necessary modifications to make them *Shari'ah* compliance. As many of those provisions, though alien to the traditional *Shari'ah*, were found not to be contrary to the *Shari'ah*, they were adopted.

I have been involved in the process since 1981 from drafting the laws which are now being used in the *Shari'ah* courts to giving lectures and participating at seminars organized to train the *Shari'ah* judges and officers. I had also served as a member of

the Technical Committee at the national level and Chairman of the Technical Committee for the State of Penang. In fact, I had also served as a Judge of the *Shari'ah* Court of Appeal in the State of Penang and, to date, is of the author of the longest judgment of the *Shari'ah* Court of Appeal on criminal procedure. One day, when I was a High Court Judge, I received a call from a *Shari'ah* High Court Judge asking me what to do with an application to set aside a default judgment. I even invited him to sit in my court when I heard appeals from the Subordinate Courts.

Secondly, when the law, including *Shari'ah* is codified, interpretation of statutes according to common law principles, becomes relevant. With no precedents to fall back on, the *Shari'ah*-trained graduates were at a loss. When a common law remedy is adopted, common law principles regarding the granting of the remedy will automatically follow. A *Shari'ah* Subordinate Court Judge who himself had a degree in law as well as a degree in *Shari'ah* once told me that he was scolded by his senior for applying the common law principles when deciding an application for an interlocutory injunction. He asked his senior what principle to apply. The senior replied: "*firasat*" (intuition). I asked him to go back and ask his senior that in an appeal how would the counsel argue and how would the appellate court decide whether the judge's "*firasat*" was right or wrong? Each one of them could have a different "*firasat*".

In the traditional Islamic judicial system, the profession of advocates and solicitors had not developed the way it had developed in the common law system. Until very recently, in Malaysia, some old-school Judges of the *Shari'ah* courts used to consider lawyers as a nuisance and were quite unhappy when they saw lawyers appearing in their courts. To the contrary, we common law judges would be worried when an accused person or a party is unrepresented. However, things are changing now. The new breed of *Shari'ah* Judges do realize the importance of lawyers in a case, to assist the court, even though at times they misled the courts. (To me, if a judge allows himself to be misled by lawyers, he is to be blamed. It only means that he does not know his job.) This change is due to the fact that the lawyers themselves, having some knowledge of the *Shari'ah*, have made themselves more relevant and speak less nonsense. The new breed of judges too, having been exposed to common law principles and practice, have begun to realize the important role of lawyers in a trial.

All these show, that even in the *Shari'ah* courts we now need lawyers and Judges who not only know the *Shari'ah* but also a working knowledge of common law principles.

The effect of the rise of Islamic banking, Islamic finance and *takaful*

When I was a boy, I would not imagine walking into a bank. It was a sinful place where “*riba*” was practiced. Not anymore. When I started working, I had to have an account at a bank. There was no Islamic bank yet then. Like anybody else, I opened an account at a bank. It was just a bank then, neither “Islamic” nor “conventional”. Those words were not in use yet.

Quite often, I have been lucky to be at the wrong places. I was lucky to be appointed as what I call “the only non-*Shari’ah* member of the *Shari’ah* Advisory Council” of the Central Bank and also of the Securities Commission of Malaysia. Sitting in the councils, I see how the “Islamic products” (I think it more correct to call them “Islamized products”) are created: take a conventional product, identify the *Shari’ah* issues, look for a way to remove the objectionable features by applying the established *Shari’ah* principle or principles, modify the feature of the product if necessary so that the product becomes *Shari’ah*-compliant. To give a simple example, it is like removing alcohol from wine and producing sparkling grape juice. I have no problem with that. Indeed, under the circumstance that we are in now, that seems to be the only practical way to do it.

Again, speaking from my experience, a lot of time is spent in trying to understand the conventional product, trying to find out whether there are *Shari’ah* issues and to identify them. What is prohibited is well known. To find out whether the prohibited element exists and where, is more difficult. Once they are identified, the challenge is how to overcome them, or to get around them.

No one person can claim to have the necessary knowledge to do it. We need to have a group of people from various relevant disciplines to do it. It is also a mistake to think that any “Islamic scholar” (or *ulama*) is an expert in the field. He may be able to cite verses from the Al-Qur’an, *Hadiths* and so on. But, he does not know how to identify the alcohol, separate and remove it from the rest of the constituents of the product. Similarly, a lawyer or a judge who is able to quote verses from the English translation of the Al-Qur’an by Abdullah Yusuf Ali, should not think that he is a *Mujtahid* capable of *ijtihad*.

Then comes the second stage: implementation. We need people who know how to execute the ruling. Again, giving a simple example, we need people who know how to slaughter a lamb the way it is required by *Shari’ah*. In this case, as far as lawyers are concerned, we need lawyers who know how draw up the contracts that comply with the *Shari’ah* ruling.

The matter may end up in court. In Malaysia, cases arising from Islamic banking and *takaful* are heard by the civil courts just like any other case arising from conventional

banking and insurance. Indeed, we hardly notice whether the application before us (usually for an order for sale) arises from a conventional transaction or an Islamic transaction. That is understandable because the contracts are drafted by common law lawyers following the Contracts Act, the charges are as provided by the National Land Code, the procedure is provided by the High Court Rules.

In 2003, when I was still a Court of Appeal Judge, I was asked to give an opinion on the proposal by the Central Bank of Malaysia to set up the “*Mu’amalat* Court”. The idea was to have specialized judges with sufficient knowledge of Islamic banking, Islamic finance and *takaful*. I did some research. I found that, until then there was not a single case in which a judge had to decide a *Shari’ah* issue in such cases. However, even then, it did cross my mind that, one day, one bright or desperate lawyer might challenge the validity of the contract from the point of view of Islamic law. Would the civil court judge be in a position to decide it?

I considered the various existing forums for the purpose namely, the civil court, the *Shari’ah* court, the State *Fatwa* Committee and the National *Fatwa* Committee. My conclusion was, for different reasons, none of them was a suitable forum to decide the issues, if arisen. So, I proposed that the *Shari’ah* Advisory Council of the Central Bank be established by law and made the only authority to decide on those issues. The advantages are:

First, being the only forum to decide on the issues referred to it by the Central Bank, financial institutions or the courts, there would be consistency in the rulings.

Secondly, the Central Bank is in a position to assemble expert from various disciplines to decide on the issues.

Thirdly, there was already a requirement for the approval by the Central Bank before a new *Shari’ah* product is launched. This is only an extension of that function.

Fourthly, the Central Bank is the supervisory authority over all financial institutions. It is in a position to enforce its rulings.

Consequently, the Central Bank Act was amended to make the necessary provisions and I was made a member of the Council.

In fact, my recommendation went further. I recommended that it be made mandatory for financial institutions and courts to refer any *Shari’ah* issue arising therein to the Council and that the Council’s rulings be binding on them. My recommendation was not

accepted. Now my fear has been proved right. A Judge of the High Court has decided that the BBA sale is not bona fide and the bank may not recover the purchase price in full. As the case is under appeal to the Court of Appeal, I shall not comment on it. That judgment has caused a lot of uncertainty in the market, the very thing I wanted to avoid when I made the recommendation.

We are faced with the same questions again. Are our common law lawyers capable of presenting their cases when a *Shari'ah* issue is involved? Are our civil court law Judges capable of deciding *Shari'ah* issues in these areas? Speaking for Malaysia, my answer is "No". That includes me. Similarly, *Shari'ah* lawyers and *Shari'ah* Judges now practicing or presiding in the *Shari'ah* courts are not in a better position either. The problem is that those who know Islamic law do not know common law and those who know common law do not know Islamic law. There is a third category: those who think they know both have never practiced law. Even all the three categories may not know Islamic banking, Islamic finance and *takaful*.

But, let us not be too pessimistic. Even now, there is a group of young men, in early forties or late thirties who have degrees in law as well as *Shari'ah*, who are proficient both in English and Arabic. They are good materials for *Shari'ah* lawyers and judges in the *Shari'ah* courts and the civil courts provided they have the practical experience in legal practice.

From the above discussion, we see that, while lawyers and judges with *Shari'ah* background practicing or presiding in the *Shari'ah* court need to have at least a working knowledge of common law principles, lawyers and judges with common law background practicing or presiding in the civil courts also need to have at least a working knowledge of the *Shari'ah*. East and West have met?

Thank you.