

ADMINISTRATION OF JUSTICE UNDER THE *SHARĪ'AH*,  
COMMON LAW AND CIVIL LAW SYSTEM: TOWARDS A  
BETTER UNDERSTANDING

By:  
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INTRODUCTION

Your Royal Highness, Tunku Ampuan Najihah binti Almarhum Tunku Besar Burhanuddin, Chancellor of the Islamic Science University of Malaysia (USIM) (incidentally, an old SOAS Alumni); The USIM Dean of the Faculty of Syariah and Law, Professor (Dr.) Abdul Samat Musa; Respected Chairman; Learned Members of the Bench and Bar here present; Other Faculty Members and Academic Colleagues here present; Honourable Invited Guests; Students; Ladies and Gentlemen; - Assalaamu Alaykum; Selamat pagi; and Good morning.

Please permit to start by expressing my gratefulness to the USIM Faculty of Syariah and Law, for this high academic honour of inviting me to give the 4th prestigious Annual Tuanku Najihah Syariah and Law Lecture this year. I feel highly honoured to be here and I greatly commend your efforts in trying to promote a better understanding of *Sharī'ah*<sup>1</sup> and Law through this annual lecture series.

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<sup>1</sup> Although the adopted spelling in Malaysia is “*Syariah*”, the more generally used spelling “*Sharī'ah*” would be used herein from this point onwards.

The topic for this year's lecture is "Administration of Justice under the *Shari'ah*, Common Law and Civil Law Systems: Towards a Better Understanding". This topic is not only of high academic importance but is also of great practical significance, because these three legal systems are major legal systems<sup>2</sup> in the world today, sometimes operating side by side, through which justice is administered in different ways that affect the lives of millions of people in different countries. There is usually a trend of promoting a climate of total conflict between the *Shari'ah* system and "Western" legal systems, which often overshadows the many areas of common ground between the three systems, especially in relation to the administration of justice. Owing to the necessary interaction between different legal systems in the modern world, it is imperative that legal scholars and practitioners continue to promote a better understanding of the different systems to encourage effective administration of justice globally. However, the topic is also quite complex, because, even though these three legal systems represent specific legal traditions, their details of application are not really monolithic but varies from country to country. For example, the details of application of the Common Law system in the United Kingdom, differs in many ways from that of the United States of America and countries in Africa and Asia. One would also find differences in the details of the Civil Law system as applied in different civil law jurisdictions such as France, Germany or Italy. Similarly, there are differences in the details of application of the *Shari'ah*, in different Muslim countries, not least of which is the differences in the schools of jurisprudence followed in the different countries.

This paper can, therefore, only be a general and modest contribution to trigger further enquiry on the subject. It provides a basic but critical analysis of the main features and historical evolution of the three legal systems and their relevant judicial processes and institutions, highlighting areas of similarities and differences and how the interactions between them may be harnessed for better administration of justice from both a domestic and international perspective.

In his book on Invitation to Law, Professor Brian Simpson observed notably that:

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<sup>2</sup> See generally, R. David & J.E.C. Brierly. 1979. *Major Legal Systems in the World Today*. London: Steven & Sons.

*Legal systems do not emerge out of nothing; they possess a history, and reflect ideas, and make use of institutions, which have developed over time, and been moulded by cultural and political forces.*<sup>3</sup>

That is absolutely true of each of the three legal systems examined in this paper. Owing to historical, cultural, religious, colonial and political factors, each of these three legal systems applies either solely or side by side each other in many countries of the world today. In different parts of the Muslim world, the *Shari'ah* system applies side by side with either the Common Law or the Civil Law system. For example, in countries such as Malaysia, Nigeria, Pakistan and the Sudan, the *Shari'ah* and Common Law systems apply side by side, with *Shari'ah* Courts and Common Law Courts administering justice within their respective allocated jurisdictions. In other countries such as Egypt, Indonesia, Kuwait, and Tunisia, the *Shari'ah* and Civil Law systems apply side by side, also with *Shari'ah* Courts and Civil Law Courts administering justice within their respective allocated jurisdictions. In these interactions of legal systems, there have been instances of agreements and disagreements between the systems both on legal principles and processes. A comparative study of the underlying general principles of the three legal systems can therefore be a very effective way for promoting a better understanding and harmony between them.

Domestically, there are ongoing academic and judicial efforts in different Muslim countries,<sup>4</sup> including Malaysia,<sup>5</sup> to explore possible ways of realising

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<sup>3</sup> A. W. B. Simpson.1988. *Invitation to Law*. Oxford: Blackwell Publications. p.55.

<sup>4</sup> See e.g. the Northern Nigerian case of *Tela Rijiyan Dorawa v Hassan Daudu* (1975) NNLR, 87 and the Pakistan Supreme Court Case of *Benazir Bhuto v The Federation of Pakistan* (1988) 40 PLD (S. Ct) 416. For similar attempts by the Egyptian Supreme Constitutional Court, see e.g. C.B. Lombardi & N. J. Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights?: How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law" (2006) 21 *American University International Law Review*, pp.379-435.

<sup>5</sup> See e.g. (Tun) A. H. Mohamad, "Harmonization of Common Law and Shari'ah in Malaysia: A Practical Approach", Paper delivered at the Abd Al-Razzaq Al-Sanhuri Lecture, Harvard Law School, 6 November, 2008. Available online at: <http://www.law.harvard.edu/programs/ilsp/events/Harmonization%20of%20Common%20Law%20and%20the%20Shari'ah%20in%20Malaysia.pdf> (Unless otherwise stated all internet references were last accessed on 21/12/10).

necessary harmony between the principles of administration of justice under the *Sharī'ah* and Common Law or the *Sharī'ah* and Civil Law systems respectively. Even Saudi Arabia, which is normally considered as a traditionally conservative Muslim country, has recently committed nearly two billion dollars to legal reforms in the country,<sup>6</sup> including the introduction of case reporting within its *Sharī'ah* legal system through the publication and distribution of judicial reports called *Mudawwanah al-Ahkām al-Qadā'iyah* by its Ministry of Justice from February 2007. The four current volumes of the judicial reports are freely available on the Ministry's website.<sup>7</sup> Different propositions on how to devise possible methodologies of harmonization to "bring greater coordination and consonance" between these legal systems have also been put forward by legal scholars and experts.<sup>8</sup> Certainly, a good coordination of the principles of administration of justice between the three legal systems can greatly promote the realisation of substantive justice within the legal systems of Muslim States where the *Sharī'ah* applies side by side with either the Common Law or Civil Law. This sentiment was reflected in an observation of the Supreme Court of Pakistan in the 1991 case of Akbar Ali v Secretary, Ministry of Defence, Rawalpindi and Another, where the Court noted, inter alia, that:

*Since the introduction of Islamic law and jurisprudence in our [i.e. Pakistani] Constitutional setup ... the emphasis on real substantive justice has increased manifold. So much so that although it is not enshrined in the Constitution as a fundamental right, ... the right to obtain justice as is ordained by Islam, has become [an] inviolable right of citizens of Pakistan.*<sup>9</sup>

This indicates the possibility of positive mutual impact of the different legal systems on one another where they apply side by side domestically, based on the common objective of achieving the fair administration of justice.

<sup>6</sup> See news item at: <http://www.ameinfo.com/134904.html>.

<sup>7</sup> <http://www.moj.gov.sa/Arabic/JudicialBlog/Pages/versions.aspx>.

<sup>8</sup> See e.g. M. H. Kamali, "Shari'ah and Civil Law: Towards a Methodology of Harmonization" (2007) 14 *Islamic Law and Society*, No.3, pp.391-420.

<sup>9</sup> (1991) 3 SCMR, 2114.

From an international perspective, a better understanding of the principles and processes of administration of justice under each of the three legal systems can greatly encourage respect for international minimum standards of fair trial and due process as envisaged under international human rights instruments. Although every State has the sovereign right to adopt any legal system of its choice, there are, nevertheless, identifiable international norms of administration of justice aimed at ensuring equity and fair play in the delivery of justice by every State to everyone within its jurisdiction. Such international minimum standards include the guarantee of fair and public hearing; independent and impartial tribunals; the right to a remedy; the right to counsel and to free legal assistance where necessary; the right to adequate time and facilities for the preparation of defence; the right to an interpreter; the right to trial without undue delay; the right to equality of arms and procedural rights; protection against double jeopardy; and the right of appeal to a higher tribunal, among others.<sup>10</sup> Today, the administration of justice under every legal system is normally weighed against these international minimum standards.

An important point that cannot be overemphasised is that, while there are, no doubt, some fundamental differences in the nature and sources of these three legal systems respectively, there are also significant areas of conceptual and evolutionary similarities between them that can certainly promote a positive interaction between them and also enhance the realisation of fair trial and due process in the administration of justice internationally.

In addressing this important topic, this paper will first examine the nature and need for administration of justice in human society, followed by an analysis of the nature and historical evolution of each of the three legal systems in relation to administration of justice. The final part of the paper will then provide a brief critical analysis of institutional and procedural parameters of administration of justice in relation to the three legal systems.

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<sup>10</sup> See e.g. UN Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex to UN Doc. E/CN.4/Sub.2/1993/24/Add.1 of 25 June 1993. See also generally, Art. 14 of the International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

## THE NEED FOR, AND NATURE OF, ADMINISTRATION OF JUSTICE

On the need for administration of justice in human society, Waheed Husain has concisely observed that:

*From the dawn of civilization when societies were gradually formed, people required protection from wrong doers. Not only life and property were protected, but social and personal disputes were required to be settled and antagonistic claims adjusted. Hence arose the necessity of administration of justice.*<sup>11</sup>

Generally, justice is about determining and remedying rights and wrongs in human society, and settling disputes impartially between disputing parties in ways that ensure peace and harmony in human relations. The ultimate aim of every legal system is to be able to deliver justice fairly to everyone through due process of law so that a decent social order can be maintained. That process of delivering justice fairly to everyone is what is normally termed the administration of justice, and it is today, in the formal sense, a State-sponsored or State-monitored process. Specifically, it refers to the processes through which justice is properly and equitably achieved free from arbitrariness or suspicion of bias. Under the *Shari'ah* system, the Qur'an provides in many places that justice must be done equitably and without bias.<sup>12</sup> An important rule of natural justice in that regard which was restated in the 1924 English case of *R v Sussex, Ex parte McCarthy*<sup>13</sup> is that "Justice must not only be done; but must be seen to be done".

To prevent arbitrariness in the administration of justice, law is usually sub-divided into substantive law and procedural or adjectival law. Substantive law provides for the substance of what is legally right and legally wrong within a legal system, while procedural law outlines the processes and procedure through which rights are sought and wrongs vindicated. Substantive law is about ensuring certainty of the law, while procedural law is about ensuring due process in applying the law. Both are, without doubt, necessary for the

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<sup>11</sup> W. Husain. 1934. *Administration of Justice During the Muslim Rule in India: With A History of Islamic Legal Institutions*. Calcutta: Calcutta University Press. p.1.

<sup>12</sup> See e.g. Q4:58; Q4:135; Q5:8 and Q16:90.

<sup>13</sup> [1924] 1 KB 256, [1923] All ER 233.

effective administration of justice under every legal system. By its nature, however, the administration of justice is more associated with institutions and procedures for the fair delivery of justice. Thus, in terms of delivery, it leans more towards procedural law, because without proper institutional and procedural standards justice cannot really be achieved and substantive law would be practically ineffective, no matter how well-crafted they are. While, the importance of procedural law to the administration of justice is recognised under each of the three legal systems, it appears that the Common Law system traditionally gave more importance to procedural law than the Civil Law and the Shari'ah Systems. It must also be said, however, that the traditional differences between the three systems in that regard is constantly shrinking, with many positive developments being undertaken under both the Civil Law and *Shari'ah* systems in recent times.

With regard to the traditional emphasis on procedural law in the administration of justice under the Common Law system, David and Brierly have noted that:

*Matters relating to the administration of justice, procedure, evidence and execution of judicial decisions have, for Common Law lawyers, an importance equal, or even superior, to substantive rules of law because historically their immediate preoccupation has been to re-establish peace rather than articulate a moral basis for the social order.*<sup>14</sup>

With regard to the Civil Law system, David and Brierly further observed that:

*Continental jurists have traditionally concentrated on "substantive law"... They have neglected matters of procedure ... those rules in the Anglo-American tradition known collectively as... adjectival law.*<sup>15</sup>

Thus, the traditional understanding has always been that while Common Law emphasises procedural norms in the administration of justice, Civil law, on the contrary, emphasises strict adherence to substantive law. Nevertheless,

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<sup>14</sup> David & Brierly, *supra*, fn 3 above, p.23.

<sup>15</sup> *Ibid*, at 327.

the importance of procedural law is not unrecognised under the Civil Law tradition. For example, the first three sections of the ancient Twelve Tables of Roman law (*Lex Duodecim Tabulae*),<sup>16</sup> which is considered to be the earliest substantive code of law in ancient Rome, are clearly provisions relating to procedural rules on administration of justice. The importance of procedural law to the effective administration of justice was also demonstrated in the codifications of modern civil law in the 19th century by the enactment of, for example, the French Napoleonic Code of Civil Procedure in 1806 and other codifications of procedural law enacted in countries like Italy in 1865 and Germany in 1877.<sup>17</sup> Also, writing in 1967 on the Italian civil law system, Cappelletti and others observed that

*For at least the past sixty years, no complaint may properly be made in Italy... that procedure and evidence have been neglected by legal scholarship. Since the beginning of this century, procedure has been one of the fields in which the doctrine has been most active and influential. The influence of legal scholarship is not limited to the drafting of the current code; it has also had great impact on the interpretation and practice followed in the courts.*<sup>18</sup>

With regard to the *Sharī'ah* legal system, some scholars have argued that the *Sharī'ah* does not really distinguish between substantive law and procedural law. That view is contestable. To appreciate the distinction between substantive and procedural law under the *Sharī'ah* legal system requires a distinction between *Sharī'ah* and Fiqh as will be analysed later. While it is true that both the Qur'an and the Sunnah, which are the main divine sources of Islamic law, mostly contain provisions relating to substantive law, yet there are some provisions that relate to procedural norms too. Furthermore, the early Muslim jurists demonstrated their appreciation of the importance of procedural law by identifying and discussing relevant procedural rules in their analysis of the administration of justice under the *Sharī'ah* legal system in

<sup>16</sup> "The Twelve Tables of Roman Law", 451BC – 450BC, See <http://www.csun.edu/~hcf11004/12tables.html> for a text of this Code.

<sup>17</sup> *Encyclopædia Britannica Online*. <http://www.britannica.com/EBchecked/topic/4776-61/procedural-law>.

<sup>18</sup> M. Cappelletti, *et. al.* 1967. *The Italian Legal System: An Introduction*. Stanford: Stanford University Press. pp.160-61.



their jurisprudential writings on judicial practice (*al-Qadā'*). Most classical books of Islamic jurisprudence (Fiqh) have a section on judicial practices (*al-'Aqdiyyah*), with relevant rules on administration of justice under the *Sharī'ah* system<sup>19</sup> that were well ahead of the rules applicable under other systems of law at that time, even though some of those classical rules may apparently be seen as outmoded in modern times.

It must be re-emphasised, however, that highlighting the role of procedural law in the administration of justice does not mean that the role of substantive law should be under-estimated. For example, the law of evidence which is an important aspect of procedure is essentially substantive law by itself. While procedural law is very important to the administration of justice, the ultimate aim of any effective system of justice would not be to merely attain procedural justice but to realise substantive justice. Procedural law is therefore not an end in itself but a means for the overall attainment of substantive justice in the administration of justice.

#### THE NATURE AND HISTORICAL EVOLUTION OF THE THREE LEGAL SYSTEMS

As earlier observed at the beginning of this paper, legal systems do not emerge from nothing but possess history, which shape their systems and processes over time. In other words, the truth of any legal system lies in its history. Thus, in seeking to understand the administration of justice under each of these legal systems, it is necessary to examine their individual nature and historical evolution.

While the different historical foundations and evolution of the three legal systems may account, on the one hand, for the traditional differences in their respective processes, there are, on the other hand, evident similarities in their respective historical evolution, which, perhaps, indicate also that the different legal systems and processes have actually been guided by reasonableness and

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<sup>19</sup> See e.g. I. A. K. Nyazee, (Trans.). 2000. *The Distinguished Jurist's Primer: Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid by Ibn Rushd*. Reading: Garnet Publishing Ltd., 2000. Vol. 2; and al-Māwardī. 1996. *Al-Ahkām as-Sultāniyyah: The Laws of Islamic Governance*, Trans. Yate, A. London: Ta Ha Publishers.

expediency across the different civilisations throughout human history. As legal historians traditionally consider the Civil Law system to be the oldest of the three by its linkage to ancient Roman law, we will begin with it first followed by the *Sharī'ah* system and then the Common Law system respectively.

### *The Civil Law System*

For clarity, it is necessary to first point out that the term “Civil Law” can be used in, at least, three different contexts.

First, the term can be used to distinguish between the civil aspects of any legal system as “civil law” and the criminal aspects as “criminal law”. This distinction exists in all legal systems. Although it is not in that context that the term is being generally used in this paper, it does have relevance to the process of administration of justice, especially in relation to classifying procedure into civil and criminal procedures respectively, as will be discussed later.

Secondly, the term “Civil Law” is often used in Muslim countries to distinguish between the *Sharī'ah* legal system (as an Islamic religious system) on the one hand and “Western” legal systems generally (as secular systems) on the other. In that sense both the Common Law and the Civil Law systems are often referred to jointly as “civil law”. Thus, in some Muslim countries, common law courts are generally referred to as “civil law courts” to distinguish them from the *Sharī'ah* courts. In that context it is important to remember that those courts although called “civil law courts” actually apply common law rules and procedure rather than civil law rules and procedure.

Thirdly, the term Civil Law refers in a general context to the Civil law system as a distinctive legal tradition. In that sense it is distinguished from other legal traditions such as the Common Law system and the *Sharī'ah* system respectively. It is in this third context that the Civil Law system is being considered in relation to the other two legal systems in this paper.

The Civil Law system or tradition originated in Europe and it continues, today, to be a principal legal tradition in Europe, Latin America as well as in

parts of Asia and Africa.<sup>20</sup> Legal historians traditionally date its origins to ancient Rome as far back as 450 BC when the *Lex Duodecim Tabularum*<sup>21</sup> was enacted in Rome, long before the beginning of the Roman Empire.<sup>22</sup> Four centuries after the enactment of the *Lex Duodecim Tabularum*, there developed, by 27 BC, a body of private jurists from the upper classes of Roman society who gained significant prominence separate from the traditional courts within the Roman legal system. These private jurists, called *jurisconsults*, regularly provided expert legal advice to the public and to the courts, especially when the courts were confronted with difficult legal questions in cases before them. The jurists were not State or public officers, but due to their jurisprudential expertise in the legal texts and the services they provided to the courts and to the populace, they gained much prominence and respect above the lay judges and magistrates of the courts who were non-professionals appointed on ad hoc and short term basis by the State. The jurists were the ones who provided written technical advice about the law and interpretation of textual material, such as the *Lex Duodecim Tabularum* or other imperial edicts, to the judges and to the public generally. They were thus almost solely responsible for the development of a comprehensive jurisprudence, independent of judicial decisions, in response to the continuing changing demands of Roman society. The short-term, non-professional character of the Roman judiciary and its method of case disposal resulted in the non-accordance of any significant importance or precedential role to the judicial decisions in individual cases under the Roman legal system, which was subsequently transferred unto the modern Civil Law system.

As will be discussed later in our analysis of the *Sharī'ah* legal system, there is some similarity between this role of private *jurisconsults* under ancient

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<sup>20</sup> See generally, J.H. Merryman & R. Perez-Perdomo. 2007. *The Civil Law Tradition*. Stanford: Stanford University Press, 3<sup>rd</sup> Ed. pp.2-3.

<sup>21</sup> "The Twelve Tables of Roman Law", 451BC – 450BC, considered to be the earliest attempt by the Romans to create a Code of Law that would be binding on everyone in Rome. See e.g. <http://www.csun.edu/~hcfll004/12tables.html> for a text of this Code,

<sup>22</sup> See however the view of David and Brierley that the Civil Law system as such (Romano-Germanic system of law) appeared in the thirteenth century and that the period of incubation preceding this lacked any idea of system as such. R. David & J.E.C. Brierley. 1978. *Major Legal Systems in the World Today*. London: Stevens & Sons. p.33.

Roman law and that of the classical Muslim jurists in the development of Islamic law too through similar private jurisprudential scholarship.

Over the centuries, there eventually developed a large accumulation of jurisprudential material and different points of view on Roman law, which sometimes created conflicts and uncertainty in the law. Thus, Emperor Justinian deemed it desirable during his rule in the 6th century, “to resolve [the] conflicts and doubts [in the law] and to organize what was worth retaining into some systematic form”.<sup>23</sup> He consequently ordered the comprehensive compilation of the imperial edicts and the authoritative writings and interpretations of the established jurists over the centuries into a single body of law known as the *Corpus Juris Civilis* (Body of Civil Law) often referred to as the Justinian Code, after the name of the Emperor. Merryman and Perez-Perdomo have identified in that regard that:

*In particular Justinian was concerned about the great number, length, and variety of commentaries and treatises written by legal scholars (called jurisconsults). He sought [through the compilation of the Justinian Code] both to abolish the authority of all but the greatest of jurisconsults of the classical period and to make it unnecessary for any more commentaries or treatises to be written. On publication of the Corpus Juris Civilis, Justinian forbade any further reference to the works of jurisconsults. Those of their works that he approved were included in the Corpus Juris Civilis, and henceforward reference was to be made to it, rather than to the original authorities.*<sup>24</sup>

A study of the history of Islamic law will reveal that there is also some similarity here with the concept of the closing of the gate of *Ijtihād* during the developmental stages of Islamic law around the 13th century when the classical Muslim jurists felt that all essential questions of Islamic law had been thoroughly discussed and finally settled,<sup>25</sup> and thus the jurisprudential scholarship of the jurists became restricted to merely commenting on the works of the past master jurists. The theoretical concept of the closing of the

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<sup>23</sup> J.H. Merryman & R. Perez-Perdomo, *supra*, fn 21 above, p.7.

<sup>24</sup> *Ibid.*, p.7.

<sup>25</sup> J. Schacht. 1983. *An Introduction to Islamic Law*. New York: Oxford University Press. p.70; See also generally N. Coulson. 1995. *A History of Islamic Law*. Edinburgh: Edinburgh University Press.

gate of *Ijtihād* by the Muslim jurists in the 13th century was also partially aimed at regulating the legal process by controlling the divergence in interpretations and commentaries of the different jurists.<sup>26</sup>

With the compilation of the Justinian Code in the 6th century, Emperor Justinian drove the final nail into the coffin of the non-significance of judicial precedent in ancient Roman law as well as the role of judicial precedent in latter Civil Law practice, establishing the principle that “legal decisions should be rendered in accordance with the law and not with examples” (*non exemplis sed legibus judicandum est*).<sup>27</sup> The Justinian Code thus became the essential building block for the substantive and procedural principles of the Civil Law system.

Glenn notes that the “Romans took their law with them, all over Europe, as far north as what we now know as Germany and as far west as the British Isles”.<sup>28</sup> There was a decline for many centuries after the Romans were eventually driven out of Europe, and Roman law was in the words of Glenn, driven off “the European territorial map for centuries, except for rudimentary versions of it in Italy and the south of France”, but it “came crashing back” in Europe in the 11th to 13th centuries.<sup>29</sup> During the intellectual reawakening of the mid-eleventh century in Europe, Roman Civil Law was “re-discovered” and revived in Italy with the Justinian Code as the main law studied in the first European University in Bologna, Italy. Scholars came from all over Europe to study that law at Bologna and returned to teach it to others in their own cities. Other European universities later followed suit, and the Justinian Code again re-emerged as the basis of legal study in Europe until around the 17th and 18th Century when its rules were re-examined in the light of modern reasoning. By the 19th century there had begun a systematic codification of modern civil law in many civil law jurisdictions such as France, Germany and Italy, which

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<sup>26</sup> The concept of the complete closing of the gate of *Ijtihād* has however been challenged by some scholars. See e.g. W. Hallaq, “Was the Gate of Ijtihad Closed?” (1984) *International Journal of Middle East Studies*, No.1, pp.341.

<sup>27</sup> J.G. Apple & R.P Deyling, *A Primer on the Civil Law System* (1995) p.5. Available on the Federal Judicial Centre website at: [http://www.fjc.gov/public/pdf.nsf/lookup/-civillaw.pdf/\\$file/civillaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/-civillaw.pdf/$file/civillaw.pdf)

<sup>28</sup> H. P. Glenn. 2010. *Legal Traditions of the World*, 4<sup>th</sup> Ed. New York: Oxford University Press. p.139.

<sup>29</sup> *Ibid.*, p.140.

constituted the authoritative legal texts in those jurisdictions. From its origins in Rome and later continental Europe, the Civil Law system gradually spread to many areas in Africa, Asia, and Latin America, which were colonies of France, the Netherlands, Spain or Portugal. The legal systems of many North African and Middle Eastern nations are strongly influenced by the French civil-law system, operating side by side with Islamic legal traditions. The precise application of the Civil Law system however varies widely in the different jurisdictions, but yet maintaining the traditional fundamental nature of the Civil Law system as a codification-based system of law, with judges restricted to simple interpretation and application of the law cautiously in the interest of certainty to the effect that prior judicial decisions are not formally considered as law, as is the case under the Common Law system.

In relation to the role of the judiciary in the administration of justice, the civil law system traditionally sees judges as merely “operators of the law”. Merryman and Perez-Perdomo illustrate this as follows:

*In deciding a case, the judge extracts the relevant facts from the raw problem, characterizes the legal question that these facts present, finds the appropriate legislative provision, and applies it to the problem. Unless the legal scientist and the legislator have failed in their functions, the task of the judge is a simple one; there is only one correct solution, and there is no room for the exercise of discretion. If the judge has difficulty finding the applicable provision or interpreting and applying that provision to the fact situation, then one of the following people must be at fault: the judge, who does not know how to follow clear instructions; the legislator, who failed to draft clearly stated and clearly applicable legislation; or the legal scholar, who has either failed to perceive and correct defects in the legal science or has failed to instruct the legislator and judge properly on how to draft and apply statutes. No other explanation is permissible. If everyone did his or her job right, the judge would have no difficulty in finding, interpreting, and applying the applicable law.<sup>30</sup>*

As Merryman and Perez-Perdomo further observe, certainty of the law was of the utmost importance under the Civil Law system.

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<sup>30</sup> J.H. Merryman & R. Perez-Perdomo, *supra*, fn 21 above, p.81.

*Hovering over the entire legal process is a brooding anxiety about certainty ... [which] requires that the law be completely, coherently, and clearly stated by the legislature, and only by the legislature. Judges are restricted to interpretation and application of “the law” in the interest of certainty, and prior judicial decisions are not “law”. Judges are also denied the power to temper the rigor of a rule in a hard case. All non-legal considerations must be excluded from the law in the interest of certainty. Considerations of justice or other ends of the law must be excluded for the same reason. Hard cases, unjust decisions, unrealistic decisions, are regrettable, but they are the price one has to pay for certainty.<sup>31</sup>*

Considering the earlier observation that the ultimate objective of administration of justice is to realise substantive justice, this strict adherence to the letter of codified law under the Civil Law system could raise many practical problems for judges. The traditional critique against the Civil Law system, especially by Common Law advocates, has therefore often been that it is too “code-centric” giving little or no room for the exercise of judicial discretion, which in turn could impact on substantive justice.

In reality, civil law judges do frequently find themselves confronted by practical problem cases in which the only applicable legislation is either too general, unclear, contradictory in application, or that the legislature did not foresee the problem now facing the judge. In such situations they neither give up on the ground that the law is not clear nor make unrealistic or unjust decisions. Rather, they usually try to create reasonable law out of the general or unclear legislation without admitting to doing so. Thus, even though administration of justice under the civil law system is fundamentally a codification-based system, yet civil law judges do improvise in the interest of justice, in ways that would be considered as law making by their Common Law counterparts, where it is necessary to do so, even though they would deny law making and try as far as possible to show that their decision was based on the obviously general and unclear legislation.<sup>32</sup> This practically makes modern civil law judges more than mere “operators of the law” by pragmatically

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<sup>31</sup> *Ibid.*, p.82.

<sup>32</sup> *Ibid.*

stepping into the role of the ancient Roman juriconsults to fill any lacunae that might confront them in deciding cases before them from time to time.

### *The Sharī'ah System*

The *Sharī'ah* system differs significantly from both the Civil and Common Law systems because it has a religious foundation and based on divine sources through revelation received from God by Prophet Muḥammad (pbuh)<sup>33</sup> over a period of 23 years in the 7th Century. However, where the scope of the immutable divine basis of the *Sharī'ah* is extended to also cover the mutable human aspect of the system, it can have a restrictive impact on administration of justice under the system. There is often a traditional misconception that the whole *Sharī'ah* legal system is divine and immutable, which usually arises from the non-distinction between the sources and the methods of the system. Traditionally, the *Sharī'ah* system is usually presented as having four sources, namely: the Qur'an,<sup>34</sup> the Sunnah,<sup>35</sup> *Ijmā'*,<sup>36</sup> and *Qiyās*<sup>37</sup> with all of them depicted as being divine and immutable, which can be misleading, particularly in relation to administration of justice. It is more accurate to classify the Qur'an and the Sunnah as the sources, which are divine and immutable, and classify *Ijmā'*, and *Qiyās* as the methods, which are non-divine and variable. For a better appreciation of the nature of administration of justice under the *Sharī'ah* system, it is necessary to note that the term "*Sharī'ah*" can also be used in, at least, three different contexts.

First, it can be used in a generic religious sense to refer to the Muslims' way of life generally. In that context it covers both issues of "non-law" and issues of strict "law", i.e., Islamic ethical, moral, religious, spiritual and legal stipulations as a whole. In that context not all *Sharī'ah* stipulations are justiciable, that is, enforceable juridically. Thus when we talk about administration of justice under the *Sharī'ah*, the non-law issues, even though

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<sup>33</sup> The abbreviation "pbuh" means "Peace be upon him" and is a prayer offered when the name of Prophet Muhammad is mentioned or written.

<sup>34</sup> The holy book of Muslims.

<sup>35</sup> Traditions and Practices of Prophet Muhammad.

<sup>36</sup> Juristic Consensus.

<sup>37</sup> Analogical Deductions.



they are part of the *Sharī'ah*, would not normally be covered, because they are not justiciable. This can be illustrated with the following three Qur'anic provisions:

Q4:86 provides that:

وَإِذَا حُيِّتُمْ بِتَحِيَّةٍ فَحَيُّوا بِأَحْسَنٍ مِنْهَا أَوْ رُدُّوهَا إِنَّ اللَّهَ عَلَىٰ كُلِّ شَيْءٍ حَسِيبٌ

*When you are greeted with a greeting, greet in return with what is better than it, or (at least) return it equally. Certainly, God is a Careful Account Taker of all things.*

This Qur'anic obligation to return a greeting in a better or at least in a similar way is only a moral and ethical obligation enjoined on Muslims, which is not justiciable. Thus, one Muslim cannot bring legal action in a *Sharī'ah* court against another Muslim who fails to return a greeting despite being enjoined to do so under the *Sharī'ah*.

Also Q3:97 provides that:

وَلِلَّهِ عَلَى النَّاسِ حِجُّ الْبَيْتِ مَنِ اسْتَطَاعَ إِلَيْهِ سَبِيلًا

*And Hajj (pilgrimage) to The House (Ka'bah) is a duty owed to God by everyone who is able to undertake it...*

Similarly, the Qur'anic obligation to perform the hajj pilgrimage is a religious and spiritual obligation enjoined on Muslims who can afford it, but which is not justiciable. Thus, no legal action can be brought in a *Sharī'ah* court against a Muslim who fails to perform the hajj pilgrimage, even though he has a religious obligation under the *Sharī'ah* to do so.

And Q3:97 provides that:

لِلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانُ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانُ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ نَصِيبًا مَفْرُوضًا

*There is a share for men and a share for women from what is left by parents and near relations, whether the property be small or large, a legal share.*

Unlike the previous two provisions, the Qur'anic stipulation on the right to inheritance is not merely ethical but also justiciable. Thus, a person can bring legal action to enforce his or her right in the *Sharī'ah* courts if, for example, there is an attempt to exclude that person from his or her legal share in the estate of the late parents.

Thus while all the three Qur'anic verses cited above are *Sharī'ah* stipulations, the first relates to the moral and ethical ("non-law"), the second to the religious and spiritual, ("non-law") and the third to the strictly legal ("law"). In relation to administration of justice only the third type of *Sharī'ah* stipulations would be relevant, bearing in mind our earlier explanation that administration of justice is about determining and remedying rights and wrongs in human society.

Secondly, the term *Sharī'ah* can also be used in a general legal sense in reference to the Islamic legal system as a distinct legal tradition with its own sources, methods, principles and procedures, separate from other legal traditions such as the Common Law and Civil Law systems. It is in that context that the *Sharī'ah* is being considered in comparison with the other two legal systems in this paper. However, when the term *Sharī'ah* is used in that context, there is the need to be cautious not to perceive the whole system as completely divine and thereby considered inflexible and unchangeable. It is such wrong perception that usually stands in the way of legitimate propositions to adjust the traditional processes and procedures of administration of justice under the *Sharī'ah* legal system in many Muslim States to meet the challenging dynamics of the administration of justice in today's world. There is therefore always the important need to distinguish between what is divine and immutable and what is human and variable within the *Sharī'ah* legal system. Thus to prevent against such erroneous mix-up, it is more desirable, in my view, to use the phrase "Islamic legal system" instead of "*Sharī'ah* legal system" in appreciation of the fact that while the system consists of divine sources (i.e. the *Sharī'ah*), it also certainly consists of human jurisprudence (i.e. Fiqh), which brings us to the third context of the term.

Thirdly, the term *Sharī'ah* can be used specifically in reference to only the Islamic divine sources, namely, the Qur'an and the Sunnah. In that context it is distinguished from Fiqh, which is the human methodical and jurisprudential aspect of Islamic law. So while the *Sharī'ah* is in this sense divine and immutable, the legal rulings derived from the *Sharī'ah* through

Fiqh are not immutable but variable, especially in respect of the inter-human relations (*Mu'āmalāt*), which we have already identified as the main objects of administration of justice. It is in that regard that Abd al 'Ati has correctly noted that “confusion arises when the term *Sharī'ah* is used uncritically to designate not only divine law in its pure principal form, but also the human subsidiary sciences including fiqh”.<sup>38</sup> Thus, in its strict juridical sense the term *Sharī'ah* refers to the corpus of the divine law as contained in the Qur'an and the Sunnah of the Prophet. It differs in that context from Fiqh which refers to the understanding derived from the *Sharī'ah* by the Muslim jurists. Thus, Fiqh, which technically means jurisprudence, is non-divine and may change according to time and circumstances. From that perspective, I submit that the *Sharī'ah* legal system consists of sources, methods and principles. While the sources, that is the Qur'an and Sunnah are divine, the methods, *Ijmā'* and *Qiyās* and the many principles that regulate its application are all human and flexible.

During Prophet Muhammad's lifetime, the application of the *Sharī'ah* was relatively straight forward, as matters were normally referred to him and his decisions were accepted as conclusive. Thus, Ramadan has noted that “the structure of Islamic Law – the *Sharī'ah* – was completed during the lifetime of the Prophet, in the Qur'an and the Sunnah”.<sup>39</sup> However, after the Prophet's death, with the passage of time and the expansion of Islam, many new cases that were not specifically covered by the Qur'an or the Sunnah emerged. Relying, inter alia, on the Tradition of Mu'ādh ibn Jabal in which the Prophet was reported to have asked one of his companions named Mu'ādh ibn Jabal, whom he had deployed as a judge to Yemen, what would be his source of law in deciding cases, whereby Mu'ādh was reported to have replied that he will judge with what is in the book of God (the Qur'an), and then the Sunnah of the Prophet and that if he found no clue in the sources would exercise his own reasoning (*Ijtihād*), which the Prophet was reported to have approved,<sup>40</sup> the concept of *Ijtihād* (legal reasoning) was utilised to devise the methods, namely

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<sup>38</sup> H. Abd al 'Ati. 1977. *The Family Structure in Islam*. Indianapolis: American Trust Publications. p.14. See also M. A. Baderin. 2003. *International Human Rights and Islamic Law*. Oxford: Oxford University Press. pp.33-34.

<sup>39</sup> S. Ramadan. 1970. *Islamic Law: Its Scope and Equity*. London: Macmillan. p.36.

<sup>40</sup> See e.g. A. Hasan (Trans). *Sunan Abū Dāwūd* (India: Sh. Muhammad Ashraf, 1984), Vol. III, p.1019, Hadīth No.3585.

*Ijmā'*, (consensus) and *Qiyās* (analogy) by the early Muslim jurists as a means of addressing new situations that needed to be regulated, but not expressly covered by the Qur'an or the Sunnah. These methods facilitated the extension of the two divine sources to answer new legal questions that arose after the Prophet.

Thus, while the revealed sources of the *Sharī'ah* system ended with the demise of the Prophet, the evolved methods were the vehicle by which the Muslim jurists transported the *Sharī'ah* into the future. To enable the efficient and realistic application of law, relevant principles such as *Ḍarūrah* (necessity), *Maṣlahah* (welfare), *Istihsān* (equity), *Takhayyur* (eclectic choice), *Talfīq* (patching up), *Siyāsah Shar'īyyah* (politics), and the principle of *maqāṣid al-Sharī'ah* (objectives of the *Sharī'ah*), among others, were also evolved by the classical Islamic jurists. Thus, similar to the jurisconsults under traditional Roman law, the Muslim classical jurists also played an important role in the development of Islamic law, particularly through the formulation of its methods and principles. In its applied or jurisprudential sense, Islamic law is therefore often described as “jurists’ law” by many modern writers on the subject.<sup>41</sup>

With the expansion of Islam outside Arabia, about 500 schools of Islamic jurisprudence (*Madhāhib*) developed in the early years but most of them disappeared and others merged by the 10th century, leaving today, four main Sunnī Schools<sup>42</sup> of Islamic jurisprudence as well as different *Shī'ah* schools<sup>43</sup> of jurisprudence, applicable today in different parts of the Muslim world. Based on their understandings of the provisions of the *Sharī'ah* through careful and prolonged study, the classical jurists of the different Schools of Islamic jurisprudence compiled books of Fiqh containing different jurisprudential

<sup>41</sup> See e.g. P. Rudolf, “From Jurists’ Law to Statute Law or What Happens When the Shari’a is Codified”(2002) 3 *Mediterranean Politics*, No.3, pp. 82-95.

<sup>42</sup> These are the Mālikī School of Islamic law, which prevails, for example, in Morocco and Nigeria, the Shāfi’ī School of Islamic law, which prevails, for example, in Malaysia and Kenya; the Hanbalī School of Islamic law, which prevails, for example, in Saudi Arabia and Qatar; and the Hanafī School of Islamic law, which prevails, for example, in Pakistan and Jordan.

<sup>43</sup> The major ones of which are the Ithnā Asharī School of Islamic law, which prevails, for example in Iran and Bahrain; the Zaydī School of Islamic law, with following, for example, in Yemen; the Ismā’īlī School of Islamic law, with following, for example, in India; and the ‘Ibādī School of Islamic law, which prevails, for example, in Oman.

views on various issues. The books of Fiqh containing the jurisprudential rulings subsequently became the material sources of reference under the *Sharī'ah* system.

By the 10th century, however, similar to what happened during the developing process of the Civil Law system in the 6th Century which led to the adoption of the Justinian Code, it was thought that the established Schools of Islamic jurisprudence had fully exhausted all possible questions of law and that the necessary interpretative materials of the *Sharī'ah* were fully formed and thus the practice of the legal reasoning of *Ijtihād* was generally discouraged. That consequently led to the claim of what was termed as “closing of the gate of *Ijtihād*”, which ushered in the practice of legal conformism (*Taqīd*) whereby Muslims were expected to conforming to or following the confirmed jurisprudential rulings in the Fiqh jurisprudential books of any one of the established Schools of jurisprudence.

As earlier mentioned, the theoretical concept of the closing of the gate of *Ijtihād* by the Muslim jurists in the 13th century was also partially aimed at controlling the divergence in interpretations and commentaries of the different jurists of the time. That slowed down the dynamism that had been injected into Islamic law from its inception, and thus, according to Iqbal, “*reduced the law of Islam practically to a state of immobility*”.<sup>44</sup> Although many contemporary scholars have challenged the notion of the closing of the gate of *Ijtihād*, the practice of *Taqīd* still prevails amongst lay judges of the lower *Sharī'ah* courts in many Muslim countries today. Although *Taqīd* remains a necessary methodology under the *Sharī'ah* for ensuring that those who are not fully qualified in the science of Islamic jurisprudence are able to base their decisions on relevant precedents laid down by the classical jurists, it must be distinguished from blind conservatism that does not allow for a reflective and contextual application of the classical precedents.

It is imperative to state that the concept of *Taqīd* should neither place unnecessary restrictions on the development of new theories and principles of Islamic law by qualified scholars and jurists nor prevent qualified judges under the *Sharī'ah* system from exercising their legal reasoning in cases before them, within the context of the sources, methods and principles of Islamic law.

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<sup>44</sup> M. Iqbal. 1954. *The Reconstruction of Religious Thought in Islam*. Lahore: Sh Muhammad Ashraf. p.148.

Actually, Muslim jurists are agreed on the fact that a qualified jurist or judge must exercise his own juristic opinion in accordance with the *Sharī'ah*, in every case before him, subject to a clear elaboration of the relevant methodologies of the law utilised in reaching his decision so that the validity of his judgment can be properly evaluated within the relevant rules of Islamic law.<sup>45</sup>

Being mainly procedural, the process of administration of justice under the *Sharī'ah* system, is covered mostly under Fiqh provisions. Apart from few provisions, for example, on the number and quality of witnesses<sup>46</sup> and the process of conciliation (*Sulh*) in marital disputes,<sup>47</sup> the divine sources mainly cover substantive law while the relevant specific details on the legal process and procedure were provided by the jurists in their jurisprudential works. Thus, while the Qur'an or the Sunnah, may specify a crime, prescribe punishments, and enjoin substantive justice and general protection of the rights and security of the individual, they do not often provide specific details on procedural issues such as arrest, detention, investigation, prosecution, creation of courts, procedure for hearings, judicial reviews, appeals, etc. The minute details on the necessary procedure for the realisation of justice are left to the jurists and the relevant authorities of State to decide in accordance with the best interests of society.<sup>48</sup>

<sup>45</sup> See e.g. I. A. K. Nyazee, (Trans.) *The Distinguished Jurist's Primer*, *supra*, fn 20 above, Vol.1, p.xxxv; A. M. al-Ghaza'ī. 1996. *al-Mustasfā fī Ilm al-Usūl*. Cairo: Makatabah al-Tijāriyyah. p.368.

<sup>46</sup> E.g. Q2:282; Q5:106; Q4:15; Q65:1-2

<sup>47</sup> E.g. Q4:35.

<sup>48</sup> For classical analysis of the development of Islamic judicial procedure, See e.g. M. Ibn Qayyim al-Jawziyyah. 1961. *Al-Turuq al-Hukmiyyah fī al-Siyāsah al-Shar'iyyah* [Arabic]. Cairo: al-Mu'asasah al-Arabiyyah. p.218ff and al-Māwardi, *al-Ahkām as-Sultāniyyah: The Laws of Islamic Governance*, Trans. A. Yate, (London, Ta Ha Publishers, 1996), pp.99ff. See also contemporary analysis on the subject by A. M. Awad, "The Rights of the Accused under Islamic Criminal Law" in M. C. Bassiouni, (ed.) *The Islamic Criminal Justice* (New York: Oceania Publications, 1982), pp. 91-92; T. J. Al-Alwani, "Judiciary and Rights of the Accused in Islamic Criminal Law", in T. Mahmood, *et al*, (eds.) *Criminal Law in Islam and the Muslim World* (Delhi: Institute of Objective Studies, 1996), p.256-263; T. Mahmood, "Criminal Procedure at the Shari'ah Law as Seen by Modern Scholars: A Review", in T. Mahmood, *et al*, *ibid.*, pp. 292ff; and generally M. Lippman, *et al*, (eds.) *Islamic Criminal Law and Procedure: An Introduction* (New York: Praeger Publications, 1988).

Traditionally, drawing from the relevant practices of Prophet Muhammad and that of the rightly guided Caliphs as well as from custom (Urf) during the early period of Islam, classical Muslim jurists endeavoured to lay down judicial procedures which they believed would facilitate the realisation of substantive justice within the boundaries of the divine *Sharī'ah* at that time. It is within that procedural context that principles of administration of justice under the *Sharī'ah* system are found. These procedural principles as provided in the jurisprudential works of the classical Muslim jurists were not rigid but were adjusted in practice under the principle of *siyāсах shar'īyyah*, especially during the Abbasid Caliphate to fulfil the needs of time and substantive justice. The historical development of the processes of administration of justice under the *Sharī'ah* system is therefore usually mapped from the early rudimentary practices of the Prophet's time through the practices of the Rightly Guided Caliphs and rising to its peak during the Abbasid Caliphate when the judiciary and other relevant institutions for an effective system of administration of justice, such as the *shurtah* (police) and *wilāyah al-ḥisbah* (market inspectorate), etc, were formally established and some level of separation between the Caliphate and the judiciary were recognised, and relatively detailed rules of evidence and procedure instituted in the courts. Jābir al-'Alwānī has noted in that regard as follows:

*During the Prophet's reign Madinah was small, and the community's legal problems were few and uncomplicated. ... The institution of legal judgment during the times of the four rightly guided caliphs remained simple and uncomplicated. Judges had no court scribe or written record of their decisions, for these were carried out immediately and under the individual judge's direct supervision. No detailed procedures were worked out for the judicial process, the registration of claims, the delineation of jurisdictions, or for any other matters that would arise later, for the lives of the people were not yet complicated enough to require such refinements. Even the Shari'a specified no details, but left them to be determined by ijtihad. In other words, the juridical system was allowed to develop in a way that would be the best suited for the peoples' circumstances and customs. Under the four rightly guided caliphs, the judiciary was limited to resolving civil disputes. Other types of disputes, such as qisas (where capital punishment may be prescribed), hudud (where punishment, including capital punishment, is prescribed by the*

*Qu'ran*), or *ta'zīr* (where punishment, including capital punishment, is left to the discretion of the judge or the ruler) were decided by the ruler or his appointed governor. Not a great deal of change in this institution took place under the Umayyids, particularly under the early rulers, so that procedures remained uncomplicated. The major development was confined mostly to recording decisions in order to avert evasion and forgetfulness. In fact, such an incident occurred during the reign of Mu'awiyah ibn Sufyan, when Salīm ibn Mu'izz, the judge of Egypt, decided a case of inheritance. When the heirs reopened the dispute and returned to the judge, he recorded his decision in writing. This period also saw agreement upon the qualifications for a judge, the specification of a place in which the judicial procedure was to be carried out, and the development of the system by which injustices in public administration would be addressed. With the coming of the 'Abbasids, however, the judiciary made significant progress. Its sophistication grew in both form and procedure, and its vistas increased with the variety of cases heard. During this period the court register was introduced, the judge's jurisdiction was increased, and the state established the position of Chief Judge (*qādi al-quḍāh*), which today is comparable to the office of the Chief Justice. One negative development, however, was the increasingly infirm nature of *ijtihād*, which limited the judges to following the previous rulings of the four established schools of thought: *taqlīd*. Thus in Iraq and the Eastern territories, judges ruled according to the rulings of Abu Hanīfah; in Syria and Spain according to Malik, and in Egypt according to Imam Shafī'ī. After the Mongol destruction of Baghdad and the subsequent end of the 'Abbasid Empire in 1258 CE/606 AH, several smaller states emerged and developed their own legal institutions. While these legal institutions differed hardly at all in their foundations and the principles upon which they were established, they did differ significantly in matters of organisation, procedures, criteria for the appointment and removal of judges, and in the schools of legal thought followed. Ibn al Hasan al Nabahī portrayed the judiciary of eighth-century (hijri) Spain as follows: 'The authorities who deal with legal rulings are first the judges, then the central police, the local police, the appellate authority, the local administrator, and then the market controller.'<sup>49</sup>

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<sup>49</sup> T. J. Al-Alwani, "The Rights of the Accused in Islam" (1995) 10 *Arab Law*



Muslim scholars therefore fully agree that the processes of administration of justice under the *Sharī'ah* system are not and have never been static or inflexible; rather they leave room for necessary refinement as the needs of substantive justice demand from time to time and from place to place.<sup>50</sup>

Nevertheless, the main concern in many circles regarding administration of justice under the *Sharī'ah* system is the tendency to often represent the traditional juridical rules found in the classical Fiqh books as being carved in stone, static and invariable, which could greatly affect the realisation of substantive justice in modern times, as some of those procedural rules would not necessarily meet the standards of administration of justice today.

In that regard, Jābir al-'Alwānī has observed notably the need to appreciate that:

*... the Shari'a did not specify a particular juridical framework. Rather, it established the principles, general foundations, objectives, and sources of legislation. Organisational details (i.e., the extent of a judge's jurisdiction, limitations of his authority in terms of time and place, the assignment (or lack thereof) of another judge to work alongside him) were to be determined by the people's customs, needs, and circumstances. As there is nothing in the Shari'a that entrusts the juridical process to an individual or an institution, it was left up to the Muslim leadership to decide. The responsibility could be spread among several officials or confined to one, as long as the sole requirement was met: the ruler must ensure that those entrusted with this responsibility meet the Shari'a's conditions.*<sup>51</sup>

Thus, while the chapters on administration of justice in the jurisprudential works of classical Muslim jurists may serve as starting points, they are not necessarily meant to be immutable. In fact many Muslim states operating the *Sharī'ah* system have, as is necessary, produced modern and

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*Quarterly*, No. 4, pp3-16 at.4-7

<sup>50</sup> *Ibid.*

<sup>51</sup> These are: faith in Islam, maturity, ability to reason intelligently, freedom and trustworthiness, having all of one's faculties, and knowledge of the Shari'a's sources. (footnote part of quoted text). *Ibid.*

updated procedural rules for the administration of justice in the *Sharī'ah* courts as required to ensure substantive justice in today's world. The approaches have not been monolithic, While some countries start with the classical rules in the traditional jurisprudential Fiqh books revising and adding new rules as is necessary, others have adapted either modern common law or civil law rules of procedure, revising and adding relevant *Sharī'ah* principles where necessary to make them *Sharī'ah*-compliant. For example, in his paper on "Harmonization of Common Law and Shari'ah in Malaysia: A Practical Approach" delivered at the Harvard Law School in 2008 the Former Chief Justice of Malaysia, Tun Abdul Hamid Muhamad explained that what they did when the *Sharī'ah* courts were created in Malaysia was to take the "existing laws that were currently in use in the common law courts as the basis to work on, remove or substitute the objectionable parts, add whatever needed to be added, make them *Sharī'ah*-compliant and have them enacted as laws [of procedure for the *Sharī'ah* courts]"<sup>52</sup> Thereby, according to the learned former Chief Justice:

*The provisions of the Sharī'ah criminal and civil procedure enactments/act are, to a large extent, the same as those used in the common law courts. A graduate in law from any common law country reading the "Sharī'ah" law of procedure in Malaysia would find that he already knows at least 80% of them. On the other hand a graduate in Sharī'ah from Al-Azhar might find that he knows only about 20% of them. Of course, there are more traditional Sharī'ah or fiqh elements in the Sharī'ah Court Evidence Enactment/Act... Still, a common law lawyer reading them for the first time will find that he is reading something familiar, section by section, even word for word. Yet they are "Islamic law."<sup>53</sup>*

I concur with the learned former Chief Justice that such efforts are indeed within the framework of the *Sharī'ah* legal system as long as the adopted provisions do not conflict with substantive *Sharī'ah* provisions, and they facilitate the realisation of substantive justice in the *Sharī'ah* courts.

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<sup>52</sup> (Tun) A. H. Mohamad, *supra*, fn 6 above, pp. 1-2.

<sup>53</sup> *Ibid* at p.10.

Similarly, Saudi Arabia enacted its Law of Procedure before *Sharī'ah* Courts in 2000 containing 266 articles of detailed procedural rules, and also its Law of Criminal Procedure in 2001 containing 225 articles of detailed procedural rules, most of which are procedural norms that one would not necessarily find in traditional Fiqh books but are rather modelled along modern common law and civil law procedural norms that ensure an effective administration of justice in modern times. Article 1 of both Laws, however, provide that:

*Courts shall apply Sharī'ah principles, as derived from the Qur'an and Sunnah (the traditions of Prophet Muhammad, peace be upon him) to the cases that are brought before them. They shall also apply laws promulgated by the state that do not contradict the provisions of the Qur'an and Sunnah, and shall comply with the procedure set forth in this Law.*

There have been similar varying endeavours by other Muslim countries in that regard. Thus there is much flexibility within the *Sharī'ah* system in formulating rules of procedure for a better administration of justice under the system as this falls mostly within the realms of Fiqh rather than the substantive provisions of the *Sharī'ah*, per se.

#### *The Common Law System*

The term “Common Law” can also be used in, at least, three contexts. First, the term can be used in a general legal context in reference to the legal tradition based on the common law of England and modelled on English law. In that sense it is distinguished from other legal traditions such as the Civil Law system and the *Sharī'ah* legal system respectively. It is in that context that Common Law is being considered in relation to the two previously discussed legal systems.

Secondly, however, the term can also be used to distinguish “common law” as a source of law from “Equity” as a source of remedy under the Common Law system. Traditionally, two types of courts developed in England under its Common Law system, namely, the common law courts manned by common law judges and a court of chancery under the Lord Chancellor.

Plaintiffs who could not get a hearing or remedy in the common law courts due to its strict formality and technical rigidity were able to apply to the court of chancery where the Chancellor gave them a hearing and remedy, avoiding the strict formalities and technicalities of the common law courts and based his decisions on principles of natural justice, fairness, and what was equitable in the particular case. The court of chancery was therefore a Court of Equity which developed to provide remedies not available in the common law courts. The two courts were however combined by the Judicature Acts of 1873 and 1875. Thus, both common law and equity are jointly applied today in a single court under the Common Law system. Both common law and equity are in that context considered as applicable “sources” of law by the courts under the general Common Law system.

Thirdly, the term Common Law can equally be used to distinguish “case law” as developed by the courts from “statutory law” as enacted by the legislature as sources of law under the general Common Law system.

The Common Law tradition originated in England based largely on the activities of the royal courts of justice after the Norman Conquest of England in 1066AD.<sup>54</sup> Before the Norman Conquest, there was no centralised national legal system in England; rather there existed a system of oral customary rules, which varied according to the different regions. Each county had its own local court dispensing its own justice in accordance with local customs, which not only varied from community to community but were enforced in an arbitrary fashion, sometimes involving trial by ordeal or trial by duel. The local courts generally consisted of informal public assemblies that weighed the claims in each case and, if a decision could not be reached, would often require the defendant to test their guilt or innocence by some test of veracity, such as carrying a red-hot iron with bare hands, which creates burn wounds. If the consequent wounds healed within a prescribed period, that was taken as proof of the defendant’s innocence, but if it did not heal within the prescribed period that was taken as proof of the defendant’s guilt and an execution usually followed.

Unlike the Civil Law and *Shari'ah* systems, which originated from textual sources, the English Common Law system did not originate from any

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<sup>54</sup> R. David and J.E. C. Brierly, *supra*, fn 3 above, p.285.

particular set of texts but from what has been described as “tradition expressed in action”.<sup>55</sup> It began as customary law used in the King’s court to settle disputes affecting the monarch directly. Initially, there were still different types of local courts operating alongside the King’s court, until 1154 when King Henry II institutionalised the Common Law system by creating a unified court system “common” to the whole of England by incorporating and elevating the local customs to the national level, thereby creating a centralised system, ended local control, eliminated arbitrary trials and remedies, and created a jury system of citizens sworn on oath to investigate criminal accusations and civil claims.

Judges appointed by the King would travel regularly throughout the country to bring the King’s justice to every citizen. The objective aim was that there should be a common system of law throughout the land, hence the laws became known as the Common Law. The travelling judges formed a nucleus of judges with national jurisdiction who had no local roots. They were thus much less susceptible to the corruption which had spoilt a similar attempt earlier in the twelfth century in which the royal judges had actually been based in the local communities. It was under Henry II that judges were for the first time sent on “circuits”, hearing pleas in the major places they visited and taking over the work of the local courts. In time the decisions of the judges were written down. As the decisions of these courts came to be recorded and published, so the practice developed where past decisions (precedents) would be cited in argument before the courts and would be regarded as being of persuasive authority.

These practices developed into the Common Law of England, the law which was available throughout the realm. Thus King Henry II is often regarded as the “father of the Common Law” largely because he was responsible for the regional and roving royal justice through which the law truly became commonly available to all. However, many other factors of a general historical nature contributed to the development of the Common Law. In the expansion of the King’s legal powers, an important role was played by the clerics. They developed a range of claim forms, called writs, and established procedures which, perhaps significantly, gave them greater

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<sup>55</sup> See generally, A. W. B. Simpson. 1986. *Legal Theory and Legal History: Essays on the Common Law*. Hambledon: Continuum International Publishing Group.

importance. The distinctive feature of Common Law is that it represents the law of the courts as expressed in judicial decisions. The grounds for deciding cases are found in the principles provided by past court decisions, as contrasted to a system which was based solely on Acts of Parliament. Apart from the system of judicial precedents, other characteristics of Common Law are trial by jury (although jury trials are not practised in many Common Law jurisdictions) and the doctrine of the supremacy of the law. Originally, supremacy of the law meant that not even the King was above the law; today it means that acts of governmental agencies and ministers can be challenged in the courts. Thus, Common Law, sometimes called "case law" or "judge-made law", keeps the law in harmony with the needs of the community where no legislation is applicable or where the legislation requires interpretation. This explains the important role of the courts in the administration of justice under the Common Law system. Glenn notes that "the Common Law was therefore a law of procedure; whatever substantive law existed was hidden by it, "secreted" in its "interstices", in the language of Maine."<sup>56</sup>

The procedure, according to Glenn, "was, and is, unique in the world and may be today the distinctive feature of the Common Law."<sup>57</sup> However, as the Common Law progressed, there developed a formality among judges, typified by a reluctance to deal with matters that were not or could not be processed in the proper form of action. Such a refusal to deal with injustices because they did not fall within the particular procedural and formal constraints, led to much dissatisfaction with the legal system. In addition, the Common Law courts were perceived to be slow, highly technical and very expensive, and a trivial mistake in pleading a case could lose a good argument. The only available remedy was damages, but such monetary compensation was not always the best remedy. The response to this shortcoming in the dispensation of justice by the Common Law courts was the development of Equity.

Thus Claimants who were unable to gain access to the Common Law courts could appeal direct to the sovereign, and such pleas would be passed for consideration and decision to the Lord Chancellor, who acted as "the King's conscience". The Chancellor based his decisions on principles of natural justice and fairness, making a decision on what seemed "right" in the particular

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<sup>56</sup> P. Glenn, *Legal Traditions of the World*, *supra*, fn 29 above, p. 243.

<sup>57</sup> *Ibid.*

case rather than following previous precedents. He would look beyond documents which were considered legally binding by the Common Law courts. To make sure his decisions were fair, new procedures, such as a subpoena requiring a witness to attend court, and new remedies, such as injunctions and specific performance, were developed. This resulted in the emergence of a specific court, a court of Chancery, constituted to deliver “equitable” or “fair” decisions in cases which the Common Law courts declined to deal with.

The Common Law courts and Court of Chancery operated separately. On occasion, this led to conflict, as the Common Law courts would make an order in favour of one party, and the Court of Chancery the other party. This situation was resolved by the Earl of Oxford’s case (1615), when the King ruled that in such cases equity, i.e. “fairness” would prevail. The division between the Common Law courts and the courts of equity continued until they were eventually combined by the Judicature Acts 1873–5. Thus the courts under the Common Law system are courts of both common law and equity.

Unlike the Civil Law system, the Common Law system tends to be case-centred and hence judge-centred, allowing scope for a discretionary, pragmatic approach to the particular problems that appear before the courts. The law can therefore be developed on a case-by-case basis. Today, the Common Law system applies or at least has considerable influence in most, if not all, countries with colonial link with England. Even though these countries may have retained, in certain areas, their own traditions and concepts, the administration of justice generally, particularly in terms of procedural norms and evidential rules have still remain largely established along Common Law lines.

Traditionally, the principal concern of the common law jurists, until the nineteenth century, was directed to the various formalistic procedures put into operation by writs, rather than to the elaboration of those principles upon which just solutions to disputes would be based.

In relation to administration of justice, the main critique against the Common Law system has thus been its over-emphasis of procedural rules which could sometimes lead to mere procedural justice to the detriment of realising substantive justice. There have been instances where cases are lost on mere technicalities of procedure to the abject disappointment of many. Often, common law judges, such as the late Lord Alfred Denning, would thus find ways of avoiding the strict adherence to procedural technicalities in favour of

doing substantive justice, whenever necessary. He is quoted to have once noted in that regard: “Unlike my brother judge here, who is concerned with the law, I am concerned with justice.”<sup>58</sup>

This analysis of the nature and evolution of each of the three legal systems reveal clearly that despite the fundamental differences in their nature and sources, their respective evolution reveals that a golden thread of pragmatism runs through them in relation to the administration of justice. The rules of administration of justice under each of the three legal systems are not strictly carved in stone but could be pragmatically adapted where necessary in the interest of achieving substantive justice. We will now proceed to examine the institutional and procedural parameters of administration of justice in relation to the three legal systems.

#### PARAMETERS OF ADMINISTRATION OF JUSTICE IN RELATION TO THE THREE LEGAL SYSTEMS

The processes of administration of justice are normally broadly divided into administration of civil justice and administration of criminal justice, with different institutions and procedures. This division is recognised under each of the three legal systems with similarities as well as differences in that regard. For example, the rules on administration of criminal justice are often much more stringent than that of civil justice under all three systems. Ibn Qayyim al-Jawziyyah has noted in respect of the *Sharī'ah* system that the nature of the procedure in cases depend on the types of claims involved, with accusatory cases (*da'wah al-tuhmah*) requiring more stringent rules of procedure and standard of proof than non-accusatory cases (*da'wah ghayr al-tumah*) which would require less complicated modes of trial and lower standards of proof.<sup>59</sup>

As part and parcel of the respective legal systems, the processes of administration of justice have evolved over many centuries under each of the

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<sup>58</sup> “Lawyer of the Century: Lord Denning”, *The Lawyer* 20 December 1999. Available at: <http://www.thelawyer.com/lawyer-of-the-century/76615.article>

<sup>59</sup> S. S. Shah, “The Principles and Procedure of Litigation in Islamic Law: A Contemporary Structuring” (2007) 51 *The Islamic Quarterly*, No.2, p.163 at 164; Ibn Qayyim al-Jawziyyah. 1985. *al-Turuq al-Hukmiyyah fi al-Siyāsah al-Sha'īyyah*. Egypt: Matba'atal-Madani. p.103.



three legal systems. Traditionally the ruling King or *Khalīf* combined wide-ranging executive and judicial powers and judges only operated on the basis of delegated powers from the ruler. In comparative terms, the administration of both civil and criminal justice has evolved much more rapidly under the Common Law and Civil Law systems, particularly in terms of procedural rules. The two systems have learnt from experiences and have been amenable to changes and reviews of their systems over time in respect of both civil and criminal procedure. This has not been the case with the *Sharī'ah* system generally. While there have been significant positive development in some Muslim countries that apply the *Sharī'ah* system, there is still very much to be done in most Muslim countries in terms of procedure and structure in relation to the administration of justice. Thus, Omar Sherif, writing on the generalities of criminal procedure under the *Sharī'ah*, noted that “*when dealing with criminal procedure under Islamic Shari'a within the contemporary context, ... one must recognize the fact that, while studies on criminal procedure in contemporary legal systems have witnessed noticeable progress and are now fully structured, studies on criminal procedure under the Shari'a have not been developed accordingly.*”<sup>60</sup> This is not a critique of the *Sharī'ah* system per se, because, as earlier stated, there is ample flexibility within the system to facilitate the enhancement of the *Sharī'ah* procedures and institutions of administration of justice. Rather, the problem is that Muslim states have, until recently, been generally very slow in addressing the reform needs of their *Sharī'ah* judicial systems. Often, this has been in fear of being accused of imitating “Western” legal systems, which, in the light of our earlier analysis of the *Sharī'ah* system, may not necessarily be true.

Contextually, the administration of both civil and criminal justice can be perceived as consisting of three interdependent stages that must work together for the effective realisation of substantive justice, namely, the “pre-litigative stage”, the “litigative stage” and the “post-litigative stage”. To work efficiently, each of these three stages require relevant components and imperatives identifiable as “pre-litigative imperatives”, “litigative imperatives” and “post-litigative imperatives”, that must be discharged within each of the

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<sup>60</sup> A. O . Sherif, “Generalities on Criminal Procedure under Islamic Shari'a” in M. Abdel-Haleem, *et. al.*, (ed.) *Criminal Justice in Islam: Judicial Procedure in the Sharī'a*, (London: I. B. Tauris), p.3.

three levels to ensure accessible justice and equitable social order in society as a whole.

Procedurally, the “pre-litigative imperatives” would cover conciliatory and mediatory measures in civil disputes, while, in criminal matters, it would cover investigative and interrogative measures before actual litigation. The “litigative imperatives” would cover all issues relating to adequate judicial safeguards that ensure fair trial during litigation in both civil and criminal matters, while the “post-litigative imperatives” would cover all issues relating to fair and effective enforcement of judicial decisions in both civil and criminal matters. These three levels are often inter-related with one another, and depending on the particular legal system, the different components of administration of justice play different complementary roles at different stages of the process towards the fair delivery of justice.

Thus, even though the judiciary is often at the centre of administration of justice in every legal system, it is certainly not the only relevant institution in that regard. Other relevant institutions would include, among others, the police force, prosecutors, legal practitioners, prison services and even the executive arm of government, owing to the prerogative powers it may sometimes exercise on judicial decisions. We will now briefly examine these different procedural and institutional parameters of administration of justice in relation to the three legal systems.

#### *A- Pre-litigative stage*

The pre-litigative stage of administration of justice refers to the stage before a dispute is formally brought to court. The components and processes at this stage would differ depending on whether the matter is a civil or criminal one. In civil matters, the imperatives are those that encourage and help the disputing parties to resolve their dispute in a pacific way. Common Law jurisdictions such as the US, Australia and England have long embraced Alternative Dispute Resolution (ADR) processes, in forms of acknowledged conciliatory and mediatory means of resolving disputes, as effective means of increasing access to justice under the Common Law system. Even though Civil Law jurisdictions have been slower in embracing ADR processes, it has recently

started gaining ground under the Civil Law system too.<sup>61</sup> It is well recognised that ensuring adequate pre-litigative imperatives that facilitate pacific settlement of disputes amongst the populace is an important means of ensuring qualitative and cooperative administration of justice that eliminates the psychological, emotional and physical stress involved in litigating disputes formally in the courts.

The *Sharī'ah* system also encourages pre-litigative imperatives to facilitate pacific settlement of disputes through the processes of *Ṣulḥ* (Conciliation), *Wasāṭah* (Mediation) or *Taḥkīm* (Arbitration) as is evident from Qur'anic provisions such as:

لاخَيْرَ فِي كَثِيرٍ مِّنْ نَّجْوَاهُمْ إِلَّا مَن أَمَرَ بِصَدَقَةٍ أَوْ مَعْرَفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ وَمَن يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا

*There is no good in most of their secret talks, except he who orders charity or goodness or conciliation between people; and whoever does that seeking the pleasure of Allah, We shall soon give him a great reward” - Q4:114*

وإن امرأة خافت من بعلها نشوزاً أو إعراضاً فلا جناح عليهما أن يصلحا بينهما صلحاً والصلح خيرٌ وأحضرت الأنفس الشُّحَّ. وإن تحسنوا و تَّقوا فإن الله كان بما تعملون خبيراً

*And if a woman fears cruelty or desertion on her husband's part, there is blame on them both if they arrange conciliation between themselves; and conciliation is best; even though human souls are swayed by greed; but if you do good and fear Allah, then Allah is well-acquainted with all that you do” - Q4:128*

وإن خفتن شقاقَ بينهما فابعثوا حكماً من أهله و حكماً من أهلها إن يريدَا إِصْلَاحًا يوفِّقُ اللَّهُ بينهما إن الله كان عليماً خبيراً

*If you fear a breach between them both [husband and wife] then appoint an arbiter from his [the husband's] family and an arbiter*

<sup>61</sup> See e.g. N. Alexander, “From Common Law to Civil Law Jurisdictions: Court ADR on the Move in Germany” (2001) 4 *The ADR Bulletin*, No.8, pp110-113.

*from her [the wife's] family; if they both wish for conciliation Allah will enable their reconciliation; indeed Allah is All-knowing and Well-acquainted - Q4:35*

The Prophet Muhammad is also reported to have said in a reported Tradition that

الصلح جائزٌ بين المسلمين إلا صلحاً حرمَّ حلالاً أو أحلَّ حراماً والمسلمون على شروطهم، إلا شرطاً حرم حلالاً، أو أحل حراماً

*Conciliation between Muslims is permissible, except for a conciliation that makes the lawful unlawful and the unlawful lawful and Muslims are bound by their terms, except a term that makes the lawful unlawful and unlawful lawful.*<sup>62</sup>

The specific rules and principles of pacific settlement of disputes are found in jurisprudential works of different classical Muslim jurists. An important part of the *Sharī'ah* court system during the period of the Abbasids was the formal establishment of a consortium of conciliators called “*Muṣliḥūn*” who were very skilled in conciliation and mediation to facilitate the pacific settlement of disputes between the parties at the pre-litigative stage. They played an important pre-litigation role of conciliation in civil matters such as marriage, debt recovery, property rights, etc, and tried to resolve disputes in that regard pacifically.

Muslim states can therefore institute comprehensive processes to facilitate pacific settlement of disputes at the pre-litigative stage within their respective *Sharī'ah* legal systems without being seen as emulating the practices under the Common Law or Civil Law systems but actually practicalising what already existed under the classical *Sharī'ah* system.

In criminal matters, the respective roles of the police, prosecutors, investigative judges and legal practitioners at the pre-litigative stage of the criminal justice system are well recognised under the three legal systems. In that regard there are at least 11 international minimum standards or procedural

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<sup>62</sup> M. Naisābūrī. 1998. *Al-Mustadrak alā al-Sahīhayn*. Beirut: Dār al-Ma'rifah. Vol.5, 2954.

rights recognised under international human rights law, which all individuals are expected to enjoy at the pre-litigative stage of the criminal justice processes of every legal system. These are:

- The right of a person not to be tried or punished again for an offence for which he has already been fully convicted or acquitted
- The right not to be subjected to arbitrary or unlawful interference with privacy<sup>63</sup>;
- The right not to be subjected to arbitrary arrest, detention or deprived of liberty except in accordance with the law<sup>64</sup>;
- The right, if arrested, to be informed, at the time of arrest, of reasons for the arrest and to be promptly informed of any charges in detail and in a language understood by the accused<sup>65</sup>;
- The right, if arrested or detained on a criminal charge, to be brought promptly before a judicial authority and be tried within a reasonable time or be released<sup>66</sup>;
- The right, if awaiting trial, to be released subject to guarantees to appear for trial<sup>67</sup>;
- The right, if detained, to take proceedings before a court to decide, without delay, on the lawfulness of such detention and an order for release if the detention is not lawful<sup>68</sup>;
- The right of the accused, if detained (pending trial), to be treated with humanity and with respect for the inherent dignity of the human person<sup>69</sup>;
- The right of an accused person to be segregated from convicted persons and to separate treatment appropriate to the status of an unconvicted person<sup>70</sup>;

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<sup>63</sup> See Art. 17 ICCPR and Art. 12 UDHR.

<sup>64</sup> See Art. 9(1) ICCPR and Art. 3 UDHR. *See also* Principle 2, UN Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment (1988), GA Res. 43/173 of 9 December 1988.

<sup>65</sup> Art. 9(2) and 14(3)(a) ICCPR. *See also* Principle 10, UN Body of Principles 1988, *ibid.*

<sup>66</sup> Art. 9(3) ICCPR; *See also* Principle 11(1) and 38, UN Body of Principles 1988. *ibid.*

<sup>67</sup> *Ibid.* *See also* Principle 39, UN Body of Principles 1988, *ibid.*

<sup>68</sup> Art. 9(4) ICCPR. *See also* Principle 32, UN Body of Principles 1988, *ibid.*

<sup>69</sup> Art. 10(1) ICCPR *See also* Principle 6, UN Body of Principles 1988, *ibid.*

<sup>70</sup> Art. 10(2)(a) ICCPR. *See also* Principle 8, UN Body of Principles 1988, *ibid.*

- The right of an accused juvenile person to be separated from adults and to be brought as speedily as possible for adjudication<sup>71</sup>;
- The right of an accused person to have adequate time and facilities to prepare his defence and to communicate with counsel of his own choosing.<sup>72</sup>
- The right, if a victim of unlawful arrest or detention, to an enforceable right to compensation.<sup>73</sup>

While some scholars are of the view that these rights are only attainable under the liberal principles of the Common and Civil Law systems,<sup>74</sup> it is important to note that these pre-litigative rights do not also conflict with any substantive provisions or principles under the *Sharī'ah*, but rather one would find relevant provisions under the *Sharī'ah* to substantiate them. Muslim countries do not therefore have any legitimate excuse under the *Sharī'ah* not to guarantee these rights within their administration of justice in accordance with the *Sharī'ah*.

#### *B- Litigative Stage*

The litigative stage in the administration of justice relates to the actual court trial in civil and criminal cases. The relevant imperatives at this stage would cover all issues relating to adequate judicial safeguards that ensure fair trial during litigation in both civil and criminal matters. This stage would involve prosecutors, judges, legal practitioners, amongst others. To promote the realisation of substantive justice, there are at least 13 international minimum standards or procedural rights which all individuals are expected to enjoy at this stage in relation to both civil and criminal justice processes of every legal system. These are:

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<sup>71</sup> Art. 10(2)(b) ICCPR See also Rule 29, UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990.

<sup>72</sup> Art. 14(3)(b) ICCPR See also Principles 7, 8, and 21, UN Basic Principles on the Role of Lawyers, 1990.

<sup>73</sup> Art. 9(5) ICCPR.

<sup>74</sup> See e.g. M. Nowak. 2005. *Commentary on the UN Covenant on Civil and Political Rights*, 2nd Ed. Kehl: Engel. p.237.

- The right to equality before the law, the courts and tribunals.<sup>75</sup>
- The right to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>76</sup>
- The right to be presumed innocent until proved guilty according to law.<sup>77</sup>
- The right to be tried without undue delay.<sup>78</sup>
- The right to be tried in person and to defend oneself in person or through legal assistance of one's own choosing.<sup>79</sup>
- The right of an accused person to be informed of the right to legal assistance if he does not have legal assistance.<sup>80</sup>
- The right of an accused person to have legal assistance assigned to him in any case where the interest of justice so requires without payment in any such case if he has no sufficient means to pay for it.<sup>81</sup>
- The right of an accused person to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.<sup>82</sup>
- The right of an accused person to a free interpreter if he cannot understand or speak the language used in the court.<sup>83</sup>
- The right of an accused person not to be compelled to testify against himself or to confess guilt.<sup>84</sup>
- The right of accused juvenile persons to the procedure that shall take account of their age and the desirability of promoting their rehabilitation.<sup>85</sup>

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<sup>75</sup> Art. 14(1) and Art. 26 ICCPR; Art. 7 UDHR.

<sup>76</sup> Art. 14(1) ICCPR; Art. 10 UDHR. See also Principle 5, UN Basic Principles on the Independence of the Judiciary, 1985.

<sup>77</sup> Art. 14(2) ICCPR; Art. 11 UDHR. See also Principle 36(1) of the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988.

<sup>78</sup> Art. 14(3)(c) ICCPR

<sup>79</sup> Art.14(3)(d) ICCPR See also Principle 1, UN Basic Principles on the Role of Lawyers 1990.

<sup>80</sup> *Ibid.* See also Principle 5, UN Basic Principles on the Role of Lawyers 1990, *ibid.*

<sup>81</sup> *Ibid.* See also Principle 3, UN Basic Principles on the Role of Lawyers 1990, *ibid.*

<sup>82</sup> Art.14(3)(e) ICCPR.

<sup>83</sup> Art. 14(3)(f) ICCPR.

<sup>84</sup> Art. 14(3) (g) ICCPR.

<sup>85</sup> Art. 14(4) ICCPR.

- The right not to be subjected to a retroactive criminal law or heavier punishment<sup>86</sup>
- The right of an offender to benefit from a retroactive lighter criminal punishment.<sup>87</sup>

It is often presumed that the Common Law and Civil Law systems, being secular systems, should be able to adapt to these principles without much problem, but that the *Sharī'ah* system being based on divine sources may not easily adapt to the principles. This is not necessarily so. Although the above provisions may not be found expressis verbis in the classical Islamic jurisprudential books, it is not difficult to establish all those guarantees within the *Sharī'ah* and the general principles of administration of justice as laid down by the classical Islamic jurists in their different jurisprudential treatises. I have analysed comprehensively elsewhere that all the above principles are achievable within the application of Islamic law, and that Muslim states have no excuse under the *Sharī'ah* not to ensure these procedural guarantees at the litigative stage of their administration of justice under the *Sharī'ah* system.<sup>88</sup>

For example one can find many of these principles reflected in the remarkable and famous letter written by the second Islamic *Khalīf*, Umar ibn al-Khatāb, to Abū Mūsā al-'Ash'arī in relation to how he should administer justice as a judge in *Kūfā* as early as the 7th Century, even before the modern concepts of fair trial and due process were formulated. Umar is recorded to have instructed Abū Mūsā in the letter as follows:

*The office of judge is a religious duty and a generally followed practice. Understand the depositions that are made before you, for it is useless to consider a plea that is not valid. Consider all people equal before you in your court and in your attention, so that the noble will not expect you to be partial and the humble will not despair of justice from you. The claimant must produce evidence; from the defendant an oath may be exacted. Compromise is permissible among Muslims, but not any agreement through which something forbidden*

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<sup>86</sup> Art. 15(1) ICCPR; Art. 11(2) UDHR.

<sup>87</sup> Art. 15(2) ICCPR.

<sup>88</sup> See M. A. Baderin. 2005. *International Human Rights and Islamic Law*. Oxford: OUP. pp.97-113.



*would be rendered permissible, or something permitted forbidden. If you gave judgment yesterday, and today upon reconsideration come to the correct opinion, you should not feel prevented by your first judgment from retracting; for justice is primeval and it is better to retract than to persist in error.*

*Use your brain about matters that perplex you and to which neither the Qur'an nor the Sunnah seem to apply. Study similar cases and evaluate the situation through analogy with them. If a person brings a claim, which he may or not be able to prove, set a time limit for him. If he adduces evidence within the time limit set, you should allow his claim; otherwise you are permitted to give judgement against him. This is the better way to forestall or clear up any possible doubt. All Muslims are acceptable as witnesses against each other, except such as have received a punishment provided by the religious law, such as are proved to have given false witness, and such are suspected of partiality on the ground of client status or relationship, for Allah, praised be He, forgives because of oaths and postpones punishment in face of the evidence. Avoid fatigue and weariness and annoyance at the litigants. For establishing justice in the courts of justice, Allah will grant you a rich reward and give you a good reputation. Farewell.<sup>89</sup>*

Similar to the other legal systems the judiciary occupies the central role in the administration of justice under the *Sharī'ah* system, particularly at the litigative stage. There are many areas of common ground between the *Sharī'ah*, the Common Law and Civil Law systems in that regard, but also some significant areas of apparent differences. For brevity, I will quickly highlight two of those areas of apparent differences and possible ways of resolving them.

The first point is in relation to the appointment of female judges under the *Sharī'ah* legal system. In his *al-Aḥkām al-Ṣultāniyyah al-Māwardi* noted that no one can be appointed as judge under the *Sharī'ah* system unless he fulfils all the conditions necessary for such appointment. He then listed seven main conditions, the first of which is that the appointee must be male and

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<sup>89</sup> See Ibn Khaldun, *The Muqaddimah: An Introduction to History*, (Ed.) N. J. Dawood, and (Trans.) Franz Rosenthal. 1989. Princeton University Press. p.173.

mature, and that a female may not be appointed as a judge. While majority of the classical Muslim jurists concur with this view, Imām Abū Hanīfah opines that a woman may be appointed as a judge regarding those matters in which the evidence of women are acceptable. Imām Ibn Jarīr al-Tabarī is however of the opinion that a woman can be appointed as a judge in all cases in the same way as a man. It is clear that the position of the majority of classical Muslim jurists contrasts sharply with the position under both the Common Law and Civil Law today. Some Muslim States have however adopted the position of Imām al-Tabarī in that regard. For example, in 1982 a petition was brought before the Federal Shariat Court of Pakistan in the case of *Ansar Burney v Federation of Pakistan* challenging the appointment of women judges as being violative of the *Sharī'ah*. In his judgment, the Chief Judge of the Federal Shariat Court, Justice Aftab Hussain, CJ, extensively examined the different opinions of classical Islamic jurists on the issue and relying on the view of Imām al-Tabarī and a similar view attributed to Imām Mālik, found that the appointment of a woman as a judge was not contrary to the *Sharī'ah*. Other Muslim States are slowly adopting this view. For example Bahrain appointed its first female judge in 2006, while the United Arab Emirates appointed its first female judge in March 2008. Also in February 2009, two female judges were appointed to the *Sharī'ah* court in the West Bank in Palestine.

In view of the fact that most of the *Sharī'ah* courts in Muslim countries today deal mainly with family-law matters such as marriage, divorce, child custody, child support and inheritance, it is hereby submitted that allowing women to be appointed as judges in the *Sharī'ah* courts would greatly enhance the realisation of substantive justice at the litigative stage of administration of justice under the *Sharī'ah* system as long as they have the requisite qualifications to be so appointed.

The second point is in relation to the right of a litigant to be represented by a legal practitioner. While legal representation is well recognised and encouraged under both the Common Law and Civil Law systems, there is a general assumption that legal representation by counsel is not recognised under the *Sharī'ah* legal system because the issue has not been specifically addressed in the classical jurisprudential books on Islamic legal procedure. In response to such assumptions, Jābir al-‘Alwānī has observed that: “*This apparent omission [of specific discussion of the need for legal representation in classical Islamic jurisprudence] might be due to the fact that, historically,*

*court sessions [under the Sharī'ah system] were public [and] widely attended by legal scholars and experts, whose presence represented a true and responsible legal advisory board that actively assisted the judge in dispensing justice, [thus] there was never any need for professional counsel*".<sup>90</sup>

Further research reveals that even though the early Islamic jurists concentrated largely on the litigant presenting his case personally, they nevertheless recognised the right of a litigant to appoint another person to represent him. This was often based on the concept of agency (*wakālah*).<sup>91</sup> It is reported for instance that the fourth Islamic Khalīf, Ali ibn Abī Tālib, disliked litigation, so he would usually appoint Aqīl ibn Abī Tālib or Abdullah bn Ja'far as his attorneys to represent him.<sup>92</sup> Also in his work titled *Tārīkh Qudāt Qurṭubah*, (History of the Judges of Cordova), al-Khushānī records the example of two men who brought a matter before the judge Aḥmad ibn Bāqī. In presenting their cases, the judge observed that one of the men was very eloquent while the other had problems presenting his case eloquently. The judge thus advised the latter saying: "Would it not be better if you were represented by someone who could match the verbal skills of your opponent?" The man answered saying: "But I only speak the truth". The judge in insisting that he engaged a counsel said: "How many men have perished [due to lack of eloquence even though] telling the truth!"<sup>93</sup> It is also very clear that there is nothing under the *Sharī'ah* that prohibits legal representation, especially in criminal trials<sup>94</sup>, and thus under the principle of legality, which is to the effect

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<sup>90</sup> See T. J. Al-Alwani, "Judiciary and Rights of the Accused in Islamic Criminal Law" in Mahmood, et.al (Eds.) *supra*, fn 49 above, p. 256 at 274.

<sup>91</sup> See e.g. W. Al-Zuhaylī, *al-Fiqh al-Islamiyy wa Adillatuh*, Vol. 5, p.4077. See also G. M. Azad, *Judicial System of Islam* (Islamabad: Islamic Research Institute, 1987) p.108-113 for a discussion of the views of different scholars on this point.

<sup>92</sup> See A. al-Bayhāqī, *Kitāb al-Sunan al-Kubrā* (1925) 26 cited in O. A. al-Saleh, "The Right of the Individual to Personal Security in Islam" in Bassiouni, M.C., (Ed.) *supra*, fn 49 above, p.81. See also W. al-Zuhaylī, W., *supra*, fn 92 above, p. 4077; G. M. Azad, *ibid.*, p.108.

<sup>93</sup> See Al-Khushānī, *Tārīkh Qudāt Qurtubah*, cited in Awad, A.M., "The Rights of the Accused Under Islamic Criminal Procedure" in Bassiouni, M.C., (Ed.) *supra*, above p.91 at 99 footnote 4.

<sup>94</sup> See H. Esmā'īlī, H., and J. Gans, "Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials" (2000) 28 *Denver Journal of International Law and Policy*, No.2, p. 145 at 150, and F. E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), pp.160-161.

that all actions are considered legal unless clearly prohibited by the *Sharī'ah*,<sup>95</sup> it will be wrong to contend that legal representation is prohibited within the administration of justice under the *Sharī'ah* legal system without any specific provision of the *Sharī'ah* prohibiting it as such.

Although legal representation by counsel is not generally practised in the *Sharī'ah* judicial system of some Muslim States, there is nothing in Islamic law that prevents the use of counsel to protect the interest of litigants and to ensure substantive justice. Due to the fact that most individuals are generally ignorant of the law and oblivious of their rights under the *Sharī'ah*, the right to effective legal representation in *Sharī'ah* courts has actually become more imperative today under Islamic law, especially in criminal cases. The guarantee of effective legal representation for the defendant will no doubt ensure equality of arms at law especially in criminal trials between individuals and State Prosecutors who, on their part, are often well trained and not oblivious of the law as is the accused person. Many contemporary writers on Islamic law have argued that the right to legal representation falls within the “theory of protected interest” of the individual under Islamic law and must be fully ensured by the State.<sup>96</sup> It is notable, in that regard, that many Muslim States, including Malaysia, Saudi Arabia and Nigeria, acknowledge the right to legal representation under their *Sharī'ah* criminal justice systems.

In light of the above analysis, although legal representation by counsel as we know it today may not have been specifically addressed in the jurisprudential works of classical Islamic jurists, there is no doubt that such representation is an important element of fair trial and due process that is fully accommodatable within the limits and flexibility of procedural law under the *Sharī'ah*.

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<sup>95</sup> This is expressed by the Islamic legal maxim “*al-Asl fī ash-yā' ibāhah*”. See e.g. S. Ramadan. 1970. *Islamic Law: Its Scope and Equity*. London: Macmillan. p.68.

<sup>96</sup> See e.g. T. J. Al-Alwani, *supra*, fn 49 above, pp.274-276; O. A. al-Saleh, *supra*, fn 49 above, pp. 81-84; A.M. Awad, *supra*, fn 49 above p. 95; T. Mahmood, ‘Criminal Procedure at the Shari‘ah Law as Seen by Modern Scholars: A Review’, in Mahmood, T., *et al*, *supra*, fn 49 above, p. 300.

### *C- Post-litigative Stage*

The post litigative stage in the administration of justice relates mainly to the fair and effective enforcement of judicial decisions in both civil and criminal matters. Generally, there are four main identifiable minimum guarantees that must be ensured at this stage by every legal system, which are:

- The right of appeal to a higher tribunal.<sup>97</sup>
- The right of a person not to be tried or punished again for an offence for which he has already been fully convicted or acquitted in accordance with the law and penal procedure of each country.<sup>98</sup>
- The right to compensation according to law for wrongful conviction.<sup>99</sup>
- The right, if detained (after trial), to be treated with humanity and with respect for the inherent dignity of the human person.<sup>100</sup>
- These post-litigative guarantees are also all achievable within the administration of justice under the Common Law, Civil Law and Shar'iah legal systems respectively.

### CONCLUSION

There is today a general perception that the traditional differences between the Common Law and Civil Law systems have shrunk greatly and that both, being secular "Western" systems, should be able to accommodate one another and impact on one another easily and positively. It is the *Sharī'ah* system, being based on divine law, that is often perceived as being radically different and possibly not having anything in common with either the Common Law or the Civil Law systems respectively. Our analysis of administration of justice in this paper however demonstrates that the jurisprudence of the three legal systems have evolved along similar lines and that under each of the systems the relevant theories and principles of administration of justice have been

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<sup>97</sup> Art. 14(5) ICCPR.

<sup>98</sup> Art. 14(7) ICCPR.

<sup>99</sup> Art. 14(6) ICCPR

<sup>100</sup> Art. 10(1) and 10(3) ICCPR

influenced by reasonableness and expediency which gives room for the necessary flexibility to ensure the realisation of substantive justice under each one of the three legal systems, if there is the political and judicial will to do so on the part of the ruling authority, the judiciary and other relevant institutions of administration of justice respectively. In view of the continuing interaction between the three legal systems in different countries of the world today, there is a need to continue promoting a better understanding of the systems to enhance an effective administration of justice across the legal systems globally.

In my view, this is why the combined law programme in *Sharī'ah* and Common Law offered by the Islamic Sciences University of Malaysia and other universities in other parts of the world today should be applauded as a necessary and valuable means of training future legal experts who would not only be well grounded in the *Sharī'ah* but also in the Common Law system. I had the same unique combined undergraduate training in *Sharī'ah* Law and Common Law from the Usmanu Danfodiyo University in Nigeria many years ago, for which I am very proud today as it gives me a very rounded comparative understanding of the *Sharī'ah* and Law generally, which I think is very necessary in the international legal community today.

Once again, I thank USIM for inviting me as the guest lecturer for this year's Tuanku Najihah Annual Lecture and I also thank you all, respected guests, for your kind audience.

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