

SHARIAH CRIMINAL MODE OF ADJUDICATION: DISTINCTIVE FEATURES VIS-À-VIS MODERN SYSTEMS

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ABSTRACT

Modern discourse on adjudication has been made against the backdrop of the two dominant Western models of inquisitorial trial of the Civil Law and adversarial trial of Common Law. The fundamental feature of inquisitorial system is that it is that the judge who has the overarching role in adjudicating whilst the unique feature of adversarial system is that it is partisan-centric. As to which of the models Islamic mode of adjudication fits, opinion varies. Some comparative scholars assimilate it with adversarial model whilst others see it identical to inquisitorial model or having the features of both. Using qualitative method by undertaking a critical library research of some crucial works, this paper, however, argues that the Shariah mode of criminal trial though resembling some features of both, has certain unique features of its own. This is on account of its religiously colored conception of crime, notion of judicial function, methods and standard of proof and the role of attorney, which defies its equation with any of such models.

Keywords: adjudication, adversarial, *fiqh*, inquisitorial, *shariah*.

INTRODUCTION

Accordingly, contrary to what is claimed by some quarters,¹ Islamic law contains sufficient rules, principles and processes through which the lawsuit is instituted, its validity ascertained, the claim against is given a fair hearing, and the judgment against an accused/ defendant is pronounced and executed. The legal rulings governing litigation is called *fiqh al-muhakmat* (Shariah adjudication). Its foundation was laid down by the prophet and its full legal corpus was developed through *ijtihad* during the classical period of Islamic *fiqh* evolution. The court proceedings depending on the nature of the complaint (*da`wa*), civil or criminal, vary as testified by Ibn Qayyim (1985): “The nature and intensity of procedures depended upon the types of the claim involved vary in Islamic jurisprudence. If a cause of action is accusation-based complaint (*da`wa tuhmah*), it requires more stringent rules of the procedure and standard of proof. But if it is a non-accusation-based case (*d`awa ghayr tuhmah*), less complicated mode of trial and lower standard of proof are needed” (p.103). Al-Mawardi (n.d) also points to the complexity of Shariah adjudication along civil and criminal lines when he says: “If two judges are appointed in a city and one of them receives a category of complaints (say about the commission of crime), and the other receives a complaint to a civil wrong, like a claim regarding the custody of the child, is it is permissible provided that each judge is confined to the judgment of what is under his jurisdiction (p.73). In detail, however, jurists added to the complexity of the nature of cases filed in the court into one the three categories: property-related claims (*da`awa al-huquq al-maliyyah*), non-monetary rights claims (*da`awa al-huquq ghayr al-maliyyah*) and accusatory – claims (*da`awa al-itiham*)(Madhkur, 1966,p.336).

In the context of modern comparison between Shari`ah mode of criminal adjudication and conventional mode of trial especially in criminal cases, is the debate over the place of partisan-based mode of trial or judge-centered mode of criminal prosecution from Shariah perspective. To address this, the customary method of comparing Shariah issues with law is the dominant approach among the comparativists. This is achieved by looking at modern laws and then searching for the principles in the Shariah, enshrined in Qur`an, the Sunnah and juristic laws, in order to see what are the similarities and differences between them. This is called functional methodology in comparative law- focusing more on commonality than divergent rules and doctrinal framework (Hoecke, 2015). This paper, therefore, aims to focus on this conceptual divergence aspect of the debate when it comes to comparing Shariah adjudication with other modes of adjudication.

To thrush this out, by using qualitative method of research we review some pertinent literature, to delineate the essential features of Shariah adjudication in criminal cases vis-à-vis dominant models. Using textual analysis method, we try to arrive at our findings based on works written by academics as well as those with practical experience on the applied working of the Civil Law and Common law models. In doing so, we offer the basic principles of adjudication, followed by an overview of modern modes of trial as compared with Islamic model before concluding the paper.

Fundamental Feature of Shariah Adjudication

The primary function of adjudication through judiciary and its allied institutions of arbitration (*tahkim*), *hisbah* (municipal tribunal) and *mazalim* (ombudsmen) is the establishment of justice in society. Judicial justice has to be attempted with fairness and there should not be any elements of prejudices in its procedural stages. That is why the Qur`an juxtaposes justice (*adl*) with

¹ Godbard of the English Court of Appeal has cynically described Islamic court as “the qadi sits under the palm tree with no principles and rules of law to guide him”. Similarly, Felix Frankfurter, of the U.S Supreme Court has sarcastically remarked: “The U.S Supreme Court is not a tribunal unbound by rules. We do not sit like a qadi under a tree dispensing justice according to the consideration of expediency.” Quoted in Razali Haji Nawawi (1991, p.II.

fairness (*ihsan*) when it commands Muslims: "Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded" (Al-Nahl: 90). Capturing this spirit of the Shari'ah, Ibn Qayyim(1985) held: "Allah the Exalted has made clear in his law (*sharia*) that the objective is the establishment of justice between His servants and fairness among the people, so whichever path leads to justice and fairness is part of the religion and can never oppose it"(p.13).

For the realization of the above God-mandated ideal, the Shariah contains sufficient measures in the form of broad principles in the Qur'an, paradigmatic Sunnah of the Prophet and juristic operational rules and maxims, the collective weight of which points to the fundamental features of Islamic adjudication which include: first, judicial authorities should have the requisite prudence (*farasah*) so as not to be beguiled by deceptions played by scheming litigants during the hearing as the Qur'an makes it explicit: "Indeed, We have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful and advocate" (Al-Nisa :105). The verse was revealed to prompt the Prophet about the risk of injustice on account of deceit by the Muslim party in a case. Commenting on the above, Maududi Maintains:

The incident involved a person called Tu'mah or Bashir ibn Ubayriq of the Banu Zafar tribe of the Ansar. This man stole an Ansari's coat of mail. While the investigation was in progress, he put the coat of mail in the house of a Jew. Its owner approached the Prophet (peace be on him) and expressed his suspicion about Tu'mah. But Tu'mah, his kinsmen and many of the Banu Zafar colluded to ascribe the guilt to the Jew. When the Jew concerned was asked about the matter he pleaded that he was not guilty. Tu'mah's supporters, on the other hand, waged a vigorous propaganda campaign to save Tu'mah's skin. They argued that the wicked Jew, who had denied the Truth and disbelieved in God and the Prophet (peace be on him), was absolutely untrustworthy, and his statement ought to be rejected outright. The Prophet (peace be on him) was about to decide the case against the Jew on formal grounds and to censure the plaintiff for slandering Banu Ubayriq, but before he could do so, the whole matter was laid bare by a revelation from God (<http://www.islamicstudies.info/tafheem.php?sura=4&verse=105&to=112> accessed 20 June 2019).

Second, during the hearing, the judge should not let his personal perceptions (prejudice and spite) about the litigants to sway him from conducting the hearing in a fair and just manner: "O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do" (Al-Ma'idah: 8).

Third, just adjudication is not merely a secular assignment but a divine trust (*amanah*) which has to be fulfilled by judges: "Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing" (Al-Nisa: 58). Finally, administration of judicial justice was one of the key functions to which all the messengers including our Prophet were commanded to perform and set the shining precedents for future Muslim rulers to emulate: "Indeed We sent Our Messengers with Clear Signs, and sent down with them the Book and the Balance that people may uphold justice...." (Al-Hadid: 25).

To demonstrate the practical application of divine justice in human reality, the Prophet through both legislative directives and judicial decisions laid down a body of fundamental principles and illuminating judicial precedents which provide basic standards by which the fairness and justness of adjudication can be benchmarked. Some of the most cited prophetic edicts in this context are: first, beyond the worldly KPI (Key Performance Indicator) for competent judgeship, the merit of a just adjudication lies on a judge's success in discovering and establishing the truth so as to hand down a just verdict in a case: "Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell" (Sunan Abu Daud, *Kitab al-Aqdiyah*, Number: 3566).

Second, a mistaken judgement, if not rectified by appeal in this world, does not legitimize *haram*; as wrongs may escape the compass of secular authorities but can never elude the knowledge of Allah, the Almighty: "I am only a human being, and you people (opponents) come to me with your cases; and it may be that one of you can present his case eloquently in a more convincing way than the other, and I give my verdict according to what I hear. So if ever I judge (by error) and give the right of a brother to his other (brother) then he (the latter) should not take it, for I am giving him only a piece of Fire" (Sahih Bukhari, *Kitab of Ahkam*, Vol.3, Number : 638). Ostensibly this prophetic judicial pronouncement sends a strong signal to those legal counsels who by twisting facts and manipulating the law endeavor to beguile the judge and win the case for their client.

Third, Islamic justice does not discriminate between people on account of religious affiliation as was clearly laid down in the *hadith* of Tu'mah verses Ubayriq which we referred before. Similarly, the Prophet's fair disposal of a murder charge brought against the Jewish community by Muslims is another testimony to the effect: "It is narrated that when the people of Khaybar killed 'Abdullah ibn Sahl, the Prophet did not rule that they had to pay the diyah (blood money), and he did not punish them for their crime, because there was no clear evidence against them. The Prophet even paid his blood money from the wealth of the Muslims (bait al-maal). Likewise, when al-Ash'ath ibn Qays and a Jewish man referred a dispute to the Prophet concerning some land in Yemen, and 'Abdullah did not have any proof, the Prophet (blessings and peace of Allah be upon him) ruled that the land belonged to the Jew, on the basis of his oath" (Sahih, Muslim, <https://islamqa.info/en/answers/84308/the-prophets-interactions-with-the-jews> (accessed 16 May, 2019)).

Lastly, the Prophet's loud declaration to say "No" to all forms of discrimination in the process of implementing justice and adherence to the rule of law resonates for all times to come and should serve as a stark reminder to all those who have the propensity to oppress and rule unjustly: "It is narrated by Aishah that Quraish became concerned about the case of the Makhzumi woman who had stolen, and they said: "Who will speak to the Messenger of Allah concerning her?" They said: "Who would dare to do that other than Usamah bin Zaid, the beloved of the Messenger of Allah?" So Usamah spoke to him, and the Messenger of Allah said, "Are you interceding concerning one of the legal punishments of Allah (SWT)?" Then he stood up and addressed (the people) and said: "O people! Those who came before you were only destroyed because when one of their nobles stole, they let him off, but when one of the weak people among them stole, they would carry out the punishment on him. By Allah, if Fatimah the daughter of Muhammad were to steal, I would cut off her hand." (Sahih)(One of the narrators) Muhammad bin Rumh said: "I heard Laith bin Sa'd say: 'Allah (SWT) protected her (Fatimah) from stealing, and every Muslim should say this'"(Sunan Ibn Majah, Vol.3, Number 2547).

Following the footsteps of the Prophet, the *Sahabah*(companions), especially the Four Righteous Caliphs continued to uphold the principle expeditious and just trial of in their capacity as both ordinary citizens and political-cum – judicial officials, the most classical among which are: first, caliph Umar implemented retributive justice against the son of his provincial governor (Amr Ibn al-Aas, the ruler of Egypt) in order to elucidate that Islamic justice and law do not discriminate between ordinary citizen and those affiliated to political authority: "Once during the reign of Umar Faruq, the second Caliph, Amr ibn al-Aas, who was then governor of Egypt, arranged a horse race in which his own son, Muhammed ibn Amr, was to participate. But when his son's horse lost to a young native Copt, the enraged son lashed the Copt boy with a whip, saying, "Take that! That will teach you to beat the son of a nobleman!" The Copt youth complained to the Caliph in Medina, who called an inquiry. When it was found that the beating was unjust, he immediately sent an emissary to summon the governor and his son from Egypt. When they arrived, Caliph Umar Faruq handed the Copt boy a whip to flog the guilty party, just as he himself had been flogged." (Delic, 2007). Caliph Umar also promulgated the first code of Islamic adjudication through his official letter to Abu Musa al-Ash'ari which, among others, include:

- judicial function is a solemn duty;
- a judge must fully acquaint himself with the facts of a case and its circumstances before arriving at his judgment;
- a judge must give equal treatment to the disputants so that a man of high position would not hope for getting scot-free from accountability and the weak person will not lose confidence in judiciary by thinking that he may not get justice;
- the onus of proof is on the complainant and the oath on the defendant;
- reconciliation is lawful among Muslims except that which make a lawful prohibited and renders the prohibited lawful;
- he who claims on the strength of an absent evidence, fix a time-limit for him to produce it. If he fails to furnish such evidence dismiss his claim;
- Do not hesitate to review your yesterday's decision if it was proven not to be right. Because it is better to return to what is right than to clinging onto what is wrong;
- Evidence of all Muslims is admissible except: who he has been flogged for *qazaf*(false accusation of *zina*), found guilty of perjury and the one has an interest in the case (relative or affiliate to the claimant);and
- Allah knows the hidden secrets of His servants and has put a cover upon in them in crimes punishable with fixed penalties (*hudud*) except those that are exposed through evidence to us (Mir, 1994).

Second, Caliph Ali laid down the golden principle that under Islamic justice system "no one is above the law" even if he is the head of the state(Caliph) when he himself appeared before the court and subjected himself to the ordinary process of litigation by abiding to the judge's decision: "It is reported that during the reign of Ali Ibn Abi Taleb (4th ruler of Islamic state after the Prophet), he lost his Shield in a battle and a Jew took it. After knowing that the Jew had it, the Prince of the Believers, as Islamic rulers were called, asked the Jew to give him the shield back. The Jew refused and insisted that this shield belonged to him and not Ali. Ali took the case to court (Qadi Shurayh. As the Jew and Ali stood before the judge, the latter said: "Please lay your case O Aba Al-Hassan (Ali) while he called the Jew with his name (without titles). Ali rebuked the judge by giving him the privileged by calling him in a way to show friendship and did not do the same thing with the Jew. To substantiate his claim, Ali produced his son (Hassan) and Attendant (Qanbar) as witnesses but they were regarded as incredible on account of their relationships with him (bias). And the judge decided that by the Islamic law due to lack of acceptable proof that the shield belonged to Ali, then the Jew owns it. The Jew could not believe that justice would be applied in the Islamic state even against Ali, the Caliph who is at the same time the Prophet's beloved and trusted cousin. Then the Jew said: "I declare that there is but one God and that Muhammad is His Prophet. O Prince of the believers the shield was yours, I followed your army while you were leaving "Siffin" and it fell from your camel". Ali said: "You became a Muslim so I give it to you as a gift"(adopted with necessary modification from <https://www.alsiraj.net/English/misc/nonmuslims/html/page28.html>(accessed 16 May 2019). Caliph Ali also inaugurated the foundation for the involvement of expert opinion in the process of uncovering the truth. "It is reported that during Umar, there was a woman who was strongly fond of a man and attempted in various ways to seduce him but all failed. Then she tried to implicate him by accusing him of committing fornication with her (molesting her). She took an egg and poured its yolk between her thighs and upon her cloth. Thereafter, she went to Umar and lodged a complaint that she was raped. Umar, on seeing her egg-stained cloth, sought the opinion of a woman, who testified it to be semen. Then he consulted Ali to ascertain whether it was semen as alleged by the woman. Ali then soaked the traces of stains in boiled hot water and they subsequently turned into white-solid. On smelling it, he found it to be egg white and not semen" (Ghanem, 1982,p.29).

In light of the above, Muslims jurists (both classical and contemporary) have expanded on the basic structure and framework of the foundational juridical rules set by the Qur'an, the Sunnah and companion through their *ijtihad*. They, among others, have

detailed the minutest details of conducting a fair trial and just adjudication in terms of both substantive law and procedural regulations, the minutest juridical exposition of which can be found in juristic manuals and treatises.

Principles of Criminal Trial

The mode of criminal trial is primarily determined on the basis of the nature of crime that has been committed. In *hudud* crimes, once the charges are read out against the accused, he may either make a full and free confession or denies it. In the first situation, the court, if satisfied, will pass the verdict of guilty against him. Nevertheless in the case of his denial or silence, no adverse inferences will be made against the accused but instead the judge would require the affected party /their *wakil* or the prosecution officer whichever may be the case to prove their case (Haleem *et al*, 2018, pp.9-10). The types of proof may differ depending on the nature of the offence for which the accused has been indicted. They may be in the form of oral evidence by eyewitnesses, or confession by the accused, or material evidences connecting him to the case, such as blood specimen etc (Awdah, 2008, Vol.2, p.34). At the end of the trial, the judge after meticulously examining the evidences if satisfied that a case has been made out against the accused with certainty (yaqin) or a degree next to it (*ghalbat al-zann*), will proceed to write his judgment (Hameem *et al*, p.24).

Some of the basic principles governing the whole procedures are:

1. No one will be indicted for a crime unless he has prior notice of its requirements and consequences

This principle exemplifies the cardinal principle of criminal prosecution in Islam which anticipates that: "No person can be accused of a crime or suffer punishment except as specified by law (*la jarimata wa la 'uqubata bila nass*) (Bani Isra'il : 15, al-Nisa : 165 , al-Qasas : 59, al-An'am : 19 and al-Fatir : 25; Awdah, Vol.1, p.25). By extension, this legal maxim implies that there should not be any unwarranted intrusion of the state on the people's life and liberty except with due process of the law; there should not be any prosecution for an offence except if it is clearly defined and proclaimed by the law; and no sentencing by the court unless as provided for by the law (al-Saleh, 2018, p.58). The above principle has to be upheld at all times except if it is excluded to obviate a serious threat to public order at the discretion of the state. That is why Islamic jurisprudence clearly defines prosecutable crimes as *hudud, qisas, diyat and ta'zir*.

2. Every person is presumed to be innocent unless proven otherwise (*al-aslu bara' al-dhimmah*):

Similar to modern legal system, the basic presumption about an accused or defendant in Islamic law is also one of non-liability. The basis for this legal maxim is the *hadith* of the Prophet when he said: "Every infant is born pure by nature; it is his parents who subsequently convert him to Jew, a Christian or a Magus" (*Miskat al-Masabih*, 2006, vol.3, p.194). The legal imports of this principle are:

- a. The burden of proof is on the accuser – on the authority of the prophetic edict when he said : " Had men been believed only according to their allegations , some persons would have claimed the blood and properties belonging to others , but the accuser is bound to present positive proof" (Al-Dar Qatni, 2001, vol.4, p.296).
- b. Doubt is construed strictly against the accuser, again on basis the Prophet's saying " prevent punishment in case of doubt" (*Sunan al-Tirmidhi*, vol.4, p.25), thus requiring the accuser to provide evidence of sufficient probity.

3. **Every person has dignity (*karamah*).** Human *karamah* which in Islamic outlook is conferred by God confers inviolability (*ismah*) to human beings. As such human *ismah* cannot be violated except as prescribed by the Shariah. Thus, in Islamic criminal justice system, there is no room for arbitrary arrest, torture, and prisoners' abuse (Al-Isra :70).

4. The accused must be given a fair trial

This is because justice is the most cherished goal of Islam and cannot be implemented through unjust means. The most important implication of this are :

- i. The accused must be availed the right to defend himself. This right primarily is vested in the person of the accused who can exercise it himself. But in some instances, the accused may not be able to exercise it himself due to the psychological impact of the indictment on his mind (loses clarity of mind which may cause him to falter in his defense) or due to lack of oratory skill. In such circumstances, he will be in need of hiring a lawyer. Therefore, the *fuqaha* in principle agreed that it is allowed. This stand is supported by judicial precedent of caliph 'Ali. In many instances, Ali appointed 'Uqayl ibn Abi Talib to represent him in the court (Bassiouni, 1982, p.98). Nevertheless, in detail the jurists are divided on the admissibility of representation by an attorney, in cases involving the violation of the right of God, such as adultery. Majority oppose it while Shi'ah and some Hanabilah do not. Majority, among others, argued that the violations of God's rights being remittable by doubt should be personally pleaded while the supporters cite the case of 'Asif, a woman accused of adultery, thereupon the Prophet appointed Anas (as his wakil) to go and try the woman for the alleged charges, as a general evidence of permissibility of agency in *hudud* cases as well (Ibid, p.82).
- ii. Every accused has to be subjected to the same mode of trial and prosecution as we saw in the case of Ali and the Jew.
- iii. The defendant can appeal if not satisfied with the decision of the primary court as was established by Ali in the case of tribal dispute over the blood money in the incident of Zubyah.

5. **And during passing judgment**, the judge must note: first, when examining evidences about the *hudud* and *qisas* offences, he must judiciously examine them so as to be sufficiently strong to sustain a conviction. Because any shred of doubt in it would vacate a guilty verdict in such cases by virtue of the *hadith*: “Fend off the *hudud* punishments from Muslims as much as you can If you find any way out for him to err in forgiveness rather than err in punishment” (*Sunan al-Tirmidhi*, vol.4.p.25). Second, he must also ensure that witnesses do not retract their testimony and the confessor does not withdraw his confession before the verdict is made in the above cases. This is evident from the Prophet’s statement to Ma’iz when he queried: “..Maybe you simply kissed or felt or looked...” (Bassiouni,p.87).

Execution of the judgment

Once, the sentence is meted out and not challenged by appeal but confirmed by the higher court (in *hudud* or *qisas* cases- as Prophet confirmed Ali’s decision in the case of Zubyah), the judge will proceed to: first personally supervise the execution; and second instruct the witnesses to assist the officer in the implementation of the sentence upon the convict (Haleem *et al*, pp.20-21).

However, it is to be noted that when implementing the sentences upon the convict, the judges and executioner’s conducts are governed by a set of rules commensurating with the specifications of the sentences in question. For instance, in *hadd* crimes once they were proved by sufficiently convincing proof, the judge has no discretion or authority whatsoever to change or reduce their amount. Nevertheless, the emergence of any doubt even before the stage of their execution will drop or mitigate them (Ibid; and Al-Tajkani,n.d., p.197).

But in the case of *ta`zir* sentences, the judges have wider discretion: first, he can choose from various types of sentences, such as counselling, fines, public or private censure, seizure of property, confinement in the home or place of detention, and flogging or some time even death penalty against the offender provided that such will be fitting of the offender. Second, to require lower standard of proof for their establishment (Haleem *et al*, p.21).

Implementing *qisas* (for intentional killing and injuries), however requires somewhat different processes. In intentional homicide cases, the victim’s family has more say in the sense that after the verdict of the court, they have absolute authority either to press for the execution of the punishment on the offender or pardon him and accept compensation in lieu of *qisas*. *Diyah* sentences for unintentional or semi-intentional homicide primarily being monetary in nature can also be demanded, compromised or totally waived (Ibid, pp.97-110).

An Overview of Modern Trial Systems

By modern trial system, we mean the procedures in the court room in Euro-American systems of common law and civil law. The common law follows adversarial trial system where the contending parties have the liberty to present and argue their case before the court through their counsels. The judge would be overseeing the procedures to gather the facts and determine the law in order to arrive at his ruling. This emerged in the Anglo-American legal systems during late nineties. It evolved to realize the twin judicial goals of “the right to counsel” and “right against self-incrimination” which were deemed as necessary to for meting out justice in the circumstances of their legal tradition. The most obvious moral handicap of adversarial system is that the attorney is seen to be more protective of exculpating his clients than caring for the truth for societal protection (Tang, n.d, pp. 23-31.).

The mode of trial in the Civil law, spearheaded by the French legal system, on the other hand, basically is Inquisitorial. Its essential feature is that the judge is an active participant at both investigating stage to gather evidence and question the witnesses, and trial stage to conduct the hearing against the accused or defendant based on a pre-prepared charge documents, called dossier (Ibid).

Underlining the basic features of both the system, Hodgson(2006) maintains that though the legal players in both systems bear the similar titles, namely the judge, prosecutor, legal counsel, accused, their adjudicative and investigative roles are different in the two systems in view of divergent historical and cultural development of the two legal system(para 2). They vary from each other in several aspects because inquisitorial mode of trial as the central feature of Civil law is described as “ a state-centered, unified inquiry into ‘the truth’, centering upon the pre-trial investigation, “while the Common law model is characterized as” a legally regulated debate between the parties, with the trial as its center piece”(Ibid, p. 4). In specific term, the main differences between the two systems are: first, in the adversarial system, the opposing parties investigate and gather evidence, present and debate them before the court. Conversely, in the inquisitorial model, the judge is charged with the task of truth-uncovering who investigates the case to gather both exculpatory and incriminatory evidence against the accused. Second, the truth determination in the inquisitorial model is made at the pre-trial stage and the hearing is just to confirm what has already been established during the investigation. The site of fact finding in the adversarial model, on the other hand, is the court where the opposing parties present their side of the case and cross examine that of their adversary (Ibid, p.6). Third, in adversarial system, the trial judge primarily identifies issues during the trial and his role in investigating the case is *umpireal*. In the inquisitorial trial, on the other hand, the judge’s duty is not restricted only to passing judgment based on evidences presented by the parties but also is bound to undertake the task of fact-finding so as to satisfy itself of the guilt or innocence of the accused(Tang, p.9). Accordingly, structurally there are two judges in the process of an inquisitorial trial; one is the investigating judge, called standing judge (the *parquet*) who investigates the case and gather evidence together with the police and another is the sitting judiciary (the *juge d’instruction*) who conducts trial on the basis of dossier prepared during the pre-trial stage(ibid). Fourth, the attorneys are central in the adversarial system where the trial is one of defense dominance. The defense has proactive role who may *dispute evidence produced by the police, bring their own witnesses to contradict the prosecution case, or alleging police malpractice* (Ibid, p.12). Although recent changes in the French system also affords some space for the defense lawyers in the investigation stage where they have the power of investigation to question their clients and inspect the dossier- but can do so under the supervision from

the magistrate (Ibid, p.10). Finally, the accused is extremely marginalized in an adversarial system as he has no any interaction with judge except if he chooses to give evidence (Ibid, p.18). In Inquisitorial trial, the accused contributes to the process of truth-uncovering where he is questioned by the judge at the outset and invited to respond to the case presented by the prosecutor before hearing his defense lawyer (Ibid, p.14). The questioning in an adversarial trial is done by the partisan parties not with aim of unveiling the truth but to construct the case against the defense (Ibid, p.15).

Nevertheless, each model has its own supporters and opponents to eulogies one over the other. On the thorny issue of which one of the system really strives to uphold the truth and ostensibly establish justice, some see no difference by maintaining that both the systems have a common goal of arriving at the truth and hence the differences in procedures are technical (Ibid). However, others see a clear divergence in view of the different understanding of "what the legal truth is". Inquisitorial proposes that an objective truth exists in every case and its discovery cannot be entrusted to the whimsical contestation by the parties but requires a central inquiry to unveil it (Ibid). While the adversarial model sees the legal truth as something *as the most plausible or likely account, established after the elimination of doubt by being contested by both parties in the open court* and the judge's role is just to ensure the reliability of the evidence adduced and procedures to be observed (Ibid).

On another counter accusation as to which of the system twists facts, each argues that the other is the culprit. For instance, the opponents of the Civil law model argued that inquisitorial questioning by the judge is aimed not only at clarifying facts as documented in the dossier but also at strengthening the case as constructed by the prosecution without given equal opportunity for the defense to present alternative account of the case (Ibid). Conversely, the frequent traditionally mounted accusation against adversarial system is it serves the wealthy and is apt to manipulate fact and twist the law to serve the client and not justice.

In short, it is argued that the central feature of Civil law model as let the "accused speaks" when compared to the most striking features of common model let the "lawyers speak" presents probing the most paradoxical question as to which one of the two can better serve the cause of justice; pursuing the discovery of truth via the accounts given by the parties or leaving it to what the counsels argues to be the truth (Ibid, p.16).

Islamic Model vis- a -vis Modern Models

In positive law tradition, two modes of trial, adversarial and inquisitorial, are considered more appropriate means of ensuring that justice is seen to be applied especially in criminal proceedings. Civil Law adopts inquisitorial mode and contends that it is the judge who can mount an objective inquiry to uncover the truth and thereby adjudicate in accordance with the truth and establish justice (Pakes, 2007, p.251). Common law, on the other hand, argues that if judge is at the center stage of fact finding, his probity to adjudicate fairly and justly can be compromised on account of being acquainted with the facts of the case during the pretrial stage. Hence, the thrust of adversarial model is getting at the truth via partisan contest between opposing parties (Rani, 2006, p.2). The supporters of each model hail the strength of their models by pointing the flaws of the other system. For instance, Inquisitorial proponents argue that judge's investigative role to dig for the truth, in a criminal case -prior to trial, not only helps the court to determine *prima facie* case for prosecution, but also has the advantage of fact finding while the memories of witnesses are still fresh. Moreover, it affords justice to parties who cannot hire prolific lawyers (Ibid). Adversarial school, on the contrary make the case for their model by maintaining that justice can only be dispensed when the litigants have the liberty to produce their facts before the courts so that the judge can operate in a factual vacuum to uphold the truth. Inquisitorial dismisses this by contending that, how can the facts presented by the adversaries unveil the truth via such a system the thrust of which is the lawyers are the master of controlling and manipulating the facts and prosecution is free what witnesses to call (Ibid). The tussle over superiority of one over the other system is so intense that is described as "unfettered discourse" among the jurists of procedural law in the Western legal tradition (Pakes, p.251)). Modern discourse, however subdues the heat of the debate by holding that the present state of the arts in trial procedures in most jurisdictions do not represent a clean exclusive clinging onto one of the two but hybrid system combining some features from one into another. For instance, the Malaysian criminal procedure though a replicate of adversarial system contains features from inquisitorial, such as judge's power to ask questions from the accused, explain the decision to the unrepresented accused etc (Rani, pp.4-6).

As to which model the Shariah court procedures can fit, is also debatable. One body of opinion maintains that the *qadi* court is basically adversarial because the burden of discovery of the truth (fact-discovery) is the responsibility of the parties, in litigations involving both personal rights and public rights because of famous *hadith*: Evidence is the onus of the plaintiff, and an oath is due from the defendant". Hence, a complaint once brought before the court, the judge after ascertaining its veracity, requires the plaintiff to substantiate his claim with credible proof- direct evidence, such as testimony of witnesses or indirect evidences, such as circumstantial evidences. Failure to do so, his lawsuit would be dismissed if the defendant denies it by taking the oath (Joe, 2017, p.6). Second view, however, maintains that traditional Islamic courts trials bears some close resemblance to the inquisitorial system because: 1) the judge actively participates in investigating the truth of claim via verification of admission/confession of the defendant if that be the case and ensuring the veracity of testimonies tendered by the witnesses before the court; 2) legal representation by way of engaging a counsel is not an explicit right of the accused in Islamic law (because it is not adversarial) but *waklah* in litigation is allowed in exceptional circumstances when the defendant or plaintiff cannot personally appear before the court; 3) Representation by a lawyer is a byproduct of modern legal system, the need for which in Islamic trial could not arise because judge had both religious and legal duty to adjudicate justly and the presence of legal scholars and experts during trial served as powerful safeguards against deviation of the judge from the norm of a fair trial (Tang, pp.5-25). And yet another view maintains that Shariah does not fix any particular mode for trial as a cursory reading of the historical sources point to the permissibility of all - it can be either one or combining the features from both (Rani, p.11).

We, nevertheless, believe that the view that describes the shariah trial as adversarial may invoke segmented Islamic evidences to prop up its stand, but is inaccurate from several aspects including: first, Islamic law primarily does not subscribe to the idea that fair trial is impossible without attorney representation. It is correct that the classical jurists recognized the role of *wakil* (normally a friend or relative) to represent someone who due to illiteracy or feeble-mindedness cannot present his case to the *qadi* but it is not a constitutional right as is the case with common law. If some contemporary views tend to twist Shariah evidences to go along with common law, it would not only be a contradiction of professional role of the *qadi* as the central dispenser of justice but also undermine the *qadi*'s duty of truth-finding. The danger of leaving the task of truth-discovery to a partisan like the attorney is obvious as he is there to be more protective of exculpating his clients than caring for the establishment of truth, which God has charged the judge with in the Islamic view (Tang, p.15). The present system of defense attorney renders the presence of litigant party in the court room as non-existent because it is the attorney who even dictates the client as to what to say. Hodgson recounted: "On numerous occasions in my own research, when asked by the court clerk whether she understood the charge, the accused turned to her lawyer, who, in full view of the court, mouthed 'yes'; the defendant then repeated, 'yes'" (p.7). Accordingly, placing the legal counsel at the center-stage which repudiates the judge's both religious and legal duty to be involved in fact-finding mission is contrary to the very notion of *qada* in Islamic jurisprudence. Similarly, Islamic judiciary cannot be equated with inquisitorial system as the judge cannot overindulge himself with the investigating stage nor can he induce confession from the accused.

On top of the above, the Shariah adjudication being governed by the broad principles of the divine law has its own distinct features and standards on the basis of which justice has to be meted out. The most salient among which are: first adjudication by a *qadi* is both a religious and secular duty for the establishment of justice among the disputing parties. The *hadith* of the Prophet which emphasized that only one judge will go to paradise makes this clear. Second, adjudication is activated against a citizen when he happens to transgress on one or more of the rights which Shariah aims to preserve, namely the right of Allah (*haqq Allah*), right of private individual (*haqq al-'Abd*) or the right partaking of both the right of Allah and humans (*haqq al-Mushtarak*). Nevertheless, for such violations to be triable, in the case of offenses associated with the right of Allah, in the sense of flouting His command not to do so, such as sexual offenses, highway robbery, theft, drinking liqueur, they have to be reported to the court (Awdah, p.134). Filing the case with the court is also a condition for hearing litigations involving human rights provided that the parties cannot reach a settlement outside the court with the exception of homicide in view of its severity and complex procedure of conciliation between the offender and victim's next of kins.

Third, when hearing the case, the judge has to ask for material evidence by which he can deliver his judgement. The evidence required to prove a civil infringement or guilt has to be of the Shariah standard of *yaqin* (certainty) or reach the most probability (*ghalbat al-zam*) level. The reason is that mere conjecture and doubtful evidences cannot rebut the original presumption of innocent state of the defendant/accused which is a fundamental law in Islamic law as we noted before. For this to be rebutted, we need evidence of highest probity by virtue of the legal maxim: "certainty cannot be removed by doubt".

Forth, the material proofs for proving a case in Islamic law include not only direct and circumstantial evidences but also religiously impelled means if truthful and sincere. Direct evidences include testimony by the eye-witnesses and confession/admission by the accused/defendant. The weight of eyewitnesses' testimony varies depending on the nature of the violations involved. Sexual crimes require the testimony by four upright male eyewitnesses in view of its moral sensitivity with destructive influence on moral wellbeing of Muslims if frequently broadcasted in the court (Muawalli, 2003, pp.103-105.). Other cases have to be proven by the testimony of two upright male eyewitnesses or testimony by one man and two women.

Nevertheless, since religious devotion and tapping on its potential for truth-discovery is also pivotal in the law of proof, in the absence of eyewitnesses in a case, Shariah recognizes confession (*iqrar*) and oath (and *qasamah*) as the two other independent proof of liability or guilt even without any corroboration with physical evidences. Particularly *iqrar* is regarded as the best type of evidences (*sayyid al-adillah*) - even stronger than the testimony by upright witnesses in Islamic law. Elucidating this, al-Shirbini (2009) held that informing the court about the right of another against oneself is stronger in terms of believing it to be true than testimony by the witnesses. The reason is that witnesses may commit perjury but a confessor not because humans normally do not implicate themselves for transgression against others by pretention (Vol.2, p.238). Since confession establishes the charge rather than mitigating it as is the case in common law, is regarded as evidence of highest probity because a Muslim makes it on account of deep sense of remorsefulness and guilt against Allah so that he will meet him with clean record on the Day of Judgment. Ma'iz and Ghamiyyah who committed adultery set the paradigmatic cases when they came to the Prophet incessantly pleading to cleanse them from the guilt (*tahhimi*) by punishing them for their offence (al-Bayhaqi, al-Sunan al-Kubra, kitab al-Hudud, Vol. 8, Number 16993; Sahih Muslim, number 1695).

Moreover, circumstantial evidences in the form of trace evidences, documents (both printed and electronic) and expert accounts of cases can be corroborative according to the majority of the jurists and can be the sole basis of liability if overwhelmingly strong (*qarinah qati'ah*) according to Ibn Qayyim.

Finally, when conducting a trial, the judge has both religious and secular duty to exert in the path of truth discovery. He can neither be a passive party to the task of fact-finding nor he be an overzealous dictator to extort confession or intimidate the litigants and witnesses. By virtue of this dual-duty a judge must not only adjudicate according to the Shariah but has numerous other roles in the discovery of the truth, such as calling witnesses, inquiring about their uprightness (*tazkiyah*), urging the confessor to relay all the details of his transgression, supervising the execution of the sentences which he metes out. Stressing this, Tang maintains that in spite of modernization (Westernization) of Shariah court procedures through legislative enactments in majority of Muslim countries, the principled Shari'ah modes of trial cannot be boxed within the frame of any of the European

models. The reason is because of the unique Islamic conception of justice and its realization, and the confidence that Islam places on the judge and investigating officers, i.e. justice if not realized in the court, God will mete out it ultimately in the hereafter; a devout *qadi* and police cannot be suspected to fail in their religious duty by mounting malicious prosecution against an accused (or press a frivolous claim against a defendant)(pp.34-35).

CONCLUSION

To sum up, in light of the above, Shariah mode of adjudication whilst bearing some resemblance with certain features of European and American models in terms of technicalities, such as involvement of judges, investigating officers, witnesses and even lawyers in the process of trial, it diverges from them at doctrinal level based on its unique broad conception of justice, crime, punishment, judicial function, quantum and standard of proof, and the role played by legal counsel. It is neither partisan-centric nor judge domineering system but an integrated model in which the central role of judge is regulated by the parameters of standard of proof and religiously-controlled methods of evidence. It does not suffocate the voice of the accused whilst affording him legal counsel if he cannot speak for himself. The argument proffered in this paper is valid in the local context because Malaysian Shariah courts in spite of adopting some important features of adversarial system maintains some religious features of Shariah adjudications. For instance, Kelantan Shari`ah Criminal Procedure Enactment ,1985, while recognizing certain features of modern legal systems, such as legal representation by lawyers, involvement of prosecution in the process of investigation, maintains certain religious features like allowing private citizens to report cases to religious officials, administering oath on the accused if the prosecution cannot prove the case against the accused, and involving state Mufti in the appellate court to hear the appeal(Kelantan Shari`ah Criminal Procedure Enactment ,1985, Sections 8 and 53; Nawawi, 1990,pp.130-151). The epilogue therefore, is that the understanding of the doctrinal and structural features of shariah mode of criminal adjudication is significant for comparative studies in terms of sound methodological analysis of reforming and updating the system in such a way as not to lose its originality and essence in the process.

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