Editorial

Need for more support for our UK enforcement officers and judges when dealing with domestic and cross-jurisdictional aspects of Shari’a law[1]

Shari’a in the UK domestic legal system poses both challenges and opportunities. Some of the legal challenges have recently been highlighted in a number of training sessions this author was instructed to deliver in-house by the UK’s Crown Prosecution Service (CPS) – in the area of Islamic financial law.

Contextualising Shari’a’s interconnectedness with business and the marketplace since the inception of Islam, the fundamentals of Islamic financial law, the controversy of plurality of Islamic jurisprudence (Fiqh), the contribution of the Qur’an and Sunna to Islamic business rules, Shari’a’s constitutional relevance in the modern day were among topics tackled. This is by no means the complete constituents of the various threads to the discussion required on the subject matter. But it is rather a structured introduction to a nuanced topic often hallmarked by legal incertitude. To have in-depth appraisal of a subject matter such as Islamic financial law (imbued heavily in traditional Fiqh), both Shari’a’s micro-transactional principles and its macro-jurisprudential objectives need to be fully expounded. This is especially the case, given that Islamic financial law is beset by jurisprudential imprecision, lack of practice-based standardisation, unreliable literature and misapplication.

Nevertheless, what was evident from these training sessions was the proactiveness of the Crown Advocates and Special Prosecutors who attended as displayed in their expert and more general interest in the subject matter. Their genuine engagement, open-mindedness and legal perceptiveness is a credit to the CPS in its wider attempts to surmount the many challenges wrought by domestic and cross-jurisdictional applications of Shari’a law. Equally, a tribute to our British legal system which globally is amongst the very best in its professionalism and dedication to justice and procedural probity.

Enforcement issues and legal facets pertaining to asset tracing when there is a Shari’a element are further compounded by multiplicity in Fiqh rulings and muddying of the parameters of the relationship between national (overwhelmingly secular) laws and Shari’a. This is the case even in the majority of Islamic countries. Added to this are problems often encountered in enforcing foreign (judicial and arbitral) decisions/awards – or lack of legal assistance when conducting extra-territorial investigations pre-trial contexts. Also, by defendants’/disputants’ attempts to exploit Shari’a to obfuscate legal boundaries to hide, mix or transfer assets or title to such assets.

The fact that there are no formal guidelines adopted in the UK (even at a basic advisory level) to provide lucidity on Shari’a law in the UK criminal justice system does contribute to the above dissatisfactory state of affairs. This is especially as there is lack of authoritative treatment of Shari’a, coupled with lack of clarity vis-à-vis the identification of its technical rules (intermeshed with its legal maxims, known as Al-Qawā’id Al-Fiqhīyah) and its applicability domestically under challenges posed, for example, by the 1980 Rome Convention.

The need for such formal guidelines is even more imperative given that the principles of Shari’a (which stand firm in supporting weaker parties to a transaction, require full disclosure and contractual good-faith) appear to be pushed aside for the sake of commercial profiteering. In this respect, there is no industry which typifies the gulf between its
jurisprudential aspirations and contradictory practices more than in the Islamic financial services industry today.

The approach of consecutive UK Government appears perfunctory, barely scratching the surface of the challenges. It also seems to be punctuated by political opportunism if not hypocrisy in the sense of complacent electioneering vis-à-vis the 3 million British Muslims – in the hope of wider electoral appeal.

Indeed, whether we are talking about the mixing of Halal and Haram monies, illegal yet widely approved practices such as “purification” in the Islamic financial services industry (legitimised by Standard 21 of AAOIFI), proper understanding of domestic implications of Hawalah, etc., there needs to be a formal guidance in the UK which sets the record straight – taking account of Shari’a’s jurisprudential thrust which emphasises moderation and fairness.

For, not only such formal guidelines would assist our enforcement officers and prosecutors when going about their investigative work in the UK or extra-territorially. They would also aid our UK judges when they domestically adjudicate on mis-selling of Shari’a-compliant financial products or tackle cases where Shari’a is a constituent element of the dispute before them – whether civil or commercial (with or without an extra-jurisdictional dimension).

Courage and dismissal of political expediency is a language which our governments need to learn to speak when it comes to tackling the challenges posed by Shari’a in our domestic UK legal system. We certainly in the UK don’t suffer from lack of resources. We should have the confidence to offer modernist (while simultaneously jurisprudentially watertight) formal interpretative guidelines of Shari’a in a manner consonant with UK law and the diktats of justice with full compliance with our UK public policy objectives. This is important and long overdue.

Being able to stamp our perspectives formally, resulting in what can be legitimately described as modernist British Islam would undoubtedly put the UK in good stead domestically and internationally – sending a global message of tolerance and consideration. It would equally distinguish us in the UK as a jurisdiction which is assertive in riding itself of fundamentalist interpretations of Shari’a.

Furthermore, an authentic UK stance on setting the record straight regarding a non-partisan codified understanding of Shari’a would be a precedent in the Western world, earning us in the UK much admiration and goodwill in the Muslim world. It would encourage Muslim countries to enter into mutual legal assistance agreements – giving our enforcement officers and judges (who deserve all of our support) a competitive advantage and structured tools to enhance the execution of their investigative and adjudicatory duties. Thus, resulting in a fairer, efficient and more inclusive British criminal justice system.

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