



SPECIAL WORKSHOP

HARVARD LAW SCHOOL - AUGUST 7, 2007

## DARS FĪ-NAWĀZIL FIQH AL-MU'ĀMALĀT: A SHORT REPORT

On Tuesday, August 7, 2007 the Islamic Finance Project (IFP) sponsored a short course by Shaykh Nizam Yaquby (Niām Muammad āli Ya`qūbī) on Islamic financial law. The topic of the short course—which took place 9am-2pm in International Lewis Center, Seminar Room 301 at the Harvard Law School—was synthetic transactions (Arabic *al-jam' bayna l-'uqūd*, “combination of contracts”). Issues surrounding the legality of synthesizing financial transactions have been debated by Muslim jurists (*fuqahā'*, singular *faqīh*) throughout the history of Islamic law. Since *shari'a*-compliant financial institutions (commonly referred to as “Islamic financial institutions”) typically use alternative financial instruments that are combinations of themselves composition of simpler contracts (such as sales and leases), the legality of synthesizing, i.e. combining, financial transactions is of profound significance in application of contemporary Islamic financial law.

The invited course leader, Shaykh Nizam, is a noted Bahraini jurist and one of the most active Islamic legal consultants (singular, *mustashār shar'i*) in the Islamic financial sector. As a jurisconsult (*mufti*) with a degree from McGill University in economics who is fluent in English, he serves on the *shari'a* supervisory boards of tens of Islamic financial institutions. The *shari'a* supervisory board (SSB) of an Islamic financial institution is responsible for reviewing the business practices of the institution for compliance with *shari'a*.

The short course was the culmination of a week-long visit to the Harvard Law School by Shaykh Nizam. Although the visit was not his first to Harvard University—a long-time friend of IFP, Shaykh Nizam has participated for more than a decade in the IFP-hosted Islamic Finance Forum—this visit was special in that it was a dedicated research trip. Shaykh Nizam visited Harvard in order to consult the University's libraries, in general, and the Islamic manuscripts in the Houghton Library, in particular. He is a manuscript expert who owns a noted private Islamic manuscript collection himself and has edited several classical Arabic works.

The short course was attended by a small group of faculty, graduate students and other experts in Islamic law. Faculty and staff attendees included Baber Johansen, Professor of Islamic Religious Studies, Harvard Divinity School and Acting Director, Islamic Legal Studies Program (ILSP) and Affiliated Professor, Harvard Law School; Frank Vogel, Founding Director, Islamic Legal Studies Program and S. Nazim Ali, Director, IFP. Graduate student attendees represented the Harvard Law School, Department of Near Eastern Languages and Civilizations as well as a few from outside Harvard. The short course was conducted in Standard Arabic (*al-arabiya alfu'ā*). It focused on a text that was read aloud by several of the graduated students and commented upon intermittently by Shaykh Yaquby. The course was structured as follows: attendees participated in collective close reading of an advanced draft of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) *shari'a* standard (*miyār shar'i*) on the combination of contracts. AAOIFI is a standards development organization that was established in 1990 in order to create, publish and disseminate accounting, auditing, governance and Islamic legal standards for the Islamic financial sector. Its *shari'a* standards are drafted by a dedicated group within AAOIFI, the *shari'a* council. The AAOIFI *shari'a* council is composed of sixteen of the leading Muslim jurists in the sector. The standards that the *shari'a* council produces are documents that represents attempts to document and promulgate best practice that are immediate relevant to the activity of external *shari'a* auditors, internal *shari'a* compliance officers as well as SSB members themselves. The standards that have been published to date cover topics ranging from the composition of the SSB and the minimum qualifications of its members to the rules governing the permissibility of oft-used specific contracts, such as diminishing equity financing (*mushāraka mutanāqi'a*). The final version of the standard on synthetic transactions was first addressed by the council in 2005 and approved earlier this year. The standard was just recently published by AAOIFI a few weeks ago.

Shaykh Nizam began the short course by outlining the dimension of the contemporary debate among Muslim jurists about the legality of combining contracts. He noted that while some non-experts erroneously believe that combining contracts is prohibited in Islamic law, in fact, the jurists have held a variety of nuanced positions on the issue over the course of Islamic legal history. He noted that the jurists, in arriving at these opinions, considered not just the various relevant indicants (*adilla*)—such as the tradition (*adith*) “that the Prophet Muammad forbade two sales in one (*bay`atayn fi bay`*)—but also applicable legal maxims (*qawā'id fiqhiyya*). Shaykh Nizam noted that the text of the draft copy had been modified prior to approval by the AAOIFI *shari`a* council. He also observed that much of the actual phrasing of the technical document was extracted verbatim from a study prepared for the council by one of its senior members, Dr. Nazih ammād. Dr. ammād, a respected Canadabased jurist of Syrian origin, was formerly professor in the Faculty of *Shari`a* at Umm al-Qurá University (Mecca). It is the practice of the AAOIFI *shari`a* council to ask experts (whether members of the council or external experts) to prepare papers on the topic of a proposed *shari`a* standard prior to the session in which the topic will be discussed. The studies are then presented by their authors and debate among the members of the council. Only after this debate has been concluded and various views have been heard, does the council precede to draft the standard. The council then votes on the adoption of the standard. After reviewing the section of the standard that addressed the formal definition of combining contracts, Shaykh Nizam moved on to the central issue of the legality of combining contracts. He pointed out that the council’s jurists had clearly affirmed the basic legality (*jawāz*) of synthesizing transactions. All such combinations were legal provided that certain rules (*awābi*) were observed. The discussion therefore focused on these rules. In summary, the standard allowed the combination of contracts provided that 1) the combination not be of a form that is explicitly prohibited by prophetic tradition (such as an X executing an exchange transaction and a loan with Y); 2) that the two or more contracts of which the synthesized transaction is composed not be mutually contradictory, such that they have logically inconsistent legal effects (such as X executing the donation and the sale of the same item to Y); 3) that the synthesis not constitute a blameworthy legal device (*īla*) by which usury (*ribā*) is achieved and 4) that the synthesis not constitute the means (*dharī`a*) for achieving impermissible contracts, such as a usurious contract. One of the recurring themes of the short course the significant role that legal maxims apparently played in the reasoning that jurists employed in order to arrive at the rules that governed the scope of legality of synthesis of transactions. The utility of these maxims was particularly evident in Shaykh Nizam’s commentary on the section of the standard that addressed the issue of collusion (*muwā`a`a*) between the contracting parties and its affect on the legality of various types of synthetic transactions.

The session was marked by an atmosphere of intimacy, interactivity and erudition that prevailed throughout. Professor Johansen demonstrated his familiarity with the details of the classical *fiqh* texts by calling attention to *anafī* approaches to the legal issues surrounding certain agricultural financial practices and their relevance the issues raised in the standard. In particular, he cited a position by Shams al-A'imma al-Sarakhsī (d. 1090) in his opus, the vast *anafī fiqh* encyclopedia, the *Mabsū*. Throughout, Professor Vogel called attention to the jurists’ innovative use of traditional legal tools, such as the formal consideration of public interest and prevailing commercial practice, to recognize practical and flexible boundaries of legality.

Overall the short course was well received by the attendees. In fact, several attendees expressed an interest in exploring the possibility of inviting Shaykh Nizam to visit the Harvard Law School again in order to present another short course on Islamic financial legal issues.