

INTERNATIONAL CONFERENCE ON HARMONIZATION OF SHARI'AH AND CIVIL LAW

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HARMONIZATION OF SHARI'AH AND CIVIL LAW IN MALAYSIA: PRESENT REALITY AND FUTURE ACTIONS

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The very mention of harmonization of Shari'ah and civil law is sufficient to bring about strong reactions from two extreme groups in Malaysia. From one extreme, the reaction would most probably be: "What? Are they taking Malaysia 1400 years backward?" Or, "Are they going to make all men grow beard, wear turban and women cover their faces?" From the other extreme, the reaction would, most probably, be: "What? Mixing God-made law with man-made law?" Or: "Mixing God's law with secular law?" Or worse.

Clearly, one group fears what it does not know. The other group condemns what it does not know. And both groups reject what they do not know. They may not be aware of the similarities in the two laws in many areas. They may overlook the fact that even in "Islamic law", there are non-prophet human opinions too. They may not realize that even if Islamic law is implemented, a majority of the existing laws will remain, simply because we cannot now do without them and there are no traditional Islamic law on them. Both groups would be surprised to read the introduction written by David Moussa Pidcock in the book "Napoleon and Islam" that 97% of Code Napoleon was taken from the rulings of Imam Malik or that a study made in Pakistan some time ago showed that only about 10% of the laws then in force in Pakistan, which was based on the English common law, was contrary to Shari'ah. (I remember reading that statement a long time ago. But, as I am now unable to trace the source, I am relying on Prof. Hashim Kamali who had "narrated" the same to me. I have no reason to doubt the "isnad". I consider it as "sahih").

If we hold either of the two extreme views mentioned earlier, then this conference is a non-starter. But, it is because we do not, that we are here. So, I am not going to argue whether or not there is a need for harmonization of the Shari'ah and civil law. I shall start from the premise that we want to harmonize the two.

In this speech I shall use the term “proponents of Islamic law” to refer to people who want to introduce Islamic law in this country and the term “proponents of civil law” to refer to people who want to maintain the status quo.

As at present, the proponents of civil law are quite happy with the law of this country as it is. They certainly would like to maintain the status quo. On the other hand, it is the proponents of Islamic law who wish to “replace the civil law with Islamic law.”

Before going any further, I think a few points should be noted first.

It must be realized that the present is not all bad and the past was not all good. Every period has its good and bad points. All that we can say, and that is no more than a matter of opinion, is that on the whole, one period may be better than the other. That is all. Unfortunately, Muslims, generally, seem to look at the past the way they look at the moon: from a distance and on a clear, calm night. So, all that they see is beauty – poetic beauty. At the same time, by comparison, what they see around them, on the ground, is nothing but filth and dirt. So, to escape from the filth and the dirt around them they dream of returning to the so-called “Golden Days of Islam”. The truth is that even those “Golden Days” were not all gold. There were a lot of filth and dirt too. If Hadiths could be forged and Hajrul Aswad could be removed, carried away and kept somewhere else for twenty years, what more need be said?

The jurists of the past did not try to solve issues that did not exist then or issues that they did not know would exist centuries later. It also cannot be denied that whatever opinions they gave then on a particular matter were based on their knowledge of the facts and the law that they knew and understood and that they were also influenced by their surroundings, their perception of good and bad, right and wrong, at that time. Such perceptions change from time to time and from place to place, at least over some matters. That is why even Imam Shafi’ie is reported to have changed his rulings on certain matters after he had moved to and lived in Egypt. And that happened over a very short period of time compared to then and now.

We must come to grips with reality of the present day. Trading is no longer the sale of prayer mats, prayer beads etc. where both the parties and the goods are present, face to face. Finance is not just a matter of borrowing money to buy food or other essentials. No developer, no investor, no entrepreneur, or at least most of them, can raise enough capital individually to finance his ventures. He has to borrow, by whatever name it is called, including from foreign sources. Companies, even countries have to borrow.

Any law, even God’s law, so long as it is interpreted by human, is bound to have differences in opinions. No one can claim that his opinion alone is the correct position in the eyes of God. Unfortunately, throughout history we find that

Muslims, including scholars, seem to have a very low level of tolerance in respect of differences of opinion over Shari'ah. Unless this is overcome, it is not going to be easy to implement the Shari'ah, what more globally. In the case of Islamic banking, finance and insurance, for example, unless the scholars can come up with a uniform law I do not see how the Islamic version is going to operate globally.

Any law, even God's law, so long as it is implemented and administered by human, may, at times, lead to injustice. Basmati rice does not guarantee good "briani", always. It depends on how it is cooked. Unfortunately, quite often, it is the rice that gets the blame, not the cook. The case of Amina Lawal in Nigeria serves as a good example. On 25 September 2003, a five-judge Katsina Sharia Court of Appeal acquitted her of adultery and quashed the sentence of death by stoning passed by a lower court on the grounds that she was not allowed to retract her alleged original "confession", insufficient time was given to her to understand the charge, the alleged "confession" was made only once before a single judge when it should have been made at least four times before three judges. Clearly, there was a miscarriage of justice in the lower court. True that the injustice has been rectified, but think of the damage the case has done to Islamic law and Islam. That is the kind of thing that we should try to avoid. It only gives a bad name to shari'ah and Islam.

It appears to me that too much emphasis is being placed on punishment rather than on justice. So long as the punishment is imposed, no matter how, Islamic law is implemented. In some cases, those "guardians of Islam" go to the extent of taking the law into their own hands: they are the complainants, the investigators, the prosecutors, the witnesses and the judges, all in one. With respect, I beg to differ. Shari'ah is not just about punishment. It is about justice.

Faith (iman), piety and prayer (do'a) alone are not sufficient to bring Allah's assistance in all things at all times. If faith, piety and prayer alone are sufficient to guarantee Allah's assistance towards victory, it would not have been necessary for the Holy Prophet (s.a.w.) to seek the views of the companions as to how to defend Madinah, to adopt the suggestion of Salman, the Persian and to dig a trench around the city. The idea had to be conceived. The planning had to be done. The tools had to be procured. The manpower had to be gathered. The digging had to be done. Accompanied by prayer.

Any system, including law, imposed against popular opinion, will not last. The disintegration of communism is a recent example. Iraq may be the current example.

We must come to grips with the reality of this country. We cannot escape from the fact that Malaysia is a multi-racial, multi-cultural, multi-religious democracy. In a democratic country, any change we want to make, must be done the democratic way. In a democracy, we cannot afford to ignore the views of a great section of the population, i.e. voters. What more when the non-Muslim population

in Malaysia is about 40% of the total population. That is assuming all the 60% Muslims would support the change which is very unlikely, as most Muslims are still in the dark about what the specific law on a specific matter would be like. Indeed, I dare say that very few know, including the proponents of Islamic law, many of whom are only moved by “religious zeal” than anything else.

Falling back on the principle of the law of evidence, “the burden” is on the proponents of Islamic law to themselves have a clear picture of the Islamic law that they want to replace the existing law, to show that Islamic law is more just than civil law, to show that it is a workable system in the present world, to show that the “Islamic Court” is more efficient and more fair than the civil court and to allay the fears of and to convince the public that the implementation of Islamic law is for the general good as well as for their own good and to their benefit.

It is important, therefore, that we have a clear picture of what we want to abolish and what we want to establish. To have such a picture, it is necessary that a study of all the existing laws be made to identify which of the existing laws are contrary to Islamic law and come up with clear statements of Islamic law on the respective subjects. Only then we can compare the two.

In my view, we should pay more attention to the substance of the law rather than the form. We should look at the principles of the law rather than manner in which a thing was done centuries ago, to determine whether it is Islamic or not. The fact that something was not done in the past does not necessarily mean that, if done today, it is un-Islamic. The fact that something was done in a particular way in the past does not necessarily mean that, if is done in a different way today, it is un-Islamic. The fact that something was done in the past in a particular way does not necessarily mean that it must be done in exactly the same way, unless there are clear injunctions to the effect. Indeed, some of them may not be acceptable by today’s standard. For example, some of the “legal methods” recorded by Ibn Qayyim al-Jawziyyah as translated by Dr. Ala’eddin Kharofa under the title “The Legal Methods in Islamic Administration” are clearly unacceptable by present standard. To me, they are too arbitrary, lack transparency and open to abuse.

Comparatively, I think, the proponents of common law are, generally speaking, not very concerned with the source or the form. They look more at the substance. If it is more beneficial to them they would accept it. A good example is Islamic Banking and finance. I am sure that the non-Muslims have voluntarily resorted to Islamic banking facilities not for any religious grounds. It is simply because they know that it is more beneficial to them: they do not have to pay compound interest, they do not have to pay penalty interest, not even interest after judgment until full realization of the judgment debt. So, the longer they can prolong the repayment, the more they gain. To them, profit is “ma’ruf” and loss is “munkar”.

On the other hand, it is the proponents of Islamic law who are more concerned with form and source, at times to the extent of missing the substance. Consider these two examples:

I was told recently that some shari'ah court judges are reluctant to apply the Islamic civil procedure rules on the ground that the rules were adopted from the Subordinate Courts Rules 1980 and therefore man-made law!

I was also told that a junior shari'ah court judge was taken to task by his superior for relying on the principles developed by the civil courts in granting an injunction. The junior judge did so because he knew that injunction had its origin in the common law of England and there were no precedents from the shari'ah courts on the subject. When the junior Judge asked the senior judge what principles to follow, the senior judge replied: "Follow your firasah".

Such closed minds are not going to help in the harmonization process, nor to convince the proponents of common law, indeed, it is, in my view, a disservice to Islam.

We have to plan our move and move forward gradually. Even Prophet Muhammad (s.a.w.), starting with *iqra'* (read), took about two decades to educate the people, a period similar to what it takes to educate a child from kindergarten to Ph.D. nowadays. By the time the Muslim community and Islamic law was established in Madinah, the Prophet (s.a.w.) already had with him a generation of "Ph.Ds" plus experience in work as well as in war.

There is no point making a great leap forward and then backtracking. At the recent International Seminar on Islamic Criminal Justice System in Johor Bahru, I learnt that the Sharia Court of Appeal in Nigeria had overturned the decision of the Upper Sharia Court in Sokoto State in the case of Saffiyatu Hussaini and Yakubu Abubakar. In that case, the police had gone to Suffiyatu's house to inquire and investigate her about her pregnancy. Suffiyatu was said to have confessed to the offence. She was convicted and sentenced with "rajm". Yakubu denied and was discharged and acquitted. On appeal, the Sharia Court of Appeal quashed the conviction and sentence passed against Suffiyatu and acquitted and discharged her. The main ground for the reversal was (I am quoting from the paper by Prof. Dr. Ibraheem Sulaiman from the Centre of Islamic Studies, Ahmadu Bello University, Nigeria) "that the whole exercise was wrong ab initio since the sharia does not empower the state to investigate, let alone, bring to trial any pregnant woman, regardless of the nature of pregnancy." That had led me to remark at the seminar. "If the state cannot investigate and we are only going to wait for the offenders to come forward and confess and get stoned to death, how many people are going to do that? Are we not, indirectly, encouraging "zina"?"

It should be noted that Prof. Dr. Ibraheem Sulaiman, at the seminar, stated that the implementation of the shari'ah in Nigeria "came as a surprise" and, therefore, was done in a hurry.

At that seminar, I also learnt from the Chief Justice, Federal Shariat Court of Pakistan that the Supreme Court of Pakistan set aside the decision of its Shariat Appellate Bench in Shariat Appeals No 11 to 19 of 1992, the case concerning "riba". My check in the internet shows that an application was made to the Supreme Court for a review of the judgment. The petition number is: Civil Shariat Review Petition No. 1 of 2000. The Supreme Court, on 24 June 2002, set aside the judgment of the Shariat Appellate Bench dated 23 December 1999 that confirmed the judgment of the Federal Shariat Court given on 14 November 1991. The Supreme Court also remitted the case back to the Federal Shariat Court for fresh determination by that Court. It is interesting to note that in the proceedings before the Supreme Court of Pakistan an affidavit was affirmed by the Secretary, Ministry of Finance stating, inter alia, that the implementation of the order of the Shariat Appellate Bench was not practical or feasible and would pose a high degree of risk to the economic stability and security of Pakistan. The Deputy Governor of the State Bank of Pakistan, in his affidavit, stated, inter alia, that the State Bank of Pakistan's considered judgment was that "a parallel approach will be in the best interest of the country....This approach will eliminate the risk of any major costs/damage to the economy, give a fair chance to Islamic banks to develop alongside the conventional banks, and will provide a choice to the people of Pakistan, and the foreigners doing business in/with Pakistan, to use either of the two systems." That "parallel approach" is what we had introduced in Malaysia.

I am not saying whether the earlier or the later judgments in the two cases are right or wrong. I bring up this point merely to show what appears, on the face of it, to be a sign of backtracking or, at least the problems faced by the courts in those countries that we in Malaysia try to emulate in the implementation of the shari'ah. That, I think, is something that we should try to avoid. It is better to move slowly, even step by step, so long as we move forward. If, we make a big leap in the dark and then start backtracking when we see light, it is very demoralizing and very difficult to justify either the original leap, the backtracking or the next move forward. The cynics may even ask: "So, God's law keeps changing too?"

Actually, the process of harmonization of shari'ah and civil law has been going on for more than two decades in this country except that the word "harmonization" is not used. The first category involves the rules of procedure and evidence that are now being used in the shariah courts. Examples are the Shari'ah Civil Procedure Act/Enactments, Shari'ah Criminal Procedure Act/Enactments, Shariah Evidence Act/Enactments. They are adapted from their civil equivalents, with changes "to Islamize" them or to suit their application in the shari'ah courts. In fact the shari'ah courts have gone further to try to look like the civil courts. The names of

the courts, the designation of the judges, the dress of the judges when sitting in court, the manner of addressing the judges have all been borrowed from the civil courts. I call that “civilling” the shari’ah courts.

The second category involves laws administered by the civil courts. Examples are Islamic banking and finance and takaful even though, in this area the law is developed by the professionals in the field, not through detail provisions of laws enacted by Parliament.

All these prove two points. First, what is called “civil law” is not very unIslamic after all. Only certain parts that require to be harmonized with the shari’ah. Secondly, the shari’ah is applicable in the modern world with the support of the “civil law” infrastructure. That speaks well for both laws and for harmonization too.

How then should we proceed from where we are now?

My answer is that we should proceed within the confines of the Constitution. Whatever has been done and achieved has been done and achieved through work done quietly and within the framework of the Constitution. So, let us proceed in the same way but we will have to get ourselves better organized.

First, I think we will have to identify which of the existing laws are contrary to shari’ah. Then, we should decide on which area to be given priority for Islamization. I think, priority should be given to those areas in which the Malaysian public can be more easily convinced that the Islamic law on those matters is more just, less oppressive and more favorable to them than civil law and therefore more easily acceptable to the general public. “Muamalat” may be a good starting point. In this respect, I think Dr. Mohd. Ma’sum Billah has done a good job. For example, in his book “Islamic Law of Trade and Finance” he has identified the similarities and the differences of the principles of common law and Islamic law on the subject and provide the rationale for the principles in both laws for us to compare. That is the kind of “digging” that we should be doing.

Such principles of Islamic law should be absorbed into the Federal law, applicable to Muslims and non-Muslims alike. Where it is permissible by the Constitution, two sets of laws may be allowed to operate side by side. If Islamic law is the better of the two, as we believe, it should in no time, prove itself to be the better of the two and become more popular than the other. We learnt from history that even though the Hudaibiya pact appeared to be more favorable to the Quraish, it was Islam that prevailed. According to Professor Masud-ul-Hasan in his book History of Islam, the way the Muslims behaved during their pilgrimage in the year following the signing of the pact made great impressions on the Quraish that great warriors like Khalid Ibn Walid and Amr Ibn Al ‘Aas accepted Islam. It was also for the same reason that the Mongols and the Tartars, having devastated the Islamic empire and ruined its civilization, within a short period,

accepted Islam and started rebuilding the civilization they had ruined. Never in history the conquerors became the conquered. There is no reason why history will not repeat itself.

I think, those areas that are more controversial, more likely to receive strong oppositions should be put aside first. One example may be “hudud”. But, there is no harm if anybody having the expertise to make a study and come with specific proposals. At least the public would know what the Islamic law is on those matters. It is better to have specific and concrete proposals than to hear fiery and emotional general statements which, as we say in relation to pleadings, “do not condescend to particulars”.

Who should do “the digging”? The short answer is: the proponents of Islamization. However, let us be pragmatic. We know this a major task. It involves a lot of work, time consuming and requires expertise both in shari’ah and civil law and practical experience.

According to the book “Islamization of Pakistan Law” by Dr. Tanzir-Ur-Rahman which was first published in 1978, the former Chief Justice of Pakistan, Mr. Justice Hamoodur Rahman who was appointed to head the Council of Islamic Ideology to work on Islamization of Pakistan law, complained that “ the lack of capable researchers in this field is seriously hampering the work of the Council.” I would be insulting many of you here if I were to say that we lack capable researchers. But, may be our researchers are not put together to do the research.

Generally speaking, those who know Islamic law do not know enough civil law and those who know civil law do not know enough Islamic law. There may be a few who know both. They can work individually or in pairs: one civil lawyer and one shari’ah lawyer.

Where are they to come from? I think, the best source is the law and the shari’ah faculties of our universities. Research is part of their job.

There must be a secretariat. But that is a matter of details that should be worked out if the suggestion is found to be feasible. May be this conference can discuss it and come up with something.

In conclusion, it is my view that unless we are brave enough to assert our right and our capability to think, unless we can think clearly in the context of today, unless we can analyze and bring the relevancy of the principles of Islamic law to the present circumstances, unless we know clearly what we want to abolish and what we want establish, unless we can convince the public that Islamic law is more just and fair and unless we can show that Islamic law can and will be implemented and administered fairly by today’s standard of justice, I do not see

how our dream will come true. Dream we should but the dream should not turn into a nightmare.

Perhaps I should conclude by quoting Imam Abu Hanifah: "What I say is only my opinion. If there are better opinions, follow them."

Thank you.