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HARMONISATION OF SHARI'AH AND COMMON LAW IN MALAYSIA: THE
WAY FORWARD

By

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Last December, USIM conferred on me the honorary degree of Doctor of Philosophy in Shari'ah and Judiciary. Today, it is either I have to pay for it or to prove that I deserve it. If it is the latter, you will be the judge.

I have amended the title by changing the words at the end from "Some issues and possibilities" to "The way forward." The reason is this: I am on "injury time". I don't have much time left to ponder on problems and think of possibilities. I want to move forward, suggest the practical way of doing it and invite you all to contribute to what my committee (The Law Harmonisation Committee, Bank Negara Malaysia) is doing.

To begin with, I would like to make two points. First, I am not an Islamic scholar and, secondly, I am not an academician. I am trained as a common law lawyer, spent forty years as common law lawyer and Judge. Along the way, I was involved in the drafting of laws for use in the Sharia's Courts besides serving as a Shari'ah Court of Appeal Judge for the State of Penang. Now, as Chairman of the Law Harmonisation Committee of the Bank Negara Malaysia, my duty is to try to harmonise civil (or common) law used in Islamic banking, Islamic finance and *takaful* with the *Shari'ah*. I am also involved in a similar exercise on a wider scope in Brunei Darussalam. So, I think, I have seen quite a bit of the subject.

The use of the word "harmonisation" in this area is quite new. However, the fact that the word "harmonisation" was not used earlier does not mean that the work of harmonisation was not done. We were doing the very same thing without calling it harmonisation. The laws now being used in the Shari'ah Courts, for example, the Shari'ah Civil Procedure Enactment, the Shari'ah Criminal Procedure Enactment, the Shari'ah Evidence Enactment are the product of harmonisation of *Shari'ah* and common law. To give an example, in the case of criminal procedure, we took the Criminal Procedure Code, modified the provisions to suit the Shari'ah Court structure and to make them *Shari'ah* compliant, enact it and giving the name *Shari'ah* to it.

Why was it done that way? Because nobody could produce an "authentic *Shari'ah* criminal procedure", if there is such a thing.

In the circumstance, I don't see anything wrong in doing it that way. After all, neither the *Qur'an* nor the *Sunnah* provides detailed provisions regarding criminal procedure in a court proceeding. That is understandable because no rule of procedure can fit all times and places. So, whatever rules developed by the traditional *ulamas* were rules that suited their time and surroundings. Over more than one-and-a-half millenniums, better rules were made to cope with new circumstances. As far as procedural law is

concerned, I am of the opinion that the present day rules found in our Criminal Procedure Code and the Subordinate Courts Rules 1980 and adopted for use in the Shari'ah Courts are far superior than what Ibn Qayyim al-Jawziyyah had during his lifetime.¹

To me, the test is whether a rule, coming from whatever source, is contrary to the principles of Shari'ah or not. If not, the more it caters for the achievement of justice, the better it is, and the "more Islamic" it is. I still hold the view that any law that is not un-Islamic is Islamic and that, in certain areas, we may have a law which is different from the time of the Prophet yet it is "more Islamic" than the law that existed then. I gave the example of the prohibition of slavery in my Al-Sanhouri Lecture at Harvard University.²

We had to fall back on the Criminal Procedure Code because no one could produce the "Shari'ah Criminal Procedure Code" to use as working draft. What is interesting is that, more than a decade after the Enactment became law, an Associate Professor from the Faculty of *Shari'ah* of one of our universities told me that the Criminal Procedure Code is actually a reproduction of the Hanafi rules regarding criminal procedure. I am not a *Shari'ah* scholar and I do not know whether and how far that is true. My reaction is "If it is so, then it is good. It means that we have taken the rules from an "Islamic source". But, why didn't anybody produce the draft or, at the very least, tell us so when we were drafting it so that we could tell everybody then that it was so."

Similarly, but to a lesser extent, the Shari'ah Evidence Enactments, the Islamic Family Law Enactments were modelled on the Evidence Act 1950 and the Law Reform (Marriage and Divorce) Act 1976 with necessary modifications to comply with *Shari'ah* requirements.

What we see here is the absorption of common law principles into *Shari'ah*. Is it happening on the reverse i.e. absorption of *Shari'ah* principles into common law rules?

If you are talking about absorption by the court, the answer is very little, if at all. The main reason is that the function of the Judge is to apply the law, not to make law. The latter is the function of the Legislature. If, for example, I am hearing a bankruptcy case, I'll apply the Bankruptcy Act, the Bankruptcy Rules and relevant case law. Those are the applicable laws. I would be wrong to do otherwise. So, there is no room for laws coming from other jurisdiction or other sources, unless they are legislated. In other words, if you want the court to apply the *Shari'ah* bankruptcy law, you will have to legislate it. Could someone come up with the draft? Rhetoric is not taking us anywhere.

There may be a small opening in tort, that too is subject to the doctrine of precedent. To those who are interested, I would like to suggest that they read the Judgment of the High Court in Penang. The name of the case is *Nepline Sdn Bhd v. Jones Lang*

¹ See for example, the English translation of Ibn Qayyim al-Jawziyyah's treatise under the title of "The Legal Methods in Islamic Administration" by Dr. Ala'eddin Kharofa.

² Harmonization of Common Law and Shari'ah in Malaysia: A Practical Approach. Abdul Razak Al-Sanhouri Lecture, Harvard Law School' 6th November 2008.

Wooten (1965) 1 CLJ 865. Though it is not said so in the judgment, which was done on purpose, in that judgment, I relied on the *Shari'ah* principle that it is obligatory for the seller to disclose the defect in the goods he is selling to the purchaser, to arrive at my conclusion. That led to the conclusion that an estate agent is duty bound to disclose to the intended lessee of a premise of the pending foreclosure action on the property. The case went to the Court of Appeal which confirmed the judgment, most probably, without even knowing where the principle came from as it did not even give a written judgment.

At the same time, we have introduced laws, though general in nature, that have enabled the application of *Shari'ah*, for example in Islamic banking³, Islamic finance⁴ and *takafu*⁵. As a result, putting aside the motives, transactions are being challenged on the ground that they are not in compliance with *Shari'ah*. This is a new development. The transactions are being tested against the *Shari'ah* principle, something unheard of in the common law courts fifty years ago, except may be in a few *waqaf* cases.

There is also a *Shari'ah* Division in the Attorney General's Chambers with Tan Sri Sheikh Ghazali Abdul Rahman⁶ as a full time advisor besides a "Shari'ah Community" established six years ago. *Shari'ah* issues arising in the drafting of laws, contracts, court cases handled by the Attorney General's Chambers and others are referred to the *Shari'ah* Division for advice.

The *Shari'ah* and Civil Law Technical Committee headed by Tan Sri Sheikh Ghazali is still on going.

I have also met a few Professors from the International Islamic University Malaysia who have been given grants by the Legal Affairs Division of the Prime Ministers Department to review certain laws. I have suggested to them and they have agreed that, in the review, they will also be looking at those laws from the *Shari'ah* perspective. Similarly, at our suggestion, the review of the National Land Code has also included the objective of making land law *Shari'ah* compliant to facilitate the development of Islamic banking and finance. Officers of the Ministry are working closely with the Law Harmonising Committee. I am sure that other universities and Islamic institutions have their own projects.

You cannot imagine such things happening fifty years ago. At that time the common law lawyers and Judges and the *Shari'ah* scholars never met: the former spent their time in the club bars while the latter spent their time in the *madrasahs*. The two groups dressed differently, ate different food and differently, spoke different languages, had different hobbies and even behaved differently.

Today, for example, we are all here. I am a common law lawyer and a former Judge of the civil court and many of you are *Shari'ah* scholars. We are discussing

³ Section 2 of the Islamic Banking Act 1983 (Act 276) defines "Islamic banking business" to mean banking business whose aims and operations do not involve and element which is not approved by the religion of Islam.

⁴ Section 2 of the Central Bank of Malaysia Act 2009 defines "Islamic financial business" as any financial business in ringgit or other currency which is subject to the laws enforced by the Bank (Bank Negara Malaysia) and consistent with the *Shari'ah*.

⁵ Section 2 of the Takaful Act 1984 (Act 312) defines "*takafu*" as a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose;

⁶ Former *Shari'ah* Chief Justice, Federal Territory

harmonisation of *Shari'ah* and common law. If you attend an international conference on Islamic banking, Islamic finance or *takaful*, you will find that many, at times, the majority of the participants and paper writers are non-Muslims and Europeans. You will also find that a number of them have converted to Islam, again a new development. That is why I have asked the question whether "East and West have met", particularly through Islamic banking, Islamic finance and *takaful*.

But, all these are not enough. There must be a concerted effort by all to:

- i. Identify the laws that are *Shari'ah* non-compliant;
- ii. Produce the *Shari'ah* compliant draft;
- iii. Engage the relevant Ministries/Departments to take it through the process of legislation.

I have made my suggestions since 2003⁷, repeated twice with modification in 2005⁸ and again in 2010.⁹ Unfortunately, no one bought the idea and, until today, we don't see the results.

Then, the burden, or part of it, fell on my shoulder. That is due to the establishment of the Law Harmonisation Committee by Bank Negara on 27 July 2010 of which I am Chairman. This is part of the Government's effort to make Malaysia a holistic hub for Islamic banking, Islamic finance and *takaful*. I have spoken at length about this in my 12th Emeritus Prof. Ahamd Ibrahim Memorial lecture.¹⁰

The background to it is this. Islamic banking, Islamic finance and *takaful*, as we know them today, were born at the close of the twentieth century in a common law surrounding. While the *Shari'ah* is applied to ensure the *Shari'ah* compliance of the product, the law applicable, from the establishment of the Islamic financial institution, to the documentation of the product, settlement of dispute, enforcement of the order of court right up to the winding up of the companies, if it happens, are all the existing common law based laws. Why is it so? Simply because we do not have the *Shari'ah* alternative. The opinions of the scholars may be in their respective books, but there is no *Shari'ah* Companies Act, no *Shari'ah* Contracts Act, no *Shari'ah* National Land Code that could readily be applied. So, contracts have to be drawn as provided by the Contracts Act, charges have to be registered under the National Land Code and so on.¹¹

To me there is nothing wrong with it so long as the provisions are *Shari'ah* compliant. After all, they are procedural and administrative laws. However, we want to be sure that all the provisions of the laws used in Islamic banking, Islamic finance and *takaful* are *Shari'ah* compliant. That is what the Law Harmonisation Committee is trying to do: to find out which provisions in the relevant laws are not *Shari'ah* compliant and amend them to make them *Shari'ah* compliant. Besides, the Committee is also trying

⁷ Harmonisation Of *Shari'ah* And Civil Law In Malaysia: Present Reality And Future Actions 20 & 21 October 2003

⁸ Opening Speech at the International Conference on "Harmonisation of *Shari'ah* and Civil Law: Towards a Methodology of Harmonization. 29 – 30 June 2005; Komuniti Syari'ah: Peranannya Dalam Isu-su Syari'ah dan Sivill 5 Disember 2005.

⁹ Interface Between *Shari'ah* and Civil Law in Islamic Finance: Current Problems and the Way Forward. 29 - 31 July 2010.

¹⁰ Malaysia as an Islamic Finance Hub: Malaysian Law as the Law of Reference and Malaysian Courts and Arbitrators as the Forum for Settlement of Disputes. 7th December 2011.

¹¹ See, *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn. Bhd.* (2003) 1 C.L.J. 625,

to introduce *Shari'ah* principles into our law to facilitate the development of Islamic banking, Islamic finance and *takaful*.

I thought I could get the assistance from the Islamic universities, *Shariah* faculties, Islamic departments, institutions and organizations. With so many Masters and Doctors being produced in comparative law, with so many lecturers and professors doing research and teaching law and *Shari'ah*, I thought I could just appeal to them to submit their findings to the committee and we could straightaway start drafting. Unfortunately, it did not happen that way. In spite of the fact I had written scores of letters and visited three Islamic universities to plead for their contribution, I have not received a single response. I just cannot believe that no one in his or research, thesis, or lecture had not come across such provisions.

Since there are many academicians in this hall, I would like to take this opportunity to appeal to all of you that if, in the course of your research or teaching, you had come across any area in our law applicable to Islamic finance which are *Shari'ah* non-compliant or which are not conducive to the development of Islamic finance, please let us have them, preferably with the *Shari'ah* position and your recommendation. We will even invite you to present your findings and suggestions at our meeting.

Between all of you, you must have done centuries of research. I am sure that you have come across something that would be useful to us. Let us have them. Let us put the results of your research to practical use. To me, to do a research without putting the findings to practical use is like conceiving without delivering.

In the meantime, we tried to do it ourselves. We adopt a practical approach and work within the system. We would identify the laws or provisions that are not consistent with the *Shari'ah* or which are not conducive to Islamic finance, ascertain the *Shari'ah* position, draft the *Shari'ah* alternative and send it to the relevant authorities for legislation. We would not debate about the Federal and State jurisdictions or Civil and *Shari'ah* Court jurisdictions. We would accept the constitutional provisions as they are. If there are legal or *Shari'ah* issues, we would refer them, respectively, to the Attorney General's Chambers for advice or to the relevant *Shari'ah* Advisory Councils for rulings.

In identifying the *Shari'ah* non-compliant provisions we adopt the approach: any law that is not un-Islamic is Islamic. That was exactly what we did when we drafted the procedural laws for the *Shari'ah* Courts, but without saying so because I came out with that phrase much later.

We took the easy ones first, especially something that would have a big impact on the industry. For example, when we look at the Rules of the High Court, we found that only one provision is objectionable i.e. the provision regarding interest after judgment¹². The *Shariah* Advisory Council of the Bank Negara and the Securities Commission had ruled that late payment charges could to be imposed, based on the principles of *ta'wid* (compensation) and *gharamah* (penalty).¹³ So, we drafted a rule

¹² Order 42 rule 12, Rules of the High Court 1980

¹³ Bank Negara Malaysia - SAC 50th meeting (26 May 2005), 61st meeting (24th August 2006), 100th meeting (30th April – 1st May 2010), 111th meeting (28 April 2011), 13th Special SAC meeting (25 July 2011) and 115th meeting (25 August 2011) & Securities Commission Malaysia - SAC 12th meeting (14 July 1999), SAC 30th meeting (8 November 2000), SAC 78th meeting (8 May 2007) and SAC 121st meeting (25 July 2011).

and forwarded it to the Rules Committee which has agreed to include the provision in the Rules, applicable to cases arising from Islamic banking and Islamic finance transaction.

We have, so far, identified a number of issues, including *wa'ad* and *ibra'* and a number of provisions that need to be harmonized and are working on them. We have also formed a Land Laws Sub-Committee to look at the land laws. The Committee has identified a number of areas e.g. regarding charges, liens and others and is working on them.

Let me tell you an interesting episode that happened recently. I met a lecturer who had written a thesis for his Phd. on guarantee, comparing the law of guarantee under common law and the *Shari'ah*. We invited him to present his paper to our committee which he did. Briefly, his finding was that the *Shari'ah* position according to Shafi'ie, Hanafi and Hanbali Schools is that the creditor may choose whether to make a claim the principal debtor or the guarantor to recover the debt. However, according to the Maliki school, the creditor must make a claim against the principal debtor first. He also found that our law is similar to the view of the three *mazhabs*. However, he suggested that we adopt the Maliki view because, to him, it is more just.

After some discussion, a member of the committee, a common law lawyer, pointed out that there is a provision in our law which is similar the Maliki position in the case of social guarantee. We checked the law. Sure enough there is such a provision.¹⁴ However, the wording may have to be amended to suit *Shari'ah*-based transactions.

The paper presenter then suggested that the Maliki rule be applied to all guarantees. To that, a member of the Committee, a *Shari'ah* scholar, said that to do that would go against the original concept of guarantee in *Shari'ah* which is gratuitous. Then a representative of Bank Negara added that if we were to do that, the cost of finance will increase because financial institutions will require additional security. Furthermore, in the case of commercial guarantors, the guarantors are usually the directors of the company, which is the principal debtor, and are not gratuitous guarantors.

So, the committee decided that there was nothing to be done. But, the important thing is that the Committee now knows and will be able to tell the public that our law of guarantee is already *Shari'ah* compliant and that we have adopted the majority as well as the minority view (though partly), ironically without knowing it.

Similarly, researchers from ISRA were invited to present a paper on *wa'd*. They found that *wa'd* is very similar to promissory estoppel under the common law.

It appears that the more you dig and the more you know about *Shari'ah* and common law, the more similarities you find.

¹⁴ Section 5(3) of the Bankruptcy Act 1967 which accords protection to social guarantors as defined in Section 2: "social guarantor" means a person who provides, not for the purpose of making profit, the following guarantees:

- (a) a guarantee for a loan, scholarship or grant for educational or research purposes;
- (b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use;
- (c) a guarantee for a housing loan transaction solely for personal dwelling;

Let me conclude by saying this. I am of the view that the close of the twentieth century and the beginning of the twenty first century mark the beginning of a new era in the development and spread of *Shari'ah*, in particular *mu'amalat*. And it happens because of Islamic banking, Islamic finance and *takaful*. The scholars, faced with new reality, are developing the *Shari'ah* by accepting the views of all *sunni mazhabs* instead of strictly following a particular *mazhab*. At times, they even accept isolated views of traditional scholars as well as the views of contemporary scholars even though such views may differ from the views of the traditional scholars. They consider the views of other Shari'ah Committees all over the world. They accept the current custom (*urf*) in financial transactions. All these will make the *Shari'ah* more global and current. At the same time, the *Shari'ah* is moving into the main stream and making its appearance in non-Muslim countries and applicable even to non-Muslims. The beauty is that it is happening without conquest and without conversion. But the irony is that it is not happening because of piety but because of money!

Let us focus on this area first and let us be proud to make our contributions to this development, as much as we can. We are lucky that this opportunity happens during our lifetime and let us not miss it.

Thank you.