INTERNATIONAL CONFERENCE ON "HARMONIZATION OF SHARI'AH AND CIVIL LAW: TOWARDS A METHODOLOGY OF HARMONIZATION"

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Speech at the Opening Ceremony
By
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So far, I mean until this morning, I had officially closed two conferences but I had not opened any. This morning, I am invited to officially open one. That it should be such an important conference as this, participated by learned scholars and academicians from various parts of the world and on a subject that is of interest to me, is really a great honour to me. I hope that I deserve the honour given to me.

Being a "worker", i.e., a person who looks for the law to apply to the facts before him in order to come to a decision in a case he is hearing (that is what a Judge really does) and not an academician who first decides on his methodology before starting his research, I wondered whether I was the right person to deliver this opening address. Then it dawned upon me that perhaps it is a good thing because we may be complimenting each other: the "worker" should know what he is doing and the "planner" should execute his plans.

During the period of over twenty years that I was involved the drafting of the various laws, procedural and substantive, for use in the Shari'ah Courts, the words "harmonization" and "methodology" did not even cross my mind. We were simply doing it. Little did I realize that, in fact, we were "harmonizing" the two laws and that the Islamic scholars in the committee were, to a certain extent, exercising their "ijtihad" following a "methodology" that I did not even know. Anyway, the work was done.

Whether we like it or not, Islamic law (I prefer to use the broader term "Islamic law" for fear of being wrong technically) has been in the cold storage, so to speak, since the fall of the Muslim empires and the colonization of the Muslims by the Europeans. (I am avoiding the use of the term "Islamic" in relation to "empires" because how "Islamic", at least some of those empires were, is debatable). During that period, the world had progressed so fast and so much, technologically and otherwise, for better or for worse. Trading is no longer a matter of buying and selling goods displayed in the market. Limited companies, having their own legal entities, do most of the trading, undertake development projects, in fact, monopolize almost all major businesses. Borrowing is no

longer confined to individuals to buy daily necessities. Richer people borrow more. Big companies borrow even more and countries borrow even more. It is no longer practical for a person to save enough money in order to have enough capital to start a business or even to buy a house or a car. He has to borrow. Almost all companies carry out their businesses on borrowed money. Trading is done across the globe without the parties coming face to face. As a result, modern banking, finance and insurance have developed in such a way that is unimaginable by the Islamic scholars who have lived hundred of years ago.

New inventions have flooded the world, solving some old problems and creating new ones.

Life-style has changed. Human rights assumes its importance. It and the public demand a certain basic standard that should be complied with even in the administration of justice.

New technologies have enabled a fact to be proved in ways unknown previously.

To cope with these new developments and problems, new laws have been enacted. Common law too developed in tandem with those developments, at times, using the very same technology and invention to solve the problems created by them. Unfortunately, Islamic law had stopped developing.

Then, starting about 30 years ago, quite suddenly, after the European physical colonization of the Muslim countries came to an end and fueled by what is perceived by the Muslims as “anti-Islam policy” of the West, the Muslims began to think as an “ummah” again, this time as an “ummah” under oppression. They began to look back to their “past glory” and dig into their old archives. Law is their main focus. They wish to reestablish Islamic law. But, they find that some aspects of it have been overtaken by time. They cannot go back and live in the past. They have to bring the law up to date in order to be relevant, applicable and effective.

Where do we begin? Start from where the law had stopped developing or accept the existing laws as a basis and adjust them so that they comply with Shari’ah principles? Of course, the second choice is more practical. At least the infrastructure is already there. And, that is the way it was done, be it in procedural law, banking, finance and takaful.

One good example, I think, is section 79 of the Islamic Family Law (Federal Territory) Act 1984 and its equivalent in the State Enactments regarding the period a child is entitled to maintenance. It provides that an order for maintenance shall expire when the child attains the age of eighteen years except where the child is suffering from “mental or physical disability” and therefore unable to maintain himself or herself. It goes on to provide that “the Court may, on the application by the child or any other person, extend the order for

maintenance to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training."

It is to be noted that, first, the age of eighteen years, which is the age of majority in Malaysia, was adopted instead of the usual age of attainment of "baligh" under the traditional Islamic law. Secondly, it goes further than the provision of section 95 of the Law Reform (Marriage and Divorce) Act 1976 which provides that the order shall expire when the child attains the age of eighteen years "or where the child is under physical or mental disability, on the ceasing of such disability, whichever is later."

Thus when hearing the appeal in the case of Karunairajah a/l Rasiah v. Punithambigai a/p Poniah (2004) 2 MLJ 401 in the Federal Court, learned counsel for the Respondent, in supporting the Judgment of the High Court and the Court of Appeal was urging the court to interpret the words "mental disability" to include "pursuing and/or completing tertiary and/or vocational education", I remember asking her whether she realized the effect of her argument which would mean that every university student, until he or she graduates, is suffering from mental disability? Even though I personally agreed that the period for maintenance of a child should cover the period he or she pursues tertiary education, I did not favour such an interpretation because that would amount to the court "legislating" an amendment to the law which is not the function of the court but that of the Parliament. However, I did suggest that an amendment be made by Parliament to the law which, I believe, is on the way.

Brothers and sisters, ladies and gentlemen,

I personally think that, under the circumstance that we are in, that is the most sensible thing to do i.e. take the existing laws as a basis and adjust them where they are not, to make them Shari'ah compliance. And, in so doing, I think that the emphasis should be more on the principles rather than on the method and the form. The form may be outdated, the method may not be acceptable anymore, but the principles are there to stay and to be applied. In my humble view, it is the principles that make the difference whether a law is Islamic or not. Thus, in criminal law, for example, some of the methods used by the Kadhis in the past as found in 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, may not be suitable anymore. They appear to be quite arbitrary, lack transparency and are open to abuse. I think, the modern system that separates investigation, prosecution and adjudication is more fair, more transparent and, to my mind, more "Islamic".

That brings me to an incident that happened a few years ago. One afternoon, a young man came to my office. He introduced himself as a Ph.D. student from the University of Istanbul and that his professor had asked him to see me when in Malaysia. He wanted to interview me for his Ph.D. thesis. The first question that

he asked me was, “What is your definition of ‘Islamic Law’?” Almost without thinking, I replied, “Any law that is not un-Islamic”. The interview lasted for about two hours. After he had returned to Istanbul, he sent me an email. Among other things he said, “How I wish that our “ulama’s” are as broad-minded as you are.” I replied, “The point is, I am not an ‘ulama’”.

Now, looking back, rightly or wrongly, I think that that reply which I gave “almost without thinking”, though it begs the question, is still my view as to what we should consider as “Islamic law” now. (I hope to hear some comments from our learned scholars on this point during this conference. I am here to learn from you all). To me, a law which is not found in the traditional fiqh books, need not necessarily be un-Islamic, provided it is not contrary to Islamic principles, derived from the recognized sources of Islamic jurisprudence. If there were cars during the life-time of Caliph Umar Ibn Khattab, I am quite sure that he would have come up with a law to regulate the use of cars. Had that happened, most likely, now, it will be considered as an “Islamic Road Transport Law” or even, as the term is commonly used in Malaysia, “hukum syarak” (“Shari’ah”).

Similarly, we may want to take a fresh look at the rules regarding witnesses. In a small community or village, where everybody knows everybody, it may be possible to say at the outset that so-and-so is trustworthy and reliable and so-and-so is not. Nowadays, even neighbours often do not know each other. Judges do not know every person appearing before him (in fact, it is more transparent if he does not know the people appearing before him). How is the Judge going to decide who is trustworthy and who is not, before the witness even opens his mouth in Court? In any event, I think that the focus should be on the evidence rather than the person.

(I remember reading in one book that certain Arab communities in pre-Islamic and may be post-Islamic period too, regarded clean-shaven men as untrustworthy and, therefore, not qualified to be witnesses, may be because they were “smooth” or “licin”. I also remember that in 1950’s, men with shaven heads were regarded as more pious by the people in my village. They were the “hajis” and the “lebais”. Now, more often than not, it is the “rockers” and the footballers who sport such a hair-style.)

Besides, just because a person is known to have lied on a previous occasion does not mean that he would lie all the time. Similarly, there is no guarantee that a person who had not been caught lying may not lie in court. So, there is a case for admissibility of evidence to be separated from the weight to be attached to it. A piece of evidence may be admissible but it may not be reliable. An experience Judge can see it quite easily, after considering the whole of the evidence adduced in a case, including expert and documentary evidence.

Numbers do not necessarily bring out the truth. Quite often, when a story is repeated by a number of persons in the same way and containing the same

details, it is open to suspicion that they might have been coached. Could the requirement as to the number of witnesses giving oral evidence not be complimented by documentary and scientific expert evidence available nowadays?

After all, in ascertaining the facts in a trial, the bottom line is to get the truth in a fair way. Witnesses are the tools. Previously, oral evidence was the primary source of evidence, if not the only source available. Nowadays, especially in civil cases, documentary evidence plays a more important role. While oral evidence still plays a very important role in criminal trials, expert and documentary evidence are becoming more important.

We may also want to take a fresh look at the rule regarding the period of gestation of two years traditionally held by the scholars. Is modern medical science not more reliable than the assumptions or beliefs of the mothers of those great scholars about the length of the period of their pregnancies?

These are only examples that cross my mind. You know better what you should be discussing.

Brothers and sisters, ladies and gentlemen,

From the topics of the keynote addresses and the papers to be presented at this conference, it appears to me that the organizers of this conference realize the importance of extracting the Shari'ah principles to be used in the process of Islamizing the existing laws and the methodology thereof. I shall not repeat the topics. At the same time, I also see that specific works have been done to harmonize or Islamize existing laws with Islamic principles. Again, I shall not repeat them.

These are specific works that have been done, and I hope more are coming. I am sure that they will be fully discussed at this conference.

The next step is to bring them to the attention of the authorities for consideration with a view to adopting them as law, if as a matter of policy, they are found suitable. For that purpose, there must be an agency to follow up. I cannot think of a better agency than the Shari'ah Division of the Attorney General Chambers. I hope there are representatives from the Attorney General's Chambers here. Please take note. The work has been done for you. All that you have to do is to follow it up. If you need assistance, you can always get it from our Islamic scholars and the experts in the relevant fields. Actually, we have the brains and the machinery. It is only a matter of putting them together to work together.

I congratulate the International Islamic University Malaysia for organizing this conference and thank the keynote speakers, the paper writers and the participants for their willingness to share their vast knowledge with us.

In the name of Allah, the most Gracious, the most Merciful, I declare this conference open.