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HARMONIZATION OF COMMON LAW AND SHARI'AH IN MALAYSIA: A
PRACTICAL APPROACH

By

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I thought that my visit to Harvard last year to attend my daughter's graduation was going to be my first and last visit here. However, thanks to Professor Baber Johansen, whom I had not even met until I arrived here two days ago, that was not to be. Professor Baber Johansen invited me to deliver a lecture named after a person whose name I had not even heard before I received the invitation. This is the greatest gift for my retirement.

Not being an academician, I choose to speak about something I have been involved in for nearly twenty years in the area that later came to be referred to as "harmonization of the common law and *Shari'ah*", and that too, only from the Malaysian experience.

In fact, when we started doing it and when we were doing it, the word "harmonization" did not even cross my mind. I did think of the word "Islamization" after reading a book from Pakistan. There was no mention of the word "methodology" either. We were just doing what needed to be done. The *Shari'ah* Courts had been established as provided by the Federal and the State Constitutions. The courts have to have laws, substantive and procedural. The laws have to be *Shari'ah*-compliance and codified. The Islamic scholars and the *Shari'ah* court judges could not produce a draft that could be enacted as laws. They also had no expertise and experience in drafting bills to be enacted as laws by Parliament and the State Legislative Assemblies. So, the common law lawyers headed by the late Professor Ahmad Ibrahim (a Cambridge trained lawyer) and Judges of the *Shari'ah* courts sat down together to draft the laws. Being a State Legal Advisor (State Attorney General), I was then involved until now, though, over the years, in different capacities according to the positions that I held during the period. We decided to take the existing laws that were

currently in use in the common law courts as the basis to work on, remove or substitute the objectionable parts, add whatever needed to be added, make them *Shari'ah*-compliance and have them enacted as laws. In fact, the process and that “methodology”, if it can be so called, continue until today.

It is also a shame that, at that time, I had not even heard the name of Abd al-Razzaq al-Sanhuri. If I could be excused, even the Al-Azhar graduates in the committee did not mention his name. Abd al-Razzaq al-Sanhuri deserves to be known and his works deserves to be appreciated.

Ladies and gentlemen,

Before going any further, let me give you a brief background of the circumstances in Malaysia that had led to the present position so that you can appreciate its peculiarities.

Islam came to the Malay Peninsular in the 14th century by peaceful means i.e. through Muslim traders from Yemen and India. Some scholars say Islam came to the Malay Peninsular through China. We shall leave it to the historians to debate. The Malay *Sultans* converted to Islam and the population followed suit. Over the years, the word “Islam” became synonymous with the word “Malay”, the race. Hence, until very recently, when a non-Malay converted to Islam, he or she was said to have “*masuk Melayu*” (literally, “*enter Malay*”), not even “*enter Islam*”. So strong is the Malay-Islam relationship that even the Federal Constitution defines “Malay” as a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom. In other words, the first test of a person’s race is his religion. You may not find a similar provision in any other constitution in the world.

Interestingly, the Malaysian Constitution was drafted by common law judges and lawyers including Lord Reid and Sir Ivor Jennings. I remember how strong the views of the Malays were on the issue at the time (1950s) when the Federal Constitution was being drafted. The Malays would not have accepted the Constitution had Islam not been made an ingredient in the definition of “Malay” and had Islam not been declared to be the religion of the Federation.

Going back in history, in 1511 the Malay State of Melaka was colonized by the Portuguese, followed by the Dutch and the British. By the 19th century, British colonization had spread throughout what is now Malaysia. They also introduced the English common law and rules of equity and their legal and judicial system.

The British, directly or indirectly, also caused the immigration of Chinese and Indians to the then Malaya and the two Borneo States that now form Malaysia. The immigrants brought with them their religions besides their languages and cultures. However, the Muslims remained the majority with slightly over 50% of the population, even after the two Borneo States, i.e. Sabah and Sarawak joined Malaysia in 1963.

Perhaps realizing the sensitivities of the Malays over their religion and custom, the British left matters of Islamic religion and Malay Custom to the Malay Rulers, or, for convenience, we shall call them “*Sultans*”. There are nine of them. Every five years they elect one of them, usually the most senior, to be the King of the whole of Malaysia. So, our King is elected and he reigns for a period of five years only. Then he goes back to his home State to continue to be the *Sultan* of his state. One may say that instead of going to war as Kings had always done throughout history, they queue up to become the King of the whole of Malaysia. That is very civilized, isn't it? Malaysia is a Federation of 13 States, nine with hereditary *Sultans* and four without.

Being a Federation, jurisdictions and powers have to be shared between the Federation and the States. Even though Islam is declared to be the “religion of the Federation” (Article 3), matters concerning Islam, following the model during the British period, was left with the States. The Federal Constitution declares the *Sultan* of each State to be the Head of the Religion of Islam in his State. In the States without a *Sultan*, the King is the Head of the Religion of Islam.

Coming now to the division of the legislative powers between the Federation and the States, the Federal Constitution provides, for our purpose I shall only refer to the Federal List and the State List. The Federal List covers almost all laws, civil and criminal. But Islamic law, except for the ascertainment of Islamic law for Federal purpose, is a State matter. Non-Muslim family law is a Federal matter falling within the jurisdiction of the common law courts. Family law of the Muslims is a State matter within the

jurisdiction of the *Shari'ah* Courts. Criminal law, tort, contract, land law and others are Federal laws applicable to both Muslims and non-Muslims alike. The division looks neat. Perhaps even the learned drafters of the Constitution did not envisage that there would be conflicts even of laws, what more conflicts leading to religious and racial tensions.

We cannot blame the drafters of the Constitution. In 1957 (the year of independence), the Muslims were mainly Malays living in the rural areas. Inter-marriages were very rare. In any event, when a non-Muslim wanted to marry a Muslim he or she converted to Islam. (My wife is one of them). Almost everybody accepted that the law of the country, civil and criminal, was the common law of England as modified, either by the legislature or the court, to suit the local circumstances. Islamic law was only applicable to Muslims and, even then, restricted only to matrimonial matters, inheritance and in regard to the administration of mosques, *waqf* and the like. Criminal law, based on the English common law as codified in India, was already in place. The only offences that the States are allowed to legislate were and are offences "against the precepts of Islam" and only applicable to Muslims. Similarly, the English law of Contract, law of Evidence and others, which had been codified in India were introduced in Malaysia. At that time, Islamic banking, Islamic finance and "*takaful*" were unheard of.

Indeed, in a landmark judgment of the Malaysian Supreme Court, the court clearly said that Malaysia was a secular State and that Islam was only relevant for ceremonial purposes. (Wan Jalil Bin Wan Abdul Rahman & Anor v Public Prosecutor ([1988] 1LNS 150)

However, one of the first indications of conflict of laws and jurisdictions between the common law courts and the *Shari'ah* courts arose over the issue of custody of a Muslim child. (Myriam v Arif ([1971] 1 LNS 88; [1971] 1 MLJ 265). Prior to the establishment of the *Shari'ah* courts, custody of children, Muslims and non-Muslims, was within the jurisdiction of the common law court. When the *Shari'ah* courts were established, the jurisdiction over custody of Muslim children was given to the *Shari'ah* courts. That is as clearly as provided for in the Federal Constitution and was perfectly valid. However, the old law was not amended. An application was made in the High Court (i.e. the common law court) for a custody order of a child of a Muslim couple, even though the mother was an English girl who had converted to Islam. The High Court held that it had jurisdiction to make the order and gave custody to the mother. Even though in that case

the matter ended there, to avoid conflicting orders being made by the common law court and the *Shari'ah* court over the same or similar matters in the future, the Federal Constitution was amended. It was a very simple amendment. It merely says that where the *Shari'ah* court has jurisdiction over a matter, the common law courts do not have jurisdiction over it. Everybody thought the problem was solved.

But, that was not to be. As later cases show the problems were more complex.

First, the subject matter may fall within the jurisdiction of the *Shari'ah* Court but one of the parties is a non-Muslim and the *Shari'ah* court has no jurisdiction over non-Muslims. Which court is to hear the case?

Secondly, in the same case there may be issues falling within the jurisdiction of the common law courts and also issues falling within the jurisdiction of the *Shari'ah* court. Which court is to hear the case? (I pointed out these problems in 1996 when I was a High Court Judge in my judgment in Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang Dan Satu Tindakan Lain (1996 MLJU 500).

Thirdly, in a case which on the face of it appears to be falling within the jurisdiction of the *Shari'ah* court, there may be constitutional issues. I have delivered two judgments of the Federal Court on this issue. (For clarification, the "Federal Court" which is equivalent to the U.S Supreme Court, was renamed "Supreme Court" but is now renamed "Federal Court" again. That is the work of politicians, not judges). In those cases, I said very clearly: "Interpretation of the Constitution is a matter for this court" - see Latifah Bte Mat Zin v Rosmawati Binti Sharibun & Anor. F.C.C.A. No. 2 - 39 - 2006; Sulaiman Bin Takrib v Kerajaan Negeri Trengganu & Anor, Federal Court Petition No.1 of 2006. That issue is settled, I think.

Regarding the first and the second problems, time does not permit me to discuss them in detail. Suffice for me to say that in the same High Court judgment mentioned earlier (i.e. Lim Chan Seng) I suggested two ways to overcome the problems. First, to combine the two court systems. Common law cases will be heard by judges trained in common law and *Shar'iah* cases will be heard by Judges trained in *Shari'ah*. Where a case involves both common law and *Shari'ah* issues, it should be heard by two judges, one common law judge and one *Shari'ah* judge.

That judgment has often been quoted at conferences but it was not politically feasible as it would involve amendments to the Federal and State Constitutions. The States, especially those under “the opposition” Islamist party would certainly not agree to hand over their powers over the religion of Islam to the Federal Government under the National Front. At least, some of the *Sultans* would not agree as it is seen as taking away their powers as Head of the Religion of Islam in their respective States. So, the problem is really politics and not law.

My second suggestion was to leave the courts as they are. However, cases in which both Islamic law and common law issues arise, whether the parties are all Muslims or not, should be heard by the common law court with two judges, one a common law judge and one a *Shari’ah* judge. Even this suggestion is considered by the politicians as “too sensitive”. So, the problems remain unsolved.

In the meantime, partly contributed by external factors such as the Iranian revolution, the Gulf War, the rise of the Taliban, September 11, Osama Bin Ladin, the “invasion of Iraq” (that is the way it is seen by the Muslims in Malaysia), the victory of Islamist parties in other countries and even “the war against terror”, Malaysia’s own Islamist party gained greater influence and success in the general election. Now the party controls two States and is a member of the coalition that rules three other States. In fact, even the Malay nationalist party (the United Malay National Organization, one of the main partners in the National Front that had ruled the country for fifty years) has also become more Islamist than nationalist. So, the States want more powers to be given to the *Shari’ah* courts.

Beside, every year, hundreds of graduates return to Malaysia from Universities in the Middle East, Pakistan and other countries, majority of them on State Scholarships, besides thousands who graduate from local universities in Islamic-related subjects. Many of them end up as religious teachers, preachers and even politicians. They too want a share of the high positions held by graduates from Western Universities and their colleagues from other disciplines, which were not available to them because of their qualification in Islamic religious subjects only. (But, I must say that, in the last decade, a new group is emerging. They are equally fluent in English, Arabic and Malay. They hold degrees in both *Shari’ah* and law or in comparative studies from Islamic universities using Arabic as the medium

of instruction as well as from Western universities, including Harvard. They are now in the Islamic banking, Islamic finance and *takaful* sectors, internationally. They know where the money is and it is not unholy to make money, to hold high positions and to have a good life, a very welcomed development.)

All these have led to demands for more power to be given to the *Shari'ah* courts. Two States went so far as to draft the "*Hudud* Law" but their implementations were blocked by the Federal Government, constitutionally, I must say, correctly. However, in revising the Islamic laws administered by the *Shari'ah* courts, more offences were created, some of them overlap with the existing criminal law which is a Federal matter within the jurisdiction of the common law courts. A good example is sodomy. That offence overlaps with a similar offence under section 377A and 377D of the Penal Code. In one very famous case (Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 2 CLJ 707), the accused person was charged in the common law court under section 377D of the Penal Code. He challenged the jurisdiction of the common law court to try him arguing that it was a matter within the jurisdiction of the *Shari'ah* court. He relied on the amendment to the Federal Constitution which says that when a matter is within the jurisdiction of the *Shari'ah* court, the common law court has no jurisdiction over it.

We now see that the amendment that was meant to clarify the jurisdictional issue was used to oust the existing jurisdiction of the common law court by creating similar offences in the State law. The matter went up to the Court of Appeal. The Court of Appeal held that the amendment did not apply. For it to apply the *Shari'ah* court must have exclusive jurisdiction over the matter. This legal issue has now been greatly politicized.

I was only a High Court Judge then. While I agree with the decision, I do not agree with the reasoning. To me the newly created offence in the State law is unconstitutional, it being "criminal law" under the Federal List and such an offence had existed since before the Independence. Furthermore, Article 75 of the Federal Constitution clearly provides:

"If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void."

I should say something about the case of Latifah Binti Mat Zin (supra). Under the Federal Constitution and the law, Letters of Administration and Distribution of estate of a deceased person are within the jurisdiction of the common law court. Islamic law regarding inheritance and gifts of Muslims are within the jurisdiction of the *Shari'ah* court. A Muslim died leaving some properties. An application for a Letter of Administration was made in the common law court. A dispute arose whether money in a certain account in the name of one of his widows was part of his estate or a gift to that widow. One of the beneficiaries of the estate applied to the *Shari'ah* court for the determination of that issue. The widow opposed it saying that since the matter involves Letters of Administration, the issue should rightly be determined by the common law court.

Delivering the judgment of the Federal Court, I ruled that the determination of the issue whether that money had been given away as a gift or was part of the assets according to Islamic law was a matter within the jurisdiction of the *Shari'ah* court to decide. The grant of Letters of Administration and the distribution of estates of deceased persons are matters within the jurisdiction of the common law court. Both parties being Muslims, the application to the *Shari'ah* court was rightly made. So was the application to the common law court. Once the *Sharia'h* court determines the Islamic law issue, the common law court would then make the distribution order in accordance with the order of the *Shari'ah* court. Call it "harmonization", if you like.

In that judgment, I pointed out that even though there was a way out in that case, it requires two applications to be made, one in the common law court and the other in the *Shari'ah* court. That causes delay and incurs additional costs. Once again I called upon the Legislature to rectify the anomaly. "The trouble is," I said in that judgment, "everyone looks to the court to solve the problems of the Legislature."

Sulaiman Bin Takrib (supra) was my last judgment of the Federal Court delivered three weeks ago. The accused persons, all of them professed to be Muslims, were charged in the *Shari'ah* court for acting in contempt of a religious authority by defying or disobeying the "*fatwa*" regarding the teaching and belief of one Ayah Pin which was published in the Government Gazette of the State of Terengganu on 4th December 1997. In the *Shari'ah* court, that was clearly a "criminal case". They filed an application in the Federal Court for the determination of the constitutional

issue whether the offences created by the State Legislature were ultra vires the Constitution. They argued that the offences for which they were charged were outside the powers of the State Legislature to enact, they not being “offences against the precepts of Islam” and they being “criminal law” under the Federal List.

On the first point, while holding that interpretation of the Constitution was a matter for the Federal Court, we reminded ourselves that we were interpreting the words “precepts of Islam” used in the Constitution and not issuing a “*fatwa*” on the “precepts of Islam”. We allowed affidavits of Islamic scholars to be filed on what “precepts of Islam” means in the Islamic context. Since the offences relate to “*aqidah*” or faith we held that they were offences “against the precepts of Islam.”

On the issue whether those offences were “criminal law”, I said, inter alia:

“It was also argued that the offences are “criminal law” and therefore within the Federal jurisdiction to legislate. I admit that it is not easy to draw the dividing line between “criminal law” and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is “criminal law”. However, if every offence is “criminal law” then, no offence may be created by the State Legislatures pursuant to Item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as “criminal law”

Considering the difficulty to draw the line between the two categories of offences and the fact that the Supreme Court in Mamat Bin Daud (supra) too did not attempt to lay down the principles for the distinctions to be made, I too shall refrain from attempting to do it as I fear that it might do more harm than good. I would prefer that the issue be decided on a case to case basis. However, if, for example, a similar offence has been created and is found, in the federal law, since even prior to the Merdeka Day, that must be accepted as “criminal law”. But, where no similar “criminal law” offence has been created,

then, as in the case of Mamat Bin Daud (supra), the Court would have to decide on it.

In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover Muslims only and pertaining to Islam only, clearly it cannot be argued that they are “criminal law” as envisaged by the Constitution.”

Ladies and gentlemen,

I think I should now move to another aspect of the subject, i.e. the law. I have touched briefly at the beginning of my speech (I still feel shy to use the word “lecture”) how “we made” what is now known as “*Shari’ah* law” in Malaysia. The main ones which are being used in the *Shari’ah* courts are:

- the *Shari’ah* Criminal Procedure Enactment/Act,
- the *Shari’ah* Civil Procedure Enactment/Act,
- the *Shari’ah* Court Evidence Enactment/Act,
- *Shari’ah* Criminal Offences Enactment/Act,
- Islamic Family Law Enactment/Act.

(The word “Enactment” is used when it is a State Law made by a State Legislature for use in the *Shari’ah* courts in the State and the word “Act” is used when it is made by Federal Parliament for use in the *Shari’ah* courts in the Federal Territories)

The provisions of the *Shari’ah* criminal and civil procedure enactments/act are, to a large extent, the same as those used in the common law courts. A graduate in law from any common law country reading the “*Shari’ah*” law of procedure in Malaysia would find that he already knows at least 80% of them. On the other hand a graduate in *Shari’ah* from Al-Azhar might find that he knows only about 20% of them. Of course, there are more traditional *Shari’ah* or *fiqh* elements in the *Shari’ah* Court Evidence Enactment/Act and even more in the Islamic Family Law Enactment/Act. Still, a common law lawyer reading them for the first time will find that he is reading something familiar, section by section, even word for word. Yet they are “Islamic law”.

That brings me to an incident that had happened five or six years ago. One afternoon, a young man came to my office. He said that he was from the University of Istanbul and that his Professor had asked him to see me when in Malaysia. (His Professor was no other than Professor Sukru Ozen who was here a few years ago.) I welcomed him. He said he was a Phd. student and wanted to interview me for his thesis. The first question he asked me was: "What is your definition of Islamic law?" Almost without thinking, I replied: "Any law that is not un-Islamic". After he had returned to Istanbul, he sent me an email. Among other things, he said: "How I wish that all our *ulama's* (Islamic scholars) are as broad-minded as you are." I replied: "The point is I am not an *ulama*'."

Last year, I told the story to a group of Islamic scholars, I would call them the "modern ones" from not less than ten countries, both East and West. Everybody laughed. But, after a while, Professor Tahir Mahmood from New Delhi, India came to me and said, "Your definition is not a joke, you know. There is a lot of truth in it."

Rightly or wrongly, putting "*ibadah*" aside, I have come to believe that that is what "Islamic law" should be. We should focus more on substance and the "*maqasid*" rather than the form. We should look to the sources for the principles but the detail should be determined by the surrounding circumstance. A law need not be medieval or Arabic to be Islamic. In fact, we can have even better and, I would say, "more Islamic" laws compared to the law at the time of the Prophet s.a.w. That statement may sound preposterous but please consider these two examples.

First, suppose there were cars during the time of Caliph Umar Ibn al-Khattab, I am quite sure that he would have made rules as to how they should be driven. Had he done that, I am quite sure that today those rules would be known as the "*Shari'ah* or Islamic Road Traffic law". Had he fixed a speed limit, that might be known today as the "*Shari'ah* or Islamic speed limit" and, probably, different *mazhabs* would have different speed limits!

Secondly, take slavery as an example. No one in history, even one thousand years later, had done more to improve the life and rights of slaves than Prophet Muhammad s.a.w. and Islam. Yet, Islamic law did not outlaw slavery. That is understandable considering the circumstances then. Now slavery is outlawed. Would anyone say that outlawing slavery is un-

Islamic? Would anyone say that a modern Islamic state must reintroduce slavery to be Islamic? I have posed these questions in Malaysia. No one had, so far, answered “Yes”. I believe that outlawing slavery is more Islamic than tolerating it, no matter how improved their lives are. It means that our present law can be different, better and at the same time more Islamic than the law at the time of the Prophet s.a.w. So, to determine whether our law is Islamic or *Shariah*-compliance or not, we should not be looking backward one thousand five hundred years and compare whether our present law is the same as the law then or not. The test should be whether it contravenes any *Shariah* principle or not.

Indeed, over the past thirty years, that was what was being done in the field of Islamic Banking, Islamic finance and *takaful*, perhaps, again without realizing it. I have had the advantage of preparing the paper that suggested the establishment of the *Shari’ah* Advisory Council of the Central Bank of Malaysia and, when it was established, to be appointed as a member. (I call myself the only non-*Shari’ah* member of the *Shari’ah* Advisory Council.) Having sat in the Council for three years I find that that is exactly what is being done: take a conventional product, identify the “*Shari’ah* issues”, look for *Shari’ah* and/or *fiqh* principle that can be applied to validate or justify the *Shariah*-compliance of the product. At times, different principles are applied at different stages and the factual metrics are modified e.g. by the creation of an M.P.V. in between two contracting parties to make the product *Shariah*-compliance. So, we can now have savings account, current account, credit cards, *takaful*, *sukuk* and others, something unimaginable fifty years ago. I must admit that having been trained to look at the substance rather than the form, at times, I find the methodology rather artificial. But, since I am not an *ulama’* and since the *ulama’s* say that they are *Shari’ah*-compliance, I am not going to argue with them. What more when they say that there is no other or better way that can be done, at least for now.

So, I became more convinced of my definition of “Islamic law” and I began to say to myself that a big chunk of the law that I was administering in the common law court was not un-Islamic after all. Unfortunately, that is not the perception of the majority of the Muslim *ummah*. The reason, I think, is that, those who know common law do not know Islamic law and those who know Islamic law do not know common law. I belong to the first category. However, as I have mentioned earlier, things are changing. More and more

people are studying both laws. Even non-Muslims are taking keen interest in Islamic law.

Ladies and gentlemen,

We see that, in Malaysia, the *Shari'ah* has absorbed the principles of common law which are not contradictory to its principles. I think that the same development will happen in other countries, Muslim majority or otherwise, that introduce the *Shari'ah*, even for limited purposes. But, I doubt that common law will absorb the principles of *Shari'ah*, mainly for two reasons: prejudice and ignorance.

I also foresee that in Muslim majority countries the two courts may merge. The same judges may be hearing the two types of cases. Non-Muslim lawyers will be arguing Islamic law issues, just as non-Muslim experts in Islamic banking and Islamic Finance are already doing now. After all one does not have to be an Englishman to be an expert in the English common law. The same argument applies to the relationship between Islamic law and civil or continental law

Secondly, within the *Shari'ah* itself, I also see the disintegration of the *Mazhabs*. We know that one of the reasons that had led to the differences of opinions between Imam Malik and Imam Abu Hanifah was the geographical factor. Now that is not a factor anymore. All information, whether on facts or law, are accessible to all no matter where they are, within seconds. Rulings made by a committee in the Middle East, Europe or elsewhere are known to other scholars everywhere in the world and vice versa. Even custom is becoming more and more globalised. In fact, in the field of Islamic banking, Islamic finance and *takaful* that is already happening. Let us pray to Allah that we live long enough to see the development, if it happens.

Thank you.

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