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THE CONCEPT OF HARMONIZATION AND UNIFICATION OF THE LAW IN MALAYSIA: AN ISLAMIC APPRAISAL

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ABSTRACT

Harmonization and unification of laws is an important topic for all Muslim countries irrespective of the governmental jurisdictions they follow due to the plurality of laws applied therein. Accordingly, this study considers the possibility of harmonizing Islamic law and common law in certain jurisdictions and studying what is the best choice to be applied in different cases, whether harmonization or unification. This paper aims to study both concepts and their application in Malaysia and the EU as an example for greater understanding of these concepts. The main finding of this paper is that harmonization has been applied successfully to harmonizing Islamic law and other legal issues in Malaysia, unlike unification.

KEYWORDS: Harmonization, Unification, Islamic law, Malaysia, The EU.

1. INTRODUCTION

Comparative law has experienced a remarkable upsurge of interest and action after the conclusion of World War II and it is commonly acknowledged that comparative law is a significant element of legal education nowadays. Therefore, the study of differences and similarities between the laws of different countries has become more beneficial with some concepts of comparative laws, such as harmonization and unification of laws (Fox, 1991).

Harmonization and unification of laws are the means of processing laws to change the relationship between two laws to bring them into a state of compatibility; unification replaces them by a single law while harmonization retains their individuality. Therefore, the harmonization and unification of laws share significant similarities but there are some instances where they vary with each other. However, they deal with each other when it comes to the issue of development and advancing the laws of different jurisdictions or different legal families (Waller, 1993).

Thus, this effort aims to discover the differences between harmonization and unification of laws, in order to achieve better understanding of the concepts and their role in developing and advancing various laws, with a specific focus on Islamic law.

2. REVIEW OF LITERATURE

2.1 Harmonization of Laws

The idea of harmonization is that it is a process to bring different components in harmony, which in general creates a relationship between different components. Thus, it essentially implies bringing the relationship to accordance and consonance. Therefore, harmonization of laws was defined by Kamba as "designed to achieve an approximation or co-ordination of different legal systems or provisions by eliminating the main differences and making minimum requirements or standards" (Kamba, 1974, p. 501). Hence, it is not the same as unification; it is only the convergence of norms or the coordination of policies. Furthermore, practically speaking, the harmonization of laws is an attempt to alter the connection between at least two laws in order to bring them into a state of compatibility (Kamali, 2007, p. 392), but it retains the individuality of such laws while they are combined to each other. As a result, Martin Boodman said that "harmonization is a process in which diverse elements are combined or adapted to each other so as to form a coherent whole" (Boodman, 1997).

The concept of harmonization of laws arises generally in issues of comparative law and particularly in matters connected with inter-jurisdictional and private transactions. This is

applicable to both general as well as specific areas of the law in different countries or states within a particular country in order to facilitate transactions either for residents or citizens. Harmonization is similarly superfluous to the internal analysis and development of the laws of a particular jurisdiction or legal domain within a jurisdiction. As seen recently, the comparative analysis of private law rules is the main concern of comparative law. The movement for the unification of laws in comparative law postulates a view to eliminate the diversity of laws in international or inter-jurisdictional transactions, as much as possible. Harmonization requires a minimum connection among subjected laws. Thus, Goldring describes the process of harmonization as "one under which the effects of the type of transaction in one legal system are brought as close as possible to the effect of a similar transaction under the laws of other countries". It can be concluded that it is a process in which different laws are made simple to be understood and applied for easy compliance (Kamba, 1974, p. 501).

Indeed, in terms of the harmonization of the Sharī'ah and other legal systems, the areas of *'aqīdah* (Islamic creed) and *'ibādah* (worship) are outside the purview of harmonization because they are not covered by statutory law or *ijtihād* (striving to understand the *shar'ī* ruling on the basis of *shar'ī* evidence). Harmonization of Islamic law [of] civil transactions (*mu'āmalāt*) and other legal systems, on the other hand, is feasible. As a result, *mu'āmalāt*, such as contracts and finance in which new interpretations may be permitted, law, and *ijtihād* are viable and have the potential to promote social-economic progress. Certain aspects of the Islamic law were brought into harmony with civil law e.g., the Sharī'ah aspect for partnership such as *sharikah*, *mudārabah* and finance such as *ijārah* which have been subjected to new procedures for better management of transactions in Islamic banks and financial institutions.

Harmonization of Islamic law and another law means the process of articulating and selecting (*takhayyur*) the relevant parts of the two major legal systems and piecing them (*talfīq*- a method of *usūl al-fiqh* to reconciling two points of view) in order to arrive at formulae that are both coherent and unified. As a result, Sharī'ah harmonization is largely concerned with existing law, rather than introducing new laws. Its methodological methods, which will be outlined below, are with selecting (*takhayyur*) and piecing together (*talfīq*) important elements of the Sharī'ah and civil law in order to integrate them into coherent and unified formulae. Both *takhayyur* and *talfīq* are common *usūl al-fiqh* techniques that can be grouped together under the larger notion of *siyāsah shar'iyyah*, or Sharī'ah-based policy (Barlinti, 2011).

On the other hand, harmonization is impossible between two radically opposed perspectives, such as Sharī'ah and civil law's conflicting views on banking interest (*ribā*), one prohibitive and the other favorable. It is impossible to have an Islamic bank that does not use *ribā* or a normal bank

that does not use interest. The concept of *caveat emptor* in common law vs the option of the flaw (*khiyār al-ʻayb- the ability to put the contract into effect or to cancel it if a defect is discovered*) in Sharīʻah law is another example of *muʻāmalāt* dispute that is not necessarily linked to Islamic finance. The former allows the seller to avoid disclosing any existing faults in the item of sale to the buyer, whereas the latter does not (Kamali, 2007, p. 399). Moreover, harmonization of Islamic laws and other laws such as common laws do not imply that these two systems should be combined without regard for Islamic law norms. The harmonization process here refers to the use of common law concepts that are not in conflict with Islamic law but must be consistent with the principles of Islamic law (Kamali, 2007).

Malaysia is a country having both Islamic and common law traditions, and the phrase "focused harmonization of laws" refers to the blending of Islamic and common law traditions. It is interesting to note that the issue of harmonization arose since the negotiation leading to the formation of Malaysia in 1963. With different historical, racial and cultural backgrounds the harmonization procedure was carried out by amending the existing legislation (Bari, 2005, p. 21) The best example of the harmonization between Islamic laws and Common laws is what it has done to Malaysia, during the last four decades, of the harmonization of Islamic Banking and Common Laws (Barlinti, 2011). In the context of Islamic banking, harmonization of Islamic and common law does not imply that these two systems be combined without regard for Sharīʻah principles. The application of common law principles that are not in contradiction with Islamic law is referred to as the harmonization process (Rahman, 2007). It means that current laws, such as common law principles in contract law, might be merged with Sharīʻah principles to enhance the legal infrastructure for Islamic banking (Tajuddin & Abd Rahman, 2021). The Islamic Banking Act of 1983, as well as Section 124 of the Banking and Financial Institutions Act of 1989, do not provide a clear framework for Islamic banking. In general, any type of business can be part of an Islamic financial institution. *ʼuqūd tamlīk* (contracts of ownership), *ʻuqūd sharākah* (contract of partnership), *ʻuqūd tawthīq* (contracts of guarantee), *ʻuqūd itlāq* (general contracts), *ʻuqūd taqyīd* (contracts of restriction), *ʻuqūd isqāt* (contract of waiver), and *ʻuqūd ḥifẓ* (contracts of deposit) are just some of the Sharīʻah principles that can be offered to the market. (al-Nasir & al-Basl, 1999, p. 41).

In addition, the Contracts Act 1950, the Sale of Goods Act 1957, the Companies Act 1965, and the Hire Purchase Act 1967, as well as a slew of other key procedural statutes, have explicit provisions. As an example, we may look at the implementation of the housing project under *bayʻ bithaman ājil's* products. According to Sharīʻah norms, the parties must provide options and meet the contract's pillars. Customers must be provided appropriate alternatives such as *khiyār al-majlis*

and *khiyār al-ʻayb*. In the meanwhile, Islamic financial organizations must adhere to the norms of common law enshrined in the Contracts Act of 1950 (Yaacob & Maamor, 2019).

It is important to note that the harmonization technique for implementing Islamic banking simply cannot be employed without adhering to particular Islamic requirements. In this regard, harmonization could not be applied to things that are forbidden in Islam, ethical considerations should not be jeopardized, Qurānic and Sunnah rulings should not be changed, no harmonization should be allowed to make forbidden things permissible and vice versa, and no universal Islamic principles should be violated to justify equality in transactions. In carrying out this harmonization process, the ideas of Sharīʻah objectives (*maqāsid Sharīʻah*), public interest (*maslaḥaḥ*), blocking the means to evil (*sadd al-dharā'iʻ*), and other principles may be used (Sale, 2020).

2.2 Law Unification

"Unification signifies the process whereby two or more different legal provisions or systems are supplanted by a single provision or system: it creates an identity of legal provisions or systems" (Kamali, 2007, p. 392) The unification of laws may be described as a process by which conflicting rules from two or more legal systems are replaced by a single norm that applies to a legal transaction. The reason to unify the laws is voluntary or imposed by adoption of a judicial institution of one of the countries by the other country in order to achieve a legal and economic importance (Rosett, 1992).

A good example of unification of laws is the European Union (EU). Subsequently, it is an attempt to replace two or more legal systems with one single system. A complicated and secure legal framework is formed by the symbolic interplay of national law, international agreements, and European Union Acts. Divergent contracting laws across member states increases barriers to internal market exploitation and leads to competition distortion (Belikova, 2019). Due to a lack of knowledge of the legal principles that apply to business relationships and the inability to evaluate risks, the unification of international private law standards is insufficient to facilitate cross-border trade. The project of unifying substantive international commercial laws necessarily depends on a technocratic legal process. The process has its own political economy with predictable and unattractive implications for what is produced.

International unification instruments display a strong tendency either to compromise legal entity or to advance the agenda of interested groups. In both the two cases, the offer is not an obvious gain as compared to rules produced through the national legislative process. In fact, we have no reason to expect the instrument to achieve substantial improvements in the law, if we may disregard what the interested groups get out of their adoption. The unification project of the past century has served as a useful means for promoting comparative research and scholarship and depends on our

understanding of the institutions. The traditional method of achieving uniformity between different countries has not succeeded in the field of private law. The apparent reason is that a treaty can only come when being in an agreement of the contracting States and will only get in to force, after an approval by the State in which the treaty is to apply. Experience has proved that it is very difficult to reach uniformity particularly in the field of private law (Belikova, 2019).

The unification of laws is considered to be the least practical process when applied to the Islamic legal system to be in accordance with other legal systems. This can be explained through the understanding of the Unification of Laws principle as it replaces different rules with a single rule that must be followed by both or all parties. Unlike Harmonization of Laws, unification does not retain the individuality of such laws. So, in the case of the unification of Islamic finance and conventional finance, there are many opposing legal positions between the Sharī‘ah and other systems, and such unification cannot be condoned between these opposing legal positions. For example, prohibiting *ribā* in Sharī‘ah and permitting interest in civil law, any attempt to unify them will be practically unrealistic. On other hand, the harmonization between Islamic finance and conventional finance is more suitable since it focuses on common principles and retaining the individuality of the different laws. Practically, by harmonizing both finances, conventional banking will continue using interest while Islamic banking will replace it by another Islamic concept because an Islamic bank that practices *ribā* and a normal bank that does not practice interest are incompatible (Kamali, 2007).

3. RESEARCH METHODOLOGY

This study is conducted based on two research approaches. A content review analysis is a primary methodology applied to analyze both qualitative and textual data. In addition, certain comparative techniques are utilized in evaluating both concepts of harmonization and unification, with the goal of identifying their theoretical nature and implementation in Malaysian and EU legislation. Both primary and secondary data sources in this context have been analyzed. As original sources, a large body of literature and references has been studied on the notions of harmonization and unification. In addition, a critical Islamic viewpoint is added to the notion of harmony and unification.

4. RESULTS AND DISCUSSION

The scope for harmonization can be understood and analyzed by the following points which show how harmonization and unification are important at the international level. Custom, commercial practice, legislative actions or their equivalents, judicial practice, and the work of legal writers are all used to achieve unification and harmonization. Comparative law is an unavoidable requirement in every situation of unification or harmonization. It is critical to have a full grasp of the numerous

systems that are being unified or harmonized. Comparative legal studies and research are required not only for the goal of evaluating if unification or harmonization is feasible, desirable, or helpful, but also for deciding whether it is feasible, desired, or useful. The development of a unified or harmonized legal framework is only the first step. To achieve this goal, it is important to provide as much uniformity as possible in terms of interpretation and implementation throughout the many jurisdictions that have adopted the law.

Levels at which legal unification or harmonization is possible: At times, harmonization and unification of legislation have taken place at the national level, while at other times, they have taken place at the international level. As a result, there are certain levels of legal harmonization that are occurring. Some argue that there are essential components, ideas, conceptions, and institutions shared by all civilized legal systems, which might be determined via comparative law. However, only a few areas of international law, such as commercial law, maritime law, space law, and broadcasting law, are possible and desirable.

Harmonization, on the other hand, has a greater chance because, although it removes or reduces main legal impediments, it allows for some variance in minor details. Due to the closeness of history and culture, states in the same geographical area may have very similar legal death systems. The tight connection formed among the regional nations makes the necessity for unification or harmonization more imperative such as in Scandinavian countries and the European Union, for example.

Despite the close similarities between the three concepts there still exist differences between harmonization, unification and convergence of laws which have been seen above. Highlighting some differences includes: Both imply a deliberate negotiated process aimed at producing a legislative or other conventional act. Harmonization directs a change of rules, standards, or processes in order to avoid conflicts and bring equivalence, while unification is a common set of rules that is applied for all interest jurisdictions (Cruz, 1999, p. 21).

Harmonization is the process of bringing various legal systems or laws closer together or coordinating them by removing major discrepancies and establishing minimal criteria or standards." (Kamba, 1974, p. 501). Furthermore, it retains the individuality of different legal systems or provisions. On the other hand, unification is the uniform law that is designed to be adopted by the State and it is considered as a substitution of two or more legal systems with one system, so it does not retain the individuality of both legal systems and provisions. Therefore, harmonization makes the dissimilarity of legal rules more identical or reduces it which will be achieved within the same legal family; while unification focuses on combining the legal system and substituting it with common legal rulings.

In terms of the Sharī'ah and other legal systems harmonization, *'aqīdah* and *'ibādāt* are beyond the purview of harmonization because they are not covered by statutory law or *ijtihād*. Harmonization of Islamic law (*mu'āmalāt*) and other legal systems, on the other hand, is feasible. So civil transactions (*mu'āmalāt*), such as contracts and money in which new interpretations may be permitted, law, and *ijtihād* are possible and have the potential to promote socio-economic progress. Harmonization of the Islamic law and another law means the process of articulating and selecting (*takhayyur*) the relevant parts of the two major legal systems and piecing them (*talfīq*) together with a view to arriving at coherent and unified formulas. Therefore, harmonization of the Sharī'ah is primarily concerned with the law as it exists, less so with proposing new legislations. Its methodological tools (to be articulated below), are concerned with the selection (*takhayyur*) of the relevant parts of the Sharī'ah and other laws and putting them together (*talfīq*) in order to make them intelligible and unified formulae. Both *takhayyur* and *talfīq* are common *usūl al-fiqh* techniques that can be grouped together under the larger notion of *siyāsah shar'iyyah*, or Sharī'ah-based policy.

Harmonization, on the contrary, is difficult between two profoundly opposing perspectives, such as the Sharī'ah and civil law's opposing views on banking interests (*ribā*), one of which is prohibited and the other permitted. It is difficult to have either an Islamic or a conventional bank that does not employ *ribā*. The finest example of harmonization of Islamic law and other laws is what Malaysia has accomplished over the previous four decades in terms of Islamic banking and common law harmonization. The unification of laws, on the other hand, is seen as the least realistic approach for achieving compliance between the Islamic legal system and other legal systems. The reason for this is that unification of laws substitutes many rules with a single rule that both or all parties must observe. Unlike harmonization of laws, unification does not retain the individuality of such laws. So, in the case of the unification of Islamic finance and conventional finance, there are many opposing legal positions between the Sharī'ah and the other systems, and such unification cannot be condoned between these opposing legal positions. For example, prohibiting *ribā* in the Sharī'ah and permitting interest in civil law, any attempt to unify them will be practically unrealistic. On other hand, the harmonization between Islamic finance and conventional finance is more suitable since it focuses on the common principles and retaining the individuality of the different laws. Practically, by the harmonization of the finance in both laws, conventional banking will continue using interest while Islamic banking will fix it with a suitable Islamic concept because one cannot have an Islamic bank that practices *ribā* or a conventional bank that does not practice interest.

In conclusion, it may be deduced from the above discussion that there are various findings that we can draw, which are as follows:

1. Law Harmonization is the process of making two laws applied at the same time and in the same area.
2. The procedure of implementing one law by eliminating or creating new legislation is known as the Unification of the law.
3. Islamic law is the legislative part of Islam as a religion; as a result, one of the most fundamental tasks of Muslims as followers of Islam is to implement Islamic law.
4. Al-Qurān, sunnah, *ijmā'*, and *ijtihād* are the sources of Islamic law. Each of these resources has a distinct level of obligation; whilst the laws of the Qurān must be followed at all times, the rules of *ijtihād* can be amended based on the area or era.
5. Islamic jurisprudence has used this approach of harmonization under the name of (*talfīq*).
6. The influence of colonialism on the laws in Islamic countries is quite apparent and widespread.
7. Due to the obvious influence of colonialism or the diversity of religious groups in society, certain Islamic countries have had difficulty enforcing Islamic law.
8. Using the harmonization approach to apply Islamic law in a community with several religious groups, while retaining the peremptory norms of Islamic law and altering the *ijtihād* rules, might be a viable option.
9. Malaysia has a long history of reconciling Islamic and common law, particularly in the area of Islamic finance.
10. The European Union (EU) is a superb example of legal unification.
11. When it comes to the Islamic legal system, the unification of laws is thought to be the least realistic approach.

5. CONCLUSION

The harmonization of the law is an attempt to apply two different laws at the same time without any conflict between them. Unification of the laws is the case when there are two laws that need to be applied, in the case of unification, there are three solutions:

1. First: To apply the first law and delete the second law.
2. Second: To apply the second law and delete the first law.
3. Last: To delete both laws and create a new law.

Harmonization can be applied to harmonization between Islamic law and other law families because Islam encourages all Muslims to get wisdom from wherever the source lies. Unification of the law cannot be applied in Islamic law because Islam as a religion believes that Islamic law is compulsory to be applied in all Muslim life aspects. Harmonization could be used in harmonizing Islamic law with non-Islamic law, but the unification of the laws cannot be used in most Islamic laws. It can be generally understood from the above discussion that the harmonization and unification of laws share significant similarities but there are some instances where they vary with each other. The main difference is that harmonization and unification alike imply a deliberate negotiated process aimed at producing legislative or other conventional acts. Besides, unification led to the replacement of different laws by one single law, whereas harmonization of laws is only a process of bringing harmony; so, it retains the individuality of such laws. This feature of harmonization enables it to hold a wide range in the case of bringing accordance between the Islamic legal system and other legal systems. However, the concepts have co-existed with each other when it comes to the issue of development and advancing the laws of different jurisdictions or different legal families.

The impact of colonialism on the law on Islamic countries is very clear. Therefore, it is recommended to use harmonization of the law to keep the Islamic identity of the law in Muslim countries especially as most of the constitutions of Islamic countries recognize Islamic law as the main source of law. It is recommended to conduct more studies in different scopes of the law in the light of the harmonization approach to do detailed studies.

There are various suggestions that may be addressed in future contributions which include the following:

1. Understanding the degree of laws in terms of mandatory is one of the principles that should be followed while employing harmonization and unification of laws with Islamic law.

2. More research by Islamic scholars is needed to elucidate the Islamic rules that are under *ijtihād* and which can be altered to assist legislators.

3. The approach of harmonization and unification of laws can be applied within the Islamic laws to choose the best school of jurisprudence (*madh'hab)* to be applied.

4. There are some Islamic countries that ignore some Islamic rules as an impact of colonialism which led to a conflict between society and the States; by harmonizing Islamic law and the other legal systems, this conflict may be resolved.

5. More research is needed in the fields of Islamic banking and finance in order to develop Islamic banking that can function and compete in the international banking system.

More research is needed in the domain of unifying Islamic countries' laws as a first step toward achieving complete unity.

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