

Islam and Civilisational Renewal

**A journal devoted to contemporary issues
and policy research**

Volume 7 • Number 2 • April 2016

Produced and distributed by



ISLAM AND CIVILISATIONAL RENEWAL

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AIMS AND SCOPE

- **ISLAM AND CIVILISATIONAL RENEWAL** (ICR) offers an international platform for awakening the civilisational potential of the Islamic legacy. Revitalising synergies between Islamic and other civilisations in a spirit of self enrichment through discovery and research may facilitate renewal within Muslim societies and more significant contributions by Muslims to the global human community.
- ICR explores contemporary dynamics of Islamic experience in legal and religious practice, education and science, economic and financial institutions, and social and intellectual development.
- We seek viable policy-relevant research yielding pragmatic outcomes informed by the best values and teachings of Islam as well as of other contemporary civilisations.
- ICR is inter-disciplinary, non-political and non-sectarian. We seek to contribute to prospects of peace among all nations, and assist the conceptual and societal transformation of Muslims.
- ICR encourages a fresh discourse for self renewal informed by an inclusive tolerant approach to diverse schools of thought and expression of ideas. The intent is to integrate over 1,400 years of Islam's civilisational resources of diversity, dialogue and coexistence for meaningful exchanges with other world civilisations.
- ICR promotes the Malaysian initiative of *Tajdid Haqārī* or Civilisational Renewal, with its component principles: 1. Faith, Ethics & Spirituality, 2. Just Governance, 3. Independence & Self-Determination, 4. Mastery of Knowledge & Science, 5. Islamic Economics & Finance, 6. Human Dignity & Ecological Wellbeing, 7. Cultural & Aesthetic Integrity, 8. Equity & Fraternity, 9. Diversity & Dialogue, 10. Peace & Security.

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Published by IAIS Malaysia, Jalan Ilmu, Off Jalan Universiti, 59100 Kuala Lumpur
Printed by Vinlin Press Sdn Bhd, Jalan Meranti Permai 1, Meranti Permai Industrial Park, 47100 Puchong, Selangor

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EDITORIAL

In this April 2016 issue of IAIS Malaysia's flagship journal, *Islam and Civilisational Renewal*, I am pleased to present six substantive articles (all with actionable policy recommendations) and four viewpoints, in addition to five event reports. With some sadness, I also include the obituaries of four well-known Muslim scholars.

The first article is my own, entitled 'Peace in the Islamic Tradition: One Vision, Multiple Pathways'. A comprehensive overview of how peace, *jihad* and conflict resolution are understood by the Islamic tradition, I conclude that: 1) Islam's core principles emphasise peace and Muslims must return to them while considering broader objectives and eschewing literalism; 2) Muslim countries must prioritise good governance, social justice and the rule of law as the bedrocks of peace; 3) peaceful interpretations of *jihad* must rise to the fore; and 4) major international actors must consider how their actions impact upon the peace and security of weaker Muslim countries.

Our second article, entitled 'Towards Authentic Behaviour Management Models for Islamic Schools – A Framework Synthesising Research', is by Dylan Chown and Omaidra Alam, both of Razi Education. Concerned with the effectiveness and Islamic authenticity of the Behaviour Management Models (BMMs) currently being employed in Islamic schools, the authors suggest a seven-point framework for the assessment and improvement of these BMMs. This framework includes: consideration of an effective Islamic pedagogy within the context of an Islamic worldview; an emphasis on Islamic etiquette (*adab*); a teacher-modelled, student-directed approach set within a 'whole community' perspective; character education; and an interventionist approach capable of fostering transformative experiences in students.

For our third article, K. M. Zakir Hossain Shalin, of the International Islamic University Malaysia (IIUM), presents us with 'Juristic Views on Ribā, Gharar and Qimār in Life Insurance'. Zakir's thought-provoking discussion engages with a longstanding debate amongst Islamic scholars: does conventional life insurance include the prohibited practices of usury (*ribā*), risk/speculation (*gharar*) and gambling (*qimār*)? Although Zakir concludes that it does not, to make this clearer to the scholarly community at large he recommends that: 1) life insurance be explicitly redefined as 'securing financial assistance', not 'financial gain'; 2) restrictions be placed on the investment of insurance premiums so that insurance operators do not engage in prohibited activities; 3) surplus premiums be repaid to premium holders; and 4) bilateral life insurance contracts be discontinued in order to redefine insurance operators as managers of the insurance process.

Our fourth article, ‘The *Maqasid* of *Zakah* and *Awqaf* and their Roles in Inclusive Finance,’ is by IAIS Research Fellow, Tawfique al-Mubarak. In it, Tawfique examines the nature and effectiveness of inclusive finance – that is, financial assistance rendered to ‘unbankable’ members of the public who are usually denied access to more standard finance. Tawfique argues that current inclusive finance programmes have failed to alleviate widespread hardship because they deal in interest; he proposes rectifying this by incorporating the interest-free principles of compulsory alms (*zakah*) and perpetual charity (*awqaf*) into the process. He also recommends that, instead of cash loans, inclusive finance programmes provide employment opportunities. This, along with the use of *zakah* and *awqaf*, would help transfer ownership of assets to the target group, materially improving their lives.

Our fifth article, ‘The Structural Development of *Istisnāʿ Ṣukūk* from a Shariʿah Perspective,’ is by Auwal Adam Saʿad, Mohammad Deen Mohd Napih and Uzaimah bt Ibrahim, all of IIUM. Concerned with the Islamic bonds known as *istisnaʿ sukuk*, the article argues that these are only permissible when asset prices, quality and deliverability are known in advance. To ensure that this is always the case, the authors recommend markets employ multi-contract structures so that *istisnaʿ sukuk* is always combined with equity-based instruments designed to deliver knowledge of these factors.

In our final substantive article, IAIS’s Deputy CEO, Mohamed Azam Mohamed Adil, presents the *ICR* with its first Malay-language article, ‘Mahkamah Syariah di Malaysia: Kemajuan dan Pencapaian (The Shariʿah Courts in Malaysia: Progress and Achievements)’. This insightful piece asks whether the jurisdiction of Malaysia’s Shariʿah Courts must be expressly conferred by the state legislature, or whether it can be implied from the State List in the Ninth Schedule of Malaysia’s Federal Constitution. Favouring the second option, the author recommends an immediate halt to civil court interference in Shariʿah Court jurisdiction, even when the latter has not been directly conferred. He also recommends that special courts be set up to adjudicate cases that, although pertaining to Islamic law, involve parties of different faiths.

Turning to our four viewpoints, the first is by myself and entitled ‘The Indicators of *Wasatiyyah* or Moderation in Islam’. In it I discuss Islam’s commitment to moderation, as demonstrated by its advocacy of mutual recognition (*taʿaruf*), reasonable disagreement (*ikhtilaf*), consultation (*shura*), dialogue (*hiwar*), and cooperation (*taʿawun*). Finally, I highlight how Sufism has traditionally embodied Islam’s preference for the middle path through its emphasis on spirituality and inner reflection.

Our second viewpoint, entitled ‘Indigenous Islamic Modernity: A Necessary Basis for Renewal and Reform,’ sees IAIS Research Fellow, Alexander Wain, critique the enduring association between being ‘modern’ and ‘Western’. Drawing on the work

of Franz Fanon and ‘Ali Shariati, Alexander argues that a new ‘indigenous Islamic modernity’ is required, via which Muslims can discover and speak for themselves without remaining beholden to Western values. This new form of modernity must, however, be brave enough to radically restructure and reform traditional society.

Our third viewpoint, by IAIS Research Fellow, Tengku Ahmad Hazri, is entitled ‘Interpreting Islam in the Constitution: Question of Fact or of Law?’ Centred on the Malaysian Federal Court’s 2009 decision to defer interpretation of the phrase ‘precepts of Islam’ in the Constitution to external experts in Islam, Tengku Hazri asks whether this course of action was legally valid. He suggests that the Malaysian authorities should prioritise the resolution of this matter, both to maintain the coherence of Malaysia’s legal framework and to provide a guide to others.

In our final viewpoint, called ‘The Lucrative Business of Othering’, Anis Bajrektarevic, professor in international law and global political studies, based in Vienna, Austria, examines Europe’s factious relationship with the Islamic world and asks whether the former’s persistently negative view of the ‘other’ can survive in a world where power and wealth continues to shift towards Asia.

Aside from our articles and viewpoints, this issue of the *ICR* also reports on several noteworthy events. First, on 16 April 2016, IAIS hosted the Fourth Abdullah Yusuf Ali Memorial Lecture, entitled ‘English as a Modern Literary Language for Islam: The Significance of Yusuf Ali’s Translation of the Qur’an’. Delivered by the former ASEAN Secretary General, Emeritus Professor Surin Pitsuwan, and co-organised by the Islamic Book Trust, this stimulating and insightful lecture saw Dr. Pitsuwan emphasise the remarkable value of Yusuf Ali’s famous translation and its unique role in promoting English as an Islamic language.

On the 31 March, IAIS also hosted the launch of a new book by Imam Feisal Abdul Rauf, entitled *Defining Islamic Statehood: Measuring and Indexing Contemporary Muslim States*. Presided over by Malaysia’s former Prime Minister, Tun Abdullah Ahmad Badawi, this launch ceremony introduced its many attendees to an important text that, for the first time, details a set of practical and realistic guidelines for Islamic governance and statehood in the twenty-first century.

Between the 30 and 31 March, Bank Negara Malaysia hosted the inaugural Responsible Finance Summit. Co-organised by the Responsible Finance Institute Foundation and Middle East Global Advisers, this event was well-attended by a wide range of notable individuals. It highlighted the importance of responsible finance and good governance for the creation of financial inclusivity and long-term sustainable economic growth. Tawfique al-Mubarak represented IAIS.

On the 10 March, IAIS hosted the important seminar, ‘Understanding Fatwa in the Contemporary Context’. This event was jointly organised by the Office of the Mufti of the Federal Territory, the Federal Territory Islamic Religious Council (MAIWP), the Selangor Islamic Religious Council (MAIS), the Institute of Islamic

Understanding Malaysia (IKIM), the World Fatwa Management and Research Institute of USIM (INFAD), and the Academy of Islamic Studies, Universiti Malaya (APIUM). The Department of Islamic Development Malaysia (JAKIM) also lent its support. The event concluded with many valuable recommendations for improving Islam's contemporary relevance and the role of fatwa in the resolution of important social problems.

Our final event report covers the 'Halal Cosmetics and Personal Care' forum, held on 16 February at the KLCC Convention Centre in Kuala Lumpur, and organised by the Halal Development Corporation (HDC). A large number of cosmetic industry experts assembled for this event, which highlighted the increasing demand for halal products within the cosmetics industry as a whole. It recommended that the halal industry do more to tap into this lucrative market. Apnizan Abdullah represented IAIS Malaysia.

Finally, it is with great sadness that I end this issue of the *ICR* with the obituaries of four leading Muslim scholars: Dr. Taha Jabir al-Alwani, the former President of Cordoba University in Ashburn, Virginia (US); Professor Hassan al-Turabi, a renowned Sudanese scholar and politician; Professor Dr. Mumtaz Ahmad, Executive Director of the Iqbal International Institute for Research and Dialogue, based at the International Islamic University (IIU) Islamabad; and Professor Dr. Zafar Ishaq Ansari, also of IIU Islamabad. Each of these distinguished scholars contributed immeasurably to our understanding of Islam in their respective capacities. We pray that Allah s.w.t. reward them for their efforts and embrace them in His unbounded mercy.

Mohammad Hashim Kamali
Editor-in-Chief

FOCUS

PEACE IN THE ISLAMIC TRADITION: ONE VISION, MULTIPLE PATHWAYS

*Mohammad Hashim Kamali**

Abstract: This article begins by looking at peace as a theological principle, before proceeding to explore peace from various other angles, such as peace through inclusivity, peace through non-violence, peace through equity and fair treatment of others. There is also an elaborate articulation of methods for the peaceful resolution of conflicts, including counselling (*nasihah*), conciliation (*sulh*), arbitration (*tahkim*), forgiveness (*'afwa*), and truce (*al-hudnah*). After reviewing these, the discussion then presents a selection of Islamic legal maxims (*qawa'id kulliyah fihiyyah*) that accentuate the primacy of peace in Islam. Legal maxims are concise epithetic declarations of principles that accentuate the higher goals and purposes of Islam. We conclude with a set of actionable recommendations.

Keywords: Islam, peace, equity, conciliation, non-violence, Qur'an, Sufism, *jihad*

Introductory Remarks

Peace in our time is being challenged by persistent imbalances, wars, terrorism, widening inequalities, environmental degradation and an international system that has become far too polarised. This suggests that humans have not allowed themselves to be transformed by their respective traditions, nor by the harrowing experiences of these turbulent times.

Religion and peace are intimately co-related in almost all major world traditions. Peace from the Islamic perspective is not merely the absence of war but an ideal state of inward and outward equilibrium and harmony achievable through striving against egotism, racism, economic exploitation and social injustice. Peace through equity and justice is a cardinal objective of Islam, often championed by Muslim intellectuals and the vast majority of ordinary Muslims. The events of September 11, 2001, have, however, focused the world's eyes on Muslim terrorists, leading to a much distorted view of Islam and Muslims.

Islam's fundamentally peaceful nature is, however, easy to illustrate. *Jihad*, for example, abusive interpretations of it notwithstanding, is primarily an instrument of peaceful self-discipline. The pathways to peace are also enriched by Islam's rich tradition of Sufism and its wealth of teachings on human fraternity, compassion, justice, beneficence, honouring one's neighbour, avoidance of harm to others, and a dignified resistance to provocation. A coercive narrative of peace through subjugation also exists but which is exceptional to Islam's normative advocacy of pacifism that is sustained by our readings of Islam's history and scripture.

Insofar as Muslims feel that they are "under siege," radical and authoritarian understandings of Islam do maintain considerable vitality and appeal. That said, there is a compelling core of Islamic values for a rich understanding of peace that transcends the medieval legal constructs of war and peace, themselves not altogether devoid of departures from essential guidelines. Muslims are encouraged by the core teachings of their religion to deepen their commitment to equity and justice in a democratic and cosmopolitan manner.

A narrow preoccupation with Western hostility towards Islam has prevented Muslims from addressing local conflicts in the Middle East and elsewhere, and from taking advantage of increasingly democratic trends in their societies. Although radical fundamentalists like Osama bin Laden and Abu Bakr al-Baghdadi have been content with a superficial appropriation of discredited symbols from earlier times (*dar al-harb*, *dar al-Islam*, belligerent *jihad* and revival of a caliphate), moderate revivalist thinkers have placed emphasis on the need for new ways of thinking about problems of domestic and international peace, as well as of global governance.¹

Evidence shows that Islam has not been witness to any more violence than one finds in other civilisations, particularly that of the West, as manifested in colonialism, World War I & II, the occupations and conflicts in Iraq, Afghanistan, Libya and elsewhere. Nonetheless, for the West it seems that events like the Muslim conquest of Spain and the Ottoman domination of Eastern Europe have provided a historical memory associating Islam with force and power. Moreover, the recent upheavals in the Middle East, and especially movements using the name of Islam and *jihad* for political ends, have reinforced the idea that, in some special way, Islam is related to violence.² Certainly, mainstream Islamophobic propaganda readily endorses and magnifies this image. Nevertheless, it should be remembered that it has not always been valid. Indeed, and in an inversion of current events, Muslim countries were once where the persecuted of Europe, in particular the Jews, sought refuge. The pogroms and the inquisitions of Europe forced the Jews to migrate to both the Muslim countries of North Africa and the Ottoman territories.

The Qur'an designates the Muslims as a community of the 'middle path' (*ummatan wasatatan*) which, together with its parallel concept of 'mutual recognition' (*ta'aruf*) for friendship, visualises Muslims as the agents and facilitators of peace. In the Muslim historical narrative, Islam is understood to have been a progressive, tolerant, and civilising force with binding rules constraining injustice and wanton violence. Islam's self-identity as a "religion of peace" is based on the premise that Islam challenges the root causes of human violence. Islamic scripture provides varied readings of warrior and pacifist perspectives. An attempt is made in the following pages to present a comprehensive vision of peace and the varied ways in which the source evidence of Islam is interpreted by its classical and contemporary commentators.

Peace as a Theological Principle

Islam's intimate identity with peace begins with its name: Islam (conventionally translated as "submission to the will of God") derives from the notion of *salm*, *silm*, and *salamah*, meaning security, peace-making, resignation and conciliation. It is also associated with the *salam* in the daily greeting of Muslims: *as-salam alaykum* 'may safety and peace abide with you.' It is an assurance of security and freedom from all harm. For Muslims, *Islam* suggests a state of peace and security that comes through renunciation of willfulness and rebellion. Sincere resignation to God's revealed guidance is the essential connotation of "*Islam*" and as a conventional term it serves as the name for the Muslim faith. "I have chosen Islam as your religion" (Q al-Ma'idah, 5:3).

Another important spiritual foundation for peace in Islam is the belief that God is Peace and is the ultimate source of Peace: "He is God; there is no god save He; the King; the Holy and the Peace (*al-Salam*)" (Q al-Hashr, 59:23).³ Symbolising the exalted name and attribute of God, peace in Islam thus partakes in a sparkle of the divine.

The five daily prayers (*salah*) that Muslims perform end with the salutation "peace be upon you," saluting first the right side of the world and then the left side of the world. Then also God's illustrious name, *al-Salam*, is recited in the supplication (*du'a*) at the conclusion of the five daily prayers by Muslim worshippers: "O God, you are Peace, the source of Peace, and to you Peace returns, so help us live in peace ..."

Islam's notion of peace is holistic, implanted in the essence of human conscience and radiated into their hearts. This is then manifested into healthy thinking and positive attitudes, peaceful treatment of fellow men and women, the living inhabitants of the earth, as well as the flora and fauna of their natural surroundings.⁴

God shows His human servants the path to seek Him, and whoever sets out upon that path is rewarded with an inner tranquility (*sakinah* - Q al-Tawbah, 9:26 & 40) that gives him strength to build a peaceful environment around him. Peace comes from God, but not in an obvious way, as the Qur'an says: "He it is Who sent down tranquility into the hearts of the believers... so that they might grow firm in their faith [in Him]" (al-Fath, 48:4). God then praises those who live peacefully with others in daily life: "The [true] servants of God are those who walk the earth with humility, and when the ignorant address them, they reply 'Peace'" (al-Furqan, 25:63). Peace is thus to be found, not outside the heart of man, but primarily within it, and from here it spreads to the outer world. From the Qur'anic perspective, peace finds expression in three interlocking circles, the first of which is peace of the heart, which in turn nurtures peace with God and faith in Him, and which then extends to the third circle, peace with the outside world. All three circles interact and influence one another.⁵

Islam itself may not be imposed on anyone through compulsion and violence (Q 2:256). The Qur'an confirms that coerced religion would be pointless as it destroys the essence of conviction and belief. Muslims are enjoined to invite non-Muslims "to the Way of Thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious...God is with those who restrain themselves, and those who do good" (Q al-Nahl, 16:125-28). For Ibn Taymiyyah (d.1328 CE), the idea of initiating unprovoked war to convert people to Islam belies the religion: "If the unbeliever were to be killed unless he becomes a Muslim, such an action would constitute the greatest compulsion in religion."⁶ Ibn Taymiyyah's renowned disciple, Ibn Qayyim al-Jawziyyah, reiterated this point and wrote that "fighting is permitted on account of war, not on account of disbelief."⁷

Paul Hedges wrote that "the freedom of religion that Europe developed around the period we called the Enlightenment actually came from an admiration of the tolerance seen in the Ottoman Empire."⁸ The Ottomans had many religious traditions represented amongst their subjects and enacted policies to allow them to live together in relative harmony. The Ottoman Millet system sat at the heart of these policies. Applied to non-Muslim religious communities, this institution provided a means of accommodating religious diversity. Over centuries of expansion into non-Muslim lands, the application of the Millet system created an elaborate structure of fairly autonomous communities whose religious leaders were even able to develop formal relations with the rulers of other Muslim empires.⁹ In a manner unimaginable at the time, Christians, Jews, Sabaeans, and Hindus all had access to considerably high state posts, right up until the dissolution of the Ottoman Empire at the beginning of the 20th century.¹⁰ "Europe had nothing like this, and so had to learn from it."¹¹ Moreover, the Ottomans were

not simply inventing this system, but were building upon foundations going back to the Prophet Muhammad and his early successors, the Four Rightly Guided Caliphs.

Compassion (*rahmah*) is another central concept in the Islamic order of values. God says in the Qur'an: "My mercy encompasses everything" (Q 7:156), and that "God has written mercy upon Himself" (Q al-An'am, 6:12, & 54). Like compassion, peace cannot be imposed from outside. It starts within the hearts and minds of people and the dynamics it generates are externalised through patience, tolerance, generosity, and forgiveness.¹²

Ihsan (beauty and benevolence) is an integral part of the peace and spirituality of Islam. It is, however, possible to act rightly but be devoid of *ihsan*. One can practice the externalities of one's religion at the level of submission (*islam*) but be devoid of faith (*iman*). One can even be religious in both these senses (*islam*, *iman*) but be lacking in beauty and spiritual devotion (*ihsan*). The Qur'an repeatedly mentions God's love for the *muhsinun*, or those who practice *ihsan*, a state which is only possible when the existential reality of one's daily life is not overwhelmed by conflict. Peace thus becomes the prerequisite of beauty; it has theological significance, and it partakes in the comprehensive fulfillment of Islam.

Peace Through Inclusivity and Universalism

Tawhid, the principle of Divine Oneness, is the first article of the Muslim faith and a major theme of the Qur'an. There is only one God and essentially only one humanity too, which implies that all humans are equal, simply because we are all of one and the same essence and ancestry. "O mankind!" God says in the Qur'an, "surely We have created you from a male and a female and made you into tribes and nations so that you may get to know each other. The noblest of you with God are the most righteous of you" (Q al-Hujurat, 49:13). The Qur'an also appeals to the people to cooperate in good deeds and "cooperate not in hostility and sin" (Q al-Ma'idah, 5:2), and then it also enjoins them to: "vie with one another in good works. For to God you shall all return..." (Q al-Ma'idah, 5:48). *Tawhid* thus constitutes the basis of Islam's universalism, inclusivity and tolerance.

The universalist outlook of *tawhid* is also manifested with reference to the sanctity of human life. Every human life is equally important, without discrimination of any kind. God has repeatedly proclaimed that human life – a sacred gift – may never be taken without a "just cause." Islam protects every life and therefore seeks to establish safety and security for all.

In the Sufi tradition, *tawhid* has meant, not only the unity of God, but also the presence of God within His creation and the complete dependence of creation

upon its divine foundation – a condition some Sufi metaphysicists have described as “the unity of being” (*wahdat al-wujud*). By offering an “inner Islam” for those seeking a path to God, Sufism has left a profound mark on Islamic culture. By expressing itself in literature, philosophy, music, poetry, ethics and the visual arts, Sufism has created a culture in which love is “presented as the key to Islamic life and practice.”¹³

Despite its emphasis on *tawhid*, however, the Qur’an is also cognisant of internal diversity and pluralism among human communities and nations, whether on account of language, creed, custom or culture.¹⁴

Unto each of you We have appointed a [different] law and way of life. And if God had so willed, He could surely have made you all one single community. But [He willed it otherwise] in order to test by means of what He has vouchsafed unto you. Vie, then, with one another in doing good works! (Q al-Ma’idah, 5:48; and Q Hud, 11:118).

The existence of *tawhid* in a pluralist world implies the need to discover through dialogue that which is common and universal in all religions and pursue them through respectful debate and cooperation. Advocates of peace through universalism therefore seek to engage with representatives of different cultures and religions on the basis of this Qur’anic principle of divinely-sanctioned pluralism in human societies. Human diversity exists as a function of divine will and not because of human proclivity alone. In light of this diversity, exchanges of views about the world’s many pressing problems ought to be conducted in a way that not only reflects Islamic values but also calls on others to act on the guidance they have received. It also means strengthening the institutions of international law and bolstering a global civil society of world opinion in order to promote and protect peace and justice.¹⁵

Authoritative voices among Muslims who embrace the Sufi dimension of Islam have often called for respectful communication among all of the world’s religions, including Hinduism, Buddhism, Taoism and Confucianism. Prominent Muslim scholars, including Seyyid Hossein Nasr and Abdul Aziz Said, maintain that Islam offers a confident but not overbearing perspective on human religious experience. Islam retains its core theological claim with respect to the principle of divine unity while supporting dialogue among spiritual practitioners on a basis of appreciation and mutuality.¹⁶

The absence of a central religious authority or clergy in the Islamic tradition preempts authoritarianism as a model, and as further attested by the multiplicity of schools of Islamic theology and law. The incremental process of establishing orthodoxy is not therefore the monopoly of the *ulama*; it is shaped by a multitude of social agents, including men of letters, political leaders, artists, scientists,

traders and theologians. The dissemination of religious authority on the one hand, and the malleability of cultural expressions in Muslim societies on the other, have challenged authoritarianism and also raised questions of legitimacy and authenticity.

In creating their cultural orthopraxis, Muslim communities have used the ethical universalism of the Qur'an and Sunnah, especially the Qur'anic call to enjoin what is good and praiseworthy (*ma'ruf*) and reject what is morally evil and disliked (*munkar*). This non-culture-specific injunction was addressed to all people, regardless of their religious affiliations. The notion of the middle community (*ummah wasatah*, Q 2:143) supports the same ethical universalism: "And thus We willed you to be a community of the middle way, so that you might bear witness to the truth before all mankind, and that the Messenger might be a witness over yourselves."

This ethico-spiritual universalism aims to create an open society based on moral values, not on the received traditions of one tribe, city or nation. The fact that the Qur'an positions itself against the cultural and tribal localism of pre-Islamic Arabia confirms this universalistic outlook.¹⁷ Instead, society should be based on knowledge (*'ilm*) and moral virtue (*taqwa*) (Q 49:13). These are the ultimate criteria of nobility, before both God and humanity. In this milieu, cultural and religious co-existence is not based on the mere temporary absence of conflict and confrontation between Muslims and non-Muslims; it is about Muslims' inclusive attitude toward other cultures and religions, making Islamic civilisation, as Hodgson phrased it, "simultaneously both Islamic and islamicate."¹⁸

The experience of *convivencia* among Jews, Christians and Muslims in Andalus was a result of the Islamic notion of cultural inclusivism. While the Jews of Europe were subjected to woeful vilifications during the Middle Ages, a major Jewish intellectual tradition developed under Muslim rule and included prominent figures of medieval Jewish thought. This resulted in a unique interaction between medieval Jewish philosophy on the one hand and Islamic philosophy, *kalam*, and Sufism on the other.¹⁹

During the ninth and tenth centuries CE, Baghdad, the Abbasid Empire's capital, became one of the most cosmopolitan cities of the medieval world, where Muslim, Jewish and Christian scholars collaboratively searched for knowledge. Along with Cordoba in Andalusia, Baghdad was one of the two focal points of a remarkable research programme: the collection, translation and synthesis of all known sources of human knowledge. Not only Greek but also Indian, Iranian and Chinese advances in knowledge were integrated into this synthesis. Syriac Christian and Jewish scholars played a particularly vital role in an officially sponsored effort to translate scientific and philosophical texts into Arabic.²⁰

A little later, the Indian subcontinent saw a cultural syncretism develop between Hindu and Muslim cultures, as evinced by Abu Rayhan al-Biruni's (d.1047 CE) historic study of India and Amir Khusraw's (d.1325 CE) formulation of an Islamic identity in the Indian cultural environment. A vast literature came into being as a result, generating a unique symbiosis between the two worlds at the social, philosophical, artistic and cultural levels.²¹ Such modes of inclusivity and coexistence were made possible by the Qur'anic recognition of diversity and mutual recognition.

Even though Muslim fundamentalists consider cases of cultural symbiosis and syncretism to be deviations from their idealised construct of Islam, traditionally both the Islamic intellectual tradition and Muslim societies have envisaged peace as a cross-cultural and intercommunal value that overrides and subsumes isolated and sectarian readings of Islamic heritage and scripture.²²

Sufism provides a powerful outlook on inclusivity and universalism. It opens a window to the inner world of spirituality, linking peace in the world to internal processes of human transformation. A Sufi approach to spirituality represents Islam's capacity for fostering inclusiveness and an appreciation of human differences. According to this universalistic Islamic perspective, cultural and religious diversity becomes a resource for humanity's enrichment.

Although the Sufis did not create a separate sect within Islam, they were united by an ambitious understanding of the spiritual paths of their religion. They aspired not so much to attain a heavenly reward in the afterlife, as to 'meet' God in life through a deep commitment to doing what is beautiful in daily activities and observances.²³ Even today, Sufism transcends sectarian identities and represents an aspect of Islam whose core doctrines are shared by both Sunni and Shia. The broad-minded ecumenical and universalist tendencies within Sufism have endowed the present generation of Muslims with a rich heritage that can be used to build bridges of cross-cultural and interreligious understanding in the modern world.

Peace Through non-Violence

In a conflict-ridden world, those who wish to see a radically different culture embodying the values of justice, love and mercy ought to take the way of peaceful resistance since radical and lasting change can only spring from the transformed hearts of human beings. Mahatma Gandhi, who was no armchair theorist, but a militant political leader facing the might of British imperial power, said that non-violence comes from strength, and the strength is from God, not man. Seeking peace through non-violence always comes from within.²⁴

A survey of the Qur'an reveals not only passages that grant legitimacy to armed resistance to oppression, but also ones that reject wanton bloodshed

and the use of force for aggressive purposes. Like the Torah and the Bible, the Qur'an identifies Cain's offence against Abel as the first instance of violence in human history, clearly marking it as a great wrong through which Cain became responsible, not only for his own sins, but also for those of his brother. Abel confronts Cain before the latter's fateful action, and tells him: "Even if you stretch out your hand against me to kill me, I shall not stretch out my hand against you to kill you. I fear God the Lord of the worlds" (Q al-Ma'idah, 5:28). From this vantage point, the Qur'an asserts in a passage reminiscent of one in the Jewish Talmud a moral imperative to protect life: "On that account, We decreed for the children of Israel that if anyone slew a person – unless it be for murder or for spreading mischief upon earth – it would be as if he slew all humanity." The passage then continues: "and whoever saves a life, it would be as if he saves the life of the whole of humanity" (Q al-Ma'idah, 5:32). Other Qur'anic passages exemplifying peace through non-violence include:

Whenever they [mischief-makers] kindle the fire of war, God extinguishes it. They strive to create disorder on earth and God loves not those who create disorder. (Q al-Ma'idah, 5:64)

God commands you to treat [everyone] justly and kindly. (Q An-Nahl, 16:90)

Good and evil can never be equal. Repel evil [not with evil but] with good, then you will see that even one with whom you had enmity will become as though he were an intimate friend. (Q Fussilat, 41:34)

Fear God, and know that God is with those who restrain themselves. (Q al-Baqarah, 2:194)

The Prophet Muhammad added his voice to this in several hadiths:

Gentleness fails not to create beauty whenever it enters into something, and it is not taken away from anything without causing ugliness.

A Muslim is one from whose hands and tongue other Muslims [read human beings] are safe.

People are God's children, the most beloved of them to God is one who is of greatest benefit to his children.

Muslims are enjoined never to give up hope that peace will prevail. "It may be that God will bring love (and friendship) between you and some of those whom you (now) hold as enemies. For God has power over all things. He is most

forgiving, most merciful” (Q al-Mumtahanah, 60:7). Muslims are enjoined to be just and kind to all their fellow humans regardless of their colour and creed - if they have not been aggressive toward them [Muslims] nor invaded their homes (Q 60:8).

The scriptural sources of Islam are emphatic about the merits of patience (*sabr*), which is widely seen as a manifestation of quietist yet activist resistance to the wrongdoings and excessive behaviour of others. The Qur’an (Q al-Zumar, 39:10) promises that “Those who are patient will be given their reward without measure.” This is endorsed in another verse which says “They will be awarded in the high place [in heaven] for what they bore in patience.” (al-Furqan, 25:75). And again: “As for those who after persecution fled their homes and strove actively and were patient to the last, your Lord will be forgiving and merciful to them” (16:110). The Prophet began his ministry in Mecca with non-violent resistance to persecution and persistent provocations by the Quraysh of Mecca. He remained steadfast in this for 13 years until his migration to Madinah, which marked the momentous event of the Hijrah, itself a vivid manifestation of non-violent and patient (yet activist) resistance to aggression.²⁵ In a long hadith, the Prophet is reported to have said: “Patience is of three kinds: patience during tribulations, patience in obedience to God, and patience in avoiding sin. Whoever remains patient during a tribulation until he averts it, God will ordain for him three hundred levels [of recompense]...”²⁶

Ibn Abi al-Dunya’s (d.894 CE) treatise on the virtues of patience (*fada’il al-sabr*) underscores patience as a hallmark of piety. According to a hadith report by one Abu Imran al-Juni, “After faith, the believer has not been given anything more meritorious (*afdal*) than patience with the exception of gratitude, but it [patience] is more meritorious of the two and the fastest of the two to reap recompense for the believer.”²⁷ A similar report by the ninth century scholar, Sufyan b ‘Uyaynah (d.813 CE), says: “The believers (*al-abad*) have not been given anything better or more meritorious than patience, by means of which they enter heaven.”²⁸

Religion must be taught in a civil, non-violent, and courteous manner – as the Qur’an enjoins the Prophet, “You are not one to overawe them by force (*bi-jabbaar*)” (Qaaf, 50:45). A Muslim’s attitude towards the ‘other’ should be: “To you is your religion and to me my religion.” (al-Kafirun, 109:6). These verses merely endorse the basic Qur’anic position that “There shall be no compulsion in religion” (2:256).

Due to the sacredness of human life, non-violence becomes of primary importance for Muslims when resolving conflicts. Several Muslim leaders have spearheaded the peace-through-nonviolence initiative, including Badiuzzaman Said Nursi (1876-1960), Abdul Ghafar Khan (also known as ‘Frontier Gandhi’

1890-1988), Lala Aziza, Ghazal al-Magdashiyyah, and Fethullah Gulen. Other significant advocates of non-violence include Mubarak Awad, Chiawat Sata-Anand, Hakim Mohammad Said, Sakina Yakoobi, and Jawdat Sa'id.²⁹ The Qur'an inspired most of these in their advocacy for non-violence, each quoting passages from the Qur'an in support of their views.

For example, in his *magnum opus*, the 6,000-page *Risalah-i Nur*, Nursi developed the principles of the non-violent actions of love, tolerance, and good reason. There is a profound focus in Nursi's work on responding to evil with understanding and kindness, to working for peace regardless of the obstacles and unfavourable conditions. He firmly believed that responding to evil with evil would create a vicious cycle and only increase the spread of evil.³⁰ On the subject of *jihad*, Nursi wrote that "spiritual *jihad* is the *jihad* of this century." His understanding of *jihad* involved preventive action through communication and dialogue. This was because violence in society would contravene the rights of innocent people. Acting in an ethical and positive way – taming anger and revenge – would protect the lives of others.³¹

Nursi wrote that "Hatred should only be directed to ignorance, poverty and hypocrisy," and that "our relations with non-Muslims will be in the way of persuasion. It is our duty to present Islam to them as a religion of love." For Nursi, non-violence was an integral part of Islam, and he argued that the future of civilisation depends on peaceful co-existence.³²

Nursi lamented the atrocities of the two World Wars and wrote that when the human heart is shorn of respect and compassion, rationality cannot tame mankind's animal self. Equally, when driven by greed and selfishness, human beings can turn into "cruel and horrible monsters." Nursi frequently quoted the Qur'anic directive for Muslims to "make peace among your brethren" (al-Hujurat, 49:10) and its guidance that one should respond with "what is most beautiful," so that "the one with whom you had enmity could become an intimate friend" (Fussilat, 41: 34).³³

Today, Nursi's message is most notably carried forward by Fethullah Gulen, who has, like Nursi, inspired millions to work for peace through service, including the establishment of schools, charities, media outlets, and youth groups around the world, whether for Muslims or non-Muslims. Through these efforts, Gulen has been contributing extensively to global peace efforts in many countries.³⁴

Turning to Abdul Khafar Khan, he founded the Afghan-Pashtun Khuda'i Khidmatgarspeace movement. By doing so, he established the world's first non-violent army using the Islamic principles of patience, kindness and love, as well as the Pashtun traditions of honour, bravery and commitment to one's word. He mobilised the frontier province of the Indian subcontinent during British colonialism to protest oppression and occupation.³⁵ Using the Islamic values

of service through action (*'amal*), faith (*yaqeen*) and love (*muhabat*), Khan argued that the connection between Islam and peacebuilding is more obvious and stronger than the stereotypical link to violence. He maintained that Islam emphasises social justice, brotherhood and equality of mankind.³⁶

Ghazal Ahmad 'Alwan al-Magdashiyyah, of late 19th century Yemen, was a powerful and persuasive dispute mediator who successfully resolved a number of conflicts through non-violent means. In due recognition of her role, her name was given to the main lecture hall at the Empirical Research and Women's Studies Center at the University of Sanaa.³⁷

In the context of the Arab-Israeli conflict, Mubarak Awad has striven to promote religious values and ethical considerations in order to persuade the warring groups to explore non-violent coexistence. Although these efforts have yet to bear fruit, in several places their presence is considerable.³⁸

Moroccans have long recited the narrative of Lala Aziza, a courageous and deeply spiritual Muslim woman of the fourteenth century C.E, who reconciled conflicting tribal groups and, on one occasion, persuaded the governor of Marakesh to desist from acts of military aggression against the people of her region. According to traditional lore, she approached the general and his army when they reached the region of Seksewa, where she lived. Her face-to-face debate with the general was entirely couched in Islamic discourse. Unsettled by the woman's courage and personal charisma, the general gave up his ambition to subjugate her people.³⁹

In addition to these specific examples, the Sufi tradition has also traditionally embodied a spirit of non-violent protest. During the Abbasid and Ottoman periods, for example, numerous Sunni and Shia Sufi leaders refused to sanction calls to military jihad by rulers whom they deemed to be unjust.⁴⁰

What of *jihad*?

References to *jihad* in the Qur'an occur in twenty-four verses, most of which advance a spiritual and non-violent understanding thereof concerned mainly with: being steadfast in faith and being prepared to make sacrifices in its cause; with the migration of the nascent Muslim community from Mecca to Madinah; with the peaceful propagation of Islam, and with personal and financial sacrifice.⁴¹

Jihad in the sense of self-discipline, or *jihad al-nafs*, for example, is repeatedly mentioned in the Qur'an:

And whoever strives (*jahada*), he only strives for his own self, for God is independent of his creatures (Q al-'Ankabut, 29:6).

As for those who strive for Us (*jahadu fina*), We surely guide them to Our paths (Q al-'Ankabut, 29:69).

Obey not the unbelievers, but strive against them with it (*jahidhum bihi*) with utmost striving (*jihadan kabiraa*) (Q al-Furqan, 25:59).

The renowned Companion, Ibn ‘Abbas, commented that the phrase ‘strive with the utmost striving’ in the last verse denotes preaching and exhortation as the greatest forms of *jihad*, and that ‘with it’ refers to the Qur’an itself.⁴² It should be noted that none of these references to *jihad* have a military connotation; they are references to the *jihad* of enlightenment and education, as guided by the Qur’an itself.

According to a *Hadith*: “The *mujahid* is he who wages a struggle against himself.”⁴³ And then again that “The best form of *jihad* is to tell a word of truth (*kalimatu haqqin*) to a tyrannical ruler.”⁴⁴ ‘*Jihad* against the self’ is the foundation of all *jihad*, for fighting an external enemy would not be possible without a successful engagement in this inner *jihad*. In this respect, the Sufis have taken this *Hadith* as the main authority for their doctrines.⁴⁵

In a *Hadith* record by al-Bukhari (d.870 CE) and Muslim (d.875 CE), a young man asked the Prophet: “Should I join the *jihad*?” In response, the Prophet asked him a question “Do you have parents?” and when the man said “Yes”, the Prophet told him “then strive by serving them.”⁴⁶ Likewise, al-Bukhari and Muslim both record another *hadith*, stating that “One who helps widows and the poor are like fighters in the path of God.”⁴⁷ According to another *hadith*, recorded by Ahmad ibn Hanbal (d.855 CE) and al-Tirmidhi (d.892 CE), “One who strives against oneself is a *mujahid* who carries out *jihad*.”⁴⁸ The Prophet has also said: “Whoever goes out in the world seeking licit work to support his family is in the path of God; whoever goes out in the world seeking licit work to support himself, is in the path of God.”⁴⁹ Al-Tirmidhi has recorded the following *hadith*: “Whoever departs in pursuit of knowledge is in the path of God (*fi sabil Allah*) until he returns.”⁵⁰ This clearly rebuts the assertion by some that the phrase “*fi sabil Allah*” refers to military combat only.

The Andalusian jurist and theologian Ibn Hazm (d.1064 CE) held that defending Islam through non-militant, verbal and scholarly efforts qualified as a meritorious struggle in the path of God. *Jihad* is best carried out, he affirmed, through inviting people to God by means of the tongue and through defending Islam by sound opinion. By contrast, armed combat was marginal as, Ibn Hazm added, the majority of the Prophet’s activities fell into non-violent categories.⁵¹

Given the above, the common usage of *jihad* appears to be peaceful. This is especially so in the Qur’an’s early Meccan revelations. During the initial thirteen years of the Prophet’s ministry in Mecca, he conducted his mission entirely through non-violent means, even to the extent of not allowing his followers to defend

themselves against aggression. When, for example, the Meccans persecuted the Muslims and forced a number of them to migrate, initially to Abyssinia and then later to Madinah, some of them urged the Prophet to allow a reciprocal response. He repeatedly refused, however, due to Qur'anic injunctions like:

So wait patiently (O Muhammad) for thy Lord's decree, surely thou art in Our sight (al-Tur, 52:48);

Then bear with them and say: peace. They will (eventually) come to know (al-Zukhruf, 43:89).

So overlook (any human faults), with gracious forgiveness (al-Hijr, 15:85);

Repel (evil) with what is better, and when you do that, the one with whom you had enmity will become your dearest friend (Fussilat, 41:34).

Even when the pagans of Mecca planned an attack on the Prophet's life, he chose to migrate to Madinah rather than retaliate. Only a year later, when the Meccans set out to attack the Muslim community in Madinah, was the first Qur'anic verse permitting fighting revealed:

Permission is granted to those who fight because they have been wronged, and God is indeed able to give them victory; those who were driven from their homes unjustly because they said: our Lord is God (al-Naba', 78:39).

So, whereas in Mecca Qur'anic references to *jihad* were all to its peaceful manifestations, in Madinah references to *jihad* began to include military *jihad* (cf., Q 2:215; 9:41; 49:15). But these passages validated *jihad* in the sense of a 'just war' fought to repel:

And fight in the way of God those who wage war on you, but do not transgress, for God loves not the transgressors (2:190).

Thus it is clear that military *jihad* is waged in self-defence and against aggression. By contrast, *jihad* as an offensive war does not have any scriptural mandate. Rather, it is a latent development that features in the work of those jurists and commentators who sought to legitimise the policies of territorial expansion.⁵² When planning to mobilise the military for purposes of annexation or conquest, especially at times when no organised armies existed, Muslim rulers would encourage religious leaders to declare *jihad* to legitimise attack. This was the case, for example, when Amir Abur Rahman of Afghanistan waged a *jihad* against Nuristan in 1895; before the attack, he convened a large number of religious figures to issue a collective *fatwa* in support of it.⁵³

The peaceful objectives of *jihad* and a respect for freedom of religion can be seen in the renowned Constitution of Madinah, dating back to the first year of the *hijra*/622 CE. This document guaranteed freedom of religion for non-Muslims, Jews and Christians. The same sentiment is noted in a renowned letter by the first Caliph Abu Bakr, dated 12 AH/635 CE, that exhorted the Muslim troops leaving for a Syrian campaign to protect civilian life and property and avoid torture and undignified treatment of prisoners of war. Written at such an early point of Islamic history, it is remarkable to note how closely Abu Bakr's letter resonates with the spirit of contemporary international law. Respect for freedom of religion is also manifested in the second Caliph, Umar al-Khattab's, example following the defeat of the Romans at the Battle of Yarmouk in 648 CE. The caliph made a pledge on behalf of all Muslims to protect the places of worship of Jews and Christians and allow them unhindered freedom of access to their churches and synagogues.⁵⁴

Muhammad Abu Zahrah (d.1974 CE) has quoted Taqi al-Din ibn Taymiyyah (d.1328 CE) in support of his own conclusion that war in Islam is permitted for only one purpose: defence against aggression. This is why the permission to fight granted by the Qur'an to Muslims is immediately qualified by the phrase "and do not transgress".⁵⁵ The ultimate goal of war in Islam is to prevent *fitnah* (sedition, tumult), as in the verse: "And fight them until *fitnah* is exterminated" (Q al-Anfal, 8:39).

Influenced by the prevailing pattern of hostile relations with non-Muslims, some Muslim jurists took an extreme position on the subject of abrogation (*naskh*) in the Qur'an. The so-called verse of the sword (*ayat al-sayf*, 9:5) was thus taken to abrogate no less than 114 (and according to some, 140) verses on peaceful relations with non-Muslims spread across 54 suras of the Qur'an. The verse in question was revealed when the Prophet negotiated the truce of Hudaibiyah with the pagan Quraysh. A year later, the Quraysh violated the terms of that treaty, and it was on this occasion that the verse in question was revealed, addressing Muslims to "Slay those who ascribe divinity to others than God wherever you find them, and take them captive and besiege them." The text then states that, if the enemy repents and mend its ways, violence must be brought to an end (Q al-Tawbah, 9:5). I shall not engage with the details of abrogation, which I have treated elsewhere,⁵⁶ but suffice to say that it is a controversial subject and that to use it in order to establish such a drastic position as abrogating a whole chunk of the Qur'an on peaceful relations, justice and tolerance, patience and perseverance, treating others with fairness and dignity, is far too excessive. The verse is also taken out of its particular context and exceedingly generalised.

In course of time, juristic writings on *jihad* became so preoccupied with the military aspects of the term that it began to be used only in that sense, to the

near-total exclusion of its wider connotations. Western militarism and violence during and after colonialism exacerbated the situation; against the background of the West's anti-Islamic policies and onslaught, the Muslims began to strike back and became more inclined to embrace the militaristic interpretations of *jihad*. The persistent Western media depictions of Muslims as prone to terrorism and violence, however, calls for a corrective. The fact is, and as Mazrui notes, that "in the last 100 years Western civilisation has killed millions more people than any other way of life in the annals of man in a comparable unit of time.... It has also been the West in the preceding 100 years which had made warfare less and less respectful of civilians."⁵⁷ The Christian ethic of the minimisation of violence has been observed more by non-Christians in Asia and Africa and elsewhere than by ostensible followers of the Cross.⁵⁸

Peace Through Equity

In contrast to 'peace through subjugation,' wherein peace is understood in conceptually minimalist terms as the absence of war, 'peace through equity' conceives of peace as the presence of justice, communal self-determination and solidarity. Certainly, peace cannot be truly said to exist in the face of persistent injustice. Efforts to promote equity and justice thus qualify as a form of *jihad*. Islam itself may be described as an uprising for justice providing guidelines for establishing a just and humane society. The Muslim Ummah can also play a significant role in peace-making by acting on the Qur'anic principle of "enjoining what is right and forbidding what is wrong."⁵⁹

In its affirmative sense, Islam's version of peace through equity is concerned with social justice, necessitating the elimination of extreme disparities in society. Social justice envisages a fair distribution of wealth and opportunity, of the prevention of large gaps between rich and poor. The existence of large disparities, however, has become a stark feature of the twenty-first century and is a source of tension, both within Muslim societies and in the larger context of global relations. Islamic teachings regard the existence of economic deprivation as a social wrong caused by the failure of society and state to protect the weak. The imbalances are often caused by hoarding, protectionist trading policies and unfair exploitation. Insofar as poverty and economic exploitation lead to social turmoil, the objectives of security and economic justice are naturally threatened and compromised. Islam is emphatic on care for the poor and the deprived, and sees economic justice as a means toward a state of equilibrium and social peace.⁶⁰

Islamic explanations of disequilibrium and injustice in human societies emphasise an indictment of greed, moral blindness and egotism, be it individual or collective. The worst forms of human oppression are derived from tyranny

of the human ego, referred to in the Qur'an as *taghut*, a well-spring of moral transgression that ultimately partakes in idolatry (*shirk*). For many Islamic ethicists, idolatry manifests not only in the theologically erroneous attribution of partners to God, but also in humanity's existential attitudes of egotism and greed.

The contemporary Islamic call for justice critiques exploitative capitalism, assertive nationalisms that override consideration of equity and fair treatment of others, racism and fanatical tribalism. Whereas power politics utilise double standards that sow seeds of oppression and discontent, Islam's peace through equity perspective evokes a common ethical standard of universal appeal. The purpose of politics should be to advance the cause of justice, rather than merely preserve the status quo or pursue the benefits of only one particular state, nation, or subnational group.⁶¹

Islam subscribes to an essentially optimistic view of human nature (*fitrah*) and potential, which is in turn the basis of humankind's vicegerency (*khilafah*) in the earth, or the divine trust to build the earth up with peace and justice. The 'peace through equity' approach also recognises that coercion and violence cannot persuade people to act justly, and that achieving positive ends for world peace requires skilful persuasion and advocacy of shared moral standards. Only approaches that are deeply rooted in moral and humanitarian values can provide a basis for sustainable peace.

Peace Through Conciliation

The Qur'an repeatedly enjoins Muslims to, whenever possible, respond to provocations with patience and affirmative action capable of facilitating conciliation. Fighting should be avoided until it becomes necessary – that is, after all attempts have failed to achieve a peaceful resolution. This approach is not vastly different from the Western notion of a Just War, which also considers war to be the last resort. Peace through conciliation and the restoration of harmony remains God's preference and a higher objective of Islamic theology and law.⁶²

From an Islamic viewpoint, the prevalence in Western thought of individualistic rationality and self-interest is lop-sided and problematic. Contemporary Western thinkers place a high premium on the skilful management of competition and conflict through an international system based on exploitative capitalism and a balance of power. Islamic thought argues in normative terms for a world order that cannot be constructed without commitment to justice, security and peace.⁶³

That said, neither the West nor Islam is monolithic and both face noticeable tensions between professed and actualised commitments. The age of globalisation dictates that both must aspire to an enlightened global citizenship. Listening to different cultural voices - and those of the Muslims in particular - is all the more

important for the West, both so that it can know itself better and coexist with others in an ever-shrinking world.

At the level of linkages between precept and practice, Islam provides multiple approaches to the peaceful resolution of conflicts, many of which have parallels in other traditions and cultures. Yet partly due to media bias, but also radicalism and militancy in the name of religion, inquiry into the precepts and practices of peace in Islam is still a relatively new topic for modern scholarship. Nonetheless, interest in the alternative methods of dispute resolution in Islamic law has grown wider in recent decades, beyond its traditional and relatively narrow focus of Islamic banking and finance. The following paragraphs look at Islamic approaches to conflict resolution through negotiated settlement (*sulh*), arbitration (*tahkim*), grant of amnesty and forgiveness (*'afwa*), counselling (*nasihah*), and truce (*al-hudnah*) to allow time for settlement. These are in addition, of course, to adjudication (*qada*), which is of concern mainly to courtroom proceedings that, although well-regulated, are also protracted and restrictive, often lacking the flexibility offered by the non-courtroom alternative methods. We shall therefore preclude adjudication from our coverage and suffice by saying that it is available in most cases of concern here, as a last resort. The disputing party or parties may thus opt for adjudication if the alternative conflict resolution methods have failed to deliver the desired results.

1. Dispute Settlement Through Conciliation (*Sulh*, also *Islah*)

In this method, individual parties agree to settle a dispute among themselves without the involvement of a third party. The linguistic meaning of '*sulh*' is to end a dispute through conciliation and agreement reached via a variety of tools, including negotiation, mediation, reconciliation, and amicable settlement through compromise. However, from the legal viewpoint *sulh* is a contract which needs to be ratified by the expressed agreement and consent of disputing parties who are, in principle, attempting to end the dispute between them. Without wishing to enter into details, Muslim jurists have elaborated on the juristic consequences of the contract of *sulh*, adding a number of other contract varieties that may be integrated therein, depending on whether the terms of *sulh* involves exchange of values, waivers, affirmation or denials of statements, and so forth. The Qur'anic authority for *sulh* is provided in the following passage:

In most of their secret talks, there is no good, but if one enjoins an act of charity or justice, or conciliation between people (*islah bayn al-naas*) [then secrecy is permissible], and those who do this earn God's pleasure and the highest reward. (Q al-Nisa', 4:114)

Ibn Rushd al-Qurtubi (d.1126 CE) comments that this verse is a general (‘*am*’) statement on conciliation and applies to all disputes pertaining to life, property and honour – indeed, to any claim or disagreement that gives rise to a dispute among people.⁶⁴

Elsewhere the Qur’an speaks of conflicts that may arise between two Muslim groups. In these cases, an attempt must be made to reconcile them (*fa-slihu baynahuma*). But, if any such attempt fails due to, for example, one party’s aggression and lawlessness, then the aggressors should be fought until they cease aggression. If they cease aggression then “make peace between them with justice – *fa-slihu banahuma bi’l-‘adl*.” The verse then continues: “the Believers are but a single Brotherhood. So make peace between your two [contending] brothers.” (al-Hujurat, 49:9).

In a separate passage relating to disagreement and discord between spouses, the Qur’an enjoins them to settle their differences amicably, for “conciliation (*al-sulh*) is best” (al-Nisa’, 4:128). The text therefore not only permits *sulh*, but recommends it as the best way to resolve matrimonial conflicts. This is said without any qualification, as priority is given to unqualified reconciliation, rather than one contingent on justice. In other places the text usually espouses peace with justice, especially when conflict has led to military confrontation and violence.

A question has arisen about whether a one-sided and unjust peace should be rejected and abandoned, or whether it is still permissible. Two responses have been given to this question. First, it has been noted that the Qur’an has praised peace-making absolutely. As such, we do not necessarily need to look at the fairness aspect of an agreement, as *sulh* is not always an issue of legality and rectitude, but of putting an end to hostility and violence. To support this view, proponents point to the *hadith* in which the Prophet says “Peace among Muslims is permissible - *al-sulh ja’iz bayn al-Muslimin*.” Turning to the second view, this refers to some of the qualifications that the Qur’an itself (and also some *hadith*) have recorded – namely, the stipulation that *sulh* may not turn what is *halal* into what is *haram*, and vice versa. For example, in a *hadith* narrated by Abu Hurairah, the Prophet said: “Making a settlement between Muslims is permitted, except that which permits what is prohibited or prohibits what is permitted.”⁶⁵ Juristic discussion records further details on this but draws the conclusion that permissibility of peace generally is the preferred position.⁶⁶ Scholars of *hadith* and *fiqh* have further held that the substance of these provisions applies to Muslims and non-Muslims alike, unless the position has been specified otherwise.

That all this is mentioned as occurring ‘between Muslims’ merely reflects the fact that they are the ones most likely to adhere to Shariah judgments. Certainly, Islamic law recognises several types of settlement based on the relationship of the parties involved, and each type is treated individually. These

include settlements between a Muslim state and a non-Muslim state; between the head of state (*Imam*), rebels and renegades; between husband and wife; and between parties to a financial dispute etc., which we do not propose to elaborate on here.⁶⁷

Sulh is also a private dispute settlement method, appropriate for disputes in which the parties concerned agree upon a solution without involving any courtroom proceedings. The parties may also agree to refer the matter to a community appointed judge, who may enjoy broad support. In this respect, *sulh* may be suitable for Muslim minority groups living in non-Muslim majority countries, who may find themselves operating within multiple laws and judicial systems, especially in personal law matters, such as family and inheritance disputes. The parties may consequently agree voluntarily to resort to a private *sulh* settlement method.⁶⁸ But *sulh* may also be suggested by the court: the judge may ask the parties to negotiate and reach a settlement through mutual agreement between themselves, thus avoiding adversarial court litigation. On this note, the second caliph, ‘Umar ibn al-Khattab, is quoted as having said: “refer the litigants to attempt conciliation (*sulh*) between them, for court adjudication often leaves the parties with unsettled resentment.”⁶⁹

2. Arbitration (*Tahkim*)

Tahkim is voluntary arbitration in which disputing parties appoint an arbitrator to resolve their dispute. The linguistic and juridical meanings of *tahkim* are almost concurrent - to designate someone as an arbitrator/judge when deciding on a given matter. The difference between arbitration and courtroom proceedings, however, is that, in the former, the parties themselves select the arbitrator and voluntarily accept to obey his or her decision. The parties may also stipulate conditions to their agreement - for instance, regarding time limits, the place of arbitration, or that a certain learned person or body be consulted/involved etc.⁷⁰ Arbitration is a lesser form of dispute resolution, inasmuch as it is undertaken pursuant to private authority, whereas adjudication by the court of law partakes in the exercise of public authority.⁷¹

All the leading schools of Islamic law uphold the validity of arbitration, although most tend to preclude crimes and punishments and the decisive injunctions of Shariah, such as the prescribed penalties (*hudud*) and just retaliation (*qisas*). The Hanbali school has, however, removed all such limits and offers the widest scope for arbitration, holding that it applies to all disputes and litigations that can be adjudicated before the court of justice, including financial matters, matrimonial disputes, crimes and penalties, *hudud* and *qisas*.⁷²

Arbitration must fulfill the following conditions: 1) The arbitrator is a competent person. For the Hanafi School, this means that he/she is qualified to

be a judge. The Shafi'i, Maliki and Hanbali schools, however, do not specify this as a requirement. In the context of this condition, it is further stated that, if both parties are Muslim, the arbitrator should also be a Muslim, but a non-Muslim may be appointed as arbitrator if both or one of the parties to the disputes is non-Muslim; 2) There is a real conflict to be resolved; 3) The parties agree to accept the result of the arbitration. In the event that the local court or *qadi* appoints the arbitrator/s, however, the parties' advance consent to the outcome of arbitration is not necessary. The Hanafi school also validates arbitration even if the parties' consent is given only after the arbitrators' decision is announced; 4) That the arbitrator is not related to one of the parties such that it would be prohibited for one to be witness for the other (like parent and spouse).⁷³

Textual authority for arbitration is provided by both the Qur'an and Sunnah. In the Qur'an, God Most High says with reference to matrimonial discords: "And if you fear a breach between them [the spouses] appoint an arbitrator from his folk and an arbitrator from her folk. If they both desire reconciliation" (al-Nisa', 4:35). In a subsequent verse in the same chapter, it is provided with reference to the Prophet that: "They can have no (real) faith until they make [you] the arbitrator/judge (*yuhakkimuka*) in all disputes between them, and then submit willingly to thy decisions" (4:65). The Prophet has also approved of arbitration; on at least three occasions the Prophet was informed of arbitration attempts by his Companions, Sa'd bin Mu'adh, al-A'war bin Bashamah, and Aba Shurayh Hani' bin Yazid, and was reportedly pleased when he heard that the parties concerned in each case had accepted the outcome of the process.⁷⁴

3. Amnesty ('*afwa*)

Amnesty and forgiveness are the means in Islamic theology and law – as also in most other world traditions – of relieving someone from punishment, blame, civil liability or religious penalty. It is also a recognised means of overcoming conflict and paving the way for peace. Whereas Christianity primarily conceives of forgiveness as a moral and religious imperative, Islam adds a legal dimension: it affirms it as a noble course of action, as a social good, and a means of peace-making. For instance, Islamic conflict resolution in the context of homicide and bodily injury assigns a role for granting forgiveness to either the victim of the crime or his/her family. The Qur'an and hadith consistently hold out forgiveness as the preferred option.

Being the subject of over 30 verses in the Holy Book, forgiveness ('*afwa*) plays a role in ending legal disputes. While speaking of just retaliation (*qisas*) as a right of the crime victim and his/her family, the Qur'an follows on to declare that "if the family of the slain grants forgiveness, he may be compensated with handsome gratitude in a decent manner" (2:178). The text then warns that, after

granting forgiveness, there must be no vengeance or aggression; everyone must make sure that the conflict comes to an end.⁷⁵

The Qur'an often praises those who take a forgiving attitude, speaking of *'afwa* as a manifestation of *ihsan* (beauty, beneficence - al-Baqarah, 2:178). God also speaks of His love for those who forgive without vindictiveness, especially when they are overwhelmed with the urge for revenge (Aal-'Imran, 3:134).

The recompense of an injury is an injury the like it, but whoever forgives and makes reconciliation, his reward is with God; and God loves not those who do wrong. (al-Shura, 42:40)

But (remember) one who endures with fortitude and forgives, that indeed is the most distinctive of all deeds. (Q 42:43)

Hold to forgiveness, enjoin kindness, and turn away from the ignorant. (al-A'raf, 7:199).

Pardoning is especially meritorious for someone who can avenge but chooses to exonerate and forgive. Yet Islam also puts a high premium on justice demanding sternness, especially from a leader or judge. Justice and amnesty often moderate and temper one another but can also conflict. To quote the Qur'an:

God commands justice (*al-'adl*) and the doing of good (*al-ihsan*) and generosity to one's kindred, and He forbids indecency, wrongdoing and oppression. (al-Nahl, 16:90)

In this verse, justice is enjoined side-by-side with *ihsan*, which seems to imply that it is not always a measure-for-measure justice that is desired; justice should be tempered, whenever appropriate, by *ihsan*, which in this context subsumes amnesty and forgiveness. Punishing the wrongdoer is the normal course enjoined by the Shariah, but amnesty may be preferable at times. Amnesty and forgiveness can play a vital role in post-conflict situations, such as those that now obtain in Iraq, Afghanistan, Libya and many other post-Arab Spring scenarios. The priority in post-conflict situations may be to bring peace and facilitate an environment in which people can leave the torments of the past behind in the hope of building a stable future. Certainly, normal rules of law may be difficult to apply due to difficulties in evidence and proof and other factors – hence the special relevance of forgiveness.

4. Counselling (*Nasihah*)

Counselling (*nasihah*) is a Qur'anic principle that consists of giving sincere advice to another person or persons (including disputing parties) in an effort

to resolve differences. It is also a recognised method within the rubric of alternative dispute resolution (ADR), especially in commercial disputes outside the courts' jurisdiction. Yet *nasihah* is a broad concept that cannot be confined to any particular context. Indeed, *nasihah* characterises Islam itself, as the proclamation found in a renowned hadith attests: "religion is good advice – *al-dinu al-nasihatu*."⁷⁶ As a method of dispute resolution, *nasihah* consists of giving constructive professional advice that guides conduct and recommends a solution to resolve disputes. Although acting upon that advice is recommended, it remains essentially optional.

In order for *nasihah* to be acceptable and effective as a dispute resolution mechanism, certain rules need to be followed: a) *nasihah* should not be given in a manner that implies accusing any of the disputing parties; b) one should not expect any of the conflicting parties to comply with a given *nasihah* instantly or expect specific results; c) *nasihah* should be given in its proper context, paying attention to place and time and also to the right manner of delivery; d) the counselor should be knowledgeable in the subject matter of the dispute and be able to offer useful advice. *Nasihah* may be offered by community leaders, Imams or Muslim counselors, social workers, and professional counselors, all of whom could provide early intervention and advice in order to prevent a problem becoming larger, more damaging, or intractable.

The Islamic *nasihah* differs from mainstream counselling because it is based on the embedded perception of a common belief system – Islam – shared by both the advisee(s) and the counsellor. This shared understanding should ideally create a trusting relationship between all parties, often inspiring the advisee(s) to attempt a peaceful and amicable resolution of a particular dispute.

5. Truce (*al-Hudnah*)

Literally, *Hudnah* (also known as *muwada'ah* – mutual abandonment) means stillness after turbulence or excitement. Juridically, it has been variously defined by the different Islamic law schools. The Hanafi school, for example, defines *Hudnah* as an agreement/contract to cease fighting for a stated period, with or without financial consideration, when the Imam (head of state) deems it to be of benefit. Other schools concur, but add that *Hudnah* is signed only with a warring party (Shafi'i) and with non-Muslims (Hanbali).⁷⁷

The legality of a truce is established by the Qur'an (al-Tawbah, 9:4; al-Anfal, 8:61; al-Ma'idah, 5:1). The truce of Hudaibiyyah, which the Prophet signed with the pagans of Mecca in the year 5 A.H, also proves the validity of *Hudnah*. Truces may be concluded with non-Muslims (including apostates who have renounced Islam), rebels and mutineers. This is with the proviso, however, that the latter group are not entitled to any financial consideration.

For a truce to be valid, it must meet the following conditions: 1) that the Imam or his deputy ratifies it. Although this is the majority (*Jumhur*) position, the Hanafi's hold that *Hudnah* may be signed by any group of Muslims – just as a pass of safe conduct (*aman*) may be signed by any Muslim citizen; 2) that the truce is for the benefit (*maslahah*) of Muslims and fulfils a valid Shariah purpose; 3) that it is for a specified period. Although this condition is not agreed upon by all the schools, the majority (Maliki, Shafi'i and Hanbali) maintain that it should be neither open-ended nor permanent. Only the Hanafis validate a truce that is not time-bound; and 4) that it is not contingent on an unlawful condition that violates Shariah.⁷⁸ This last condition may, however, be disregarded in the event of necessity (*darurah*). Hence a condition, such as payment of a financial consideration to the disbelievers, may be agreed to when necessary, but it would be deemed illicit otherwise.⁷⁹

As for the consequences of a truce, it is generally agreed that a valid truce binds all Muslims, their Imam and his successors (if any). It accords safety and protection to all its counterparties, their persons and properties. Muslims are also required to be amicable and fair with the counterparties, both in word and act, and refrain from harming or humiliating them in any way, especially if they happen to be Muslims. Only when the signatories commit acts of treachery or openly violate the terms of the agreement can the Imam revoke the truce. Whereas blasphemy (such as insulting the Prophet Muhammad) amounts to a breach of truce according to the majority, the Hanafis hold that it does not.⁸⁰ The truce comes to an end either upon expiry (if time-bound) or upon its termination by the Imam.

Islamic Legal Maxims

We now present a selection of Islamic legal maxims relating to peace, illustrating how the juristic tradition lends support to its promotion:

- Human dignity is a foundational purpose of the Shariah.
(تكریم بني ادم مقصد شرعي آسا س)
- The norm with regards to life, property and honour is inviolability.
(الأصل في الدماء والأموال والأعراض العصمة)
- Avoidance of hostility is, as far as possible, an obligation.
(التحرز عن الخصومة واجب ما أمكن)

- Everything which causes sedition/tumult is impermissible.
(كل ما كان سببا للفتنة فإنه لا يجوز)
- Elimination of injustice is, as far as possible, an obligation.
(دفع الظلم واجب بحسب الإمكان)
- Elimination of harm is, as far as possible, an obligation.
(دفع الضرر واجب بحسب الإمكان)
- Settlement/cessation of a dispute is, as far as possible, an obligation.
(قطع المنازعة واجب مع إمكان)
- The principle of reciprocal treatment among nations is bound by considerations of moral virtue.
(مبدأ التعامل بالمثل بين الدول مقيد بالفضيلة)
- The obligation of *jihad* partakes in the obligation of means, not of ends and purposes.
(وجوب الجهاد وجوب الوسائل لا المقاصد)
- Shariah advocates equality among people unless there be evidence to justify an exception.
(الشريعة سوت بين الناس إلا ما قام الدليل على تخصيصه)
- Muslims, *dhimmis* and temporary residents are all equal in respect of enacted rights that protect them against harm.
(الحقوق الموضوعة لدفع الضرر يستوى فيها المسلم والذي والمستأمن)
- Peace among Muslims is permissible provided that it does not turn the lawful into unlawful and vice versa.
(الصلح جائز بين المسلمين إلا صلحا أحل حراما أو حرم حلالا)
- When defence is possible by lighter means, the more difficult/heavy ones may not be attempted.
(متى أمكن الدفع بأسهل الوجوه لم يعدل إلى أصعبها)
- The norm is absence of hostility.
(الأصل عدم العدوان)

- The norm is absence of treachery.
(الأصل عدم الخيانة)
- Liability [for compensation] falls on the aggressor.
(الضمان على من تعدى)
- Aggression does not acquire a right for the aggressor.
(العدوان لا يكسب المتعدي حقاً)

Conclusion and Recommendations

In this article, we have explored the many distinguishing features of peace-making in the Islamic tradition. We have seen a vision of Islam as a religion of peace and justice, with an emphasis on equitable approaches to economic and political development, a qualified affirmation of cultural and religious diversity within the larger rubric of human fraternity, peace-making through non-violence, peace through equity, peace through conciliation, and an optimistic conception of human responsibility and potential. The evidence presented lends support to the following conclusions and recommendations:

- The pathways to peace-making expounded here should be practiced, as far as possible, by Muslim individuals, communities and leaders. History shows that Muslims are strongest when they are true to their principles. Values must therefore guide conduct if the latter is to be effective. Certainly, Islam is both faith and action (*'aqidah wa 'amal*); the one without the other is incomplete and inconsequential.
- Our understanding of Islam should be inclusive of its broader objectives and purposes, not constrained by the rigidities of literalism and/or divisive scholasticism. The Sunni-Shia conflict clearly stands in contrast with Islam as a religion of peace and unity.
- Good governance, social justice and the rule of law are strongly conducive to normalcy and peace. These, however, are the very areas which require the most attention in many present-day Muslim countries. Governments in Muslim countries should therefore commit themselves on these fronts, as part of key performance indices that can measure progress on a regular basis.
- Muslim individuals and communities must engage in only peaceful *jihad*, such as fighting illiteracy, disease, environmental degradation and other social ills. Military *jihad* is today the assignment of professional armies.

- In the era of globalisation, domestic peace is often inseparable from international peace. Yet, Muslim societies are most often afflicted with domestic conflicts. Peace from within must therefore be given priority over external affairs.
- Major international actors must bear greater responsibility for acting in the best interests of all and letting their policies be guided by ethical norms, not nationalist and/or protectionist interests that tend to widen inequality and poverty levels worldwide.
- The use of force as a last resort is inevitable when confronting rampant terrorism. Yet it has become patently obvious that violence breeds violence. Negotiated political settlements informed by ethical norms and justice, and not military force, are indispensable and should be prioritised during efforts to uproot international terrorism.
- Sufism can transcend the barriers that divide humanity. Muslim communities and their leaders should utilise the resources of this rich tradition in order to bring their own people closer together and improve the climate of understanding between communities and nations.

Notes

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1. Cf., Nathan C. Funk and Abdul Aziz Said, *Islam and Peacemaking in the Middle East*, Boulder- Colorado & London – UK: Lynne Rienner Publishers Inc., 2009, p. 130.
 2. Cf., Seyyed Hossein Nasr, “Islam and the Question of Violence,” in ed., Aftab Ahmad Malik, *With God on Our Side, Policies and Theologies of the War on Terrorism*, Bristol, UK: Amal Press, 2005, p. 273.
 3. “Al-Salam” is, moreover, one of the ninety-nine Most Excellent Names (*al-asma’ al-husna*) of God that occur in the Qur’an. These are descriptive of the illustrious Self of God, the way that God makes Himself known to His human servants.

4. Cf., Asna Husin, "Acehnese Women Struggle for Peace and Justice: Challenges and Opportunities," *Islam and Civilisational Renewal*, Vol.6, no.3 (July 2015), pp. 319-320.
5. Cf., Mahmoud Zakzouk, *On Philosophy, Culture and Peace in Islam*, ed., Andreas Bsteh, published as English tr. from German, New Delhi: Vikas Publishing House, 2004, pp. 126-7.
6. Ibn Taymiyyah, "Qa'idah fi Qital al-Kuffar," quoted in Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, Baltimore: The John Hopkins University Press, 1966, p. 59.
7. Ibn Qayyim al-Jawziyyah, *Ahkam al-Dhimma*, 3rd ed., Subhi al-Salih, ed., Beirut: Dar al-'Ilm li'l-Malayin, 1983, 1:17.
8. Paul Hedges, "The need for religious literacy," Kuala Lumpur: *New Strait Times*, August 31, 2015, p. 29.
9. See details Andrew C Hess, "Millet," *The Encyclopedia of Modern Islamic World*, Vol. 3, p. 107.
10. See for details Ibrahim Kalin, "Islam and Peace: A Survey of the Sources of Peace in the Islamic Tradition," in ed., Qamar-ul Huda, *Crescent and Dove: Peace and Conflict Resolution in Islam*, Washington D.C: United States Institute of peace, 2010, p. 19.
11. Hedges, p. 29.
12. Cf. Mahmoud Zakzouk, *On Philosophy*, p. 115.
13. Sachiko Murata and William C. Chittick, *The Vision of Islam*, New York: Paragon, 1994, p. 309.
14. Cf., Ayse Kadayifci-Orellana and Meena Sharify-Funk, "Muslim Women Peacemakers and Agents of Change," in ed Qamarul Huda, *Crescent and Dove: Peace and Conflict Resolution in Islam*, Washington DC: United States Institute of Peace, 2010, p. 190.
15. Cf., Major Leon "Bogo" Cornwall, "The Socio-Political and cultural Implications of Monotheism in a Conflict-Ridden world," *The Cordoba Seminar Series Papers*, London: The Cordoba Foundation and Muslim Centre, February 2010, p. 11.
16. Cf., Seyyid Hossein Nasr, *The Heart of Islam*, 2002, p. 221; & Funk and Said, *Islam and Peacemaking*, p. 216.
17. Cf., Kalin, "Islam and Peace," p. 24.
18. The term *Islamicate* suggested the hybrid and multifaceted nature of Islamic civilisation, as many previously non-Islamic elements were incorporated into Islamic civilisation in a relatively short period of time. See Marshall Hodgson, *The Venture of Islam*, Chicago: University of Chicago Press, 1974.
19. Kalin, "Islam and Peace," p. 27.
20. See for details Funk and Said, *Islam and Peacemaking*, 220f.
21. See Arthur Hyman, "Jewish Philosophy in the Islamic World," in S. H. Nasr and Oliver Leaman, eds., *History of Islamic Philosophy*, London: Routledge, 1996, 677; Kalin, "Islam and Peace," pp. 27-28.
22. Cf., Kalin, "Islam and Peace," p. 29.
23. Cf., Sachiko Murata and William C. Chittick, *The Vision of Islam*, New York: Paragon, 1994, p. 267.
24. Gandhi as quoted by Cornwall, "The Socio-Political and Cultural Implications

- of Monotheism,” p. 10.
25. Cf. Asma Afsaruddin, “Recovering the Early Semantic Purview of Jihad and Martyrdom: Challenging Statist Military Perspectives,” in ed. Qamar-ul Huda, *Crescent and Dove*, p. 43.
 26. See Ibn Abi al-Dunya, *al-Sabr Wa’l-Thawab ‘Alayhi*, ed. Muhammad Khayr Ramadan Yusuf, Beirut: Dar Ibn Hazm, 1997, p. 85.
 27. Ibn Abu al-Dunya, *Sabr*, p. 85
 28. Ibid., p. 51.
 29. See Qamar-ul Huda, ed., *Crescent and Dove*, Introduction, p. xix.
 30. See for details, Zeki Sartoprak, “Badiuzzaman Said Nursi’s Paradigm of Islamic Nonviolence,” in Qamarul Huda, ed., *Crescent and Dove: Peace and Conflict Resolution in Islam*, Washington DC: United States Institute of Peace, 2010, p. 102.
 31. Ibid., p. 103.
 32. Badiuzzaman Said Nursi, “The Voice of Truth,” *Volkan*, Istanbul, March 27, 1909 as quoted in Sartoprak at “Nursi’s Paradigm,” p. 101.
 33. Cf. Sartoprak, “Nursi’s Paradigm,” 100f.
 34. Ibid., p. 104.
 35. Ayse Kadayifci-Orellana and Meena Sharify-Funk, “Muslim Women”, p. 194.
 36. Mohamed Abu-Nimr, “An Islamic Model of Conflict Resolution,” in ed., Qarar-ul Huda, *Crescent and Dove*, p. 77; Chandra Muzaffar, *Religion Seeking Justice and Peace*, Penerbit Universiti Sains Malaysia 2010, p. 77.
 37. See Asma Afsaruddin, “Recovering the Early,” p. 189.
 38. Muzaffar, *Religion Seeking Justice*, p. 78.
 39. Funk and Nathan, *Islam and Peacemaking*, p. 185.
 40. Cf., Nathan and Said, *Peacemaking*, p. 186.
 41. All of the 24 verses of relevance to *jihad* can be found in Cherif Bassiouni and Amna Guellali, eds., *Jihad and Its Challenges to International and Domestic Law*, Hague Academic Press, The Hague, 2010, pp. 126-127.
 42. Muhammad Sa’id Ramadan al-Buti, *Jihad fi’l-Islam*, Beirut, Dar al-Fikr 1995, p. 16.
 43. ‘Abd al-Rahman al-Mubarakfuri, *Tuhfat al-Ahwadhi bi-Sharh Jami’ al-Tirmidhi*, ed. By ‘Abd al-Rahman ‘Uthman, Cairo, Matba’at al-Marifa [n.d.] *Hadith* No. 1671.
 44. Ibn Majjah, *Sunan Ibn Majjah, Kitab al-fitan. Bab al-Amr bi’l-Ma’ruf wa’l-Nahy ‘an al-munkar*, *Hadith* No. 4011. Abu Dawud and Tirmidhi have recorded a slightly different version of this *Hadith* which mentions, the word ‘*adl*’ (justice) instead of ‘*haqq*’ (truth).
 45. Mubarakfuri, *Tuhfat al-Ahwazi*, p. 250.
 46. Muslim, *Mukhtasar Sahih Muslim*, p. 469, *Hadith* No. 1756.
 47. A J J Sinck, *Al-Mu’djam al-Mufahras li-Alfāz al-Hadīth al-Nabawī*, vol. 1, Leiden: E J Brill, 1967, p. 389.
 48. Ibid.
 49. ‘Abd al-Razzaq, al-San’ani. *Al-Musannaf*, vol. 5, Beirut: DKI, nd., p. 271-272.
 50. Muhammad Ibn Isa Al-Tirmidhi, *Sunan al-Tirmidhi*, Vol 4, *hadith* no: 2647, Cairo: Darul Al-Hadith, 2005, p. 454.
 51. Ibn Hazm al-Zahiri, *Kitab al-Fisal fi’l-Milal wa’l-Ahwa’ wa’l-Nihal*, Cairo: al-

- Matba'ah al-Adabiyyah, 1321/ 1942, 4:135.
52. Cf., Manzooruddin Ahmad, *Islamic Political System in the Modern Age* (Karachi, Royal Book Company 1983) p. 185.
 53. See Mohammad Hashim Kamali, *Law in Afghanistan*, Leiden: E.J. Brill, 1985, p.7.
 54. Bassiouni, *Jihad and its Challenges*, p. 140.
 55. Muhammad Abu Zahrah, *Nazariyyat al-Harb fi'l-Islam* [The Theory of War in Islam], Cairo, Dar al-Qahirah lil-Taba'ah, 1380/ 1961, pp. 24-25.
 56. Cf., Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Cambridge, Islamic Texts Society 2003) pp. 202-228.
 57. Ali A. Mazrui. 'The Ethics of War and the Rhetoric of Politics: The West and the Rest,' *Islamic Millennium Journal* (2002) p. 1.
 58. Ibid., pp. 3-4. Ali Mazrui mentions in this connection many leading non-Western personalities, including Mahatma Gandhi, Albert Luthuli, Anwar Sadat, Desmond Tutu, Nelson Mandela, and Kofi Annan, whose advocacy of peace echoes the spirit of Christian teachings better than most mainstream Christian themselves (Mazrui, *ibid.*, p. 7).
 59. Q Aal-'Imran, 3:110.
 60. For details on Social Justice in Islam, see Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam*, Cambridge: Islamic Texts Society, 2000, 133-43.
 61. Cf., AbdulHamid A. AbuSulayman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought*, Herndon, Va: International institute of Islamic Thought, 1987, p. 20.
 62. Cf., Joel Howard, "Warfare in the Qur'an" in eds., Ghazi bin Muhammad et al, *War and Peace in Islam*, p. 47.
 63. This wider concept of peace has gained further ground since the so-called post-Cold War Washington New Consensus, which holds that elimination of violence has become more challenging since the 1990s "without major structural international change and deeper forms of justice." See Oliver R. Richmond, "The changing concept of peace building," Kuala Lumpur: *News Straits Times*, December 29, 2015, p. 16.
 64. Ibn Rushd al-Qurtubi, al-Muqaddimat al-Mumahhidat, 2:515 as quoted in Mawsu'ah Fiqhiyyah, Vol. 27:325.
 65. Muhammad ibn Hibban, *Sahih Ibn Hibban*, Beirut: Mu'assasah al-Risalah, 1988, hadith no. 5182.
 66. Cf., "Sulh," in *al-Mawsu'ah al-Fiqhiyyah*, vol.27: 335-337 at p. 336.
 67. Cf., Ibid., Vol.27, pp.323-357; Musa Furber, "Alternative Dispute Resolution," *Tabah Analytic Brief*, No, 11, 2011: Tabah Foundation, Abu Dhabi, U.A.E., p.2. For details, Furber refers the reader to al-Sarqawi's commentary on Zakariyya al-Ansari's, *Hashiyat al-Sharqawi 'ala Tuhfat al-Tullab*: Cairo: Mustafa al-Babi al-Halabi, 1941, 2:64.
 68. Furber, "Alternative Dispute Resolution," p. 9.
 69. Quoted in *al-Mawsu'ah al-Fiqhiyyah* (Kuwait), "Sulh," Vol.27, p. 327.
 70. Cf., "Takhim" *al-Mawsu'ah al-Fiqhiyyah*, Kuwait: Wizarat al-Awqaf wa'l-Shu'un al-Islamiyyah, 10:233-34.
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73. “Tahkim,” *al-Mawsuah*, 10:238-241.
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78. Ibid., pp. 207-213.
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ARTICLES

TOWARDS AUTHENTIC BEHAVIOUR MANAGEMENT MODELS FOR ISLAMIC SCHOOLS - A FRAMEWORK SYNTHESISING RESEARCH

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Abstract: The purpose of learning in Islamic schools should be to facilitate transformation on the path to *ma'rifatu'Llah*. Transformation over compliance would therefore best characterise those behaviour management models most appropriate for Islamic schools. But unfortunately, behaviour management models are often adopted in Islamic schools without considered thought or evidence from tradition or empirical research. A critical examination of current behaviour management models and their embedded practices in Islamic schools is therefore required. To what extent are common practices effective, authentic and aligned with visions of Islamic education? The purpose of this paper is to produce a framework that can inform the development of future authentic behaviour management models in Islamic schools that are conversant with Islamic principles. The framework offered is based upon a synthesis of research within the field of Islamic education.

Introduction

As Islamic schools in Western contexts negotiate the next phase in their development, empirical research to assess both the appropriateness and effectiveness of their approaches to behaviour is essential. The tragedy in many Islamic schools is the assumption that certain practices are working without empirically assessing their effectiveness. With reference to building a strong school culture manifesting Islamic values and etiquettes, typically there is no indication that the systems in place fosters either obedience or responsibility. While Islamic schools want to encourage and support the latter, most often the methods applied lead to the former. This can apply to the area of behaviour management, which for the purposes of this paper will encompass classroom management, school discipline and all other terms used to denote a behaviour management model (BMM). BMMs and similar approaches can be situated

within certain educational philosophies and are themselves informed by child psychology theory. They also subsequently inform behaviour management systems (BMS).

Research suggests that discipline and high standards of conduct reflective of religious and cultural expectations are a factor for parents when choosing an Islamic school for their children.¹ Certainly, a good character inspired by the Prophetic standards, a strong and positive school culture in the spirit of Islam, dignified conduct in classrooms, and principled and healthy interpersonal relations are all arguably high priorities for Islamic schools. However, there is little by way of an established model or blueprint for achieving such standards.

There is no one singular, agreed upon philosophy of Islamic education. Rather, the discipline is dynamic in nature. This flexibility has allowed for the development of a set of principles and values which are enduring, applicable to all contexts for all time. Overall, however, the purpose of Islamic education is inextricably linked to the purpose of creation, which is to worship Allah Almighty and to be His vicegerent (representative) here on earth.² This purpose informs the broader aims of Islamic education – namely, to instill the desire to seek both the pleasure of Allah Almighty and success in the Hereafter.³ It is the duty of those who educate Muslim children to utilise educational approaches which instill these higher values throughout a student's formal school education.⁴

Whilst the philosophy, purpose and aims of Islamic education are distinct, Muslim educators are not alone in valuing effective BMMs. Currently, a continuum of BMMs guide contemporary educational approaches and practices. These variously emphasise choice, consequences, responsible behaviour, restorative justice,⁵ and positive learning.⁶ Researchers in Islamic education circles^{7,8,9,10,11} however, question the suitability of many of these contemporary approaches to behaviour management and instead suggest the consideration of a model that is more cognisant and consistent with an Islamic worldview and approach. The Islamic worldview, rooted in the ontological and epistemological basis of Islam, is the lens through which Muslims see and understand the world. The Islamic worldview provides a useful point of reference or parameter for ensuring that Islam's educational philosophy, purpose and aims inform broader educational approaches. This paper synthesises research in the field of Islamic education related to behaviour management, character education, the connections between purpose and path, and the central role of *adab* in the learning process. The resultant framework aims to inform the development of an Islamically authentic behaviour management model for Islamic schools, conversant with Islamic principles and Prophetic practices. The framework presented in this paper is currently being piloted by the Amanah Institute, a *madrassah* in Brisbane, Australia.

The Broader Context

Within a high-performing school, behaviour management is an important component. The challenges inherent to managing student behaviour and maximising their engagement and learning, however, occur against a wider backdrop of societal and generational change. This is most evident in terms of advancement in technology, particularly the impact of the internet and social networking. The result has been a generation of ‘switched on’ and ‘developmentally compressed’ students who possess broad yet shallow knowledge and who at times struggle to cope with new concepts, ideas and thinking.¹² Family dysfunction and rising mental health concerns are additional factors that impact upon schools and their focus on student engagement and motivation.¹³

Many Western schools, including those in countries like the United States, Canada and Australia, are inherently diverse, reflecting the spirit of multiculturalism. Islamic schools in the West also model this spirit, exhibiting the highest levels of diversity on almost every marker – cultural, ethnic, linguistic and sectarian.¹⁴ This, however, can present both challenges and opportunities, particularly when it comes to building a strong school culture with a shared expectation of student behaviour. In many cases, a shared faith encompassing religious principles governing good character, relationships, conduct and behaviour (including culturally acceptable notions of respect) serve as enablers to achieve the school’s aims of better student behaviour and engagement with learning.

However, no significant research has been conducted to examine the nature of student behaviour in Islamic schools in the West, including how that behaviour is managed and how it impacts on teacher-student relations. Although it could easily be assumed that these Islamic schools suffer from the same problems as other Western schools, the situation is likely to be more complex given that Western Muslim students face a unique set of pressures in the post-9/11 world.¹⁵ Since birth, these Muslim students have been exposed to an overwhelmingly negative media discourse regarding Islam and Muslims, set amidst a complex geopolitical climate. These students therefore feel pressured to negotiate and reconcile their multiple identities and sense of belonging, impacting on student behaviour and engagement with learning. Moreover, many Muslim students in Islamic schools in the West have either negotiated a refugee experience (along with the subsequent acculturation process) or are the children or grandchildren of families who have done so. This trauma is often an additional factor impacting upon behaviour. Nonetheless, the absence of research in this specific field makes it difficult to conclusively state the prevalence and causes of behaviour issues within Western Islamic schools.

Authentic Behaviour Management Models for Islamic Schools - A Synthesis of Research

In forming our synthesis, we have relied on Memon's highly respected and comprehensive Islamic pedagogy.¹⁶ We would also like to acknowledge the influence of Nasr¹⁷ and Shamma,¹⁸ who we have utilised in order to ensure that an Islamic worldview is present throughout our work. This has helped maintain the Islamic integrity, relevance and appropriateness of the BMM framework we propose. We have also accepted al-Attas's¹⁹ heavy emphasis on *adab* in the learning process; like him, we have maintained that *adab* is central to learning and that its inclusion reconciles the notions of knowledge and learning peculiar to Islamic education. Additionally, the importance of teachers in the Islamic tradition has convinced us that BMMs in Islamic schools must be teacher-modelled. We have also taken inspiration from Memon and Bacchus's²⁰ call for character education in Islamic schools in order to create a school climate with Islamic values at its heart. We have borrowed from the domain of discipline with dignity,²¹ particularly from Alam's articulation of the Prophetic principles of teaching by the maintenance of dignity.²² We added to this the pursuit of a mutually transformative experience between students and educators, the result of which would be the improvement of both parties and their overall relationship. Taken together we offer the following seven requisites as a platform for developing an Islamically authentic Behaviour Management Model for Islamic Schools:

1. Alignment with an Islamic pedagogy (why, what and how)
2. Informed by an Islamic worldview
3. An unrelenting and central emphasis on *adab*
4. Teacher-modelled, student-directed
5. Adoption of a 'whole community' approach
6. Utilisation of preventative approaches, including a character education component
7. Utilise interventionist approaches that maintain dignity and look for mutually transformative experiences.

1. Alignment with an Islamic Pedagogy

An Islamic pedagogy should be an overarching framework that defines excellence in Islamic schooling. It should be applied for its enabling function in the assessment and evaluation of approaches to Islamic schooling within a criterion of excellence. Authentic BMMs for Islamic schools best operate within an Islamic pedagogy. According to Memon,

An Islamic Pedagogy is the principles of education in Islam that inform both what we teach and learn, and the way we teach and learn... An Islamic Pedagogy provides a framework of the principles of education derived from the Islamic tradition that influence our approaches to schooling.²³

Memon further asserts,

For Muslim educators who see Islam as a central part of our being – the *tarbiyah* (nurturing of an Islamic value system), the *adab* (comportment and etiquette), and the *ilm* (knowledge about Islam) that we continue to gain shapes our educational values and by virtue defines our pedagogy.

Islamic pedagogy foregrounds the ‘why’ of Islamic education, while also aligning with ‘what’ and ‘how’ we teach and learn. The ‘why’ encapsulates the Islamic tradition, including the purpose of education in Islam. It therefore informs subsequent aims in addition to the various educational approaches that can be employed. In this case, the approaches pertain to a BMM as a forerunner to a BMS. When such a system is guided by and operates within a framework derived from the Islamic tradition, it will be both authentic and appropriate for Islamic schools.²⁴

2. Informed by an Islamic Worldview

An Islamic worldview can be defined as the lens through which a Muslim student and/or educator sees and understands the world. It is rooted in the ontological and epistemological core of Islam. Consideration of an Islamic worldview provides a useful point of reference (or parameter) for ensuring that any given educational approach is authentically Islamic. Al-Attas explains that the Islamic worldview is,

characterised by an authenticity and a finality that points to what is ultimate, and it projects a view of reality and truth that encompasses existence and life altogether in total perspective whose fundamental elements are permanently established.²⁵

In other words, an Islamic worldview is constructed around Islamic beliefs about creation, existence, purpose and destiny.²⁶ It is this worldview that should inform a Muslim student’s way of knowing, doing²⁷ and being²⁸, as well as their hopes for the Hereafter.²⁹

An Islamic worldview contains a fundamental set of principles which places all systems of meaning and standards of life and values into a coherent order.³⁰ At the centre of this worldview is *tawhid* (Divine Oneness), the ontological

foundation of all things ‘Islamic’. Since Islam is based upon *tawhid*, the development of the whole Muslim student is only possible when this concept is fully considered.³¹ It is very important to note that beyond the concept of *tawhid*, there is a great diversity of Islamic worldviews. The character and role of this fundamental element, however, will always remain the same.³²

According to Shamma, an Islamic worldview encompasses three main points:

- Allah is the Creator of all mankind. He is One.
- Unity of creation. There is no dividing line between humans and the environment, between religion and science.
- Included in Allah’s creation is a set of rules which guide all of nature; and if man chooses to follow those rules, he will be successful in this life and the life to come.³³

The goal of the Islamic school educator is to direct the student towards the Creator via an Islamic worldview. Any BMM must do so in a holistic, growth-oriented manner.

3. An Unrelenting and Central Emphasis on *Adab*

Contemporary research has identified a strong correlation between student behaviour and the quality of teaching students receive. Quality teachers who engage in quality teaching have higher student engagement and less behaviour management issues. Orderly classrooms similarly result in increased student engagement, motivation, and academic success.³⁴ These principles have been found to hold true across different schools and communities. There is, however, a nuanced (and oft-overlooked) difference within Islamic education: while contemporary research only positively links behaviour and learning with regards to the absence of problem behaviour, in Islam importance is also attached to the presence of what is referred to as *adab* (etiquette). This addition is most noteworthy.

Adab encompasses “a complex set of meanings including decency, comportment, decorum, etiquette, manners, morals, propriety, and humaneness.”³⁵ It must, play a central role in any Islamic BMS because in Islam learning encompasses both imparting knowledge and the acquisition of manners. Al-Attas posits that “no true knowledge can be instilled without the precondition of *adab* in the one who seeks it and to whom it is imparted.”³⁶ The *adab* mentioned here cannot be instructed, but rather is transferred from teacher to student.³⁷ In the Islamic worldview, *adab* is not only an essential part of the education process, but also an outcome of education^{38, 39}. This implies a heightened role and responsibility for teachers in Islamic schools.

4. Teacher-modelled, Student-directed

In the Islamic tradition, the teacher is both a *mu'allim* (a transmitter of knowledge) and a *murabbi* (a nurturer of souls).⁴⁰ To align their teaching to an authentically Islamic BMM, therefore, teachers must teach the morals, ethics and character of the Prophet (peace be upon him) and embody these traits within their own personalities. If they do not have these traits, they must strive to develop them in order to facilitate the ethical learning process of their students. Shaykh Hamza Yusuf Hanson, president of Zaytuna College in California, speaks to the historical purpose of moral education,

Regarding education, the ancients understood that its primary purpose was not economical but ethical, and while they knew ethics could not be taught, they knew it could be induced through moral example and wise childrearing techniques that ultimately resulted in moral and intellectual excellence.⁴¹

When teachers respond with *adab*, they inadvertently model the behaviour of their students. Henzell-Thomas concurs with this approach to traditional education,

In authentic spiritual traditions, the teacher is not only responsible for the instruction and training of the mind and the transmission of knowledge, but also with the education of the whole being. Such traditions never divorced the training of the mind from that of the soul.⁴²

The concept of training the soul is highlighted by numerous Prophetic traditions and is the basis for the Islamic science of spirituality. When the Prophet (peace be upon him) carried the bags of a woman who was leaving Makkah in order to avoid meeting him, she cursed “this man, Muhammad” without knowing that it was he who was walking alongside her. Not once, however, did Muhammad (peace be upon him) condemn her or return her abuse. In another tradition, the Prophet (peace be upon him) went and visited a neighbour who regularly threw filth and trash at him as he went into his house. His sole aim was to inquire about her. In both cases, the Prophet (peace be upon him) returned injustice with kindness, and in doing so became the best disciplinarian. In short, he followed the Quranic injunction,

Not equal are good and evil. Repel [evil] with what is best; you will unexpectedly see one with whom you had enmity become an intimate friend. [Quran 41:34]⁴³

Muslims recognise the Prophet Muhammad (peace be upon him) as the ideal model of behaviour and as an example for all humanity. The behaviour of the Prophet (peace be upon him) can be found in his *Sunnah* and adhering to

it is considered a virtue. This emphasis on excellent behaviour and conduct is of paramount importance in Islam and is summed up by the Prophet (peace be upon him) in his *hadith*, “Fear Allah wherever you are. Follow up a bad deed with a good deed and it will blot it out. And deal with people with excellent character.” The Prophet Muhammad (peace be upon him), like all messengers, is considered a teacher. Certainly, he declared “I have been sent as a teacher.” This is personified by the Prophet’s (peace be upon him) efforts to educate his earliest followers, the companions, via his model teaching approach.

The above links with Mendler and Curwin’s development of a way to address the behavioural concerns of at-risk students who have learning and emotional disabilities. Referred to as the Discipline with Dignity Framework, this model is a needs-based approach to behaviour and classroom management. The goal is to increase student engagement in a way that meets the needs of the student. This work, however, is in line with the Prophetic pedagogy: students are dignified through the conduct and character of the teacher, in what can be referred to as a mutually transformative experience. Moreover, at the root of this framework is the inculcation and deep understanding of the concept of *adab*. An authentic and Islamically viable BMM must include the emphasis on noble character and concepts of discipline with dignity, *adab*, and Prophetic pedagogy and be designed for a variety of Islamic educational settings.

5. Adoption of a ‘Whole Community’ Approach

One of the issues facing Islamic schools is the ‘split personality’ students adopt, behaving one way at school and another way at home. In some instances, the home environment is not conducive or consistent with the values presented at the Islamic school. According to Memon and Bacchus,

Muhammad, may Allah bless him and grant him peace, trained his companions in character through his own example; not in any specified training session. He created an environment that was conducive to the improvement and growth of individuals through his own character and examples. He inspired others to be like him—they wanted to hear him because it was so pleasing to them. He created an environment of growth—growth in certainty of Allah. Creating such an environment begins with a willingness to improve ourselves which starts with the top: school board members, school principal, teachers, and parents – before we can ask students to reflect on their own character.⁴⁴

A successful BMM addresses this. Transformation must be community-wide, where discussions, orientation and methodology are shared by students, teachers, and administrators, in addition to board members, parents and student families.

6. Utilisation of Preventive Approaches, including a Character Education Component

Character education is a foundational aspect of authentic and appropriate BMMs for Islamic schools. It is also a sacred duty on the community as a whole. It must, however, begin with the teacher,⁴⁵ thereby bringing together the above requisites for the framework presented in this paper.

Memon and Bacchus have also highlighted the importance of character education. In a paper presented at the ISNA Education Forum in Chicago, 2015, they stated that,

The premise of character education in the Islamic tradition is to nurture an individual's attachment to their Lord. This attachment is exhibited through drawing out our innate nature to be moral human beings who naturally exhibit good character. Character education cannot therefore be reduced solely to programs, posters, and checklists. Students need to see good character around them and have the opportunity to reflect on it consistently. Seeing and reflecting on good character softens the heart and the essential elements that define character in Islam – *tazkiyah* (character refinement) and *taqwa* (God consciousness) – are connected to the heart.⁴⁶

BMMs that expand on opportunities for transformation based on these concepts will align spirituality with character education and academics with deeper sacred knowledge. A comprehensive character education programme will serve as a preventative measure towards misbehaviour. Borrowing again from Mendler and Curwin,⁴⁷ in the context of character education a successful BMM will consider the following:

1. Do the methods used preserve dignity or cause humiliation?
2. Are they primarily obedience-oriented or do they teach responsibility?
3. How do they affect a student's motivation to learn?
4. Do they lead to a commitment to change?
5. Do they work?

7. Utilise Interventionist Approaches that Maintain Dignity and Look for Mutually Transformative Experiences

The Prophet (peace be upon him) advised his companions to take the high road based on his example. Teachers should respond to offensive and/or inappropriate behaviour in a way that honours this Prophetic model. This will show students that the teacher is competent enough to respond to the issues at hand. Consistently sending a student to the office to let the principal respond to the issue, or

responding in such a way that diminishes the teacher's dignity, indicates to students that the teacher is either unwilling or unable to be a part of the solution. But, and as Mendler and Curwin have stated, every time an educator successfully defuses inappropriate student behaviour in a dignified and competent manner, he or she will also succeed in modelling effective behaviour techniques to students. In this era of impulsive, aggressive and "have-the-last-word" behaviour, teachers play a vital role in modelling the best response for students. "Good teachers intuitively know that attacking students even in a momentary lapse of weakness takes something away from themselves" and negatively impacts upon their own dignified status.⁴⁸

Teaching within the framework of an authentic BMM model results in a *mutually transformative experience*.⁴⁹ This transformation is not limited to within the Islamic school's walls; the goal is to include everyone within the community.

Conclusion

Behaviour management is an important component within any school, including Islamic schools. But while substantial studies have been undertaken to examine behaviour management approaches in other types of schools, Islamic schools have been neglected. This paper has aimed to produce a framework that can inform the development of an authentically Islamic (i.e. in tune with Islamic principles and Prophetic practices) behaviour management model (BMM) for Islamic schools. Based on a synthesis of research within the field of Islamic education, the paper has offered seven requisites as a platform for the framework: 1) alignment with an Islamic pedagogy; 2) informed by an Islamic worldview; 3) an unrelenting and central focus on *adab*; 4) a teacher-modelled and student-directed approach; 5) adoption of a 'whole community' approach; 6) utilisation of preventative approaches, including a character education component; and 7) interventionist approaches that maintain dignity and look for mutually transformative experiences.

We suggest that the framework should inform the creation of an authentically Islamic BMM for application in both Islamic schools and *madrasahs*. Such a model is currently being piloted at the Amanah Institute, a *madrasah* in Brisbane, Australia. Following this pilot, the framework will be tested more broadly in Islamic schools in Australia, America and the UK. It is hoped that this will provide much needed empirical evidence concerning the effectiveness of the BMM, given it is an essential ingredient to achieving the 'Islamic' in an Islamic school.

Notes

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JURISTIC VIEWS ON *RIBĀ*, *GHARAR* AND *QIMĀR* IN LIFE INSURANCE

*K. M. Zakir Hossain Shalim**

Abstract: Throughout the Muslim world, the issue of whether life insurance involves unlawful elements of *ribā*, *gharar* and *qimār* continues to be debated. A heated controversy has been raging over this problem, with Muslim jurists becoming divided into two distinct groups: those who have argued that *ribā*, *gharar* and *qimār* are all in some way involved in life insurance (thereby making the latter *ḥarām*) and others who have denied these arguments. Interestingly, both groups have supported their views with proofs from the sources of Islamic law, creating much confusion in the Muslim world. Hence, this paper examines the different juristic arguments and counter arguments on this issue in order to determine the preferable view. Ultimately, the paper concludes that, conceptually speaking, there is no *gharar*, *ribā* or *qimār* in conventional life insurance. However, in order for conventional life insurance to be admissible in Islam, the paper has recommended some policies for insurance companies and participants to follow.

Introduction

It is permissible in Islam to seek help or protection from others in times of difficulty. In some cases, it is obligatory for a Muslim to find lawful ways and means to cope with disasters. “If a major source of income for a family unit, for example, is eliminated due to death, disability, or other impairment of one or more family members, it will be necessary for the family to make economic and social adjustments. Sometimes these adjustments result in serious physical or psychological harm. A spouse might have to seek new or additional employment at the expense of other family responsibilities; the children might have to find work at the expense of formal education; the family members might have to accept charity from relatives, friends or social agencies at the expense of independence and self-respect; and the family’s living standard might be reduced to a level

below that essential for health and happiness.”¹¹ In such situations, life insurance can provide families and businesses with an important financial planning tool through which financial security can be obtained. Certainly, the prime objective of life insurance is to undertake “a responsibility towards safeguarding widows, orphans and other dependents of the deceased (assured/policyholder) from unexpected future material risks.”¹²

The Arguments on Life Insurance

A group of Islamic jurists have argued that *ribā*, *gharar* and *qimār* all exist within life insurance, thus making the latter impermissible in Islam. Amongst others, this group includes: Muḥammad Abū Zahrah,⁴ Wahbah al-Juḥaylī,⁵ Shaykh Rajab al-Tamīmī,⁶ Shaykh ‘Abd Allāh bin Zayd al-Maḥmūd,⁷ Shaykh Shawkat ‘Aliyyān,⁸ Ṣiddīq al-Ḍarīr,⁹ Ḥusayn Ḥāmid Ḥassān,¹⁰ Muḥammad al-Dāsuqī,¹¹ ‘Abbas al-Ḥusnī,¹² and Muḥammad Biltagī.¹³ Their objections can be summarised as follows:

1. Life insurance deals with *ribā* (interest, usury).
2. Life Insurance involves elements of *gharar* and *jahālah* (speculation).
3. Life insurance functions like *qimār* (gambling or *mysir*).

In the following pages, each of these objections will be discussed in turn, along with their supporting arguments. Concurrently, we will also consider the answers to these objections.

***Ribā* (Interest, Usury)**

The linguistic meaning of *ribā* is ‘to increase’.¹⁴ Technically, it means increase in a specific thing.¹⁵ *Ribā* is strictly prohibited in Islam by the Qur’ān, the *ḥadīth*, and the consensus of the scholars. Regarding this prohibition, Allah says: “O believers, fear God, and give up the *ribā* that remains outstanding if you are believers” (Al-Baqarah, 2:278). Similarly, the Prophet forbade it in a *ḥadīth*: Jabir bin ‘Abd Allāh, in a report on the Prophet’s farewell pilgrimage, said: “The Prophet (pbuh) addressed the people and said, ‘All the *ribā* of *al-jahiliyyah* is annulled, and the first *ribā* that I annulled is our *ribā*, accruing to ‘Abbās bin ‘Abd al-Muṭṭalib (the Prophet’s uncle).’”¹⁶ *Ribā* is prohibited because it is thought to have a bad impact on society.

The Relationship of Life Insurance to Ribā

The National Fatwa Council of Malaysia (*Majlis Fatwa Kebangsaan*) issued a legal verdict in 1974 that conventional life insurance is not permissible because it contains elements of interest.¹⁷ Similarly, in 1977 the council of Senior ‘*Ulamā*’ in Saudi Arabia declared all types of commercial insurance (including

life insurance) prohibited¹⁸ because they deemed it to carry interest.¹⁹ The question, however, is to what extent is interest actually involved with life insurance?

According to those who oppose it, life insurance's involvement with interest can be summarised as follows:

1. Life insurance comprises *ribā al-faḍl* and *ribā al-nasī'ah*. Muḥammad Biltagī states: "The payment in insurance by the insurance companies to the insured or his heirs is not the same [amount] as that paid by the insured but is definitely either less or more." Therefore, he argues, *ribā al-faḍl* is involved in life insurance. Moreover, *ribā al-nasī'ah* is also involved "because the insurer [insurance company] doesn't pay the agreed money to the insured [policy holder] in one go but over a period of time."²⁰

Shawkat 'Aliyyān (1978) explains that a usurious transaction is a transaction in which one of the following conditions exists: 1. an increase of principle; 2. an increase fixed according to a time factor; 3. an increase stipulated in the transaction.²¹ His statement confirms the explanation above, that *ribā al-faḍl* and *ribā al-nasī'ah* are both involved in life insurance policies.

2. Some scholars argue that Muslims who condemn *ribā* as one of the major defects of life insurance are influenced by a wider notion of the term *ribā*. This broader understanding holds that insurance compensations are collected without work and that the amount deposited with the company (the premium) is never returned to the insured in its original sum. It may be returned partially (in property and liability), tens of times more than its original amount (in life insurance), or not at all. In the latter case, the company collects all the profits.²²

Counter Arguments to these Objections

The defenders of life insurance respond as follows:

1. Muhammad Nejatullah Siddiqi dismisses the argument that life insurance contracts necessarily imply the presence of interest due to the fact that the insured is promised an amount far in excess of what he will have deposited in installments before the occurrence of any accident. This opinion, he argues, is based on the assumption that all incremental payments constitute interest. This, however, is a baseless assumption as the *Shari'ah* does not regard absolutely every increment as interest. Money paid as a premium does not have the nature of a

loan, and the payment of a claim does not amount to returning the loan with an incremental amount that may be considered as interest. Rather, a premium payment is a kind of co-operative contribution towards the availability of a useful social service. This spirit is manifest in mutual insurance and in state-controlled insurance. Even in the case of private insurance we cannot rightly call a premium a ‘loan’. Rather, it must be considered as the price of a service to be rendered if and when needed.²³

2. As against typical interest bearing loans, the amount of claimed money received by the insured depends neither on the time period nor on the total money deposited in premium payments at the moment of occurrence of any accident. Rather, the amount either depends on the extent of financial loss incurred in consequence of an accident or is agreed upon beforehand.²⁴
3. In life insurance, one faces the difficult problem of assessing the financial loss a family incurs from the death of a person at a particular time. Valuation of property and other goods according to objective standards is available for this. But, the decision to calculate such a loss and then opt for a policy involving a particular sum is best left to the discretion of the individuals concerned. The capacity and willingness of individuals to save is also important and a relevant consideration that might be left to their discretion. Moreover, all these matters can be re-examined. But even under present conditions, the mere fact that the insured may get more money than was paid out in premiums provides no grounds for considering the excess money as interest. If the problem is considered in relation to the pure form of insurance, i.e. mutual assurance, the money that a group of insured persons gets is exactly the same as the amount they deposited in premiums. This is because the rate of the premiums is calculated on the basis of the law of large numbers and the law of averages with a view to compensate the losses of the whole group.²⁵

In light of this discussion, it should be clear that the nature of life insurance differs from that of interest. In interest-bearing loans, the borrower has to repay an amount larger than the amount borrowed. This applies equally to the case of a group or of an individual. In life insurance, however, a group of insured persons collectively gets the same amount of money, though at the individual level the pattern is different.²⁶

Gharar and Jahālah

Some jurists believe *gharar* and *jahālah* are also involved in life insurance.

Linguistically, *gharar* means risk, peril or danger,²⁷ while *jahālah* means ignorance or lack of knowledge.²⁸ According to Shafi‘ī, Hanbalī and Ḥanafī jurists, both concepts imply selling something without knowing its availability, quantity or deliverability. Imām Mālik, on the other hand, sees the concepts as entailing something whose completion or non-completion is unknown.²⁹ According to al-Dasūqī and Shawkat ‘Aliyyān, *gharar* also means deception, disguise, or anything with an uncertain end result.³⁰ Al-Sanhūrī explains that the difference between *gharar* and *jahālah* is that *gharar* means to sell something whose availability is unknown (for example, birds in the air before they are captured or fish in the water before they are caught), while *jahālah* means to sell something which does exist but the quantity or size of which is unknown.

The prohibition against contracts based on *gharar* can be found in many Prophetic sayings. Imām Muslim, for example, narrated an *ḥadīth* in which the Prophet prohibited people from becoming involved in trade with *gharar*.³¹ Another *ḥadīth*, narrated by Imām Ahmad and Ibn Mājah, has Abū Sa‘īd al-Khudrī reporting that the Prophet Muḥammad prohibited the selling of unborn animals.³² Another important *ḥadīth* prohibits selling fish that are still in the water.³³

Relationship of Gharar with Life Insurance

How does *gharar* relate to life insurance? Those Muslim jurists who object to life insurance have identified the following points:

1. There is an element of *gharar* in life insurance policies because of the uncertainty surrounding the subject matter of the contract, or *ma‘qūd ‘alayh*. Thus, while the insured (or the policyholder) agrees to pay a fixed premium, the insurance company only guarantees to pay an undetermined sum of compensation (sum insured) in the event of catastrophe or disaster. Moreover, the insured is not informed about how the compensation will be derived or when it will be received.³⁴ According to the *Sharī‘ah*, these things must be clear from the start.
2. ‘Lopsided’ contracts which favour one party at the expense of another are also viewed as *gharar*. This applies to life insurance contracts when there is a loss of premium in the event that: 1. the policyholder cancels his policy before the policy acquires forfeiture status; or 2. there is a non-proportional refund of premiums against the unexpired period in the event of early retirement.³⁵
3. According to M. Ma’sum Billah, any contract in which *gharar* applies to either the subject matter or to the object of a contract is null and void *ab initio*. In a life insurance contract, the subject matter is death.

Although death is certain, it is uncertain whether the assured's death will occur during the policy period or not. For Billah, this uncertainty results in the policy's invalidity.³⁶

Counter Arguments to these Objections

Scholars who favour life insurance argue that:

1. *Gharar* is essentially a means of gain based on risk. Hence, it partakes in gambling and pawning, both clearly prohibited by the *Sharī'ah*.³⁷ However, no human action is completely free from risk or probability, making these points an insufficient basis for dismissing life insurance. Indeed, jurists permit selling unripe fruit from trees, despite the degree of obscurity involved in doing so. They also permit selling fruits in successive periods where the period of succession is short. Their argument is that the benefits reaped from the trees are always unknown. This principle could also apply to life insurance.³⁸
2. Jurists permit contracts based on the principle "Deal with Mr. X and whatever claim you have over him, I shall take the responsibility for it." On this basis, life insurance contracts should also be sound.
3. Although some ambiguity may exist in life insurance contracts, it does not lead to dispute. Significantly, therefore, the *Sharī'ah* only prohibits *gharar* leading to dispute.³⁹
4. Traditionally, prohibited forms of *gharar* have only applied to *uqud al-mua'awadat* (contracts of exchange). Life insurance, however, is *tabarru'* (a contract of donation). If life insurance is classified under this rubric, the obstacle of *gharar* is tolerated.⁴⁰
5. According to Muḥammad Salām Madkūr, *jahālah* is only prohibited when it affects the execution of a contract and causes dispute. *Jahālah* in life insurance contracts, he claims, is not of this nature.⁴¹

***Qimār* (Gambling)**

Qimār is another prohibited element which, according to some Muslim jurists, forms part of life insurance. In the Qur'ān, *qimār* appears in the context of a discussion on *maysir*, a game of chance, which is strongly condemned.⁴² Allah says:

They ask you (O Muhammad) concerning alcoholic drinks and gambling. Say: "In them is a great sin and (some) benefit for men, but the sin of them is greater than their benefit." (Al-Baqarah, 2:219).

Islam prohibits *qimār* because it can harm the needy and provide income

without work.⁴³ Moreover, gambling (i.e. giving power to chance) is also against monotheism in as much as it attempts to take fate into one's own hands.⁴⁴

The Relationship between Life Insurance and Gambling

Muḥammad Biltagī, quoting Abū Zahrah, has argued that life insurance involves gambling because it is high risk. Moreover, al-Dasūqī and Aḥmad Ibrāhīm have argued that the gambling occurs on both sides: the insured may pay only one premium and be compensated – in which case the company loses – but if no peril occurs the insured may pay the premium without compensation, in which case the insured loses.⁴⁵ Thus, although it is certain that a person will die, an element of gambling still enters into life insurance because it is uncertain when the policyholder will die – i.e. how many premiums the insured will pay before his heirs can collect the agreed upon death benefits or face value of the policy.⁴⁶

According to Ma'sum Billah, in gambling the gambler pays a certain amount of money in the hope that, by chance, he will subsequently gain an additional large amount of money. Similarly, in a life insurance policy the assured always hopes for a chance to gain. According to Billah, this hope has the same nature as gambling and, thus, is prohibited by the *Shari'ah*.⁴⁷

Fadzil Yusuf has argued that gambling arises in life insurance because of the presence of *gharar*. For example, when a policyholder dies before the end of the period of his insurance policy (i.e. after paying only part of the premium), his dependents will receive an uncertain sum of money.⁴⁸

Counter Arguments to These Objections

1. Those *fuqāhā'* who support life insurance say that there is no similarity between it and gambling. This is because a life insurance policy is for the protection of the material welfare of orphans, widows and other dependents.⁴⁹ Thus, it is a co-operative system which aims to assist others.⁵⁰ Gambling, on the other hand, is a game with potentially very negative consequences.⁵¹ Al-Zarqā' says: "Gambling is a game based on luck which aims to kill the moralities and efficiencies of human beings. In the Qur'ān, Allah has characterised it as a root of evil, which leads to enmity and hatred among human beings and prevents them from remembering Allah...Insurance, on the other hand, is not like that. Rather, it is a system on the basis of which remedies for the consequences of disasters that have befallen human life, wealth and their activities can be made."⁵² Therefore, life insurance policies are actually contrary to gambling, like fire is contrary to water.⁵³

2. In order to show the difference between life insurance and gambling, Muhammad Nejatullah Siddiqi has argued that the evil of gambling lies in the fact that, through betting and wagering, the gambler willfully seeks out risk which was not there earlier, or which, even if it did exist, did not personally concern him. Buying lottery tickets, betting and staking on horse races, football matches, and games of cards or chess are examples of this. All possible forms of gambling and its current practices therefore have one thing in common – a risk of financial loss which the gambler could have avoided. However, the case of life insurance is fundamentally different. The occurrence of peril, against which (and the effect of which) the insured seeks protection, does not depend on whether someone is insured or not.⁵⁴
3. Siddiqi adds that another fundamental difference between gambling and life insurance relates to the hope of gain; the financial motivation for gambling lies in the event of winning, while in the case of life insurance it consists in the desire to be protected against loss.⁵⁵
4. The objection that the insured buys a life insurance policy in order to receive a huge amount of clear profit is also baseless. This is because the stipulated amount that the insured receives cannot be considered as profit; it only provides their heirs with financial relief from potential difficulties later in life. It does not in any way add to wealth. By contrast, the money won by a gambler does increase the latter's wealth. For him, it is absolute profit.⁵⁶

Observations

After examining the views of both sides of the debate on the involvement of *ribā*, *gharar* and *qimār* in life insurance, the study has the following observations:

- **Firstly:** Scholars who object to life insurance do so because they define it according to its actions rather than its aims/intentions. The current researcher, however, strongly believes that intentions should be privileged over actions. As the Prophet (peace be upon him) says, “Deeds are judged by intentions.” Certainly, those who deny any link between life insurance and *ribā*, *gharar* and *qimār* base their argument on the intent behind life insurance (i.e. helping widows, orphans and other dependents from unexpected future material risks).
- **Secondly:** There should be a distinction made between literal/conceptual views of life insurance and more practical concerns. For example, the current author's Masters thesis, entitled ‘*Life Insurance in Islamic Law: A*

Comparative Study Between Shayrikat Takaful Malaysia Bhd and Takaful Ikhlas Sdn Bhd,’ identified several practical aspects of life insurance in which *ribā*, *gharar* and *qimār* do occur. These included investing money in unlawful products; accounting standards; lack of transparency; not sharing surplus; law of nomination; and cause of death.⁵⁷ The researcher affirms that, should there be any *ribā*, *gharar*, and *qimār* in life insurance, it will be in the above mentioned practical aspects, not in any conceptual dilemmas.

- **Thirdly:** It seems that the current Muslim debate surrounding life insurance is dominated by two ideological groups: orthodox Muslims and reformist Muslims. For the orthodox Muslims, “*Sharī‘ah* is still, as it has always been, divinely authoritative. To them, no code of conduct or even scale of values can be formulated by mere human reason: all necessity must be based on Divine Revelation.”⁵⁸ On the other hand, reform-minded Muslims seek to delineate an alternative to this traditionalist position. Proclaiming the need for Islamic reform, they respond to, rather than react against, the challenges of Western modernity. They blame the internal decline of Islam, with its accompanying loss of power and backwardness, to a blind and unquestioned following of the past. They argue that Islam is capable of demonstrating its dynamism, flexibility, and adaptability. They believe in internal reform through a process of reinterpretation and selective adoption of Western ideas and technology.⁵⁹ In this context, it is significant that there is no direct statement about life insurance in either the Qur’ān or *ḥadīth*. Orthodox ideology, and its maintenance that “*Sharī‘ah* is still, as it has always been, divinely authoritative,”⁶⁰ therefore does not apply in this instance. Rather, the dynamism, flexibility, and adaptability of the reformist approach is called for.⁶¹
- **Fourthly:** Some scholars have argued that conventional life insurance is declared void and unlawful because the contract involved is bilateral (i.e. a contract of exchange, *‘aqd mu‘āwadat*). In other words, they see it as a contract of indemnity in which the insurer agrees to indemnify the insured for a certain amount and the insured agrees to pay the premium for this indemnity. This, however, and as discussed, can entail *gharar* because of the uncertainty surrounding events mentioned in the contract.⁶² This study, however, maintains that life insurance should be viewed as a donation contract (*tabarru‘i*), in which the existence of *gharar* is tolerated. These contracts are unilateral in nature, the insurance company (or *takāful* operator) acting only as a manager.⁶³

Conclusion and Policy Recommendations

Given our discussion, the author concludes that, conceptually, there are no *ribā*, *gharar* or *qimār* in life insurance. However, in order for life insurance to be admissible in Islam, the study recommends the following:

1. All parties involved in a life insurance policy must agree that the policy is not for the purpose of material gain. Instead, it must be a means of securing financial assistance in the event of unexpected loss, damage or peril.
2. A participant's premium contributions should not be invested in unlawful/unethical activities and/or institutions.⁶⁴
3. Surplus premiums (i.e. money paid in excess of a participant's claims) should be repaid to participants. It should not be distributed to shareholders or the company.
4. There should be surrender benefits⁶⁵ in all types of life insurance. A portion of the PSA fund should also be repaid to participants.
5. There should be transparency between insurance companies and participants. Everything, such as profits, losses, income, expenses, and surpluses (if any), should be clear to both parties.
6. On the date of a policy's enforcement, all participants should receive a 'participation certificate' as proof of their involvement with the company.
7. The nominee of a life insurance policy should be treated as a mere trustee. He should receive all the benefits of a policy and redistribute them amongst the legal heirs of the deceased in accordance with the Islamic principles of the law of inheritance.⁶⁶
8. A participant's cause of death should not hinder an insurance company from honouring a policy. The beneficiary(s) should have the right to claim legitimate benefits from the operator of a life insurance policy, regardless of whether the death of the participant was by natural causes, suicide or a violent act while committing a crime.⁶⁷
9. Bilateral contracts should not be used for life insurance. To ensure the permissibility of life insurance in Islam, all actors involved in a life insurance policy should mutually agree to indemnify each other. The contract should be unilateral in nature. The insurance (or *takāful*) operator must act as a manager only.

Notes

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THE MAQASID OF ZAKAH AND AWQAF AND THEIR ROLES IN INCLUSIVE FINANCE

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Abstract: Financial inclusion refers to the providing of finance to the non-financeable segments of the population, who are traditionally denied financial services like banking and insurance facilities due to the absence of collaterals to substantiate their ‘bankability’. They are thus considered as ‘un-bankable’ by formal financial institutions. This ‘un-bankable’ segment of society is estimated to cover more than 2 billion adults - that is around one third of the world population, and over half of the world’s working adults - hindering them from growth, productivity, employment, and stability, compromising the peace and prosperity of society at large. Therefore, the primary aim of inclusive finance is to provide the ‘un-bankable’ with access to finance, to strengthen domestic resource mobilization and contribute to economic and social development. In recent years, only conventional and Islamic microfinance institutions (IsMFIs) have considered ‘inclusive finance’ - which includes various delivery channels, like credit unions, banks, insurance and also mobile operators. However, the Islamic institutions of *zakah* (compulsory alms) and *awqaf* (perpetual charities) were also ordained with the objectives (*maqasid*) of eradicating poverty, circulation of wealth, creating a stable and sustainable economy, and enhancing micro, small and large scale infrastructure for social and economic development. This paper attempts to identify the *maqasid* of these two traditional institutions of the Islamic economy and their potential roles in inclusive finance.

Keywords: *Zakah* and *awqaf* institutions, poverty alleviation, inclusive finance, sustainable economy, *maqasid* of *zakah* and *awqaf*.

Introduction

The problem of poverty is the greatest threat to development in many societies. There is still a large segment of people who struggle with poverty on a daily basis despite the presence of numerous microfinance institutions (MFIs). More than 2 billion adults around the globe, that is over half the world’s working adults, have yet to be covered by any financial service, due to their absence of proper collateral.¹ As such, they have been deprived of any financial assistance from formal financial institutions, like banks or insurances. This, along with poverty, has hindered many societies from development and progress. In the recent years,

themes like ‘inclusive finance’ have been adopted by development agencies and the microfinance sector to provide financial facilities to more than 2 billion adults of the ‘un-bankable’ segment, aiming to contribute to a more sustainable social and economic development agenda.

Contemporary Islamic economists have observed that the main contributors to poverty include, among other factors, the absence of justice, equality, fair treatment, as well as barriers to fulfilling basic needs.² Therefore, Islamic finance ought to share the responsibility of eradicating poverty while ensuring justice, equality, fairness, providing basic needs and generating wealth creation among its major principles. The institutions of *zakah* and *awqaf*, being among the most effective economic institutions contributing to society’s growth and development, are primarily aimed to address the above mentioned problems. However, these remain untapped in most Muslim majority nations. *Zakah* and *awqaf* are potential instruments not only for poverty alleviation, but also for creating a sustainable economic environment, answering the problems of food security, sanitation and healthcare services, safe drinking water, employment, and other contemporary challenges which are often addressed within the spheres of ‘financial inclusion.’

This paper attempts to identify the inherent objectives (*maqasid*) of the two institutions, so as to understand the real potentials of these institutions and fulfil those objectives in implementing projects based on *zakah* and *awqaf*, towards offering more resilient economic development programs for an inclusive finance agenda.

1. *Zakah* and *Awqaf*, and their Objectives (*maqasid*)

1.1. *Zakah*

Literally, the Arabic word ‘*zakah*’ means ‘growth,’ or ‘increase’. It also implies ‘purification,’³ ‘righteousness,’ or ‘justification’ as it has been used to denote these terms in the Qur’an.⁴ However, in Shari’ah terminology, *zakah* is “the determined share of wealth prescribed by God to be distributed among deserving categories”.⁵ Generally, it is understood as the monetary servitude (*ibadah*) prescribed by Allah for a Muslim who possesses wealth greater than a prescribed amount (known as *nisab*), for a complete lunar year. *Nisab* is the minimum criterion for the ‘zakatability’ of an item. Anyone who owns less than the *nisab* is exempted from paying *zakah*. Based on the Prophetic narrations, the *nisab* for different items are: 200 *dirhams* (equivalent to 595 grams) of silver, or 20 *dinar* (equivalent to 85 grams – of 24 karat quality) of gold, for gold, silver and items which fall under these categories, like cash, shares, or bonds. The *nisab* for animals and agricultural products vary according to the amount or quantity and quality of the products.⁶

Zakah is no doubt one of the most significant institutions of Islam. In early Islamic history *zakah* proved to be an extremely effective tool for poverty alleviation and inclusive finance. During the rule of Umar ibn al-Khattab between 13H to 22 H (634-644 CE) and the reign of Umar ibn Abd al-Aziz (r. 99-101 H./ 717-720 CE), the distribution of *zakah* was so successful that at one stage no one was qualified to receive *zakah*, due to the people's improved financial conditions. Umar ibn Abd al-Aziz then wrote to the governor of Egypt to use the *zakah* money in the construction of bridges and rest houses for travellers, in freeing slaves and in helping young men and women to get married.⁷

Despite tremendous success of poverty alleviation through *zakah* disbursement in early Islamic history, its immense potentials still remain untapped in the contemporary Muslim world. The current performance of *zakah* management in the Muslim world is quite poor, with a few exceptions. In many Muslim majority countries, there are no official authority responsible for the management of *zakah*.⁸ An Islamic Development Bank (IDB) report estimates that the current annual *zakah* collection is only around USD10 billion per annum. In reality, *zakah* could potentially generate at least USD 200 billion, implying that only 5% of total potential *zakah* is actually being collected throughout the Muslim world. This is only 0.15% of the OIC member countries' GDP, given the fact that the GDP of the OIC member countries is USD 6 trillion.⁹ These figures indicate that there is a need for a massive reform and revitalisation of the institution of *zakah*, which is undoubtedly an important tool for the development of inclusive finance and poverty eradication.

1.2. *Awqaf*

Awqaf (plural of *waqf*) are the non-obligatory philanthropic institutions of Islam and uphold very similar objectives to the institution of *zakah*. Literally, *waqf* means 'to uphold,' 'to pause,' 'to secure or confine' (*habs*), or 'to stop from moving forward.'¹⁰ In juridical terms, *waqf* refers to a property or asset (including cash) which is donated to the cause of Allah (referring to general welfare) and thus is prevented from being owned or sold; rather its extracted usufruct is utilised for the welfare of the community, and righteous or philanthropic activities. The *waqif* (one who donates an asset as *waqf*) may stipulate conditions for his *waqf*, as long as the conditions do not violate the limits of Shari'ah.

Although the term *waqf* does not appear even for a single instance in the Qur'an, its core idea and principle have been in practice since the time of the Prophet (pbuh) and the companions. When verse 92 of Surah Aal-i-'Imran (3:92) was revealed, urging the believers to spend what they love for the cause of Allah, the companions donated their most beloved properties for righteous and philanthropic activities, marking the initiation of *waqf* in Islamic history.¹¹ Ibn

Kathir (d. 1373), in his *Tafsir Ibn Kathir*, specifically mentioned the companion Abu Talha, who had a ‘water well’ (known as *bayruha*) facing the Prophet's mosque, from which people would often drink and make ablution. Upon hearing this verse from the Prophet (pbuh), he endowed it as *waqf*. Similarly, Umar ibn al-Khattab, who later became the second Caliph, went to the Prophet (pbuh) expressing his interest in donating a piece of land in Khaybar, the best of what he possessed. The Prophet (pbuh) suggested he render it as *waqf*. These imply that one of the core *maqasid* and teachings of *waqf* is to curb one's personal greed by sacrificing the best of what one possesses, in exchange for the satisfaction of Allah. Great companions like Abu Bakr, Umar, Uthman, Ali, Zubair, Sa'ad ibn Abi Waqqas, 'Amr ibn al-'As – may Allah be pleased with them all – among many others donated their properties as *waqf*. This implies that the practice of *waqf* was prevalent among the companions, and hence its status in Islamic law is undisputed.¹²

Awqaf institutions may comprise several types and can be aimed at different beneficiaries. They can be either religious or philanthropic. Religious *awqaf* include mosques, shrines, graveyards, Islamic educational institutions like *madrasahs*, etc. Philanthropic *awqaf* include the *waqf* of a property or asset for a specific philanthropic purpose, like medical aid, general education, inns, etc. Similarly, the beneficiaries of a *waqf* may be family members (*waqf ahli/dhurri*), or the general public.¹³

One of the fundamental characteristics of *waqf* is that it is a perpetual charity, unlike *zakah* which is an occasional or recurring charity. This is also reflected in another Prophetic *hadith*, when he (pbuh) mentioned that only three types of activities bring forth benefit for a person after his death: a) a continuous charity, b) knowledge which benefits others, and c) a child who prays for his deceased parents.¹⁴ Perpetuity of *waqf* renders it the characteristic of a sustainable development instrument, which is instrumental for poverty alleviation as well as inclusive finance.

1.3. The *Maqasid* of *Zakah* and *Awqaf*

The term *maqсад* (plural: *maqasid*) refers to “purpose, objective, principle, intent, goal, or end.”¹⁵ When referred to as the *maqasid al-Shari'ah*, the word denotes the purposes behind the rulings in the Shari'ah. There have been detailed discussions of this elsewhere, and thus this brief paper need not elaborate further.¹⁶ However, with relevance to the *maqasid* of *zakah* and *awqaf*, the objectives would fall under the specific category of the *maqasid al-mu'amalat* (objectives of financial transactions). Among the broad objectives which the Islamic law of financial transactions and contracts commonly upholds, Ibn 'Ashur (d. 1973) identified five such *maqasid*: circulation of wealth

(*rawaj* or *tadawul*), transparency (*wuduh*), preservation (*hifz*), durability and sustainability (*thubat*), and equity (*'adl*).¹⁷ Other objectives include transfer of ownership (*tamlik*), civilisational construct (*'imarah al-ard/ 'umran*), and lawful acquisition of wealth (*kasb*).¹⁸

Similarly, the institutions of *zakah* and *awqaf*, which play vital roles in the development of Muslim communities, whether in terms of education, health, infrastructure, or economics, do have certain *maqasid* behind their enactment in the Shari'ah. Among the major *maqasid* which *zakah* and *awqaf* institutions ought to uphold are the following:

1. One of the main objectives behind enacting charities in the Qur'an, including *zakah* and *awqaf*, is the purification of the heart by curbing selfishness and material greed. This is evident from Surah al-Taubah (9:103), which commands the Prophet (pbuh) to take alms (*sadaqat*) from the believers' wealth to purify and sanctify them. Besides, Surah Aal-i-'Imran (3:92) demands the believers spend on the path of Allah from the most beloved of their properties, which directly crushes one's desires for materialistic greed and avarice. Previous passages have mentioned how the companions understood the objectives of *awqaf* and donated their best possessions for the sake of Allah. These are in concordance with enriching one's spiritual life by training one to get rid of excess material means.
2. *Zakah* and *awqaf* as wealth (*mal*) in general are both deemed to be transferred from the rich to the poor. This creates circulation of wealth through transfer of ownership – serving the general *maqsad* of *rawaj*. An inherent objective behind circulation is to prevent the rich from becoming richer and the poor from becoming poorer, thus creating a balanced and equitable economy. This is also reflected in the Qur'anic verse of Surah al-Hashr (59:7). This verse also urges the believers to take proactive measures in reducing the gaps between the haves and have-nots and alleviate poverty in society, thereby demonstrating the direct roles of *zakah* and *awqaf* in inclusive finance.
3. In a number of verses (51: 19, and 70: 24-25), the Holy Qur'an mentions a distinct objective of *zakah*: that it is a 'right' of the poor and destitute. This stresses the Qur'anic emphasis on poverty alleviation through *zakah*. *Zakah* as an obligatory charity for the poor is undoubtedly an important tool for poverty eradication, which has been proven historically.
4. Another *maqsad* of *zakah* is that it confirms an individual as part of the greater Muslim community, as the verse 9:11 underlines. This also emphasises the significance of *zakah* as the most important financial

pillar of Islam. As a matter of fact, *zakah* contributes to building the Islamic identity of an individual, and constitutes a fundamental element of communal harmony and cooperation among Muslims.

5. *Awqaf* generally consists of real assets which are to be developed and turned into a productive asset so that benefits can be reaped on a perpetual basis. This means that the economic activities under *awqaf* programs should be sustainable, efficient, economically viable and profitable lest the principle asset is consumed and renders no benefit. Thus it complements the *maqsad* of permanence and sustainability (*thubāt*) in specific terms, and the *maqsad* of preservation of wealth (*hifz al-māl*) from a broader perspective.
6. *Awqaf* were originally meant for rendering undeveloped lands and assets to fruitful projects, thus fulfilling the *maqsad* of construction of civilisation (*i'mār al-ard*). Surah Hud (11:61) refers to *isti'mār* (civilisational construct) as a purpose behind the creation of human beings, thereby making humanity responsible for maintaining '*umran* (civilisation). *Awqaf* projects, such as hospitals, educational institutions, inns and rest houses, public parks, public facility spaces, and the like, are clear examples of *awqaf*'s contribution to the civilisational construct. Similarly, *zakah* has the potential to contribute to the development of '*umran* by influx of wealth to the economy, as was the case during the reign of Umar ibn Abd al-Aziz (mentioned earlier).
7. The verse in Surah al-Taubah (9:103) commanding the Prophet (pbuh) to collect *zakah* implies that *zakah* should be collected by the government or another responsible authority. The institution of *zakah* thus requires transparency, good governance, legal documentation, and creation of employment opportunities for many to serve in the *zakah* collection process. Similarly, *awqaf* institutions should be brought under proper management to maximise their utility. These purposes come in as secondary objectives (*maqasid tab'iyyah*) for the institutions of *zakah* and *awqaf*. Habib Ahmed suggests that the Muslim states and governments should strengthen their administration, legal and regulatory frameworks, and effective organizational structures in order to enhance the process of collection and distribution of *zakah* and *awqaf* for poverty alleviation purposes.¹⁹ Transparency, good governance, diligent administration and job creation are among the core tools for social inclusion. In fact, without these, social inclusion would remain impossible. These connect the immense potentials of *zakah* and *awqaf* with inclusive finance.

It may be suggested that the *maqasid* identified above can be fulfilled by implementing projects based on *zakah* and *awqaf*. Having said so, the *maqasid* of the two institutions are not confined to that which has been discussed above. The rest of this article will explore and expand further *maqasid* for *zakah* and *awqaf*.

2. Roles of *Zakah* and *Awqaf* in Inclusive Finance

‘Financial inclusion’ used to refer to providing financial services and facilities to the low-income segments of society, at a very affordable cost. Currently, around 73% of poor people do not have any formal banking or financial services, due to complex banking requirements, the distance from their place of abode to the banking facilities, or the excessive costs of opening a simple banking account.²⁰ In addition, more than 200 million formal small and medium sized enterprises (SMEs) in emerging markets lack access to finance.²¹ This hinders growth, productivity, employment, stability, and as such compromises peace, security and prosperity of the society at large. However, in the past decade, the term ‘financial inclusion’ has evolved into a four dimension framework, which includes: a) easy access to finance for all households and enterprises, b) sound institutions guided by prudential rules and regulations, c) financial and institutional sustainability, and d) competition between service providers to deliver alternative programmes to beneficiaries and customers.²²

The office of the United Nations Secretary-General’s Special Advocate for Inclusive Finance for Development (UNSGSA) in its mandate for inclusive finance, observes that financial inclusion aims to help people and communities meet their basic needs, such as safe housing and shelter, nutritious food, healthcare facilities, education and clean water facilities, and to promote financial institutions and businesses which provide them with these services.²³ Most of these services are generally covered under any typical *zakah* or *awqaf* project. *Zakah* and *awqaf* institutions aim to contribute to the development of society in all possible forms. Historically, significant educational institutions, healthcare services, mosques and other places of worship, rest houses or inns, huge arable lands producing fruits and agricultural products for beneficiaries, and many other poverty alleviation projects and inclusive finance tools were successfully established and administered from the proceeds of *zakah* and *awqaf*.²⁴ The Ottomans left behind a glorious example of *awqaf* for us. *Waqf* became a norm during Ottoman rule, so much so that even the non-Muslims endowed large amounts of property for the benefit of the entire society. To reflect its immense significance and the unparalleled central role it played in the Ottoman Empire, it would not be considered an exaggeration to say that a person would be born in a *waqf* house, sleep in a *waqf* cradle, eat and drink from *waqf* properties, read *waqf*

books, go to a *waqf* school, receive salaries from a *waqf* institution, and, when they died, be placed in a *waqf* coffin and buried in a *waqf* cemetery.²⁵ Such was the inclusive role which *waqf* played in society.

In our contemporary era too, and like the illustrious successes of the past, we find many inspiring results of *zakah* and *awqaf*-based programmes. For instance, the Selangor Zakah Council (Lembaga Zakat Selangor – LZS) in Malaysia, through its '*Zakat for Asnaf's Business*' programme, has set convincing examples of eradicating poverty. Its beneficiaries were given capital for investment in their small and medium-sized businesses, with continuous assistance and support from relevant stakeholders and regular monitoring. Thus, the beneficiaries were soon able to start their own entrepreneurship, bidding farewell to poverty.²⁶

Zakah and *awqaf*-based institutions may also replicate the ARI-AIM-Mydin Business Transformation model for a sustainable chain of business ventures. The Accounting Research Institute (ARI) of the Universiti Teknologi MARA (UiTM), Malaysia, together with Amanah Ikhtiar Malaysia (AIM) and Mydin Mohamad Holding Berhad initiated a poverty eradication model, whereby financing from AIM supported rural women in setting up a tailoring business. AIM also sponsored the building of a special workshop with ample sewing machines, tools, furniture, an office and an exhibition room for the *baju kurung* (local Malaysian ladies' dress) prepared by the beneficiaries. Mydin Mohamad Holding Berhad, a local supply chain hypermarket, supplied the raw materials to the beneficiaries and sold the produced *baju kurung* in their stores. Hence, Mydin played the important role of supplying raw materials and marketing the produced goods, completing the supply chain cycle. Since Mydin has its own reputation as an established hypermarket, marketing of the produced good is not a concern. As a retailer selling the produced goods, it has also guaranteed the sustainability of the entire model.²⁷ The success of this model prompted its replication both in the state of Terengganu, Malaysia, under the joint collaboration of ARI, Mydin Holdings and Yayasan DiRaja Sultan Mizan (YDSM), and in three distinct Malaysian cities.²⁸ The model is among the three Islamic economic transformation models initiated by ARI, which includes Islamic microfinance, Islamic social entrepreneurship and corporate *waqf*. No doubt it represents another success story of the *waqf*-based inclusive finance model.

An important factor differentiating inclusive finance from the institutions of *zakah* and *awqaf* is that the former is dependent on a financial system based primarily on interest (*riba*). By contrast, *zakah* and *awqaf* are totally interest-free, charitable institutions. The institutions of *zakah* and *awqaf* do not burden the client with any additional pressure to pay interest, but rather assist in coming out of that vicious process.

Interest hinders economic growth and social development in various ways. Finance based on interest creates debt, and debt creates instability in the economy. It also results in inequity in the distribution of income and wealth, which causes inefficient allocation of resources.²⁹ The frequently cited menace in the European debt crisis of “privatisation of profit and socialisation of loss” explains the enormous effects of debt on society and civilization. Debts, along with the interest and profits paid over the capital borrowed, causes inflation. National development declines due to less expenditure from the government. Similarly, there is a sharp decrease in national investment, since the wealth created is spent on huge unpaid debts.³⁰ Increased cost of living due to economic inflation increases distress among general people, and restricts their productive contributions to economic and social development. The effects of debts are undoubtedly alarming. Hence, an inclusive finance agenda based on debt or interest will not be successful. Alternatively, philanthropic institutions like *zakah* and *awqaf* have more potential for successful poverty alleviation. Financial inclusion in the conventional sense could be successful only if interest is eliminated while the financial service is rendered to facilitate the non-bankable segment.

Conclusions and Recommendations

Despite the active presence of a large number of poverty alleviation institutions around the globe, a vast number of people still live below the poverty line, and many do not have access to healthcare, sanitation, safe drinking water and basic nutrition. These issues are worsening with the current political and economic turmoil. Research shows that the major reasons behind the slow pace of poverty alleviation include: the high interest rates applied to the credit taken from conventional microfinance institutions (MFIs), low human development, and, most notably a lack of balance between spiritual life and material life.³¹ Many MFIs have been unsuccessful in transferring wealth to beneficiaries; rather their clients remain trapped within the cycle of debt and loan repayment, effectively excluding them from financial services.³²

Undoubtedly the bigger problem is the imposition of interest by conventional microfinance institutions and poverty alleviation programmes. Islamic microfinance institutions, however, may not impose interest. Nevertheless, the cost of profit can at times becomes burdensome for the client. Therefore, it is strongly argued here that the following policies should be considered for enhancing inclusive finance, especially by the Islamic financial tools of *zakah* and *awqaf*:

- Eradicate interest from poverty alleviation programmes. In fact, *zakah* and *awqaf* are two vital institutions which could play a decisive role in

this process. Although financial inclusion may be successful at rendering financial services to the un-bankable, because it is interest based it is not likely to ultimately serve any fruitful purpose, which *zakah* and *awqaf* institutions ought to.

- Offering employment opportunities to target group and beneficiaries, rather than providing cash loans – be it interest free (*qard hasan*) or otherwise. Employment would lessen the burden of loan repayments, and encourage the target group to work and develop skills.
- *Zakah* and *awqaf*-based projects would be instrumental in transferring ownership of assets to the target groups. This would accelerate poverty alleviation, while fulfilling the *maqasid* of the two institutions.

Notes

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THE STRUCTURAL DEVELOPMENT OF *ISTIṢNĀʿ* *ṢUKŪK* FROM A SHARĪʿAH PERSPECTIVE

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Abstract: *Istiṣnāʿ ṣukūk* structures have been widely accepted for manufacturing and construction financing purposes. This paper looks at the structural development of *Istiṣnāʿ Ṣukūk* and evaluates both its basic and combination structures. Concerning the former, the paper argues that when *Istiṣnāʿ* is used for asset purchasing exercises, it should strictly comply with the general Sharīʿah rules regarding *Istiṣnāʿ* contracts. Prices must therefore be stipulated at the beginning, as must quality and expected delivery times. The paper then highlights some conflicting features arising from the combination of *Istiṣnāʿ* and *Ijārah* transactions. These raise Sharīʿah issues when the issuer seeks to lease an asset to the end user at maturity, even though the asset has been transferred to that end user by way of the *Istiṣnāʿ* contract. It is therefore recommended that the market innovates in order to develop additional structures free from this type of impediment. The study proposes a 'multiple contract' structure be used whenever *Istiṣnāʿ ṣukūk* is issued in combination with other debt and equity instruments. This will help overcome Shari'ah issues related to secondary markets in *Istiṣnāʿ ṣukūk* issuances.

Keywords: *Istiṣnāʿ*; *Ṣukūk*; Structure; Sharīʿah

Introduction

Ṣukūk (Islamic bonds) are very sophisticated and have generated tremendous interest around the world. *Ṣukūk* represent a great evolution in domestic and global capital markets. It is the fastest growing sector in Islamic finance and is viewed by many as the most innovative product of Islamic finance. One of the most important features of *ṣukūk* is that they are backed by a true asset, making it possible for *ṣukūk*-based investment portfolios to produce returns that are interest-free. *Ṣukūk* issuance processes must follow Sharīʿah requirements and should not engage in unauthorised business practices. Furthermore, the transaction must fulfill the objectives (*maqāṣid*) of al-Sharīʿah. If any *ṣukūk* assets cease to be Sharīʿah compliant at any moment during the duration of the *ṣukūk*, those assets become invalid and all measures must be taken to remove them from the pool of assets. They may then be replaced with other Sharīʿah compliant assets.

Despite its popularity, *ṣukūk* are also controversial. This is because some argue that *ṣukūk* can be used to evade restrictions on usury (*ribā*). Under Islamic law, however, *ṣukūk* cannot be issued based on interest income and must be structured in a manner that rewards investors based on their exposure to business risk. Furthermore, *ṣukūk* portfolios should not, under any circumstances, contain non-*halāl* assets as income generators. *Istiṣnā'* *ṣukūk* are generally intended for construction and manufacturing purposes. Different types of *Istiṣnā'* structures are illustrated in this paper. The paper focuses on the structural development of *Istiṣnā'* *ṣukūk* and explores Sharī'ah issues related to structures presented in the paper.

Ṣukūk Definition

Ṣukūk (the plural of *Ṣakk*) refers to papers, securities, notes, or certificates with features of liquidity and tradability.¹ *Ṣukūk* can also be defined as a set of documents or certificates which represent the value of an asset.² This definition, however, has been criticised by some Islamic finance scholars for being incomplete and for not specifying other types of assets *ṣukūk* could represent. Thus, assets may also include financial assets, such as receivables and debt, as well as non-financial assets in the form of tangible assets, usufruct and services. The Securities Commission of Malaysia has also defined *ṣukūk* as certificates of equal value that evince the undivided ownership of, or investment in, assets using Sharī'ah principles and concepts endorsed by the SAC.³ Likewise, *ṣukūk* has been defined by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) as: "Certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or in the ownership of the assets of particular projects or special investment activit[ies]." This, however, is only true "after receipt of the values of the *ṣukūk*, the closing of subscription and the employment of funds received for the purpose for which the *ṣukūk* were issued."⁴ *Ṣukūk* under this definition represent tangible assets, usufruct, services and assets of particular projects or special investment activities.

Ṣukūk as applied to Capital Markets pertains to the process of securitisation. Securitisation is the financial engineering process associated with fixed or floating income securities, where payment of principal and profits are both derived from the cash flow generated by the indebtedness that the securities represent, or from the receivables or revenue derived from the pool of assets that underline the transaction in the issuances of the securities.⁵

Ṣukūk can be classified as either asset-based or asset-backed. Asset-based *ṣukūk* includes debt securitisation evincing indebtedness originating from the contracts of exchange of *bay' bi thaman ājil* (BBA), *murābaḥah* or *istiṣnā'*, each of which arise from the back-to-back sale of the issuer's assets.⁶ Such *ṣukūk*

give the holders the rights to the obligations attached to the indebtedness. It also includes financial *ijārah* contracts, through the sale and leaseback or lease of third party-held acquired assets, which come with purchase-option obligation (financial lease).⁷ Asset-based *šukūk* show the conversion of future Sharī‘ah compliant cash receivables arising from contracts such as *murābaḥah*, *bay‘ bi thaman ājil* and *istiṣnā’* into tradable debt instruments. In Malaysia, non-tangible assets in the form of receivables are accepted as the underlying asset for *šukūk* issuances, provided they are transacted on a cash basis (on the spot) to avoid *bay‘ kālī ‘bi al-kālī* (sale of debt for debt).⁸

Understanding Sharī‘ah

Sharī‘ah is a code of law derived from the Holy Qur‘an and the teachings and traditions of the Prophet Muḥammad, peace be upon him. Sharī‘ah not only regulates man's relation with Allah, but also provides Muslims with a legal code governing their everyday life. The Qur‘an states that Allah created and owns every single thing; the wealth of men is therefore only held in trust and must be handled in the way Allah desires. The manner in which this should be done is found in the Sharī‘ah. When any new financial issue arises, however, on which traditional Sharī‘ah rulings are unclear or silent, it is necessary to seek the legal opinion and interpretation of capable religious scholars (*Mujtahid* or *Muftī*). Each and every Islamic financial institution must therefore have a committee of Sharī‘ah experts who will evaluate all Sharī‘ah transactions and their validity, with all new Islamic financial products being either accepted or rejected according to the evaluation of this committee.⁹ It is important to note, however, that the legal interpretation of one *Mujtahid* might vary from another, depending on which rules of interpretation are being followed.

The Sharī‘ah prohibits Muslims from dealing in *ribā*, excessive risk, gambling and other such activities. Muslims are not, however, averse to earning legitimate profit, with Islam encouraging them to use their money in legitimate Islamic ventures, not just to keep it idle. Keeping this in mind, the main feature of *šukūk* in Islamic banking and finance is the prohibition of *ribā*, and where this is generally understood to mean, both usury and standard interest.¹⁰

The theoretical foundation of an Islamic financial system, where banking is the most developed part of that system, goes beyond the interaction of factors of production and economic behaviour. While the conventional financial system focuses primarily on economic and financial aspects of transactions, the Islamic system places equal emphasis on ethical, moral, social and religious issues in order to enhance the equality and fairness of the system for the good of society. Nevertheless, in an Islamic system the banks still perform the same function

as those in a conventional system – that is, they act as administrators of the economy's payments system and as financial intermediaries.¹¹

The most unique aspect of investment *ṣukūk* is Sharī'ah compliance; this aspect differentiates it from other, more conventional asset class investments. The Sharī'ah offers a detailed explanation of the Islamic concept of money and capital, the relationship between risk and profit, and the social duties of financial institutions and individuals with regards to *ṣukūk* structures.¹²

Istiṣnā' Ṣukūk

Istiṣnā' literally means "seeking construction." Technically, *istiṣnā'* is a construction contract which involves a contractor, a client and the property to be constructed.¹³ Shaykh Aḥmad al-Fahmī defines it as a contract of sale for a property to be constructed by the seller in line with specifications and a set price determined by the purchaser.¹⁴ This is mirrored by Ibn 'Ābidīn, who defines *istiṣnā'* as requesting labour from a manufacturer for the fabrication of a specific item, in a particular way.¹⁵ Al-Kāsānī likewise identifies *istiṣnā'* as a contract in which a person asks a manufacturer to manufacture goods from materials the person himself provides, for a specific cost and to parameters fixed by that person.¹⁶ Al-Babartī also defines *istiṣnā'* as a contract in which a person comes to the manufacturer and requests him to manufacture something by giving a description of it. The manufacturer in turn gives the client its price, which is paid after delivery, either in full or in part.¹⁷

Ḥanafī scholars have different opinions about whether *istiṣnā'* is *wa'd* (a promise to buy) or a sale contract, and whether the thing being sold is the labour itself or the manufactured item. Shaykh al-Ḥākim al-Marwazī, Saffār and Moḥammad ibn Salāmāh are all of the opinion that an *istiṣnā'* contract is initially merely a promise to buy; only after the completion of the item is the sale contract enforced.¹⁸ That means, however, that an *istiṣnā'* contract is not binding on the seller, entailing that he will not be compelled to execute the contract as stipulated. This is not, however, the view of all Ḥanafī scholars. Rather, the majority uphold the opinion that *istiṣnā'* is a contract of sale for an item (i.e. not for labour). Therefore, the contractor (or *ṣāni'*) is obliged to provide and complete the contract as stipulated.¹⁹ This means, however, that for Ḥanafīs an *al-istiṣnā'* contract is an exception to the prohibition of *bay' ma'dūm* (the sale of non-existent items).

Given the last point, the majority of Muslim scholars are of the opinion that *istiṣnā'* is actually impermissible. This is, for example, the opinion of Imām Mālik, Zufar, Shāfi'ī and Aḥmad. However, these scholars still allow it, provided that it is combined with either *salam* or *ijārah* contracts so that the rules of these latter two also become applicable to *istiṣnā'*.²⁰ Thus, whereas in a standard *istiṣnā'* contract

the buyer (*mustaṣniʿ*) would be required to bring his own equipment/materials and hire the *ṣāniʿ* to both manufacture the desired item (in the manner stipulated by the *mustaṣniʿ*) and identify the cost of the labour necessary to do so (and which could be paid either immediately or by installments), when combined with *ijārah* this contract becomes binding on both parties, with neither being able to nullify it without the consent of the other party.²¹ If done through a *salam* contract, the *mustaṣniʿ* would enter into a contract of sale with the *ṣāniʿ* to buy an item with the option of specifying some of the item's features and a stipulated expected time of delivery. In this case, the payment must be done immediately (although the Mālikī *madhhab* allows a delay in payment of not more than three days).²²

Nevertheless, those *jumhūr* who base their arguments on *qiyās* (analogical deduction) still maintain that *istiṣnāʿ* violates the Sharīʿah because, not only does it involve the sale of non-existent items, but also the prohibited selling of a deferred item for a deferred payment, also known as *bayʿ al-kālīʿ bi-al-kālīʿ* (selling of debt for debt). It also includes *gharar fāḥish* (excessive risk) in the sense that the *ṣāniʿ* engages in labour while being uncertain about whether the item to be produced will be delivered in the future, as stipulated.²³ Furthermore, the Prophet Muḥammad (peace be upon him) said, “You do not sell what you do not own.”²⁴

However, Imām al-Kāsānī has tried to maintain *istiṣnāʿ*'s permissibility based on preference (*istiḥsān*) – i.e. Muslims have engaged in *istiṣnāʿ* for a long time and the Prophet (peace be upon him) said, “The Islamic *ummah* will never have a consensus on a mistake.” People have been contracting through *istiṣnāʿ* from the time of the Prophet Muḥammad (peace be upon him) until today, without objection. It has been used in various ways, from building houses, to making slippers, clothes, containers, swords and other things. This widespread usage indicates the societal need for *istiṣnāʿ*. Prohibiting it would cause difficulty for people, which is contrary to Sharīʿah.²⁵ Allah said: “And he has not placed upon you in the religion any difficulty.”²⁶ Moreover, the Qurʾan relates the following episode from the life of Dhū al-Qarnayn:

Then he followed a way until he reached (a pass) between two mountains, he found beside them a people who could hardly understand his speech. They said: O Dhū al-Qarnayn, indeed Gog and Magog are great corrupters in the land. So may we assign for you expenditure so that you might make between us and them a barrier?²⁷

The people Dhū al-Qarnayn encountered therefore requested an *istiṣnāʿ*-based project for the building of a barrier between them and Gog and Magog. The Qurʾan nowhere objects to this contract – indeed, the mere fact it is mentioned in the Qurʾan suggests its permissibility.²⁸

Turning to *istiṣnāʿ ṣukūk*, these are certificates of equal value issued with the aim of mobilising funds for the production of goods that, once produced, are owned by the certificate holders.²⁹ *Istiṣnāʿ ṣukūk* can be used for financing the construction of houses, plants, bridges, roads and highways. The issuer of these *ṣukūk* is the manufacturer (supplier/seller), while the subscribers are the buyers of the intended product. The funds realised from the subscriptions are the cost of the product. The *ṣukūk* holders possess the product and are entitled to either the sale price of the certificates or the sale price of the product sold on the basis of a parallel *istiṣnāʿ*.

Istiṣnāʿ ṣukūk is also suitable for financial intermediation because the contractor may enter into a parallel *istiṣnāʿ* contract with a subcontractor. Thus, a financial institution may undertake the construction of a facility for a deferred price, but sub-contract the actual construction to a specialised firm. Sharīʿah prohibits the sale of these debt certificates to a third party at any price other than their face value. Except in Malaysia, where the Sharīʿah Advisory Committee of the Securities Commission has approved the practice, such certificates cannot be traded in the secondary market.³⁰

There are also some models of *istiṣnāʿ ṣukūk* in the Islamic Capital Markets. For example, Tabreed *Ṣukūk* is a five-year global corporate *ṣukūk* issued on behalf of the National Central Cooling Company of the United Arab Emirates to fund the construction of a cooling plant. The SPV issued the *ṣukūk* and raised USD 200 million. The issuer then, and on behalf of the investors, entered into an *istiṣnāʿ* agreement with Tabreed to construct the cooling plant. Payments to investors were scheduled periodically. Under the *istiṣnāʿ* agreement, Tabreed will pay a security amount of USD 1.25 million at least two days before the periodic payments start date, so as to secure its obligation under the *istiṣnāʿ* agreement. Therefore, if the plant is not completed, Tabreed will forfeit the security amount. However, upon completion the SPV will lease the plant to Tabreed, who will then start paying rent. The rent will then be used to pay the periodic payments to the *ṣukūk* holders.³¹ *Istiṣnāʿ ṣukūk* have been used almost exclusively to finance large scale construction and manufacturing projects like this.

The Basic *Istiṣnāʿ Ṣukūk* Structure

In the most basic *istiṣnāʿ ṣukūk* structure, the SPV sells an asset to the end user. The *ṣukūk* holders will therefore be holding receivables representing an asset due for delivery. This limits the tradability of the *ṣukūk* in the secondary market. Under AAOIFI rules, *istiṣnāʿ ṣukūk* may only be traded at par, as any discounting to the *ṣukūk* would transform the trading into *bayʿ al-dayn* (debt trading).

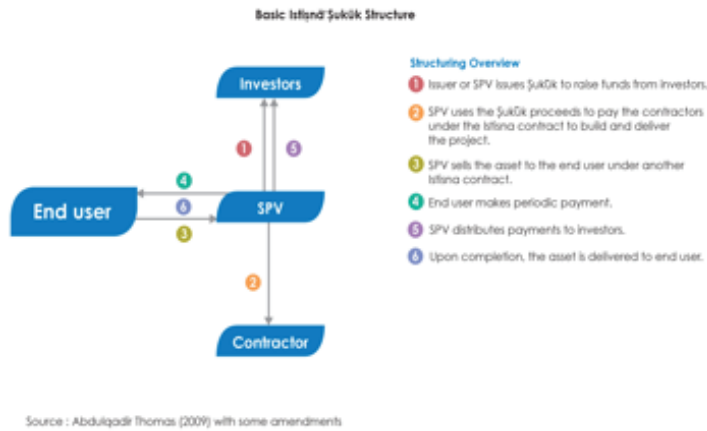


Figure 1.1 Illustration of Basic *Istiṣnāʿ Šukūk*

Istiṣnāʿ Šukūk and Bayʿ al-ʿīnah

In Malaysia, the structures of *istiṣnāʿ šukūk* also involves *bayʿ al-ʿīnah*. As such, instead of involving just two parties (the end user and contractor), the structure also involves a process of selling and buying back between the obligor and the SPV,³² as stipulated in the structure below:

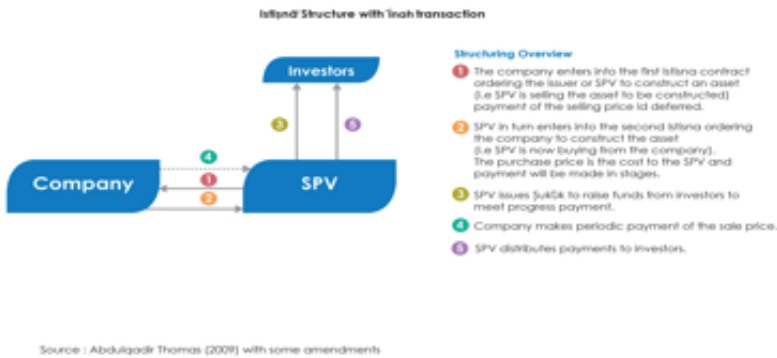


Figure 1.2 Illustration of *Istiṣnāʿ Šukūk* with *Bayʿ al-ʿīnah* Transaction

Istiṣnāʿ Šukūk combined with an Ijārah contract

The combination of *istiṣnāʿ šukūk* and *ijārah* occurs when the SPV acquires the asset to be constructed from the builder and then sells it on to the end user via another *istiṣnāʿ* contract. In some cases, the tenure of the second *istiṣnāʿ* is structured to match the contribution period. However, in cases involving large

amounts of money, the end user will be unable to settle the total selling price. In these instances, some banks will exit the *istiṣnā'* contract with the end user by entering into an *ijārah* contract instead. This structure is illustrated below:

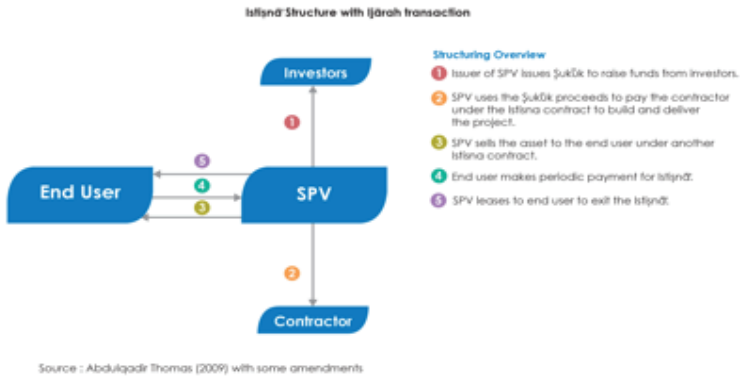


Figure 1.3 Illustration of *Istiṣnā'* *Ṣukūk* with *Ijārah* Transaction

This combination of *istiṣnā'* and *ijārah* displays some inconsistencies. For example, if the SPV has already sold the asset to the end user via *istiṣnā'*, it means the end user already owns the asset. Thus, it appears that the SPV is leasing the asset to a party that already owns it, the end user.

Other requirements needing consideration when combining *istiṣnā'* and forward leasing include the clarification of the assets' prices and specifications from the beginning. It is quite common for purchasers to split the purchase price (paid in advance) into staged payments that correspond to certain targets previously agreed upon with the contractor. Although it is not necessary to fix the time of delivery under *istiṣnā'*, the purchaser may fix a maximum time for delivery. This essentially means that, if the contractor delays delivery after the scheduled completion date, the purchaser will not be bound to accept the goods and pay the price.³³ In this regard, however, provisions for liquidated damages may be included in order to incentivise the contractor to deliver on schedule. Although not universally accepted, the majority of Sharī'ah scholars consider forward leasing permissible on the basis that advance rentals are taken into account (as rental which has been paid) and have to be refunded in full if the assets are not actually delivered for leasing. Such matters, however, must be carefully addressed in any documentation in order to ensure that the commercial deal is not disturbed. For example, careful calculation of any payments triggered by pre-delivery termination is necessary in order to ensure that the amount payable by the contractor is sufficient to cover the dissolution amount.³⁴

Conclusion and Recommendations

It is concluded that *istiṣnā' ṣukūk* is permissible if the *istiṣnā'* asset price is stipulated and its quality, expected time of delivery and related conditions are all specified. The most basic *istiṣnā' ṣukūk* structure requires that assets be sold to the end users, while the *ṣukūk* holders retain the receivables representing the asset due for delivery. This *ṣukūk* cannot be traded in the secondary market except at par because to do so would amount to the sale of debt, which is not accepted by many scholars. However, with the passing of *bay al-dayn* (sale of debt) legislation in Malaysia, *istiṣnā' ṣukūk* could be traded in the secondary markets in Malaysia.

This study has also found that *istiṣnā' ṣukūk* structures combined with *ijārah* transactions, where the SPV acquires an asset and sells it via another *istiṣnā'* contract with the end user, will result in an impossible settlement of total selling price within the anticipated time schedule. This is due to the huge amounts of money involved. This particular structure also has some conflicting features. For example, if the SPV has already sold the asset to the end user via *istiṣnā'*, it means the end user already owns the asset; the SPV cannot then lease the asset to the end user under any circumstances. The market should therefore adopt some alternative structures, including 'multiple contracts' that combine *istiṣnā'* with other equity-based instruments suitable for construction and project finance portfolios, and as illustrated by this structure:



The 'multiple contracts' structure proposed here could be an important alternative for construction and project finance. Although technically debt instruments, *Murabahah* and *Istiṣnā' ṣukūk* can be traded on secondary markets. However, according to Sharī'ah principles, money is a medium of exchange and not a commodity. Therefore, it can only be traded at par value and not for a profit. But, if *Murabahah* and *Istiṣnā' ṣukūk* were part of a larger portfolio comprising

more than 51% tangible assets, then the securitised certificates of that portfolio could be traded on secondary markets.

Notes

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MAHKAMAH SYARIAH DI MALAYSIA: KEMAJUAN DAN PENCAPAIAN¹

*Mohamed Azam Mohamed Adil**

Abstract: Malaysia's Shariah court system long predates the country's Independence in 1957 and has since undergone a series of developments. Yet the Shariah court's jurisdiction remains limited by the Parliament and the Federal Constitution. This limited jurisdiction has triggered an on-going conflict between Shariah courts and civil courts. This article discusses the jurisdiction of Shariah court prior to and after the landmark amendment inserting Article 121 (1A) into the Malaysian Federal Constitution. It also discusses the challenges faced by the Shariah courts within and outside the system. This article suggests that the present jurisdiction of the Shariah courts should be reviewed, and that the civil courts should not interfere with the jurisdiction that has been awarded to the Shariah courts, even if that jurisdiction is only implied. This article ends with a suggestion that a Special court should be set up to adjudicate cases pertaining to Islamic law but involving parties of different faiths.

Keywords: Shariah Court; Civil Court; conflict of jurisdictions; developments; achievements.

1. Pendahuluan

Mahkamah Syariah di Malaysia telah melalui beberapa perubahan semenjak pindaan Perkara 121 (1A) pada tahun 1988 dan penubuhan Jabatan Kehakiman Syariah Malaysia (JKSM) pada tahun 1998. Walaupun begitu, bidang kuasa jenayah Mahkamah Syariah masih tidak berubah semenjak pindaan terhadap Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (pindaan 1984) yang memberi bidang kuasa kepada Mahkamah Syariah menjatuhkan hukuman tiga tahun penjara, denda RM5,000.00 dan sebatan enam kali. Terdapat cadangan untuk meminda bidang kuasa ini oleh Menteri di Jabatan Perdana Menteri tetapi ia masih belum menjadi kenyataan sehingga artikel ini ditulis.²

Satu kajian menyeluruh telah dibuat oleh Institut Kefahaman Islam Malaysia (IKIM) dengan kerjasama Jabatan Perdana Menteri (JPM), JKSM, Jabatan Kemajuan Islam Malaysia (JAKIM), Universiti Islam Antarabangsa Malaysia

(IIUM), Jabatan Peguam Negara, dan beberapa agensi kerajaan lain. “Kajian Pemacuan Transformasi Sistem Perundangan Islam di Malaysia” (2010-2012) tersebut menyentuh kesemua aspek yang melibatkan perundangan Islam di Malaysia termasuk pelan tindakan transformasi Mahkamah Syariah.

Artikel ini menganalisa dan menilai kemajuan dan pencapaian Mahkamah Syariah sejak pindaan Perkara 121 (1A) Perlembagaan Persekutuan dan penubuhan JKSM pada tahun 1998. Kertas ini juga mencadangkan beberapa tindakan yang perlu diambil bagi melihat transformasi yang sedang diusahakan mencapai kejayaan.

2. Sejarah Undang-undang Islam di Malaysia

Kedatangan Islam ke Nusantara pada abad ke-13 dan Melaka pada abad ke-14 telah mengubah landskap perundangan yang banyak terpengaruh dengan adat. Hatta semasa kegemilangan kesultanan Melaka, undang-undang Islam bercampur adat Temenggong lalu membentuk apa yang dikenali sebagai Kanun Melaka.³

Undang-undang Melaka banyak merujuk kepada teks Abu Shuja' dan Fath al-Qarib yang ditulis oleh Ibn al-Qasim al-Ghazzi. Beberapa undang-undang Melaka yang termasyhur terdiri daripada Undang-Undang Melaka Asal, Undang-Undang Laut, Undang-Undang Keluarga Islam dan Undang-Undang Jualbeli dan Acara Islam. Undang-Undang Melaka juga telah mempengaruhi undang-undang negeri lain seperti Undang-Undang 99 Perak, Undang-Undang Johor, Undang-Undang Pahang dan lain-lain.⁴

Undang-undang Islam telah menjadi undang-undang utama di Tanah Melayu. Ini telah dibuktikan dalam *Shaikh Abdul Latif & Others lwn Shaikh Elias Bux*⁵ di mana mahkamah memutuskan bahawa undang-undang Islam yang diubahsuai dengan adat tempatan terpakai ke atas orang Islam. Pandangan yang sama juga diputuskan dalam kes *Ramah lwn Laton*⁶ di mana mahkamah semasa penjajahan Inggeris mengiktiraf undang-undang Islam sebagai undang-undang tempatan Tanah Melayu.

Namun begitu, hakikatnya undang-undang Islam tidak diberi tempat yang sewajarnya semasa penjajahan Inggeris. Undang-undang Inggeris secara perlahan-lahan telah diperkenalkan oleh Inggeris. Ini dapat dilihat dalam Kanun Jenayah, Enakmen Keterangan, Enakmen Kontrak, Kanun Acara Sivil, Kanun Acara Jenayah dan Kanun Tanah.⁷

Begitu juga, undang-undang Inggeris diterima pakai melalui keputusan-keputusan mahkamah. Ini kerana, dalam amalan *common law*, keputusan mahkamah yang lebih tinggi mengikat mahkamah bawahan dan keputusan sebelum mengikat keputusan mahkamah yang mendatang. Tambahan pula, hakim yang mendengar kes-kes adalah orang Inggeris, maka mereka sudah tentu

terpengaruh dengan undang-undang Inggeris. Ia juga menjadi rujukan mahkamah sekiranya tidak terdapat undang-undang bertulis. Ini dapat dilihat dalam beberapa kes seperti *Myriam lwn Ariff*⁸ yang mengenepikan keputusan Mahkamah Syariah yang mengikut hukum Syarak yang memberi hak penjagaan anak kepada bapa. Mahkamah Tinggi memberi alasan ia mempunyai bidang kuasa dan apabila pertindihan bidang kuasa berlaku antara Mahkamah Syariah dan Mahkamah Tinggi Sivil, maka Mahkamah Sivil mempunyai bidang kuasa. Keputusan dalam kes *Ainan lwn Syed Abu Bakar*⁹ juga dengan jelas mengenepikan undang-undang Islam mengenai persoalan anak sah taraf dengan merujuk kepada seksyen 121 Akta Keterangan.

3. Sejarah Penubuhan Mahkamah Syariah

Dari segi sejarah, Mahkamah Syariah di Malaysia wujud semenjak sebelum merdeka. Ia terdiri daripada Mahkamah Kadi Besar dan Mahkamah Kadi. Kes-kes rayuan didengar di Mahkamah Jawatankuasa Ulang Bicara. Kadi-kadi dilantik oleh Sultan/Raja masing-masing. Kedudukan ini berkekalan sehingga pada tahun 1980an Mahkamah Syariah telah dipisahkan dari Jabatan Agama Islam. Pada tahun 1990an, kedudukan Mahkamah Syariah telah dipertingkat dengan penstrukturan semula hierarki mahkamah dan penamaan semula nama mahkamah. Mahkamah Syariah terdiri dari Mahkamah Rendah Syariah, Mahkamah Tinggi Syariah dan Mahkamah Rayuan Syariah.¹⁰

Sebagai contohnya, Akta Pentadbiran Undang-Undang Islam (Wilayah Persekutuan) 1993 memperkenalkan struktur baru yang berkonsepkan *three-tier hierarchy* di mana ketiga-tiga hierarki Mahkamah Syariah mempunyai bidang kuasa masing-masing yang meliputi:

- i. Mahkamah Rendah Syariah yang mempunyai bidang kuasa sivil dan jenayah;
- ii. Mahkamah Tinggi Syariah yang mempunyai bidang kuasa asal dan juga rayuan; dan
- iii. Mahkamah Rayuan Syariah yang merupakan Mahkamah Tertinggi.¹¹

Dengan perubahan hierarki dan struktur Mahkamah Syariah, nama jawatan juga ditukar. Mahkamah Syariah diketuai oleh Ketua Hakim Syar'ie yang dibantu oleh hakim-hakim mahkamah Tinggi dan Rendah. Perlantikan hakim-hakim Syar'ie dilantik oleh Sultan/Raja. Perlantikan hakim Mahkamah Rendah dibuat melalui proses biasa di bawah skim perkhidmatan awam atas cadangan Ketua Hakim Syar'ie. Hakim-hakim Mahkamah Tinggi juga dilantik oleh Sultan/Raja atas perakuan Ketua Hakim Syar'ie. Hakim-hakim Mahkamah Rayuan Syariah

pula terdiri daripada seorang pengerusi dan beberapa hakim yang dilantik dari kalangan Hakim Rayuan JKSM dan yang bukan berjawatan hakiki untuk menganggotai panel rayuan.¹²

Penubuhan JKSM pada tahun 1998 bertujuan antara lain mempersekutukan perkhidmatan Mahkamah Syariah seluruh negara dengan mengambil kira struktur organisasi, kuasa dan pencapaian. Ia meliputi bidang tugas pegawai Syariah, beban tugas dan tanggungan Kerajaan Persekutuan dan Negeri serta kemudahan yang dinikmati oleh Pegawai Syariah.

Perkara lain yang menyebabkan tertubuhnya JKSM ialah kerana kewujudan masalah ketidakseragaman keputusan Mahkamah Syariah kerana terdapat perbezaan peruntukan dalam Enakmen Pentadbiran Agama Islam dan tatacara pelantikan hakim-hakim Mahkamah Rendah Syariah, Mahkamah Tinggi Syariah dan Mahkamah Rayuan Syariah serta kekurangan hakim di Mahkamah Syariah seluruh negara yang menyebabkan banyak kes tertunggak.¹³

4. Bidang Kuasa Mahkamah Syariah - Terhad, Tersurat dan Tersirat¹⁴

Salah satu persoalan besar dalam Mahkamah Syariah ialah bidang kuasa yang terhad yang diberi oleh Parlimen dan Perlembagaan Persekutuan. Ini kerana Jadual Kesembilan, Senarai II Senarai Negeri Perlembagaan Persekutuan menghadkan bidang kuasa Mahkamah Syariah ke atas mereka yang menganut agama Islam dan setakat mana yang diberi oleh undang-undang Persekutuan yang meliputi undang-undang diri dan keluarga, termasuk mengenai perwarisan, wakaf, zakat, Baitulmal, masjid dan tempat sembahyang bagi orang Islam, dan pengwujudan dan penghukuman kesalahan yang dilakukan oleh orang Islam terhadap perintah agama tersebut. Dari segi hukuman pula, Akta Mahkamah Syariah (Bidang kuasa Jenayah) 1965 (Pindaan 1984) memperuntukkan bidang kuasa jenayah Mahkamah Syariah hanya terhad kepada tiga tahun penjara; denda RM5,000.00 dan enam kali sebatan. Bidang kuasa ini lebih rendah dari Mahkamah Sesiyen dan Mahkamah Majistret yang disifatkan dalam Perlembagaan sebagai “mahkamah bawahan” (inferior courts).

Malah sebelum tahun 1988, terdapat kes-kes yang berkaitan dengan undang-undang Islam yang diadili di Mahkamah Sivil. Ini menimbulkan masalah kerana hakim Mahkamah Sivil tidak mempunyai latar belakang Syariah dan undang-undang Islam.

Satu pindaan Perlembagaan telah dibuat pada tahun 1988 di mana Perkara 121 telah dipinda dengan memasukkan (1A). Tujuan sebenar Parlimen berbuat demikian adalah untuk memastikan tiada campur tangan Mahkamah Sivil ke atas kes-kes yang bidang kuasanya dianugerahkan ke atas Mahkamah Syariah

seperti yang diperuntukkan dalam Jadual Kesembilan Senarai II Senarai Negeri, Perlembagaan Persekutuan.¹⁵ Namun, realitinya Mahkamah Sivil masih “bertegas” untuk mendengar kes-kes yang melibatkan undang-undang Islam. Sehingga pada tahun 1992 dalam kes *Mohamed Habibullah bin Mahmood lwn Faridah bt. Dato’ Talib*¹⁶, di mana Mahkamah Persekutuan memutuskan bahawa Mahkamah Sivil tidak mempunyai bidang kuasa yang diperuntukkan kepada Mahkamah Syariah. Ini diikuti oleh kes *Soon Singh a/l Bikar Singh lwn PERKIM, Kedah*¹⁷ di mana Mahkamah Persekutuan memutuskan bahawa Mahkamah Syariah mempunyai bidang kuasa membuat keputusan keluar dari agama Islam walaupun tiada peruntukan tersurat mengenai perkara itu. Memadailah dengan menganggap bidang kuasa terhadap kes murtad dimiliki oleh Mahkamah Syariah secara tersirat, berdasarkan peruntukan perlembagaan.

Namun, pertelingkahan dan pertindihan bidang kuasa antara Mahkamah Sivil dan Mahkamah Syariah tidak berhenti. Beberapa kes jelas menunjukkan bahawa ada kecenderungan hakim Mahkamah Sivil yang masih tidak dapat menerima hakikat pindaan Perkara 121 (1A) yang mengeluarkan bidang kuasa Mahkamah Sivil dari mendengar kes yang berkaitan dengan undang-undang Islam. Persoalan timbul sama ada sesuatu peruntukan bidang kuasa itu diberikan kepada Mahkamah Syariah adalah secara tersurat atau tersirat. Apa yang menimbulkan khilaf ialah sama ada bidang kuasa mahkamah Syariah perlu diberi oleh enakmen negeri secara langsung dan tersurat, contohnya melalui Enakmen Pentadbiran Undang-Undang Islam, atau bolehkan bidang kuasa dianggap tersirat bagi mahkamah Syariah semata-mata kerana perlembagaan memberikan peruntukan bidang-bidang tertentu bagi kerajaan negeri meskipun enakmen negeri tidak memberi peruntukan.

Pendekatan pertama: bidang kuasa perlu dikurniakan secara tersurat

Menurut pendekatan ini, Mahkamah Syariah hanya memiliki bidang kuasa jika bidang kuasa tersebut dikurniakan secara tersurat oleh Enakmen Negeri, meskipun perlembagaan (Jadual Kesembilan, Senarai II—Senarai Negeri) jelas menyenaraikan bidang-bidang tertentu seperti perundangan Islam, sebagai tertakluk di bawah kuasa kerajaan negeri. Ini kerana senarai tersebut hanyalah sekadar *senarai* yang memberi kuasan dan keizinan kepada kerajaan negeri untuk menggubal undang-undang antara lain bagi mengurniakan bidang kuasa kepada Mahkamah Syariah secara *tersurat*. Jika kerajaan negeri gagal mengurniakan bidang kuasa melalui undang-undang yang berkenaan, maka Mahkamah Syariah dianggap tidak memiliki bidang kuasa.

Pendekatan ini dapat dilihat dalam kes *Ng Wan Chan lwn Majlis Agama Islam Wilayah Persekutuan dan satu lagi*¹⁸ di mana pertikaian timbul antara balu si mati dan Majlis Agama Islam sama ada si mati semasa meninggal dunia

adalah seorang Buddha atau Islam. Si balu memohon supaya Mahkamah Tinggi mengeluarkan injunksi *interlocutory* supaya mayat suaminya tidak diserahkan kepada Majlis. Majlis kemudiannya mempertikaikan bidang kuasa Mahkamah Tinggi kerana pada pandangan Majlis, kes ini terletak di bawah bidang kuasa Mahkamah Syariah Kuala Lumpur. Mahkamah Tinggi berpendapat seksyen 45(2) dan (3) Enakmen Pentadbiran Hukum Syarak 1952 Negeri Selangor yang terpakai ke atas Wilayah Persekutuan tidak memperuntukkan bidang kuasa kepada Mahkamah Syariah dalam memutuskan seseorang itu seorang Islam atau tidak semasa kematiannya. Hakim Eusoff Chin berkata:

“Sekiranya undang-undang negeri tidak menganugerahkan kepada Mahkamah Syariah sebarang bidang kuasa untuk menangani sesuatu perkara seperti yang tersenarai di bawah Senarai Negeri, Mahkamah Syariah terkeluar dari mengendalikan perkara tersebut. Bidang kuasa tidak dimiliki secara tersirat”.¹⁹

Justeru itu, Mahkamah Tinggi Sivil mempunyai bidang kuasa untuk membuat keputusan. Mahkamah Tinggi memutuskan bahawa keterangan yang diberi membuktikan bahawa perbuatan si mati semasa hayatnya tidak mengikut ajaran Islam, maka si mati bukanlah seorang Islam semasa kematiannya.

Pendekatan yang sama juga diambil dalam kes *Lim Chan Seng lwn Pengarah Jabatan Agama Islam, Pulau Pinang & Satu Lagi*²⁰ di mana dalam kes ini Mahkamah Tinggi Pulau Pinang menerima pandangan bahawa persoalan mengenai penentuan akidah seseorang Islam adalah terletak di bawah Bahagian 1 Senarai Negeri, Jadual Kesembilan, Perlembagaan Persekutuan. Walau bagaimanapun, Hakim Dato’ Abdul Hamid Mohamad (ketika itu) memutuskan bahawa Mahkamah Sivil merupakan mahkamah yang kompeten untuk mendengar kes permohonan murtad memandangkan bahawa tidak terdapat peruntukan yang nyata dalam Enakmen Negeri Pulau Pinang yang memberi kuasa kepada Mahkamah Syariah untuk berbuat demikian.²¹

Ini juga dapat dilihat dalam kes *Shaik Zolkaffly Shaik Natar & Lain-lain lwn Majlis Agama Islam Pulau Pinang*,²² pandangan yang sama juga diambil oleh hakim yakni apabila terdapatnya pertikaian bidang kuasa Mahkamah Tinggi, persoalan pokok bukan sama ada Mahkamah Tinggi mempunyai bidang kuasa tetapi sama ada bidang kuasa itu terletak ke atas tangan Mahkamah Syariah. Bidang kuasa Mahkamah Syariah diberi oleh undang-undang negeri tetapi sekiranya undang-undang negeri tidak menganugerah Mahkamah Syariah bidang kuasa yang tersenarai di bawah Senarai Negeri, maka Mahkamah Syariah tidak mempunyai bidang kuasa tersebut di bawah Senarai Negeri. Dan bidang kuasa itu tidak boleh diambil melalui pendekatan tersirat sahaja.

Perlunya bidang kuasa diberikan secara tersurat dapat juga dilihat dalam kes *Latifah Mat Zin lwn Rosmawati Sharibun & Satu Lagi*²³ di mana Mahkamah Persekutuan berpendapat bahawa Mahkamah Syariah telah terkhilaf dalam kes *Jumaaton dan Satu Lagi v Raja Hizaruddin*,²⁴ bahawa ia isu yang dibawa kepadanya melibatkan probet dan pentadbiran. Walaupun Mahkamah Syariah betul mengatakan probet dan pentadbiran adalah di luar bidang kuasanya yang terletak ke atas Mahkamah Sivil persoalan yang dibawa ke Mahkamah Syariah oleh pemohon ketiga ialah waris-waris berhak kepada bahagian mereka masing-masing menurut faraid merupakan satu persoalan undang-undang Islam yang jelas terletak di bawah bidang kuasa Mahkamah Syariah. Mahkamah Persekutuan menambah lagi bahawa adalah tidak betul bagi Mahkamah Syariah mengambil pendekatan bahawa ia tidak mempunyai bidang kuasa disebabkan probet dan pentadbiran termasuk dalam bidang kuasa Mahkamah Sivil kerana persoalan faraid jelas di bawah bidang kuasa Mahkamah Syariah.²⁵

Dalam kes *Abdul Kahar Ahmad lwn Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Yang Lain-lain (Pencelah-pencelah)*²⁶ diputuskan bahawa sebelum bidang kuasa Mahkamah Sivil boleh disingkirkan, ia hendaklah terlebih dahulu hendaklah ditunjukkan bahawa Mahkamah Syariah mempunyai bidang kuasa terhadap perkara yang dipertikaikan iaitu Enakmen Kesalahan Jenayah Syariah Selangor 1995. Walaupun begitu, hanya Mahkamah Sivil yang mempunyai bidang kuasa untuk memutuskan persoalan sama ada peruntukan yang dicabar berada di bawah kuasa Dewan Undangan Negeri (DUN) atau tidak dan sama ada ianya sah ataupun tidak. Mahkamah Syariah tidak mempunyai bidang kuasa berbuat demikian.

Ini juga disahkan dalam kes *Sulaiman Takrib lwn Kerajaan Negeri Terengganu; Kerajaan Malaysia (Pencelah) & Kes-kes Lain*.²⁷ Perayu memohon agar seksyen 10 & 14 Enakmen Kesalahan Jenayah Syariah (Takzir) Terengganu 2001 dan seksyen 51 Enakmen Pentadbiran Hal Ehwal Agama Islam Terengganu 2001 diisytiharkan batal dan tidak sah atas alasan tidak berperlembagaan. Mahkamah Persekutuan memutuskan bahawa peruntukan tersebut diberi kepada bidang kuasa negeri dan Mahkamah Syariah mempunyai bidang kuasa. Justeru itu, kesalahan itu boleh dibicara di Mahkamah Syariah.

Rosli Dahlan & Fawza Sabila Faudzi berpandangan bahawa, Mahkamah Sivil mempunyai bidang kuasa untuk menentukan apakah perkara ditimbulkan dalam mahkamah itu terletak di bawah bidang kuasa Mahkamah Sivil atau Mahkamah Syariah, hanya Mahkamah Sivil yang mempunyai kuasa menentukannya meskipun ia melibatkan undang-undang Islam. Persoalan pokoknya ialah, apakah bidang kuasa itu disebut dan dianugerahkan dalam enakmen negeri. Sekiranya isu undang-undang Islam itu diperuntukkan dalam sesuatu enakmen negeri, maka Mahkamah Sivil mempunyai bidang kuasa membicarakan kes tersebut.²⁸

Pendekatan kedua: bidang kuasa dimiliki secara tersirat berdasarkan peruntukan perlembagaan

Pendekatan ini tidak mengkehendaki Mahkamah Syariah diberi bidang kuasa secara jelas atau nyata. Ia memadai walaupun Negeri tidak memperuntukkan peruntukan secara jelas/tersurat dalam perkara tersebut. Apa yang perlu hanya dengan peruntukan secara tersirat. Sebab utama pendekatan ini diambil ialah perkataan ‘bidang kuasa’ dalam Perkara 121 (1A) Perlembagaan Persekutuan “merujuk kepada bidang kuasa yang lebih luas seperti mana yang diperuntukkan dalam Jadual Kesembilan, Senarai II - Senarai Negeri, Butiran I. Di bawah kategori ini, bidang kuasa tersebut dianugerahkan kepada Mahkamah Syariah meskipun tidak dinyatakan secara tersurat”.²⁹

Pendekatan ini dapat juga dilihat dalam kes *Dalip Kaur lwn Pegawai Polis Daerah Bukit Mertajam & Anor*.³⁰ Mahkamah Agung menolak rayuan ibu simati bahawa anaknya seorang bukan Islam semasa meninggal dunia. Perayu mendakwa bahawa anaknya semasa hayat setelah memeluk agama Islam, telah keluar Islam dengan kembali kepada agama Singh. Mahkamah Agung mengarahkan agar kes ini diserahkan kembali ke Mahkamah Tinggi kerana beberapa persoalan undang-undang Islam ditimbulkan. Penentuan sama ada seseorang itu telah keluar Islam (murtad) hendaklah ditentukan oleh Mahkamah Syariah. Oleh kerana tiada penentuan telah dibuat bahawa simati bukan Islam semasa kematiannya, maka dianggap seorang Islam. Mahkamah Agung memutuskan bahawa hanya Mahkamah Syariah yang mempunyai bidang kuasa menentukan sama ada seseorang itu masih lagi seorang Islam atau tidak.

Pendekatan yang sama juga diambil dalam kes *Md Hakim Lee lwn MAIWP*³¹ yang merujuk kepada kes *Dalip Kaur lwn Pegawai Polis Daerah Bukit Mertajam & Yang Lain*³² di mana perayu yang memeluk agama Islam dan kemudiannya membuat pengisytiharan *deed poll* dan deklarasi undang-undang bahawa beliau bukan lagi seorang Islam mengikut peruntukan Perkara 11 (1) Perlembagaan Persekutuan yang menjamin kebebasan beragama. Persoalan timbul sama ada Mahkamah Sivil mempunyai bidang kuasa mendengar kes murtad. Diputuskan bahawa Mahkamah Sivil tidak mempunyai bidang kuasa mengenai murtad dan hanya Mahkamah Syariah yang mempunyai bidang kuasa ini walaupun tiada peruntukan jelas dalam Enakmen Negeri.

Dalam kes *Soon Singh lwn PERKIM*,³³ Mahkamah Persekutuan memutuskan bahawa Mahkamah Sivil tidak mempunyai bidang kuasa mendengar permohonan deklarasi murtad. Hanya Mahkamah Syariah mempunyai bidang kuasa bagi menentukan sama ada seseorang itu telah murtad atau tidak. Pihak perayu, semasa di peringkat Mahkamah Tinggi telah memohon satu deklarasi bahawa beliau bukan lagi seorang Islam. Beliau mempertikaan bidang kuasa Mahkamah Syariah mendengar kes ini kerana tiada peruntukan secara nyata dan jelas dalam

Enakmen Pentadbiran Agama Islam Kedah 1962. Mahkamah Persekutuan memutuskan bahawa bidang kuasa ini diserahkan kepa Mahkamah Syariah walaupun tiada peruntukan dalam Enakmen Negeri. Justeru itu, Mahkamah Syariah mempunyai bidang kuasa secara tersirat kerana kalaulah bidang kuasa masuk Islam diletakkan di bawah Mahkamah Syariah, secara tersirat jugalah keluar Islam diletakkan di bawah Mahkamah Syariah.

Tetapi keputusan kes *Soon Singh* tidak dapat menyelesaikan masalah pertindihan bidang kuasa antara Mahkamah Sivil dan Mahkamah Syariah. Memang betul perkara ini terletak di bawah bidang kuasa Mahkamah Syariah tetapi kalau melibatkan pihak yang bukan Islam, Mahkamah mana mereka akan pergi kalau tidak ke Mahkamah Sivil? Ini adalah kerana, bidang kuasa Mahkamah Syariah hanya diberikan kepada orang yang menganut agama Islam sahaja.³⁴ Situasi ini dapat dilihat dalam kes *Dalip Kaur lwn Pegawai Polis Daerah Bukit Mertajam & Anor*,³⁵ *Ng Wan Chan lwn Majlis Agama Islam Wilayah Persekutuan dan satu lagi*,³⁶ *Kaliammal Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain*³⁷ dan *A Rayapan*³⁸ di mana pihak-pihak yang terlibat adalah orang bukan Islam.

Dalam kes *Tongiah Jumali & Anor lwn Kerajaan Negeri Johor & Ors*,³⁹ Mahkamah memutuskan bahawa Mahkamah Syariah merupakan Mahkamah yang kompeten untuk mengendalikan kes yang melibatkan penentuan keluar Islam walaupun peruntukan sedemikian tidak diperuntukkan secara tersirat dan nyata dalam Enakmen Pentadbiran Undang-undang Islam Johor 1978. Malah, melihat kepada Perkara 121 (1A) Perlembagaan Persekutuan, Mahkamah Sivil tidak mempunyai bidang kuasa untuk mendengar kes permohonan keluar Islam kerana kuasa demikian dan bidang kuasa untuk berbuat demikian terletak ke atas Mahkamah Syariah.

Dalam kes *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan & Anor*⁴⁰ di mana pihak plaintif telah memohon untuk menukar namanya dari Islam kepada bukan Islam dalam kad pengenalnya. Alasan yang dikemukakan oleh plaintif ialah hak kebebasan beragama seperti yang termaktub dalam Perkara 11(1), Perlembagaan Persekutuan. Walau bagaimanapun, Hakim Faiza Tamby menolak permohonan plaintif berdasarkan dua peruntukan lain dalam Perlembagaan Persekutuan. Menurut Hakim, hak kebebasan beragama seperti yang diperuntukkan dalam Perkara 11(1) tidak boleh dibaca berasingan dengan Perkara 3(1) yang memperuntukkan agama Islam sebagai agama Persekutuan. Mengambil kira peruntukan tersebut, kedudukan agama Islam tidak sama dengan kedudukan agama-agama lain kerana agama Islam diletakkan di atas satu tempat yang utama dan dominan dalam Persekutuan.⁴¹ Oleh kerana plaintif semasa membuat permohonan tersebut masih lagi seorang Islam, dengan mengguna pakai Perkara 160 (2) Perlembagaan Persekutuan, plaintif tidak dibenarkan sama

sekali meninggalkan agama Islam. Justeru itu, permohonan menukar nama dari nama Islam kepada nama bukan Islam tidak boleh dilakukan selagi mana plaintiff seorang Melayu. Hakim yang bijaksana, bagaimanapun berkata bahawa beliau tidak membuat sebarang keputusan berkaitan keputusan pihak plaintiff untuk meninggalkan Islam, kerana forum yang layak untuk berbuat demikian adalah Mahkamah Syariah.

Tidak puas hati dengan keputusan Hakim Dato' Faiza Thamby, Azlina Jelani merayu ke Mahkamah Rayuan. Mahkamah Rayuan memutuskan bahawa perayu bebas untuk menganut agama kehendaknya, namun bagi seseorang Islam yang mahu keluar dari agama Islam (murtad), permohonan untuk mendapat perisytiharan hendaklah terlebih dahulu dibuat di Mahkamah Syariah. Ini kerana, Mahkamah Syariah merupakan platform yang sebenar dan Mahkamah Sivil tidak mempunyai bidang kuasa tersebut dengan pindaan Perkara 121 (1A) Perlembagaan Persekutuan pada tahun 1988. Selagi mana Mahkamah Syariah tidak membuat sebarang perisytiharan bahawa seseorang itu bukan lagi seorang Islam, maka orang tersebut hendaklah dianggap sebagai seorang Islam sehingga dia meninggal dunia.

Beliau merayu ke Mahkamah Persekutuan dan menamakan Majlis Agama Islam Wilayah Persekutuan dan JPN sebagai responden-responden. Mahkamah Persekutuan dalam keputusan majoriti 2-1 menolak rayuan terakhir beliau. Mahkamah Persekutuan memutuskan bahawa perkara yang berkaitan dengan keluar Islam (murtad) terletak secara mutlak ke atas Mahkamah Syariah walaupun secara tidak langsung (tersirat). Mahkamah Persekutuan menambah bahawa dengan adanya pindaan terhadap Perkara 121 (1A) Perlembagaan Persekutuan, Mahkamah Sivil tidak mempunyai kuasa dalam perkara yang berkaitan murtad. Mahkamah Persekutuan juga berpendapat bahawa keputusan *Soon Singh*⁴² adalah tepat.

Nampaknya permasalahan pertindihan bidang kuasa belum menampakkan penyelesaian. Ia tidak boleh diselesaikan oleh mahkamah sama ada Mahkamah Sivil ataupun Mahkamah Syariah. Yang boleh menyelesaikan permasalahan ini ialah Parlimen dan Dewan Undangan Negeri. Tun Abdul Hamid Mohamad pernah menyarankan dua pandangan: pertama, apabila terdapat persoalan Syariah dalam kes di Mahkamah Sivil, hakim Mahkamah Sivil hendaklah bersidang dengan hakim Mahkamah Syariah. Kedua, Menyatukan kedua-dua Mahkamah ini. Mungkin satu pendekatan pentadbiran dengan penubuhan Mahkamah Khas seperti mana Mahkamah Muamalat dengan melibatkan kedua-dua hakim Mahkamah Sivil dan Syariah, dapat mengurangkan pertindihan bidang kuasa antara Mahkamah Syariah dan Mahkamah Sivil dalam perkara-perkara yang melibatkan undang-undang Islam dan pihak yang terlibat adalah seorang yang memeluk agama Islam dan seorang lagi tidak.⁴³

4.1 Status Lebih Rendah (Inferior Status)

Terdapat juga Mahkamah Syariah yang merasakan dirinya lebih rendah dari Mahkamah Sivil dengan tidak menggunakan bidang kuasa yang ada bagi mendengar kes-kes yang melibatkan orang Islam. Dalam satu kes *Jumaton dan satu lagi lwn Raja Hizaruddin*⁴⁴ yang melibatkan tuntutan harta pusaka, Hakim Mahkamah Tinggi Syariah memutuskan bahawa Mahkamah Tinggi Syariah tidak mempunyai bidang kuasa dan kes ini ditolak. Kes ini di rayu ke Mahkamah Rayuan Syariah. Malangnya, sekali lagi, Mahkamah Rayuan Syariah menolak rayuan yang dibuat ke atas tuntutan dalam perkara probet dan surat mentadbir harta orang Islam dengan alasan ia terletak di bawah Senarai 1 Jadual Kesembilan, Perlembagaan Persekutuan yang terpakai juga ke atas orang Islam. Keengganan Mahkamah Syariah untuk menggunakan kuasa yang diberi dikritik hebat oleh Salleh Buang yang menegaskan bahawa pandangan yang mengatakan bahawa Mahkamah Syariah tidak mempunyai bidang kuasa kerana kuasa pembahagian harta pusaka seperti yang diterangkan dalam Seksyen 46 (1) Akta 505 yang disekat oleh rangkai kata probet dan surat mentadbir harta dalam Senarai Persekutuan tidak dapat diterima oleh akal yang waras.⁴⁵

Mahkamah Syariah perlu berani membuat keputusan dan mengambil pendekatan terbuka. Ikutilah contoh kes *Datuk Menteri Othman Baginda lwn Dato Omi Syed Alwi*⁴⁶, yang menyatakan Perlembagaan Persekutuan merupakan undang-undang bertulis yang tersendiri.

Walaupun bagaimanapun, dalam kes *Latifah Mat Zin lwn Rosmawati bte Sharibun & Satu Lagi*⁴⁷ Mahkamah Syariah dianggap sebagai “mahkamah bawahan” (*inferior court*) menyamai kedudukan seperti mana yang diberi kepada Mahkamah Sesyen dan Mahkamah Majistret.⁴⁸

5. Transformasi Mahkamah Syariah

Dalam meningkatkan mutu dan kualiti perkhidmatan Mahkamah Syariah, beberapa transformasi perlu dibuat. Antaranya:

5.1 Bidang kuasa

Seperti yang dibincang sebelum ini, permasalahan bidang kuasa yang terhad yang dianugerahkan kepada Mahkamah Syariah merupakan satu masalah yang masih belum selesai. Walaupun ada cadangan untuk menambah bidang kuasa untuk diberi kepada Mahkamah Syariah, persoalannya, adakah Mahkamah Syariah sudah bersedia untuk memikul tanggung jawab ini? Cuba bandingkan bidang kuasa yang diberikan antara Mahkamah Syariah dan Mahkamah Sivil? Bidang kuasa Mahkamah Tinggi Sivil lebih besar berbanding dengan bidang kuasa Mahkamah Syariah. Tetapi dengan bidang kuasa yang terhad yang diberikan

kepada Mahkamah Syariah, apakah ia telah digunakan semaksimanya? Banyak kritikan dibuat ke atas penghakiman kes *Jumaaton dan Satu Lagi lwn Raja Hizaruddin*⁴⁹ di mana Mahkamah Syariah, dalam satu usaha positif, cuba memainkan peranan seperti Mahkamah Sivil untuk membuat interpretasi perlembagaan yang sebenarnya bukan bidang kuasanya.⁵⁰ Tetapi pada masa yang sama “takut” untuk mengguna bidang kuasa yang diberi kepadanya. Sudah tiba masanya hakim Mahkamah Syariah perlu berani menggunakan kebijaksanaannya untuk menggunakan bidang kuasanya sama ada tersirat atau tersurat.

Dari segi bidang kuasa jenayah, Mahkamah Syariah tertakluk hanya kepada orang Islam dengan had yang dianugerahkan dalam Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (Pindaan 1984) yang memberi kuasa kepada Mahkamah Syariah menjatuhkan hukuman tiga tahun penjara, denda RM5,000.00 dan sebatan enam kali.⁵¹ Memandangkan pindaan terakhir berlaku pada tahun 1984, sudah tentulah bidang kuasa ini perlu dinaikkan melalui pindaan di Parlimen. Usaha untuk meminda Akta ini telah dibuat oleh Parti Islam Se-Malaysia dengan memajukan rang undang-undang persendirian di Parlimen bagi meluaskan bidang kuasa Mahkamah Syariah untuk pelaksanaan sebahagian undang-undang jenayah Islam di bawah *hudud* di Kelantan.⁵²

Dalam semakan kehakiman kes *Azmi B Mohamad Azam@Roney lwn Pengarah Jabatan Agama Islam Sarawak dll*⁵³ Mahkamah Tinggi Sivil Kuching memutuskan bahawa pemohon adalah dari keturunan Bidayuh dan beragama Kristian. Ibubapanya memeluk agam Islam sekitar tahun 1983. Hasil dari pemeluk Islam ayahnya pemohon juga mengikut agama baru bapanya sekitar umur lapan tahun dengan diberi nama Azmi Mohamad Azam. Walau bagaimanapun, pemohon dibesarkan dan dididik secara Kristian di kalangan suku Bidayuh dan dibaptiskan pada 4 September 1999. Pemohon tidak mengamalkan ajaran Islam. Pada tarikh 15 Julai 2014, pemohon memohon kepada Jabatan Pendaftaran Negara (JPN) cawangan Limbang memohon penukaran nama pada kad pengenalnya kepada nama bukan Islam tetapi dimaklumkan bahawa pemohon perlu membawa dokumen dari Jabatan Agama Islam Sarawak (JAISr) dan Arahan Mahkamah. Pemohon pergi ke JAISr Limbang dan dimaklumkan JAISr tidak boleh membantu dalam hal ini dan menyuruh pemohon memohon di mahkamah.

Persoalannya ialah apabila peguam pemohon menulis kepada Jabatan Kehakiman Syariah Sarawak (JKSS), jawapan balas oleh Ketua Hakim Syarie dalam surat bertarikh 7 Julai 2015 memaklumkan bahawa JKSS tiada mempunyai bidang kuasa untuk mengeluarkan sijil keluar dari agama Islam.

Memandangkan bahawa JKSS tidak mempunyai bidang kuasa mengeluarkan sijil keluar Islam, peguam pemohon berhujah bahawa JPN tidak mempunyai asas supaya Mahkamah Syariah mengeluarkan sijil tersebut. Respondan

satu (JAISSr) dan Majlis Agama Islam Sarawak (MAISr) tidak membantah permohonan pemohon untuk keluar Islam. Tetapi JPN tetap dengan pendirian bahawa ia memerlukan satu arahan dari Mahkamah Syariah.

Peguam Persekutuan berhujah bahawa walaupun Ordinan Mahkamah Syariah 2001 tidak menganugerahkan bidang kuasa untuk mendengar kes keluar Islam (murtad), tetapi secara tersiratnya, Mahkamah Syariah mempunyai bidang kuasa berbuat demikian.

Peguam Persekutuan membawa kes-kes seperti *Dalip Kaur, Md Hakim Lee, Soon Singh, Shaikh Zulkaffily, Lina Joy* dan *Hj Raimi bin Abdullah lwn Siti Hasnah Vangaram bt Abdullah*.⁵⁴ Namun, Hakim Datuk Yew Jen Kie tidak dapat menerima hujah-hujah tersebut kerana pada hemat beliau, isu yang timbul bukanlah isu bidang kuasa tetapi isu perlembagaan.

Oleh kerana pemohon dibesarkan secara Kristian dalam masyarakat Bidayuh dan mengikut agama ibubapanya sekitar umur 10 tahun, pemohon tidak pernah mengamalkan ajaran Islam malah mengikut ajaran Kristian. Pemohon memohon hak kebebasan beragama seperti yang terkandung dalam Perkara 11 (1) Perlembagaan Persekutuan bahawa beliau adalah seorang yang beragama Kristian.

Angkara keengganan Mahkamah Syariah Sarawak mendengar kes ini akhirnya, ia telah jatuh ke tangan Mahkamah Sivil dengan keputusan bahawa pemohon adalah seorang Kristian; bahawa JPN hendaklah menukar namanya daripada Azmi B Mohamad Azam Shah@Roneey kepada Roneey Anak Rebit dan memadam perkataan Islam pada kad pengenalan pemohon.

5.2 Struktur

Struktur Mahkamah Syariah kini dalam perancangan penambahan menjadi lima hierarki berbanding dengan sekarang yang hanya mempunyai tiga hierarki iaitu Mahkamah Rayuan Syariah-Mahkamah Tinggi Syariah-Mahkamah Rendah Syariah. Dengan lima hierarki: Majlis Rayuan Syariah-Mahkamah Rayuan Syariah-Mahkamah Tinggi-Mahkamah Tengah-Mahkamah Rendah, ia melihat seolah mempunyai persamaan dengan hierarki Mahkamah Sivil. Sebenarnya, struktur ini dicadangkan oleh Seksyen Syariah Jabatan Peguam Negara. Malangnya, cadangan penstrukturan semula oleh JKSM yang hanya menambah satu lagi peringkat rayuan yang dikenali Mahkamah Rayuan Khas Syariah tidak diterima walaupun telah diluluskan oleh kabinet dan Majlis Kebangsaan Hal Ehwal Islam (MKI). Salleh Buang mempersoalkan pendekatan yang diambil oleh kerajaan yang menolak cadangan dari JKSM.⁵⁵ Perbincangan lanjut sedang berlangsung antara JKSM dan Jabatan Peguam Negara melalui satu Jawatankuasa Khas yang dibentuk oleh YB Menteri di Jabatan Perdana Menteri. Ia perlu dibentangkan semula dalam mesyuarat MKI.⁵⁶ Cadangan mewujudkan

Mahkamah Rayuan Khas Syariah yang dicadangkan oleh Jabatan Peguam Negara di mana Sembilan orang Hakim Mahkamah Rayuan Khas Syariah termasuk seorang Ketua Pendaftar yang akan dibentuk di bawah pekenan Majlis Raja-raja.⁵⁷ Dari pengamatan penulis, tidak semua sultan bersetuju dengan cadangan lima hierarki dan masih terlalu awal untuk melihat ianya menjadi realiti.

5.3 Penghakiman

Bandingkan pula corak penghakiman yang ditulis oleh hakim Mahkamah Syariah dengan hakim Mahkamah Tinggi Sivil dan hakim Mahkamah Tinggi Syariah. Perbandingan ini tidak adil kerana kelayakan kemasukan dan skim yang berbeza antara keduanya. Tetapi bukannya sekarang terdapat ramai hakim Mahkamah Tinggi Syariah yang berkelulusan Sarjana Muda Undang-Undang (LLB) dan LLB Syariah/Syariah & Undang-undang/Syariah, yang mampu merujuk sumber-sumber bahasa Arab dan bahasa Inggeris? Tetapi kalau kita sering membaca penghakiman yang ditulis oleh hakim Mahkamah Syariah, masih ramai hakim menjadikan buku fiqh karangan Dr Wahbah Zuhaili, *Fiqh wa Adillatuh* sebagai buku rujukan utama. Amat sedikit dan jarang mereka merujuk kepada kitab-kitab klasik muktabar. Tambahan lagi, jarang sekali merujuk kepada buku berbahasa Inggeris walaupun kini terdapat banyak rujukan yang baik dalam bahasa Inggeris. Ada pandangan bahawa kita tidak boleh salahkan hakim Mahkamah Syariah kerana ‘*entry point*’ menjadi hakim Mahkamah Syariah adalah sangat berbeza dengan di Mahkamah Sivil. Terdapat peguam kanan sivil yang berpuluh tahun berpengalaman dilantik menjadi hakim Mahkamah Tinggi Sivil. Ini tidak terdapat di Mahkamah Tinggi Syariah. Malah sebelum tahun 1998 dengan penubuhan JKSM, kelebihan perkhidmatan adalah lebih baik lagi di Jabatan Agama Islam dan JAKIM. Akibatnya, ia tidak menarik minat orang untuk mengisi jawatan hakim Mahkamah Syariah.⁵⁸ Tetapi situasi berbeza sekarang dengan tertubuhnya JKSM. Peluang kenaikan pangkat agak mudah dan cepat. Mungkin juga tiada pembantu penyelidikan bagi hakim Mahkamah Tinggi Syariah dengan kekangan kerja yang menyebabkan ketidaksempatan hakim Mahkamah Tinggi Syariah membuat rujukan yang lebih baik. Meskipun begitu, hakim Mahkamah Rayuan JKSM mempunyai kemudahan pegawai penyelidikan yang dapat membantu mereka dalam mendapat bahan untuk menulis penghakiman.

5.4 Memperkasa Hakim Wanita

Buat masa sekarang, hanya segelintir wanita dilantik menjadi hakim di Mahkamah Syariah. Terdapat dua hakim wanita di Mahkamah Rendah Syariah Wilayah Persekutuan (dua jawatan tambahan sedang dalam pertimbangan). Di

Melaka, dua wanita juga telah dilantik sebagai hakim wanita di Mahkamah Rendah Syariah Melaka. Manakala di Kelantan seorang wanita dilantik sebagai pegawai sulh dan hakim di Mahkamah Rendah Syariah Kelantan.

Nampaknya jumlahnya masih kecil dan perlu penambahan yang ketara. Tambahan pula, tidak terdapat langsung hakim wanita di Mahkamah Tinggi Syariah. Pihak JKSM ada mencadangkan seorang wanita untuk menjadi hakim Mahkamah Rayuan JKSM dengan gred JUSA B (Jawatan Utama Sektor Awam) tetapi masih lagi belum diluluskan oleh kerajaan.

Situasi ini perlu ditangani oleh pihak berkuasa bagi melantik lebih ramai lagi hakim di kalangan wanita. Mahkamah Syariah agak ketinggalan dalam hal ini berbanding dengan Mahkamah Sivil.

5.5 Emolumen Hakim Syariah

Emolumen yang dinikmati oleh hakim Mahkamah Syariah teramat rendah berbanding dengan hakim Mahkamah Sivil. Mengambil peringkat hakim Mahkamah Tinggi Sivil dan Mahkamah Tinggi Syariah, kebanyakan hakim Mahkamah Tinggi Syariah memegang gred jawatan LS48 (LS adalah jawatan perkhidmatan perundangan Syariah) dan LS52. Jarang bagi mereka yang memegang gred LS54. Buat masa sekarang terdapat dua hakim Mahkamah Tinggi Syariah Wilayah Persekutuan gred LS54 dan satu di Melaka.⁵⁹ Terdapat satu kes istimewa seorang hakim Mahkamah Tinggi Syariah memegang gred JUSA C (Khas Untuk Penyandang-KUP) sebelum ini yang dipegang semasa berkhidmat di Jabatan Peguam Negara dan dibawa bila berpindah ke Mahkamah Tinggi Syariah Wilayah Persekutuan. Amalan sekarang ialah semua Ketua Hakim Mahkamah Syariah Negeri memegang gred JUSA C.

Bagi gred jawatan hakim di JKSM, Ketua Pengarah/Ketua Hakim JKSM memegang gred TURUS 3 (melebihi Ketua Pengarah JAKIM), manakala hakim Mahkamah Rayuan Syariah JKSM gred JUSA B.

Dalam kertas cadangan Rang Undang-undang Majlis Rayuan Syariah (cadangan lima hieraki Mahkamah Syariah), dicadangkan penubuhan Majlis Rayuan Syariah dengan perlantikan Ketua Hakim dan Hakim Majlis Rayuan Syariah. Gaji yang dicadangkan dalam Rang Undang-undang Saraan Hakim Syarie nampaknya sungguh lumayan yang mungkin setaraf dengan Ketua Hakim Negara. Bagi emolument Ketua Hakim Majlis Rayuan Syariah ialah RM40,600.00 tidak termasuk elaun khas RM12,000.00 dan elaun tahunan yang lain (gaji pokok RM25,000.00).

Sekiranya skim perkhidmatan baru ini dapat dilaksanakan, satu transformasi emolumen akan berlaku dalam perkhidmatan kehakiman Syariah di Malaysia.

5.6 Latihan Kehakiman Syariah

Buat masa sekarang, tiada satu institut latihan khusus bagi kehakiman Syariah. Bagi perkhidmatan kehakiman Sivil, Institut Latihan Kehakiman dan Perundangan (ILKAP) ditubuhkan bagi memberi latihan dan kursus khas dalam perkhidmatan kehakiman dan kepeguaman Sivil. Bagi perkhidmatan kehakiman Syariah, mereka “menumpang” latihan dan kursus di Institute Latihan Islam Malaysia (ILIM) yang ditubuhkan di bawah JAKIM yang bukan dikhususkan kepada kehakiman Syariah sahaja. Satu cadangan penubuhan institut latihan kehakiman seperti ILKAP sedang dalam perancangan yang dikenali sebagai Akademi Kehakiman Syariah Malaysia. Dengan pengwujudan akademi ini, diharap mutu perkhidmatan dan kualiti penghakiman Syariah dapat dipertingkatkan.

5.7 Pengurangan Kes Tertunggak

Satu kajian bersama telah dibuat oleh JKSM dengan Majlis Produktiviti Negara bagi melihat keberkesanan pengurusan kes perceraian di Mahkamah Syariah dari tahun 2005-2010 bagi mengenal pasti kelewatan penyelesaian kes perceraian.

Hasil daripada kajian tersebut, satu tindakan drastik dengan membuat post mortem dengan tujuan untuk mencari penyelesaian terbaik bagi mengurangkan kes perceraian tertunggak di Mahkamah Syariah.

Justeru itu, satu ketetapan KPI (Key Performance Indicator) telah dibuat pada tahun 2011 di mana semua kes tertunggak bagi tiga tahun kebelakang (2008-2010) telah dapat diselesaikan 100% pada tahun 2011 juga.

KPI ini sebenarnya selaras dengan KPI yang telah dipersetujui oleh semua negeri pada tahun 2008 bahawa semua kes mal (kewangan dan harta) hendaklah diselesaikan dalam tempoh 180 hari (enam bulan) mulai dari kes itu didaftarkan sehingga keputusan dibuat.⁶⁰

5.8 Memperkasa Pegawai Sulh

Mendengari dari maklum balas pegawai Syariah di Mahkamah Rendah Syariah, didapati proses Jawatankuasa Pendamai (JP) yang diperuntukkan di bawah seksyen 47 Enakmen/Akta Undang-undang Keluarga Islam nampaknya kurang berkesan. Ini berkemungkinan berkait rapat dengan kelemahan JP itu sendiri.

Tambahan pula, proses Hakam jarang digunakan bagi kes perceraian. Maka bagi mengurangkan tempoh kes perceraian, pemerkasaan Hakam hendaklah dibuat secara komprehensif dan berkesan. Satu jawatan Hakam akan diwujudkan di setiap Mahkamah Syariah Negeri dan Wilayah Persekutuan bagi mengurangkan isu kelewatan kes perceraian dari tempoh satu tahun ke tiga bulan sahaja.⁶¹

5.9 Pembangunan Infrastruktur

Pihak JKSM sedang giat membangunkan infrastruktur ibu pejabat Mahkamah Syariah Negeri:

1. Pulau Pinang - RM36 juta (kelulusan tender)
2. Negeri Sembilan - RM27 juta (30%-40% pembinaan)
3. Melaka - RM36 juta (50% pembinaan)
4. Kelantan - RM27 juta (30%)
5. Sabah - RM36 juta (meratakan tapak)
6. Pahang - dalam proses permohonan peruntukan.⁶²

Dengan siapnya infrastruktur baru ibu pejabat Mahkamah Syariah Negeri, ia dapat memberi satu persekitaran baru tempat kerja yang selari dengan tuntutan semasa, standing atau lebih baik dari infrastruktur Mahkamah Sivil.

6. Kesimpulan

Dari perbincangan di atas, dapat disimpulkan bahawa bidang kuasa yang diberikan kepada Mahkamah Syariah adalah sangat terhad seperti yang diperuntukkan dalam Jadual Kesembilan Senarai II Senarai Negeri, Perlembagaan Persekutuan – yang hanya meliputi orang Islam, yang terbatas kepada undang-undang personal, pewarisan dan hukuman ke atas mereka yang melanggar ajaran Islam.

Dengan bidang kuasa yang kecil ini, terdapat sesetengah hakim Mahkamah Syariah yang enggan menggunakan bidang kuasa tersebut yang secara relatifnya sangat rendah dengan rakan mereka di Mahkamah Sivil.

7. Cadangan

- Bidang kuasa jenayah yang diberikan kepada Mahkamah Syariah di bawah Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (Pindaan 1984) yang berkuatkuasa 1 Januari 1986 perlu dipinda bagi memberi bidang kuasa jenayah Syariah yang relevan dengan masa. Had sekarang iaitu tiga tahun penjara, RM5,000.00 denda dan sebatan enam kali dianggap rendah bagi Mahkamah Syariah. Sebagai contoh, Parti Islam SeMalaysia (PAS) cuba membawa rang undang-undang persendirian untuk meminda Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (Pindaan 1984) di Parlimen bagi memberi laluan pelaksanaan sesetengah peruntukan jenayah hudud di Mahkamah Syariah tetapi sehingga artikel ini ditulis masih belum menjadi kenyataan. Cadangan dan pindaan ini telah sampai

ke pejabat Peguam Negara dan memerlukan pindaan di Parlimen. Pindaan ini perlu dibuat segera kerana lebih 30 tahun ia tidak dipinda.

- Walaupun Mahkamah Syariah telah tertubuh sebelum negara merdeka (termasuk semasa penjajahan Inggeris), malangnya, pengwujudannya hanya disebut dalam Perkara 121 (1A) dan Jadual Kesembilan, Perlembagaan Persekutuan. Tambahan pula, keputusan Mahkamah Syariah boleh dicabar dan diketepikan oleh Mahkamah Sivil meskipun selepas pindaan kepada Perkara 121 (1A) Perlembagaan Persekutuan. Realitinya, dalam banyak kes, Mahkamah Sivil bukan sahaja mengeneipkan keputusan Mahkamah Syariah, tetapi dalam hal-hal tertentu telah campur tangan dalam bidang kuasa Mahkamah Syariah. Selagi amalan pendekatan bidang kuasa eksklusif dan tersurat diterima pakai oleh Mahkamah Sivil, masalah lama seperti pertindihan bidang kuasa akan berlarutan.
- Seharusnya, hakim Mahkamah Syariah hendaklah bersidang bersama hakim Mahkamah Sivil apabila kes mengenai undang-undang Islam dibangkitkan dalam Mahkamah Sivil. Hakim Mahkamah Syariah boleh dipinjamkan ke Mahkamah Sivil apabila ada keperluan.⁶³ Ini dapat menyelesaikan kes seperti *Dalip Kaur* di mana pihak yang memfailkan kes terdiri dari orang bukan Islam. Sedikit pindaan perlu dibuat kepada Perlembagaan Persekutuan dan Akta Mahkamah Kehakiman 1964.⁶⁴

Notes:

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43. Sila lihat www.tunabdulhamid.my, “55 Tahun Pelaksanaan Peruntukan-peruntukan Mengenai Islam dalam Perlembagaan Persekutuan: Masalah dan Penyelesaian”, *Syarah Perundangan Islam*, Jabatan Syariah & Undang-undang, Akademi Pengajian Islam, Universiti Malaya, 22 Mei 2013. Lihat juga Mohamed Azam Mohamed Adil & Ahmad Badri Abdullah, *Penukaran Agama Kanak-kanak: Isu dan Cadangan, Kertas Polisi IAIIS Malaysia*, 2016; Mohamed Azam Mohamed Adi, *Penentuan Agama dan Hak Penjagaan Kanak-kanak Menurut Undang-undang Islam*, JAKIM, 2014
44. [1998] 6 MLJ 556.
45. Lihat perbincangan ini dalam Mohamed Azam Mohamed Adil, “Bidang kuasa dan Kedudukan Mahkamah Syariah di Malaysia Pasca Alaf 20: Ke Arah Mana?”, *supra*, hh. 107-108.
46. [1981] 1 MLJ 29.
47. [2007] 5 MLJ 101 di 114G.
48. Koh Kek Hoe & Fawza Sabila Faudzi, *Trends in Judicial Review of Shairah Matters dalam G25 Malaysia, Breaking the Silence - Voices of Moderation - Islam in a Constitutional Democracy*, Marshall Cavendish Editions, Singapore, 2016, h. 120.
49. [1998] 6 MLJ 556; Shad Saleem Faruqi, *Shariah Laws, Civil Laws and the Federal Constitution dalam G25, Breaking The Silence - Voices of Moderation - Islam in a Constitutional Democracy*, 2016, hh. 55-75.
50. Ini dapat dilihat kes *Latifah Mat Zin lwn Rosmawati Sharibun & Yang Lain* [2007] 5 CLJ 253.
51. Jadual Kesembilan Senarai II, Senarai Negeri Perlembagaan Persekutuan; lihat juga Shad Saleem Faruqi, *Shariah Laws, Civil Laws and the Federal Constitution*,

- supra*, hh. 58-75.
52. “PAS Tetap Akan Bentang Usul Pinda Akta Mahkamah Syariah”, 30 Mac 2015, <http://www.mstar.com.my/berita/berita-semasa/2015/03/30/pas-tetap-bentang-usul/>
 53. KCH-25-7/12-2014 – keputusan 24 Mac 2016.
 54. [2014] 3 MLJ 757.
 55. Salleh Buang, “Penstrukturan Semula Mahkamah Syariah”, *Utusan Malaysia*, 16 Disember 2014, <http://www.utusan.com.my/rencana/penstrukturan-semula-mahkamah-syariah-1.36909>.
 56. Tan Sri Ibrahim Lembut, “Pelan Tindakan Transformasi Mahkamah Syariah: Peranan dan Cabarab Jabatan Kehakiman Syariah Malaysia (JKSM)” dalam *Laporan Kajian Pemacuan Transformasi Sistem Perundangan Islam di Malaysia (2010-2012)*, IKIM dll, 2013, h. 100.
 57. *Supra*.
 58. Wawancara dengan Dr Naim Mokhtar, Timbalan Pengarah Bahagian Sokongan Keluarga (ketika itu), JKSM, 29 November 2013.
 59. Wawancara dengan Dr. Naim Mokhtar, *supra*.
 60. Tan Sri Ibrahim Lembut, *supra*, h. 101.
 61. *Supra*, hh. 102-103.
 62. *Supra*, h. 105.
 63. Tun Abdul Hamid Mohamad, *supra*, hh. 8-9.
 64. *Supra*.

VIEWPOINTS

The Indicators of *Wasatiyyah* or Moderation in Islam

*Mohammad Hashim Kamali**

I will begin by posing a question: Are there any indicators to tell us that Islam anchors itself in the middle path of moderation, to show, in other words, that *wasatiyyah* is the governing principle of Islam?

Islam's advocacy of *wasatiyyah* is, first of all, known by the explicit affirmation of the Qur'an, when it designates the Muslim community as a community of the middle path (*ummataṉ wasatān*) (al-Baqarah, 2:143). This Qur'anic designation is espoused with a commitment for the Ummah to act as witnesses for truth and serve the cause of justice.

Justice is the closest synonym for *wasatiyyah*, and a great virtue in its own right; it is a major theme of the Qur'an and a principal assignment of government in Islam. *Wasatiyyah* without justice would be an empty concept, yet justice too must be anchored in *wasatiyyah*: a judge can be inclined toward severity, or its opposite, and is thus advised to observe moderation in the delivery of justice.

Islam's commitment to the middle path of *wasatiyyah* is also manifested in mutual recognition (*ta'aruf*) - Q 49:13). The *ummah* builds its relationships with other communities and nations in the spirit of *ta'aruf* that nurtures friendship and peaceful co-existence. One of the manifestations of *ta'aruf* in Islam is the recognition of Christianity and Judaism as valid religions. Muslim jurists have by analogy extended the same status to the followers of other faiths and communities that reside in Muslim territories, and those who become non-Muslim citizens of a Muslim state.

Another manifestation of the middle path of *wasatiyyah* in Islam is its recognition of reasonable disagreement (*ikhtilaf*) in matters of interpretation and opinion. The reality of *ikhtilaf* in Islam is manifested in the plurality of its juristic and theological schools (*madhhabs*), such as the Hanafi, Shafi'i, Maliki, and Hanbali - all of which co-exist and have, for the most part, also recognised one another as valid interpretations of Islam. *Ikhtilaf* thus becomes an aspect of Islamic life and thought and acts as a significant moderator from within.

In a similar vein, Islam advocates consultation (*shura*) in matters of community affairs, governance and leadership (Q 3:109 & 42:38). *Shura* is a great moderator in that it seeks to give voice, reconcile and reach consensus-based solutions to issues. The Prophet of Islam practiced it most, as did the Orthodox Caliphs (*khulafa' Rashidun*) after him, thus making *shura* the principal mode of decision making in public affairs. Consultation is also advised in family relations: the husband, in particular, should consult his wife in family matters and the upbringing of children.

Islam's conception of *wasatiyyah* is further manifested in its support for dialogue (*hiwar*) and cooperation (*ta'awun*) among people in pursuit of beneficial objectives (Q 5:2: "cooperate in good and righteous works, and cooperate not in [pursuit of] hostility and sin"). Dialogue is an Islamic imperative, as is known from the Qur'anic address that engagement and dialogue with the different 'other' must be in the "best and most courteous manner" (16:125), to be conducted in reasonable and persuasive ways leading to better understandings.

Islam also advises moderation in religiosity and the practice of its own duties. The faithful are enjoined to opt for easier ways in the practice of Islam, and that it is God's own illustrious purpose "to lighten your burdens" and "make things easy for you" (Q 4:28; 4:185). Removal of hardship and lightening people's burdens thus become one of the cardinal purposes (*maqasid*) of Shariah. Hence the ruler, judge and Mufti must opt for easier solutions and *fatwas* as a matter of priority and preference. The Prophet, pbuh, has advised against excessive fasting, all night vigil, and lengthy prayers that cause fatigue and prove prejudicial to normal family life. He kept his own prayers and sermons, when leading congregations, at moderate length, and instructed others to do the same.

Opting for the middle path is further manifested in Islam's recognition of people's customary practice (*'urf*). Custom is a recognised basis of law and judgment, which is mentioned in the Qur'an side by side with forgiveness and a certain easiness with people's misgivings: "Take to forgiveness, follow the '*urf* and turn away from the ignorant" (7:199). People and communities who nurture these values are likely to be practicing *wasatiyyah*. God praises those "who swallow their anger and forgive others" (Q 3:134) and those who choose to forgive in preference to retaliation and revenge (2:178).

The middle path is the chosen path of Islam in financial transactions and business relations. This is manifested, in the affirmative sense, in the Shariah laws of commerce and contract which enjoin fair exchange and equivalence in countervalues. Fair exchange is also pursued in the prohibitive injunctions of Shariah on usury (*riba*), excessive risk-taking and uncertainty in contracts (*gharar*) and avoidance of morally unethical business transactions.

Moderation is also advised in the personal lifestyle and character that Islam seeks to nurture among the believers. To this effect, the Qur'an praises those who are peaceful, walk the earth with humility, and are the agents and propagators of peace (25:63). The Prophet added his voice to this, saying: "Every religion has its ethos and the ethos of Islam is modesty - *al-haya'*."

And lastly, it is a manifestation of Islam's preference for the middle path of moderation that a rich Sufi tradition of spirituality, inner reflection, and a certain distancing of oneself from materialist indulgences has grown throughout the Islamic lands. Sufism is a powerful moderator of dry legalism and obsession with measure-for-measure justice. The Qur'an frequently mentions justice side by side with *ihsan* (beauty), and Sufism is the nurturing of inner beauty through self-discipline and devotion.

Notes

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Indigenous Islamic Modernity: A Necessary Basis for Renewal and Reform

*Alexander Wain**

The Orient is not an inert fact of nature. It is not merely *there*, just as the Occident itself is not just *there* either...[rather] men make their own history, that what they can know is what they have made.¹

Edward Said

[I aim] to wage an emancipatory cultural and intellectual struggle to save human *freedom* from the barren wastelands of capitalism and class exploitation, *equality* and justice from the violent and pharaonic dictatorship of Marxism, and *God* from the ghastly and gloomy graveyard of clericalism.²

‘Ali Shariati

The term ‘modern’ has been variously understood. By the mid-twentieth century it had come to denote a particular kind of civilisation: Western, industrialised and democratically-based civilisation, in which a commitment to self-determination and an expectation of ever-increasing mastery over nature had led to higher standards of living (including wages and healthcare), rates of urbanisation, technological achievement, and economic output. ‘Modern’ therefore referred to a superior form of society associated with the ‘First World’ of the West, and in direct contrast to the societies of the ‘Third World’ (i.e. developing countries).³

But, and as highlighted by Henri Lefebvre, the ‘modern’ is also a Western state of mind, a triumphant set of images and projections of the self. In the wake of the eighteenth-century European Enlightenment, ‘to be modern’ became fused with ‘to be European’, the assumed pre-eminence of ‘modernity’ naturally entailing the inherent superiority of ‘modern’ Europe over ‘pre-modern’ non-European societies (i.e. China, Japan, India and the Islamic world).⁴ This perception would later define the European colonial project; we need only think of Rudyard Kipling’s 1899 poem, *The White Man’s Burden*, with its celebration of European and North American imperialism, and its duty to ‘civilise’ the rest of the world, to appreciate this. As described by Edward Said, however, the result was an essentialised notion of the East (or of ‘the Orient’) as inherently inferior.⁵

Although contemporary Europe and North America are generally less audacious when asserting claims of inherent superiority, arguably the essential notion remains. For example, in 2011 the Oxford-trained, Harvard-based historian, Niall Ferguson, published his *Civilisation: The West and the Rest*. An historical exploration of the West's political, military and economic pre-eminence, Ferguson argued that the West's ability to dominate made it "demonstrably absurd" to suggest that Eastern civilisation was its equal. Rather, he attributed the West's success to six identifiable complexes of institutions and associated ideas and behaviours – competition, science, property rights, medicine, the consumer society and a strong work ethic. Together, these complexes had created modernity and, according to Ferguson, could only have been evolved by Europe (before later being exported to America). As a consequence,

it became clear in the second half of the twentieth century that the only way to close that yawning [modernity] gap...was for Eastern societies to follow Japan's example in adopting some (though not all) of the West's institutions and modes of operation.⁶

In other words, Ferguson argued that all civilisation must (to a greater or lesser degree) become Westernised in order to progress. The West alone holds the key to the evolution of modernity's superior form of civilisation. Although many have dismissed this argument as apologia for empire, it nonetheless reflects the persistence of colonial-period notions that, as non-Western societies develop (i.e. become 'modern'), they will simultaneously (and necessarily) become more Western, both institutionally and behaviourally. In short, even in contemporary Western society the opinion remains that there is only one model of modernity. This, however, is controversial and, since the advent of post-colonialism, has been challenged numerous times.

Thus, Frantz Omar Fanon (d.1961), author of the highly influential post-colonial text, *The Wretched of the Earth* (1961), rejected such a narrow view of modernity. Instead, he challenged Europe's former colonies to cease being beholden to European civilisation and begin to discover and speak for themselves, arguing that "the Third World must start over a new history of man."⁷ For Fanon, colonialism had been fundamentally dehumanising – not only had it led to the political, social and economic exploitation, oppression and repression of its colonial subjects but, via a complex web of colonial identities (notably European-coloniser-superior versus native-colonised-inferior), it had degraded and subverted the value of non-European civilisation. For Fanon, the West's narrow conceptualisation of 'modernity' was simply a reflection of this process. Moreover, he deplored how, through the colonial and post-colonial European training of 'native' officials and intellectuals, Europe continued to brand its

culture onto the heads of the formerly colonised and argue that imitation of (superior) European culture was the only means for (inferior) native culture to become modern. For Fanon, this perspective was merely another imperialist tool, a continued suppression of non-Western identity. He believed that Europe did not own modernity and, via his work, hoped to intellectually divorce it from its former colonies, to demonstrate to the latter the feasibility of forging a new, indigenous modernity (the “new history of man”). This idea formed the core of his work and, in turn, was taken up by the Iranian intellectual, ‘Ali Shariati (d.1977).

While studying sociology in Paris in 1960, Shariati encountered Fanon and began drawing extensively on his work, even translating *The Wretched of the Earth* into Persian. When Shariati returned to Iran in 1964, he also began utilising Fanon’s ideas in his sociology lectures at Mashhad University, consistently discussing the problems of Iranian society in light of Islamic (i.e. indigenous) principles. This approach quickly proved popular with his students and, throughout the rest of the 1960s and 70s, Shariati focused more and more on an advocacy of indigenous-based solutions to Iran’s problems. Essentially, he sought to advance Iranian society by radically restructuring and reforming its traditional cultural and religious institutions. Drawing on Fanon, Shariati argued that the only prerequisite for developing modernity was autonomous will based on freedom from colonial tyranny; only by being free could Iran find appropriate solutions to the challenges it faced. Importantly, therefore, Shariati saw autonomous will as a continuation of the core principles of monotheism – principles not always followed, but always there. In a society like Iran, where religious norms prevailed, Shariati believed that sustainable change leading to modernity could only be achieved through religious transformation. For Shariati, therefore, religion was a harbinger of progressive social change, not a retrograde force (as often depicted in the West).⁸

Like Fanon, Shariati demanded a ‘new thought’ and a ‘new humanity’ – in short, a new modernity. But, coupled with this rejection of narrow Western readings of the ‘modern’ – and by implication, all those Western-educated Muslims who advocated them – Shariati was equally scathing of the essentialist views of Islam advocated by Islamist thinkers like Pakistan’s Abul A’la Mawdudi (d.1979), Egypt’s Sayyid Qutb (d.1966) and Iran’s own Ayatollah Khomeini (d.1989). These figures tended to attribute Muslim decline to Western domination, arguing that the only viable solution to the problem was a return to an earlier and more pristine form of Islam. Shariati, however, argued that the decay of Muslim society had as much to do with Islam’s obsolescence in the face of present realities as with Western imperialism. For him, Islam also needed to be reformed (as opposed to ‘reset’) if any progress was to be made. To his mind, the best

Muslim reformers were therefore people like Jamal al-Din al-Afghani (d.1897) and Muhammad Iqbal (d.1938), individuals who had not only critiqued Western modernity, but also Islam. Shariati strongly supported their calls to reinstitute *ijtihad* and reform Islam in line with contemporary needs – that is, to evolve an indigenous Islamic modernity.⁹

As of 2016, however, or nearly forty years after Shariati's death (and fifty-five after Fanon's), Shariati's indigenous Islamic modernity has yet to emerge. To be sure, a Muslim rejection of Western modernity has (to a greater or lesser degree) become widespread. Whether manifested in Iran's Islamic Republic, the conservative ideology of Saudi Arabia's internationally influential Wahhabi movement, or the work of Muslim organisations like the Muslim Brotherhood, Jamaat-e-Islami and Parti Islam Se-Malaysia, the desire to intellectually divorce Muslim society from Western ways of being has become clear. By and large, however, the suggested alternatives fall short of Shariati's vision for a progressive and independent Islam suited to the contemporary world. Instead, they tend towards essentialism, favouring the replacement of Western institutions and values with ones evolved directly from the Qur'an and Sunnah – that is, from seventh-century Arabia.¹⁰ Although a genuinely 'Islamic' modernity would necessarily retain the Qur'an and Sunnah at its heart as a guiding light, the imitative approach essentialism takes towards tradition neglects the core of the problem – that Ferguson, despite his faults, is correct when stating that the West triumphed over Islam because it was able to evolve a new and aggressively competitive way of life – a way of life now called modernity. Islam's current problem is not therefore a lack of respect for or adherence to past tradition, but an inability to match the West's dynamism and willingness to change – that is, to evolve its own modernity. In this context, Islamism's 'turn-the-clock-back' attitude is arguably little more than a reactionary throwback to a past age, as much a product of Islam's hegemonic condition as any blind following of Western tradition. This article therefore challenges those Muslims currently trying to resist Western hegemony (including intellectuals, government actors, NGOs etc.) to do so in a way that is both progressive and sensitive to the needs of the present day. Only in this manner can Muslim society hope to truly progress.

Notes

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1. Edward Said, *Orientalism* (London: Penguin Books, 1995), 4-5.
2. Cited in Siavash Saffari, 'Rethinking the Islam/Modernity Binary: Ali Shariati and Religiously Mediated Discourse of Sociopolitical Development,' *Middle East Critique* 24, no. 3 (2015): 244.
3. Peter Wagner, *Modernity: Understanding the Present* (Cambridge: Polity, 2012), vii, 4.
4. Henri Lefebvre, *Introduction to Modernity: Twelve Preludes, September 1959-May 1961*, trans. John Moore (London: Verso, 1995), 1. See also, Anthony Giddens, *Conversations with Anthony Giddens: Making Sense of Modernity* (Stanford, CA: Stanford University Press, 1998).
5. Said, *Orientalism*, 5, 7.
6. Niall Ferguson, *Civilisation: The West and the Rest* (New York: The Penguin Press, 2011), 4-5. Competition, for example, was uniquely fostered by early Europe's politically divided nature, which stood in sharp contrast to the East's large unified empires. A strong work ethic, on the other hand, resulted from Protestant Christianity.
7. Frantz Fanon, *The Wretched of the Earth*, trans. Richard Philcox (New York: Grove Press, 2004), 238.
8. Ali Rahnama, *An Islamic Utopian: A Political Biography of Ali Shariati* (London: I. B. Tauris, 2000), 176-206; Arash Davari, 'A Return to Which Self? Ali Shariati and Frantz Fanon on the Political Ethics of Insurrectionary Violence,' *Comparative Studies of South Asia, Africa and the Middle East* 34, no. 1 (2014): 86, 238-9.
9. Davari, 'Which Self?' 236-7, 339-40.
10. There are, of course, exceptions. Most notably, while Prime Minister of Malaysia between 2003 and 2009, Tun Abdullah Ahmad Badawi proposed the concept of *Islam Hadhari* (Civilisational Islam) as a basis for renewal (*tajdid*) and reform (*islāh*) in Islam. Mirroring Shariati, Badawi framed *Islam Hadhari* as a progressive reinterpretation of Islam designed to reconcile it with modernity, see Abdullah Ahmad Badawi, *Islam Hadhari: A Model Approach for Development and Progress* (Petaling Jaya: MPH Group Publishing, 2006). See also, Mohammad Hashim Kamali, *Civilisational Renewal: Revisiting the Islam Hadhari Approach* (Kuala Lumpur: IAIS, 2008). Additionally, the field of Islamic finance has recently seen an outpouring of innovative and progressive reform tailored to the needs of modern Muslims, see Sheila Aimon Yussof, 'The Islamic Financial Services Act, 2013: Malaysia's Model Framework for Shariah-compliance and Stability,' *Islam and Civilisational Renewal* 4, no. 3 (2013): 391-406.

Interpreting Islam in the Constitution: Question of Fact or of Law?

*Tengku Ahmad Hazri **

Under Malaysia's federalism, the legislative powers of the Federation are distributed between the federal and state governments by the Federal Constitution, classified under Federal List, State List and Joint List. Thus state legislature is authorised to legislate on matters involving, among others, Islamic law. This power includes to create "offences against the precepts of Islam".¹ So two questions then arise. Firstly, what constitutes the "precepts of Islam"? Secondly, who shall interpret what that phrase means? The first question is decisive to the determination of whether laws enacted by the state government are constitutional. The second question reveals a more subtle issue at work, for it questions the very locus of interpretive authority, and shows the delicate balance the judiciary needs to make between constitutional supremacy and religious autonomy.

The landmark case is *Sulaiman Takrib v Kerajaan Negeri Terengganu* (2009).² In *Sulaiman Takrib*, the Federal Court heard an application to declare an enactment by a state legislature void for being un-constitutional.³ In particular, the petitioner claimed that the enactment—under which the teachings of one "Ayah Pin" were criminalised—had gone beyond the power allowed under the constitution because the phrase "precepts of Islam" is restricted to the five pillars of Islam. Consequently, state legislature, it was claimed, was not authorised to legislate on the subject matter.

In determining whether or not the subject matter of the enactment fell within the rubric of "precepts of Islam", the court deemed it necessary to interpret what in the first place this phrase means. Yet instead of exercising its own interpretation, the court called on court experts consisting of leading scholars of Islamic law to offer their opinion.

Now under the applicable law of evidence, only "relevant" evidence can be admissible in court.⁴ Opinion evidence (i.e. opinions of third parties not directly related to the case) is not admissible for want of relevance except in two circumstances, i.e. when the evidence of witness' opinion is either inevitable or desirable.⁵ Such exception is thus provided in the Evidence Act 1950, section 45 which stipulates that opinion evidence is deemed "relevant" when the court needs information to understand the facts of the case.⁶ However—and this is the crucial point—such experts are only to be called on to decide on questions of

facts, not of law, which is the province of the judge.⁷ This is further made clear in the Rules of Court 2012 (then 1980), order 40, rule 1(1) which states that such experts are only “to inquire and report upon any question of fact or opinion not involving questions of law or of construction”.

In sharp contrast, in the *Sulaiman Takrib* case, the experts were invited to interpret the meaning of the phrase “precepts of Islam” which is used *in the constitution itself*. Is this not an interpretation of the law par excellence? To be clear, the court distinguished between *what* constitutes the precepts of Islam and *whether* the subject matter of the said enactment concerned the precepts of Islam, lending the impression of due observance to the fact-law distinction. Yet the distinction can be more accurately construed as that between law and the application of the law, not between fact and law.

Oddly enough, in *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor & Ors*⁸, the Federal Court held that the Syariah court had no power to interpret the term “precepts of Islam” and “State law could not possibly confer such power because (a) the ascertainment of Islamic law and other personal laws for purposes of federal law is a federal matter; (b) any question whether law is made by a state is within the power of a state; and (c) interpretation of the Federal Constitution is a matter for the High Court.”⁹ In effect, the court in *Abdul Kahar* denied Syariah court jurisdiction on the ground that the latter lacks competence to deal with the subject matter. Thus having claimed that it is the civil court rather than Syariah court that has competence in the subject, one of the judges in *Sulaiman Takrib*, Zaki Azmi PCA, observed that “This court is not an expert in Islamic law. It therefore has to rely on opinions given by experts in this field.”¹⁰

By the court’s own admission, the interpretation of the phrase amounts to constitutional interpretation:

“It was argued that the offences created by the impugned sections are not offences against the precepts of Islam...So, the question is what is the meaning of the words ‘precepts of Islam’ as used in the Constitution. It is important to remember that *this court is interpreting the Constitution...*”¹¹

Interpretation of the constitution, which is interpretation of the law par excellence, has been understood in the case of *Sulaiman Takrib* to be a question of fact requiring knowledge and expertise in Islamic law. The case has been cited with approval in subsequent cases, such as *Fathul Bari v Majlis Agama Islam Negeri Sembilan*.¹²

The *Sulaiman Takrib* case offers a concrete illustration of how a legal-constitutional question morphs into a “religious” one, with the direct implication that the court concedes lack of knowledge, competence and expertise necessitating

expert opinions. The point is pivotal given the popularity of such ‘Shariah as a source of law’ clauses across the Muslim world, which may invite the same implications.

The case is also important because in Malaysia Islamic law is recognised as the law of the land and is applicable within certain limitations. Comparing the cases of *Abdul Kahar* and *Sulaiman Takrib*, it seems ironic that the court in the former denied jurisdiction to Syariah courts even when the matter pertains to Islamic law, only to concede in the latter that the court lacks competence to deal with Islamic law.

The Malaysian experience is significant in a number of respects. In some Muslim countries with a pluralistic population, the rights of minorities are insufficiently recognised in the constitution; thus, whereas the Muslim-majority seeks to preserve the status quo, the non-Muslim minorities insist on constitutional reform or amendment to safeguard their rights.¹³ In Malaysia by contrast, it is the minorities themselves who stridently hold on to the constitution, even as some segments of the Muslim-majority population call for amendment or reform of the constitution. In 2012, a leader of an Islamic party reportedly called for an amendment to the Federal Constitution for the word “religion” to be changed to *al-din*, the Arabic for “religion”, on the grounds that the English word inadequately captures the meaning of “religion” as a way of life in Islam.¹⁴

Such an episode, along with the aforementioned case, highlights the role of the judiciary in delimiting the boundaries of constitutional supremacy and religious autonomy.

Notes

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1. Federal Constitution, Ninth Schedule, List II—State List, Item 1
2. *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354
3. Pursuant to Articles 4(3) of the Federal Constitution
4. Evidence Act 1950, section 5
5. Mohd Akram Shair Mohamed, “Evidence” in Asghar Ali Mohamed (ed.), *Malaysian Legal System* (Kuala Lumpur: CLJ Publication, 2014), 635.
6. Section 45 (1), Evidence Act 1950 (Act 56) reads, “When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are *relevant facts*.” (emphasis added)

7. A court expert in the case argued that since violating a *fatwa* is not an offence against the precepts of Islam, the enactment was therefore un-constitutional to which the court responded. “With respect, these are matters for this court to decide and not for him.”
8. *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor & Ors* [2009] 6 MLJ 863.
9. Rosli Dhalan & Fawza Sabila Faudzi, “The Position of the Syariah Court in Malaysian Legal System” in G25 Malaysia, *Breaking the Silence: Voices of Moderation – Islam in a Constitutional Democracy* (Kuala Lumpur: Marshall Cavendish, 2016), 111.
10. *Sulaiman bin Takrib*, at 384
11. *Ibid.*, 371. (emphasis added)
12. *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Anor* [2012] 4 CLJ 717
13. A case in point is Article 66 of Turkey’s 1982 Constitution, which identifies all citizens as “Turks”, thereby courting the displeasure of some Kurdish minorities who, among others, perceived it as an attempt to impose upon them the Turkish ethnic identity. See Mustafa Akyol, “Are All ‘Turks’ Really Turks?”, <http://www.al-monitor.com/pulse/originals/2013/01/turkey-kurdish-minorities-rights.html>
14. Zulkiflee Bakar, “Hadis rhetoric of amending the constitution”, Utusan Online, 07-05-2012, http://www1.utusan.com.my/utusan/special.asp?pr=theMessenger&y=2012&dt=0507&pub=theMessenger&sec=Features&pg=fe_01.htm; Loh Foon Fong, “MCA rejects PAS ‘addin’ move”, The Star Online, 9 May 2012, <http://www.thestar.com.my/news/nation/2012/05/09/mca-rejects-pas-addin-move/>

Lucrative Business of Othering

*Anis H. Bajrektarevic**

One of the leading figures of Renaissance Europe, Dante, put the Prophet Muhammad in the eighth circle of Hell. The only individuals below Muhammad were Judas, Brutus, and Satan. As Rana Kabbani noted in her luminary piece, *Imperial Fictions*, “Islam was seen as the negation of Christianity, as anti-Europe...and Muhammed as an Antichrist in alliance with the Devil.”

Nevertheless, both religions trace their origin back to Abraham. They also both lived in harmony (or at least cohabitated) within the Middle East (notably in Lebanon, Syria and Iraq). Why, then, was there no wider harmonious relationship between Christian Europe and the Middle East? This, one might say, is the story of past centuries. But, in the absence of any self-reflection on the side of the EU towards its current policies in the Middle East, it is worthwhile revisiting some of the bleaker chapters of European history and the genesis of its pre-secular and secular thought.

Europe came to be known as ‘Christendom’ because its identity was imagined (or invented) as Christian in contradistinction to the Islamic Middle East. Christianity, of course, originated in the Middle East, not Europe. It was, however, subsequently Europeanised by the Balkan-born Roman Emperor, Constantine the Great. The post Roman/Byzantine inauguration of European ‘Christendom’ therefore necessitated some intellectual acrobatics: an ideological and geopolitical inversion, with the periphery presenting itself as the centre.

This creation of European Christendom, however, served two vital objectives: domestic and external. Domestically, it created a coherent sense of self, a sense of *extra ecclesiam nulla salus* (no salvation outside the church, i.e. Europe) and which followed on from the old Roman rationale, ‘no world beyond *Limes* line’. Externally, the notion of a European Christendom created a justification for military voyages and other forms of organised plunder against non-Christians.

Regarding the latter, by the time of the Renaissance, Europe realised that in order to effectively project itself – i.e. physically and/or mentally to colonise overseas territories – it needed to exercise coercion, including enslavement and even physical extermination. The dilemma over which instruments to use influenced and dominated European debates of the time – the famous

Valladolid controversy of 1550, for example, saw Bartolomé de Las Casa's view of a 'noble savage' face off against Juan Ginés de Sepúlveda's 'ignoble savage'. Whereas the former could be assimilated, the latter was destined for eradication.

These debates – which are the roots of later liberal theories, as well as the early precursors of modern notions like 'regime change', 'humanitarian intervention' and 'pre-emption doctrines' – always presupposed the inferiority (and passivity) of the 'natives'. In the course of centuries, however, the notion of extermination was replaced with cultural conversion/submission, politico-military obedience and socio-economic apartheid. At the peak of European imperialism, the noble-ignoble savage dilemma became a debate focused on whether civilisational inferiority could be remedied by an imperial 'civilising' mission, with social Darwinists being rather pessimistic.

This 'epistemology' was further embedded in the so-called Peter Pan theory, with its romanticised image of the 'other' as childishly careless and helpless. Essentially, the East was an innocent child destined never to grow up. This, of course, gave rise to various binary categorisations in order to facilitate a decisive and long-lasting differentiation between East and West. Under this influence, gradually the imperial civilising mission became a moral duty, much like the parental duty is to raise an infant child.

Christian missionaries (both Catholic and Protestant) eventually constituted one of the most powerful and influential voices in favour of this civilising mission. Their justification, however, was Biblical, e.g. while invoking the story of Noah's three sons, they cited Genesis 9:27: "God shall enlarge Japheth and he [Japheth] shall dwell in the tents of Shem, and Canaan shall be his servant." This was interpreted to mean that the 'duty' of Japheth (Europe) was to absorb Shem (the Asians) and enslave and colonise Canaan (Africa).

Over time, this narrative also became embedded in the matrix of colonisation, wilfully implanting itself into the minds of colonial officials and native peoples alike. James Lorimer, for example, and in common with other architects of the colonial project, also divided the world into three segments: civilised White, barbarous Yellow and savage Black. The 'Yellows' were a 'fallen people', a *terra infantilis* to be civilised, while the area occupied by the 'Blacks' was a 'borderless space', a *terra nullius* to be conquered and settled.

There is a consensus within the academic community that the critical factor in redefining Europe as the 'advanced West' was its 1492 expansion westward, to the Americas. This enabled the so-called 'triangular transcontinental trade' to develop: enslaved Africans were shipped to America in exchange for gold and silver that was then taken back to Europe.¹ Indeed, the Afro-American yields were so colossal that many scholars have argued that Europe's later Industrial

Revolution was, rather than a natural process of development, actually an anomalous result that pivoted around Europe's exploitation of the rest of the world.

Such a rapid shift, however, regardless of its cause, necessitated a complete restructuring of Western identity – a process which, in turn, further served to underline the split between East and West. Crucial to this process of redefinition was the Enlightenment, a pivotal moment in the creation of modern European identity. This development came along with the fundamental questions, 'who are we and what is our place in the world?' Answering these led to the systematisation and classification of a kind of intellectual apartheid: Europeans delineated themselves as the only progressive subject of world history, whether past, present or future. Eastern peoples, on the other hand, were seen as inert, passive and corrosive. While the Solar system became heliocentric, our planet became Eurocentric.

Is this situation, however, still alive and operative? How does it correlate today?

Certainly, Europe has repeatedly missed the opportunity to engage with the East (including the Middle East) through dialogue and consensus and as an equal. For the last 25 years, for example, it has primarily responded to the Middle East either militarily or with sanctions (a type of socio-economic warfare). However, in a rapidly changing world, where Europe is contracting both economically and demographically, confrontation no longer promises to pay off. Put simply, Europe is no longer the wealthiest club around; it is a place which only remembers its wealth. In this context, the EU has to learn how to deescalate and compromise. This is in its best interest, for the sake of its only viable future. Therefore, it is high time for Brussels-headquartered Europe to evolve in its views and actions. Let us start by asking a question: Is so-called Russian expansionism or Middle Eastern 'Islamofascism' spontaneous or provoked? Some honest soul searching on this issue may help point the way to a more stable future.

Notes

- * *Anis H. Bajrektarevic* is chairperson and professor of international law and global political studies, Vienna, Austria. He has authored three books: *FB – Geopolitics of Technology* (published by the New York's Addleton Academic Publishers); *Geopolitics – Europe 100 years later* (DB, Europe), and the just released *Geopolitics – Energy – Technology* by the German publisher LAP. *No Asian century* is his forthcoming book, scheduled for later this year.

1. To illustrate the magnitude of this trade, starting from the early sixteenth century, 85% of the world's silver production and 70% of the world's gold output came from the Americas. During the seventeenth, eighteenth and nineteenth centuries, the role of slavery, slave trading, and American slave-driven production centres all significantly contributed to Atlantic Europe's agricultural and industrial 'breakthrough', as it is celebrated today. Even five of the seven principal US Founding Fathers were slaveholders (Benjamin Franklin, John Jay, Thomas Jefferson, James Madison and George Washington).

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SIGNIFICANT EVENTS AND DEVELOPMENTS

**The Fourth Abdullah Yusuf Ali Memorial Lecture:
“English as a Modern Literary Language for Islam: The Significance
of Yusuf Ali’s Translation of the Qur’an”
(IAIS Malaysia, 16 April 2016)**

Tengku Ahmad Hazri

On 16 April 2016, IAIS Malaysia and Islamic Book Trust (IBT) co-organised the fourth Abdullah Yusuf Ali Memorial Lecture on “*English as a Modern Literary Language for Islam: The Significance of Yusuf Ali’s Translation of the Qur’an*” by Dr Surin Pitsuwan, an eminent diplomat and Islamic scholar who has served as Thailand’s Foreign Minister and ASEAN’s Secretary-General.

Pitsuwan took as a starting point Yusuf Ali’s remark in the Introduction to the very first edition of his translation: “I want to make English itself an Islamic language, if such a person as I can do it.” By now a classic and one of the most widely read English translations of the Holy Book, Yusuf Ali’s translation possesses a few distinctive features which Pitsuwan carefully distilled. Among others, the work was motivated by the need to make the scripture accessible to all yet preserve the beauty and aesthetic quality of the original Arabic.

More than mere translation, Yusuf Ali also offered background to the *surahs* (chapters) building on the rich heritage of classical *tafsir* scholarship to decrypt some of the hidden meanings of selected verses. A case in point is the Chapter on the Cave (Surah al-Kahf) which alludes to Musa’s resolve not to give up searching “until I reach the junction of the two seas (*majma’ al-bahrayn*)”, baffling scholars as to where exactly that location is. Through the *tafsir* of Baydawi, however, Yusuf Ali disclosed that the so-called “junction of the two seas” is not a literal geographical location but the meeting point between two streams of knowledge, i.e. discursive knowledge and mystic knowledge (*‘ilm al-laduniyyah*), the latter of which Musa learned from Khidr.

Yusuf Ali’s attempt to make English an Islamic language echoes a xenophilic tendency that was partly due to historical precedent but also partly justified by political consideration. With regards to the former, historically, in medieval Europe, Latin was the language of Islamic studies because it was the language

into which the works of Al-Farabi, Ibn Sina, Ibn Rushd, Ibn al-Haytham were translated. Politically, on the other hand, there are Islamic scholars who have already been writing in English, such as Fazlur Rahman, Seyyed Hossein Nasr and Ismail Faruqi, who were based abroad because the situation back in their homeland was not conducive to Islamic scholarship. Indeed, Pitsuan was introduced to Abdullah Yusuf Ali by Muhsin Mahdi, a student of the philosopher Leo Strauss and an émigré scholar, who was symbolic of this scenario facing Muslims. Great Islamic scholars had to migrate because their own Muslim countries had become un-conducive to research with controversial ideas. That situation made, and continues to make, English as important language for the communication of new Islamic ideas.

**Book Launch and Panel Discussion – ‘Defining Islamic Statehood:
Measuring and Indexing Contemporary Muslim States’
(IAIS Malaysia, 31 March 2016)**

Ahmad Badri Abdullah

On 31 March 2016, IAIS Malaysia hosted a book launch event for Imam Feisal Abdul Rauf, founder and Chairman of The Cordoba Initiative, who had published a new book entitled ‘*Defining Islamic Statehood: Measuring and Indexing Contemporary Muslim States*’. The book was launched by Tun Abdullah Ahmad Badawi, the former Prime Minister of Malaysia and Chairman of IAIS Malaysia. In his speech, Tun Abdullah congratulated Imam Feisal for his success in bringing to fruition such an important project to provide realistic and practical guidelines on Islamic governance and statehood for the Ummah in the 21st century. Imam Feisal in turn thanked Tun Abdullah, as well as Dato’ Seri Najib Tun Razak, the current Malaysian Prime Minister, for their patronage and endorsement of the project. He highlighted the fact that the project required a stellar working group comprising notable Muslim scholars, policymakers, and court judges. He pointed out as well that the project’s mission was to find a consensus regarding the definition of an Islamic state in the context of Islamic jurisprudence (*fiqh*) in order to develop qualitative yardsticks for measuring the Islamicity of Muslim states. It was therefore an convergence of Islamic methodologies and scientific measurements.

Furthermore, the index developed in the project focuses on the degree of deliverables, measured against the five essentials of *maqasid al-shari’ah*, principles that have been unanimously agreed upon by Muslim scholars. The project utilised data provided by governments, supported by polling data in the

pursuit of evaluating the current state of Muslim nations. In his closing remarks, Imam Feisal stressed that the book is in fact a stepping-stone for a living and ongoing project.

The speech was followed by a panel discussion, in which Prof. Mohammad Hashim Kamali pointed out that the concept of state in Islam, even though the Qur'an does not ordain any tangible model of governance, primarily involves overarching principles such as public benefit and welfare (*maslahah*), consultation (*shura*), justice ('*adl*) and accountability (*amanah*). Therefore, presenting *maqasid al-shari'ah* as the core values of the new index, as well as the qualitative benchmark of a state, are laudable steps taken by the project. The discussion was followed by a question and answer session.

Inaugural Responsible Finance Summit (Sasana Kijang, Kuala Lumpur, 30 - 31 March 2016)

Tawfique Al-Mubarak

Bank Negara Malaysia, the central bank of Malaysia, recently hosted the inaugural Responsible Finance Summit (RFS) at their headquarters in Kuala Lumpur on 30th and 31st March, 2016. The event was jointly organised by the Responsible Finance Institute (RFI) Foundation and Middle East Global Advisors.

Keynote speeches from two versatile leaders and advocates of responsible finance marked the opening of the summit on the first day. In her keynote speech, outgoing Governor of Bank Negara Malaysia, Tan Sri Zeti Akhtar Aziz, highlighted the importance of financial inclusion, and mentioned how responsible finance could connect the more than 2 billion adults who are currently excluded from any formal banking services. She remarked that the summit is an opportunity to unite in rebuilding trust and in providing the foundations of more stable and sustainable long-term economic growth. The second keynote speech was delivered by George Kell, the Vice Chairman of Arabesque Partner and Founder and former Executive Director of UN Global Compact. He emphasised that environmental stewardship, social responsibility, and good governance of the corporations are essential to promote responsible investments. Besides, recent research by Oxford University and Arabesque Partners concludes that sustainable and responsible investment and profit making can mutually co-exist.

The second day marked its opening with a powerful keynote address by His Royal Highness, Emir Muhammadu Sanusi II, Emir of Kano State in Nigeria. Also the former Governor of the Central Bank of Nigeria, the Emir was listed as one of the 100 most influential persons in 2011. In his keynote speech, he

shared his experience as the Central Bank Governor and stressed that responsible finance cannot exist in an irresponsible economic and political environment, where corrupt banking professionals affect the whole society. Therefore, diligent regulations, and committed and responsible regulators are required for creating a sustainable and responsible economic environment. Positive mindsets amongst the common people and political risks from the governments are necessary to change the paradigm.

The two-day Summit comprised nine panel discussions hosted by CEOs of corporations, thought leaders in responsible finance, and academics from across the globe. Dr. Zamir Iqbal from the World Bank underlined the need for contracts based on risk sharing principles, and reduction of debt-based contracts. Asset-based finance, activities linked to the real economy and patient capital, are necessary for creating a responsible financial eco-system. Dr. Azmi Omar from the Islamic Research and Training Institute (IRTI, member of the IDB group) stressed the government's role and continuous support in enhancing responsible finance. Responsible finance, he argued will not be successful with a bottom up approach. Rushdi Siddiqui, Co-Founder and CEO of Zilzar Tech and a leading Islamic finance expert, mentioned the unparalleled significance of developing a knowledge-based economy for enhancing responsible finance.

Professor Akram Laldin, Executive Director of International Shari'ah Research Academy for Islamic Finance (ISRA), stressed that it is incumbent upon the Islamic financial institutions (IFIs) to think and go beyond the '*halal*' or Shari'ah dimensions. Rather, responsible finance principles are well embedded in the core teachings of Islam. Professor Maliah Sulaiman from the International Islamic University Malaysia (IIUM) mentioned that the IFIs need to focus more on environmental issues rather than on common social issues (like CSR) in their reporting. This could increase awareness among the IFIs and strengthen their impact on society.

At the One-on-One panel with the CEO of SEDCO capital, Hasan Al-Jabri remarked that Prudent Ethical Investment (PEI) may be an effective roadmap towards the convergence of responsible finance and Islamic finance. While speaking on the impact and roles of leadership in developing responsible finance, speakers praised the Chinese government's agenda on green financing, which requires mandatory ESG disclosure and disclosure of carbon footprints. Dr. Daud Bakar, CEO and President of Amanie Advisors, thought that finance being responsible means that it should be able to relate its activities to the man on the street. Corporations and investors should consider connecting further down, to the micro level, in order to fulfil their responsibilities. The Summit was attended by more than 400 participants from across the world.

**Seminar on Fatwa Issues in Contemporary Context:
Contemporary Fiqh in Facing the Reality of Malaysian Modern
Society
(IAIS Malaysia, 10 March 2016)**

Razi Ahmad

The swift pace of development in our modern society in the era of globalisation is generating new demands for resolving various issues in the light of Islam. As new issues continue to emerge, the public expects the authorities and *fatwa* institutions to provide comprehensive solutions by integrating modern and Islamic perspectives and fostering closer cooperation with every stratum of society.

Realising the need to issue *fatwas* based on contemporary approaches and the need to strengthen the *fatwa* institutions, the International Institute of Advanced Islamic Studies (IAIS) Malaysia on 10 March 2016 organised a seminar on *Understanding Fatwa in the Contemporary Context: Issues Relating to Fatwa in the Context of Contemporary Fiqh*.

The event was jointly organised by the Office of the Mufti of the Federal Territory, the Federal Territory Islamic Religious Council (MAIWP), the Selangor Islamic Religious Council (MAIS), the Institute of Islamic Understanding Malaysia (IKIM), the World Fatwa Management and Research Institute of USIM (INFAD) and the Academy of Islamic Studies of University of Malaya (APIUM), with the support of the Department of Islamic Development Malaysia (JAKIM).

The seminar featured seven speakers, with the Keynote Address delivered by the Mufti of the Federal Territory, SS. Dr. Zulkifli Mohamad Al-Bakri. Other presentations were given by SS. Dato' Zulkifly Muda (Mufti of Terengganu), Prof. Dr. Mohammad Hashim Kamali, Prof. Emeritus Dato' Dr. Mahmood Zuhdi, Prof. Dato' Dr. Ahmad Hidayat Buang, Assoc. Prof. Dr. Mohamed Azam Mohamed Adil and Assoc. Prof. Dr. Irwan Mohd Subri. The seminar concluded with the following resolutions:

- **Elevate** the status of the mufti in the state and Federal Territories: the minimum qualification for the appointment of a Mufti should be Doctor of Philosophy (PhD) or its equivalent.
- **Strengthen** *fatwa* institutions through training and continuous academic and professional development. This includes holding regular courses and seminars for the staff of the Mufti's Office.
- **Develop** and improve the professional code of ethics of the *fatwa* institutions, including the utilisation of new technologies (particularly in cyberspace) to protect their integrity.

- **Provide** greater freedom to the Mufti and *fatwa* institution so that issuance of *fatwa* will be more objective, independent of political influence and free of conflicts of interest.
- **Upgrade** the system of collecting data and information in the process of *fatwa* issuance, by increasing the participation of experts from various fields, by increasing human resources or more effective negotiation.
- **Evaluate** the *fatwas* and their relevance in light of current realities, for example by reviewing *fatwas* according to contemporary *fiqh* and *usul al-fiqh*.
- **Emphasise** public interest as the focal point in the process of issuing and gazetting a *fatwa*, besides taking into consideration the short and long-term effects of a *fatwa* on the social, legal and economic aspects of Malaysian society.
- **Review** and upgrade the mechanisms and methodology of issuing and gazetting *fatwa* from time to time.
- **Transparency** should be the basic policy of any *fatwa* institution in order to counter negative perceptions and increase public understanding and acceptance of a *fatwa*.
- **Upgrade** the procedures of standardisation and coordination of *fatwas* in Malaysia, both at the state and national levels, in order to overcome public confusion.

Halal Cosmetics & Personal Care: In Trend (Kuala Lumpur, 16 February 2016)

Apnizan Abdullah

The one-day forum on “*Halal Cosmetics and Personal Care: In Trend*” was organised by the Halal Development Corporation (HDC) on 16 February 2016 at KLCC Convention Centre, Kuala Lumpur. The forum started with the networking and exhibition session which was attended by prominent brand names in the Halal cosmetics and personal care industry, namely Clara International Beauty Group, Mazaya Divine Beauty, Al-Meswak Mu'min Sdn Bhd, Simply Siti, Sendayu Tinggi and Forest Secrets. Subsequently, the event proceeded with a grooming session hosted by local fashion designer, Azura Azwa. The forum continued with the first sharing session on “Knowledge Sharing: Economy Behind Beauty” featuring four prominent speakers who are also key persons within their companies. They were Encik Amirullah Abdullah, the Chief Operating Officer (CEO) of Mazaya Divine Beauty, Mr Woo Wee Kang, the Chief Operating Officer (COO) of Clara

International Beauty Group, Encik Asyraf Datuk Khaled, the CEO of Simply Siti and Dato' Haji Zaihal Hazri Abdul Halim, the CEO of Al-Meswak Mu'min. The speakers shared their experiences in engaging their business with *Halal* and *Halalan Tayyiban* requirements. All speakers agreed that engagement in *Halal* and *Halalan Tayyiban* concepts is in parallel with the increasing demands for safe, hygienic, pure and organic products in domestic and global cosmetics and personal care markets.

In the afternoon, the second sharing session on "Trending: Latest scenario" witnessed insightful presentations by Mr Fakarudin Mas'ud of the Department of Islamic Development Malaysia (JAKIM), Ms Zuraidah Abdullah of the National Pharmaceutical Control Bureau, Ministry of Health, and Dr Puziah Hashim, the *Halal* trainer and Consultant of BB Board Sdn Bhd. The speakers discussed the legal, Shariah and Standards requirements for *Halal* cosmetics and personal care products. The event was then officiated by the Deputy Prime Minister, YAB Dato' Seri Dr. Ahmad Zahid Hamidi, who respectfully invited the former Malaysian Prime Minister, Tun Abdullah Ahmad Badawi, to co-officiate the forum. Tun Abdullah has been active in promoting the *Halal* industry since his tenure as Prime Minister.

Before the forum ended, Ms Salma Chaudhry, the CEO of the Cosmetics Company, a UK-based organic and *Halal* cosmetics producer, shared her experience in developing *Halal* cosmetics products in Europe. Her session was then followed by the second grooming session hosted by Madam Nor Hayati Kamarzaman of Sendayu Tinggi Holdings. The forum indeed highlighted many deep insights into the *Halal* Cosmetics and Personal Care products industry, which has grown promisingly over the years. The global cosmetic market was reported to be worth USD460 billion in 2014 and is expected to grow to USD 675 billion by 2020. Its trajectory growth is projected at 6.4% per annum and 27%-32% of the figure will be from cosmetics and personal care. It was highlighted by one of the invited speakers, Mr Amirullah Hj Abdullah of the Mazaya Divine Beauty, that global Muslim expenditure on cosmetics and personal care was reported to count for USD 54 billion in 2014. This figure is forecast to grow at 14.5% per annum. Based on the statistics mentioned, the *Halal* cosmetics and personal care industry is potentially a highly lucrative market to be further explored by *halal* industry players.

OBITUARIES

Taha Jabir al-Alwani (1935 - 2016)

Dr Taha Jabir al-Alwani, an outstanding scholar, thinker and teacher, passed away at the age of 81 on 4 March 2016. He was born in Iraq in 1935 and received his primary and secondary education in his native land. His undergraduate degree was obtained in 1959 from the College of Shari'ah and Law at al-Azhar University in Cairo, Egypt. From the same university he would later earn his MA (in 1968) and PhD in *usul al-fiqh* (in 1973).

After his undergraduate studies, Dr al-Alwani taught at the Military Academy of Iraq, based in Baghdad, and served as a lecturer for six years at the College of Islamic Studies. While in Baghdad, he studied under some prominent scholars, including Sheikh Amjad al-Zahawi, Sheikh Qasim al-Qaysi (the Grand Mufti of Iraq), Sheikh Mohammad Fu'ad al-Aloosi, Sheikh Abdul 'Aziz Salem al-Samerai, and Sheikh Mohammed al-Qazilchi. However, he had to leave Iraq in 1969 due to political reasons, after which he returned to al-Azhar.

Upon obtaining his PhD, Dr al-Alwani taught at the Imam Muhammad ibn Sa'ud University, Riyadh, for 10 years. In 1983, he decided to immigrate to the United States, where he settled in Northern Virginia, remaining there until the end of his life. While there, he became President of Cordoba University in Ashburn, Virginia, where he also held the Imam al-Shafi'i Chair in Islamic Legal Theory at The Graduate School of Islamic and Social Sciences. Additionally, Dr al-Awani was also the founding chairman of the Fiqh Council of North America and co-founder and former president of the International Institute of Islamic Thought (IIIT), one of the US's most significant centres of Islamic Studies.

Dr al-Alwani was a noted advocate of *ijtihad*, which he advanced without departing from Islamic tradition and methodologies. In his *Islamisation of Knowledge*, for example, he reviewed the standard rulings on apostasy based on the classical teachings of Imam Abu Hanifah. He was also an expert in the relatively new field of *fiqh al-aqalliyyat*, which deals with the jurisprudence of Muslim minorities in non-Muslim majority countries. His other publications include: *Islamic Thought: An Approach to Reform*, *Source Methodology in Islamic Jurisprudence*, *The Ethics of Disagreement in Islam*, and *The Qur'an and the Sunnah: The Time Space Factor*. Dr Alwani left behind three children, Dr Zainab Alwani, Dr Ruqaya Alwani and Ahmed Alwani.

On behalf of the International Institute of Advanced Islamic Studies (IAIS) Malaysia and myself, it is with great sorrow that we see the loss of such a great thinker and scholar. *Inna li'Allahi wa inna ilayhi raji'un*. He made immense contributions to Islamic scholarship and to our understanding of the many new issues facing the Ummah. For this reason, and also for his kindness of character and personality, his memory will no doubt live with us long after his sad departure.

We offer our condolences to his family and friends and offer prayers: May Allah s.w.t shower him with blessings and grant him a handsome reward for his lifetime of noble efforts.

Professor Mohammad Hashim Kamali's personal note on the late Dr Alwani. This was uploaded on IAIS website as of 5 March 2016.

Hasan al-Turabi: Sudan's Political Visionary (1932 - 2016)

Tawfique al-Mubarak

Hasan Abdullah al-Turabi, with a white turban on his head and a wide smile on his face, scholastic in speech and humorous in word, was for many years one of the most influential figures in Sudanese politics.

Born on 1 February 1932, in Kassala State, Northern Sudan, his father was a well-known Sufi *sheikh* and religious scholar. It was from him that al-Turabi received his early Islamic education, before going on to earn a law degree from the Gordon Memorial College (now the University of Khartoum) in the early 1950s. Subsequently, he went on to King's College, London, where he studied for higher degrees in law, before moving on to Paris to complete his PhD in constitutional law at the Sorbonne.

Al-Turabi began his academic career with a teaching position at the University of Khartoum's School of Law. In October 1964, he became an active and vocal participant in the protests against the then President, Ibrahim Abboud. This marked the beginning of his lively participation in Sudanese politics; from this point on, he began to play a significant role in Sudanese political life, his political thought finding full expression in his many writings, including his seminal book *al-Siyasah wal-Hukm* (Politics and Governance).

Al-Turabi consistently and ardently advocated the implementation of Islamic Law in the Sudan. After 1964, however, when President Abu Ja'far (Gaafar) al-Nimeiry assumed power through a military coup, these views became unpopular and al-Turabi was imprisoned for six years, before then being exiled to Libya for another three. During these turbulent years, however, al-Turabi's relationship

with al-Nimeiry gradually became more cordial until, in 1979, the latter invited al-Turabi back to the Sudan to take up the post of Attorney General. Simultaneously, Al-Turabi was also appointed to revise Sudanese law so that it conformed to the Shari'ah. However, before this 'Islamisation' project could be completed, al-Turabi was dismissed from his position and arrested once again.

When General Omar Bashir came to power in 1989, al-Turabi initially found himself imprisoned for several months. Upon his release, however, he was appointed Foreign Minister – a position he held only briefly before being removed. His subsequent absence from frontline politics afforded him the opportunity to strengthen his own political party, National Islamic Front (NIF), and its membership. After the 1996 elections, his party's success allowed him to become the Speaker of Parliament. During his tenure, he was criticised for trying to reduce Bashir's Presidential powers. Perhaps because of this, in 1999 al-Turabi was dismissed from his position and imprisoned again. Later, he became the only Sudanese politician to publicly demand that President Bashir surrender himself to the International Criminal Court (ICC) after that institute issued an arrest warrant for him following the crimes committed in Darfur. Al-Turabi was arrested again in 2011 after his open criticism of the President.

Although he married the sister of two-times Prime Minister and leader of the National Umma Party, Sadiq al-Mahdi, al-Turabi's ties and affiliations with the Presidents and Prime Ministers of Sudan were never consistent. For him, friends frequently became foes. He had a remarkable life in which imprisonment and detention were interspersed with periods of influence and high office. Although often criticised by many for his political affiliations, he is considered one of his country's most influential Islamic ideologues.

On 5 March 2016, al-Turabi suffered a heart attack and breathed his last at the Royal Care International Hospital in Khartoum. He will be remembered by many for his dedication to the establishment of an Islamic government. He is survived by his wife, Wisal Mahdi, and two sons, Isam and Sadiq. May Allah s.w.t. bless his soul! *Aameen!*

Mumtaz Ahmad, an Intellectual Icon (1940 - 2016)

Abdul Rashid Moten

As stated in the Qur'an, death is inevitable. Mumtaz Ahmad received the call from his Lord and departed this world, in full faith, on 31 March 2016, aged 76. Friends and relatives offered his funeral prayers at his native village in Gujar Khan, Pakistan.

Prof. Dr. Mumtaz Ahmad was a fine gentleman, a lucid political scientist and an erudite scholar of Islam. He received Masters degrees from Karachi and the American University of Beirut, and a Ph.D. in Political Science from the University of Chicago, where between 1976 and 1981 he was a student of Professor Fazlur Rahman. Following his education, he spent more than half a century teaching at numerous institutions, including Hampton University, Va., USA. During his distinguished career he was also a member of the “Fundamentalism Project” at the American Academy of Arts and Sciences, University of Chicago; Vice-President of the Centre for Islam and Public Policy (CIPP), Washington, D.C.; and President of the South Asian Muslim Studies Association (SAMSA). He also served as a Visiting Professor at the International Islamic University Malaysia and International Islamic University (IIU), Islamabad, Pakistan. At the time of his death, he was the Executive Director of the Iqbal International Institute for Research and Dialogue based at IIU Islamabad.

Prof. Mumtaz Ahmad published nine books, in addition to numerous book chapters, journal articles and encyclopaedia entries. His very first book, on the Kashmir issue, was honoured with a foreword by Sayyid Abul A’la Mawdudi. His writings ranged from the classical period to modern times, from social psychology to the politics of contemporary Islamic movements, and from the history of Islamic political thought and institutions to the contemporary socio-economic and political developments of South Asia and the Middle East. His writings portrayed his intellectual brilliance and bore witness to his faith in the religion of Islam. He believed that open discussion and dialogue represented the very essence of Islam. He endorsed the validity of pluralism, arguing that it was an essential element of all true Islamic polities. He was therefore broadminded and tolerant of differing viewpoints.

Right up until the end, Prof. Mumtaz Ahmad loved to teach. He provoked students to speak out. He was, however, concerned about an intellectual malaise in the Islamic educational system, believing that the latter had become ossified. On several occasions he associated the decline of Muslim power with the decline of Muslim intellectual vigour. Whenever he saw his undergraduate students wearing jeans, drinking Coke, and listening to rap music, he worried that they had forgotten about their sacred mission in this world. He believed in the possibility of civilisational revival, but maintained that it could only happen through intellectual revolution, a process in which intellectuals must play a role. He lamented, however, that very few intellectuals could be seen hanging around Muslim universities. The logic of commodity, he believed, had penetrated the world of academia; the free play of the mind was no longer nurtured by those in authority.

Prof. Mumtaz Ahmad impacted on many lives, whether as a committed mentor, colleague or friend. He influenced many Muslim intellectuals and

students, both at home and abroad. Many of his former students, both Muslims and non-Muslims, are now outstanding scholars in their own right, teaching in universities and colleges. He influenced many, all of whom will remember his smile, his warmth, his energy, his love for family and friends. Professor Dr. Mumtaz Ahmad is survived by his wife and two sons.

Zafar Ishaq Ansari (1932 - 2016)

Dheen Mohammed

Last week, the world of Islam lost one of its most benevolent sons, someone who worked tirelessly and unassumingly to promote knowledge with remarkable dedication and enthusiasm. Prof. Zafar Ishaq Ansari has joined the long list of luminaries who have bowed out of this finite world, *in sha Allah* to live on as a resplendent star guiding all wayfarers in their search for knowledge.

Many are my memories and recollections of his personality, each more powerful than the next, each vying to drop from the pen onto the page. Yet, one image stands out above the others – that of a perpetual teacher, a perennial mentor who exhausted all the strengths of his heart, soul and mind in serving the cause of Islam and creating a generation of scholars and researchers capable of carrying his legacy on to future generations. All this he did without pretension or affectation, just sheer dedication, humility, sincerity, resolve and a uniquely balanced viewpoint.

I had the privilege of working with Prof. Ansari at the International Islamic University Islamabad (IIUI) from 1990 to 2004. As a senior colleague, he was always encouraging me to read and research. I saw in him a revival of “the spirit of the fatherly scholar,” something we so often hear about yet so rarely witness. Although Prof. Ansari was frequently sought out by visiting scholars, both domestic and international, big and small, nothing pleased him more than the weekly study forums he hosted for young graduate students. Prof. Ansari found much happiness in coaching these young researchers, in guiding them in their respective fields and always being ready to spend (especially after his wife’s demise) any amount of time advising them. Many past attendees of these forums have since gone on to become prominent researchers in their own right, recognised around the world for the quality of their work. They included such notables as Dr. Modassir Ali, Dr. Qaiser Shahzad, Dr. Muhammad Akram, Mr. Azfar Saeed and his wife Ms. Hafeeza (all from Pakistan), Dr. Faruk Terzic (Bosnia Herzegovina), and Dr. Zuhrauddin (China). But despite being a man of great knowledge and experience, Prof. Ansari was extremely humble; he always

displayed a desire to listen and learn from others, even though they might be young and inexperienced.

His editorial work for the English-language journal, *Islāmic Studies*, one of the Muslim World's leading academic periodicals, readily evinced his commitment and dedication to perfection. He told his friend, Prof. Hasan al-Shafi', a former president of IIUI, that at times he would read and revise an issue of the journal more than a dozen times before allowing publication.

Prof. Ansari was extremely sensitive to the feelings of others and frequently had a hard time expressing opposition to them in a candid way. I vividly recall an occasion when he sent me a couple of books for review, both by his friend John Esposito – *Unholy War* and *What Everyone Needs to Know about Islam*. I duly wrote my review article and returned it to him. He was well aware of my inclination to be uncompromisingly blunt in my criticism and, in that article, I had not held back. He did not, however, share some of my assessments. Nevertheless, he struggled for a month to discuss these issues with me. When we finally met, instead of telling me outright about my academic failings, he afforded me a full-hour lecture on the merits of being soft-spoken and guarded in the academic world. I have never doubted his veracity and wisdom in this regard.

Over the past few years, Prof. Ansari's health deteriorated seriously, particularly after the failure of his kidneys. This did not, however, dampen his resolve; despite undergoing kidney dialysis three days a week, he continued to work tirelessly, undertaking two particular important projects: his UNESCO "Introduction to Islam" and an English translation of Maulana Mawdudi's *Tafhīm al-Qur'ān*. Although he successfully completed the former, what little remains to be done on the latter has now been handed over to another accomplished scholar. Prof. Ansari would undoubtedly have realised his most cherished desire had he completed Mawdudi's *Tafhīm* himself, but God works in ways He deems best.

Although Prof. Ansari is no longer amongst us, *in sha Allah* his legacy will last through the efforts of his students (his intellectual children) for as long as God wills it.

CALL FOR PAPERS

Islam and Civilisational Renewal (ICR) invites scholarly contributions of articles, reviews, or viewpoints which offer pragmatic approaches and concrete policy guidelines for Malaysia, the OIC countries, civic non-governmental organisations, and the private corporate sector. The principal research focus of IAIS is to advance civilisational renewal through informed research and interdisciplinary reflection with a policy orientation for the wellbeing of Muslim communities, as well as reaching out to non-Muslims by dialogue over mutual needs and concerns.

Our enquiry and recommendations seek to be realistic and practical, yet simultaneously rooted in Islam's intellectual and spiritual resources, Muslim political and social thought, inter-faith exchanges, inter-civilisational studies, and global challenges of modernity.

ICR invites contributions on the following topics:

- issues of good governance and Islamic law reform in Muslim societies
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- minorities and culture-specific studies
- ethical, religious or faith-based issues posed by modernity
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