

SHARIAH: A DYNAMIC LEGAL SYSTEM

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أَلْحَمْدُ لِلَّهِ الَّذِي أَنْزَلَ الْقُرْآنَ هُدًى وَرَحْمَةً لِلْعَالَمِينَ
الصَّلَاةُ وَالسَّلَامُ عَلَى سَيِّدِنَا مُحَمَّدٍ خَاتَمِ الْأَنْبِيَاءِ
وَالرُّسُلِينَ، وَعَلَى آلِهِ وَأَصْحَابِهِ الْمُسَبِّحِينَ بِتَعَالَمِ
الْقُرْآنِ وَالْمُسَنِّدِينَ فِي أُمُورِ الدُّنْيَا وَالْآخِرَةِ

First of all I would like to thank my great friend, His Excellency Mr, M.H. Mohamed, the Minister of Transport and the Minister in Charge of the Muslim Religious and Cultural Affairs of the Republic of Sri Lanka, for his kind invitation to me to take part in this very important Islamic gathering, the Third Asian Forum of the International Shariah Conference; and I deem it an exceptional privilege and honour to be invited to address this forum, attended by prominent Islamic jurists and scholars, all with international reputes, I am doubtful, though, that I shall be able to come up to the expectation, and to satisfy the intellectual curiosity of this professionally well informed audience.

I would like to congratulate the organisers of the Forum on the selection of its theme, namely "*Shariah and Codification*". The theme is indeed both appropriate and timely, if only because at the present moment we the Muslims are confronted by a complexity of problems, political, economic, social as well as legal. The challenge is indeed formidable. That is how could we preserve the universal validity of the Islamic teachings and its systems of value, including those embodied in the Shariah, in this fast changing world, full of social and cultural diversities.

Indonesia, for one, is now busily engaged in the reconstruction of its national legal system, and in that framework the Supreme Court and the Ministry of Religious Affairs launched recently a joint project on the Compilation of Islamic Law, with the main objective of producing law books for the Indonesian Shariah judges. In carrying out that task we need a guiding principle in order to safely reach our objective without violating the universality of the Shariah. In our search for such a guiding principle along the history of Islamic jurisprudence, I would say that we have ample evidence that the Shariah is truly a dynamic legal system, with degree of adaptability. In this speech, with all humility, I shall try briefly to substantiate the dynamic and adaptable nature of the Shariah.

To begin with, the predominant majority of the Muslim jurists are in general agreement that there is "*naskh*" both in Al Qur'an and in the Traditions of the Prophet. There are a number of Quranic verses the contents of which qualify or even abrogate the laws contained in some other verses revealed to the Prophet earlier. There are also many sayings of the Prophet that revoke some directives that he had given earlier. At this juncture

I would like to relate to this Forum the comments of two outstanding Quranic commentators (*mufasssirin*) on the verse 106, Surah Al-Baqarah which says:

مَا نَنْسَخْ مِنْ آيَةٍ أَوْ نُنسِهَا نَأْتِ بِخَيْرٍ مِنْهَا أَوْ مِثْلَهَا
الْمُرْتَضَى أَنَّ اللَّهَ عَلَى كُلِّ شَيْءٍ قَدِيرٌ

"Surely our revelations as we abrogate or cause to be forgotten, we bring (in place) one better or the like thereof. Knowest thou not that Allah is able to do all thing." (II: 106).

Commenting on that verse, *Ibn Kathir* said:

قَالَ لَيْسَ فِي الْعَقْلِ مَا يَدُلُّ عَلَى امْتِنَاعِ النِّسْخِ فِي أَحْكَامِ
اللَّهِ تَعَالَى (تفسير ابن كثير الجزء الاول ص ١٥١)

"Surely there is nothing in the human intellect that indicates the unacceptability (of the idea) of the abrogation in the laws of Allah the Most Supreme." (*Ibn Kathir's Quranic Commentary*, Part One, p. 151).

Ahmed Mustafa Al-Maragi, said:

إِنَّ الْأَحْكَامَ مَا شَرَعَتْ لِإِلَاحَةِ النَّاسِ، وَهِيَ تَخْتَلِفُ
بِاخْتِلَافِ الزَّمَانِ وَالْمَكَانِ. فَلِذَا شَرَعَ حُكْمٌ فِي وَقْتٍ
كَانَتْ الْحَاجَةُ إِلَيْهِ مَاسَّةً ثُمَّ زَالَتْ الْحَاجَةُ فَنُزِلَ الْحُكْمُ
نَسْخُهُ وَتَبَدَّلَ بِهِ حُكْمٌ يُوَافِقُ الْوَقْتَ لِأَخْرِقَ كَوْنُ
خَيْرًا مِنَ الْأَوَّلِ أَوْ مِثْلَهَا فِي فَائِدَتِهِ لِلْعِبَادِ
(تفسير المراغي، الجزء الاول ص ١٨٧)

"Surely the laws are legislated for the humanity's interest, and that interest differs in different eras and localities. So if a law is lagislated at a time when the need is urgent, when the time comes where that law is no more needed, it is wise to abrogate it and to replace it with a (new) law more suited to the time. The new law will be better than the first or the like thereof from the point view of the people's interest". (*Al-Maragi's Quranic Commentary*, Part One, p. 187).

As we all know, the Second Khalifah, *Umar b. Khattab r.a.* succeeded to the Khilafah hardly two years after the death of Prophet Muhammad. Yet during his rule he took quite a number of important decisions in the field of law which seem to represent a departure either from the texts of Al-Quran or from the Traditions of the Prophet. Below are few examples:

1. Despite the clear stipulation in the verse 60, Surah Al-Taubah, as to who the alms is to be distributed, which includes the newly converted Muslims "whose heart are still to be reconciled" (*al-muallafah qulubu-*

hum), yet Umar b. Khattab stoppes allotting a portion of the alms to them.

2. In the administration of the spoils of war Umar b. Khattab did not follow literally the pattern dictated by the verse 41, Surah Al-Anfal, that one-fifth of the spoils is to be allotted to Allah, the Messenger, his relatives, the orphans, the needy and the wayfarer, and the rest to be distributed to those who take part in the war. Umar left the properties, particularly the lands of the newly conquered regions, to the original awners, and imposed on them some sort of taxes as a source of revenue to cover the state expenditures, including the allowances of the members of what might be called to day the "Standing Army."
3. In the time of the Prophet and Abu Bakar, in addition to the punishment of one hundred whiplashes as prescribed in the verse 2, Surah Al-Nur, an unmarried adulterer had to be banished for one full year. Umar b. Khattab abolished that additional penalty after he was informed that one adulterer went out to a non Muslim country.

As to be expected, Umar's courageous policies in adjusting the original teaching of Islam to the new situation, always caused heated arguments and even frictions between him and other senior companions of the Prophet. But at the end Umar always came out as the winner, because he succeeded in convincing the others that his departure from the Quranic texts and the Traditions of the Prophet did not mean deviation from the objectives of the Shariah. On the contrary, by departing from the Quranic texts and traditions in the changing situation Umar had served the true purposes of the application of the Islamic law (*Maqasid al-Shariah*): upholding of justice, high morality, reasonability, and genuine popular interests.

Khalifah Umar b. Abdul Aziz is another great personality in Islamic history. He is well known for his puritanical life, his deep devotion to the Islamic faith, and his determination to reconstruct the then corrupt society by reintroducing high morality and justice. The Muslims accorded him an honorary title *خامس الخلفاء الراشدين* (the fifth of the Khulafaurrashidin).

In his effort to create a clean state administration, he prohibited the government officials from accepting gifts, although Islam, as it was practised by Prophet Muhammad, does not forbid the Muslims from accepting gifts. In response to the protest against the prohibition he reportedly said:

كَانَتْ الْهَدِيَّةُ فِي زَمَانِ رَسُولِ اللَّهِ (ص) هَدِيَّةً، وَالْيَوْمَ رِشْوَةٌ

"Gift in the time of the Messenger of God was gift, (but) today it is bribe".

Moreover Umar b. Abdu Aziz tolerated the diversity of legal opinions amongst the Muslim Jurists. He saw that diversity as blessing to the people.

The differences of opinion amongst the earlier Muslim jurists reflect

the extent of the Shariah receptivity to the influence of human and other earthly factors such as the personality or the individual jurists, and the situation and condition in which they lived. For instance, the Sunny jurists were divided into two major groups: *Ahl-al-hadith* (the people of Traditions) and *Ahl-al-ra'yi* (the people of reason).

The first group mostly lived in Hijaz, with *Imam Malik* as the principal leader. This group chose to stick to the Traditions and was reluctant to resort to reason, partly because it was in Hijaz, and Madinah in particular, that the Prophet used to live, and there still lived his companions or those who knew the Traditions by heart. Moreover the pattern of social life there was relatively simple. So the community problems and issues could be easily solved by the directives found in Al-Qur'an and the Traditions, and by consultation or consensus amongst the (senior) residents of Madinah. The second group, the people of reason, mostly lived in Irak. This region was much different from Madinah. The pattern of social life there was more developed. In addition, Irak had come under the influence of Greek rationalism. The other explanations as to why the members of this group relied more on intellectual reasoning rather than referring themselves to the Traditions were:

- a. the great distance between Irak and Madinah wherein lived the Traditionists (*Al-Muhaddithin*);
- b. the rampant falsification of the Traditions.

It is interesting to note that in commercial law *Imam Abu Hanifah's* view is more practicable than that of the other three great jurists *Malik, Shafei and Ibn Hambal*. This might be due to the fact that unlike the three Imams, who by their occupation were not quite familiar with the commercial world, *Abu Hanifah* belonged to a family of traders. His father was a trader. He himself was a trader and lived in a very flourishing trading centre. So he was more appreciative of the complexity of the problems of commerce.

I would like to say a few words on Shafei's *Mazhab*. First, it can be safely said that the Shafei's *Mazhab* is a kind of synthesis between the two *Mazhabs*, Hanafi and Maliki. Second, Shafei's *Mazhab* shows the moral courage of Imam Shafei to think Independently. He agrees with Malik that *ijma'* is one of the principal sources of the Islamic law after Al-Qur'an and the Traditions. But he disagrees with his former teacher on the definition of *ijma'*. To Malik, *ijma'* is a consensus amongst the (senior) residents of Madinah, while to Shafei *ijma'*, to have a validity as a source of law, must be a consensus of the whole Muslim community. Moreover, Shafei shows his reluctance to endorse Malik's idea of *istislah*. Shafei, on the other hand, is in accord with Abu Hanifah with regard to *qiyas* as another source of law. But he refuses Hanafi's theory of *istihsan*.

The development of Shafei's *Mazhab* signifies the ample influence of local conditions and circumstances on the application of law. In that *Mazhab* we know the term *Al-qoul al-qodim* and *Al-qoul al-jadid*. The first re-

presents Shafei's views when he was in Iraq, and the second his views after he moved to Egypt. One researcher in Indonesia has succeeded in finding differences between the Iraqi and the Egyptian views on over one hundred cases.

From amongst the jurists of the four *mazhabs*, despite their differences, there are outstanding personalities such as *Al-iz b. Abdul Salam* (Shafei group), *Abu Ishaq Al-Satibi* (Maliki group) and *Ibn Qayyim Al-Jauziyyah* (Hambali group) who agree in classifying the laws into two categories: the laws that are dealing with *ibadah mahdhi* (pure ritual matters) and those that are relating to *muamalah dunyawiyah* (worldly social matters). With regard to the first category there is little that the jurists can do. But as to the second category there is ample room for the jurists to exercise their intellectual reasoning, with the genuine interest of the people as their primary consideration. In this context *Ibn Qayyim Al-Jauziyyah* confirms that the laws can change or differ due to the change of time and to the differences of locality, situation, objective and custom.

It is worth noting that *Abu Yusuf* (Hanafi group), in apparent departure from *Abu Hanifah's* opinion, is holding the view that in the case when the law prescribed by a "*nas*" is based on a custom, that law will not remain valid once the custom has changed.

I hope that by this brief expose I have succeeded in sharing with you my limited informations which lead to the conclusion that *Shariah is truly a dynamic legal system with a high degree of adaptability*.

Assuming that the conclusion is acceptable, we the Muslims who live at the end of the 20th century, spreading all over the world with diverse customs, traditions, cultures, and historical backgrounds should not have any problem in adjusting the application of the Islamic law to our respective locality, custom, tradition, and culture, without endangering the universality of *Shariah*.

In concluding my speech allow me to borrow the humble yet wise words of *Imam Abu Hanifah* which read as follows:

قَوْلِي هَذَا رَأْيٌ، وَهُوَ أَحْسَنُ مَا قَدَرْتُ عَلَيْهِ. فَمَنْ جَاءَنِي
بِأَحْسَنَ مِنْ قَوْلِي فَهُوَ أَوْلَىٰ بِالصَّوَابِ مِنِّي

"What I just said is an opinion, and that is the best I could produce. Whoever comes to me with an opinion better than mine, his (opinion) deserves better to be taken as the correct one."

وَالسَّلَامُ عَلَيْكُمْ وَرَحْمَةُ اللَّهِ وَبَرَكَاتُهُ