

# ACCOMMODATING ISLAMIC TENETS WITH LESSONS LEARNT FROM MUSLIM WORLD IN MALDIVES COMMERCIAL LAWS: A LITERATURE REVIEW

**Mohamed Ibrahim**

*Ph.D Candidate, Department of Shariah and Law,  
Academy of Islamic Studies,  
University of Malaya, 50603 Kuala Lumpur.  
kunfunimohd@gmail.com*

**Ahmad Hidayat Buang**

*Professor, Department of Shariah and Law,  
Academy of Islamic Studies,  
University of Malaya, 50603 Kuala Lumpur.  
ahidayat@um.edu.my*

## ABSTRACT

*Several studies have already been carried out on Islamic law Reform within the context of Muslim world. A minor portion of these studies have focused on Islamic law reform with reference to commerce. It appears that apart from few literature reviews published in the area of Islamic banking law, which is generally part of Islamic commercial law, one may hardly find any literature on this subject in the context of Maldives. Conceptually, it is permissible to enact laws of any nature, if it does not violate the clear tenets of Islam as prescribed in the holy Quran and Sunnah. It further certitudes that in respect of the commerce, the basic tenets of Islam are the prohibition of riba (usury), gharar (uncertainty) and maysir (gambling). In addition to these, the laws have to comply with the general Islamic commercial tenets such as the prohibition of any form of business of liquor, pork and pornography etc. The selected literatures on the experiences of different parts of the Muslim world show that once these tenets are accommodated in the commercial laws, it should be deemed to declare as in conformity with Islam, which could be taken as evidence for accommodation of Islamic tenets in the commercial laws of Maldives.*

**Keywords:** *Islamic law reform, Islamic commercial law, Maldives*

## INTRODUCTION

Maldives is one of the four Atoll Island States in the world.<sup>1</sup> An island nation, with more territorial sea than land shaped the economy and commercial activities in the Maldives. The geographic location of the country ignites two industries fishing and tourism.<sup>2</sup> In addition to this, shipping and construction sectors play secondary role in the economy. In the early 1980s, Maldives was one of 20 poorest countries in the world, today it's an upper middle income nation with GDP USD 9,100/- per capita.<sup>3</sup> With the opening of its first tourist resort in 1972, the economy of the country has undergone rapid change and foreign investments have increased, in particularly tourism related business. Thus, it is required that the legal framework of the country should be of such a standard in conformity with international norms.

Maldives is a country where the Constitution is the Supreme Law of the land.<sup>4</sup> The Constitution of the Republic of Maldives, 2008 (hereafter referred to as "the Constitution, 2008") stipulates that 'Islam is the states religion',<sup>5</sup> and the country is a sovereign, independent, democratic Republic based on the principles of Islam...<sup>6</sup> The Constitution further stipulates that no law contrary to any tenet of Islam shall be enacted in Maldives.<sup>7</sup> Therefore, it is evident that it is a constitutional obligation that the Republic is to be based on the principles of Islam.

---

<sup>1</sup> Other three Atoll Island States are Kiribati, Tuvalu and the Marshall Islands. See, Lilian Yamamoto and Miguel Esteban. *Atoll Island States and International Law: Climate Change Displacement and Sovereignty*. Springer, 2013. The Republic of Maldives is situated in the south-west of Sri Lanka in the Indian Ocean and is comprised of 1190 coral Islands, forming an archipelago of 26 major atolls which is administratively divided into twenty regions. The total population of the Maldives is 370,101 who are historically originated from Indo-Arian. The language of the Maldives is Dhivehi, which is closely related to Sinhala, the national language of Sri Lanka. English is widely spoken and considered as second language and literacy rate is almost 100%. The nation's capital is Male., <http://www.thecommonwealth.org/YearbookHomeInternal/138746/>, retrieved on January 13, 2015.

<sup>2</sup> <http://www.worldbank.org>, retrieved on January 13, 2015.

<sup>3</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/mv.html>, retrieved on January 13, 2015.

<sup>4</sup> Article 8, the Constitution of the Republic of Maldives, 2008.

<sup>5</sup> Article 10 (a), the Constitution of the Republic of Maldives, 2008.

<sup>6</sup> Article 2, the Constitution of the Republic of Maldives, 2008.

<sup>7</sup> Article 10(b), the Constitution of the Republic of Maldives, 2008.

Keeping in mind the stiff development of the country from a poor country of 1980s to an upper-middle income country of modern times, along with the significance of commercial and business rules and regulation in line with modern world, and constitutional obligation to adhere to Islamic tenets, a pacific blend of these two should be ensured. An assessment of the journey of some other Islamic countries which have undergone similar kind of situation will definitely benefit Maldives as a country to undertake similar kind of venture. In this context, the aim of this paper is to review and evaluate the experience of other Islamic countries which have incorporated Islamic law principles within their municipal laws and to find out ways how Islamic tenets can be accommodated in the country. To this end, the paper is divided into three main parts along with the introduction and conclusion. Part one deals with how the issue of Islam is incorporated in the Constitutions of different Muslim countries, part two sheds focus on select literature of law reform in the Muslim countries, part three considers the accommodation of Islamic commercial tenets in the Maldives.

## CONSTITUTIONAL REFERENCE TO ISLAM

It is a matter of fact that Muslim countries have a balance between the Shariah and Constitution, due to the fact that as Muslims, they have obligations to follow the divine dictates of Allah SWT revealed through holy Quran and *Sunnah* of Prophet Muhammad PBUH, on the other hand, the modern Western scholars advocate to adhere to constitutional supremacy. Thus, Muslim countries around the world have taken different approaches to make a balance between these two.

With regards to the Constitutional reference to Islam, Muslim world is divided into four main groups. There are states that have declared themselves as Islamic states, such as Afghanistan,<sup>8</sup> Bahrain,<sup>9</sup> Iran,<sup>10</sup> Pakistan,<sup>11</sup> and Maldives, through explicit provisions in their respective Constitutions. In the second category, some countries such as Egypt<sup>12</sup> and Malaysia<sup>13</sup> have proclaimed Islam as state religion. Next are those states where Muslims are the dominant community but there is no constitutional reference about the religion. For example; Indonesia and Sudan. Lastly; there are countries that

---

<sup>8</sup> Article 1, the Constitution of Islamic Republic of Afghanistan, 2004.

<sup>9</sup> Article 1, the Constitution of the State of Bahrain, 1973.

<sup>10</sup> Article 1, the Constitution of the Islamic Republic of Iran, 1979.

<sup>11</sup> Article 1, the Constitution of Islamic Republic of Pakistan, 1973.

<sup>12</sup> Article 2, the Constitution of the Arab Republic of Egypt, 2014.

<sup>13</sup> Article 3, the Federal Constitution of Malaysia, 1957.

have declared themselves as secular states e.g. Turkey. These references are exhibits in the Table 1 below:

Table 1: Islam and the Constitutional role in the Muslim World.

<b>Declared Islamic States</b>	<b>Declared Islam as State Religion</b>	<b>Declared No Constitutional Reference</b>	<b>Declared Secular States</b>
1. Afghanistan	[Islamic states ref	1. Albania	1. Burkina Faso
2. Bahrain	in colum: 1]	2. Lebanon	2. Chad
3. Brunei	12. Algeria	3. Syria	3. Guinea
4. Iran	13. Bangladesh	4. Indonesia	4. Mali
5. Maldives	14. Egypt	5. Comoros	5. Niger
6. Mauritania	15. Iraq	6. Djibouti	6. Senegal
7. Oman	16. Jordan	7. Gambia	7. Azerbaijan
8. Pakistan	17. Kuwait	8. Sierra Leone	8. Kyrgyzstan
9. Saudi Arabia	18. Libya	9. Sudan	9. Tajikistan
10. Somalia	19. Malaysia	10. Uzbekistan	10. Turkey
11. Yemen	20. Morocco		11. Turkmenistan
	21. Qatar		
	22. Tunisia		
	23. UAE		

Source: Stahnke and Blitt (2005: 10) (adopted with modification).

Stahnke and Blitt reveal that Twenty two out of 44 predominantly Muslim countries recognized some Constitutional role for Islamic law, principles, or jurisprudence. In 18 of these 22 countries, Islam is declared as the religion of the states, whereas rest four predominantly Muslim countries did not declare Islam as the state religion. In other countries, where a constitution role for Islam is established, that role varies and in some cases may be restricted to specific matters, such as personal statutes...” Furthermore, considering the legal system of these countries in this respect, some of these countries such as Egypt and other Gulf states establish Islamic law, “principles” or “Jurisprudence” as “the basis for”, “the principal source of”, “a principal source of” or “the source of legislation”. In addition, of the countries that have declared Islam as a basis of legislation, some of them have not declared Islam as a state religion such as Syria and Sudan (*Ibid*). With respect to the meaning of Islamic Law or, Shariah or other references given in the Constitutions, majority of Muslim countries refrain from providing a definition of the term ‘Shariah’. Instead, there are countries that provide in their Constitution that a certain school of thought is to be followed. For example, Article 3 of the Brunei Darussalam Constitution provides that the religion shall be according to Shafie sect.

Probably the only country that have provided a constitutional definition of Shariah is Maldives, which in article 274 stipulates that “Islamic Shariah” means, the Holy Quran and the ways preferred by the learned people within the community and followers of the *Sunnah* in relation to criminal, civil, personal and other matters found in the *Sunnah*; A close look of this definition will reveal that it was an attempt to restrict the concept of Shariah in the modern senses by specifying three key areas only i.e. civil, criminal and family laws and discarding other rules relating to religious and ritual matters, which are also part of the Shariah (Brown, 1997). Thus, the drafters of the Constitution actually took a restrictive approach by adopting only parts of Shariah in the definition.

To examine the Constitutional provisions of Maldives in this regard as provided in Table: 1, it will be relevant to share here that article 10 of the Constitution, 2008 in clause (a) states that the religion of the state of Maldives is Islam. Islam shall be one of the basis of all the laws of the Maldives, and in (b) provides that no law contrary to any tenet of Islam shall be enacted in the Maldives.

This provision is newly incorporated in the Constitution of the country. In order to determine the interpretation of this provision, the relevant laws of the country should be considered. In order to reveal the intention of the law-makers who has incorporated Article 10 in the Constitution, 2008, whether they intended to make the whole legal system purely Islamic, or whether it was just a literal provision drafted to include into the Constitution, one should first examine the historical background of the provision (if there is) as well as the experience of other Muslim countries. The fact is that the historical background for this provision in the context of Maldives has not been studied enough. Therefore, sharing the experience of other Muslim countries’ in this regard can provide some answers in this regard.

The Constitutions of some Muslim countries provide for a provision to conform the legislation with the Shariah such as Maldives, Afghanistan, Algeria, Pakistan and Somalia (Salim, 2008). However, the wording of these provisions and terms used for this purpose are different from each other. When translated to the English language these provisions read as “the laws shall be in conformity to, “the Injunction of Islam”, “the teaching of Islam”, “the Tenet of Islam” and “the Principles of Shariah” or “the norms of Shariah”. These inconsistencies of the terminologies do not make any difference in practical sense.

Otto claims that the provision on laws in conformity with Islam is a constitutional provision, which has repeated pattern within the major part

of the Muslim world. Such a phrase does not mean much in practice as the same constitution provides, bulk of provisions to safeguard the human rights, independent of judiciary and democracy (Jan Michel Otto, 2008: 18). Conformity of divine and positive norms on a single piece of legislation is challengeable and inconsistent with each other on some cases, since then the best option could be “compatibility of Shariah and rule of law”- a mechanism for harmonization of these two under a single formula (*Ibid*, 19).

A glaring example to share in this regard is the instance of reformation of Maldives Penal Code (2014) which was constructed on synthesis of Islamic law, Maldivian tradition and International norms. According to the drafter of the Code, accommodation of these three, in particular, the international norms with Islamic law was not easy, but not impossible by analyzing the spirit of Islamic rules. In fact, a similar approach has been taken in the major part of the Muslim world, whether it is in Egypt or Malaysia regardless of nature of the law, commerce or otherwise (Robinson et al., 2007: 1)

Notwithstanding, the Constitutional reference to Islam plays a vital role in law-making in the Muslim world. It is also a matter of fact that this is not only because of Constitutional reference, or statutory requirement held in the respective legal systems, but there is desire too in the Muslim world to live according to the Shariah. Neither Indonesia nor Sudan have Constitutional reference to Islam as a religion, but the efforts of these two countries towards Islamisation of laws in recent years are astonishing. For example, Indonesian efforts to Islamise the laws in three tiers National, Provincial and local level can be noted here. Similarly, during 1980, the *Numayri* codification project in Sudan could be another paradigm (Shaham, 2009: 174). This list is endless, but when it comes to Islamic law in commerce, Malaysia is one of the best examples due to its Islamisation policy in the banking and finance sector.

## **LITERATURE REVIEW**

After having knowledge on the constitutional provisions and status of Islam in different Muslim countries, it will be relevant to discuss how these Islamic countries incorporated Islamic tenets in their legal system. The literature available in this area can be found in subjects on law reform, harmonization of laws, Islamisation of laws and codification of Shariah in the Muslim world and so on. Most similar term in relation to the proposed topic is an Islamisation of laws, in particular Islamisation of commercial laws.

## Conceptual Analysis

There are some key terms in this discussion e.g. ‘reform’, ‘Islamisation of law’, etc. which deserve detailed discussion. The word ‘reform’ is used in our daily life to mean ‘change’ or ‘modify’. The equivalent *Arabic* term which is widely used is “*islah*” in similar context (An-Naim, 1994). However, the Black’s Law Dictionary defines it as “to correct, rectify, amend, remodel” (1999). Similar is the view of Hallaq who describes it as “to change into improved form” and “to improve by change” (Hallaq, 2009: 444). Mayer described “Islamisation” is an English term which means effort of making the legal system less secular and more Islamic which will ultimately act towards making an Islamic state (Mayer, 1987). Whereas Salim defined it as: “[the] process of certain measures and campaign regardless of the identity of advocates and the motivation behind the actions, that call for establishment of what are regarded as Islamic doctrine in Muslim legal, Political and Social life.” (Salim, 2008: 45). According to Tun Abdul Hamid, the phrase “Islamisation of law” which is referred in context of Malaysia means “harmonisation of law” (Abdul Hamid, 2008: 6). However, these two terms are not identical as Kamali describes that the first one is based on unilateral process, whereas the later one is on bilateral by harmonising two systems of laws Shariah and civil laws. He further remarks in this respect that, “the harmonization differs, however, from Islamisation because of its openness to reciprocity and exchange in the quest to establish harmony between two different legal ruling and legal tradition” (Kamali, 2007).

## LAW REFORM IN THE MUSLIM WORLD: A REVIEW

In the view of Layish, the most effective method for reformation of Islamic law is “the codification of law”. The codification of Islamic law means ‘transformation of Shariah into statutory form.’<sup>14</sup> The codification of Shariah and its experience in Middle East, in particular, in Egypt and Sudan is described by demonstrating that the codification of Shariah by Muslim legislation since the middle of the nineteenth century brought about transformation of Shariah from “Jurist law”, i.e. law created by independent legal experts to statutory law. In other words, law promulgated by the national-territorial legislature. As in earlier times, there were *Qadis* as well as civil judges who resort to the uncodified Shariah even in cases where there was no lacuna in any given statute. Layish considered that this is an ongoing process rather than an accomplished

---

<sup>14</sup> To discuss the matter from a historical point of view, it will be pertinent to mention here that the first Islamic codification work was *Majalla al-Ahkam al-‘Adliyya*”, the Ottoman Civil Code (1890).

fact. In relation to the proposed subject, the codification of commercial laws was not easy to understand before the development of Islamic banking and finance (Layish, 2004; see also Browsers and Kurzman, 2004: 32).

Bechor argues that the legal and social research has hitherto failed to reveal one of the most comprehensive reform of modern Egyptian or Arab law i.e. the new Egyptian Civil Code (al-Qanun al-Madani) of 1949. It is actually a code of law which covers all sphere of the law of property, contract and damages excluding the personal law (2007). Although Bechor's work can be used to understand the history and ideals of Islamic law codification where it has encapsulated one of the early codifications completed in the Muslim world some points are missing. Historically, Jamaluddin al-Afghani (d.1897) and his disciple Muhammad Abduh (1849-1905) can be referred to as the founders of the Islamic reform theories in modern sense. Yet, it is arguable as there are references of even earlier contributions than Afghani and Abduh's publications. In this respect, Khalid Masud claims that Sir Sayyid Ahmed Khan (1817-1898) writing in his "*Mohammedan Commentary of the Holy Bible (1862)*" discussed about the harmony between science and scriptures and "*Life of Mohomet (1870)*" attempted to shed focus on the issue of polygamy and jihad can be considered as the founder of Islamic law reform (2009: 250).

Nevertheless, it is beyond any controversy that both Afghani and Abduh' as well as Abduh's disciple Rashid Rida (1865-1935) were leading reformers of the late nineteenth and early twentieth centuries. According to Parray the most prominent reformists who contributed in modernist visions and agendas were Afghani and Abduh' in the Middle East and Sir Sayyid Ahmed Khand and Muhammad Iqbal (1887-1938) in South Asia (Parray, 2011). Hallaq divides reformers of the Muslim world into two main groups i.e. utilitarians and literalists. The first were in favor of the Islamic legislative theory of *maslaha* (public interest). The second group were the pure rationalists (Hallaq, 1999: 214). Nonetheless their difference in respect of their methodology of reformation, however, most scholars agree that their desires all these efforts were to flexibility, continues reinterpretation of Islam, in order to "reform" those aspect of Muslim tradition and law (Hunter, 2009: 160).

*Ijtihād* plays vital role to ensure the continuous development of Islamic law, which is also most important sources of Islamic law after the Quran and Sunnah (Kamali, 2003: 468). Moreover, it was methodology adopted by the Federal Shariah Court of Pakistan to strike down existing laws to comply with Islam as confirmed by Shah (Shah, 1992) The detail of this methodology is explained as striving to the utmost to discover the law from the text through all possible means of valid interpretation (Niyazee, 1994). Simultaneously, the



author has further discussed the Islamisation concept, and particularly focuses on the Pakistani approach in relation to *ijtihad*. One may find two approaches in this regard- in the first case, it requires that whatever is expressly prescribed in the Shariah by way of commission or omission is to be followed and remaining laws are to be considered as permissible or *mubah* under the principle that “the original rule for all things is permissibility”. On the other hand, in the second approach, it requires that all things be considered as prohibited, unless their permissibility is justified on the basis of specific or general principles of the Shariah.

In modern history, Norman Anderson is one of the pioneers who had promoted the subject of Islamic law reform in the Western World where in the first Noel Coulson memorial lecture at School of Oriental and African Studies, London in 1987, he outlined the law reform in Muslim World from fundamental perspectives. He considered that the concept of “Shariah” is very much wider than could be covered by any modern definition of the law in the West. He further elaborated that Shariah has been described as a “system of duties” which covers matter of morality as well jurisprudence. In his observation, two questions arose - how is it been possible to reform a system of law (the Shariah), which is believed by Muslim to be divine and what has been achieved by these reform? (Anderson, 1987) Unlike the sphere of commerce, crime, contract and tort, for example, Muslim in these countries were determined that the family law must remain distinctively Islamic. His work was written decades ago, but his contribution in this area can be utilised for future direction towards law reform in Muslim world, including Maldives.

Otto endeavoured to make some comparative study in relation of Shariah law in the legal system of different Muslim countries.<sup>15</sup> The author was convinced that the politico-legal orientation of the governments of the Muslim countries under study ranges from ‘puritan’ to ‘moderate’ to ‘secularist’ and the countries vary in size of their population, percentage of Muslims, their social and economic development, their security situation, the degree of democratisation, and their political stability (2010: 28). However, Maldives was not included in the book. It was highlighted that in the last 25 years, the legal systems in the Muslim World have been Islamised and moved away

---

<sup>15</sup> The countries covered twelve Muslim countries namely; Afghanistan, Egypt, Indonesia, Iran, Malaysia, Mali, Morocco, Nigeria, Pakistan, Saudi Arabia, Sudan and Turkey. A close look on the list of these countries will reveal that five countries are selected from the Middle East and North Africa (Egypt, Morocco, Saudi Arabia, Sudan, and Turkey), three from Central and South Asia (Afghanistan, Iran, Pakistan), two from Southeast Asia (Malaysia, Indonesia) and two from West Africa (Mali and Nigeria).

from human right, democracy and rule of laws. The book contains a factual and comparative overview of role of Shariah based laws in the legal system of twelve represented Muslim Countries. For this the book focused on few questions- to incorporate the Shariah into state law to be considered in which aspect? What exactly?, To what extent? Where? When? And how? This work gives clear view of Shariah application within the Muslim world, and that may be useful to understand and assess Maldives's position in relation to Shariah incorporation.

There are also scholarly works which basically focus on the Islamic commercial law in practice instead of any discussion on Islamisation on commercial laws and hardly any attempt to form a Shariah-based commercial legislation has been made (Balala, 2010; Volker, 2010; Saleem, 2012). Foster writes an overview of the classical Sharia looking at the three Sunni Schools by sharing examples and drawing comparisons (Foster, 2010a) and considered the replacement of the Shariah regimes by Western-style law and interaction of the Sharia with Western-style law (Foster, 2010b). These two articles would be useful to study the commercial laws in a comparative setting for application of Shariah in Commercial regime of Maldives as most of the commercial legislations are derived from the English Common law. In the same echo, Slone (1998) elaborates on how courts applying Islamic law would view legal issues arising out of a commercial transaction differently than a Western court would and has concluded that the Islamic law imposes more restriction on parties' as to their freedom of contract than the Western world. This is obvious as the freedom of contract under Islamic law is restricted subject to the Islamic commercial tenets.

In question of relaxation or flexibility to accommodate these tenets in the commercial laws, it was found that Sanhuri (d.1971) while drafting Egyptian Civil Code (1948) proposed that the prohibition of *riba* should be lifted according to need of the society. He further suggested that the Parliament should continuously observe the need of such relaxation, and once it is found that the original rule of *riba* is no longer required, the prohibition should be imposed. However, this proposal becomes the subject of criticism as any prohibition provided in the Qur'an and Sunnah could be permissible only on inevitable circumstances, and there was no such circumstance in case of *riba* (Khalil and Thomas, 2006: 69-95). A close look on the trend of reformation of Arab civil codes will reveal that two different legislative steps were followed to incorporate Islamic tenets in these codes in early eighties: first, by amending the constitutional provisions and then through the promulgation of new civil codes in line with the Islamic tenets, secondly, in some other circumstances,

Islamic tenets were included in the respective codes by ways of amendment to the code (Buang, 2000: 23).

### **Middle Eastern Countries**

The experience and approach in the Middle East, particularly in the United Arab Emirates (UAE), Kingdom of Saudi Arabia and Iraq are remarkable in this regard. In his Phd thesis at the University of Kent, Canterbury in 1994 A-Mahri focuses on the position of Shariah within the UAE Constitution as provided in article 7<sup>16</sup> is considered by the UAE legislature as a theoretical basis for the islamisation of laws programme (1996). The main objective of this article was to study the said constitutional clause, by examining it in the context of different jurisdictions within Arab world. To do this, the historical inspiration of the Constitution was first explained, then Constitutional Clause and later phrase like “main source of legislation” was interpreted within the context of Arab jurisprudence. To write any commentary on Constitutional Shariah clause of Maldives, this article would be instrumental.

Sfier discusses the approach of Kingdom of Saudi Arabia in relation to reform and modernization of commercial and business laws to reconcile two competing priorities: to meet the needs of social and economic change on the one hand and the other to safeguard the value of Islamic society and its value of morality embodied in Shariah (Slone, 1998). Saudi Arabia is considered as Islamic state like Maldives and thus, Maldives has to face these two competition priorities too. Therefore, these co-principles of the Saudi Approach is instrumental in law reform and must be taken into account in Maldives’ Commercial law reform. This approach will guide the law reform in Maldives. A similar finding arrived at by Stilt in her study of Iraqi legal system where when Iraqi Governing Council was drafting new Constitution of Iraq in 2003, when one of the key issues arose in relation to the re-making of Iraqi legal System was the role of Islamic law. The American reminded that it would not tolerate an Iranian-style theocracy in Iraq, instead it preferred a Turkey-Style Islamic democracy” for Iraq (2004: 695).

### **South Asian Countries**

Within the South Asian countries, a study focused on Afghanistan, and more specifically, on the issue of jurisdiction of Supreme Court of Afghanistan

---

<sup>16</sup> Article 7 of the Constitution reads as: “*Islam is the official Religion of the Union. The Islamic Shariah shall be a main source of legislation in the Union*”.

to review laws on the basis of Islam. In this respect Lau, using comparative analysis with cases from Pakistan argues that the new Constitution which was adopted after the Taliban era was ended in 2004, empowered the Afghan Courts to review the Afghan laws on the basis of Islam (2004: 216). In Pakistan, Federal Shariah Court has competent jurisdiction to review the laws from Islamic point of view, which is its primary function. Pakistan Constitution of 1973 provides that not only all laws must be in accordance with Islamic Law, but also empowers certain courts to strike down laws found to be in breach with this stipulation. After the creation of the Federal Shariah Court, quite a number of laws were challenged on basis of Islam.<sup>17</sup> It was decided that a certain provision of laws should be amended and omitted to comply with the principles of Shariah. Decision on Pakistani Commercial laws, which later on led to ban *riba* in commercial activities in Pakistan can be cited as an example in this regard. It has already been shared that the Constitution of Maldives contains similar provision like Afghanistan and Pakistan. However, in terms of jurisdiction to review laws, Afghanistan's practice is closer to Maldives than that of Pakistan. Moreover, a proper assessment on the impact of Islam on Pakistan Legal System ought to consider not only the visible hallmark of Islamisation, the various Islamic laws introduced since 1970s onwards, but also the use of Islam and Islamic law in the judicial discourse (Lau, 2006).

In case of Pakistan, some commercial laws like the Contract law, Negotiable Instrument law and Banking law were found inconsistent with Islamic commercial tenets. The Pakistani efforts in this respects reveal more emphasis on judicial approaches than legislative. A good example in this respect under the Supreme Court of Pakistan for reassertion of the Federal Shariah Court earlier's decision baning of *riba* in commercial transaction as its against the Islamic commercial tenets. In addition, it was further ordered to strike down certain commercial laws which were found to be incoform with Islamic commercial tenets and were ceased from 31th March 2000 (Tanzil-ur-Rahman, 1978).<sup>18</sup> It can be inferred that if the commercial laws of Maldives are examined from Islamic point of view similar laws could be found inconsist

---

<sup>17</sup> For example, in the case of *Hazoor Baksh v. Federation of Pakistan*, PLD 1981 FSC 145, section 5 and 6 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 were declared to be repugnant to Islam.

<sup>18</sup> The list of such laws includes; The Interest Act (1839), The West Pakistan Money Lenders Ordinance (1960), The West Pakistan Money Lenders Rule (1965), The Punjab Money Lenders Ordinance (1960), The N.W.F.P. Money Lenders Ordinance (1960), The Balochistan Money Lenders Ordinance (1960), Section 9 of the Banking Companies Ordinance (1962).

of Islamic commercial tenets as both the countries share English common law legacy.

### **South East Asian Countries**

Indonesia is a country with the largest Muslim population in the world. Salim Arskal claims that the contemporary experience in Islamisation of laws in Indonesia is provided in three tiers. Three tiers means: the Constitutionalization of Shariah, the nationalization of Shariah and the localization of Shariah in Aceh. He argues that the implementation of Shariah in Indonesia has always been marked as tension between political aspiration of proponent, opponent of Shariah by resistance from secular state. The result has been that Shariah rules remain codified in Indonesia (Salim, 2008 and Nadirsyah, 2007). This would be appropriate to draw an expected challenge that would be faced in the process of Islamisation of law in any Muslim country, be it Maldives or other. As Maldives has its new Constitution recently, the Shariah and Islamic Clause as enshrined in the Constitution of the Maldives can be assessed on the basis of the conclusion drawn in this writing.

In respect of Malaysia, Zainah Anwar (2004) raises a question; who decides what is Islamic and what is not Islamic while adopting Islamisation of laws and public policy. She criticized the approach of the Malaysian Government towards the Islamisation of laws which was initiated in 1990. The main issue was the process and approach taken to Islamisation of the law and policy, rather than any particular area of law. In terms of practicing Islam, Maldives share similarities with Malaysia, e.g. both the countries mainly follow *Shafie* sect. Therefore, the experience provided here can have significant policy impact to Islamise commercial laws in the Maldives. It is pertinent to mention here that an attempt has already been taken in this area by Ismail Wisham et al. (2011).

### **Maldives Commercial Laws**

The Maldives' legal system is an admixture of Islamic law and English Common law. The latter covers Civil and Commercial laws, while the former covers mainly Family, Evidence and Criminal laws ((Mohamed Ibrahim and Md. Ershadul Karim, 2015). Kim demonstrates that the commercial laws are varying depending on a country and the legal system. In some countries, it comprises several piece of legislations, and in other case, it forms as a single Code of law. In some cases, a law tends to be commercial law by nature of it, while in other cases, it is listed as part of general civil law. For example, the Bankruptcy law is a separate piece of legislation in the United States of

America, whereas other countries recognise it as part of their respective Civil Procedure Codes (2014).

The commercial laws of Maldives are comprised of several pieces of legislation. From the list available at the Attorney General's Office's website, it is claimed that in area of Economic and commercial laws,<sup>19</sup> there are a total of 23 laws. These laws are: firstly, the laws relating to Import and Export, Foreign Investment, such as Law No. 31/79 (Import and Export Act), Law No. 25/79 (Foreign Investment Act) and law No.24/2014(Special Economic Zone Act) are listed, followed by the laws relating to Commercial Obligation and Contracts, such as Law No. 4/91 (Contract Act), Law No. 9/93 (Mortgage Act), Law No. 16/95 (Negotiable Instrument Act) and Law No. 1/96 (Consumer Protection Act) etc. Thirdly, Corporate laws such as Law No. 10/96 (Companies Act), Law No. 13/2011 (Partnership Act) and finally, Tourism and Tax laws such as Law No. 2/99 (Tourism Act), Law No. 5/2011 (Business Profit Act), Banking laws are listed in area of financial section in the Attorney General Office's website.

As provided earlier, as well in the view of An-Na'im (2002: 227), the drafters of these commercial laws of Maldives were influenced by similar kind of laws available under the English common law. However, this should not be treated as a problem towards following Islamic tenets in the country as some previous studies confirmed that some provisions of commercial laws those were influenced by English Common law were in consistent with Islamic Commercial tenets, e.g. banking law of Pakistan (Tanzil-ur-Rahman, 1978).

Besides, public reactions have also contributed to shape of commercial law. The example of the mass gatherings which were held in Maldives on 23<sup>rd</sup> December 2011 under the slogan of "protecting Islam" led by the NGOs and the opposition political parties can be shared in this regard. The attendants of the gathering demanded to ban alcohol and to close down the massage parlors in the country, citing that certain activities that had been happening in these places were against the Islamic tenets.<sup>20</sup> In response to these demands,

---

<sup>19</sup> The Maldives Attorney General Office categorize Maldives laws into seven key areas, constitutional and Administrative laws, Religious, Social relates matters laws, Financial laws, Economic and Commercial laws, Transport, Communication laws, Property laws and finally Criminal laws. The Maldives Attorney General of office,' website accessed on January 15, 2015.

<sup>20</sup> "Maldives shuts down spa resorts over 'anti-Islamic' activities" *The Guardian*, 30 December 2011, accessed on January 18, 2015, <http://www.theguardian.com/world/2011/dec/30/maldives-closes-spas-after-protests>; Ahmed Naish, Ahmed Nazeer, Hawwa Lubna and Eleanor Johnstone, "Protests proceed peacefully as a

the government issued a circular (Circular No.8-MBR/CIR/2011/17) on 29<sup>th</sup> December 2011, directing the closing down of all spas in the tourist resorts.<sup>21</sup> To comply with these demands, on 12 January 2012, the government referred the matter to the Supreme Court of the Maldives for consultative opinion on banning of liquor and the banning of operation of the message parlours. The merit of the petition was that as under section 4 of the Contraband Act (4/1975) which permits to import of liquors and pork for consumption in the tourists resorts by non-Muslim is repudiant of Islam as per the Constitution and whether these service can be rendered as per the provisions of the Constitution, 2008.

The Contraband Act (4/1975), containing 14 sections on Contraband related matters, came into force in 1975. The Contraband items are divided into two categories under the Act, i.e. the strictly banned items and the permissible items under a special permission. The strictly banned items include items such as worship idols, and or any material which may contradict Islam. (e.g. journals, books, and films, etc.). The permissible items to be imported under a special permission include dogs, liquor and pork related products under section 5 of the Act. Subsequently, the Liquor-Pork Regulation (No. 2011/R-47), a procedural regulation in relation to operating bars, importing liquor and pork related items was enacted under section 4 of the Contraband Act. Under this regulation these services can only be rendered for non-muslims in the tourist resorts

The Maldives Supreme Court held that by referring to Article 269 of the Constitution of Maldives which provides that “unless amended by the *People’s Majlis* (Maldives’ Parliament), the laws in force at the time of this Constitution comes into force which are not inconsistent with this Constitution shall continue to remain in force”, the Supreme Court held that the matter was not required to be treated by the Supreme Court.<sup>22</sup> Consequently, Circular No.8-MBR/CIR/2011/17) on 29<sup>th</sup> December 2011 was retracted.

Subsequently, an amendment to the Contraband Act was proposed. It was submitted that section 5 of the Act which permits to import the liquor and pork related items contradict principle laid down in Article 10 of the Constitution. As mentioned earlier on the principles laid down for law-making under Article

---

majority defends Islam” *Minivan News*, 23 December 2011, retrieved on January 18, 2015, <http://minivannews.com/politics/protests-proceed-peacefully-as-a-majority-defends-islam-29826>

<sup>21</sup> Maldives Ministry of Tourism and Arts, Culture’s website, accessed on January 18, 2015, <http://www.tourism.gov.mv>

<sup>22</sup> The government of the Maldives’ Consultative Opinion Case No. [1201/SC-L/01], accessed on January 18, 2015, <http://www.supremecourt.gov.mv>

10 of the Constitution the permitting of importing liquor and pork items is against the injunction of Islam, hence section 5 of the Act should be repealed. The bill is now pending in the Maldives' Parliament. If this subject is exposed more, it could be seen that other than the Contraband Act there are laws that are inconsistent of Islamic tenets in area of the commercial laws in the Maldives.

## **ACCOMMODATION OF THE ISLAMIC COMMERCIAL TENETS**

Article 274(a) of the Constitution, 2008 defines the “tenet of Islam” as:

*“the Holy Quran and those principles of Shariah whose provenance is not in dispute from among those found in the Sunnah of the Noble Prophet, and those principles derived from these two foundations.”*

Thus the phrase “tenet of Islam” encompasses both the sources of Shariah as led by the Quran and the general principles of Shariah, as contained in the decisions of four Sunni Schools of law. The Constitution of Pakistan, 1973 preferred to retain the terms “Injunction of Islam”, in place of the “tenet of Islam”, which means the “injunction of the Quran and the Sunnah’ as provided in article 203D of the Constitution of 1973. Thus, it can be inferred that whatever injunctions are there which are provided in the Quran and Sunnah in respect of the commerce are the Islamic commercial tenets.

The scholarships with relation to the Islamic commercial law identify the prohibition of *riba* (usury), *gharar* (uncertainty) and *maysir* (gambling) as the basic Islamic commercial tenets in relation to Islamic commercial laws reform. In addition to these, these laws should consider the general Islamic commercial tenets such as the prohibition of any form of liquor, pork and phonography etc. Any law enacted should not violate these tenets, and once these tenets can be accommodated in any law, then it can be argued that the said law is in compliance with Islamic commercial tenets.

## **CONCLUSION**

A search of the literature has revealed that the proposed scholarship cover development of Islamic law in the Muslim world, codification of Shariah, and Islamisation of law in general. It appears that there is no comprehensive piece of work that has examined the commercial law reform from Islamic point of view. It has also been found there is no contribution on Maldives commercial law other than in area of Islamic Banking law. If the debate is to



be moved forward, a better understanding of Islamic Commercial law reform with reference to the Maldives needs to be developed.

In general, therefore, it seems that under the Islamic law, the original rule for all things is permissibility, with exception to this rule is that which could be regarded as Islamic Commercial Tenets. It was disclosed that the basic tenets are the prohibition of *riba* (usury), *gharar* (uncertainty) and *maysir* (gambling). In addition to these, the laws should consider the general Islamic commercial tenets such as the prohibition of any form of liquor, pork and pornography etc.

The present study confirms previous findings and contributes that once these tenets are accommodated in the legal system, the commercial laws shall be deemed to be in conformity with the Islamic tenets. However, more research on this topic needs to be undertaken before the association between Pakistan, Malaysia and Maldives is to understand clearly.

## REFERENCES

- A-Mahri, Butti Sultan (1996). "Position of Shariah within the UAE constitution and the Federal Supreme Court Application of the Constitution Clause Concerning Shariah." *Arab Law Quarterly*, vol. 11 (3), 219-244.
- Abdul Hamid Mohamad (2008). "Harmonization of Common Law and Shari'ah in Malaysia: A Practical Approach." 'Abd al-Razzaq al-Sanhuri Lecture Islamic Legal Studies Program, Harvard Law School.
- An-Naim, Abdullahi (2002). *Islamic Family Law in a Changing World: A Global Resources Book*. London: Zed Books.
- An-Naim, Abdullahi Ahmed (1994). "Towards An Islamic Reformation: Islamic Law in History and Society Today," in *Sharia Law and the Modern Nation-State: A Malaysian Symposium*. Kuala Lumpur: SIS Forum (Malaysia) Berhad.
- Ahmad Hidayat Buang (2002). *Studies in the Islamic Law of Contracts: The Prohibition of Gharar*. Kuala Lumpur: International Law Book Services.
- Anderson, J.N.D. (1987). "Islamic Law Today: The Background to Islamic Fundamentalism." *Arab Quarterly*, vol. 2 (4), 339-351.
- Balala, Maha-Hanaan (2010). *Islamic Finance and Law: Theory and Practice in A Globalized World*. London: Tauris Academic Studies.
- Bechor, Guy (2007). *The Sanhuri Code, and the Emergence of Modern Civil Law [1932 to 1949]*. Boston: Brill Academic Publishers.
- Brown, Nathan J. (1997). "Sharia and State in the Modern Muslim Middle East." *International Journal of Middle East Studies*, vol. 29 (3): 359-376.

- Foster, Nicholas H.D. (2010a). "Islamic Perspectives on the Law of Business Organizations II the Sharia and Western Style Business Organizations," *European Business Organizations Law Review*, vol. 11, 273-307.
- Foster, Nicholas H.D. (2010b). "Islamic Perspectives on the Law of Business Organizations I: An Overview of the Classical Sharia and A Brief Comparison of the Sharia Regimes with Western-Style Law." *European Business Organizations Law Review*, vol. 11 (3), 34.
- Hallaq, Wael B. (1999). *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*. Cambridge: Cambridge University Press.
- Hallaq, Wael B. (2009). *Shari'a: Theory, Practice, Transformations*. Cambridge: Cambridge University Press.
- Hunter, Shireen (2009). *Reformist Voices of Islam: Mediating Islam and Modernity*. New York: ME Sharpe Inc.
- Ismail Wisham, Aishath Muneeza, Rusni Hassan (2011). "Possible Legal Framework to Pioneer Islamic Banking in the Maldives: Lessons to Learn from Malaysia." *Malayan Law Journal*, vol. 4, 53-71.
- Kamali, Mohammad Hashim (2003). *Principles of Islamic Jurisprudence*. Cambridge: Islamic Texts Society.
- Kamali, Mohammad Hashim (2007). "Shariah and Civil Law: Towards A Methodology of Harmonization." *Islamic Law and Society*, vol. 14 (3), 391-420.
- Khalil, Emad H and Thomas, Abdulkader (2006). "The Modern Debate Over Riba in Egypt," in *Interest in Islamic Economics: Understanding Riba*. London: Routledge.
- Kon Sik Kim (2014). "Codification in East Asia: Commercial Law," in *Codification in East Asia*, ed. Wen-Yeu Wang. Switzerland: Springer.
- Kristen, A. Stilt (2004). "Islamic Law and the Making and Re-Making of Iraqi Legal System." *George Washington International Law Review*, vol. 36, 695-756.
- Lau, Martin (2004). "Legal Reconstruction and Islamic Law in Afghanistan." *The Law Applied*, 216.
- Lau, Martin (2006). *London-Leiden Series on Law, Administration and Development: The Role of Islam in the Legal System of Pakistan*. Martinus Nijhoff Publishers.
- Layish, Aharon (2004). "The Transformation of the *Shariah* from Jurist Law to Statutory Law in the Contemporary Muslim World." *Die Welt de Islam New Series*, vol. 44 (1), 85-113.

- Mayer, Ann Elizabeth (1987). "Law and Religion in the Muslim Middle East," *American Journal of Comparative Law*, vol. 35 (1), 127-84.
- Masud, Muhammad Khalid, Salvatore, Masud & Van Bruinessen, M. (2009). *Islam and Modernity: Key Issues and Debates*. Edinburgh: Edinburgh University Press.
- Muhammad Yusuf Saleem (2012). *Islamic Commercial Law*. Singapore: John Wiley & Sons.
- Nadirisyah Hosen (2007). *Shariah and Constitutional Reform in Indonesia*. Singapore: Institute of Southeast Asia Studies.
- Nienhaus, Volker (2011). "Islamic Finance Ethics and Shari'ah Law in the Aftermath of the Crisis: Concept and Practice of Shari'ah Compliant Finance." *Ethical Perspectives-Katholieke Universiteit Leuven*, vol. 18 (4), 591-623.
- Niyazee, Imran Ahsan Khan (1994). *Theories of Islamic Law, The Methodology of Ijtihad*. Islamabad: International Institute of Islamic Thought.
- Otto, Jan Michel (2008). *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy*. Amsterdam: Leiden University Press.
- Otto, Jan Michel (2010). *First Global Overview from Saudi Arabia to Indonesia*. Amsterdam: Leiden University Press.
- Parray, Tauseef Ahmad (2011). "Islamic Modernist and Reformist Thought: A Study of the Contribution of Sir Sayyid and Muhammad Iqbal." *World Journal of Islamic History and Civilization*, vol. 1 (2), 79-93.
- Robinson, Paul H, Adnan Zulfiqar, Margaret Kammerud & Michael Orchowski (2007). "Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms." *American Journal of Comparative Law*, vol. 2 (1), 61-68.
- Salim, Arskal (2008). *Challenging the Secular State the Islamization of Laws in Modern Indonesia*. Honolulu: University of Hawaii Press.
- Sfier, George N. (1988). "The Saudi Approach Law Reform." *American Journal of Comparative Law*, vol. 36, 729-759.
- Shah, Nasim Hasan (1992). *Islamicization of Law in Pakistan*. Islamabad: Shari'ah Academy.
- Shaham, Ron (2009). "Western Scholars on the Role the "ulama" in Adapting the Shariah to Modernity: A Critical View," in *Social, Economic and Political Studies of the Middle East and Asia*, ed. Dale F. Eickelman. Leiden: BRILL, 171-192.

- Slone, Peter D. (1998). "The Status of Islamic Law in the Modern Commercial World," *The International Lawyer*, 743-776.
- Stahnke, Tad and Blitt, Stahnke (2005). "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitution of Predominantly Muslim Countries." *Georgetown Journal of International Law*, vol. 36, 947-1078.
- Tanzil-ur-Rahman (1978). *Islamization of Pakistan Law: Surveying from Islamic Point of View*. Karachi: Hamdard Academy.
- Zainah Anwar (2004). *Islamisation and its Impact on Laws and the Law-Making Process in Malaysia*. London: WLUML Publication.

Accommodating Islamic Tenets with Lessons learnt from Muslim World

