

**PRINCIPLES TO BE FOLLOWED IN
PARTIAL HARMONIZATION
BETWEEN ISLAMIC *FIQH*
AND MAN-MADE LAW**

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ABSTRACT

Nowadays all over the Muslim world, with exceptions, Man-made law, inherited from the civil or common law of the colonial power, such as Britain, France, etc., is widely being used. According to some scholars, present Man-made law of the Muslim world has been also partially influenced by the Islamic fiqh. Therefore, there are sporadic similarities between them. Additionally, many rulings that are found in Man-made law of any Muslim country do not exist in Islamic fiqh books because these rulings are related to the issues, which did not exist in the past. Hence, if an Islamic government were established today, it would not be able to abandon all of them. On the other hand, many contemporary Muslim jurists maintain that all that belongs to Man-made law are considered to be kufr (unbelief), whereas majority of the scholars of Man-made law consider that Islamic fiqh is not suitable for the contemporary

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life of Muslims.¹ In this situation there should be some bridge between these two opposite views, so that Islamic fiqh would get some benefits from the Man-made law and vice versa. The basic objective of this is to suggest some principles for partial harmonization between Islamic fiqh and Man-made law. In order to achieve this objective, the researcher will try to explore principles of Islamic jurisprudence (Uṣūl al-Fiqh) and select some of these principles that suit this partial harmonization process. Likewise, he will investigate the opinions of contemporary Muslim jurists regarding this issue.

INTRODUCTION

As long as the *Shari'ah* was implemented fully or partially and the Muslim *ummah* was going on with it until the beginning of the last 20th century or so, no serious question arose until that time whether Islamic *fiqh* partially should be harmonized with other Man-made laws or not. However, the situation changed when Islamic *Shari'ah* was thrown away by the Turkish government through demolishing the caliphate in 1924 and instead, Man-made law was implemented from the year 1926,² and the suit was followed by almost all other Muslim countries. During the last one century or so, therefore, Man-made law gradually took the leadership of the *ummah* and most of the Muslim governments have deviated so far away from Islam that ultimately they have become reluctant to establish Islamic *Shari'ah* and have instead followed Man-made laws. Another phenomenon makes the situation worse, i.e., teaching of these Man-made laws widely all over the Muslim world without giving the students any chance to know the *Shari'ah*, and to compare them. Thus, a large number of educated members of the *ummah* have become the advocates of Man-made laws.

¹ Mustāfa Ibrāhīm al-Zulamī, *Uṣūl al-Fiqh al-Islāmī fī Nasījihi al-Jadīd*, 6th edition (Kurdistan: Maṭba'at Ufset ha Walir, 1999), 168.

² 'Umar Sulaymān al-Ashqar, *Al-Shari'ah al-Ilahiyyah Lā al-Qawānīn al-Jāhiliyyah* (Kuwait: Dār al-Furqān, 1983), 66-67.

On the other hand, a unique development took place outside the Muslim world, i.e., Islamic *Shari'ah* was recognized as an independent and universal code of law by some non-Muslim scholars who organized a number of International conferences in Europe where a group of Muslim scholars presented research papers on Islamic *Shari'ah* and were able to receive this recognition. For instance, in the city of Lahai, in 1931, 1937, and 1948 consecutively three international conferences were organized on Man-made law, where the above recognition was declared. The same recognition was also declared in another conference organized by Paris University in 1951.³

Another initiative, different from the previous one was also taken by non-Muslims who organized a fifth conference on comparative law in London in 1950. This conference issued a recommendation to organize periodical meetings and gatherings to conduct research works on Islamic *fiqh*. According to this recommendation, it was decided to observe 'Islamic *fiqh* weeks.' Therefore, the first week of Islamic *fiqh* was organized in Paris in 1951, second week in Damascus in 1961, and third week in Cairo in 1967. The organizers apparently declared that the objective of these conferences and gatherings was to know more about Islamic *fiqh*. But some Muslim scholars, such as Dr. 'Uthmān Khalīl 'Uthmān, who attended these three weeks, clearly said that the purpose of these gatherings was to harmonize Islamic *fiqh* and Man-made law. Since this initiative was taken by non-Muslims and enemies of Islamic *Shari'ah*, many Muslim jurists were skeptical about these conferences. These Muslim jurists, therefore, went against harmonization.⁴

Moreover, different quarters of the Muslim *ummah* who are considered to be weak, powerless and neglected members of the society have continuously been demanding that the Muslim governments should re-implement the *Shari'ah* without compromise with anything other than it. This demand recently has become stronger than it was in the past.

Because of these contradictory attitudes of the *ummah*, some Muslim scholars began to think of a solution by proposing a type of

³ Badrān Abū al-'Aynayn Badrān, *Tārīkh al-Fiqh al-Islāmī wa Naẓariyyāt al-Milkiyyah wa al-'Uqūd* (Beirut: Dār al-Nahḍah al-'Arabiyyah, n. d.), 4-5.

⁴ Al-Ashqar, pp. 113-119; 'Abd al-Nāṣir Tawfīq al-'Aṭṭār, *Madkhal li-Dirāsāt al-Qānūn wa Taṭbiq al-Shari'ah al-Islāmiyyah*, 2nd ed. (Asyut: n. p., n. d.), 137-138.

harmonization between Islamic Law and other Man-made laws. Some sporadic harmonization between these two laws had occurred without declaration under the guidance of some secular Muslim governments, who were generally against the implementation of the *Shari'ah*. For instance, Egypt which has done so under the banner of Man-made law.⁵

Before further discussion of this topic, it would be sensible to clarify what "harmonization" means. The word "harmonization" is equivalent to the Arabic word "*tawfiq*." In English, this word is a verbal noun of the verb "harmonize," which means to bring one thing into harmony or agreement with another, or to make one thing harmonious with another.⁶ According to Mohammad Hashim Kamali, harmonization usually should be between two different types of things or ideas. If two things are identical, there is no necessity to make them harmonious because they are already in harmony. In the present context, according to him, harmonization between *Shari'ah* and Man-made law, therefore, is feasible and acceptable. This is because they are not identical. Thus, he puts *Shari'ah* and Man-made law on equal ground to allow this harmonization process to work.⁷ Likewise, Mohd. Daud Bakar puts both *Shari'ah* and Civil law on the same track, so that the chances of harmonization between them would be more practical and feasible.⁸ Countering the opinions of these two scholars, the researcher would like

⁵ See Al-Ashqar, 130, 158.

⁶ A. S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*, 11th impression (Oxford: Oxford University Press, 1983), 392; Victoria Neufeldt & David B. Guralnik ed., *Webster's New World Dictionary*, Third College Edition (Cleveland, Ohio: Simon & Schuster, Inc., 1988), 615.

⁷ Mohammad Hashim Kamali, *Shari'ah and Civil Law: Towards A Methodology of Harmonization*. A conference paper presented by the author in the International Conference on Harmonization of *Shari'ah* and Civil Law organized by Harmonization Unit & Law Centre, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Kuala Lumpur, 20th-21st October 2003, 2-7.

⁸ Mohd Daud Bakar, "*Shari'ah Law from a Common Law Perspective: An Appraisal*." A conference paper presented in the International Conference on Harmonization of *Shari'ah* and Civil Law organized by Harmonization Unit & Law Centre, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Kuala Lumpur, 20th-21st October 2003, 24.

to comment that the *Sharī'ah* is so Divine and unchangeable that harmonization is impossible between it and Man-made law. However, since Islamic *fiqh* is not completely Divine, a kind of harmonization could be done between it and Man-made laws.⁹ Therefore, the phrase Islamic *fiqh* or Law—which is not totally Divine—should be used instead of *Sharī'ah*. Additionally, since in Islamic *fiqh* there are unchangeable Divine aspects beside changeable human efforts, the whole *fiqh* cannot be harmonized with Man-made law. Rather, this harmonization process should be partial provided that it follows the negative and positive principles that are discussed later in this paper. This process may be called a type of benefit that Islamic law would receive from Man-made law. Before discussing principles of this harmonization it is necessary to highlight why this partial harmonization is required.

REASONS TO REGARD PARTIAL HARMONIZATION BETWEEN ISLAMIC *FIQH* AND MAN-MADE LAW AS A NECESSITY (*DARŪRAH*)

Due to the following reasons, partial harmonization between Islamic *fiqh* and Man-made law is considered to be a necessity (*darūrah*):

1. A number of laws such as traffic law, space law, etc. have been developed by human intellect during the last one century or so. These laws do not exist in Islamic *fiqh* books because the things for which they are developed were not present in the past, such as the invention of motor vehicles and their wide use all over the world, and the invention of airplanes, space ships, satellites, and their worldwide use. If an Islamic state were established in future,

⁹ *Sharī'ah* is the Qur'ān, authentic *aḥādīth* of the Prophet (p.b.u.h.) and well-established Islamic principles related to a belief system and obligatory duties. For this reason, it is completely divine and cannot be changed or harmonized with any other thing. On the other hand, Islamic *fiqh* consists of rulings which are derived from the sources through human efforts. Some of these rulings are unchangeable, while some others could be changed according to factors of time, place and public interest, etc. Therefore, Islamic *fiqh* is not completely divine.

it would be illogical for it to abandon these laws and instead struggle for some alternatives. Rather, it would be feasible to retain these laws as *urf* (customary law). The role of an Islamic state would be here to incorporate Islamic values in these laws. For instance, if a particular rule goes against a sound text, it should be altered, or if a rule is considered to be unfair, fairness and justice should be added to it, or if a third rule goes against any well established general principle of the *Shari'ah*, it should be modified accordingly.

2. Procedures to implement Islamic law through governments and courts were not given ready-made to Muslims. These procedures were developed by Muslims during more than a thousand years of implementation of *Shari'ah* in the Muslim world. Once implementation of *Shari'ah* was stopped a century or so ago, these procedures were not stopped. Rather, they continued to be developed by human intellect alongside imported Man-made law. If an Islamic state were established today, it would be irrational for it to put aside all these newly developed procedures by saying that they are not Islamic. Rather, it would be a wise decision to retain them through adding Islamic values to them. For instance, if a procedure is considered oppressive, it should be modified to make it just and fair.
3. A number of studies show that a large portion of the rules of law that was implemented by Napoleon in Egypt were taken from the Mālikī School of Law.¹⁰ Although disputes have been continuing until today regarding this matter, existence of the rules

¹⁰ Sayyid 'Abd Allah 'Alī Ḥusayn, a scholar of Al-Azhar, who received his B.A. in law from France, conducted one such study. See also Al-Ashqar, 142; also see David Moussa Pidcock, *Napoleon and Islam*, mentioned by Dato' Abdul Hamid bin Haji Mohamad in "Harmonization of *Shari'ah* and Civil Law in Malaysia: Present Reality and Future Actions." A conference paper presented in the International Conference on Harmonization of *Shari'ah* and Civil Law organized by Harmonization Unit & Law Centre, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Kuala Lumpur, 20th-21st October 2003, 1.

of this school in the code of Napoleon itself proves the fact. Additionally, there is no doubt that this school had been widely followed by Muslims of this area and Spain well before the invasion of Napoleon, which might explain the borrowing of this law by the invader. Likewise, another study conducted by a group of Egyptian scholars proves that a large portion of Egyptian civil law is regarded as Islamic. Moreover, a third study performed by some Pakistani scholars also shows that only a small portion of Pakistani civil law is considered to be un-Islamic.¹¹ However, since these studies had neither been conducted thoroughly nor been done by an Islamic state intending to establish *Shari'ah*, they are not free from error. Yet, these studies at least can be considered as an indication that outwardly all aspects of Man-made law are not un-Islamic. The word "outwardly" is appropriate because inwardly these laws can be considered un-Islamic as they come usually from non-Islamic sources. Their similarity with Islamic law can be a coincidence without the intention to follow Islam or *Shari'ah*.¹² In any case since there is a similarity, if an Islamic state wants to implement *Shari'ah*, it would not be able to abandon all rules of present law that exist in the country. Rather, this state would need to have a type of partial harmonization between two laws to deal with the situation.

COMPARISON BETWEEN ISLAMIC *FIQH* AND MAN-MADE LAW

In order to have a proper and practical harmonization between Islamic *fiqh* and Man-made law, some scholars tend to put both laws on equal footing. Both laws cannot be treated as equals and peers. However, in order to prove this inequality, it would be feasible and beneficial to compare between Islamic *fiqh* and Man-made law through highlighting their similarities and differences.

¹¹ *Ibid.*, 1-2.

¹² As is remarked by Shaykh Ahmad Shākir and quoted by Al-Ashqar, at 211.

SIMILARITIES BETWEEN ISLAMIC *FIQH* AND MAN-MADE LAW

There are a number of similarities between Islamic *fiqh* and Man-made law. Most important of them are as follows:

1. Both Islamic *fiqh* and Man-made law have the objective to provide rulings for different aspects of human life.¹³
2. Both of them are not considered ready-made for human beings.¹⁴ Rather, human minds have an important role to deduce different rules for different aspects of their life.
3. Both of them are currently being implemented in varying degrees. For instance, law of worship and family law of Islamic *fiqh* are being implemented in most of the Muslim countries; over the last 1400 years while Man-made law is being followed in politics, economics, etc. of both Muslim and other countries for a longer period.
4. Both of them, in varying degrees, are able to deal with new developments and changes that occur every day. For instance, Man-made law has solutions for a banking system. Likewise, Islamic *fiqh* has the solutions for it too.

DIFFERENCES BETWEEN ISLAMIC *FIQH* AND MAN-MADE LAW

Although there are some similarities between Islamic *fiqh* and Man-made law as discussed earlier, a large number of differences exist between them. Most important of these differences are as follows:

¹³ ‘Abd al-Qādir ‘Awdah, *Al-Tashrī‘ al-Jinā‘ī al-Islāmī Muqārānan bi al-Qānūn al-Waḍ‘ī*, 2nd ed. (Beirut: Mu’assasāt al-Risālah, 1986), 1:19.

¹⁴ Bakar, 2-3.

1. Although humans have a role in deciding rulings (is) of *Shari'ah* for different aspects of human life, Islamic *fiqh* is largely based on either Divine texts or other proofs or sources that are supported by the Divine texts. Therefore, Islamic *fiqh* has a Divine nature. On the other hand, Man-made law has nothing to do with Divine origin. It almost entirely is based on customs and human efforts and intellect.¹⁵ If this law accepts any rule from a religious law, it does not do so to follow this religion or to make some Divine origin for it. Rather, this is just a matter of choice and coincidence.

2. Although Islamic *fiqh* can be changed partially, Islamic *Shari'ah* that was revealed by Allah through Divine texts is fixed and unchangeable. Allah says: "No change could occur to Divine words of Allah."¹⁶ For instance, a *Shari'ah* principle "Their affairs are subject to their mutual consultation"¹⁷ is so eternal that it cannot be changed.¹⁸ Likewise, many aspects and rulings of Islamic *fiqh* that are based on certain (*qaṭ'i*) Divine texts are everlasting and unchangeable, such as the five-time daily prayers, fasting during the month of Ramaḍān, performing pilgrimage to Makkah, *ḥudūd* and *qiṣās* penalties, etc. On the other hand, all the rules of Man-made law without exception are temporary and can be changed according to the desires and wish of the people.

3. In terms of having general principles, theories, maxims, and a large number of rulings for every aspect of human life, Islamic *Shari'ah* is considered to be the only available complete code of life, which is able to solve the problems of the *ummah* at present and also in future.¹⁹ If the solution of any issue is not found ready-made in Islamic *Shari'ah*, it can be obtained through *ijtihād* based on this *Shari'a's* general principles, other secondary sources that are supported by the Divine text, and

¹⁵ Al-Ashqar, 15, 28.

¹⁶ Yūnus 10:64.

¹⁷ Al-Shūra 42:38.

¹⁸ 'Awdah, 1:18-19, 24-25.

¹⁹ *Ibid.*, 1:24 with minor modification.

through utilization of *uṣūlī* principles. On the other hand, Man-made law is always incomplete and in need of developing new theories and principles to deal with new problems and issues.

4. Principles and maxims prescribed by Islamic *fiqh* are far better than the theories of Man-made law.²⁰ For instance, Man-made law prescribes that no crime or its punishment should be determined without any text of law. On the other hand, Islamic *fiqh* maintains that crimes and punishments other than *qisās* and *hudūd* should be determined discretionarily based on general principles of the *Sharīʿah* without having a particular text for every crime and punishment. This theory of Islamic *fiqh* is better than the above theory of Man-made law because discretionary crimes are so numerous and continuously on the rise that it is not logical to have a text for every crime of this nature and its punishment as stated by Man-made law.
5. Islamic *Sharīʿah* creates its group of followers and organizes all its affairs with a complete code of life from the beginning, while Man-made law does not create its group of followers. Rather, it only tries to organize the affairs of the people within their existing groups with an incomplete code, which develops with the development of these groups.²¹
6. Islamic *fiqh* does not separate religion from the state. Rather, this law governs the state like it regulates of other aspects of human life. Man-made law, on the other hand, separates religion from the state.²² In other words, according to this law, religion is a personal matter. Therefore, a state has nothing to do with it.
7. Islamic *fiqh* is concerned about both worldly life and life in the Hereafter, while Man-made law is concerned only about worldly life. Therefore, the notion of reward and punishment in Islamic

²⁰ *Ibid.*

²¹ *Ibid.*, 1:14-16.

²² As the Turkish government did it once it replaced the *Sharīʿah* by copying and implementing the Man-made law of Europe. See Al-Ashqar, 66-67.

fiqh is applicable to both this world and the next world, whereas this notion in Man-made law is related only to this world.²³

8. Islamic *fiqh* is concerned about ‘*aqīdah* and the belief system of Islam. Therefore, this *fiqh* does not accept any rule that goes against this belief system. On the other hand, Man-made law has nothing to do with ‘*aqīdah* and a belief system.²⁴
9. Islamic *Sharī‘ah* is concerned with establishment of a person’s relationship with both of his creator and his fellow brothers and sisters, while Man-made law is concerned with only establishing one’s relationship with human beings.²⁵
10. Islamic *fiqh* emphasizes greatly on character and ethics of human beings. Therefore, it prohibits adultery, fornication, drinking alcohol, dealing with usury, gambling, etc. In contrast, Man-made law does not prohibit these deeds because this law has nothing to do with character.²⁶ Likewise, this law does not prescribe any punishment for committing these sins unless they involve harming others.
11. Man-made law is mostly case oriented,²⁷ i.e., if a case is solved today, it would be a precedent for the future generation of judges to decide the similar ruling for a similar case that might arise later. Although Islamic *fiqh* does not neglect the importance of a precedent, it basically depends on the books of law written by the jurists.

²³ ‘Alī Ḥusayn Nujaydah, *Mabādi’ al-Sharī‘ah al-Islāmiyyah al-Maṣḍar al-Ra’īsī li al-Tashrī‘ fī Miṣr* (Cairo: Dār al-Nahḍah al-‘Arabiyyah, 1990), 18.

²⁴ Al-Ashqar, 149.

²⁵ Nujaydah, 14-15.

²⁶ Al-Ashqar, 149, 152, 228; Muḥammad Abū Ḥasan, *Aḥkām al-Jarīmah wa al-‘Uqūbah fī al-Sharī‘ah al-Islāmiyyah: Dirāsah Muqāranah* (Jordūn: Maktabat al-Manār, 1987), 172; ‘Abd Allāh ‘Abd al-Qādir al-Kilānī, *‘Uqūbāt al-I‘dām fī al-Sharī‘ah al-Islāmiyyah wa al-Qānūn al-Miṣri: Dirāsah Muqāranah* (Al-Iskandariyyah: Munsha’āt al-Ma‘ārif, 1996), 274.

²⁷ Bakar, 8-9.

12. Islamic *fiqh* takes care of life, prestige, and progeny of human beings, while Man-made law takes care of only their life.²⁸
13. Contemporary Man-made law advocates some advanced theories and ideas such as justice, equality, mercy, humanity, etc., which are considered to be a recent development.²⁹ To the contrary, these noble aspects existed in Islamic *fiqh* since its onset by its Prophet Muḥammad (p.b.u.h.) more than fourteen hundred years ago.

PRINCIPLES TO BE FOLLOWED IN PARTIAL HARMONIZATION BETWEEN ISLAMIC *FIQH* AND MAN-MADE LAW

The partial harmonization between Islamic *fiqh* and Man-made law, which the author maintains as permitted, should not be unrestricted and be void of principles because this latter type of harmonization may cause deviation from the right path of Allah. These principles can be divided into into two broad categories, i.e., negative principles and positive principles.

NEGATIVE PRINCIPLES

The partial harmonization process between Islamic *fiqh* and Man-made law should adhere to a number of negative principles, which are basically related to not performing some deeds. Most important of these principles are as follows:

1. No Muslim should believe that Man-made law is equivalent to Islamic *fiqh*, which originated from either Divine texts or sources that are supported by the Divine texts.
2. Since Islamic *fiqh* has Divine origin, Man-made law should not dominate it. Rather, Islamic *fiqh* should dominate Man-made

²⁸ Abū Ḥasan, 173.

²⁹ ‘Awdah, 1:15-17.

law.³⁰ Allah says, “Every ruling or command should belong to Allah.”³¹

3. On the onset of this harmonization process, the scholars engaged in it must maintain that total and comprehensive harmonization between Islamic *fiqh* and Man-made law is neither possible nor permitted by Islamic *Shari‘ah*.³²
4. Ethical aspects should not be compromised during the process of this partial harmonization. This is because these aspects are the backbone of the *Shari‘ah*, fulfillment of which was one of the important reasons to send the Prophet into this world. The Prophet (p.b.u.h.) says: “Surely Allah sent me to fulfill the noble characteristics.”³³
5. In the field of belief or *‘aqidah* no harmonization should be permitted because Islam is the latest version of heavenly religion that abrogates all other distorted faiths in which human intellect has a role to change them.
6. In terms of worshiping (*‘ibādāt*), such as *ṣalāh*, fasting, *ḥajj*, etc. no harmonization should be allowed. This is because these are the religious aspects of Islam, for which man-made law has nothing to offer, for it is void of religiosity.
7. All other aspects and rulings of the *Shari‘ah* that are established on certain (*qaṭ‘ī*) texts, such as rights and duties of women, *ḥudūd* and *qisās* penalties, inheritance, rulings of marriage and divorce, should not be harmonized with any other Man-made

³⁰ This could be inferred from some comments stated by Muḥammad Abū Zahrah, whose statement has been quoted by Al-Ashqar, 119.

³¹ Al-An‘ām, 6:57.

³² Even enemy of Islam, i.e. a number of European scholars, such as Fitz Gerald, Nallino, etc., recognize that this type of harmony is impossible. See Al-Ashqar, 136-137.

³³ Sharḥ al-Sunnah. Please see Al-Shaykh Wali al-Dīn Muḥammad bin ‘Abd Allah al-Khaṭīb al-Tabrīzī, *Mishkāt al-Maṣābiḥ* (Lahore: Maktaba‘i Muṣṭafa‘i, n. d.), 514

law. This is because these rulings have Divine origins, which cannot be altered by any law that is inferior to this Divine law.

8. No harmonization process should be allowed to separate the religion from the state. This is because Islam covers all aspects of life including the state, which also should be governed by its rulings.
9. Harmonization should not be made between a weak opinion of a particular school of law and Man-made law. This is because even the followers of this particular school of law usually abandon the weak opinion. Therefore, it should not be imposed upon the whole *ummah* or community of a particular state.
10. No rule from Man-made law should be borrowed as granted without scrutinizing and judging it through principles of Islamic *Shari'ah*³⁴ and principles mentioned in this paper.
11. Likewise, any rule that is still under consideration, investigation, and discussion, and yet to be deemed as a rule of Man-made law should not be harmonized with Islamic *fiqh*. Moreover, those rules that had been abandoned because of their unfairness or primitive nature by the jurists of Man-made law also should not be harmonized with Islamic *fiqh*. Rather, the latest rule of this law about any issue, if it fulfills *Shari'ah* conditions, should be harmonized with Islamic *fiqh*.³⁵
12. No harmonization should be allowed to make a forbidden thing as permitted and vice versa. This is because this type of harmonization process is considered to be a clear blasphemy, which has no place in Islamic *Shari'ah*.
13. The Harmonization process should not be left in the hands of contemporary parliament of any Muslim country because

³⁴ See Abū Ḥasan with some modification, 10.

³⁵ This principle has been inferred from some statements of 'Awdah. See 'Awdah, 1: 4-5.

according to Islam, most members of this parliament are not qualified to participate in this process.

14. Past harmonization processes, efforts and examples should not be a justification for harmonizing any Islamic rule with any Man-made rule. This is because most of such past efforts were conducted under the guidance of those governments who were not Islamic and who were not willing to establish Islamic *fiqh* accurately. If future partial harmonization really requires referring to the precedence of such nature, this should be full with constructive criticism and evaluation guided by the principles of the *Shari'ah* and principles suggested in this paper.
15. No universal and general Islamic principle, such as adhering to justice, equality, human rights, truth, trustworthiness, keeping promise, etc.; and abandoning cheating, high risk, falsification, breaking of promise and contractual agreements, etc. in transaction should be violated in this harmonization process between Islamic *fiqh* and Man-made law.
16. No non-Muslim jurist should be involved in the process of this partial harmonization because this type of work is considered to be a kind of *ijtihad*, which is the work of a Muslim jurist. Likewise, this process is considered to be a religious duty, which cannot be performed by a non-Muslim.

POSITIVE PRINCIPLES

In order to conduct partial harmonization between Islamic *fiqh* and Man-made law, a number of positive principles, i.e., actions and deeds, must be followed. The most important of these positive principles are as follows:

1. The scholars engaged in this harmonization process must believe that Islamic *fiqh* is superior to Man-made law. This is a requirement of belief, which must be maintained. Therefore, they should try to make Man-made law subordinate to Islamic *fiqh*.

2. Objectives of *Shari'ah* (*maqāṣid al- Shari'ah*) could be utilized to do partial harmonization between some rules of Islamic *fiqh* and some other rules of Man-made law. For instance, according to Man-made law, violation of red traffic light is unlawful. Islamic *fiqh* can borrow this rule and can relate it to one type of *Shari'ah* ruling, i.e., prohibition (*ḥarām*). In other words, Islamic *fiqh* might consider this violation as a *ḥarām* deed. This is because it leads to preserve an important objective of the *Shari'ah*, i.e. preserving life; and if it is violated, there is a chance that some life would not be preserved. Rather, it would be destroyed.

3. Public interest (*maṣlaḥah mursalah*) could also be utilized to conduct partial harmonization between Islamic *fiqh* and Man-made law. For instance, Man-made law considers pollution of the environment as an unacceptable deed. Islamic *fiqh* is allowed to borrow this rule from Man-made law and may classify it into different categories of rulings of the *Shari'ah*, i.e., if it is severe and hampers interest of the whole nation, it could be considered *ḥarām* (forbidden). On the other hand, if it is not that harmful; rather, it does very minimum pollution, it could be considered as *makrūh* (disliked), and so forth. In doing so, no personal or group interest should be considered. Likewise, any interest that contradicts the Divine texts or established Islamic principles, i.e., *maṣlaḥah mulghāh* should not be entertained. For instance, Man-made law allows mercy killing, which could be considered nowadays as a public interest in the West, but according to Islam, it is considered to be an unsound and nullified interest because it goes against the Divine text "Do not commit suicide."³⁶ Therefore, Islamic *fiqh* is not allowed to borrow this rule.

4. Some rules of Man-made law could be considered as sound custom (*'urf ṣaḥīḥ*) that does not go against the Divine texts or established principles of Islam. Thus, these rules could be incorporated into Islamic *fiqh*. Acceptance of sound custom as a ruling of the *Shari'ah* is not a *bid'ah* (innovation) of the modern age. Rather, it had been practiced from the beginning of Islam.

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Al-Nisā', 4:29.

For instance, the Prophet (p.b.u.h.) accepted the rule of the payment of blood money of one hundred camels for homicide, *muḍārabah* type of business, *salam* type of buying and selling from the custom of the Pre-Islamic Arab society and incorporated them into Islam. When Muslims conquered Egypt they did not establish the whole *Sharīʿah* immediately. Rather, they allowed Egyptians for a while to continue with whatever customs they used to follow.³⁷ The same practice of retaining sound custom should continue even today. In doing so, caution must be observed, so that unsound custom (*ʿurf fāsid*) that goes against the Divine texts or established Islamic principles would not be taken as a rule of Islamic *fiqh*. For instance, dealing with usury (*ribā*) has become a custom all over the world. But according to Islam, it is considered to be an unsound custom because it goes against the Divine texts “Allah made trading lawful and usury forbidden for you,”³⁸ and “Don’t eat usury.”³⁹

5. *Sadd al-dharīʿah* (prevention of means), i.e., preventing public from doing some permitted deeds that might lead to commit forbidden deeds, might be used to conduct partial harmonization between Islamic *fiqh* and Man-made law. For instance, Man-made law does not allow selling of instruments, materials and components for manufacturing nuclear reactors to those countries that might utilize them for manufacturing nuclear weapons. Islamic *fiqh* might borrow this rule and consider this type of selling as *ḥarām* (forbidden) categorizing it as *sadd al-dharīʿah* because selling of materials for manufacturing nuclear reactors should be permitted (*mubāḥ*) because it may bring benefits for the public. But if they fall into suspected bad hands, they might be used to manufacture nuclear bombs, which are a means of destruction. Therefore, this selling should be *ḥarām*.
6. Partial harmonization would be allowed in different aspects of transaction law, discretionary punishments (*taʿzīr*), political

³⁷ Fathī al-Marsafāwī, *Dirāsāt Taṭbīq al-Sharīʿah al-Islāmiyyah fī Miṣr* (Cairo: Dār al-Fikr al-ʿArabī, 1980), 118-119.

³⁸ Al-Baqarah, 2:275.

³⁹ Āli ʿImrān, 3:130.

system, etc., where neither any Divine text nor any other source of law supported by Divine text is available. For these fields, Islamic *fiqh* can borrow related rules from Man-made law as *‘urf* (custom) or *maṣlaḥah mursalah* (public interest), as discussed earlier, but this borrowing must be scrutinized and examined so that it would not go against any Divine text or general principle of Islamic *Shari‘ah*.

7. Islamic *fiqh* could borrow procedures and ways to implement and establish the rulings of the *Shari‘ah*. Likewise, there should not be any problem to borrow the system of administration from Man-made law.⁴⁰ For instance, selected aspects of contemporary judiciary or parliamentary system are allowed to be borrowed in Islamic *fiqh*. This is because the *Shari‘ah* does not prescribe a particular system for these two fields of Islamic *fiqh*. For this reason, they were continuously being developed or changed by the rulers including the righteous four caliphs. For instance, the selection process for a caliph was not the same for every one of the four righteous caliphs. Rather, each one of them was selected in a different way. Likewise, at the beginning of Islam, judicial decisions used to be taken in the mosque of the Prophet (p.b.u.h.), but later a separate place was selected for this purpose. Additionally, the second caliph ‘Umar accepted the system of keeping records (*dīwān*) from the Roman system and implemented it in Islam, which is considered to be a type of procedure to implement the rules of the *Shari‘ah*. However, precaution should be maintained in borrowing anything from these contemporary systems, so that they should not contradict any Divine text, well established *Shari‘ah* rule or its general principle.
8. The system of codification also falls under the procedures and ways to establish the rulings of the *Shari‘ah*. Therefore, the most advanced contemporary codification system can be borrowed from the Man-made law and incorporated in Islamic *fiqh*, as it had been started by the ‘Uthmaniyyah caliphate in

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A contemporary Muslim jurist Shaykh al-Shanqīṭī maintains this view. See Al-Ashqar, 213.

Turkey. Since ‘Umar adopted the Roman recording system into Islam, the present Muslim rulers also should be allowed to borrow this codification system from the Man-made law.⁴¹ However, caution must be observed in this codification system, so that the door of *ijtihād* should not be closed following codifying all the rulings of the *Shari‘ah*.

9. There should not be any problem to transfer most advanced contemporary technology including the war techniques from the West into Islam. This is because this transfer would help the implementation of rulings of the *Shari‘ah* directly or indirectly. Allah says: “You should prepare your power/strength against them (your enemy) as much as you can.”⁴² The Prophet (p.b.u.h.) did not hesitate to accept the idea of digging trenches around Madinah during the battle of Khandaq, which originated from Persian war customs and suggested by Salmān al-Fārisī to him. However, in borrowing these technology and techniques, Muslims should adhere to general principles of Islam.
10. Some courses of Man-made law could be introduced into the *Shari‘ah* department or faculty of contemporary universities, so that students of *fiqh* or *Shari‘ah* would get a chance to have some idea about this law. But its teaching should be conducted by the type of experts who can teach them using the method of comparing it with Islamic *fiqh*, and thus could prove the superiority of Islamic *fiqh* to this Man-made law.⁴³
11. In order to accomplish the partial harmonization between Islamic *fiqh* and certain rulings of Man-made law, a group of scholars who have appropriate knowledge of Islamic *fiqh*, general principles and maxims of the *Shari‘ah*, and profound idea about

⁴¹ With modification from Al-‘Aṭṭār, 144-152.

⁴² Al-Anfāl, 8:60.

⁴³ This principle is inferred from the opinions of some contemporary Muslim jurists, such as Shaykh Badr Mutawallī ‘Abd al-Bāsiṭ, one time Dean of the Faculty of Shari‘ah, Al-Azhar University, and Shaykh Aḥmad Abū Sinah, a professor of this faculty. See Al-Ashqar, 116-117.

Man-made law should be appointed. In the absence of this type of scholars, a group of scholars who are experts of Islamic *fiqh* should be selected, who should consult with another selected group of scholars of Man-made law.

12. This group of scholars should proceed gradually to implement this partial harmonization process starting with the less complicated field, such as transactions, and ending with the most complicated one such as discretionary punishments.
13. As a start, both Islamic law and Man-made law could be practiced independently side by side. In order to do this, *Shari'ah* graduates should be given a chance to practice law in the contemporary courts beside graduates of Man-made law. But this should not continue forever. Rather, after a certain period of time the whole code of law should be one single system, which is called Islamic code of life comprising all different aspects of human life. Thus, all those who would practice law, should do so under the leadership of *Shari'ah* code. In order to accomplish this, graduates of Man-made law would require training in Islamic *fiqh*, and likewise, *Shari'ah* graduates would require some training in Man-made law.

CONCLUSION

Harmonization between *Shari'ah* and Man-made law is not allowed. However, partial, not comprehensive, harmonization between Islamic *fiqh* and Man-made law is permitted. All principles for conducting this partial harmonization between Islamic *fiqh* and certain aspects of Man-made law discussed in this paper are important. The most significant ones of these principles are to accomplish this partial harmonization according to necessity, to have intention to implement the Islamic *Shari'ah* in this modern age, and to conduct it under the banner and leadership of *Shari'ah*, not under the banner of Man-made law. This is because only *Shari'ah* can lead the *ummah* towards its ultimate unity and success of both this world and next world. Anything less that this would be rejected by the *ummah* and thus would not bring practical success. Likewise, this process would not work properly and perfectly unless there is support

from contemporary Muslim governments. With this type of support, if this work is accomplished, it will not bring full benefit for the *ummah* unless these governments show their interest to implement them and gradually try to make the whole system as an Islamic system.