

WAS AL-SHĀFI'Ī AGAINST AL-MAṢĀLIḤ AL-MURSALAH?*

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Introduction

The question of the adaptability of Islamic law *vis-à-vis* social changes and needs has been long debated by a considerable number of scholars and writers. It arises because any kind of law, either divine or man-made, has to face the challenge of social changes which require adaptability from it.¹ In line with this, we notice that Roman Law provides flexibility by differentiating between *jus civile* (civil law), which is strict; and *jus honorarium* (law of equity), which is elastic.² Similarly, in English Common Law,³ the required flexibility is provided by the Law of Equity, a system of law which developed in parallel with the common law to make the common law fairer.⁴ Even in Constitutional Law,

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¹ Muhammad Khalid Masud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institute, 1977), 1, hereafter cited as *Philosophy*.

² *Ibid.*, 18.

³ The English Common Law, including the rules of equity, is also applicable in Malaysia by virtue of the Civil Law Act, 1956, Part II, sections 3 & 4. See also Ahmad Ibrahim & Ahilemah Joned, *Malaysian Legal System* (Kuala Lumpur: DBP, 1987), 99–112.

⁴ P. H. Collin, *Law Dictionary*, 6th. repr. (New Delhi: Universal Book Stall, 1992), 98. The law of equity deals with "hard cases caused by the inflexibility of fixed rules", i.e., the inherent strictness of the application of common law doctrines and the inadequacy of the remedies available at common law. Equity aims at remedying all the

some countries prescribe that any provision of the Constitution may be amended provided the requirement of a two-thirds majority vote of the parliamentary members is met.⁵ Such amendment may be made if it is beneficial to the public because "it is important that the constitution alters to suit the changing aspirations of the people living under it."⁶ This shows that various legal systems have mechanisms providing flexibility in response to social changes.

In relation to Islamic law, Muhammad Iqbal has implicated its adaptability in a question form, "Is the Law of Islam capable of evolution?"⁷ Scholars and writers who discuss the issue may be divided into two opposing camps: those who claim that Islamic law is static, immutable and unchangeable as opposed to those who hold that Islamic law is both changeable and adaptable

defects of common law. However, equity never says that common law is wrong but merely provides alternative solutions to legal problems. It is thus essentially a supplementary jurisdiction, an appendix or a gloss upon the common law and adopts a different solution to that provided by the common law. In the case of conflict, rules of equity are to prevail over common law. For these remarks, see David A. Howarth, *English Legal System* (London: Blackstone Press Limited, 1988), 56, 60; Kenneth Smith & Denis Keenan, *English Law*, 7th. ed. (London: English Language Book Society, 1982), 8; Philip H. Pettit, *Equity and the Law of Trust* (London: Butterworths), 1; and R. J. Walker, *The English Legal System*, 6th ed. (London: Butterworths, 1985), 42. This last author offers one of the best definitions of the nature of equity which has been determined in an English case, *Dudley v. Dudley* (1705).

- ⁵ See, for example, the Federal Constitution of Malaysia, Part XII, Article 159 (3) and the Constitution of the USSR, Art. 174.
- ⁶ Kevin Tan Yew Lee, Yeo Tiong Min & Lee Kiat Seng, *Constitutional Law in Malaysia and Singapore* (Singapore-Kuala Lumpur: Malayan Law Journal, 1991), 95.
- ⁷ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Iqbal Academy Pakistan and Institute of Islamic Culture, 1989), 130, hereafter cited as *Reconstruction*.