

**HARMONISATION OF MALAYSIAN PARTNERSHIP  
LAW AND SHARI'AH LAW WITH REGARD TO  
RIGHTS AND LIABILITIES OF PARTNERS**

**BY**

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## ABSTRACT

The relevant provisions of the Malaysian Partnership Act 1961, built upon English Partnership Act 1890, have been scrutinized in terms of rights and liabilities of partners by undertaking a comparative investigation with the *Shari'ah* in order to identify inconsistencies between them so as to propose measures aimed at minimizing conflicts to an extent possible. The analysis has exposed that, despite the majority of the provisions of the Act being in conformity with the Islamic rules of partnership, their interpretation espoused by the courts appear to be in need of reconciliation. In devising a suitable mechanism to reconcile, the process of harmonization is adopted based on the recommendations of *Shari'ah* scholars. The study primarily relies on Malaysian case laws and case laws from Common Law jurisdictions, juristic opinions and academic writings while employing library based research methodology. The proposed process of harmonization can fulfill the underlying aim of the *Shari'ah* due to the existence of complimentary relationship between Common Law rulings and the *Shari'ah* principles within the range of the research title. As the study, limited to the title, could figure out incompatibility between the two laws, the thesis proposes amendments to the Malaysian Partnership Act by applying the process of harmonisation. Finally, a practical approach towards removing certain conflicts in the areas such as sharing fixed sum profits, sharing loss equally among partners, paying remuneration for active partners and some other relevant stipulations and suggesting recommendations to harmonise the incompatibility between the two laws.



## ملخص البحث

تفحص أطروحة الباحث الأحكام ذات الصلة المباشرة بموضوع الباحث من قانون الشراكة الماليزي لعام 1961م، والتي تركز في المقام الأول على قانون الشراكة الإنكليزي لعام 1890م، من حيث حقوق والتزامات الشركاء، وإجراء تحقيق مقارن مع الشريعة من أجل تحديد التناقضات فيما بينها، واقتراح تدابير للمواءمة بين النظامين. وقد أوضح التحليل أنه على الرغم من أن غالبية أحكام القانون تتفق مع قواعد الشريعة الإسلامية الخاصة بالشراكة، أتضح بعد ذلك من أن المفهوم التفسيري لتلك النصوص يحتاج إلى التوفيق بين المعاني المتعارضة. وعليه فعند ابتكار آلية مناسبة للتوفيق، يتم تبني عملية المواءمة بناءً على توصيات علماء الشريعة في تفسير الأحكام ذات الصلة من قانون الشراكة الماليزية. تستند هذه الأطروحة من حيث الأصل على قوانين القضايا الماليزية وقوانين القضايا من الولايات القضائية للقانون العام، والآراء الفقهية والكتابات الأكاديمية، وذلك بتوظيف المنهجية البحثية التي تعتمد على المصادر الأولية في المكتبات. يمكن لعملية المواءمة المقترحة تحقيق الهدف الأساسي للشريعة حول موضوع الدراسة بسبب العلاقة التكاملية بين أحكام القانون العام ومبادئ الشريعة تحديداً فيما يتعلق بالأحكام المتعلقة بعنوان البحث. وتخلص الأطروحة إلى أنه إلى جانب بعض العناصر، فإن جزءاً كبيراً من الشراكة في القانون العام يتماشى مع مبادئ الشريعة، ومع ذلك، لا يزال هناك مستوى من عدم التوافق لاسيما فيما يتعلق بحقوق والتزامات الشركاء، من أجل تنسيقها مع الشريعة. وعليه تقترح أطروحة الباحث إدخال تعديلات على قانون الشراكة الماليزية. وأخيراً، اتّباع نهج عملي لإزالة بعض الصراعات في مجالات مثل تقاسم الأرباح الثابتة، ومشاركة الخسائر بالتساوي بين الشركاء، ودفع الأجر مقابل الشركاء النشطين، واعتماد بعض الشروط الأخرى ذات الصلة واقتراح توصيات لمواءمة عدم التوافق بين القانونين.



## APPROVAL PAGE

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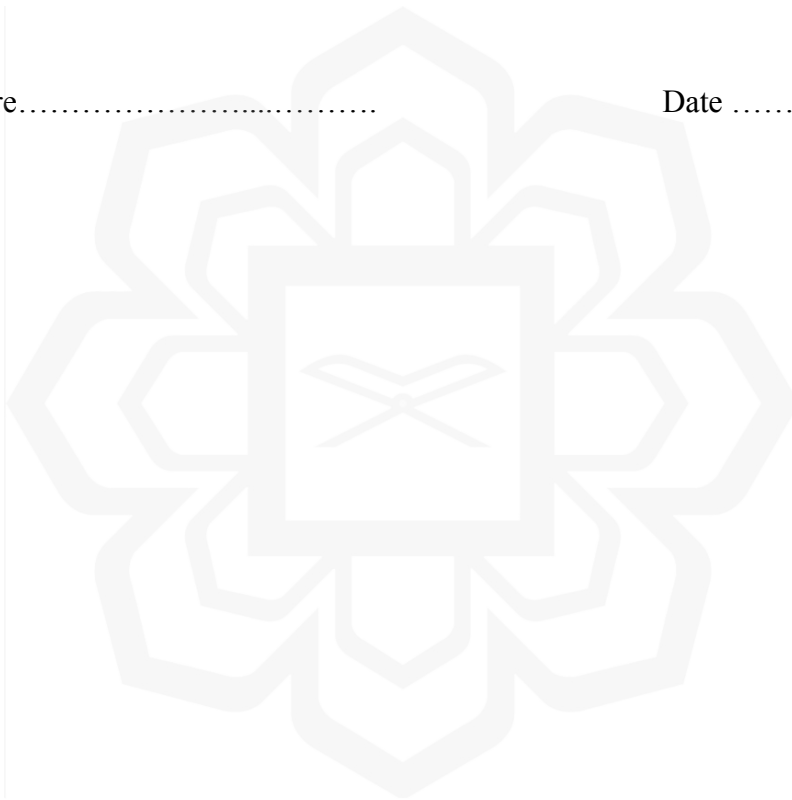
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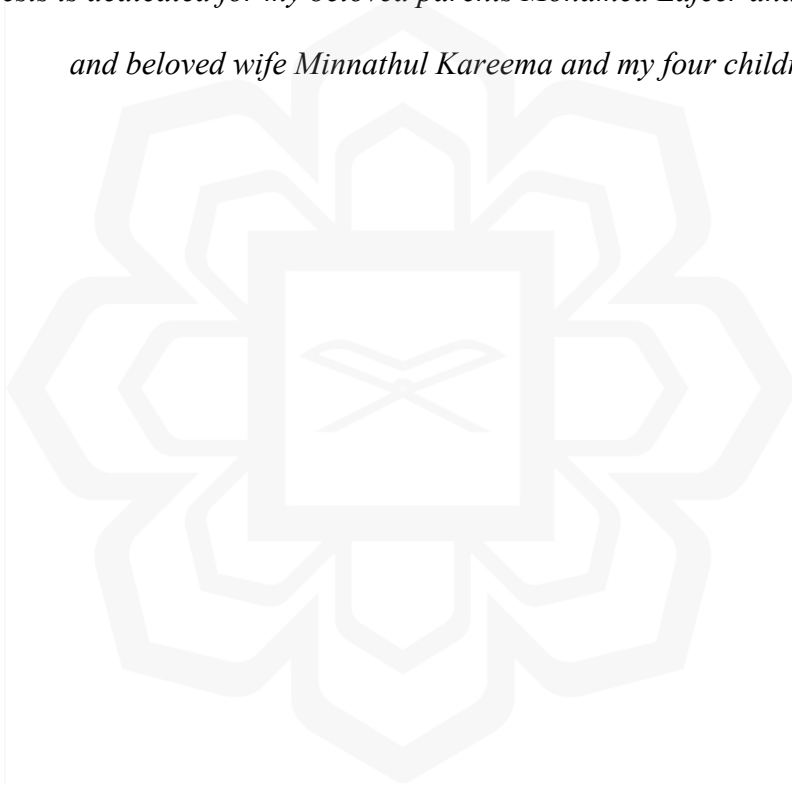
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## DEDICATION

*This thesis is dedicated for my beloved parents Mohamed Lafeer and Sithy Raseena  
and beloved wife Minnathul Kareema and my four children*



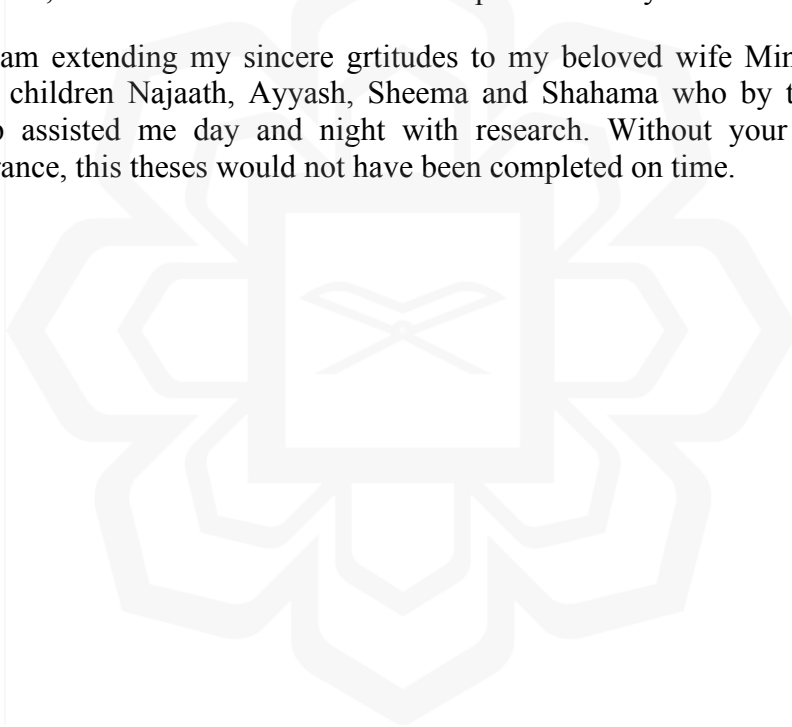


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## LIST OF ABBREVIATIONS

AAOIFI Institutions	Accounting and Auditing Organization for Islamic Financial
BNM	Bank Negara Malaysia
CTA	Civil Transactions Act
MPA	Malaysian Partnership Act
PBUH	Peace be Upon Him



# CHAPTER ONE

## INTRODUCTION

### 1.1. BACKGROUND OF THE STUDY

#### 1.1.1. Diversity In Partnership Laws

The Partnership Act 1961 (Revised 1974), a piece of legislation based on the British Partnership Act 1890<sup>1</sup> as well as Common Law principles, forms the governing law of partnership business in Malaysia. All forms of general partnership business are governed by the provisions of the Act within Malaysia as in business, when you hear the word partnership, it generally refers to a general partnership. In a general partnership, there are two or more partners. Each is liable for any debts or judgments taken on by the business. There is no limited liability, which means all the partners' assets can be taken in a lawsuit or be targeted to settle debts should the partnership become insolvent. Any partner can be sued for the full amount of business debts.<sup>2</sup> A vital point incorporated in the Act is the recognition of the rules of equity and of Common law<sup>3</sup>, based on which the courts are empowered to apply judicial decisions from other Common Law jurisdictions to the local context, whenever there is a lacuna to be addressed with such precedence, as long as the judgments drawn in are not inconsistent with the express provisions of the Act. The legislation so developed was applied, as a uniform law, on all communities domiciled in Malaysia regardless of their religion or ethnicity. An examination of the Act would reveal that compatibility

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<sup>1</sup> El Gaily Ahamed El Tayeb, *“Principles of Partnership Law in Malaysia”*, (Kuala Lumpur: International Law Book Services, 1998).

<sup>2</sup> Free Advice Staff. Free Advice, Legal, *“What is General Partnership?”*: <https://business-law.freeadvice.com> (accessed 12 August, 2018).

<sup>3</sup> Malaysian Partnership Act 1961 s 47(1) provides as, the rules of equity and of Common law applicable in partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act.

with the *Shari'ah* was not kept in view when the legislation was enacted. As a result, this particular enactment does not appear to adequately reconcile the expectations of the multi-religious population of Malaysia where Muslims constitute a sizeable proportion; whereas adhering to *Shari'ah* principles and its teachings in every aspect are considered obligatory on every Muslim in their life including business and commerce.

Even though the Malaysian Partnership Act was not enacted to be in line with the principles of *Shari'ah*, many of its provisions appear to be *Shari'ah* compliant while certain arrangements appear to be incompatible with the *Shari'ah*. It is claimed that, "the similarity between British Partnership and *shirkat* is very real: the types of partners, their rights, duties and functions and obligations to third parties in respect of debts, etc., as laid down in the British Partnership Act of 1890 are more or less the same as described under *shirkat* in the Hedaya"<sup>4</sup>. However, failure of the author Afzalur Rahman to substantiate his claim properly by providing sufficient evidence undermines the authenticity of his findings. In contrast, a close observation of the subject matter reveals that, despite parallels, there are elements of incompatibility between the principles of Common Law and the *Shari'ah*, specifically in terms of certain sections of rights and liabilities of partners, even under *shirkah*. For instance, the Malaysian Partnership Act defines partnership as the relation which subsists between persons carrying on business in common with a view of profit.<sup>5</sup> It is therefore significant to analytically explore the definition characterized within the provision in comparison with the *Shari'ah* in order to ascertain as to whether an entitlement to a share of profits of a business is a necessary pre-requisite to the existence of a partnership. As stated by Common law authorities, distribution of profits is for now

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<sup>4</sup> Afzal-ur-Rahman, "*Economic Doctrines of Islam*", 4<sup>th</sup> ed., (Lahore: Islamic Publication, 1995), 302.

<sup>5</sup> Malaysian Partnership Act 1961 s 3 (1).

not a pre-requisite.<sup>6</sup> This position appears to differ from the stand adopted by the *Shari'ah* where contractual partnership (*shirkah-al-aqd*) is defined as an agreement between two or more persons for common participation in capital and profits.<sup>7</sup>

Under the Malaysian Partnership Act both forms of partnership, as against in Islamic Law, viz. *shirkah* and *mudarabah*, are governed by a single set of rulings, whereas both forms differ in their character and rules. In contrast to the above, under the *Shari'ah*, *shirkah* and *mudarabah* are characterized distinctly with different sets of rulings. In *shirkah*, profit will be distributed among partners on the basis of proportions settled in advance and the loss will be shared in proportion to the capital invested, whereas in *mudarabah*, while the partners can settle for any proportion of profit by mutual agreement, the loss will be borne only by the partner who contributed the capital. These distinct features demonstrate that *Shirkah* and *Mudarabah* have their own set of rulings under the *Shari'ah*, since both differ in their intrinsic character. So is the case in the matter of rights and liabilities of a partner within these two divergent legal regimes.

For a partnership to be recognized by the *Shari'ah*, the share, of every partner in profit, must be determined in proportion or percentage in advance. No fixed amounts can be settled for any party.<sup>8</sup> Any condition that leads to uncertainty in this or does not correspond with this will render the contract unenforceable.<sup>9</sup> Alternatively, this pre-requisite is not a requirement in Malaysian Partnership Act for a partnership to be established as section 4(c) of the Act provides that, "the receipt by a person of a share of the profits of business is *prima facie* evidence that he is a partner in the

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<sup>6</sup> *M Young Legal Associated Limited v Zahid* [2006] EWCA Civ at 613; [2006] 1WLR at 2562.

<sup>7</sup> Ottoman, "*The Mejallah; Majallahel- Ahkam-i-Adliya and A Complete Code on Islamic Civil Law*", translated by Tyser, C.R., Demetriades, D.G. & I.H.Effendi, (Lahore, Pakistan: Law Publishing Company, 1980), s 1329.

<sup>8</sup> Ibnu Mas 'ud al-Kasani, "*Bada'i al-Sana'i*", 2<sup>nd</sup> ed., vol.6, (Beirut: Dharul Kutub al-Ilmiyyah), at 59.

<sup>9</sup> *Ibid.*, at 22.

business." According to this provision, a partner is not restricted from having a fixed sum as his share of profit in a partnership business. This is the view adopted in cases by many Common Law courts. For instance, in *M Young Legal Associates Ltd v Zahid*,<sup>10</sup> the fixed salaried partner was held to be a true partner.

### **1.1.2. Justification Of The Study**

From the foregoing discussion as well as a close examination of the relevant texts and judicial decisions, it is evident that, there exist elements of incompatibility between these two systems. Therefore, such elements of discordance between them necessitate a systemized approach in order to bring them closer to each other, which can make these distinct legal systems work together harmoniously, within a framework to be adopted on a basis compatible with the *Shari'ah* principles.

This calls for a study aiming at removing/minimizing such elements of discordance, by diagnosing them with a suitable mechanism. As far as Muslims are concerned, adhering to the principles of the *Shari'ah* and its teachings is an obligation on all Muslims in every aspect of life including civil and commercial matters. The dearth of studies, aiming at reconciling differences between these two legal systems, on the subject of rights and liabilities of partners, encouraged the researcher to concentrate on the feasibility of harmonising these laws. Accordingly, the issues of incompatibility between these laws would be addressed along with an attempt to devise an appropriate mechanism, in order to reinforce the objectives of the *Shari'ah*, to the extent possible, within the scope of the research topic.

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<sup>10</sup> [2006] 1WLR at 2562.

### **1.1.3. Nature Of The Study**

The topic itself gives the basic idea of the purported research. Harmonisation differs from Islamicization as it is a new concept.<sup>11</sup> The mechanism utilized in the research to reconcile conflicting areas pertaining to the rights and liabilities of a partner is harmonisation, because harmonisation is a concept designed to incorporate different legal systems under a basic framework.

The process of harmonisation attempted to be applied in this research does not necessarily aim at changing the existing Malaysian partnership law that forms the governing law of the country. Nevertheless, the objective of the study is to suggest suitable reforms to the rights and liabilities of partners addressing the issues which reflect the incompatibility between Common Law and Islamic Law, in order to remove/minimize the discordance.

Thus, the current research would basically concentrate on viable and effective methods of harmonisation to be applied in the areas within the scope of the study by undertaking a comparative analysis and critical examination of the legal regimes on rights and liabilities of partners under partnership laws. The process of harmonisation is expected to result in suggestions for recommended reforms which will be compatible with both Common Law and the *Shari'ah* within the framework of the existing legal system of Malaysia.

## **1.2. STATEMENT OF PROBLEM**

Malaysian Partnership Act 1961, based on Common Law principles, has made no reference to the *Shari'ah* principles when it was enacted as the governing law of partnership business. Consequently, the Act reflects elements of discordance with the

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<sup>11</sup> Mohammad Hashim Kamali, "Shariah and Civil Law: Towards a methodology of Harmonisation", *Islamic Law and Society*, vol. no.03 (2007): 393.

*Shari'ah* with regard to certain provisions therein, including those pertaining to the rights and liabilities of partners. The stipulations of the Act require that all matters in respect of partnership business would be governed by the Act within the territories of Malaysia, regardless of one's religion or ethnicity, as the Act does not contemplate any provision with a view to applying its rulings on certain group of persons, religion or any ethnic group. However, as is known, observing Islamic law and its teachings in all aspects of life is the duty of all Muslims, as encompassed in the concept of *tauhid*<sup>12</sup>. Therefore, it appears that the laws of the land should reflect, and be in conformity with, the *Shari'ah*, as is the aspirations of the Muslim community that constitutes a sizeable proportion of the Malaysian population. Any literature, in reconciling the differences between the two laws within the subject matter has not been attempted so far. This requires a study that can attempt the process of harmonization in order to minimize the gap between these two laws.

### 1.3. RESEARCH QUESTIONS

1. What are the rights and liabilities of a partner under the existing Malaysian Partnership Act 1961 and the interpretation given by the Courts of law?
2. What are the rights and liabilities of a partner (*Shirkah and Mudarabah*) under the principles of *Shari'ah*?
3. What are the similarities and inconsistencies between Malaysian Partnership Act 1961/Common Law and the *Shari'ah* principles on the rights and liabilities of partners?

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<sup>12</sup> Zaleha Kamaruddin, "*The Interrelationship and the Associated Tension between Shari'ah and Civil Family Law in Malaysia: Harmonisation as a Solution*" quoted by Abdul Haseeb Ansari, "*Harmonisation of the Shari'ah and Civil Laws*", (Kuala Lumpur: IIUM Press, 2011), 143.

4. What is harmonisation and how could it be used as a mechanism to reconcile major differences between the said two legal systems?
5. How can the differences identified within the scope of the rights and liabilities of partners be harmonized, to the extent possible, by suggesting amendments to the existing partnership law of Malaysia?

#### **1.4. OBJECTIVES OF THE STUDY**

This study is conducted with the following objectives.

- i. To examine the Malaysian Partnership Act of 1961 with regard to the rights and liabilities of a partner along with relevant case laws.
- ii. To analyze the *Shari'ah* principles on the rights and liabilities of a partner (*Shirkah and Mudarabah*) that are relevant to corresponding provisions of the Malaysian Partnership Act 1961.
- iii. To critically analyse the areas of similarities and inconsistencies in the rights and liabilities of a partner between the Malaysian Partnership Act 1961 and the *Shari'ah*.
- iv. To study possible methods of harmonisation that would be applied in order to remove/minimize inconsistencies within the scope of the rights and liabilities of partners.
- v. To suggest amendments to the existing laws by way of a method of harmonisation in order to achieve a higher level of *Shari'ah* compatibility.

#### **1.5. HYPOTHESIS**

A cursory analysis of the subject has revealed that some provisions that constitute the Malaysian Partnership Law bear elements of discordance with the *Shari'ah*, while