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“COMMON AREAS OF INTEREST FOR SHARIA AND COMMON LAW
COURTS IN JUDICIAL EDUCATION”

by

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Many people, including common law lawyers and judges and Islamic scholars, think that common law and the *Sharia* represent the East and the West that would never meet. The “clash of civilizations” is inevitable.

That, in my view, is due to ignorance and prejudice from both sides. Those who know common law do not know Islamic law and those who know Islamic law do not know common law. To the Islamic Scholars their law is “God-made law” while common law is but “man-made law”. They fail to realize that a great deal of what is commonly referred to as “*Sharia*” are in fact “fiqh” (i.e. law) which consists of rulings and opinions of the Muslim Jurist-consults who themselves were not prophets; that the Koranic injunctions are few in number and relate mainly to the more general principles of justice, rather than specific provisions of the law.

On the other hand, common law lawyers are proud of their law and many of them regard Islamic law as inferior and, in some cases, even uncivilized and that justice is only attainable through common law!

With such frames of mind, the emphasis is on the differences and conflicts and it is easy to find the differences: in family law, mention polygamy and same sex marriage, in commercial law mention interest (usury), in criminal law mention “*hudud*” and sodomy. Period. The East and the West will never meet!

But, I remember reading a book by the name of “Islamization of Pakistani Laws” in early 80’s where it was reported that a study showed that only about 10% of the laws in Pakistan then were in conflict with the *Sharia*. (I hope Mr. Justice Asif Saeed Khan Khosa will correct me if I am wrong). Professor Hashim Kamali from the International Islamic University, Malaysia gives the same estimate for Malaysia. I also remember reading the introduction by

David Moussa Pidcock to the book "Napoleon and Islam" which said that 97% of Code Napoleon were taken from the rulings of Imam Malik. It sounds unbelievable but remember the Egyptian campaign.

I am not standing by those figures and statements as I have no means of proving them right or wrong.

But, having been involved for two decades in the drafting of laws for the *Sharia* Courts and sitting in the *Sharia* Advisory Council of the Central Bank of Malaysia and also of the Securities Commission, Malaysia, I see more similarities than differences, in principle if not so much in details. What is interesting is to see common law principles being adopted for use in the *Sharia* Courts in Malaysia. This is more so in procedural laws. Take a look at the *Sharia* Criminal Procedure Act or Enactments, the *Sharia* Civil Procedure Act or Enactments or even the *Sharia* Evidence Act or Enactments in Malaysia. One will find that most of the provisions are taken from the Subordinate Courts Rules, The Criminal Procedure Code and the Evidence Act which are used in the common law courts. Those "man-made laws" have become "God-made laws" and they have been given the "*Sharia*" trade mark! What does that show? It shows that those common law principles are not in conflict with the *Sharia* principles. Hence, when I was asked "What is your definition of 'Islamic Law'?" My reply was, "Any law that is not unislamic."

In Malaysia, the areas of conflict that come to court are conflicts of jurisdictions, not conflict of laws. This is because of the Federal System and Islamic law is a State matter. The Judiciary (i.e. common law courts) are Federal Courts while the *Sharia* Courts are State Courts. I have written many judgments and papers on this issue. Give me your email address if you are interested.

Ladies and gentlemen,

There is one area of the *Sharia* which is moving into the mainstream and is becoming global. That is in the area of Islamic banking, Islamic Finance and *takaful* (Islamic insurance). The reason is simple: it is a billion-dollar business. Islamic banking, Islamic insurance and Islamic finance products are being produced all over the world, including countries like Japan and Korea. To create such products will require experts in conventional banking,

insurance or finance, experts in common law as well as in the *Sharia*. No one person can claim to have all the necessary expertise.

We need lawyers who know how draw up the contracts that comply with the *Sharia*.

The matter may end up in court. We need lawyers who know what the contentious issues are, how to draw up the pleading and argue the cases. We need Judges to decide on those issues. In Malaysia, even though such cases are heard by the common law courts, there is a law that requires the courts to refer to the rulings of *Sharia* Advisory Council of the Central Bank and even to refer *Sharia* issues arising from such cases to the Council for its rulings. Even then lawyers and Judges would have to know something of the subject. In other common law countries, the common law judges would have to decide such issues. Are they prepared for it? Or, have they been prepared for it?

I am sure at the end of the day, the country which does not have the right infrastructure in terms of lawyers and judges will lose out in the competition for the billion-dollar business.

This is something that we all should think seriously about. It may not be sufficient for common law lawyers and judges to know only common law, anymore.

Thank you.