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Conflict of Civil and Shari'ah Law: Issues and Practical Solutions in Malaysia

By

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One thing I like about the title of the paper is the word "practical". Because, even without it, that is what I would be talking about. With it, I cannot go wrong.

I would like to touch on two areas of conflict: conflict of jurisdictions and conflict of laws. At this point of time, I think conflict of jurisdictions between the two courts is the more serious of the two and the problem should somehow be solved. It is not settling a quarrel between the two courts (there is no quarrel, really) but it is to enable the parties to go to which court they should go to obtain the remedies they are seeking.

#### Conflict of Jurisdictions

Exactly ten years ago, as a High Court Judge, deciding the case of Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang (1996)3 CLJ 231, I first sounded the problem and tried to suggest a solution. This was repeated and expanded three years later in Abdul Shaik bin Md. Ibrahim & Anor. v. Hussain bin Ibrahim (1999) 5 MLJ 618 (also High Court). See also Sistem Kehakiman dan Perundangan di Malaysia: Satu Wawasan (2001) 4 MLJ clxxx and Civil and Shariah Courts in Malaysia: Conflict of Jurisdictions (2002) 1 MLJ cxxx. The problem arises, first, where the issue is one of Islamic law and within the jurisdiction of the shari'ah court but one of the parties is a non-Muslim. To which court should he go? The civil court has no jurisdiction over the subject matter and even if it has, it has no expertise, to decide the issue. The shari'ah court has no jurisdiction over him, being a non-Muslim. Companies (limited companies) too, not being natural persons able to profess the religion of Islam (or otherwise) cannot fall within the meaning of the phrase "persons professing the religion of Islam" in List II State List of the Ninth Schedule of the Federal Constitution.

Secondly, even where both parties are Muslims, there are cases where some of the issues involved are within the jurisdiction of the civil court but there are also issues that fall within the jurisdiction of the shari'ah court. A good example is the case of G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang (1993) 2 MLJ 166. In that that case, the issues involved were land law, Torrens system, adverse

possession and estoppel which are matters within the jurisdiction of the Civil court and waqf, a matter within the jurisdiction of the shari'ah court. In that case, the plaintiff was also a non-Muslim.

I had then suggested two alternatives to solve the problem. The first is to unify the two court systems into one from the lowest level to the highest. Judges from both disciplines, civil and shari'ah, will be appointed. Ordinarily, the civil law Judges hear and decide civil law cases and shari'ah Judges hear and decide shari'ah-based cases. There are a lot of advantages in this. In fact, this is the ideal. See, inter alia, Sistem Kehakiman dan Perundangan di Malaysia: Satu Wawasan (supra). However, it involves serious amendments to the Constitution relating to State and Federal Lists. I do not think it will and can happen in our life-time.

The alternative is to allow the civil court to hear cases where non-Muslims are involved even where the subject-matter or the issue is shariah-based and to allow the civil court to hear and decide cases in which both the civil law issues and shari'ah-based issues arise. However, in such cases, a shari'ah court Judge or a shari'ah expert should sit with the civil court Judge. The civil court Judge determines the facts and decides the civil law issues. The shari'ah Judge decides the shari'ah issues based on the facts found by the civil court Judge. Based on his finding of facts, his finding of law on the civil law issues and the finding of the shari'ah Judge on shari'ah issues, the civil court Judge makes the final decision. This, I think, is the most practical way to solve our current problems.

### Conflict of Laws

Coming now to the conflict of laws. One might say, even if the laws in the two systems differ, so what? **First**, even in any one particular system of law, there are differences of opinion. Indeed, differences of opinions in Islamic law is more serious than in civil law. The reason is because Islamic law develops through opinions of jurists whereas civil law are codified or, what is known as "common law", develops through decisions of courts and there is the doctrine of stare decisis (binding precedents) to ensure that only the law as expounded by the highest court in the country prevails at any given time. In addition, in Malaysia, there is only one Federal Court as against 14 Shari'ah Courts of Appeal. Even the enacted shari'ah laws vary from State to State.

**Secondly**, the non-Muslims prefer to be governed by the civil law. However, a section of the Muslim population, would prefer to be governed by what they perceive to be "Islamic law" even most of them (or us) do not know what the details are or would be on any particular subject.

Anyway, I am not going to argue whether the differences in the two laws should or should not be harmonized. That is a matter of policy. This conference assumes that we want to do it. The question is: how?

But, before answering that question, a few things should be mentioned. **First**, it is not difficult to determine what the “civil law” is on a particular issue. All you need to do is to check the Acts of Parliament, the Ordinances, the subsidiary legislations and the judgments of the courts. Then there are the law journals, the textbooks and even the internet.

It is not quite so easy with regard to shari’ah/Islamic law. In the **first** place, what is shari’ah or “hukum syarak” as it is known in Malaysia? Is it pure shari’ah or shari’ah plus fiqh or shari’ah plus fiqh plus whatever written law administered by the shari’ah courts even though they may have their origins in common law or “civil law? A few years ago, a Phd. student from the University of Istanbul asked me: “What is your definition of “Islamic law”? I replied , “Any law that is not un-Islamic”. On his return to Istanbul he sent me an e-mail. Amongst other things, he said: “How I wish that our ulamas are as broad-minded as you are.” I replied, “The point is I am not an ulama”.

**Secondly**, as I have mentioned, compared to civil law, there is less certainty in the shari’ah position on a particular issue. It depends, amongst other things, on which school (mazhab) you follow.

We will leave it to Islamic scholars to determine what the shari’ah position is on a particular issue.

**Thirdly**, too often, the differences between Islamic law and civil law is exaggerated. Too often, the division is assumed to be clear-cut, one is “God-made law”, the other is “man-made law”, one is “religious law”, the other is “secular law” or worse. I believe that there are more similarities than differences (putting aside the section on “ibadah”). David Moussa Pidcock in his introduction to the book “Napoleon and Islam” says that 97% of Code Napolean was taken from the rulings of Imam Malik. I remember reading that a study done in Pakistan some twenty years ago shows that only about 10% of the laws in Pakistan then was contrary to the shari’ah. (But, we must always bear in mind that while statistics do not lie, they do not tell the whole truth.)

**Fourthly**, to determine whether a law is “Islamic” or not, we tend to pay more attention to form, source and history rather than the substance: whether or not it is contrary to Islamic principles? That is what I mean when I say “Any law that is not un-Islamic is Islamic”. In other words, if it is not contrary to Islamic principles, it is Islamic even though it is something completely new or different from what it was during the time of the Prophet (s.a.w.) or different from what has been pronounced by the great scholars of fiqh. If there were cars during the time of Caliph Umar Ibn Al-Khattab (r.a.), most probably, he would have made

regulations for their use. Or, if there were cars during the time of Caliph Harun Al-Rashid he would have asked Abu Yusuf to come up with a law to regulate their use. Had that happened, I am quite sure that, today, in Malaysia, those regulations or laws will be known as “The Islamic Road Traffic Law” or something like that. And if the speed limit was fixed, it would be known as the “Islamic speed limit” or “had laju mengikut hukum syarak”! Why should our Road Traffic Act not be considered “Islamic”, minus the offending provisions, if any.

Furthermore, a law that we now have may be different from what it was during the lifetime of the Prophet (s.a.w.). That does not necessarily mean that it is un-Islamic. Indeed, it may even be better, more just and, therefore, “more Islamic”. Some of you may find this statement shocking. But, consider this example. Slavery was lawful during the time of the Prophet (s.a.w.). Of course, the advancement of the rights of slaves done by Islam and the Prophet (s.a.w.) during his time was revolutionary even compared to the American standard of one thousand years later. However, at that point of time, the circumstance was such that it was not practical to abolish slavery completely. The fact remains that slavery was (and, may be, still is) lawful according to the shari’ah. However, our law has made it unlawful. Question: is our law un-Islamic? To make our law “Islamic” do we have to reintroduce slavery? I do not think any reasonable person in this hall will give an affirmative answer to that question.

My point is, if we start looking at the “Islamic law” from the point of view of substance, the test being, whether it offends the shari’ah, taking into account the objectives (“maqasid”) of the shari’ah, we will find more similarities than differences. This is more so in the areas of “mu’amalat”, evidence, procedure etc. There is no question of new laws e.g. Local Government Act, Academy of Sciences Malaysia Act, Electricity Supply Act and hundreds of others being un-Islamic. To me, they are “Islamic”.

Coming back to the question: **how?** There are two ways of doing it. **First**, abolish everything that we have now and replace it with what is considered as “Islamic”. **Secondly**, take the laws as they are and “Islamize” the parts that are “un-Islamic”.

Regarding the **first**, it is easy to abolish something. To replace it is more difficult. Even to replant oil palm is more difficult than to cut down the old rubber trees. What more, to introduce the whole set of laws that are required in a modern State many of which are not even known yet. Ja’afar Nameiri did it in Sudan. (Correct me if I get my facts wrong). According to a Professor from Sudan( I forgot his name) who was here attending a conference some years ago, the day after the announcement was made by the President that Sudan would implement the shari’ah, “everything stopped”. Lawyers, Judges and, I believe, policemen too did not know what to do. Many rushed to bookshops trying to find whatever Islamic books available. The Taliban did it (again correct me if I am wrong) and they ended with issuing edicts requiring men to keep beard and women to cover

their faces. In Pakistan, according to Professor Mahmood Ahmad Ghazi who was here a few weeks ago, the riba' case is still pending. Nobody wants to touch it. So, it appears that having made one big step forward, they have, out of necessity, back-tracked. In the meantime, they have adopted the Malaysian model of having a parallel banking system: Islamic and conventional systems existing side by side. Pol Pot did it vis-à-vis communism. We all know the results. Our own experience shows that it takes years, even decades to draft and introduce one Islamized law. In short, it is not practical.

We are left with the **second** choice. In fact, this is what we have done, without any real planning but it happened quite naturally, like water flowing from higher to lower ground forming a stream then a river. As a result, we now have the Shari'ah Civil Procedure Enactment, the Shari'ah Criminal Procedure Enactment and others. Soon we may have the Islamic Hire Purchase Act, all adapted from their civil counterparts but Islamized where they are found to be un-Islamic. In that way too we have introduced Islamic (or Islamized) banking and "Islamized insurance" or takaful and a host of shari'ah-compliance product in the money market, using shari'ah principles minus the offensive characteristics like riba' and gharar. I must say that we have been quite genius at that. I think we have done the right thing. All we need to do is to pursue it.

If we want to produce greater results, we will have to do it on a greater scale. While at times, the best committee is a committee of one man and to do something well, one has to do it himself (per Tun Mohamed Suffian, former Lord President, Malaysia), this is one thing in which neither one man nor a group of men coming from the same discipline, can do it. For every project we need at least two persons, one with shari'ah background and the other with civil law background. It would be better if the latter also has practical experience. This is because we have a dilemma: those who know civil law do not know Islamic law; those who know Islamic law do not know civil law and, generally speaking, those who think they know both have never practised law. So we have to combine the different expertise.

We have the expertise. It is just a matter of getting the right people together and assigning the work to them. I assume that they are prepared to sacrifice a portion of their time and effort, otherwise they would not be attending conference after conference held to discuss the subject. Further, we have the machinery too. I see that the best machinery in the Shari'ah Section of the Attorney General's Chambers not because the officers know more Islamic law or civil law but because it is part of the Attorney General's Chambers that advises the Government on the law, that draft laws (including the Islamic laws that have been codified), that prosecutes people in court for breaching the laws and that defend the validity of the law when challenged in court.

I think the Shari'ah Section of the Attorney General's Chambers should act as the Secretariat and form a committee consisting of representatives from itself, the

Judiciary, members of the Bar, the various faculties of law and shari'ah of our universities. Small "research groups" of two or three persons each should be formed. Each group should be assigned the specific job of going through a specific law e.g. contract, land law, tort, companies law etc. to point out the parts that are not in compliance with the shari'ah, state the shari'ah positions and make suggestions regarding amendments etc. They then report back to the Secretariat. There should be a committee, like the Technical Committee to study the proposals. The Drafting Division of the Attorney General's Chambers will do the drafting, something they are familiar with and take it up with the Government, which they always do. That is their job. They know what to do.

Participants of this conference may volunteer in the project. I think in a year or two we will achieve much more than what has been achieved in the last twenty years, provided that those with the expertise are prepared to contribute.

Thank you.