

TALK AT SYRACUSE UNIVERSITY LAW SCHOOL
COMMON LAW AND ISLAMIC LAW IN MALAYSIA
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By

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Recorded history shows that Malay Kingdom of Malacca was founded in 1400 A.D. The law in force was Islamic and Malay Customary laws. Malacca was colonized by the Portuguese in 1511, by the Dutch in 1641 and later by the British. The whole of what is now Malaysia became a British colony or came under its "influence" in early 19th century. The British introduced the English common law and equity and the English legal and judicial system. However the family law of the Malay-Muslims remained to be governed by Islamic law and the Malay customary law.

Earlier cases decided by British Judges seemed to accept that Islamic law was the law of the land. By the time Malaya obtained her independence (August 31, 1957), English common law and the rules of equity, English legal and judicial systems were well entrenched.

The Federal Constitution contains provisions regarding the Federal Legislative List and the State Legislative List. Judiciary is a Federal matter. So are laws generally e.g. criminal law, contract, tort etc. But, the State List contains provisions that allow the State Legislatures to make laws on the following matters:

"... Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs.....;creation and punishment of offences by persons professing the religion of Islam against precepts of that religion except in regard to matters included in Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines of beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom."

Shariah Courts were established soon after independence. Their jurisdictions were limited. Even today, they only have jurisdictions over Muslims and only in the respective States. Their jurisdictions cover mainly matrimonial matters, like marriage, divorce, custody of children, maintenance of wife and children. Laws administered by Shariah Courts provide for a number of offences, mainly relating to non-compliance with the requirements of the law e.g. failure to register a marriage or divorce.

It is not quite right to say that the Shariah courts are equal to the common law courts (or “civil courts”). Jurisdictions, both geographical and substantive, are limited, the powers are limited.

With the so-called resurgence of Islam, the Islamic-educated began to call for more jurisdiction and power of the Shariah Courts, not only to put them at par with the common law courts but, even to replace the latter. Similarly, they want Islamic law to replace the existing law, without even knowing what is to be replaced with what except to say that the man-made law should be replaced with God-made law, as if the so-called Islamic law is all God-made law and that there are no non-prophet human opinions in it.

In an attempt to improve the administration of the Shariah Court, civil and criminal procedures were made, ironically by the so-called “secular” lawyers, of course with the assistance of Islamic scholars. The procedures in the common law courts were adopted with necessary modifications. The courts were renamed similar to the common law courts. Even the dress code and the manner of addressing Judges in the common law courts were adopted. Thus, the Shariah Courts and Judges try to look like the common law courts and Judges in order to be equal.

Is there room for conflict of jurisdictions? The answer is certainly “yes”. The first case arose in 1971. The High Court held that it (the common law court) still had jurisdiction over guardianship and custody of Muslim children even though similar jurisdiction was given to the Shariah Courts with the establishment of Shariah Courts. This led to the amendment of the Federal Constitution which, inter alia, says:

“ The (common law) courts... shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”

Almost everybody seemed to have thought that the amendment had solved all jurisdictional problems. I think that is wrong. It solves some of the problems but not all. In my view the problems will still arise in the following instances:

First, where in a case, a party is a Muslim and the other is not and the subject matter is within the jurisdiction of the Shariah Courts. Which court should hear the case?

Secondly, even where both parties are Muslims but the case involves issues of Islamic law within the jurisdiction of the Shariah Court as well as common law issues which are within the jurisdiction of the common law courts. Which court should hear the case?

Thirdly, in interpreting the Constitution and the statutes, there may be conflicting decisions, with each court saying it has jurisdiction over the matter. Of course the common law court will say that its decision prevails.

To make matters worse, since the amendment to the Constitution, more offences have been created in the State Islamic laws, some of them overlapping with criminal offences in the Penal Code that had been in existence since before Independence and which, under the Constitution are within the jurisdiction of the common law court. Are they not ultra vires the Constitution? I do not want to prejudge the issue.

In the field of law, Malaysia has gone one step further. We have made laws, Federal laws, on Islamic banking and "Takaful" (Islamic insurance). They are administered by the common law courts.

Recently, by law, the National Bank of Malaysia has established a "Shariah Advisory Council" to advice on Islamic banking and Islamic insurance. It is intended that all issues of Islamic law on Islamic banking and Islamic insurance, arising in courts or elsewhere, e.g. financial institutions, be referred to the Council for its decision

In Malaysian context, I personally think that the two judicial systems should be merged into one under the common law courts with judges appointed from both streams. Matters now within the jurisdiction of the Shariah courts and where all the parties are Muslims should be heard by Judges trained in Islamic law. Matters now within the jurisdiction of the common law courts, whether the parties are Muslims or non-Muslims, should be heard by the Judges trained in common law. Cases in which Islamic law and common law issues arise should be heard by two judges, one trained in common law and the other in Islamic law.

The law, where desirable, should be harmonized. Certain Islamic law principles may be adopted and absorbed into the "Malaysian Common Law".

There is talk about it, but very little is being done. The problem is that those who know common law do not know Islamic law, those who know Islamic law do not know common law, those who know a bit of both, i.e. the academician, have never practiced law and those who are most vocal hardly know any law.

It is a long way to go. In the meantime, the most practical thing to do is to carry on, with the common law courts playing the dominant role.

Thank you.