

# THE RELATIONSHIP BETWEEN SYARIAH AND CIVIL LAW IN THE MALAYSIAN LEGAL SYSTEM: DEVELOPMENTS AND FUTURE POSSIBILITIES<sup>1</sup>

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May I begin by expressing my deepest appreciation for the honour and privilege accorded to me by the Organizing Committee of Tuanku Najihah Syariah and Law Lecture & Kolej Universiti Islam Malaysia for inviting me to deliver the Inaugural Tuanku Najihah Syariah and Law Lecture. It is indeed an honour, which is greatly augmented by the gracious presence of Her Majesty, the Chancellor of the Islamic University College of Malaysia, who had earlier officiated the launching ceremony of this Lecture.

At the time when I accepted this invitation I was apprehensive as the topic is an unsettled territory and may even be emotive to some judging from the number of articles and commentaries published in our local law journals and books. I also realized then that I had a heavy and daunting responsibility if I were to be worthy of the opportunity to deliver this lecture.

In 1986, Tun Salleh Abas (the Lord President of the then Supreme Court) in delivering the judgment of the court in *Che Omar bin Che Soh v. Public Prosecutor*<sup>3</sup> said:

"Before the British came to Malaya, which was then known as Tanah Melayu, the Sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law. Under such law, the Sultan was regarded as God's vicegerent (representative) on earth. He was entrusted with the power to run the country in accordance with the law ordained by Islam, i.e. Islamic law and to see that law was enforced."

And R.J. Wilkinson wrote:

"...there can be no doubt the Muslim law would have ended by becoming the law of Malaysia had not the British Law stepped in to check it."<sup>4</sup>

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- 2 The speaker is the former Chief Justice of the Federal Court of Malaysia.
- 3 (1988) (2) MLJ 55
- 4 R.J.Wilkinson. 1971. *Papers on Malay Subjects, Law*. Kuala Lumpur. p. 49

It is a historical fact that when the British came, they entered into various treaties with the Malay rulers. Under those treaties the Malay rulers agreed to accept British advisors to advise on all matters of their States except those pertaining to Islam and Malay customs. Hence, acting on the advice of the British advisors, the Malay States enacted a number of laws similar to the Indian codification of the principles of English law. The Penal Code, the Evidence Ordinance, the Criminal Procedure Code and the Civil Procedure Code were some of the legislations promulgated.

The consequence of such move was the marginalization or replacement of the Syariah in the fields of criminal law, contract, evidence, and procedure. A system of administration of justice presided by English judges was thus introduced. As these judges were all trained in the English judicial system of law, it was natural for them to refer to and apply the English legal principles.

The British advisors and their officers too, directly or indirectly, introduced legislations based on principles of English law. All these developments led to Islamic law being displaced by legislations and judicial decisions in many spheres of the law and eventually Islamic law was confined only to family law and punishment for certain offences against Muslim religion.<sup>5</sup>

When the Federation of Malaya achieved independence, its 1957 Federal Constitution (article 121) vested judicial powers only in the Supreme Court, the High Court and Lower Courts established under federal law. Islamic law and its administration came within the State List. Forefront in the relationship between Islamic and Civil laws during this period until sometime in 1988 was the conflict between decisions of Syariah and civil courts.

I will begin with the case of *Re Man bin Mihat, Decd.*<sup>6</sup> Briefly put the case involved an insurance policy of the deceased who was a Muslim. The question then arose whether the money payable under the policy belonged to his widow beneficially or formed part of her husband's estate, to be distributed among heirs. Suffian J. (as he then was) ruled that by virtue of section 23 of the Civil Law Ordinance and as the policy of assurance was affected by the assured on his own life and expressed to be for the benefit of his wife, the moneys payable under the policy did not form part of the estate of the deceased. The learned judge went on to say:

*"Muslim law rigidly prescribes the share of every heir and no alteration of these shares may be made by will, for a bequest to an*

5 Ahmad Ibrahim and Ahilemah Joned. 1995. *The Malaysian Legal System*. 2<sup>nd</sup> ed. Kuala Lumpur: Dewan Bahasa dan Pustaka. pp. 20-4; Farid Suffian Shuaib. 2003. *Powers and Jurisdiction of Syariah Courts in Malaysia*. Kuala Lumpur: Malayan Law Journal. p. 9; Ahmad Ibrahim. 1994. *The Introduction of Islamic Values in the Malaysian Legal System*. IKIM Law Journal. Vol. 2. No. 1. pp. 29 – 31; Mohammad Hashim Kamali. *Islamic Law in Malaysia: Issues and Developments*. p. 22

6 [1965] 2 MLJ 1

*heir requires the consent of all co-heirs and a bequest to strangers may not take effect beyond 1/3 of the testator's estate, but there are no restrictions beyond these two limitations. So it is lawful for a Muslim to alter the prescribed shares of his heir by disposing outright during his lifetime part or the whole of his property to a favoured wife, either directly by way of a gift inter vivos or indirectly through trustees."*

Are we to say today that the learned Judge was wrong in his interpretation of the Muslim law or that it was a lesser justice since it was pronounced by a civil court?

In the case of *Myriam v. Mohamed Ariff*<sup>7</sup> the applicant and respondent obtained a divorce order by consent from the *Kadhis* court in Petaling Jaya, Selangor on a condition that the respondent would have the custody of the children with access to the applicant. Now, section 46(3) (iii) of the Selangor Administration of Muslim Law Enactment 1952 then applicable empowered a *Kadhi* to hear and determine proceedings relating to custody of infants. After her remarriage to another man, the applicant applied to the High Court, a civil court, for the custody of her children from her previous marriage. The civil court (Abdul Hamid J. [as he then was]) on the issue of jurisdiction held that the applicant was entitled to make the application and the civil court had jurisdiction to hear it by virtue of section 45(6) of the Enactment which then provided thus:

*"Nothing in this Enactment contained shall affect the jurisdiction of any civil court and in the event of any difference or conflict arising between the decision of a court of the Kathi Besar or a Kathi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail."*

On the merit of the application the learned Judge referred to section 2 of the Selangor Guardianship of Infants (Adoption) Enactment 1961, which read:

*"The Guardianship on Infants Act 1961, is hereby adopted by this Enactment and applied to persons professing the Muslim religion:*

*Provided that:*

*(a) Nothing in the said Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of 18 years who professes the Muslims religion..."*

And accordingly the learned Judge relied on section 5 of the Guardianship of Infants Act, 1961 when he said this:

*"Section 5 of the Guardianship of Infants Act, 1961 states that the*

*father of an infant shall be the guardian of the infant's person and property. It also permits the court or a judge to make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent'. Section 11 of the Act provides that the court or a judge in exercising the powers conferred by the foregoing provisions of the Act shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. In my view, this section lays down the basic principle upon which the court should be guided in considering application for custody. In that respect I think it is consistent with the underlying principle under the Muslim law that in considering custody, the paramount factor for the court to consider is the welfare of the infants."*

And in reference to section 27 of the Civil Law Ordinance 1956 which reads:

*"In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Ordinance, regard being had to the religion and customs of the parties concerned, unless the other provision is or shall be made by any written law."*

The learned Judge further said:

*"In general, I think, it means that in applying the provisions of the Guardianship of Infants Act, regard must be given to the religion and custom of the parties concerned. This does not however mean that any decision must be made in accordance with rules of the religion and custom of the parties concerned except of course, when it relates to or concerns with any person under the age of 18 and professing the Muslim religion, in which case, any provision which conflicts or is contrary to the Muslim religion or custom of the Malays, will not apply."*

In summary I would say the path taken by the learned Judge in coming to his decision involved a brief comparison on the applicable principles for custody of children under the English law and the Islamic law and he came to the conclusion that even under Islamic law the general principle that governs the custody of infants is based on the welfare of the infants. It is settled under the English law that in custody cases the paramount consideration is the welfare of the children.

The learned Judge also went on to consider whether he was strictly bound by the Islamic rules on adoption. After referring to "Mohammadaen Law" by Syed Ameer Ali, 6<sup>th</sup> edition Vol. 11 pp 225 – 256, the Singapore case of *Omar b. Shaik Salleh (M) and Hanisah bt. Shaik Salleh, Infants; Shaik Salleh*

*b. Omar Jammal v. Mariambee bt. Shaik Omar (mw)*,<sup>8</sup> the learned Judge held that in deciding the custody issue, the court was not bound to 'adhere strictly to the rules laid down under the Muslim religion' and that the Guardianship of Infants Act 1961 applied.

I have referred to this case of *Myriam* in greater detail in order to show that the civil court did, as evidenced from its grounds of decision, consider not only Islamic law but also English law and the statutes then in force. Therefore to say that in this case and in some other cases the civil court did not at all consider Islamic law is not quite right.

In the case of *Commissioner for Religious Affairs, Trengganu & Ors v. Tengku Mariam binti Tengku Sri Wa Raja & Anor*<sup>9</sup> which concerned the validity of a wakaf, the parties to the dispute had agreed to submit the wakaf document to the Mufti of Terengganu and to abide by his decision. The Mufti issued a fatwa declaring the validity of the wakaf and the fatwa was also gazetted. The effect of this was that the fatwa would be binding on all Muslims resident in the State. Nevertheless the aggrieved heirs took the matter to the High Court, which referred to section 25 (4) of the Administration of Islamic Law Enactment 1955 (Terengganu). Now, section 25(4) is in *pari materia* with section 45(6) of the Selangor Administration of Muslim Law Enactment. The High Court held that it retained the discretion as to how much of such fatwa it should accept and could decide not to be bound by it. On appeal, the Federal Court by a majority decision held that the wakaf was not valid and that the parties were estopped from challenging its validity as they had agreed to abide by the decision of the Mufti. The Federal Court however held that the High Court was right in ruling that it was not precluded by the gazetted fatwa when determining the validity of the wakaf.

The case of *Nafsiah v. Abdul Majid*<sup>10</sup> was an action for damages for breach of promise to marry. Section 40(3)(b) of the Malacca Administration of Muslim Law Enactment 1959 empowered the court of Kathi Besar to 'hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to marriage.' The High Court however refused to consider that section as excluding its jurisdiction on the ground that section 24(a) of the Courts of Judicature Act 1964 gave it the jurisdiction to deal with matters relating to divorce and matrimonial causes under any law. Section 4 of the same Act was also referred to. The section states:

*"In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail."*

There are other similar cases like the ones I have referred to earlier on.

8 1948 (4) MLJ 186

9 1970 (1) MLJ 220

10 1969 (2) MLJ 174

Cases like *Robert Kamarulzaman v. Ummi Kalthom*<sup>11</sup>, *Boto v. Jaafar*<sup>12</sup>, *Ainan Mahamud v. Syed Abubakar*<sup>13</sup>, *Abdul Rahim b. Haji Bahaudin v. Chief Kadi Kedah*<sup>14</sup> also show situation of conflicts between the decisions of Syariah courts and those of the civil courts. But what is clear in these cases is the fact that legislations had allowed to prevail civil courts' decisions over the Syariah courts' decisions in the event of conflict.

To overcome this unsatisfactory condition, Article 121 of the Federal Constitution was amended in 1988 by inserting clause (1A) to exclude civil courts in matters that Syariah Courts have jurisdiction over.<sup>15</sup> On this clause (1A) Harun Hashim SCJ (as then was) in *Mohamed Habibullah b Mahmood v Faridah bte Dato Talib*<sup>16</sup> said:

*"It is obvious that the intention of Parliament by article 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Courts, Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor."*

Unfortunately subsequent cases filed in the civil courts did not meet the expectation thereby prompting Farid Suffian Shuaib in his book 'Powers and Jurisdiction of Syariah Courts in Malaysia,' at page 4 to write:

*"It was hoped and expected that the amendment would reduce jurisdiction conflict and friction between Syariah Courts and Civil Courts. Unfortunately the conflict continues."*

The first case that considered the amendment is the case *Shahamin Faizal Kung bin Abdullah v. Asma bte Haji Junus*.<sup>17</sup> This case involved an application for a writ of habeas corpus, which in substance and effect was an application for custody of a six-year-old male child in the care of his natural grandmother. The parties were Muslims. It was contended that section 40(3)(b) of the Penang Administration of Muslim Law Enactment 1959 expressly gave to the Court of the Kathi Besar the power to determine actions in which all the parties were Muslims relating, *inter alia*, to 'maintenance of dependants, legitimacy, guardianship or custody of infants' and because of Article 121(1A) the High Court in Penang had no jurisdiction to entertain the application. However the High Court rejected this contention. Edgar Joseph Jr. J. (as he then was) held that the jurisdiction of the Kadi Besar was not exclusive. The learned Judge referred to section 4 of the Courts of Judicature Act 1964. He pointed out that except for section 5 (which came into force on 16.9.64) of the Court of Judicature Act 1964 came into force on 16.3.64 whilst Article 121 (1A) came into force only as recently

11 1966 (1) MJ 163

12 1985 (2) MJ 98

13 1939 MJ 209

14 1983 (2) MJ 370

15 Farid Suffian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*, p. 4

16 1992 (2) MJ 793

17 1991 (3) CJ 220

as 10.6.88 by virtue of Act A704. Consequently the learned Judge held that sections 4, 22 and 24 of the Court of Judicature Act 1964 gave the court jurisdiction to hear the application.

But the then Supreme Court in *Mohamed Habibullah b Mahmood v. Fatimah bte Dato Talib*<sup>18</sup> unanimously rejected the construction of clause (1A) given by the learned Judge in *Shahamin's* case. The Court was of the view that 'Acts affecting the constitution' meant no more than Acts of Parliament which amended the Constitution through the legislative process under Article 159 such as the Constitution (Amendment) Act 1988 which introduced the new Article 121(1A). Accordingly, the Courts of Judicature Act 1964 including section 4 would not qualify as an Act 'affecting the Constitution' it being an ordinary law enacted in the ordinary way. The Court went on to say that the intention of Parliament in section 4 was expressly to exclude the Constitution or any Act of Parliament enacted under Article 159 amending the Constitution and consequently section 4 would not prevail over Article 121(1A).

*Mohamed Habibullah's* case was a case between a husband and wife who were both Muslims. The wife alleged assaults by the husband and hence applied for an injunction. The High Court allowed the wife's application. But on appeal the then Supreme Court unanimously held that clause (1A) of Article 121 took away the jurisdiction of the High Court in respect of any matter within the jurisdiction of the Syariah Court.<sup>19</sup> And the Court held that the matter between the parties as husband and wife was purely a matrimonial offence, which came within the ambit of Syariah law.

Incidentally a bystander should not be faulted to think that the foregoing case had deprived a Muslim wife of a crucial protection by way of an injunction, which is still available to non-Muslim wives when their husbands abuse them.

In *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah*<sup>20</sup>, the Federal Court considered whether Syariah courts' jurisdiction could be implied from other provisions in statutes relating to Syariah courts. The appellant in this case was a Sikh and he converted to Islam when he was a minor. Upon reaching 21 years old, he renounced Islam and executed deed poll declaring that he was a Sikh. Before the High Court, he sought for a declaration that he was no longer a Muslim. The respondent contended that the High Court had no jurisdiction since the matter came under the Syariah court's jurisdiction. The High Court agreed with the respondent and dismissed the application. On appeal, the Federal Court pointed out that all State Enactments and Federal Territories Act contain

18 1992 (2) MLJ 793

19 But Article 121(1A) has also been interpreted to mean that it is meant for Muslims only and a spouse of a new convert who remains a non-Muslim is not bound by any order of the Kadi's court: see- *Ng Siew Pian lwn Abd Wahid Bin Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain* [1992] 2 MLJ 425

20 1999 (1) MLJ 489

express provisions vesting the Syariah courts with jurisdiction to deal with conversion to Islam. Relying on Craies on Statute Law 7<sup>th</sup> edition at page 112, *Albon v Pyke* (1842) 4 M & G 421,424, Bennion's Statutory Interpretation 2<sup>nd</sup> Edition page 362, the Federal Court held that:

*"When jurisdiction is expressly conferred on the Syariah courts to adjudicate on matters relating to conversion to Islam ... it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the Syariah courts."*

In coming to its decision, the Federal Court examined the then existing position of the law on the issue including the opposing views of the High Courts. For instance in the case of *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan*<sup>21</sup> the High Court adopted a liberal approach in interpretation. The High Court opined, *inter alia*, that –

The language of Article 121(1A) used by the legislature is clear and without any ambiguity;

The Syariah court shall have jurisdiction over persons professing the religion of Islam in respect of any of the matters included in item 1 thereof. It is not to be limited only to those expressly enacted.

The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that those matters are within the jurisdiction of the Syariah court within the contemplation of item 1 of the State List.

But in *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Satu Yang Lain*<sup>22</sup> another High Court applied the strict interpretation approach. It was the view of the learned Judge in that case that the State Legislature must first act upon the power given to it by Articles 74 and 77 and the said State List, and accordingly enact laws conferring the jurisdiction. Only then will the matter come under the jurisdiction of the Syariah court to the exclusion of the Civil Court.

In a later case of *Abdul Shaik bin Md Ibrahim v. Hussein b Ibrahim*<sup>23</sup> the same Judge who decided in *Lim Chan Seng's* case had the opportunity to further explain his view when he said that:

*"Article 74(2) does not make law for the states. It is the State Legislatures that make laws for the respective states, and hence are empowered to do so on matters contained in the State List."*

The implication on the use of the word 'any' in the State List itself had not been given a considered opinion. The relevant phrase in the List states- '... the constitution, organization and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam

21 1997 (4) CLJ Supp 419

22 1996 (3) CLJ 231

23 1999 (5) MLJ 618



and in respect only of any of the matters included in this paragraph... (Emphasis added). The use of the word 'any' can only mean that when a State Legislature makes laws establishing the Syariah court in a state, it can choose from amongst the matters enumerated in the State List which of them it wants to confer jurisdiction on the Syariah courts. Had the drafters of the Constitution intended otherwise, they would have said so.

State Legislatures may of course confer jurisdiction on the Syariah court over all matters contained in the State List merely by saying that the Syariah courts shall have jurisdiction over all matters contained in the State List. But none of the State Legislatures has chosen to do that.

In approaching this apparent disarray the Federal Court expressed its preference to the view adopted in *Lim Chan Seng's* case. This is what it said:

*"Whilst we agree with the approach adopted... that when there is a challenge to jurisdiction the correct approach is to look at the State Enactments to see whether or not the Syariah courts have been expressly conferred jurisdiction on a given matter, with respect, we do not agree with his Lordship's conclusion that since the Penang Enactment did not expressly confer jurisdiction on the syariah court over the matter raised, there was no impediment for the civil court to hear and dispose of the matter."*

It is unfortunate that while attempting to clear the tangled web the final conclusion of the Federal Court took a twist. In short it approved the 'expressly conferred jurisdiction' approach but took the 'implied jurisdiction' approach to say that since there was a provision dealing with conversion into Islam thereby giving jurisdiction to the Syariah court it must therefore be implied that the same court would have the jurisdiction to deal with conversion out of the religion.

Be that as it may I would say that as to the liberal interpretation adopted by the High Court in *Md Hakim Lee*, one can say in its support that Article 74(1) specifically enables Parliament to make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List, yet Article 121 (1) provides, *inter alia*, "... and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law". In other words, the limit of jurisdiction of the High Courts is determined by legislation. The Syariah courts are not affected by such constraint.

Anyway, I would say that the debate is unlikely to cease in the near future. It only goes to show that the intention of clause (1A) may not have been achieved as suggested in *Mohamed Habibullah's* case.

And I would envisage that these differing views will continue to flourish so long as the advice of Justice Hashim Yeop Sani in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*<sup>24</sup> remains unheeded. His Lordship said:

*"We are of the view that clear provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts. This is particularly important in view of the amendment to art 121 of the Federal Constitution made by Act A704 of 1988. The new cl 1A of art 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah courts."*

The case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor*<sup>25</sup> presented the first opportunity for the civil court to examine the conflict of jurisdiction in matter of offences. This case originated from the Sessions Court wherein the petitioner was charged with the offence of gross indecency under s 377D of the Penal Code. He pleaded guilty and was sentenced to six months imprisonment. He then applied for a writ of habeas corpus. He contended that the Sessions Court had no jurisdiction to try him on the charge preferred against him. He claimed that being a Muslim, only the Syariah courts had jurisdiction to try him for the offence of 'liwat' under the Syariah Criminal Offences (Federal Territories) Act 1977. Before the Federal Court Mohd Eusoff CJ said:

*"We agree with the views expressed by the Court of Appeal on the necessity of clause (1A) being introduced into Article 121 of the Federal Constitution. It was to stop the practice of aggrieved parties coming to the High Court to get the High Court to review decisions made by Syariah courts. Decisions of Syariah court should rightly be reviewed by their own appellate courts. They have their own court procedure where decisions of a court of a Kathi or Kathi besar are appealable to their Court of Appeal. Since the Syariah courts have their own system, their own rules of evidence and procedure, which in some respects are different from those applicable to the civil courts, it is only appropriate that the civil court should refrain from interfering with what goes on in the Syariah courts.... We are of the view that clause (1A) of article 121 should not be construed literally because a literal interpretation would give rise to consequences which the legislature could not possibly have intended... We would, therefore prefer to construe both clause (1) and (1A) of article 121 together and choose a construction which will be consistent with the smooth working of the system which this article purports to regulate, and reject an interpretation that will lead to uncertainty and confusion into the working of the system. Since clause (1) of Article 121 and the provisions of Federal law referred to earlier confer jurisdiction on a sessions court to try offences in the Penal Code (other than those punishable with death) and has been doing so for a very long time, it would lead to grave inconvenience and absurd results to now say that the sessions court should not try an offence under section 377D*

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25 1998 (4) MLJ 742 (HC), 1999 (1) MLJ 266 (CA), 1999 (2) MLJ 241 (FC)

*because the accused is a person professing the religion of Islam... To ensure the smooth running of the system, we would apply the provisions of sections 59 of the Interpretation Act so that where an act or omission is an offence under two or more written laws the offender may be prosecuted and punished under any of those laws, so long as he is not prosecuted and punished twice for the same offence. It follows that where an offender commits an offence triable by either the civil court or a Syariah court, he may be prosecuted in either of those courts."*

One may note that the Federal Court appeared to have taken a neutral stance in addressing the issue and left it to the Prosecution to handle the initial decision on the forum to prosecute. But once such charge is filed with the civil court it is then seized of jurisdiction.

From the legislative aspect our country has also moved to not only imbue Islamic values into our Administration but also to set up a parallel scheme of services in the commercial and banking sectors. We are all familiar with the Islamic banking and Tafakul (Insurance law) set up under the Islamic Banking Act 1983 and Takaful Act 1984 respectively. There is also the Islamic capital market, which deals with Syariah-compliant investments. These co-exist with the earlier secular west-oriented systems without any glitch. In fact the Islamic banking has been accepted by the non-Muslims who are also utilizing its services. And in the enforcement of claims or disputes relating to Islamic banking, it is presently the civil courts, which deal with them. In Kuala Lumpur, the Judiciary has set up the Muamalat Division mainly to hear Islamic banking cases. This Muamalat Division is in addition to the Civil Division and Criminal Division of the High Court of Kuala Lumpur.

I would say that the relationships of the Syariah and civil law within the framework of our present legal system have been hazy. To the protagonists of the Syariah law they would say that not much has been done to infuse the concepts into the system let alone replacing it. And most of the time the civil courts take the brunt of their displeasure as evident by the array of articles and commentaries in law journals. But is this reaction justified without taking a detailed look on the existing statutes including the Federal Constitution? It is trite law that the primary function of the courts is to interpret the law in accordance with settled principles. Hence, the civil courts Judges should not be wholly blamed for the present state of affairs of our legal system vis-à-vis the Syariah law.

Clause (1A) of Article 121 was introduced with the noble intention of defining the respective roles of the civil and Syariah courts. But from the cases discussed in this paper the target was not achieved. In fact it has caused further uncertainty in the sense that now we have differing opinions in the mode of determining the jurisdiction of Syariah courts. That is primarily caused by the existing provisions in the Constitution such as Articles 74 and 77 as well as the State List II.

And as the topic of this lecture also envisages future possibilities and not probabilities I think it does license me to express some unsolicited views on the possible enhancement of our legal system.

In order to streamline our existing legal system so as to ensure that the intermittent conflicts of jurisdiction between the Syariah and civil courts become history, one viable suggestion may be for the introduction of a unitary judicial system with Syariah courts being a branch of the present federal civil courts system. But this is not to say that civil courts Judges will be hearing Syariah law cases. Instead each hearing would be before a quorum of three Judges the composition of which should depend on the nature of the case being heard. If it involves Syariah law then all or at least two of the Judges selected should be well versed in the field whose opinion on the Syariah law would be binding on the rest. In fact this would be a gradual evolution of some of the positive aspects of the continental/inquisitorial system in Malaysia. At the same time there will be a systematic infusion of Syariah law principles into our present legal system. The end results would be an emergence of a single legal system, with a mixture of adversarial and inquisitorial features in its procedure and propounding legal principles, which we could proudly describe as our own version of common law. And on the topic of common law I am reminded of what R.H. Hickling in his book 'Malaysian Law: An Introduction to the Concept of Law in Malaysia' wrote:

*"The legacy of an imperfect common law system has its merits, of that there is no doubt: but it tends to favour over much the antique and the trivial, as well as the pragmatic; and tradition creates a blindness to the defects of the law...the time has come to break away from certain features of the system and to replace it by one more in keeping with the character of the Malaysian people, one weaving together the more appropriate aspects of all the legal systems to which Malaysia is heir. This should not be part of a revolutionary process, however, but planned as a gradual, evolutionary change. Men and women and especially the lawyers among them are by nature conservative.... Lawyers reflect that conservatism, that level of human goodness; but now that an increasing number of Malaysian lawyers are educated in Malaysia, there is no need to look to England, still less to Singapore, for inspiration. That inspiration is here, within Malaysia, in the spirit of its people. In the end, the law for the Malaysian must be purely Malaysian law.... Malaysia must ever seek to develop its own law, in its own way. Malaysians need to be made aware of the effectiveness of the Syariah law in dispensing justice. Whether the Malaysian Legal System will witness the merging of both Syariah law and civil law into one common system or the present judicial structure of having both as distinct and parallel is being retained, I envisage that for the future, the Malaysian Legal System will experience the possibilities that the*

*Syariah law will be accepted as an integral part of the Malaysian Legal System and that the common law will be applied with modification to suit local circumstances and conditions as permitted by section 3(1) of the Civil Law Act 1956.”*

As for the infusion of Islamic principles in the other areas of the civil law I would say that the successes of the Islamic banking and Takaful should provide us the impetus, encouragement, incentives and hope that surely in the other field of the laws such as in contract, commerce and property they also be equally imbued with Islamic principles which are acceptable by all including the non-Muslims and hence insured equal success.

But for now I would conclude that if the present provisions of the Constitution are allowed to remain for eternity then the future possibilities in the relationship between the Syariah and civil laws with special reference to their respective courts, will also continue to eternity in the present form of parallel legal systems.