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"LAW IN A PLURAL SOCIETY: MALAYSIAN EXPERIENCE"

by

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Introduction

1. My paper will concentrate mainly on how Malaysia, a country that is both multiracial and multi-religion, practices its laws and sustaining the peace that has lasted more than half a century. I have just retired recently, so my view on this subject is a Judge's perspective.
2. Malaysia is located just north of the Equator about half way round the world from Utah. It is geographically divided into two main regions by the South China Sea i.e. the Peninsula Malaysia and Sabah and Sarawak. Peninsula Malaysia was known as Malaya but in 1963 with Sabah and Sarawak joining in a new nation known as Malaysia was born. Singapore also became part of Malaysia but left it in 1965.

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3. Malaysia is a country which consists of many races. We have Malays (54.5%), Chinese (24.9%), Indians (7.4%) and many other races (13.2%) that make up Malaysia. In term of religions, the population consists of about 60 percent Muslims and the rest comprising of Buddhists, Hindus, Christians and a small minority still believe in animatisms and ancestral worship. All the religions except those believing in animatisms were actually imported. Islam was introduced by the traders and missionaries, the Christians by the Christian missionaries and conquerors, the Buddhist and Hindus by those who were brought in by the British as workers.

4. So today Malaysia is made up of multi religion, multi race and multi language, although we have our national language when we gained independence. And generally, we even look differently with fair coloured Chinese skins, dark coloured Indian skins and the Malays, the mix of the two colours. Even more confusing is when you meet people from East Malaysia i.e. Sabah and Sarawak who look like a Chinese but are in fact local inhabitants. Of course there are exceptions where there are Chinese looking Malays or Indian looking

Malays. Even our mother tongues and the languages we speak at home are different and even when speaking English or the national language, Malay, we can identify the different accents. We even dress differently and eat different types of dishes and cooking...The Chinese food is bland, Indian spicy and Malays hot. In short we are a confused lot of people. But as any Malaysian would be proud to say, we live as one community, we benefit by enjoying the food and culture of each other. We visit and celebrate each other's cultural festivals. Except for politicians who want to exploit for their own interest the inhabitants of Malaysia live peacefully. We respect each other's belief and religion. For those who have visited or lived in Malaysia they will observe this, as Judge Wallace and Judge Gordon Low and his wife Stephanie did. It is not unusual to find a Mosque, a Church, a Buddhist and Hindu Temple located within the same locality. The different call to prayers by way of Azan, the church bells and so do the Buddhist and Hindu Temple can also be heard

Brief History

5. For the purpose of this paper, allow me to briefly explain how Malaysia was founded. Historically, the more well known Sultanate in

the old Malaysia was the Malacca Sultanate. In the Malaysian history there were earlier traces of Islam coming to the Peninsular as early as the 13th Century but Malacca's history is well documented. Malacca is a port located in the Straits of Malacca separating Peninsula Malaysia and Sumatra, Indonesia. The Malacca Sultanate originated from Sumatra. During this period, the governing laws were basically *adat* (customary laws). The Malacca Sultanate became an international trading port as it was then strategically located in the Straits of Malacca where traders from the west en route to China and traders from the east en route to India would have to go through. In the middle of the 15th Century, Arab, Indian and Chinese traders came to trade here and historical figures such as Ibnu Battutah and Admiral Cheng Ho have come to Malacca or at least passed it. With trade, the Muslim traders particularly the Arabs also brought in the religion of Islam. They converted (or as some Muslim jurist would say, revert) the Sultan into Islam. With that, the Sultanate adopted Shariah with modifications by the customary laws as the laws of the land.

6. When the Portuguese conquered and colonized Malacca in 1511, the Sultanate ended and all territories under the Malaccan sultanate became independent states having their own rulers. So today we have nine Sultanates in Malaysia. Strangely enough, Malacca which was the original state that had a Sultan, is today without one. That was perhaps because, after the Portuguese and the Dutch colonized Malacca the British took over that territory and together with Singapore and Penang came to be known as the Straits Settlements.

7. The British came to the Malay Peninsula in the 18th Century and Sir Francis Light persuaded one of the Sultans, to hand over an Island in the northern west coast of the Malay Peninsula, in the Straits of Malacca, known as Penang, which today is a tourist island which some of you may have heard. This is where common law made its first footprint in Malaysia. As the years proceeded, the British made arrangements with the Dutch and the local Sultans and every state in the Malay Peninsula including Sabah and Sarawak on the Borneo Island. After the Second World War, efforts began by the local to gain independence from the British. In August 31st 1957, the Peninsula

part of Malaysia gained independence from the British. Later on September 16th 1963, Sabah and Sarawak joined in to form Malaysia.

Malaysia: A Federation.

8. Now a bit into the setup of Malaysia. Malaysia is actually a federal state i.e. it consists of 13 States combined under the Federation of Malaysia¹. Being a federation, every state has its own Executive and Legislature but the judiciary however, is established at the federal level and applies to all states in Malaysia.

Laws in Malaysia

9. The Federal Constitution (i.e. the Malaysian Constitution) acts as the supreme law of the country² and the Constitution provides that Islam is the religion of the federation³. I will discuss this point in detail later.

10. Malaysia has its own Constitution and Parliament and the individual states have their own State Constitutions and State

¹ Malaysia is divided into 13 States, of which nine are under Sultans and the other 4 headed a Governor appointed by the King. In addition, the Federal Territories of Kuala Lumpur, Putrajaya and Labuan fall directly under the Federal Government.

² Article 4 of the Federal Constitution

³ Article 3 of the Federal Constitution

Assemblies as well. Due to this, laws are being enacted by both the Parliament and the State Assemblies. The subject matter of the laws enacted differs and it is outlined in detail in the Federal Constitution⁴. Generally speaking, the parliament's scope is far wider than that of the state assemblies. The State Assemblies would enact laws in matters that would be administered at the State level which include land, agriculture, the local governments, the state governments and Islam. The laws that are being applied in Malaysia are the Civil Common Law, the Shariah Law and Native Customary law.

Civil Common Law

11. As like most Commonwealth country, Malaysia inherited the British Common Law system. This would include the common law principles of res judicata, stare decisis, binding precedent etc. We also inherited the jury system and applied it for capital punishment cases. However, we abolished this in the mid 80's.
12. For the purpose of this talk, I would refer the Common Law as the Civil Common Law to differentiate it with the Shariah Law. Furthermore, Malaysia does not practice Common Law in its fullest

⁴ List I, List II and List III of the Ninth Schedule of the Federal Constitution of Malaysia.

extent as statutory law remains the main source of law in Malaysia.

Judges duty is to interpret the law rather than making it.

13. The statutory laws in Malaysia applies to all people in Malaysia irrespective of race or religion. However of course, there are exceptions. For example, the laws that govern Muslim marriages would not be applicable to non Muslim marriages.

14. For information purposes and not for debating purposes, in Malaysia we still apply capital punishment as well as corporal punishment. Women, children, elderly persons and unhealthy persons would not be subject to this punishment. Capital punishment applies to offences of murder, kidnapping, discharging of firearms, act of declaration of war, drug trafficking and a few more others. Corporal punishment applies to offences such as arm robberies and rapes.

Shariah Laws in Malaysia

15. In Malaysia, the Shariah laws are confined to personal laws as well as laws pertaining to the precept of Islam. The Shariah law are governed by the Shariah Courts established under each state government. Because the Shariah Courts are established under state government, its jurisdiction is only limited to that state only (For

Federal Territories, the Shariah courts are established under the Prime Minister's Department but its jurisdiction is confined to the Federal Territories only). The Civil Common Law Courts does not have any jurisdiction in any matter that falls within the purview of the Shariah Courts⁵. The system is generally almost similar to that of the Civil Courts. They have court hierarchy, appeals, pleadings etc.

16. Matters falling under the jurisdiction of Shariah courts basically relate to personal and family laws of persons professing the religion of Islam including succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance adoption, legitimacy guardianship, gift and trusts. All other matters involving contracts and torts, even where one or both parties are Muslims fall within the jurisdiction of the Civil Courts.

17. As far as criminal law is concern, it is within the jurisdiction of the Federal Government except very limited offences relating to Islam and which are enacted to be committable only by Muslims are within the Shariah Courts. These offences include laws prescribed as

⁵ Art 121 (1A) of the Federal Constitution

offences against the precepts of Islam. Examples of these offences are eating in public during Ramadhan⁶, being found in close proximity with a person of opposite sex who is not a muhrim, not attending Friday prayers for three Fridays consecutively⁷, consuming alcohol in public. Other examples are propagating or expounding false doctrine of Islamic teachings, incest⁸, zina⁹, sodomy¹⁰ and *musahaqah*¹¹ (adultery between women).

18. The Shariah law in Malaysia are only applicable to Muslims. Thus it is not an offence if a non Muslim were to drink alcohol in public or eating in public in the month of Ramadan. The Shariah laws are confined strictly to Muslims only. Other religions, however, do not have their own laws or even court system. Unlike Shariah laws, other religious laws are not codified into law. For example, adultery is prohibited both in Islam and Christianity. If a Muslim commits adultery, he will be charge and tried before the Court, but if a Christian commits adultery, it is not an offence as there are no prescribed laws to render it as an offence.

⁶ S 15 of the Shariah Criminal Offences (Federal Territories) Act 1997

⁷ S 14 of the Shariah Criminal Offences (Federal Territories) Act 1997

⁸ S 20 of the Shariah Criminal Offences (Federal Territories) Act 1997

⁹ S 23 of the Shariah Criminal Offences (Federal Territories) Act 1997

¹⁰ S 25 of the Shariah Criminal Offences (Federal Territories) Act 1997

¹¹ S 26 of the Shariah Criminal Offences (Federal Territories) Act 1997

Customary Laws

19. Originally, customary laws of the Chinese and Indian races pertaining personal matters (*especially on marriage and divorce*) were applied by the colonial courts prior to independence on the principle that where the local law was wholly unsuited to the conditions of the parties (there was already a civil law marriage ordinances exist at this time) . However, these customary laws are more of a race customs rather that religious ordains or commandments. In 1970, the King had instructed to form a Royal Commission to study the feasibility of reforming the marriage and divorce laws for the non Muslims in light of the United Nations Consent to marriage, minimum age of marriage and registration of marriages. This was done in light of having a uniform law on marriage and divorce for the non-Muslims in Malaysia. A bill was drafted and the parliament had passed it in 1976. This law, now called the the Civil Law (Marriage and Divorce) Act applies to all non-Muslims in Malaysia.

20. Native customary law, however is still being practiced in the eastern part of the country because that is where most indigenous cultures are still practice. They even have their own court system but it is, technically, under the purview of the Civil Courts since the highest appellate court is the Civil Courts.

21. The Native Courts in East Malaysia too have their own court system but their jurisdiction is limited to matters that do not fall within the ambit of the Common Law Courts and the Shariah Courts. The law clearly stipulates that neither court should interfere with the jurisdiction in any court.

Islam as the Official Religion of Malaysia.

22. As mentioned earlier, the official religion is Islam. Art 3 of the Constitution of Malaysia clearly stipulates that Malaysia is the religion of the Federationⁱ. That is why in Malaysia, official functions or programmes organised by the government would not have pork or even serve alcohol beverages. However, the same provision also stipulates that other religion may practice in freely and peacefully. The right of other religion to practice freely and openly is guaranteed

by the constitution. This is specifically mentioned in Art 11 of the Constitutionⁱⁱ.

23. This was the intention by the framers of the Constitution as Malaysia was already a multicultural society even before independence. The Constitution of Malaysia was drafted to accommodate to unique demography of Malaysia. The Reid Commission, the commission assign to draft the Constitution, consists of judges and legal practitioners from the other commonwealth countries. The political parties who, spearheaded and supported the idea of the independence of Malaya, consist of three parties that represent the three major races in Malaya and it was the representatives provide with the suggestions to ensure that the Constitution would be practicable for the country.

24. Even now our Parliament, that houses both of our House of Representatives and the House of Senate are both multiracial and multi-religion. As Malaysia practices democracy, the citizens are free to elect whoever they please. You may have heard that certain quarters vocalising that they are being persecuted by the Malaysian Government. This is certainly not true.

25. Admittedly, however, Islam does have a special position in Malaysia. For example, the Constitution allows the Federal Government and the State Government to provide funding and maintain any Islamic institutions in Malaysia. This privilege, however, is not extended to institutions other than that of Islam. This privilege also extends to places of worship. That is why in Malaysia, you would see there are many huge mosques and the designs can be very spectacular. This is because they are being funded by the Government.

26. Another example of this is the King and each of the Sultans of the different States is advised by their respective Islamic Religious Councils. In the Federal Territory, the Council consists of 22 members who include the Chief Secretary to the Government, the Attorney General, Inspector-General of Police, the Mufti, and the City Commissioner¹². The Chairman is appointed by the King who is

¹² S 10(1) of the Administration of Islamic Law (Federal Territories) Act 1993

advised by the Minister in charge of the administration of Islam in the Federal Territory¹³.

27. All laws relating to Shariah must be agreed to by these Religious Councils before they are passed by Parliament or the respective State Legislative Assemblies.

Multicultural Society

28. As mentioned earlier, Malaysia is a multicultural society that consists of three major races and many other ethnic groups. You may wonder how Malaysia can survive on a multiracial, multicultural and even multi-religious society. I must say it is not without its problems. During the British colonial, there was an indirect segregation among the races in Malaysia. I use the word indirect because it was not made as a policy, but rather it is an economic strategy.

29. When tin mining was discovered in Malaysia before independence and even before the First World War, the British and even the Malay Rulers brought in immigrants from China to work at

¹³ S 10(2) of the Administration of Islamic Law (Federal Territories) Act 1993

the tin mines in Malaya back then. When the British took over mining industries in Malaya, they allow Chinese traders and entrepreneurs to control the tin mines. The British would then collect taxes from them due to their profitable methods of mining. The same goes for the immigrants from India and Sri Lanka. The British brought them mainly as labour workers in the agricultural sector of sugar cane and rubber and also as civil servants. Due to this the British gave a lot of advantages to the Chinese and Indians, who are supposed to be the ones who are contributing most to the economy at that time. This includes opportunity for business expansions, promotions, and even education.

30. The segregation, for the most part remained even after independence. The Chinese were mainly businessmen and lived in the major cities, the Indian were controlling the rubber estates while the Malays are mainly fishermen and farmers. This created a lot of tension between the races, especially between the Malays and the Chinese. The Malays believed that since they were the main origin race in Malaysia, they should have better rights and monopoly to the economy. In 1969, the worst racial clash occurred. It left a black mark in Malaysia's history.

31. After the racial riots, the Government formed many policies and measures to ensure that the segregation is eliminated. An example of such a policy is the New Economic Policy (NEP) introduced in 1971. The NEP basically ensures that the Malay and the natives in Malaysia (which later will be referred to as "**Bumiputera**") have their rights and share of the Malaysian economy and these rights are in a way guaranteed. Although it may look as a means to disrupt the concept of free trade and capitalist economy, but the NEP is design to be a method of racial integration and also to abolish poverty in Malaysia.

32. This, however, does not emancipate the rights of other races. In the economic perspective. In the 2010 Forbes Top 40 Richest Malaysians, there are only 10 Malays and the rest are Chinese and Indians. The first is a Chinese and the second is an Indian. The civil service, however, are dominated by the Malays. This is not because there are restrictions or the so called affirmative action taking its place. My opinion on this is simply because the Chinese are very much interested in business while the Malays and other races are not that enthusiastic about it. Furthermore, the Malays represent a large

majority of the Malaysian population, so it is natural that civil service has a vast number of Malays than other races.

Ensuring Racial Harmony

33. The Malaysian Constitution provides the protection of fundamental liberties to the people in Malaysia. The related ones to our discussion today is equality, freedom of religion and rights in education.

34. On the equality aspect, the Constitution provides that that everyone is equal before the law. It further added that there shall be no discrimination based on gender, race, religion, descent or place of birth unless it is expressly authorized by the Constitution. The examples were mentioned earlier.

35. Over the years, more and more people become more intelligent and some people may start questioning these privileges. The drafters of our Constitution used the Indian Constitution which was drafted 10 years prior to ours as their basis of drafting. Our Constitution guarantees basic fundamental liberties and human rights which are normally found in all other constitutions but due to the

nature of the Malaysian population, special provisions had to be made. Article 8 of the Federal Constitution provides for equality for all persons before the law but the same article also protects laws relating to personal law and any provision or practice restricting office or employment connected with the affairs of any religion.

36. It also exempts laws made for the protection of the aboriginal people, rights for the Malays and the Natives of Sabah and Sarawak but legitimate interests of other communities are also protected by article 153 of the Federal Constitution.

37. Art 153 of the Constitution is an article of the Constitution that is often being discussed among Malaysians. In general, it is an article that provides the reservation of quotas for the Malays and the natives of Sabah and Sarawak. It is in a way serves as an affirmative action for the Malays and the natives of Sabah and Sarawak. Although provides the safeguard of certain groups in a country, it does at the same time prohibits any form of discrimination against the rights of the groups that are not protected. It is not a blank cheque that can be used by the Government to discriminate the minority races in the

Malaysia. The Article also provides that the King shall safeguard the legitimate of other communities. Among this safeguards are that the Parliament may not restrict trade and business solely to the Malays and the Natives of Sabah and Sarawak, and that it cannot deprive the rights, privilege, permits, license scholarships already enjoyed. . In practice however, the government has, of late, been more liberal in giving scholarships to non-Malays.

38. In matters relating to freedom of speech, assembly and association, the constitution allows Parliament to make laws imposing restrictions to such right on the grounds of security and public order. In particular, it allows the making of laws prohibiting the questioning of any matter, rights and status, positions and privileges, sovereignty or prerogative established by art 152, art 153, or art 181. Article 152 relates to Malay as the National Language while allowing the teaching and learning of other languages. Article 153 as I had said earlier is the rights of the Malays and natives of Sabah and Sarawak.

39. Article 181 is the provision relating to the protection of sovereignty, prerogatives, powers and jurisdictions of the rulers.

Pursuant to the provision empowering the Parliament to pass laws prohibiting the questioning of matters earlier mentioned, Parliament passed a Sedition Act because of the sensitivity of certain aspects of the communities within Malaysia. The Sedition Act covers areas which may not be necessary in a more developed nation such as those in the west.

40. Amongst other acts described as seditious tendency, are acts which “***promote feelings of ill will and hostility between different races or classes of the population of Malaysia***” as well as acts “***to question any matter, right, status, position, privilege, sovereignty protected by art 152, 153 or 181***” as mentioned earlier.

41. Certain issues relating to race and religion, which may be quite liberally accepted by the more developed countries, are sensitive in Malaysia. Many Malaysians of the older generation have not forgotten the worst racial riots that the country went through in 1969. Since then, there have been minor incidents involving communities of

different religions. The Sedition Act therefore prohibits any remarks or acts that would cause any misunderstanding amongst other races.

42. Some so called more liberal minded NGOs, which are made up of the younger generations, would like more freedom of speech in Malaysia while others consider that the local communities are not ready yet. Those in favour of liberalization always refer to England and America as precedents for freer rights. I do not wish to express any views on this. As judges, our duty is to interpret and apply the laws. It is left to the legislatures whether or not to change the statute books.

Conclusion

43. In conclusion, in a nation that is both multi-religion and multi religion, the underlying principle to sustain the peace and harmony is the concept of give and take. Human beings embrace their religious and cultural belief, many of whom are willing to die for. Thus we must respect everyone's religious belief and culture.