

APPENDIX

Towards a Shared Malaysian Destiny

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This is a slightly revised version of an unpublished paper first presented at a course on Malaysian constitutional law organized by the Attorney-General's Chambers on 30 October 2014. It contains fifteen concrete proposals to improve ethnic harmony in Malaysia. The author, a leading Malaysian authority on constitutional law, is Professor Emeritus at UiTM Malaysia. In 1991 he drafted the Maldives constitution. He has also been adviser to Fiji, Timor Leste, Afghanistan, Iraq and Sudan on their constitutional documents.

INTRODUCTION

Despite the obsession with race and religion in public discourse, Malaysia has made many strides towards nationhood since 1957:

- The identification of race with social and economic function has been weakened.
- The vibrant economy has united our disparate racial groups.
- Sabah and Sarawak have given to pluralism a territorial dimension.
- Malaysia has successfully used the economy to create and maintain social harmony. By encouraging entrepreneurship and allowing the minority communities to provide leadership in the economic arena, twin objectives have been achieved: the economy has developed fabulously. Every community has acquired a stake in the country.

NOT ALL IS WELL, HOWEVER

Sadly, since the nineties racial and religious polarization has reached alarming levels. We have become a “nation of strangers”. In many corners of the world walls of separation are being dismantled. Sadly, in our society these walls are being fortified. Recently the U.S. Commission on International Religious Freedom, an advisory body of the U.S. Government, placed us on Tier 2 of a Watch List over concerns about limitations in Malaysia on freedom of religion. To this bleak picture two qualifications must be added.

One, some of the racial and religious discord that exists in our society is a natural process of democratic freedoms. As a transforming society opens up, pent up feelings are expressed, often in ways that are deeply hurtful to others.

Second, many of the conflicts between the Muslims and non-Muslims of this country are actually not about Islam versus non-Islamic religions but about a resurgent Eastern society seeking an alternative to the hegemony of “Western” values. For example conservative Malay-Muslim hostility towards gambling, drinking, free sex, drug-laced music concerts, same-sex marriages, homosexuality, a free-wheeling media, over-sexualization of female dressing, separation of religion and morality and extolling of a secular way of life are not reflective of a clash between Islam on the one side and Confucianism, Christianity, Buddhism, Hinduism and other religions on the other. In fact the faithful of all religions are deeply troubled by the hedonistic, sex-laced, media-driven, consumerist culture that permeates modern society. What we are all experiencing is a clash of traditional Eastern values with the moral licentiousness and moral anarchy of Western-dominated modern civilizations.

THERE IS WIDE GAP BETWEEN THE THEORY AND REALITY OF THE CONSTITUTION

If we read about the making of the Constitution, we will see that by far and large the forefathers of our Constitution were animated by a remarkable vision and optimism of a shared destiny among the various peoples of the Peninsula. Pluralism was accepted as a way of life and the unity that was sought was a unity in diversity.

The Constitution, even in its “ethnic provisions”, sought to avoid extreme measures and provided for a balance between the interests of the “*Bumiputera*” and “non-*Bumiputera*” communities. Fifty-seven years ago, a pact, an understanding, a “social contract” was forged between the Malays and the non-Malays. In 1963, with the birth of Malaysia, a new pact was drawn up to safeguard the interests of Sabah and Sarawak.

Regrettably the Constitution’s “social contracts” of 1957 and 1963 are not being fully observed. The public sector as well as the private sector and all sides of the racial and religious divide are culpable of causing breaches. A few examples may illustrate the point.

Article 153: This Article was about affirmative action for the weak, and not about racial exclusiveness or racial superiority or “ketuanan Melayu”. In reality, however, overzealousness prevails. Affirmative action under Article 153 has metamorphosed into something else that is not easily possible to defend under constitutional jurisprudence. In some areas racism has become institutionalized.

Article 11(4): This Article permits State legislatures to enact laws to control or restrict the propagation of any religious doctrine or belief among Muslims. Ten State Assemblies have enacted such laws. Though Article 11(4) is broadly phrased, its primary purpose was to prevent conversion of Malays to Christianity due to the global reach and influence of Christian evangelists. By far and large, Article 11(4)’s restrictions have been observed. But now and then, stories of Muslim apostasy break the calm. Missionary work amongst Muslim children and critically sick Muslim patients in hospitals is not unknown. Bibles are discretely placed in hotel rooms. These proselytizing activities cause disputes now and then. For example in April 2014, the Pahang Malay and Islamic Customs Council (MUIP) barred non-Islamic materials and symbols from the guest rooms and public reading areas of all the 147 hotels in the State. The Malaysian Chinese Association questioned this ban immediately and did not take Article 11(4) into consideration.

Article 152(1)(a): This Article provides that the Malay language shall be the national language and shall be used for all official purposes. However, no person shall be prohibited from using (other than for an official purpose)

or from teaching or learning any other language. The Court in *Merdeka University Bhd v Government* [1982] 2 MLJ 243 has distinguished between the right to learn a language and the right to learn *in* a language. This means that under the Constitution there is a protected right to teach and learn a language as a subject but there is no constitutional right that the language be used as a medium of instruction. Vernacular schools are permitted by the Education Act but they are not a constitutional right despite what some political parties represent.

Extremism Has Become Mainstream

In many other areas, the demagogues, the racists and extremists of all communities are preaching their own sectarian interpretation of our “document of destiny” and are fanning fears and suspicions. Extremism has become mainstream and moderation is seen as capitulation to other races and religions and as a betrayal of one’s own community.

Within society, extremist race and religious organizations are mushrooming. It will not be proper to call for their ban. They have a right to exist under the Constitution. But the authorities must ensure that (i) other moderate organizations are allowed to exist and function without unfair restrictions and (ii) the law is applied fairly and equally to all and there is no selective prosecution when transgressions of the law take place.

INTER-RELIGIOUS DISPUTES ARE INTENSIFYING

- Around the world, attempts at proselytization often result in violent reactions. Malaysia has mostly been able to avoid religious riots but tensions remain high due to intense competition between Islamic *dakwah* and Christian missionary activities in regions inhabited by the *Orang Asli* and by the natives of Sabah and Sarawak.
- The use of the word “Allah” by West Malaysian Christians has aroused the anger of many Peninsular Muslims. The argument by some West Malaysian Christians that the word “Allah” is central to Christian faith and restrictions on its usage will hinder freedom of religion has not convinced Muslims, most of whom suspect that the new-found veneration for the word Allah in West Malaysian Christian dialogue is an adroit attempt to circumvent the pre-Merdeka restriction contained

in Article 11(4) on propagation of other religions to Muslims. On the other side of the fence is the equally convincing argument that sermons in private places and in books clearly marked “For Christians Only” cannot amount to proselytization of Muslims.

- Some Muslims allege that the constitutional limitation on preaching to Muslims in Article 11(4) is often adroitly evaded or ignored.
- The occasional case of Muslim apostasy causes much tension.
- There are disputes pertaining to the religious status of a deceased. Muslim authorities are known occasionally to seize dead bodies for Muslim burial.
- Recently, Jabatan Agama Islam Selangor (JAIS), in clear disregard of the Constitution and of the sensitivities of Christians, raided a Christian place of worship and seemingly served notice that non-Muslim places of worship are subject to monitoring by Islamic authorities. Earlier, it had raided a Christian place of worship because of the suspicion that proselytization was taking place.
- Recently there was the incredible allegation of a “Christian conspiracy to take over the country”.
- There are unedifying and unsolvable problems of custody and conversion of infants when in a non-Muslim marriage, one party converts to Islam.
- There are seemingly irreconcilable jurisdictional disputes between syariah and civil courts (something which is quite common in countries with legal pluralism).
- Islamization of all aspects of life is proceeding at a rapid pace and this is impacting on non-Muslims. Moral policing is resulting in imposition of Islamic values on others.
- The dispute about whether Malaysia is an Islamic or secular state flares up now and then.
- The drive towards implementation of *hudud* is scaring all non-Muslims and many Muslims. Some Muslim groups like ISMA are alleging that non-Muslims have no right to comment on the gathering momentum for *hudud*.
- Many Muslims allege that non-Muslim dominated NGOs raise their voice of concern, and rightly so, in many areas of human rights concern. Regrettably they are thunderously silent when Muslims in Palestine, the Balkans, Afghanistan, Iraq, Syria, Kashmir and Iran are brutalized, demonized and de-humanized.

WHAT, THEN, IS NEEDED TO RESTORE UNITY?

1. Improve constitutional literacy

We need to improve knowledge of the Constitution's glittering generalities, especially its provisions on inter-ethnic relations. The lack of familiarity with the basic charter's provisions is glaring even within the top echelons of the civil service, the police, parliamentarians and politicians. Their constitutional literacy must be improved.

Our secondary schools and universities must have a familiarization course on the basic features of the Constitution and the reasons for the many delicate compromises contained therein. Knowledge of the Constitution is a prerequisite to good citizenship. Such knowledge will also help to moderate extremism and to give appreciation of one of the world's most unique and hitherto successful experiments in peaceful co-existence in a nation of dazzling diversity.

2. We need need to go back to the spirit of 1957

As a nation we are farther apart today than we were fifty-seven years ago. Knowledge of the Constitution's delicate provisions dealing with inter-ethnic and inter-regional relations can help to provide some understanding of the give and take that lay at the basis of our supreme law. If we have to go forward as a united nation, we need to go back to the spirit of moderation, accommodation and compassion that animated the body politic in 1957.

3. We must provide a new statutory, institutional framework for reconciling race and religious conflicts

Conflicts are unavoidable in any vibrant society. What is necessary is to reconcile them with the least friction and to provide appropriate remedies when rights are infringed.

- It is time to consider a new legislative initiative. A National Harmony Act (or a Race and Religious Relations Act or a Maintenance of Religious Harmony Act) should be drafted after wide consultation.
- The National Unity Council should be upgraded to a statutory status (much like the Race Relations Boards of the U.K.) or converted to a statutory Community Mediation Council.
- Perhaps there should also be a statutory Inter-Faith Council whose job should be to foster dialogue over all that unites us and to seek tolerance and compassion towards all that divides us.

- Race relations training should be part of the agenda.
- The Community Mediation Council as well as the Inter-Faith Council could be incorporated into a new National Harmony Act.
- All in all, the new National Harmony Act should have a triple purpose. First, to administer cautions and warnings whenever peace is poisoned by hate speech or actions. Second, to try to bring parties together through education and conciliation. To this end, a Community Mediation Council could be set up. Singapore offers such an example. Third, to impose sanctions as a matter of last resort when conciliation fails. Sanctions, when imposed, need not be custodial. Community-service, injunctions and damages may be better alternatives.

4. We must promote interfaith studies

In schools, colleges and universities, interfaith studies should be encouraged as a step towards understanding, tolerance and unity. Most prejudices are born out of ignorance. With greater knowledge and understanding we learn that it is not differences that cause disunity. It is intolerance of differences that leads to disunity and violence. We have to teach people that the primitive ethic of tribalism, racism or religious exclusiveness has no place in modern society. The circle of life has expanded. We are all brothers and sisters on this big blue marble.

In our homes, classrooms and workplaces we have to teach our wards and brethren that justice is the highest virtue. Justice is impossible unless we try to be objective. Objectivity is impossible unless we are prepared to be subjective from the other person's point of view! This entails that we must consciously try to view the world through the other person's lenses, to step into the shoes of the other, to feel his or her pain. In sum we should, as the Bible says, do unto others as we wish to be done unto us. Or as Prophet Muhammad says: "No man is a true believer unless he desireth for his brother that which he desireth for himself".

I believe that just as religion is a divisive force it can also be a great uniting force for justice. (Refer to Martin Luther King's query to his brother pastors about what Christianity says on racial discrimination). I came across a quotations from Prophet Muhammad which I wish to share with you:

*Shall I not inform you of a better act than fasting, alms and prayers?
Making peace between one another: enmity and malice tear up heavenly
rewards by the roots.*

5. Subject to the Article 153 quotas, racial discrimination must be prohibited in both public and private sectors

In both the public and private sectors, ethnicity reigns supreme. We are caught up in a vicious circle. The absence of a Civil Rights Act or a Race Relations Act prevents sanctions against ethnic discrimination that transgresses constitutional provisions. Both sides of the divide are to blame for ignoring the painstaking compromises and the gilt-edged provisions of the Constitution. Lack of legal literacy about the Constitution contributes to the eclipsing of the basic law. For example Article 136 (on non-discrimination in the public services) is obviously ignored. Under the Constitution's Article 153(5), Article 136's equality clause is not overridden by Article 153.

Likewise, non-Chinese applicants to Chinese-dominated private sector enterprises are often asked at interviews: "How good is your Mandarin?"

The prohibition of unconstitutional discrimination must be incorporated into the National Harmony Act. I do not recommend the nomenclature of an Equality Act or a Non-Discrimination Act as these will be viewed by the critics as anti-Malay.

6. Depoliticize implementation of Article 153 programmes

On another note the implementation of Article 153 policies by civil servants and politicians has not worked well. We need an impartial, professional body (like an Affirmative Action Board) to handle this aspect of our social transformation.

Specifically the limits of Article 153 protection seem not to have been complied with. A closer look at the Article reveals that affirmative action is allowed only in areas permitted by the Constitution — positions in the public service; educational scholarships and facilities; places in institutions of higher learning; and permits or licences.

The Article specifically enjoins the King to safeguard "the legitimate interests of other communities". Nothing in Article 153 permits Parliament to restrict business or trade solely to Malays and natives of Sabah and Sarawak. Article 153 does not override Article 136 which requires impartial treatment in the public services. Reading Articles 136 and 153 together, it is apparent that reservations and quotas are permitted at entry point but in the post-entry milieu there should be no ethnic preferences.

An impartial, multi-racial Commission or Board, acting under the directions of the King, can put the Article on an even keel and restore moderation and balance.

7. As fellow-citizens, we must build bridges, not walls

It is time for building ethnic bridges and dismantling walls; for healing and reconciliation; and for developing a vision of unity. I couldn't say it better than Datuk Azlina Aziz (wife of Datuk Seri Nazir Razak). "It is time for engagement, for listening, for cutting the invisible barbed wires that separate 'them' and 'us' and extending a hand over the divide to those who may disagree with your views but have as much of a stake and future in the country as you do."

8. Our educational system must be revamped

An educational system must nurture tolerance, mutual respect and intercultural dialogue. It must bring the learners together, not separate them on grounds of race, religion or language. If young people do not learn together, how will they live together? For a start, the ethnic diversity of school teachers and school principals must be restored, and we should use school sports as a uniting force.

9. The Federal-State division of powers often prevents remedial action

In the light of the recent JAIS raid, it is clear that interfaith and interracial institutions and procedures must exist not only at Federal but also State levels. Perhaps the Conference of Rulers can play a significant role in this area to build bridges of understanding.

10. Declaration on Religious & Racial Harmony

Let us put our heads together to draft such a Declaration, similar to the Rukun Negara. It will act as a polestar for executive and judicial action and will exert normative influence on citizens.

Admittedly a mere declaration will not have the status of law but its existence will provide a yardstick by which to judge executive and legislative actions that impinge on racial and religious interactions. Supplementing the declaration could be a Race and Religious Harmony Commission to provide community mediation to resolve interreligious and interracial disputes.

11. Criminalize hate speech

Hate speech polarizes communities and often leads to violence. Existing provisions in the Penal Code, Communications and Multimedia Act, Printing Presses and Publications Act and the Sedition Act need to be buttressed by a new law.

The new law, to be administered by a Race and Religious Harmony Commission, should adopt a multi-pronged approach. It should aim at community education to remove prejudices born out of ignorance. It should resort to community mediation and only on the failure of mediation should the criminal provisions be invoked.

12. Liberalize *locus standi* requirements to enable wrongdoers to be exposed and made accountable

Equality under the law refers to equal protection under the law as well as equal harassment under the law. Selective prosecution is a violation of our Constitution. There should be vigorous, impartial and speedy invoking of the law whenever race and religious harmony is intentionally breached. The statutory boards proposed above must be given statutory powers to prosecute. Citizens and citizens' groups must be given *locus standi* to raise civil proceedings or private prosecutions. This may require an amendment to Article 145(3) which gives a monopoly to the Attorney-General to raise or discontinue criminal proceedings.

13. Race and religion based political parties must open up to others

Dato' Onn Jaffar was a visionary who sacrificed his political career for this cause. In the 70s the idea of ADMO (Alliance Direct Membership Organization) was revived but didn't go anywhere. The idea of Associate Membership of race and religious parties has been put forward in some States. It is time to allow these ideas to germinate. In this day and age of humanism, it is rather odd to still have race and religious polarisation, and race and religious discrimination (other than affirmative action).

14. We need to learn from others

In many societies — including Singapore, the United Kingdom and the United States — the law is being used to socially engineer a more tolerant society. There is no shame in emulating others and building our garland with flowers from many gardens.

15. We need leadership

Political leaders, media personalities and community chiefs must condemn hate crimes and hate speech immediately, strongly, publicly, and consistently. They must send out a message of tolerance and restraint. It is not enough to ignore the ignorant and the extremists.

Finally, to the young idealists present here I wish to quote Prophet Muhammad: "Four things support the world: the learning of the wise, the justice of the great, the prayers of the good, and the valor of the brave".

Be one of these four. May Allah be with you.

