September 5th 2017

THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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The Impact of Article 3(1) of Malaysian Constitution towards Judgment made in Civil Court.

By
Dr Ahmad ZaharuddinSaniSabri
Director, Institute of Dr. Mahathir Thoughts

Abstract
The legal system of Malaysia was modeled after the English legal system which practices parliamentary democracy and is ruled by a Constitutional Monarchy, with His Majesty the Yang di-PertuanAgong (the King) presiding ceremonially as the Head of the country. Although the Malaysian legal system is predominantly based on English common law, there are also other secondary legal systems concurrently affecting certain sections of the law, such as Islamic law and customary law. Though Islam has a most exalted position as the religion of the Federation, the sharia is not the basic law of the land. This conception paper believes Article 3(1) on Islam as the religion of the Federation is qualified by Article 3(4), which clearly states that "nothing in this article derogates from any other provision of the Constitution". This means that Article 3(1) does not override any other provision of the Constitution. This article view that a united and functional Malaysia can only exist when legal issues are determined in accordance with principle, in well-reasoned judgments by the courts, with a willingness to grapple with difficult issues without glossing over or avoidance or oversimplification or a giving way to sentiment.

Keywords: Malaysian Legal system, Malaysian Constitutions, Islam, Sharia Law

Introduction

The Malaysian legal system is a unique system. It shares a substantial heritage with the common law and has England as its duplication.. However, upon a closer examination one finds that it is not entirely English or foreign in orientation values are found in the system. This was further strengthened after independence by later developments to the law and legal system. It may and can be said that the Malaysian legal system actually contains plural legal systems, which are formed from a mixture of the Sharia law, customs and British law. This article seeks to discuss the roots of the legal system followed by a discussion on the British influence on the legal system. Following that the discussion is focused on the system that was established within the independent constitution. The development of the legal system after independence is later discussed and this is followed by the recent developments in the system. Included in the discussion are my own observations and prediction on the future of the Malaysian legal system.

Before a discussion of the focal issues the article begins with, a brief discussion on the relationship between law and order is needed. This discussion is necessary to appreciate the necessity for a legal system that is suitable and adaptable to the needs and demands of society.

Law and social order

Socio-legal scholars generally agree that law is made by the society around it, and that it necessarily reflects the complexity of social relationships. (Brian, Z., 1977) Although some scholars tend to disagree about how closely law "mirrors" society, few would dispute that law is a product of social interaction; in the contemporary jargon, it is "socially constructed." But, what are the implications of that understanding for our description of what law is in any particular society? If we are to be consistent in our acceptance of the proposition that law has a constructed nature, then we must also bear in mind that to some extent every society is unique. The distinctive characteristics of the local configuration of values, traditions, and established institutional arrangements will produce changes in the meanings and roles attached to law as we move from examining one society to another.

For me, Law has certain functions in society. Apart from ensuring order it satisfies social wants, expresses the values and convictions of a given society. As a consequence, law is an indispensable mechanism for the creation and maintenance of peace and stability in society. In order to be effective the law has to be representative; it should not be something that is imposed on society. It should not bring in values that are alien or unacceptable to society.

Apart from that, the law is subject to changes, especially when society changes. Social changes are inevitable, and they are a feature of the modern states. Indeed, laws are changed to meet the new needs and requirements of society and law is a response to social 'demands'. This is undoubtedly the Malaysian experience; its laws and legal system have undergone substantial changes throughout the sixty years of independence. The change had to happen to accommodate the changes and needs of the Malaysian community.

Briefly I will say the purpose of law is to make good persons and a good society, and to make sure everything in right order so society can live harmonies. Its whole objective is how someone interpretative about ethical and moralities.

Transformation of Malaysian Legal System

It is important for us to understand that much of Malaysia's history is related to Great Britain. Although the Dutch, Portuguese and Japanese were the earlier colonial powers, the British, who had ruled Malaya for more than one hundred and fifty years with just one short interruption during World War II, left a much greater impact upon the law of the country. The legal history of Malaysia begins with the acquisition of Penang in 1786 and with the introduction of the Charters of Justice in 1807, 1826, and 1855.

The Federation of Malaya received independence from the British in the year of 1957. The first Federal Constitution of Malaya (before it is called Malaysia) came into force on August 27, 1957 which was a few days from the independence day of August 31, 1957. Subsequently on September 16, 1963, the Constitution of Malaya had been amended to accommodate the eleven states of the Federation of Malaya, the former colonies of Sarawak and Sabah on the western coast of Borneo, and the State of Singapore to form the Federation of Malaysia.However in August 1965, Singapore seceded from this newly-formed federation to become its own independent republic.

The reception of English law slowly evolved and developed during the period of British colonization. However, the reception of English law only became statutory after the promulgation of the Civil Law Enactment of 1937. There are three periods during which modern Malaysian laws were made. Pre-war law was made during the decentralization of Malay states (1866-1942). The Malay states at that time were divided into three groups of states: the Straits Settlement (SS) group of states comprised of Penang, Malacca, and Singapore, the Federated Malay States (FMS), comprised of Perak, Selangor, Negeri Sembilan, and Pahang, and the Unfederated Malay States (UMS), comprised of Johor, Kedah, Perlis, Terengganu, and Kelantan. (Ahmad ZaharuddinSani, 2015)

Post-war law was made after the unification of all the Malay states except Singapore under a federal administration (1946-1957), and Post-independence law was made after the formation of the Federation of Malaya and Malaysia (1957 and 1963). Prior to independence in 1957, most of the laws of the United Kingdom were adopted and either made into local legislations or simply applied as case laws. The application of English law or common law is specified in the Civil Law Act 1956 as stated in Sections 3 and 5 of the said Act, which allows for the application of English common law, equity rules, and statutes in Malaysian civil cases where no specific laws have been made. Similarly, in the context of civil law, Section 5 of the Criminal Procedure Code also states that English law shall be applied in cases where no specific legislation has been enacted.

Malaysian law is also modeled on other jurisdictions' laws, such as Australia and India. The Malaysian Criminal Procedure Code was based on the Indian criminal code. Similarly, the labor law and the Contracts Act are also based on the Indian model. Malaysian land law is based on the Australian Torrens system. There are a number of laws made during the colonization that are still in existence and applicable with certain modifications in line with domestic and current circumstances.

I suggest an understanding of the basic arrangement of the current Malaysian legal system and the concept of separation of (law-making) powers will assist you in understanding how Malaysian legal resources are organized and found.

Although the Malaysian legal system is predominantly based on English common law, there are also other secondary legal systems concurrently affecting certain sections of the law, such as Islamic law and customary law. Therefore, it is also important for readers to note which jurisdiction and group of people that the law was designated for and whether the laws are still in force.

For general information, legal system of Malaysia was modeled after the English legal system which practices parliamentary democracy and is ruled by a Constitutional Monarchy, with His Majesty the Yang di-PertuanAgong (the King) presiding ceremonially as the Head of the country. The Yang di-PertuanAgongis elected by the Conference of Rulers for a five-year term from among the hereditary Rulers of the nine states in the Federation which are ruled by Sultans. The states are Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan. In the other states, namely Melaka, Pulau Pinang, Sabah and Sarawak, the Head of State is the Yang di-Pertua Negeri or Governor of the State. The Yang di-PertuaNegeri is appointed by the Yang di-PertuanAgong for a four-year term. (Ahmad ZaharuddinSani, 2015)

The Federal Constitution of Malaysia clearly divides the law-making authority of the Federation into its legislative authority, judicial authority and executive authority. The separation of powers also occurs both at federal and state levels. The federal laws enacted by the federal assembly, known as the Parliament of Malaysia, apply throughout the country. There are also state laws governing local governments and Islamic law enacted by the state legislative assembly which applies in the particular state.

The Existence of Sharia Law

The earliest record of Islamic law in Malaysia is in the Terengganu inscription on a stone, which dates back to 1303. It gives the punishments for some offences following the provisions in the Qur'ān and Sunnah. For example, it is stated

"Those who commit unlawful intercourse between male and female, the order by the King are; if they are free person (not a slave) and unmarried, they will be flogged hundred lashes and if the free man had a wife or the free woman had a husband, they will be buried till waist and will be stoned to death."This law is in line with Islamic teaching.

When Malacca was a Malay kingdom, a compilation of laws was made on the orders of the Ruler and this, the Malacca Laws (Undang-undang Melaka), shows the influence of Islam in modifying the Malays customary law.

The first thing we must bear in mind concerning the Undang-undang Melaka is that it is a hybrid text. In other words, it is composed of several separate texts bound together as one manuscript. It was copied and later recopied and although it undoubtedly came to be regarded as one text, the various component parts still clearly show themselves. The structures of Malacca Laws consist of six different texts:

(i) The Undang-undang Melaka (proper)
(ii) The Maritime Law (partly)
(iii) Muslim Marriage Law
(iv) Muslim Law of Sale and Procedure
(v) The Undang-undangNegeri
(vi) The Undang-undang Johor

When the kingdom of Malacca fell to the Portuguese in 1511, the texts of the Malay laws were taken and adapted with modifications in the various Malay states including Pahang, Johor and Kedah.

According to Ahmad Ibrahim, all of these examples show that there were attempts before the coming of the British to modify the Malay custom and to adopt Islamic law. This process was in progress when the British came and exercised their influence in the Malays states.

I would like to quote R.J Wilkinson said: "There can be no doubt that Muslim law would have ended by becoming the law of Malaya had not British Law stepped in to check it."

This also proven by Shaik Abdul Latif&Ors. V Shaik Elias Bux (1915) 1 FMSLR 204 "Before the first treaties the population of the states consisted almost solely of Mohamedan Malays with a large industrial and mining community in thye midst. The only law at the time applicable to the Malays was Mohamedan modified by local custom."

And in judgment Ramah v. Laton (1927)FMSLR 128 Thorn J. said: "Muslim law is not foreign law but local law; it is the law of the land, and the local law is a matter of which the court must take judicial notice. The court must propound the law."

What is Article 3 (1)?

Article 3(1) states that, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."Article 3(1) states that, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." What is the meaning of the phrase "religion of the Federation"? For me, in interpreting a constitution, one cannot apply ordinary principles of interpretation. Recognition must be given to "the character and origin of the instrument" and "respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language". The historical perspective behind the phrase is, therefore, important. A constitution cannot be read literally.

In 1956, as one of the final steps taken in the direction of self-government for the Federation, an independent commission headed by Lord Reid was appointed by the British Crown and the Conference of Rulers to make recommendations for a constitution for an independent Federation of Malaya.The draft constitution and the report submitted by the Reid Commission was passed with amendments and approved by the Federal Legislative Council in July 1957.

In the course of the deliberations of the Reid Commission, the then-dominant political party called the Alliance submitted a proposal that Islam be made the official religion.The Reid Commission decided to not make any provision for an official religion, preferring to maintain the status quo by retaining religion as a State matteras they were concerned over the apparent contradiction between the Alliance declaration that Malaya would be a secular state and the proposed provision for Islam to be the official religion of the Federation.

This omission led to the formation of a Working Party comprising representatives of the British Government, the Malay Rulers and the Alliance coalition to review the Reid Report.Tunku Abdul Rahman, the first prime minister, argued strongly for an article declaring Islam as the official religion of the Federation.The component parties in the Alliance agreed that the proposed provisions should include two provisos; first, that it would not affect the position of the Rulers as head of religion in their respective States, and second, that the practice and propagation of other religions in the Federation would be assured under the Constitution.

Justice Sheik Abdul Hamid, the member of the Reid Commission from Pakistan who initially agreed with the other members to omit any provision for an official religion in the draft constitution, later proposed in his Notes of Dissent that the Alliance proposal be adopted as it was "innocuous", pointing out that at least 15 other countries had similar provisions in their constitutions.

The Federation of Malaya government, in a White Paper published in 1957, explaining the changes to the recommendations of the Reid Commission, stated:

"There has been included in the proposed Federation Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practise his own religion and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the Muslim religion."

In the event, an express provision was made in Article 3(1), the terms of which have remained unchanged since:

"Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation."

As it can see today, conflict of jurisdiction between the Sharia and Civil Courts in the Malaysian legal system is not a new issue to be discussed. This issue has been extensively debated and studied by the researchers all over the world in order to find a solution. However, the scope of this article is not to examine the same issue, but is aimed to discuss the impact of article 3 (1) towards civil court judgments.

Jurisdictional controversies

In this paper I would like to quote two (2) most recent controversies judgments done by civil court that totally against the article 3(1) of Malaysian Constitution.

Judgment 1

In June 2014, enforcement officers of Negeri Sembilan Department of Islamic Affairs (JHEAINS) arrested 17 people at a wedding reception. Those arrested were transgender persons, present at the wedding in service as wedding planners and beauticians. They were charged for cross-dressing against the Sharia law in Negeri Sembilan.

Those accused applied to the High Court for judicial review, which was refused. In the Court of Appeal, it was declared that the Negeri Sembilan Islamic religious enactment barring cross-dressing was contrary to the Federal Constitution.

The Director-General of Malaysia Department of Islamic Affairs (JAKIM) publicly criticized the Court of Appeal for interfering with the administration of Islamic law by the Sharia court in contravention of Article 121(1A) of the Federal Constitution. ("The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts.")

The Minister for Religious Affairs then issued a statement to the effect that the Government was planning to establish a Sharia Federal Court in order to prevent any further interference by the civil court.This reignited the debate whether Malaysia has a dual legal system of civil law and Shariah law.

Judgment 2

Last month The Court of Appeal has ruled that a child conceived out of wedlock may bear the father's name in a landmark decision that also clearly outlined the legal limitation of the National Fatwa Committee.The ruling, made unanimously by the three men panel, was made in an appeal involving a seven-year-old child. In 2003, the National Fatwa Committee declared that a child conceived out of wedlock ("AnakTakSahTaraf") cannot carry the name ("tidakbolehdinasabkan") of the person who claims to be the father of the child, if the child was born less than six months of the marriage.

On Sept 3, 2015, the parents of the child who requested to for their identities be made anonymous had filed a judicial review at the High Court but their application was dismissed on Aug 4, last year.

The Muslim couple were legally married on Oct 24, 2009 and the child was born on April 17, 2010 which is five months and 27 days (according to the Islamic Qamariahcalender) from the date of their marriage.

Actually, the period was short of a few days before the six months period to legitimise the birth of a child.

Their child's birth was only registered two years later and they had jointly applied to the NRD for the name of the father of the child to be registered as the last name in the birth certificate.

The court was further quoted saying that such an application of the fatwa violates the legislative process.
"A fatwa or a religious edict issued by a religious body has no force of law, unless the fatwa or edict has been made or adopted as federal law by an Act of Parliament,"

The jurisdictional controversies referred to above remain unsettled as these circumscriptions on the legislative power of the State and the jurisdiction of the Sharia court have yet to be closely examined before the courts. It is possible that some of the actions taken by the religious authorities and the orders issued by the Sharia court in the above cases may have exceeded their power and jurisdiction.

But for me it is a common misconception that once established, a sharia court has ipso facto jurisdiction over all matters relating to Islamic law and Malay customs set out in the State List.It is also inaccurate to hold that the sharia court has exclusive jurisdiction on all matters related to Islamic law. Given that the sharia court is a creature of State law, it has no power of interpretation on any matter which is the province of the High Court and the subordinate courts, including issues on the interpretation of federal law and State law.

All these need to be discuss separately to ensure no misleading in the topic currently discussed here.

Prediction of Malaysia Legal System in the future

Some scholars argue that Islam being the religion of the Federation did not mean that laws passed by Parliament must be imbued with Islamic religious principles; nor did the existence of Sharia law prior to independence require that laws of general application must conform to the Sharia, for to hold otherwise would be contrary to the constitutional and legal history of the Federation and also to the Civil Law Act 1956, which provides for the reception of English common law in this country.

It is in this sense of the dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3. Religion being often described as a sensitive matter in Malaysia, TunSalleh Abbas ex-chief judge of Malaysia,once said in his judgement:

"... we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law."

I beg to opposed on this, I Ironically agreed with the former chief justice of Malaysia, Ahmad Fairuz Abdul Halim, said in a lecture recently that any law that was in contradiction to Islamic scriptures was unconstitutional. This was later supported by a senior lawyer named HaniffKhatri Abdulla. In essence, both of them argue that Article 3 of the Federal Constitution has the effect

of incorporating substantive Islamic jurisprudence into the constitution. They say, therefore, that any law that is inconsistent with Islamic jurisprudence is unconstitutional.

For me, any of the civil judgment if involve a Muslim, either you like it or not, article 3(1) of the Federal constitution need to be uphold and give a thought from Islamic perspective, and it can't be ignore totally.

Conclusion

The nation called "Malaysia" has no existence outside of the Federal Constitution, which is the supreme law of the country. A united and functional Malaysia can only exist when legal issues are determined in accordance with principle, in well-reasoned judgments by the courts, with a willingness to grapple with difficult issues without glossing over or avoidance or oversimplification or a giving way to sentiment.

Quite clearly, the idea of a "dual" legal system in Malaysia of civil law and sharia law is misconceived. sharia law is only applicable to Muslims and only as personal law, with provision for certain offences against the precepts of Islam. Nothing in the Federal Constitution suggests that the sharia court is to compete with or be parallel to the civil court on the same subject matter, and this is supported by judicial authorities.

This issue is of vital importance to the people of Malaysia, with their multicultural, multi-ethnic and multi-religious history.It should be clear, therefore, that on existing law it is not correct to attribute to enacted Islamic law or to sharia courts a legal superiority over constitutional provisions and total immunity from constitutional review by the civil courts.

Academically, of course such an aspiration may come to pass one day, if the pace and range of Islamisation continues. But we are not there yet. The Constitution is still supreme. Proponents of "one country, two systems" or two equal and parallel legal systems have to be level-headed about the legal, political, economic and social implications of such a significant change to the constitution's basic structure.

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