LEGAL EDUCATION AND SOCIAL JUSTICE*

In Malaysia, as in most evolving democracies, a massive effort at social engineering is underway. Law and legal institutions are being used not only to redefine relations, reorient expectations, redistribute wealth and opportunities, they are also being employed vigorously to control and dissipate the inevitable tensions and conflicts that result in any effort to bring about change or to force the pace of change.

In the background of a Malaysian society in a state of flux, what shoud be the aims of legal education in this country?

No simple answer to this question is possible because the goals of legal education are as broad and diverse as the aims of education itself- and those are to produce mature and responsible students who are imbibed with a desire for the adventure of ideas and who are receptive to beauty and humane feeling[1]. In addition to this general goal, legal education has some specific aims which can be outlined as follows:

Firstly, the traditional aim of producing legal scholars who are just as much "legal technicians"[2] — those who have a qualification which is academic as well as professional.

Secondly, to prepare students who are acquainted with basic procedural and substantive aspects of the law while having an equal appreciation of the impact of law on society and society on law.

Thirdly, to develop the law students' ability to think clearly, precisely and logically and to communicate thought effectively.

*Adapted from a speech at a Colloquium on 'Legal Education and Human Development' at he Faculty of Law, University of Malaya, 11th December 1979.

[1] Adapted from Alfred North Whitehead, *Aims of Education*, Macmillan, New York, 1949, p. 1.

[2] The term is borrowed from Lee Hon Phun, "The Law Student In His Legal Environment". *NERACA*, 1972/73 vol. 1, p. 27.

Fourthly, to produce lawyers who are equipped to react to changes when they come and who can provide leadership in effecting them.

Fifthly, to train students for service in the public interest. This important objective has only recently been recognised. It can be achieved by involving students in programmes like Legal Aid and Advice. It can be accomplished by law teachers and practitioners highlighting the need for reform and change in the law. Inclusion of courses on Legal Ethics, Consumer Protection, Poverty and the Law,[3] Women and the Law, Children and the Law, Race Relations and the Law may be another way of lifting the students' thought to the public service role of the profession. Perhaps the University of Malaya could expand its curriculum to include the above specialised subjects in order to emphasise areas where tensions between conflicting interests are widespread. But inclusion of any further schemes or subjects in the University of Malaya's four-year undergraduate course may create serious overburdening of staff and students. Given the diverse roles performed by lawyers today and given the time limits of a formal legal education programme, no law school can, or should, try to fulfill all the needs of its students. Some things have to be left to experience which is a good but hard school. The danger of trying to achieve too much in too short a time is that breadth of knowledge and experience is acquired at the expense of depth, and the students end up knowing less and less on more and more. If, however, the duration of the University of Malay's law programme is extended to five years in time to come[4] — and this is a proposal worthy of consideration in view of the fact that the law course at the University is an undergraduate programme — inclusion of integrated courses on law and society and at least one on humanities would be highly desirable.

[3] A useful introduction to the law in this area is found in Nik Abdul Rashid, "The Law and The Poor" in *Some Case Studies on Poverty in Malaysia*, Edited by Mokhzanai and Khoo Siew Mun, pp. 228–243, Persatuan Ekonomi Malaysia, 1977.

[4] See Nik Abdul Rashid, "Legal Education in Malaysia: A Review" p. 9, Paper presented at the First Asean Law Conference, Jakarta, 1979.

The rest of this paper is devoted to four aspects of legal education which have a bearing on social justice.

1. The Limits of Law

Legal education while emphasising the dynamic and constructive role of the law in initiating and accelerating social change must also emphasise the limits of law as a tool of planned social change.

The truism that justice is not in legislation but in administration needs to be repeated. As Cohen says: "Words are frail packages for legislative hopes. The voyage to the realm of law-observance is long and dangerous".[5] Between the law in the book and the law in action there is a wide hiatus. Executive officials do not always do what legislative formulae require of them. Much executive action is clothed behind secrecy and confidentiality and the citizens, even when they are aggrieved, have no effective way of finding out what has been done and why. Problems of corruption, of administrative delay and inefficiency, of misunderstanding the law or failing to give it a purposive interpretation, all have the effect of reducing the impact of law on society. A long time ago Justice Oliver Wendell Holmes said this of law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."[6] In the administrative labyrinths of the modern state it will not be too much of an exaggeration to say that the prophecies of what the administrator will do in fact, and nothing more pretentious, is what is meant by the law!

Not only administrators have the means to neutralise the impact of law. Sometimes judges cause the same by saying one thing and doing another. Often they interpret a statute in such a way as to make the law in action very different from what was intended. In the United Kingdom, early history of judicial decisions on race relations indicates that the conservative-minded

[5] Quoted in Julius Stone, *Social Dimensions of Law and Justice*, London, Stevens, 1966, p. 47.

[6] Holmes, *Path of the Law*, 461.

House of Lords interpreted the Race Relations Acts 1965 and 1968 so restrictively as to deprive them of much of their vitality. Section 2(1) of the now repealed Act of 1965 states: "It shall be unlawful for any person concerned with the provision to the *public* or a *section of the public* (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services. . ." (emphasis provided). This section was not meant to forbid private discrimination. In *Dockers' Labour Club* v. *Race Relations Board* [1974] 3 W.L.R. 533 the main issue was whether the Dockers' Club which enforced a colour bar was providing services to the 'public' or a 'section of the public' or alternatively whether it was a purely private club unaffected by section 2(1)? The club had a genuine process of selection of members but belonging to a union of working men's clubs it was participating in a scheme whereby members of one club could use facilities in all other participating clubs as "associates" or the union. Over one million associates were involved. But the House of Lords held, overruling the Court of Appeal, that the Dockers' Club was not involved in providing services to the public or a section of the public and was therefore free to enforce a colour bar.[7]

Article 5(3) of the Malaysian Constituion confers on an arrested person a fundamental right to know the grounds of arrest and to consult and be defended by a legal practitioner of his choice. But in several cases denial of these rights has not induced the courts to issue habeas corpus.[8] In *Hashim bin Saud* v. *Yahaya bin Hashim* [1977] 2 M.L.J. 116 their Lordships held that the right to counsel commences from the day of arrest but its operation may be postponed if its exercise impedes

[7]The Race Relations Act 1976 has reversed the law on this point. Clubs having more than twenty members cannot discriminate on grounds of colour, race, national or ethnic origin.

[8]See, for instance, *Ooi Ah Phua* v. *O.C. Criminal Investigation, Kedah/Perlis* 1975] 2 MLJ 198.

police investigations.[9] This decision clearly strips article 5(3) of much of its vigour.

The practice of taking liberty with the language of a statute is, however, an accepted way to enable judges to bring the law in tune with the needs of changing times as the judges perceive them.

There are other factors which impose restraints on or hinder legislative intentions. The actual consequences which flow from the observance of law are often quite different from the ones intended by the legislature. All legislation leads to a mixed bag of social consequences all of which must be measured. The student of law must be made aware of the fact that in law as in life there are no ideal solutions. Law is applied as a solution to social problems. It creates new problems in turn to which new legal solutions are applied and the cycle goes on.

Sometimes the forces of change that the law unleashes begin to direct the law rather than be directed by it. The law, then, becomes the mere medium and not the master of change.

Finally, "law" itself can be an obstacle to change and reform because of its powerful influence in preserving the status quo. "Legal rules or institutions may reflect the very ideas, values or institutions which nations wish to transform. Law may serve to delay or distort development efforts rather than to realize them."[10]

Legal education in colleges and universities must balance doctrinal studies with a functional approach to understand what the living law is. Theory cannot be ignored. But a study of what the law is must be accompanied by a study of what the law does and what the law ought to be from the point of view of social justice goals.

[9]The Court went on to say that the onus is on the police to prove to the Court that the right to counsel would impede police investigation.

[10]"Law and Development", p. 2. *Report of the Research Advisory Committee on Law and Development*, International Legal Center, New York, 1947.

2. Plea for Legislative Intervention

Legal education must make students alert to the need for reform in the law and it is the duty of law teachers to foster this alertness.

The law, by its very nature, is a sluggard. It does not reach out, it reacts to social needs. The demand must arise before the law expands to meet it. In the interim period, between the discovery of social problems and the use of law to solve them, legal scholars, in their role as initiators of public discussion for the reform of law, have a duty to focus attention on the burning socio-legal issues of the times. In the classroom and outside, they must contribute to the necessary discussion and generate and sustain the impetus which may lead to desirable changes in the law in areas where they are needed.

Equality of the sexes is one such area. Article 8(2) of the Constitution forbids discrimination against citizens "on the grounds only of religion, race, descent or place of birth. . ." There is no express provision against discrimination on grounds of sex and in numerous areas including family law inequities continue unabated.[11]

Race relations is another area where legislative action is needed to combat, correct or mitigate widespread racial prejudices, unauthorised discrimination and segregation. Communal sentiment, accompanied by feelings of resentment and hostility towards other racial groups – dramatized so tragically in 1969 – is an intractable phenomenon in a great many countries of the world. Effective ways have yet to be discovered to reduce its subtler manifestations and social incidence. But efforts are being made in most democratic societies. The experience of countries like the USA and the UK suggests that outlawing racial discrimination has in fact reduced the incidence of discriminatory conduct.[12] The hour has come for the Malay-

[11] Refer to Gong Chin Keen, "Women's Rights And the Equality Provisions of Article 8 of The Constitution" and another paper with the same title by Nik Abdul Rashid. Both papers were presented at the Fifth Malaysian Law Conference, Kuala Lumpur 1979.

[12] A good study of the United Kingdom's Race Relations Acts 1965 and 1968 (now 1976) can be found in Lester and Bindman, *Race and Law*, Penguin, 1972.

sian legislature to venture into the complex field of race relations. Except for the constitutionally permissible discrimination under article 153 and article 8(5), other instances of unreasonable and unfair discrimination in the public and private sector should be met by the might of the law. The necessary legislation could be implemented in stages. The government must ensure that "social change occurs within the framework of the legal system and the basic values of the law are not lost in the process".[13] Article 136 of the Constitution dealing with impartial treatment of federal employees should be strengthened. The private sector must be required to observe some prescribed standards of fair dealing as between the races.

Harmonious race relations could be promoted by backing up the penal provisions of legislation with adequate machinery for reducing friction and promoting conciliation. The self-imposed silence by the legal community on this matter should be broken.

Redistribution of wealth and opportunities to help the truly weak and vulnerable sections of the population is another issue of social and moral concern.[13a] The goals of the New Economic Policy and of social justice will be defeated if redistribution of wealth and opportunities as between the Bumiputras and the non-Bumiputras is not accompanied by a redistribution of wealth within each community. In neither community must wealth and opportunities be allowed to be concentrated in the hands of a small minority. Otherwise the danger is that one peaceful revolution will be achieved only to create the need for another one. The massive effort at social engineering being undertaken today must be subjected to intense scrutiny to see if this aim is being fulfilled.

[13]The Rt. Hon. Lord Justice Scarman, "Lawyers And the Welfare State", *Law Teacher*, vol. 10, No. 2, 1976, pp. 67–73 at 67.

[13a]Refer to *Some Case Studies on Poverty in Malaysia*, f.n. 3 *Supra*. Essays in Part V by Thillainathan, Nik Abdul Rashid and Mohd Nor Abdul Ghani are specially relevant.

3. Public Access to the Legal System

Problems of public access to the legal system must be tackled forcefully. Legal education can contribute to the mitigation of this problem.

The role of law and legal services as grievance-remedial instruments is an important aspect of social justice. But investigations have ably demonstrated that the overwhelmingly urban-based, ethnically divided and inadequately numbered legal profession in Malaysia is not able to satisfy the growing need for legal services.[14] The shocking prevalence of unrepresented accused,[15] the neglect of socially tragic but non-lucrative areas of litigation, the preference of Malaysian lawyers for serving institutional clients rather than individual ones[16] and the unbridled capitalism of the legal community point to the need for change and reform to enable more people to benefit from the justice of the law. A few suggestions can be made:

a) Legal fees: The "gatekeepers of the profession" charge exorbitant fees. In at least some areas like housing transactions, defence of accused persons, divorce cases where the money claim is below a certain sum, legal fees must be regulated, if not by internal rules of the profession, then by legislation.

b) Some "sacred" rules of the legal profession like those which forbid contingency fees, advertising and touting need to be reappraised. The propriety, morality or a'priori content of these rules may be defensible. But their social consequences to the ordinary citizen in need for legal help need to be looked into. A functional, empirical and sociological investigation into their consequences must be undertaken to determine how far they result in depriving the poor or ordinary citizen of the

[14] K.G. Machado and A. Rahim Said, "The Malaysian Legal Profession In Transition: Structural Change And Public Access to The Legal System, (1977) 2 *MLJ* lxxxiii.

[15] G.S. Nijar, "Are There Adequate Safeguards In Our Laws To Prevent Innocent People From Being Convicted?" pp. 3, 8, 9–15. Refer also to a paper by Prof. Ahmad Ibrahim carrying the same title. The papers were presented at the Fifth Malaysian Law Conference, Kuala Lumpur, 1979.

[16] Machado and Rahim, *op. cit*, lxxxiv.

services of the gatekeepers of the profession. Machado and Rahim have stated clearly in their article on page lxxxv: "Poor and ignorant accident victims would have little access at all, if the laws against contingency fees and touting were actively enforced. An individual lacking the capacity to pay very well and whose problem does not promise a generous contingency fee will have poor access".

c) Legal Aid and Advice: The twelve branches of the Legal Aid and Advice Bureau in the country are performing a useful but limited role. Problems of finance and personnel are preventing the Bureau from extending its operations.

Between 1970 to 1975 it helped 4,681 people of which 947 received full legal aid, 180 partial aid and advice and 3,554 free legal advice. Only persons whose income is less than $134.00 per month and whose assets are not worth more than $500.00 are eligible for help in a limited range of situations.[17]

Unless the Legal Aid scheme can be substantially extended, the justice of the law will not reach down to the poor and the ignorant. This scheme should be supplemented by legal education of the masses, by development of informal, out-of-court mechanisms for removal of grievances and by creating a corps of para-legals. These are mentioned below.

d) Petition-writers and free-lancing law clerks: Given the high cost of legal services and problems of accessibility, the legal system must open its eyes and grant recognition to these non-professionals, who despite their flaws, are providing useful, low cost services and thereby alleviating the problem of access.[18] In many areas of law like writing of wills and leases experienced non-professionals are quite capable of providing some kinds of services which should be recognised but regulated.

e) Para-legals: Developing countries can help alleviate their shortage of legal professionals by training and using paraprofessionals. A lawyer is not needed to solve every legal problem and many so-called legal problems are actually administrative in

[17]Tan Sri Dr. Suffian, "Legal Aid," (1975) 1 *MLJ*, xliii and *The New Straits Times*, Jan. 22, 1975.

[18]Machado and Rahim, *op. cit*, lxxxiv.

nature.[19] Many traditional figures in developing countries, religious leaders, social workers, retired public servants, may perform common yet important legal and quasi-legal functions.[20] The effort should be to train a corps of experienced and mature people with the basics of law in some chosen fields which lend themselves readily to the use of para-legals. To cite one example: a retired civil servant from the Employees Provident Fund with a three month crash course in the relevant law will be far more suitable to advise on EPF matters than a professional lawyer who is, in most cases, not a specialist.

The University of Malaya and Institut Teknologi MARA can join in a cooperative relationship towards this endeavour. Retired civil servants or disabled armed force members could be invited to attend vacation or Extension Education Courses to prepare them for working alongside lawyers and judicial authorities in the cause of justice. Recruitment of retired civil servants for such a programme will achieve another social welfare aim — of saving healthy, active and willing retired people from the cruelties of enforced retirement. Many fifty-five-year-olds are very energetic and youthful and have years of productive work left in their sinews.[21]

f) Informal Remedies outside of the Courts of Law: There is a misconception that the more mature a legal system is, the more litigation conscious are its people. This need not be so. The more mature a legal system is the more extra-legal, informal, out-of-court remedies it provides to enable complaints to be entertained and resolved. In Malaysia there is a dearth of such remedies and procedures. Where they exist, their effectiveness is questionable. In any case not much is known about their working. There is a Public Complaints Bureau in the Prime Ministers Department. Established in 1971 it received 22,000 complaints between 1971 to 1977. "Of these 15,000 had been

[19,20] Cindy Ludvigsen, "Legal Education". A Report to the Manila Conference on the Law of The World, p. 3.

[21] Who is it who said that "Youth is a state of the mind, a quality of the imagination, a temperament of the soul"?

processed while the rest were found to be not within the ambit of the Bureau"[22] More publicity and information is obviously needed on whether "processing" by the Bureau leads to wrongs being righted and what the Bureau's ambit is.

The consumer councils, individual ministries, local authorities, Members of Parliament and State Assemblymen also entertain complaints from the public. Major newspapers run 'Letters to the Editor' columns and these are by far the most popular means of airing public grievances. In November 1979, the *New Straits Times* published 87 letters from members of the public and 15 from public officials. It is not known how many letters were actually received. Sixty five out of eighty seven letters from the public (74%) involved complaints against public authorities. Ten out of eighty seven (11.4%) were in praise. Nine out of eighty seven (10.3%) of the letters made specific requests for replies and explanations from the public authorities concerned. During the month fifteen responses and replies from public authorities were published.[23]

The Malaysian legal system must provide more avenues like conciliation committees, "neighbourhood tribunals"[24] and ombudsmen for solving disputes outside of the courts of law. The Public Complaints Bureau should come out from under the wings of the Prime Minister's Department and be established as a separate authority or be replaced by an Ombudsman or Parliamentary Commissioner. It is unfortunate that the Ombudsman principle which has been so successfully developed and extended in other countries has found no favour in Malaysia. The 1968 Report of the New Zealand Ombudsman, Sir Guy Powles, who studied the feasibility of introducing the Ombudsman system in Malaysia has not been subjected to public scrutiny.

[22] Socio-Economic Research and General Planning Unit Director-General, G.K. Rama Iyer quoted in the *New Straits Times* of Jan. 1979.

[23] From an unpublished study by the author.

[24] The term is used to refer to low level, relatively informal dispute-settling agencies. A relevant study is Heleen F.P. Ietswaart, "Studying Law in Society: The Truth About Fieldwork". (Background paper at the Socio-Legal Workship, University of Malaya 1979.)

The government and the legal community must educate the population as to the desirability of utilising the existing informal remedies. In this way the fearful backlog of cases in the courts may be mitigated. Statistics for August 1979 reveal that a total of 326,077 civil and criminal cases filed since 1977 were waiting to be heard in Magistrates and Sessions Courts. Of these 151,891 were civil cases and 174,186 criminal.[25]

4. Extension of Legal Education to the Masses

The benefits of legal education must be extended to the masses to enable them to know what their rights and duties are. This is a challenge to the legal community which is hitherto unanswered.

As society evolves and former family and community institutions disintegrate, law replaces them as the governor of many social, personal and business relations. All citizens should, therefore, understand the basic provisions of their laws and legal systems and their effects on daily lives.[26]

One of the well acknowledged functions of law is to protect the weaker and vulnerable sections of society. But this function of law cannot be fulfilled if those for whose benefit the law is enacted are not aware of what the law is and how it seeks to protect them.

Legal education in this country and abroad is confined to a select group of citizens. Others remain remote from the law. If they seek the benefits of the law they have to go through intermediaries to find out whether they have a legal right or not and if they do whether they can have it enforced and at what expense. It is not the intention of the author to denigrate the importance of lawyers. They are needed and will always be needed to wage legal battles on behalf of citizens and they are essential in our adversary system of justice where the truth is supposed to emerge out of a clash of opinions. What has to be

[25] Statement by the Parliamentary Secretary to the Prime Minister's Department, Encik Shahrir Abdul Samad in Parliament, *New Straits Times* Nov. 29, 1979, p.6

[26] Cindy Ludvigsen, *op. cit*, p. 2

emphasised is that this system of reliance on intermediaries — whether in a private lawyer's office or in a Legal Aid and Advise Bureau — is based on the false assumption that whenever there is a legal wrong the aggrieved party will go running to a lawyer for help. The fact of the matter is that most people have very little awareness of their rights. They have scant idea that the law is on their side and that they have a reasonable cause of action. It is true that many people who are aware of their legal rights still do not seek legal aid. But that is another matter. For the present discussion the point is that most people do not seek out lawyers because of ignorance of their rights. For this reason alone some form of informal legal education should be extended to members of the public. In what way this should be done and by whom is a matter of detail and can be worked out. The following suggestions may be considered:

Law Schools, the Attorney General's Chamber, Government Departments and the Bar Council must share the responsibility of giving weekly talks over TV and radio on different aspects of law which are of special concern to the citizen. Translations of these talks should be reproduced in major newspapers.

Weekly columns like 'Sunday Star Law'' column in the *Star* should be supplemented by periodic publication of simple articles on matters such as hire purchase law.

Government Departments should print and circulate, free of charge, pamphlets on various aspects of law within their jurisdiction.

Citizens should be familiarised with and encouraged to make use of existing informal remedies for redress of grievances.

To assist public education in law, more books on law and the layman should be published. The responsibility for this is that of the legal community. Universities can help by giving generous subsidies and secretarial assistance.

"Extension Education Courses" in law by educators and legal practitioners should be started to enable interested citizens to acquire some appreciation of how the law touches thier lives. No formal entry requirement to the courses should be imposed.

Finally, one last word on the need to extend informal legal education to the public. In our system of justice, ignorance of the law is no excuse. That being so, is it not the government's and the legal profession's obligation to educate the public on their rights and duties under the law?

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HUKUM BERKAHWIN DENGAN KITABIYYAH

Masalah perkahwinan antara seorang lelaki Islam dengan wanita yang bukan Islam sudah lama diberi perhatian oleh undang-undang Islam. Ini kerana Islam menyedari adanya berbilang penganut dari berbagai-bagai ugama dalam sebuah masyarakat. Persoalannya ialah wanita yang bukan islam manakah diboleh-kan berkahwin?. AlQuran dalam soal ini menggariskan yang ber-maksud. . . ." pada hari ini dihalalkan bagi kamu memakan makanan-makanan baik dan makanan Ahli-l-Kitab adalah halal untuk kamu dan makanan kamu (orang-orang Islam) adalah halal untuk mereka dan wanita bibas dari kalangan Ahli-l-Kitab terdahulu daripada kamu, mereka itu adalah halal untuk kamu (halal mengahwini mereka)"[1] Oleh itu terjelas kepada kita bahawa wanita yang bukan islam yang dibenarkan kahwin hanya wanita-wanita Ahli-l-Kitab atau Kitabiyyah.

Berdasar kepada ayat-ayat di atas kita dapati para sarjana undang-undang Islam atau lebih dikenali dengan Fuqaha berpen-dapat iaitu seorang lelaki Islam boleh mengahwini kitabiyyah. Sebelum dari Fuqaha mengeluarkan pendapat mereka dalam masalah ini, kita dapati para-para sahabat Rasulu Allah-kecuali Abdullah Ibni Umar — telah pun bersepakat kata mengatakan bahawa perkahwinan dengan Kitabiyyah adalah boleh.[2] Ini di-ikuti dengan amalan setengah-setengah sahabat, seperti Talhah Ibni Ubaidillah, Othman Ibni Affan dan Huzaifah. Oleh kerana kuat hujjah-hujjah pihak yang berpendapat boleh mengahwini Kitabiyyah, Ibnu Almunzir ada memberi pandangannya dalam masalah ini. Ia mengatakan bahawa tidaklah boleh diterima kalau ada dari kalangan orang terdahulu (kalangan sahabat) yang berpendapat tidak boleh berkahwin dengan wanita seperti ini.[3]

[1] Al-Maidah ayat 5.

[2] Al-Sayed Sabiq "Fiqhu Al-Sannah", Shaltut "Al-Fatawa". Mengikut mereka yang memboleh berkahwin, perkataan "Kitabiyyah" tidak termasuk dalam golongan wanita-wanita shirik yang dilarang berkahwin dengan mereka. Lihat muka 101, 277.

[3] Al-Sayed.Sabiq, ms. 101.