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THE ROLE OF RELIGION IN STATE AFFAIRS: THE MALAYSIAN PERSPECTIVE

By

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I thank the organizers for inviting me to this conference and, more so, for giving me the honor to speak before the learned and distinguished judges, jurists, scholars and participants present here today. This is my maiden speech outside Malaysia since I became the Chief Justice of Malaysia. To avoid saying something wrong, I have decided to speak about something I think I know better rather than what I think you expect to hear from me. So, I will speak on "The Role of Religion in State Affairs: the Malaysian perspective."

Ladies and gentlemen,

The Sultanate of Malacca was a Malay-Muslim State at the time when, in 1511, it was conquered by the Portuguese followed by the Dutch and the British. By the 19th century the British had completed her dominance over what is now Malaysia. In Peninsular Malaysia, even though the administration of the States was practically in the hands of the British, the British left matters concerning the religion of Islam and Malay Customs to the Malay Rulers. This was clearly motivated by political exigencies as those were very sensitive issues to the Malays and their Rulers.

British colonization (by whatever name it was called) had led to the influx of Chinese and the Indian immigrants to what is now Malaysia. They in turn brought their religions, Buddhism, Taoism, Hinduism, Sikhism, and Christianity. However, the Malays remained Muslims even though a majority of the natives of Sabah and Sarawak, who were animists, were converted to Christianity. Out of the total population of Malaysia of about 26 millions now, 60% are Muslims, 19% are Buddhists, 6% are Hindus, 9% are Christians, 1% are Sikhs and 5% others.

The movement for independence that began around 1946 was mainly a Malay affair. This is understandable as the country was colonized from the Malays. At that time, most of the Chinese and the Indians still considered China and India the homelands, respectively. Only about ten years later, when independence looked imminent, that the Chinese and Indian leaders joined in mainly to assert the interests of their communities.

They were skeptical of the impending “Malay rule”. Given a choice, then, they would prefer the British to remain.

The main Malay political party (the United Malay National Organization or UMNO) that fought for independence, though a nationalist party by name has, until today, its objectives arranged in the following order: religion, race and nation. The other Malay-based party, the Pan-Malaysian Islamic Party or PAS has Islam as the sole objective of its struggle. Religion was and is a very important factor to the Malays.

So, it is not surprising that the Federal Constitution contains specific provisions regarding Islam. Even though the Constitution does not declare Malaysia to be an Islamic State, Article 3(1) declares that “Islam is the religion of the Federation...” Article 3(2) confirms the Malay Rulers in States having Rulers as the head of the religion of Islam in their respective States. The Constitutions of States not having Malay Rulers are required to make provisions conferring on the King the position of Head of the religion of Islam in the respective States. So strong is the relationship between the Malays and Islam that Article 160 of the Malaysian Constitution defines “Malay” as follows:

“Malay” means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and....”

Perhaps, you will not find a similar provision in any other Constitution in the world.

Whether Malaysia is an Islamic state or not is a matter of opinion. However, there is no doubt that religion, especially Islam, plays a very important role in Malaysian politics. With UMNO as the dominant party in the coalition National Front that has ruled the country since independence and its main political rival, PAS, competing for the Malay votes, Islam has always been an important issue in every election: PAS says that the country is not Islamic and UMNO says it is Islamic. At the same time UMNO tries to convince its non-Muslim partners in the coalition that UMNO is not an extremist Islamist party like the PAS. There is no doubt UMNO is more moderate and pragmatic in its views and approach. The strategy had worked since independence: the coalition National Front had been returned at every general election to form the Federal Government with a two third majority since independence in 1957.

In 2001, to neutralize the attacks by PAS and in the wake of the so-called “Islamic resurgence”, the then Prime Minister, Dr. Mahathir Mohamed declared Malaysia to be an Islamic State. A conference was held soon after the declaration on the issue whether Malaysia was an Islamic State or not. My dear friend Prof. Hashim Kamali, who is here with us today, and I were among the speakers. I started off this way: “The former East Germany was officially known as ‘The German Democratic Republic’ while the former West Germany was known as ‘The Federal Republic of Germany’. North Korea is officially known as ‘The Democratic People’s Republic of Korea’ while South Korea is simply known as the ‘Republic of Korea’. Does that mean that East Germany was more democratic than West Germany and North Korea is more democratic than South Korea? So, ‘What is in a name?’” As usual, my dear friend Prof. Hashim Kamali was

scholarly and serious. But I remember what a Political Science Professor at the International Islamic University of Malaysia, a Bangladeshi, said. He posed the question: "Is Malaysia an Islamic State?" He answered "Yes". He gave several reasons, the last two being: the ladies wear headscarves and Dr. Mahathir says so!

When Abdullah Badawi, the Present Prime Minister, succeeded Dr. Mahathir, he introduced "Islam Hadhari" (Civilizational Islam). He fought his first general election on that platform and won the biggest victory ever for the National Front, almost eliminating the Islamic Party.

As Islam is a very important factor to the majority of the voters, a lot of money is spent on it, in building mosques and Islamic universities, colleges and schools and other Islamic institutions, giving scholarships to students to pursue Islamic-related studies locally and abroad, paying salaries and allowance to mosque officials in every village and so on. In fact, Islam is everywhere and in everything in Malaysia. Islamic education is compulsory to Muslim students in national schools. Don't be taken aback by the word compulsory. Complaints by parents are that it is not enough, not that it is compulsory. Islamic religious celebrations like the birthday of Prophet Muhammad, the beginning of the Muslim calendar year, the end of Ramadan are held by the government. The Government-sponsored celebration of the Eidil Fitr at the end of the fasting month of Ramadan attracts hundred of thousands of people, Muslims and non-Muslims alike. The call for prayer is aired even in offices. Religious talks are held in offices even during office hours and so on.

Since Malaysia is a multi-religious country, the Government also provides financial and other assistance for the construction of houses of worship for other religions. Deepavali, Thaipusam, Wesak Day, Chinese New Year and Christmas are public holidays. The Government also sponsors celebrations for Deepavali, Wesak Day, Chinese New Year and Christmas.

What is the legal position? The Federal Court in Che Omar Bin Che Soh v. Public Prosecutor (1988) 2MLJ 55 held that Malaysia was a secular country and that the religion of Islam was only practiced for ceremonial purposes. It is interesting to note that the Chief Justice who made the ruling, after "retirement", joined PAS, the Islamist Party, maybe to make Malaysia more Islamic!

The Federal Constitution makes provision for the State Legislatures to make laws, inter alia, for the establishment of the Shari'ah courts within the respective states. As a result we have two systems of courts: the civil courts and the Shari'ah courts. The civil courts are federal courts with jurisdiction throughout the country over both Muslims and non-Muslims. The Shari'ah courts are state courts with jurisdiction over Muslims only in respect of their personal laws within the respective states. (It should be noted that there is a separate set of personal laws applicable to non-Muslims).

We do have jurisdictional problems between the two courts. That is because one of the parties may be a non-Muslim and some of the issues in the case may be a federal or common law issue and other issues may be Islamic law issues. Generally speaking, the

civil court has no jurisdiction over Islamic law issues. The Shari'ah court clearly has no jurisdiction over non-Muslims and non-Islamic law issues. I have, last year, in my judgment pointed out that the problem is really a legislative problem not the court's. The trouble is that everybody looks to the court to solve the problems of the legislature. I then called upon the Legislature to amend the Constitution to solve the problems.

Religion also plays an important role in finance, banking and insurance in Malaysia. Hence, 39 years ago, Malaysia established the Pilgrims Board ("Tabung Haji") to help prospective pilgrims to save and at the same time invest in Shari'ah-compliance investments. It is now well known all over the Muslim world. Now, Malaysia is also one of the leading countries in the development of Islamic banking, finance and insurance. What started as an avoidance of sin has become a multi-billion-dollar business.

There are times when the Federal Court is called upon to interpret the Constitution on the so-called religious issues. An interesting case is one in which three Malay-Muslim students at a government national school challenged the school regulation prohibiting them from wearing turban as part of the school uniform. They argued that the prohibition was unconstitutional as the Constitution guaranteed them the right to practice their religion and the wearing of turban was a practice of their religion. Delivering the judgment of the Federal Court, I laid down the following tests whether a prohibition of a particular act, claimed to be a practice of a religion, is unconstitutional or not:

"First, there must be a religion. Secondly, there must be a practice. All these having been proved, the court should then consider the importance of the practice in relation to that religion. This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or "an integral part" of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it.....

"The next step is to look at the extent or seriousness of the prohibition. A total prohibition certainly should be viewed more seriously than a partial or temporary prohibition....

"Then, we will have to look at the circumstance under which the prohibition is made."

We held that the prohibition was not unconstitutional.

I must say that that was the pragmatic approach that I took otherwise there would be chaos: the army and the police would not be able to have uniforms, air traffic control tower would have to close during Friday prayer where no non-Muslim or female operators are available, operations by Muslim doctors will have to be "adjourned" when they exceed the prayer period. Multiply them by the number of religions, established and claimed to be. The answer is CHAOS.

Such an approach may not be ideal to the jurists. But, I believe that while justice is blind, judges should not be. They should be aware of the surrounding circumstances even in interpreting the constitution.

I think there is a lesson to be learnt from Malaysian experience: let a country develop what suits her best, so long as it is done democratically.

Thank you.