

Fourth Conference of Constitutional Court Judges
November 29 -30, 2006 in Manila, Philippines

Conflict of Interests Between Different Basic Rights

By

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I shall approach this subject from the Malaysian perspective.

The Portuguese rule of Malacca that began in 1511, followed by the Dutch, did not change significantly the racial or ethnic composition of the population of the Malay Peninsular (as Peninsular Malaysia was then known). It remained inhabited, besides the aborigines, by the Malays professing the Islamic religion. However, during the period of British colonization (by whatever name it was called) of the Malay Peninsular that began with "the founding" of Penang in 1786, immigrants from China and India came in large numbers first to work and later to settle in Malaya, as peninsular Malaysia was known by then. By the time the British left and Malaya became independent in 1957, the demography of Malaya had changed tremendously. There were then three main racial groups, the Malays, the Chinese and the Indians with different religion, language and culture. Six years later (in 1963) Sabah and Sarawak joined Malaya and Malaya became Malaysia. Sabah and Sarawak brought in more ethnic, religious, language and cultural denominations. Malaysia then was also facing the threat of Communist insurgency.

That was the reality that the country had to face when it obtained her independence in 1957. On the one hand, there was the conflict of interests and, therefore, the need to balance the demands of the various ethnic, language, religious and cultural groups. On the other hand, there was the necessity to establish law and order, to rule the country and to develop it.

So, the Constitution that was adopted in 1957 was a social contract between various interest groups and also the State. There was a lot of give and take. No particular group got everything it wanted. But each group got something. The non-Malays, the immigrants, were given citizenship. The Malays, who by definition in the Constitution must be persons professing the religion of Islam, got Islam recognized as "the religion of the Federation". In return, the non-Muslims got the assurance that they may practice their religions "in peace and harmony in any part of the Federation." The Malay Rulers or "Sultans", as most of them are called, remained as constitutional monarchs in their respective States. Every five years they elect one of them to be the Agong (King) for the whole country. (Perhaps, Malaysia is the only country in the world where the King is elected and only for a term of five years. So far there has been no extension of time, abridgement, yes, but only because of death.) The Malay language became the

National Language but the use of other languages is protected. Chinese and Tamil schools not only continue to exist but are financed by the Government. No one is required to change his name or religion. The culture of every group is in fact promoted to make “Malaysia truly Asia” as the tourism advertisement goes. On the legal side, the Muslims have their Islamic personal laws administered by the Shari’ah Courts. Personal laws of the non-Muslims are governed by the common law of England, codified or otherwise. Please do not think that the non-Muslims have been denied the right to have their own respective personal laws e.g. Chinese personal law or Indian personal law. It is their choice to adopt the common law of England.

(I pause here to ask one question: If a Muslim majority State can allow a plural system of personal laws to operate why can’t a Christian, Buddhist or Hindu majority State allow the same?)

It appears that in balancing the rights and demands of the various ethnic, religious, language and cultural groups that make Malaysia, the approach was to give every group its due as far as possible while trying to build a united nation where the people can live harmoniously, sharing the enlarged economic cake and trying to forge a national culture with the Malay culture as its core which is historically and politically understandable. And that is generally accepted by Malaysians. Perhaps that is the explanation why Malaysians kept returning the same government every five years (roughly) since independence and why the Malaysian army had remained in their barracks all these years!

We now come to the basic rights of individuals and the balancing of such rights against the interests of the State. In this, at times, the courts have a role to play.

There are no rights without duties and responsibilities. Two individuals sharing a room cannot just think of their rights. Each of them has his duties and responsibilities to his roommate which will somehow and somewhat curtail his rights. Place the individual in a family, a society and a nation, there will certainly be conflicts between his interests (or rights) as against the interests (or rights) of the family, the society or the nation. How do we balance the conflicting rights? I think our approach has been more pragmatic than idealistic.

Take equality, for example. What we had was a newly independent, multi-racial, multi-religious, multi-language, multi-cultural country with big economic and educational gaps between the groups under the threat of communist insurgency. So, the Constitution, inter alia, provides for “special privileges” for the Malays and the Natives or Sabah and Sarawak. They may be discriminatory even though permissible in law. However, the wisdom has been proved in the last 50 years. Now, at least two countries have copied our provisions: South Africa and Fiji.

Similarly, take freedom as another example. A newly born country with a multi-racial, multi-language, multi-religious, multi-cultural population cannot be given

the same treatment as an old-established country with a homogeneous population. In the case of the former, too many things may be sensitive and explosive. Previously, people in old-established countries with homogeneous population and without serious economic gap between them, did not seem to appreciate this factor. Now, with only a relatively small fraction of their population being people of different ethnicity, religion, language and culture they have begun to face serious problems. And they begin to learn from our experience, an indirect recognition that our imperfect model is not too bad, after all.

For a long time, preventive detention laws have been the sore point in the Malaysian legal system, more so to foreigners. (Since I am a Judge, I not going to argue whether it is desirable or not. That is a matter of policy for the Government to decide). The Courts in Malaysia accept that it is a valid law, it is not unconstitutional and it was made pursuant to the provisions of the Constitution. In case some of you are not aware if it, such laws were introduced and applied by the British long before Malaysia became independent. The Courts have been very strict in applying those laws. Courts have issued the writ of habeas corpus on the slightest non-compliance with the provisions of the law or regulations thereof, e.g. where only one copy of the form for the detainee to make representation was given to the detainee when the regulation says that two copies should be given.

In view of the post-9/11 events, I have asked myself this question: which is better, to have detailed provisions of the law and regulations governing such detentions or not to have any law at all but such detentions are done all the same? In the first case, there is a right to make representation to an independent tribunal which makes recommendations to the appropriate authority whether the detention should be extended or not. From the day a person is arrested, he may, through his counsel, challenge his arrest and subsequent detention in Court and ask for a writ of habeas corpus to be issued. And, as I have mentioned, the Courts have always been very strict in ensuring that every provision of the law or regulation has been complied with. Such applications are argued in open court, written judgments are handed down and there is a right of appeal right up to the highest Court in the country. In the second case, there is no bad or infamous law, so to speak. But, people are arrested and detained all the same, without trial. What legal remedies do they have? To whom do they make representations? How are they going to argue that their arrests and detentions have not been in compliance with the law or regulation thereof when there is no law or regulation governing their arrests and detentions, in the first place? Well, I am not going to answer these questions. I shall leave them to you to answer them for yourselves.

However, it is worth noting that after 9/11 this “infamous law” too has been a subject of interest, favorably I mean, to the big powers that, for a long time, condemned it. It is also worth noting that, thank God and may be, thanks to a few pre-emptive arrests under that “infamous law” that Malaysia had, so far, been

spared of bombing incidents as had happened in other countries. Most of the detainees, if not all, have since been released, the latest being on the eve of Id Fitri (end of the fasting month of Ramadan) last month. And, there have been no allegations ill-treatment, what more torture!

While still on the issue of freedom, I shall mention a few cases on religious freedom. There are only a few of them. I shall take them in chronological order. First, the case of Che Omar Bin Che Soh v. Public Prosecutor (1988) 2 MLJ 55 (S.C.). In that case it was argued that the mandatory death sentence for drug trafficking was against the injunctions of Islam and therefore unconstitutional and void. The then Supreme Court rejected the argument. It held that the term "Islam" or "Islamic religion" in Article 3 of the Federal Constitution in the context means only such acts as relate to rituals and ceremonies.

In Hjh Halimatussaadiah bte. Hj. Kamaruddin v. Public Commission, Malaysia (1994) 3 MLJ 61 (S.C.), Halimatussadiyah who was at one time my clerk at the State Legal Advisor's Office was dismissed from service for wearing the "purdah" that covers her face to work. The wearing of "purdah" to work was prohibited along with jeans, slacks and shorts. She challenged her dismissal, arguing, inter alia, that the regulation was ultra vires Article 11 of the Federal Constitution that guarantees freedom to profess and practice one's religion. The then Supreme Court dismissed her appeal and held that the prohibition did not affect her constitutional right to practice her religion and that the wearing of the "purdah" had nothing to do with that right.

The most recent case is the case of Meor Atiqulrahman bin Ishak v. Fatimah binti Sihi & 2 Ors. (2006) 4 AMR 557 (F.C.) (I believe it is this case that has brought me here). In that case, three schoolboys aged between 8 to 11 were dismissed from Government School for wearing turban as part of the school uniform to school in contravention with the school regulation. They challenged their dismissal on the ground that the school regulation was ultra vires the Federal Constitution, in particular, Article 11. For the students, it was argued that any law or regulation that restricts any practice of any religion is unconstitutional. For the Attorney General it was argued that a law or regulation is unconstitutional only if it prohibits a practice which is an integral part of a religion, following Indian authorities. The Federal Court dismissed their appeal. In so doing, writing the judgment of the Court, I rejected both the tests. Briefly, this is what I said:

".....whether or not a practice is or is not an integral part of a religion is not the only factor that should be considered.....I would prefer the following approach. First, there must be a religion. Secondly, there must be a practice. Thirdly, the practice is a practice of that religion....All these having been proved, the court should then consider the importance of the practice in relation to the religion....."

The next step is to look at the extent of the 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 circumstances under which the prohibition is made....

.....all these factors should be considered in determining whether the "limitation" or "prohibition" of a practice of a religion is constitutional or unconstitutional under Article 11(1) of the Federal Constitution."

Regarding the practice of wearing turban, my view was summed up in this short sentence: "Islam is not about turban and beard". In other words, it is cultural rather than religious.

The reactions to that judgment are interesting. Most, if not all, newspapers in Malaysia carried the news on the front page. The leading English language newspaper devoted the whole of the front page to it. It also came out with an editorial that begins with the following sentence:

" Federal Court Judge Dato' Abdul Hamid Mohamad in his landmark judgment on the case of three Muslim pupils expelled for insisting on wearing the turban to school, has done this nation and its Constitution a great service."

On the other hand, the opposition Islamic Party accused me of insulting Islam. I was told that a police report had also been lodged against me for allegedly insulting the Prophet (p.b.u.h.), I believe, when I said in the judgment:

"Islam is not about turban and beard. The pagan Arabs, including Abu Jahl, wore turbans and kept beards.....

I accept that the Prophet (p.b.u.h.) wore turban. But he also rode a camel, built his house with clay walls and roof of leaves of date palms and brushed his teeth with the twig of a plant. Does that make the riding of a camel a more pious deed than traveling in an aero plane? Is it preferable to build houses and mosques using the same materials used by the prophet (p.b.u.h.) and the same architecture adopted by him during his time? In Malaysia, Muslim houses and mosques would leak when it rains! There would be no Blue Mosque or Taj Mahal, not even the present day Masjid Al-Haram and Masjid Al-Nabawi, Alhambra or Putrajaya that the Muslims can be proud of! Again, is it more Islamic to brush one's teeth with a twig than using a modern tooth brush with tooth paste and water to wash in the privacy of one's bathroom?"

I took that approach because, to me, the Constitution is a working document, a living document. The country has to move on. There has to be some order, in school some discipline. In a multi-racial, multi-language, multi-religious and multi-cultural country, the last thing one would like to have, beginning in school, is polarization along those lines. To recognize every claim by everybody that a certain act is his religious practice and any infringement, though partial and temporary, irrespective of the circumstances under which it is made is unconstitutional, would throw the country into chaos: there will be no school, police or army uniform. Even provisions of civil and criminal laws and the provisions of the “Islamic Family Law” itself may be declared unconstitutional because some of the provisions may be contrary to the Shariah (Islamic law) or any of the many religions practiced in Malaysia. So, I laid down the tests to be applied when deciding the issue, based on the facts of each case.

If there is anything that can be learned from the Malaysian experience, I think, it is that there should not be one rigid formula that should be required to be applied under whatever circumstances, be it with regard to justice, democracy, equality, freedom human rights and so on. The basic requirements must be there. But the details, the frills, the approach, the emphasis should be left to the wisdom of the people who are directly affected by the results. Certainly, they know better what is best for them under the circumstances that they are in. They should have some flexibility to make adjustments as circumstances require.

In the final analysis, it is the people that matter, the people who exercise the powers, be it executive, legislative or judicial. Are they honest with themselves in what they do? If they are, the chances of things going wrong are minimal. If they are not, it is already wrong from the word “go”. To me, “transparency” is a poor substitute for “honesty”. “Transparency” is concerned with perception while “honesty” deals with truth. And truth always prevails, often admitted, usually as soon as the people involved retire and write their memoirs, indeed, from recent events, even earlier!

Thank you.

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