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CONTEMPORARY PROBLEMS AND CHALLENGES OF THE LEGAL PROFESSION AND THE JUDICIARY IN MALAYSIA

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Thank you for inviting me to your campus. At least I can say that I have been here before I retire. Jitra has a special place in my career and I have fond memories of Jitra. It was in the Magistrate's Court of Jitra that I first sat on the bench, in fact on the very day I reported for duty. I learnt the job from scratch in Jitra, tutored by Pakriasamy and Liang, the reliable Tamil and Chinese interpreters, respectively, especially during the first week. It was in Jitra that I came across the most precise and the most lucid synopsis of the cause of death written by a policeman on the cover of the Sudden Death Report File: "Sebab-sebab kematian: jatuh pokok petai naik tahan burung." But, that was in 1969.

Now, I am speaking in 2008, thirty nine years later. Of course, during the period, there have been tremendous changes. The Magistrate of Jitra is now the Chief Justice of Malaysia. The bachelor is now a grandfather. There was not a single law school in Malaysia then. I do not know how many there are now. There were less than a thousand lawyers in the whole of Peninsular Malaysia then. That may be the number of lawyers produced in a year now. Based in Kangar, Perlis, I then covered three courts, i.e. Kangar, Jitra and Langkawi. Now each of those courts has its own resident Magistrate, in fact Kangar has two. There was only one law report, the Malayan Law Journal with two very slim volumes a year. Judgments were from one and a half to a few printed pages. Compare with the number of law reports, the length of the judgments and the number of judgments reported per year now.

Cases, even murder cases were simple. A typical case was something like this: two cousins quarreled over the boundary of their inherited rice fields. There was a fight. One killed the other. The killer surrendered himself at the police station with the parang. Nothing like the Althantuya trial.

One of the few cases that drew public attention was when an ex-Magistrate, a royalty, armed with a shot gun, went to look for an officer in the Land Office, Alor Setar. Failing to find him, as the officer had escaped by the back door, the ex-Magistrate went out of the office and fired at the clock tower, damaging the clock. He was charged under the Minor Offence Ordinance. He pleaded guilty, was convicted and fined RM50! That was already big news then.

We live in a different world now. You know what it is like. A lot of things are better now, but there are new problems and new challenges that you have to face. But, being children of this era and graduates of this millennium, certainly you are prepared to face it. Indeed, you have no alternative but to prepare yourselves to face it, if you want to survive. What is clear now is that you will face stiff competition whether in getting jobs or in your practice, if you choose to practise. To get into the Legal and Judicial Service, for example, you will have to compete with thousands of your contemporaries. Certainly, the service will only choose the best. If you are among the top, jobs may be looking for you. If you are not, you will have to improve yourselves in order to attract the attention of you prospective employers.

What do they look for? Let me give you some tips. First, they will look at your academic credentials. In so doing, besides your grade, they will pay particular attention to your spoken English. Whether we like it or not, the language of the profession, whether in the public or the private sector, is English. It is more so in the private sector. They will see how you present your ideas or your case. After all, you are a lawyer, words are your ammunition and speech is the means. Of course, such requirement is not necessary if you were a veterinary doctor because a veterinary doctor does not even have to convince the dog or the cat before injecting it or putting it to sleep. They will then look at your extra-curricular activities. They will look for someone who is assertive, outgoing and confident.

I don't know much about practice or running a law firm because I have never practiced myself. But, a few things that I came across when I was the Chairman of the Advocates and Solicitors Disciplinary Board that I think I should bring to your attention. I don't want you to make the same mistakes. There was one advocate and solicitor, a Malay girl, who got into trouble in the second year of her practice. Upon her admission she was offered partnership by another lawyer. Happily she accepted the offer. The "senior partner" was in full control of the firm, financially and otherwise. The client's account was not in order. The following year she could not get her practicing certificate. The senior partner could not be traced.

When I was the Chairman of the Advocates and Solicitors' Disciplinary Board, there was an average of two complaints against lawyers a day, holidays or no holidays. That was six or seven years ago. Of, course, many are without merits: they complained against their lawyers when they lose a case. In turn, the lawyers blamed the judge. Bear in mind that in every case, someone has to lose!

Coming back to the lawyers, what I am very concerned about is misdeeds involving criminal breach of trust of clients' money. There were also cases where lawyers, upon admission, opened their own firms. Since they could not make ends meet, they misappropriated client's money. In one case it was only about RM6,000.00. He got struck off the roll. So, my advice is, if you want to practice, it is better to be an assistant first, if possible try to get into a big firm. You can go on your own later.

Law practice is very varied. Not everybody is suited for everything or the same thing. If you are too timid and you cannot stand the pressure of litigation work, stay in office and do solicitor's work. If you like the limelight, you enjoy arguing on your feet and you think you are good at it, try litigation. Even in litigation, you will find that you may be better in one thing, and not so good in another. Some lawyers are good at cross examination of witnesses but not that good in civil litigation. You will find out quite soon what you are more suited for and you should make full use of it. Even now you may already have some rough idea what kind of job suits you best.

The fact that you are a graduate in law does not necessarily mean that you will have to practise law for a living. After all, graduates in philosophy do not earn a living as philosophers. There is no limit to things that you can do. But, whatever you do, you will find that the discipline, especially the ability to analyse, to think, to apply and to make decisions, which is part and parcel of working life, is useful.

I observe that three main causes of downfall of lawyers are dishonesty, greed and living beyond their means. I have told this story a few times, but I think it is worth repeating. A lawyer, on being called to the bar was heard boasting: "I'll be a millionaire in two years". Well, I do not know whether he did become a millionaire in two years. But I know that he was suspended within about that period. On the other hand, I remember reading Lord Denning saying that, in his days, if in the first two years as a barrister you earn enough to buy two hot meals a day, that is good enough. That, I believe, is partly because of the split profession in England. You are better off here because you can do both the work of a solicitor as well as that of a barrister.

<u>The Judiciary</u>

Never in the history of Malaysia, is the judiciary so much in the limelight, albeit for the wrong reason. And I, fortunately or unfortunately, take over the helm at the time when the public perception is at its lowest in the history of the Malaysian judiciary, since Merdeka. My biggest challenge is to revive the image of the Judiciary. In this respect I notice a very close relationship between the Bar and the Bench, albeit for the purpose. That is why in my inaugural speech, I made this remarks:

> "In this regard, I would also like to draw the attention of lawyers that, from my own observations, there is hardly any allegation of corruption or wrong doing involving a judge or an officer of the court in which at least one lawyer is not involved. I appeal to the Bar Council to co-operate to discipline their members while I will do my part to discipline the members and officers of the Judiciary."

All these years, like almost all courts in the world that adopt adversarial system, uphold the rule of law, practice natural justice, especially the right to be heard, the main problem was delay in the disposal of cases. There are many reasons for the delay. I do not propose to mention all of them here. Suffice for me to say that delay in the disposal of cases is not caused by one party, e.g. the court alone. Everyone involves in a case, be it the court, the lawyers, the parties and the witnesses, even the procedure

may cause delay. In fact some of the reasons for the delay are intentional. A party with a bad case, may try to delay proceedings by making all kinds of interlocutory applications. Each application is like another case. There may be numerous such applications in one case. Whether they have merits or not, the other party would need time to reply to the affidavits and there would be counter reply and further reply. Like it or not, the court will have to hear the application and decide on it. Once it is decided, the losing party will appeal. The matter would be going up and down the whole hierarchy of the courts a few times before the main suit is heard and decided and the appeal process sets in again. Even when it is all over, they will try to have the case reviewed. That same process may repeat in the execution stage.

We have been thinking very seriously how to overcome this problem. One suggestion is to abolish appeals in interlocutory matters. It sounds simple. But it may lead to injustice in bona fide cases. It appears that the only way is for the application for leave to appeal in such matters to be heard very promptly, judges should be very strict in granting leave in such applications, if allowed, priority should be given for the hearing of such appeals. A party who keeps filing frivolous applications should be penalized with a special fee to be paid to court for wasting the court's time and resources besides costs to the opposite party. But the last-mentioned suggestion is not easy to implement. We will have to look as how Singapore does it. I understand that Singapore has something like that.

Early this month, I spoke at the Employment Law Conference. I traced the development of administrative law in Malaysia vis-à-vis Industrial Court awards from the time when the court would only allow judicial review on the ground of error of jurisdiction until now when even the merits of the award comes under the scrutiny of the court. You may look at it as development of administrative law in Malaysia and some may even claim to be the champion. You may look at it as getting lost in the legal jungle and forgetting the original destination. I posed the question whether in "developing" our administrative law, following the development in other Commonwealth countries, sufficient attention was paid to the provisions of the Industrial Relations Act 1967 and the objective of the establishment of the Industrial Court. I would like to pose that question to you too. Whatever it is, the "side effect", as I call it, is delay in the settlement of disputes.

Now, besides delay, there is a new problem, which in my view, is more serious. This concerns the image of the Judiciary, the integrity of the Judges and the negative perceptions of the public towards the Judiciary. In this respect, we hear calls for the establishment of a tribunal for the appointment of judges. While that is a policy decision for the government to make, the only comment that I would like to make now is that whatever system we have, in the final analysis, it is the men who implement the system that matters. It depends on what do you look for in a candidate. I always say that we reap what we sow. If you plant "pisang kelat" you should not expect the fruit to be "pisang emas".

<u>Civil Court v. Shari'ah Court</u>

The Constitution was made 50 years ago at the time when the Muslims in the then Malaya were mostly Malays living in rural areas working mainly, as farmers, rubber tappers and fishermen. Marriages were usually within the village or the district. Inter-marriages were very rare. Conversions to Islam were equally rare. Indeed, at that time anyone who converted to Islam "became a Malay" ("masuk Melayu"). "Harta sepencarian" was confined to small plots of rice land or rubber small-holdings in the same District or State. The Constitution was drafted under those circumstances and it was to cater for such conditions that the syari'ah court was established. No one then could foresee the problems that would arise regarding the administration of the syari'ah court (e.g. as a result of it being a State court) and the jurisdictional issues involving the syari'ah and the civil court and non-Muslims involved in a matter falling within the jurisdiction of the syari'ah court.

Now, fifty years after independence during which period Malaya had become Malaysia. The country that was an agricultural country has transformed into an industrial country. With better education and economic development, the Malay-Muslim society itself has transformed. Inter-state population movement is common. Inter-state marriages and inter-marriages are a common occurrence. Conversion to Islam and re-conversion happen more frequently. "Harta sepencarian" now includes shares and bank accounts. In other words, the conditions have drastically changed.

As a result, jurisdictional problems that had not been envisaged have arisen. First, a party to a proceeding in which Islamic law issues are involved may be a non-Muslim or a limited company. (Is a limited company "a person professing the religion of Islam"?) In such a case, while the civil court has jurisdiction over both Muslims and non-Muslims, it may not have jurisdiction over the Islamic law issue. In any event the civil court does not want to pretend to be an expert in Islamic law. The shari'ah court does not even have jurisdiction where a party is a non-Muslim, to start with. Secondly, in a particular case, there may be both Islamic law issues and civil law issues e.g. land law, estoppels, adverse possession and waqf as in G. Rethinasamy v. Majlis Ugama Islam Pulau Pinang & Anor. (1993)2 MLJ 166. Which court is to decide in such cases? Even if both parties are Muslims, those civil law issues are outside the jurisdiction of the shari'ah courts. In any event, when do shari'ah court judges become experts in the land law and the English rules of equity? Certainly, we do not want a situation where:

> "Ustaz cuba mentafsir Perlembagaan.
> Peguam cuba mentafsir Al-Qur'an."

These are not matters that the courts can solve as the courts owe their jurisdiction to statutes. It is for the Legislature to step in, to decide as a matter of policy what should be the solution and legislate accordingly. In the meantime, where possible, we have suggested a double proceeding, one in the civil court and another in the syari'ah court before a final decision may be made. This will causes delay and incurs unnecessary expenses. I do not think I will see it happen before my retirement. And, what is sad is that, what actually is a technical legal problem has taken a different dimension. People have taken sides along religious and ethnic lines. It has become as some kind of

"crusade" or "jihad". It appears that some groups are taking advantage of the situation. In this country, that is a very dangerous thing to do. I hope that the government will decide, as a matter of policy, to which court such cases should go and make the necessary amendments to the law, including the Constitution, wherever necessary.

There is another point that crossed my mind this morning as I was looking out of the window of my room. A doctor who teaches in the medical Faculty himself treats patients. A surgeon himself carries out operations while teaching his students how to do it. But a law professor or lecturer only teaches. He or she does not practice law. On the other hand, one of my daughters told me when she was at the London School of Economics and Political Science, her international law professor, a Queen's Counsel, would go to the House of Lords in the morning to argue the Pinnoche case and lecture to them on extradition in the afternoon. Of course, he did that as a Queen's Counsel. He, like the doctors and the surgeons, have the benefit of the actual practice of the subject that they teach. Unfortunately, our law professors and lecturers don't.

I think, to give our law professors and lecturers a greater perspective and experience, we should find a way to enable them to practice law while teaching it. Teaching and practicing are two different things. Such an arrangement, I think, would benefit the professor or lecturer as well as the students.

With that experience, they should then be eligible for consideration to be appointed as judges. As I said in my minority judgment recently, perhaps it is time that law professors and lecturers be made eligible for appointment as judges. If, as matter of policy, it is thought so, then the Constitution should be amended to provide for it. As I said in that judgment:

> "It is not right for the court to rewrite the Constitution under the pretext of interpreting it to sneak in someone under the two existing categories when he or she does not really belong to either of them."

Perhaps the College of Law, Government and International Studies, Universiti Utara Malaysia will undertake to put up a paper as to how to implement this idea.

Thank you.