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# Administration of Justice: Time for a Paradigm Shift?

By

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A Subordinate Shariah Court Judge who, I believe, is a graduate in law and Shariah, once told me of this incident. There was an application for an injunction before him under the Islamic Family Law Enactment. Knowing that injunction as a remedy has its origin in the Common Law of England and that there were no precedents from the Syariah Courts, he applied the principles laid down in American Cyanamid Co. v. Ethicon Ltd. (1975) 2 W.L.R. 316.

When his superior came to know about it, the superior Judge was furious. "Why must you follow a judgment of the Civil Court?", he asked. "What principles am I going to follow?" the junior Judge replied. "There are no decisions of the Syariah Courts on the subject." The senior Judge replied, "Ikut firasat." (follow your "firasat").

Before coming here, in order to be sure of the meaning of the word "firasat", I checked it with two Malay dictionaries. They both give the same meaning. But, as the Kamus Lengkap also gives the meaning in English, I shall quote from it:

> "firasah/firasat - art of judging character or the future from marks on the face, body, etc.; presentiment, premonition, feeling that something is about to happen after seeing signs; marks on the face, body etc. which reveals a person's character".

So, when we talk of "paradigm shift", I hope we are not talking about a shift from deciding cases based on law and established principles to one based on "firasat". How is anybody going to argue in an appeal that the Judge's "firasat" is wrong? How are you going to advise your client whether he has a good case or not? Perhaps you will have to rely on your "firasat" of what the Judge's "firasat" might be!

When we talk of a shift of paradigm, the first question that arises is: a shift from what to what or from where to where?

I do not think we can clearly say that there is a stereotype view or stand amongst Judges on similar issues. You can see that from their judgments.

To which direction should there be a shift? One should remember that whatever view he holds on an issue, his view is not the only view. He may want the paradigm to shift his way. Others want it to shift their way. For example, even now there is a strong pressure coming from a certain group that the court should interpret the words "Islamic law" in the State List of the Ninth Schedule of the Constitution to mean Islamic law in toto which means that the State Legislature may legislate on all laws, including criminal law, contract, commercial law etc. Only last month, at a seminar that I attended, a participant suggested that, in matters of faith of a child, the civil court should always decide in favour of Islam. Some of you may find that proposition shocking. Yet, others consider it as a religious duty over which there should be no compromise.

We are against the Executive influencing Judges in deciding cases. The question is, should that not apply to other groups as well?

Last May, I met a Magistrate from Australia. He was not a young man like our Magistrates. He told me that of late, in Australia, Judges had been appointed from certain groups to represent the views of those groups. He thought that was not right. I share the same view. Judges should not be sitting on the bench to represent any group.

Speaking for myself, I think it is better that a Judge decides according to the facts and the law as it is whether or not the decision is popular with either party or any group. After all, when a Judge decides, one party is bound to be dissatisfied. Quite often, both parties are not satisfied. That is why the Rules provide for cross-appeals. I remember the late Tun Suffian saying: "When both parties are not satisfied, it means that we are independent."

On judicial review, (here I am referring to awards of the Industrial Court,) in spite of the amendments to the Industrial Relations Act 1967, in particular, sections 33A and 33B in 1980, we have gone quite far, from South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Peoducts Manufacturers Employees Unhion &Ors. (1980) 2 M.L.J.165 (P.C.) to R. Rama Chandran v. The Industrial Court of Malaysia (1997) 1 M.L.J. 145 (F.C.), and more. The question is, before going any further, should we not stop to ponder its justification?

There is a purpose for which the Industrial Court was established. The very reason why the Industrial Court was established was because it was thought that the court of law was not a suitable forum to settle such disputes. It was to do

away with the rigidity of the procedure, the rules of evidence and even the factors to be considered in making an award. So, should the court of law, through judicial review, introduce the technicalities of the court of law that the establishment of the Industrial Court was meant to avoid and, in so doing, turning judicial review into an appeal, or more? See Telekom Malaysia Kawasan Utara v. Krishnan Kutty a/l Sanguni Nair (2002) 3 M.L.J. 129 (C.A.).

The same can be said about administrative and quasi-judicial decisions of government departments, domestic tribunals, disciplinary boards and others. No government department, no company can and should be expected to follow rigidly the decision making process of a court of law. It just won't work. What is most important is that the decisions should be fair to both parties, the employer and the employee.

In the days of global competition, efficiency is the pre-condition to survival. And there can be no efficiency without a dedicated, hardworking and disciplined workforce. But, at the same time, no employer should be allowed to short-change or exploit the workers. The same can be said about the public service.

Every individual has his rights. But, there is no right without responsibility. No individual lives by himself. Therefore, the rights of an individual should be equitably balanced with that of the society at large.

As a general statement, I believe that no Judge is a Parliament. Even the court is a creation of statutes. Its jurisdiction is as provided by Federal Law. That is what Article 121 says. Therefore, the liabilities and the remedies of a party should be determined in accordance with law. The court of law is not a complaints bureau.

I also believe that one should not try to achieve through the judiciary what he should but could not achieve through political means. To do that is to politicize the Judiciary. Once the court enters that arena, it is going to set a very dangerous precedent. No one should be too happy if it does. Today, it may work in your favour and tomorrow against you.

We talk about the independence of the Judiciary, the separation of powers and check and balance.

I do not think the Judiciary is independent if it leans towards one party or group or the other. That is bias, not independence.

Separation of powers requires the three bodies to have mutual respect of each other's jurisdiction. It does not mean that while the Executive should not encroach into the jurisdiction of the Judiciary, the Judiciary may do the reverse, except as provided by law.

Check and balance does not mean taking a confrontational stand against each other. It does not mean that the Judiciary should block what the other two bodies do, if it does not like it. Check and balance means that each body should not be allowed to exceed its jurisdiction. So, if a law is unconstitutional, the Court should strike it out. If an Executive act in unlawful, it should be quashed. Not otherwise. Just as the Legislature and the Executive should act in accordance with law, so is the Judiciary.

We must always remember that Malaysia is Malaysia. Malaysia is not a part of England and she is no longer a British Colony, or of any other country. So, when interpreting such term as "public policy in Malaysia" as provided by section 5(1)(a)(v) of the Reciprocal Enforcement of Judgments Act 1958, for example, it is the public policy in Malaysia that we should be concerned about. This is because the public policy in one country may be different from that in another country. Even the public policy in the same country may be different at different times. We may consider decisions of courts in other jurisdictions. We may adopt the principles, if they suit us. But, I do not think that the courts in this country should simply quote a passage from a judgment from another jurisdiction and apply it without considering the facts of that case and the factors and the circumstances prevailing in the country at the time the judgment was delivered and without considering the facts of the case before it and the factors and the circumstances prevailing in our country at the time the decision is to be given.

I also do not think that, as a matter of law, what the public policy in Malaysia should always fit into the pigeonholes established by the courts in other jurisdictions. The stage of development of that country and our country may be different. The political and social problems may be different. Attitude of the general public and the government towards religion may be different. The national interest may be different. When a foreign court decides on the public policy in that country, it considers the circumstances prevailing in that country, not Malaysia's. The foreign court is not concerned with Malaysia. But we are, when we are deciding a case in Malaysia. I had occasion to express my view on this in Banque Nasionale De Paris v. Wuan Swee May & Anor. (2000) 3 M.L.J. 587. It is a High Court judgment.

On public morality, I believe that we should always take into account the cultural, moral and religious values on the people of Malaysia. It is for that reason that I had cautioned against relying on cases involving "live-in couples". To me, such an arrangement should not be recognized by the court (unless Parliament legislates otherwise) as creating a matrimonial relationship. Because, once that is accepted, the whole institution of marriage breaks down. It is against our cultural, moral and religious values. Thus, in Sivanes a/l Rajaratnam v. Usha Rani a/p Subramaniam (2002)3 M.L.J. 273 (C.A.), I said this:

> "I am of the view that the courts in this country should not treat such a relationship as in Dennis v. Mc Donald (1981) All.E.R.

> 632 as a “matrimonial relationship”. There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either married or not married. There is nothing in between. A marriage is either monogamous or polygamous. There is nothing in between.”

I also said:

> “If a couple chooses not to get married as provided by our law, they should not be talking about a “matrimonial relationship”, “matrimonial home”, “conjugal rights”, “matrimonial proceedings” or “division of matrimonial assets”. Those terms are exclusively for lawfully married couples in accordance with our laws.”

I have so far taken the oath of office four times that I “will faithfully discharge my judicial duties in that office to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its constitution” as provided by the Sixth Schedule and Article 124 of the Federal Constitution. I will try to keep to my oath as best I can.

Thank you.

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