PARALLEL PERSPECTIVES FROM MALAYSIA AND THE UNITED KINGDOM*

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I INTRODUCTION

Prior to the establishment of the Faculty of Law, Universiti Malaya in 1972 as the first law school in Malaysia, all our law graduates mostly qualify in the United Kingdom – specifically in England. Today, many of our graduates still do qualify in England but we have since established numerous local law schools to produce our own home-grown graduates. This fusion of backgrounds is a good thing because it keeps alive the variety of experiences and characters we have at the Bar and Bench.

I was accepted into the Faculty of Law, Universiti Malaya in the year 1978, and so I had the privilege of being the 7th intake of the Faculty. My years at the Faculty which I feel flew by far too quickly, were my most formative years. I say this for several reasons.

For one, I forged invaluable friendships with many people which have remained alive to this day and some of which have carried me through my legal career – one such relationship being the one I had with a classmate and who is one of my most ardent supporters – my husband.

I learned a great deal in law and in life from the towering figures who founded much of the legal structure and learning that we have today. Revered names such as Tan Sri Professor Ahmad Ibrahim, Tan Sri Professor Visu Sinnadurai (who I am pleased to welcome in the audience), and of course Dr Alima Joned who was my lecturer – and who I am so pleased to see on the virtual stage today – I must say that I am a very proud alumna.

Indeed, our alumni has achieved considerable feats and have held numerous significant and key national-level positions. We have had and still do have in our ranks alumni who are senior and respected members of the Bar, past and present Attorneys-General, PARFUM's Patron – Tun Raus Sharif as the first alumni Chief Justice, and most recently, the first ever Prime Minister from the Faculty. Even the Judiciary is proud to have within it graduates of the Faculty alumni throughout the Court hierarchy. The Top 4 senior-most judges are alumni as is the Chief Registrar of the Federal Court.

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Graduates from English universities are equally revered. Speaking specifically in the context of the Middle Temple, our immediate past Attorney General holds such a distinction. We have also senior and highly-regarded lawyers such as Master Cecil Abraham who is present today and on the judicial side, Justice Nallini is an astute example of the kind of quality Middle Temple has produced.

In that sense, both graduates from the Faculty as well as those from the Middle Temple are on equal footing in terms of their calibre. I am therefore most pleased that there is this tripartite collaboration between the Middle Temple, PARFUM and TMMTA as a testament to our strong stature and lasting friendship.

I also notice that the heads of the Malaysian alumni bodies of the other three major English Inns are also here with us today, and so I would like to take this opportunity to welcome you on board to be a part of this engagement with PARFUM and TMMTA.

The theme: 'Parallel Perspectives from Malaysia and The United Kingdom' is also most relevant to us. As we transition and acclimatise ourselves to the new conditions brought about by the 4th Industrial Revolution and the Digital Age, this cooperation between our institutions is not a choice but a timely necessity.

I note with great interest the two topics that will be the subject of discussion today. The first is 'The Pandemic, Virtual Courts, Zoom and Then?'. The second is 'The Conundrum of Cross-Legal Culture – To be Feared or Embraced?'.

I am sure that our erudite speakers have much to say on these two topics, nevertheless please allow me to share some general thoughts on the topics.

II DIGITALISATION, ACCESS TO JUSTICE AND THE RULE OF LAW

The pandemic began in late 2019 but we only witnessed the full debilitating effect of it on our justice system when lockdown measures were imposed in March 2020. During that time, we had already embarked on the course of digitalising our judicial processes but it was apparently not enough. In essence, the pivotal aspects of our justice system such as trials and hearings were always conducted physically. Digitalisation was only to the extent that it related to ancillary processes such as electronic filing and remotely conducted case management.

To be clear, even before the pandemic hit, we had already decided that the Courts should become completely paperless in stages and to this extent, hearings – in the appellate courts at least – became less bulky.

The problem, however, has been that change is always subject to inertia and so it had to be introduced gradually and integrated slowly. The Covid-19 pandemic, though a global health tragedy, has brought about some positive developments as a major impetus or catalyst for change.

With the lockdown measures in place, we had a stronger reason to embark on complete digitalisation to the extent that hearings, and now even trials, can take place either completely virtually or at least in part. There was, no doubt, resistance at first but all parties eventually came around and accepted the change, especially after the mechanism was legislatively endorsed.

These changes are important and are perhaps gaining traction because their profound effect on access to justice – an integral facet of the Rule of Law – have become all the more tangible. The Rule of Law requires that justice must be done according to valid law with primary emphasis on the notions that everyone is equal before the law and entitled to an effective remedy administered by an independent judicial system.

The fact that Courts have now taken to the online platform allows lawyers from all walks of life to appear before the Courts irrespective of physical limitations meaning that litigants have a better choice of counsel and should litigants choose to represent themselves, they now have greater, more direct access. The shift to an online venue, in my considered view, further bolsters judicial independence because it sends the clear message that the Courts are free and ever ready to perform no matter the circumstances but subject of course, to the laws and regulations in place. In other words, if the pandemic and measures passed in reaction to it indirectly impeded access to the Courts, the Courts remained ever ready to come down to the public while keeping the system running.

Needless to say, the online mechanism is a new ball game altogether and is riddled with its own flaws and complications especially when it involves trial, witnesses and perceived problems such as the oft-missed 'personal touch'. Detractors and critics are quick to point out that a fact-finder cannot read a witness's unspoken words or body language in an online setting in the same way he or she can read them in a physical one. I accept that these imperfections must be ironed out at the soonest and it is talks and discussions like these that help build the foundational ideas for future developments.

III THE CONUNDRUM OF CROSS-LEGAL CULTURE

This brings me to the second sub-topic on cross-legal culture. From my understanding and in our context, the word 'cross-legal' refers generally to a situation where rules and principles established by or within one jurisdiction are imported into and sometimes, applied with modification by another jurisdiction as a foundation or justification for that second jurisdiction's judicial decisions. The word 'culture' in 'cross-legal' suggests that the reliance on 'cross-legal' is the norm rather than a measure of last resort in select cases.

'Cross-legal' culture is most prevalent in cases where there is a paucity of authority or precedent within that country's own jurisprudence, such that references to another jurisdiction's case law makes for a handy guide. In the specific context of Malaysia and its legal history with Britain, many of our legal principles comprise remnants or reworked importations from the British legal system. Examples include our Evidence Act 1950, Contracts Act 1950, the Penal Code, Criminal Procedure Code and similar legislation which were developed by the British as a means to unify the application of the English law with modifications. These laws remain law to this day not just in Malaysia but other jurisdictions like India and Singapore.

In modern times, we have come to legislate our own laws or reworked old laws by referring not only to English laws but the laws of other countries to meet our own peculiarities. Our land law system – the Torrens system – is from Australia as is our company law legislation. Our Federal Constitution is itself a creative amalgamation and

upgraded version of the American and Indian Constitutions and the written constitutions of many other States that gained independence before us.

Given the divergence in our laws, legal culture and legal system, the crucial question that this webinar seeks to address is whether such a culture ought to be embraced or feared. I have always believed that we only fear what we do not understand and so to fear cross-legal culture is obviously out of the equation.

In Malaysia, given the complex nature of our laws and legal history we have good reasons to develop our laws by reference to cases from other jurisdictions. One example of this is the decision of the Federal Court in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor*[1] which developed the tort of harassment in Malaysia by building on the English jurisprudence on nervous shock cases, such as the landmark decision in *Wilkinson v Downton*.[2] The makings of the tort were foundationally the same but subject to local guidelines and developments. It is one of the many useful examples of how cross-legal culture, particularly with England, has benefited us.

That said, there are also serious implications when importing foreign jurisprudence wholesale without first understanding the context within which they were made. For instance, the laws and constitutional system of the other country, the context upon which those cases were decided, and so on, are all relevant when deciding whether the *ratio decidendi* of those cases are relevant to Malaysian law. It calls for caution.

In any case, it cannot be gainsaid that reliance on cross-legal culture in the modern sense has become increasingly relevant in a borderless world. Ideas are shared at a faster pace and our problems tend to converge as we all reach the same page.

The onslaught of this pandemic is one such example in which almost all jurisdictions are turning to the online platform and as such, the hiccups and teething problems we face when implementing them will bear some degree of similarity. Whether we are dealing with a common problem or a complex issue with its own set of intricacies, we have to curate a fine balance on the reliance on cross-legal culture. Perhaps our speakers can shed some light by suggesting on how we should draw that line, from the immense experience they have gained in their respective fields.

IV CONCLUSION

Whatever be our position on the prevalence of cross-legal culture or the boom in digitalisation, none of us can ignore the fact that we are all connected now more than ever before. This tripartite collaboration is therefore a step in the right direction as it is a manifestation of our willingness to work and learn together in spite of the physical limitations we face.

In this vein, I would like to add that this webinar also acutely highlights the importance of alumni institutions. Most of us graduated from our *alma maters* a long time ago but I do not see that as discharging us from the responsibility of ensuring that the next generation is given the same, if not a better opportunity than us. It is through

[1] [2016] 4 MLJ 282.
[2] [1897] 2 QB 57.

engagements such as these that we can give back to the institutions and people who made us what we are today.

With that, I bid PARFUM, the Middle Temple and TMMTA congratulations for hosting this event. I would like to thank our speakers Masters David Joseph and Michael Bowsher for logging on from England and also to Dr Alima Joned for logging on at what are perhaps ungodly hours there in the United States.

I would also like to record my sincerest appreciation to all the participants from the United Kingdom, Malaysia and other jurisdictions for attending as your attendance is a recognition of the importance of the discussions that are about to unfold.