THEME:

"Recent Developments (2004-2009) in the Legal Systems of ALA Member Countries"

Murad Ali bin Abdullah
Advocate & Solicitor, High Court of Malaya (Peninsular Malaysia)
Life Member, ALA Malaysia
Chairman, Tax Committee, LAWASIA

EVEN WHEN THE LAW IS AN ASS, THE JUDGES ARE NOT, AND JUSTICE NEED NOT BE : Welcome to the Malaysian Tufail case

1. Legal Issues

Early this year, in a celebrated and decorated case known as the Tufail case, two legal issues came up for determination before the Federal Court of Malaysia:-

i. Whether an Advocate & Solicitor from Peninsular Malaysia is entitled to appear as Counsel in an appeal to be heard in Peninsular Malaysia arising from a matter originated in the High Court of Sabah and Sarawak at Kuching, East Malaysia?

ii. Whether an Advocate & Solicitor from Kuching, East Malaysia is entitled to appear as Counsel in an appeal to be heard in Peninsular Malaysia arising from a matter originated in the High Court of Sabah and Sarawak at Kuching, East Malaysia?

2. Brief Facts

The Appellants at the Federal Court of Malaysia are Dato' Haji Mohammad Tufail bin Mahmud and 4 others.

The Respondent is Dato' Ting Check Sii

The legal issues were derived from a preliminary objection at the Court of Appeal sitting in Peninsular Malaysia hearing appeals related to the decision of a High Court heard in Kuching, East Malaysia.

The substantive matter in that Appeal was with regard to the dismissal of a Petition and another against the dismissal of a Winding-Up Petition under the Malaysian Companies Act 1965.

At the High Court of Sabah and Sarawak at Kuching in East Malaysia, solicitors and Counsels for both parties, were Advocates & Solicitors having their registered practice in East Malaysia.

In the Court of Appeal sitting at Putrajaya, Peninsular Malaysia, a Peninsular Malaysian advocate was engaged by the Respondent to lead other advocates from East Malaysia. Hence, the preliminary objection.

3. Court of Appeal Decision

The same preliminary objection was raised first at the Court of Appeal, sitting at Putrajaya, Peninsular Malaysia. The Court of Appeal held that :

a. Only a person admitted to practice as an Advocate at the High Court of Sabah and Sarawak, East Malaysia may appear before the High Court and the Federal Court when it sits in East Malaysia to hear appeals from East Malaysia:

b. There is a glaring omission in the Law about the right of audience before a Court of Appeal in appeals arising from the decisions of the High Court of Sarawak, East Malaysia:

c. The Sarawak Advocates Ordinance has no extra-territorial effect i.e. does not apply to appeals posted for hearing at Peninsular Malaysia.

d. The Legal Profession Act 1976 which governs Peninsular Malaysia Advocates comes into play when the Court of Appeal sits in Peninsular Malaysia: and

e. Wherefore only a Peninsular Malaysia Advocate has the right of audience before the Court of Appeal when it sits in Peninsular Malaysia.

4. Leave

The Appellant sought leave from the Federal Court of Malaysia to bring a Motion before it to clarify the ruling made by the Court of Appeal.

Since this issue affects all Advocates and Solicitors in Peninsular Malaysia and East Malaysia, leave was granted by the Federal Court of Malaysia.

5. History

Before the formation of Malaysia (31st August 1957) the Courts in Sabah (North Borneo) and Sarawak were:

(i) the Supreme Court of Sarawak, North Borneo and Brunei (which consists of the High Court of Sarawak, North Borneo and Brunei) and a Court of Appeal of Sarawak, North Borneo and Brunei;

(ii) the lower courts i.e. the Magistrates' Court, and the Native Court.

Rule 3 of the Sarawak, North Borneo and Brunei Court of Appeal Rules provides that:-

(iii) the place where Court of Appeal shall ordinarily sit depends on where the matter arises;

(iv) advocates admitted to practice under the Advocates Ordinance have exclusive right to practice in Sarawak and to appear and plead in the Supreme Court and also in all subordinate Courts in Sarawak.

At this juncture, it must be noted that the safeguards and assurances provided to Sarawak, and in this case their advocates' livelihood, were critical and pivotal to secure the participation of Sarawak in the subsequent formation of Malaysia.

The Cobbold Commission which sought the views of the people of the Borneo states whether they want to be part of Malaysia showed that the people had fears. Fear of:

(i) Substitution from one colonization to another;

(ii) Being taken over by Federation of Malaya (now Peninsular Malaysia);and

(iii) Submersion of their individualities.

Those fears were addressed through Inter-Governmental Committee with special constitutional arrangements and safeguards for special interest of the people of the

Borneo states being incorporated in the Federal Constitution of Malaysia and reflected first in the Malaysia Agreement concluded between United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak, and Singapore signed on 9.7.1963.

Malaysia was born on 16 September 1963, with Federation of Malaya, North Borneo (Sabah), Sarawak, and Singapore merging as one. Singapore took her destiny into her own hands in 1965.

The Malaysia Agreement provides that where it is not expressly provided for in the Constitution of Malaysia, then the Government of the Federation of Malaya, North Borneo, and Sarawak will take such legislative, executive or other action to implement the assurances, undertakings, and recommendations contained in the Inter-Governmental Committee Report. The right to practice law is one of the safeguards.

It was agreed that after the formation of Malaysia the exclusive rights of the East Malaysian advocates to practice in respect of East Malaysian matters in all courts would continue.

But today, with further change in law, the Federal Court of Malaysia is the appellate court of last resort for both Peninsular Malaysia and East Malaysia and whereas the Court of Appeal is the intermediate Appellate Court for both Peninsular Malaysia and East Malaysia.

Unfortunately pursuant to an amendment in 1965 via the Modification of Laws (Advocates) (Borneo States) Order 1965, the law was worded as follows:

> "Advocates shall have the exclusive right to practice in Sarawak and to appear and plead in the ***Federal court in Sarawak*** and in the High Court".

As a direct result of which, Sarawak advocates are being restricted to appear within the borders of Sarawak for Federal Court, and their right of audience before the Court of Appeals is silent.

6, The Decision of the Federal Court of Malaysia

The Federal Court, having taken cognizance of the history and the formation of Malaysia, propounded as follows:

a. Just because a Sarawak matter is heard outside Sarawak, it could not be the intention of the legislature that a Sarawak advocate would lose his right of audience;

b. Constitution being a living piece of legislation, its provisions must be construed broadly and not in a pedantic manner, and the Constitution must be interpreted with less rigidity and more generosity;

c. A Constitution is sui-generis. It calls for its own principles of interpretation, suitable to its own character. It must be construed in an ambulatory approach;

d. The Malaysian Constitution as it breathes today, carries enumeration and entrenchment of certain rights and freedom of both Peninsular Malaysian and East Malaysian people;

e. The rights of the people of East Malaysia, including advocates cannot be reduced or encroached upon after the formation of Malaysia by whatsoever error, mistake or act save for voluntary and willful surrender or change coming from East Malaysian people themselves, including lawyers;

f. The unfortunate verbiage in the amended Modification of Laws (Advocates) (Borneo States) Order 1965 i.e. the phrase "Advocates shall have the exclusive right to practice in Sarawak and to appear and plead in the Federal court in Sarawak and in the High Court" must be taken as a drafting error;

g. This interpretation will do justice, preserve the rights and freedom of the people of East Malaysia, lawyers included and strengthen the state of Malaysia, as envisaged in the Cobbold Commission Report, the Inter-Governmental Committee Report, Malaysia Agreement, Malaysia Act Advocates Ordinance of Sarawak, and all culminating into Article 161B of the Constitution of Malaysia;

h. The Legal Profession Act which governs Peninsular advocates has no application to the rights and freedom of East Malaysia advocates;

i. The right to be heard is an integral part of the rules of natural justice, but the right to be represented by the counsel of one's choice is however conditional upon the laws regulating it;

j. And wherefore, the answer to the first legal question is in the negative and the answer to the second legal question is in the affirmative.

7. Remark

This “Tufail” case of Malaysia simply put, demonstrates that even when the law is an ass, Judges are not, and justice need not be.

And I take my hats off to the bench in this case, the new Chief Justice of the Federal Court of Malaysia Justice Tun Zaki Tun Azmi (who is also our ALA Malaysia President), the new President of the Court of Appeal of Malaysia Justice Alauddin Dato’ Mohd Sheriff, the new Chief Judge of Malaya (Peninsular Malaysia) Justice Arifin Zakaria, the Chief Judge of Sabah and Sarawak (East Malaysia) Justice Richard Malanjum and a Federal Court Judge Justice Zulkefli Ahmad Makinudin for this unanimous and glorious arrival of law and justice in Malaysia, and for keeping Malaysia intact.

Thank you.