THE MALAYSIAN JUDICIARY

YEARBOOK 2019

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Cover

"The Palace of Justice at night"

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Foreword

By The Right Honourable Tun Tengku Maimun binti Tuan Mat

Chief Justice of Malaysia

It is with the greatest pleasure that I welcome and present to you the Malaysian Judiciary Yearbook for 2019. Praise be to Allah for another remarkable year in the history of the Malaysian Judiciary.

Reflecting on 2019, I am honoured to be appointed the Sixteenth Chief Justice of Malaysia, succeeding Tan Sri Richard Malanjum. My appointment has been lauded by some quarters as being an achievement for the female gender, but as I have mentioned before, an appointment to the position of Chief Justice cannot and should not be determined or coloured merely by the consideration of gender. The pivotal role of the Office of Chief Justice and of a Judge is to ensure the proper and efficient administration of justice to all litigants and public in accordance with the law and its settled principles.

Moving forward, I reiterate my commitment to continue and further enhance the reform agenda initiated and implemented by my predecessor. On this note, I echo my predecessor's statement on the need for the legal

profession to embrace technology during his speech in the Opening of the Legal Year 2019 where he said:

> *"Technology is coming to the legal profession and we must embrace technology. There is no option, either we adapt or be dropped..."*
>
> *RH Tan Sri Richard Malanjum*
> *Opening of the Legal Year 2019*
> *11 January 2019*

The Malaysian Judiciary is committed to continue its initiatives and efforts to enhance the judicial and technological innovations across the Judiciary. The e-Review system where the preliminary case management of a particular case filed in court will be done online has been implemented in the Appellate Courts and the High Courts in Kuala Lumpur, Shah Alam and Penang. Work is being done to expand the e-Review system to all the High Courts in Malaya and the Subordinates Courts in Peninsular Malaysia. The Malaysian Judiciary is also exploring ways to embrace Artificial Intelligence ("AI"). Two areas have been identified, namely, data sentencing and personal injuries damages. The use of AI will help boost efficiency and consistency in sentencing and awarding damages. Apart from the enhancement of technological innovations, the Malaysian Judiciary will continue its efforts to enhance "access to justice" by serving the rural and remote communities in Sabah and Sarawak through the mobile court project as it is not feasible to set up physical court buildings in those areas. I had the opportunity to take part in one of the mobile court programs at SK Golong, Paitan in Sandakan, Sabah. It was a humbling and enriching experience and I am committed to give my continuous support for the program as "access to justice" is a very important part of the Malaysian Judiciary's framework.

The year 2019 also marked the official opening of the new Kota Kinabalu Court Complex which occupies 6.25 acres and a five-storey building housing 16 court rooms comprising five Magistrates' Courts, six Sessions Courts, four High Courts, a Federal Court/ Court of Appeal and a host of supporting offices and facilities. It is fully equipped with the Integrated Court System ("ICS") comprising the Court Recording and Transcribing System ("CRT"), Case Management System ("CMS"), Video Conferencing System, e-Review System, Exhibit Presentation System ("EPS") and e-Court Finance System ("ECF"). I am confident that the new premises would better serve the legal fraternity in Sabah and the society at large with timely dispute resolution and excellent court service.

On the international front, the Malaysian Judiciary actively participated in a series of collaborations with its counterparts in other jurisdictions. I had the privilege to lead the Malaysian Judicial delegation to attend and participate in several international events such as the 5th Joint Judicial Conference in Singapore, the Board of Members Meeting of the Association of Asia Constitutional Courts and Equivalent Institutions and the 3rd Indonesian Constitutional Court International Symposium ("ICCS") in Bali, Indonesia as well as the 41st ASEAN Law Association ("ALA") Governing Council Meeting and the 7th Council of ASEAN Chief Justices Meeting ("CACJ") held in Phuket, Thailand. On the CACJ, Malaysia has been tasked to lead the Working Group on Services of Civil Processes within ASEAN, which was set up to share best practices in facilitating the service of civil processes within ASEAN. The Working Group is studying the feasibility of proposing a standard and uniform method of service of civil processes among ASEAN member countries, either by way of treaty or a model rule in the ASEAN member countries' respective rules of court. Indeed, these events and institutions are a great platform for exchanging and sharing experiences and insights, and for collaboration and networking in areas of common interest within Judiciaries in other jurisdictions.

I also had the privilege to lead the Malaysian Judicial delegation in a visit to the U.S. District Court of the Southern District of New York, which was hosted by the U.S Department of Justice's Office of Overseas Prosecutorial Development Assistance and Training ("OPDAT"), U.S Department of State and Judge Loretta A. Preska of the Southern District of New York. The program was designed to strengthen bilateral judicial engagements and encourage the sharing of best practices. Following the visit, we are working on the plan to collaborate and work with the United States District Court for the Central District of California to hold a Judicial Officers' Internship Attachment Program. The program will be a platform for judicial

officers from Malaysia to understudy and observe the U.S Judicial Clerks when performing their duties, particularly in assisting the judges. Work ethics and processes found to be beneficial would be adopted for practice in the Malaysian Judiciary.

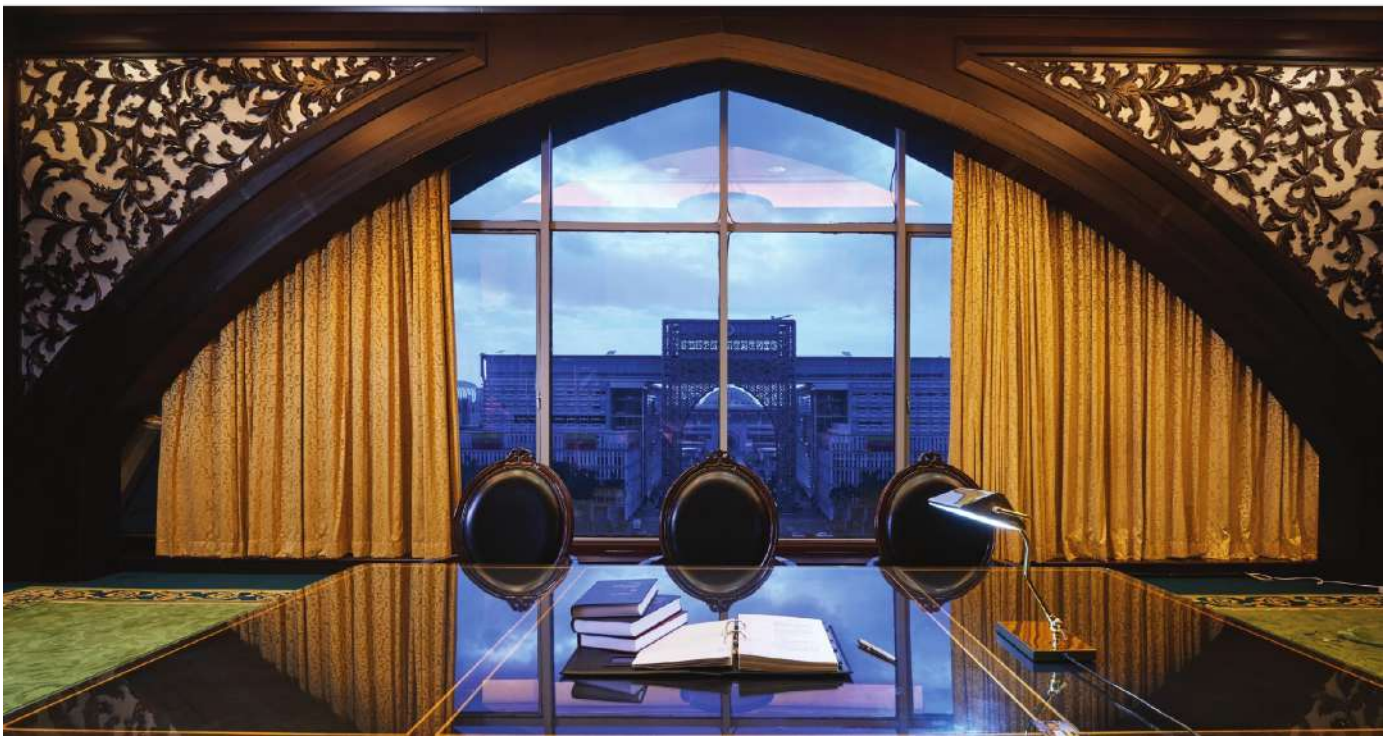
I acknowledge that the judicial transformations and reforms which were implemented by the former Chief Justices are a continuous process and require commitment. Certainly, such reforms would not have been a success without the dedication and cooperation of the judges, judicial officers and staff as well as the Attorney General and his officers, members of the respective Bars and all stakeholders. I wish to record my sincere appreciation to each and every one of them for their unrelenting support.

I would also like to express my heartfelt gratitude and appreciation to the former 6th Lord President of Malaysia, Tun Dato' Dr. Mohamed Salleh Abas and the former Federal Court Judge, Tan Sri Datuk Zainun Ali for sharing their valuable thoughts in this edition of the Yearbook. Also to Emeritus Professor Datuk Dr. Shad Saleem Faruqi, Justice Noorin Badaruddin, Justice Mohd Firuz Jaffril and Judicial Commissioner Dr. Shahnaz Sulaiman for their contribution in sharing their critical insights on their respective legal topic.

Finally, I wish to record my gratitude and heartfelt congratulations to the Yearbook Committee, led by Justice Nallini Pathmanathan who took over the responsibility from Justice Idrus Harun upon his appointment as the Attorney General of Malaysia, together with her dedicated team: Justice Mohd Zawawi Salleh, Justice Vernon Ong Lam Kiat, Justice Abdul Rahman Sebli, Justice Hasnah Mohammed Hashim, Justice Rhodzariah Bujang, Justice Azizah Nawawi, Justice Azizul Azmi Adnan, Mdm. Ilham Abd Kader, Mdm. Azniza Mohd Ali, Mdm. Wan Aima Nadzihah Wan Sulaiman, Mdm. Radzilawatee Abdul Rahman, Mdm. Suzarika Sahak, Mr. Nik Muhammad Azrin Hafiz Nik Mahmood, Mdm. Ng Siew Wee, Mdm. Rafiah Yusof, Dr. Iriane Isabelo, Mdm. Chang Lisia, Mdm. Ainna Sherina Saipolamin, Mr. Ahmad Afiq Hasan and Mr. Saifullah Qamar Qamar Siddique Bhatti. I am grateful for their laborious efforts and hard work in making this publication a success. I am also grateful to the publisher Attin Press Sdn Bhd for bringing this publication to light.

I hope that you will find this Yearbook as enlightening as I did. Enjoy your reading!

Tun Tengku Maimun Tuan Mat
Chief Justice of Malaysia



Preface

By Justice Nallini Pathmanathan
Judge of the Federal Court,
Editor of the Malaysian Judiciary Yearbook 2019

Much like the Nobel prize winning novel "Love in the Time of Cholera" by Gabriel Garcia Marquez, this year's edition of the annual yearbook for 2019 is the result of a long labor of passion and commitment, achieved despite the many obstacles thrown at the Committee throughout the course of the year. Perhaps a more apt title for the edition would be "Writings in the Time of Corona".

The annual yearbook is, and has always been, very much a collaborative effort on the part of the judges, judicial officers and our external creative advisors and publishers. To orchestrate the meetings of these three diverse groups was no mean feat, given the limitations imposed on us by the corona virus. Our production was worsened by the departure of our previous illustrious editor, Tan Sri Idrus Harun, now the Attorney General.

Nonetheless we managed to reach publication before the end of the year, and for this my immense gratitude must go to our core team of senior judicial officers, namely Azniza Mohd Ali, Chang Lisia, Ilham Abd Kader, Rafiah Yusof, Wan Aima Nadzihah Wan Sulaiman, Dr. Iriane Isabelo and Ainna Sherina Saipolman who devoted hours and days on end to ensuring this publication met the high standards set by our previous erudite and creative editors, Tan Sri Zainun Ali and Tan Sri Idrus Harun. Our artist Muhammad Nur

Hazimi Khalil (Jimmy) deserves special mention for the thought and care he put into creating the designs utilized throughout the publication, as does Saari Maula Mustajam, the designer from Attin Press Sdn Bhd.

The year 2019 is historic as it marked the retirement of Tan Sri Richard Malanjum, the first Kadazandusun and East Malaysian to be appointed to the highest judicial office in the country, that of the Chief Justice of Malaysia. His legacy is exemplified by his call for judicial independence and integrity at all costs.

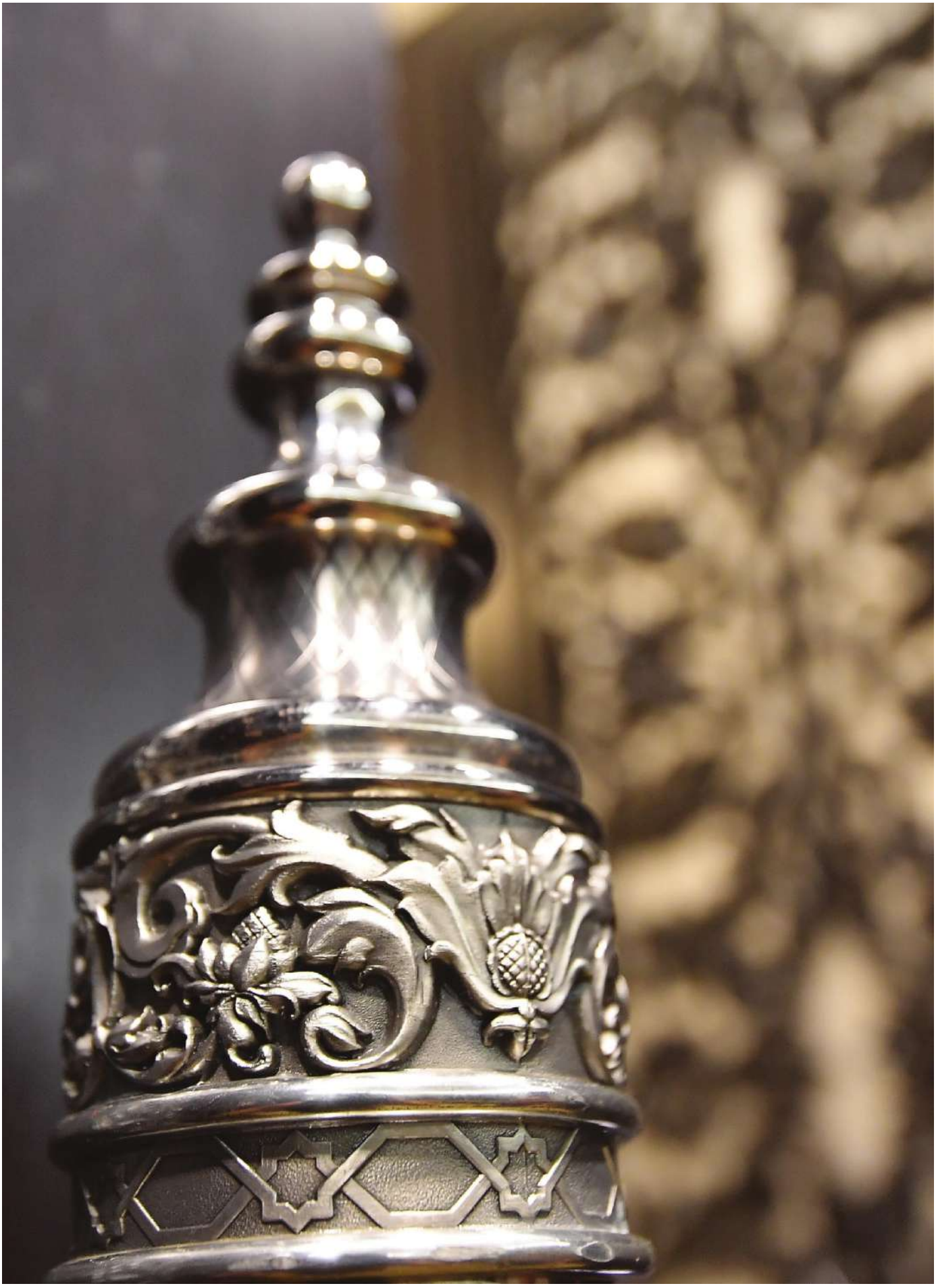
2019 marked an event of prime importance, as it celebrated the appointment of the first female, Tun Tengku Maimun Tuan Mat, to the highest of judicial office, namely the Chief Justice of Malaysia, in April. The year resonated with the appointment of two unique and distinguished persons who represent significant minority groups in our plural nation.

The appointment of our first female Chief Justice was followed by the appointment of Tan Sri Azahar Mohamed to the office of the Chief Judge of Malaya in August 2019, the third highest judicial position in the country. In December 2019, the first female was elevated to the second highest judicial office in the country, when Tan Sri Rohana Yusuf was appointed the President of the Court of Appeal.

These appointments were warmly welcomed by the nation at large, as evidenced by the overwhelmingly positive reaction of the public, both personally and through the media, both traditional and social. This in turn served to increase the appeal of the Judiciary to the public. The year 2019 denoted a high water-mark in the standing and repute of the Judiciary. It was no doubt a year which signified a renaissance in the spirit and philosophy of our institution. It is one of those years which will go down in our history as an extraordinarily exceptional year.

We have sought to capture some of that spirit in this edition. On behalf of the Committee, I hope you will enjoy the diverse array of articles in this year's edition of the Annual Yearbook for 2019.

Justice Nallini Pathmanathan
Editor



CHAPTER 1

THE OPENING OF THE LEGAL YEAR 2019 & THE 53RD ANNUAL MEETING OF THE COUNCIL OF JUDGES

THE OPENING OF THE LEGAL YEAR 2019

The Right Honourable The Chief Justice of Malaysia, Richard Malanjum signalled the Opening of the Legal Year 2019 by striking the gavel

11 January 2019 marked the Opening of the Legal Year 2019. Held at the Putrajaya Marriott Hotel, the day began with a procession of judges of the Federal Court, the Court of Appeal and the High Courts, followed by the judicial officers, officers of the Attorney General's Chambers and members of the Malaysian Bar.

The occasion was graced with the presence of YB Datuk Liew Vui Keong, Minister in the Prime Minister's Department; YB Tuan Mohamed Hanipa bin Maidin, Deputy Minister in the Prime Minister's Department; the Honourable the Chief Justice of Singapore Sundaresh Menon; the Honourable the Chief Justice of the Constitutional Court of the Republic of Indonesia Dr. Anwar Usman S.H., M.H, and the Honourable the Deputy Chief Justice of Non-Judicial Affairs of the Supreme Court of the Republic of Indonesia Dr. Sunarto, representing the Chief Justice of the Supreme Court of the Republic of Indonesia.

Past and present members of the Malaysian Judiciary, the Honourable Mr. Tommy Thomas, the Attorney General of Malaysia; Mr. George Varughese, the President of the Malaysian Bar; Mr. Brendon Keith Soh, the President of the Sabah Law Society; Mr. Ranbir Singh Sangha, the President of the Advocates' Association of Sarawak; the Attorney-Generals of Sabah and Sarawak, academicians, representatives from the foreign diplomatic corps were also present to witness the ceremony. Members of the Judicial Appointment Commission, members of the Institutional Reform Committee, members of the G25, past presidents of the Malaysian Bar, senior members of the Malaysian Bar as well as representatives from foreign judiciaries and law associations also attended the ceremony.

The Attorney General of Malaysia was given the honour of delivering the first speech. Mr. Tommy Thomas in his speech stressed the importance of the relationship between three parties, namely the Judiciary, the Attorney General's Chambers and the Malaysian Bar, as all three are equal partners in the administration of justice. He exhorted them to publicly undertake and pledge to each other, and to the nation,

an oath to promote justice. He called on the judges who "take and subscribe (to) the oath of office" to preserve, protect and defend the Constitution and to discharge their judicial duties to the best of their ability. He encouraged his office to show professionalism of the highest standard combined with honesty, industry and a true commitment to the rule of law while delivering legal services. The members of the Malaysian Bar are expected to act honestly and ethically and continue to be the voice of the public in the pursuit of justice.

In his speech, the President of the Malaysian Bar; focused on the role of the Judiciary in acting as a check and balance of the intimately linked Executive and Legislative branches of Government. He reiterated the call for more direct appointments from the Bar to the Bench as practiced in other jurisdictions for a better-balanced Bench with diverse expertise. He pledged to maintain the legal profession's traditional role to continue to uphold and preserve the rule of law and to act as the sentinel and guardian of the fundamental rights of the individual. In moving with the times, the Malaysian Bar proposed to have a holistic and comprehensive revamp of the Legal Profession Act 1976 to account for developing trends and technological innovation in the legal profession and to introduce provisions with the aim of being a fully self–governing Bar. In closing, he reiterated the need for continuous, effective, and reliable administration of justice by the partners in the administration of justice to preserve and protect the rule of law, and to uphold the supremacy of the Federal Constitution.

Speaking to the audience during the Opening of the Legal Year 2019, the Chief Judge of Sabah and Sarawak highlighted the initiatives taken by the Judiciary in ensuring access to justice to the people in Sabah and Sarawak. He applauded initiatives taken by the Chief Justice in introducing the concept of Mobile Courts to improve accessibility and better served the public. He noted that the Chief Justice has transformed the Judiciary from the old, manual court process into the modern IT-based model which is very much appreciated and treasured by the legal fraternity in East Malaysia. The Judiciary's efforts were given recognition when the IT advances introduced secured the judiciary an award at the MSC Malaysia Asia Pacific ICT Alliance ("APICTA") Awards 2008. Further, in order to meet the demands of the legal profession, he announced that the Judiciary will launch three (3) new applications of exclusive features namely the E-Review App, the E-Appeal App and the Mobile App at the Opening of the Legal Year in Kota Kinabalu. He appreciated the Judiciary upgrading the infrastructure there with the new opening of the Kota Kinabalu Court Complex.

When invited to address the assembly, the Chief Judge of Malaya began her speech by giving a brief report on the performance of the High Courts in Malaya and the Subordinate Courts in Peninsular Malaysia for the year 2018. The Chief Judge of Malaya also put on record her personal appreciation to the judges, judicial commissioners and judicial officers for their hard work in 2018 and hope for a better output for 2019. She also acknowledged initiatives taken by the Chief Justice in implementing the e-Review system, introducing video conferencing for case management and hearing of some types of applications, and appointing one supervising judge in each High Court location to act as a resource person for officers and staff in that location.

> *The will of the majority, the court must remain the conscience of society so as to ensure that the rights and interests of the minority and the weak are safeguarded. per Wan Suleiman SCJ in Krishnan v Public Prosecutor [1987] 1 MLJ 292 at page 295 where he stated that:*
>
> *"It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law.... it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough."*
>
> *Chief Justice Richard Malanjum at the Opening of the Legal Year 2019*

The President of the Court of Appeal put on record his gratitude to the judges of the Court of Appeal, the registrars and staff of the Court of Appeal for their hard work and tireless efforts in ensuring the efficient and timely disposal of cases. He highlighted that for the year 2018, the judges of the Court of Appeal had written and produced a total of 480 reported grounds of judgment comprising 294 grounds in respect of civil

appeals and 186 grounds in respect of criminal appeals. As expressed earlier by the Chief Judge of Malaya, he also applauded the implementation of the e-Review system in the Court of Appeal from 15 October 2018 which enables judicial officers and legal representatives to conduct case management via an exchange of written messages without having to physically attend court. He briefly highlighted several significant amendments to the Rules of the Court of Appeal 1994 which came into force in 2018 with the aim to improve the efficiency of the court's system. He further extended his sincere appreciation and gratitude to the Honourable Attorney General and the officers of his Chambers for their continuous support and co-operation as well as to the Malaysian Bar, the Advocates' Association of Sarawak and the Sabah Law Society for their efforts and commitment in maintaining a close and harmonious working relationship with the Court of Appeal.

Chief Justice Richard Malanjum, in his reply extended a warm welcome and recorded his appreciation to the honourable guests who had come from near and far. Consistent with the proposals made by the Institutional Reform Committee to improve the Court's system, the Chief Justice touched on the innovations made by the Judiciary which aimed at expediting delivery of justice. He highlighted such innovations to name a few–the introduction of a system of collegiate self-governance, e-Balloting, the establishment of a Consultative Committee of the three stakeholders in the judicial system, the implementation of the e-Review system and video conferencing in Kuala Lumpur, Penang and Shah Alam Courts Complexes, and the Queue Management System, the introduction of a Complaint Mechanism via hotlines and social media to receive public complaints and suggestions on the Judiciary's performance. Further, a new Judicial Officers Code of Ethics similar to the Judges Code of Ethics was introduced to ensure that judicial officers keep a high standard of behaviour on and off the Bench. On plans for future innovation, the Judiciary is looking forward to the usage of Artificial Intelligence in the courts system such as "Data Sentencing" as a guide in the sentencing process and to avoid disparity in sentencing.

Judges of the Federal Court marching into the hall. Seen in the picture are (L-R): Justice Mohd Zawawi Salleh, Justice Rohana Yusuf, Justice Alizatul Khair Osman Khairuddin, Justice Balia Yusof Wahi, Justice Azahar Mohamed, Justice Ramly Ali, and Justice David Wong Dak Wah

The President of the Sabah Law Society and the President of the Advocates' Association of Sarawak followed by other delegates marching into the hall

The setting-up of the stage resembles that of proceedings in open court. Seen in this picture – Judges of the Federal Court and Registrars of the Superior Courts and the Subordinate Courts

The Chief Justice pledged to uphold the rule of law and emphasised zero tolerance to any form of corruption and judicial interference whether internal or external, political or otherwise, in the execution of judicial duties. He also encouraged judges and judicial officers to consider imposing community service instead of imprisonment to offenders in appropriate cases. For the purposes of enhancing the competency of judges, he welcomed the efforts made by the Judicial Academy of the Judicial Appointment Commission for organising regular in-house training for judges in several areas of the law. In tandem with the challenges in handling modern crimes such as money laundering, crypto currency fraud, terrorism and human trafficking, he praised the effort made by the Justice Department of the United States of America in exposing and training judges and judicial officers in this area of law. The Chief Justice commended the United Nations Development Programme ("UNDP") for being very helpful to the Judiciary especially in handling public interest litigation.

On the appointment of judges and judicial commissioners, the Judiciary has taken the initiatives to get the three Bars to be actively involved in the form of consultation on potential candidates for judgeship. The Chief Registrar has finally been allowed to take on the role of "Financial Controller", thus affording the Judiciary some degree of financial autonomy. For better access to judgments, the Judiciary has, since last year, been working with the ASEAN Legal Information Centre based in the University of Malaya on the setting up of a Malaysian Judgments Portal. A Special Unit was also established to assist retired judges in any manner possible especially when requiring medical care.

Before the ceremony was brought to an end, Minister in the Prime Minister's Department, YB Datuk Liew Vui Keong launched the Judiciary's publication entitled "Judicial Review Guide for Public Officers, An Introduction". This publication is produced to mitigate any misunderstanding that may arise when the courts grant judicial review against decisions of government departments. The said publication was made possible by the efforts of the Judiciary in collaboration with the Faculty of Law of the University of Malaya.

After the conclusion of the ceremony, light refreshments were served before the judges continued for the 53rd Annual Meeting of the Council of Judges which commenced that afternoon and ended on 13 January 2019.

Judges and guests during the Opening of the Legal Year 2019

(L-R): Justice David Wong Dak Wah, Chief Justice Richard Malanjum, YB Datuk Liew Vui Keong, Justice Ahmad Maarop, Justice Zaharah Ibrahim at the Opening of the Legal Year 2019

Judges after the conclusion of the Opening of the Legal Year 2019
(L-R): Justice Mariana Yahya, Justice Mohd Zawawi Salleh, Justice Tun Abdul Majid Tun Hamzah, Justice Hasnah Mohammed Hashim and Justice Lau Bee Lan

THE OPENING OF THE LEGAL YEAR 2019 FOR SABAH AND SARAWAK AT KOTA KINABALU, SABAH

The Chief Justice of Malaysia Richard Malanjum (centre) during a lighter moment of the Opening of the Legal Year 2019 for Sabah & Sarawak

The Opening of the Legal Year 2019 for Sabah and Sarawak was officiated on 18 January 2019 by the Right Honourable The Chief Justice of Malaysia Richard Malanjum. Hosted for the first time at the newly built Kota Kinabalu Court Complex, it was attended by more than 500 participants consisting of judges and officers of the Sabah and Sarawak Judiciary and selected judges and officers from Peninsular Malaysia, the Sabah Law Society and the Advocates Association of Sarawak, the Malaysian Bar, the Sabah and Sarawak State Attorney General's Chambers, the Federal Attorney General's Chambers as well as invited guests from abroad. Prominent figures of the Executive and Legislature also attended to witness the commencement of the legal year, 2019.

As in preceding years, this annual event began with a 1.6 km procession full of legal pomp from the Exhibition Hall of Karamunsing Complex Kota Kinabalu to the new Kota Kinabalu Court Complex. The start of the procession was signalled by the police marching band which started playing at around 7.50 am. The participants in the procession, which was led by the Chief Justice, were all dressed in their respective ceremonial outfits. Members of the judiciary were clad in their black robes with gold trimmings and songkok for the gentlemen. Federal and State Counsel, prosecutors and lawyers were attired in barristers' full court wear.

At the end of the procession, all participants gathered at the Conference Hall of Kota Kinabalu Court Complex for the open court ceremony. Besides members of the legal fraternity, representatives of the media were also in attendance to record this event as it is a significant highlight of the legal year. During the Chief Judge of Sabah and Sarawak's open court address, His Lordship reiterated the significance of the Opening of the Legal Year for Sabah and Sarawak. To quote, His Lordship said:

> OLY (Opening of the Legal Year) is also an occasion where we are able to tell or inform the public that the judiciary is one of the three arms of government- a concept not understood by many. The executive, legislative and the judiciary which is completely independent of the other two.

His Lordship emphasised the distinctiveness and independence of the High Court of Sabah and Sarawak, despite being of co-ordinate jurisdiction with its Malaya counterpart. This explains the need to have at least one judge who hailed from the High Court of Sabah and Sarawak jurisdiction to preside over matters from Sabah and Sarawak in the Court of Appeal and the Federal Court. Moreover, the input of a local judge is required to ensure any decision reached would reflect and suit the Sabah and Sarawak community. In the words of His Lordship,

> This presence of a local Judge should never be underestimated. Much too often we have seen decisions, with respect,(which) have been decided without the presence and the benefit of a local Judge and such decision may have been different had there been some input of the local conditions in coming to a decision.

In addition, His Lordship also declared the Courts' ongoing and unabated effort to ensure access to justice for communities living in the peripheral areas and one way this is achieved is through the mobile court programme. As at 31 December 2018, a total of 87,345 cases related to birth certification have been resolved via the mobile court programme. This programme has not only proven effective in countering the present geographical setbacks but has also shown to be more cost-efficient with the vehicle housing the mobile court, a bus that serves both as a means of transport as well as a courtroom. In accordance with the theme of the Opening of the Legal Year 2019 that is "The Way Forward-Continued Legal Education", the Courts have also introduced new strategies to further enhance the competence of new lawyers such as the introduction of advocacy and strategic litigation courses.

To further improve the standard of ethics and etiquette among members of the Bar, His Lordship extolled the achievement of the Disciplinary Board of the Sabah Law Society and Inquiry Committee of the Advocates Association of Sarawak. These professional bodies have expended tireless efforts in ensuring that members of the Bar constantly meet the level of professionalism expected of them. Last but not least, as part of "The Way Forward", the Courts also strive to innovate to meet the demands of the legal profession, including embracing

The start of the annual ceremony was marked with a procession led by Chief Justice Richard Malanjum from the Exhibition Hall of Karamunsing Complex Kota Kinabalu to the new Kota Kinabalu Court Complex

and integrating technology in the administration of justice. To this end, the Courts launched the "E-Review App", "E-Appeal App" and the "Mobile App".

The launching of these mobile applications concluded the Opening of the Legal Year 2019 for Sabah and Sarawak. Proceedings adjourned and the participants dispersed. All participants looked forward to a successful legal year.

Judges and stakeholders in procession at the Opening of the Legal Year for Sabah & Sarawak

Judges and guests during the Opening of the Legal Year 2019 for Sabah & Sarawak which was held on 18 January 2019

THE 53rd ANNUAL MEETING OF THE COUNCIL OF JUDGES

The 53rd Annual Meeting of the Council of Judges (hereinafter referred to as "the 53rd Annual Meeting") was held from 11 January 2019 to 13 January 2019 at the Marriott Hotel, Putrajaya. The 53rd Annual Meeting was convened pursuant to section 17A(1) of the Court of Judicature Act 1964 was attended by the judges of the Federal Court, judges of the Court of Appeal and judges as well as judicial commissioners of the High Court. Besides exchanging ideas and discussing issues faced by the judges specifically and the Courts at large, the 53rd Annual Meeting also provided an avenue for the judges all over Malaysia not only to interact but also to share ideas and discuss current legal issues pertaining to the administration of justice.

The opening ceremony of the 53rd Annual Meeting commenced on 11 January 2019 at 3.00 pm, after the closing ceremony of the Opening of The Legal Year 2019 which was also held at the same venue. Thus, the delivery of the opening address by the Chief Justice Richard Malanjum was a brief and compendious speech, emphasising the importance of efficient administration of justice while adapting to the utilisation of modern technological advancements which serve primarily to boost access to justice.

The second day of the meeting was the highlight of the main agenda of the 53rd Annual Meeting. Headed by the Chief Justice and accompanied by the President of the Court of Appeal, Chief Judge of Malaya and Chief Judge of Sabah and Sarawak, the minutes of the 52nd Annual Meeting in 2018 were read and approved. There was also a session for discussion among the judges on matters affecting the administration of justice and the feedback from judges were recorded and noted for further action. There were also separate and simultaneous sessions of discussion for the Federal Court judges, the Court of Appeal judges and the High Court judges respectively on the topics which were allocated by the Chief Justice. Besides that, the participants of the 53rd Annual Meeting expressed general agreement with the Chief Justice's suggestion that every judge be provided with a tablet. Noting that judges are at present entitled to both a desktop computer and a laptop, the Chief Justice suggested that one of the options is to provide judges with a tablet as its light weight and portable nature would enable convenient perusal of cases while travelling.

The third day of the meeting began with a sharing session on the topic entitled "Emergence of competition law in Malaysia" conducted by Mr. Iskandar Ismail, the Chief Executive Officer of the Malaysia Competition Commission ("MyCC"). In his talk, Mr. Iskandar discussed the main thrust of the Competition Act 2010 ("the Act") which is to regulate anti-competitive practices. He started his session by explaining the historical background of the Malaysian competition law regime and enlightened the audience concerning the corporate background and the organisational structure of MyCC. Among others, Mr. Iskandar explained that pursuant to the Act, MyCC is empowered to conduct investigations on its own initiative upon the Minister's direction or complaint by any member of the public. Not only that, this Act also equips MyCC with other comprehensive powers essential to the performance of its mandate. In his concluding reflection, Mr. Iskandar outlined a number of proposed initiatives and the way forward for MyCC's critical role in the national competition law and policy agendas.

After the valuable sharing session with Mr. Iskandar, the 53rd Annual Meeting proceeded with another session for discussion on current issues and problems affecting the administration of justice with participation by all the judges. There were also knowledge sharing sessions and presentation by judges who attended international courses in 2019.

The first presentation on the topic of "Judicial Co-operation between Singapore and Malaysia" was by Justice Nallini Pathmanathan based on her discussions with Justice Belinda Ang Saw Ean from the Singapore Supreme Court. Justice Nallini stated that the primary objective of their discussions was to improve the quality of judgments. It was observed that Singapore has moved away from the English common law and adopted their own position based on local circumstances, an approach which Justice Nallini suggested may be considered in Malaysia. To this end, Justice Nallini proposed that a lecture series be held with the aim of enhancing judgment writing skills for the judges in both countries.

The Chief Justice of Malaysia with the President of the Court of Appeal, the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak

Justice Azizah Nawawi and Justice Faizah Jamaludin presented their findings from their study visit to the Singapore Family Justice Courts in December 2018. Their joint presentation was entitled "Family Justice Framework: Case Management in respect of Divorce and Matrimonial Proceedings". They shared their experience and knowledge on the Family Court in Singapore as compared to the Family Court in Malaysia. In a nutshell, Justice Faizah gave a timeline of the steps taken towards the establishment of the Family Justice Courts in Singapore. It was explained that a structural change was undertaken; a Family Division was set up consisting of the family courts, youth courts and the family division of the High Court to hear appeals against decisions of the two aforementioned courts. It was observed that the specialised courts in Singapore were designed to be child-centred and less adversarial.

Justice Faizah further observed that the power of the court in the adjudication of family disputes was strengthened by adopting a judge-led approach. Social and psychological services comprising personnel with a minimum qualification of PhD are an integral part of the Family Justice Courts. It was noted that the courts regularly engage with family lawyers and also offer a family law practitioner accreditation.

Justice Azizah continued the presentation by sharing her findings on the case management system in Singapore. According to Her Ladyship, the approach is a judge-led one, with judges having full control of the proceedings and the power to issue various directions. With the exception of the first case management which is handled by a registrar, all subsequent sessions are conducted by the judges.

Chief Judge of Sabah and Sarawak David Wong Dak Wah then gave a talk titled "Save the Forest" in which His Lordship shared his experience in adopting a paperless system in the administration of justice in Sabah and Sarawak. The Borneo experience would be relevant to Peninsular Malaysia to avoid excessive consumption of resources, particularly paper. His Lordship showed how technology can be used to facilitate work on the go. Using a tablet, His Lordship demonstrated the ways to use an electronic calendar, to scan and store documents electronically and how to use the device efficiently for working purposes without resorting to physical reading materials and stationaries. This would reduce the burden on the courts, lawyers and litigants as the records are in electronic form and proceedings are held online. Consequently, all parties concerned would save printing costs, transportation costs, and ultimately, the environment.

Judges and Judicial Commisioners at the 53rd Annual General Meeting of the Council of Judges

The 53rd Annual Meeting ended at 11.00 am on the third day of the meeting. In his concise closing remarks, the Chief Justice expressed his satisfaction with the active participation of all the judges in the meeting. As the most senior puisne judge, Justice Ramly Ali expressed gratitude on behalf of all judges to the Chief Justice, the President of the Court of Appeal, the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak for conducting the 53rd Annual Meeting successfully. This was the last meeting for all the four top judges as they would retire by the next meeting, thus making this a more memorable occasion.

Justice Tengku Maimun Tuan Mat, Justice Rohana Yusuf and other judges of the Federal Court and Court of Appeal during the 53rd Annual Meeting of the Council of Judges

(L-R): Deputy Chief Registrar, Datuk Aslam Zainuddin, Justice Umi Kalthum Abdul Majid, Justice Badariah Sahamid and Chief Registrar, Dato' Sri Latifah Mohd Tahar

The meeting ended with a special farewell luncheon for retiring judges from the Federal Court, the Court of Appeal and the High Courts. Among them were Justice Alizatul Khair Osman Khairuddin, Justice Balia Yusof Wahi and Justice Ramly Ali from the Federal Court, Justice Stephen Chung Hian Guan, Justice Yew Jen Kie and Justice Yeoh Wee Siam from the Court of Appeal and Justice Su Geok Yiam from the High Court. The farewell luncheon was made more meaningful and memorable by performances from the officers of the Chief Registrar's Office and farewell video presentations.

A video montage showing the judges of the Court of Appeal paying a courtesy call to the President of the Court of Appeal Ahmad Maarop at his meeting room before he retired

CHAPTER 2 THE FEDERAL COURT

STATEMENT BY THE CHIEF JUSTICE

The Chief Justice Tun Tengku Maimun Tuan Mat

The core business of the Federal Court remains the same as in previous years. The majority of cases heard at the Federal Court may be grouped into three main categories, namely civil appeals, criminal appeals and leave applications for civil appeals. The rest are civil and criminal references, criminal applications and cases where the Federal Court exercises its original jurisdiction pursuant to Article 128(1) of the Federal Constitution.

In 2019, a total of 1,023 cases were registered. This is a reduction compared to 2018, which saw a total of 1,182 cases being registered. The Federal Court disposed of 997 cases in 2019 which brings the percentage of disposal against registration to 97.45%.

For leave applications, a total of 515 cases were filed compared to 652 cases filed in 2018. This shows a reduction of 137 cases. However, the disposal rate of leave applications against the cases registered is 100.97% as the Federal Court managed to dispose of 520 cases.

For civil appeals, a total of 146 cases were registered in 2019 which shows a decrease as compared to 175 cases in 2018. Here too, the disposal rate is encouraging. The disposal rate against cases registered is 118.49% as the Federal Court managed to dispose of 173 cases in 2019.

Unlike civil appeals, the registration of criminal appeals showed an increase from 186 in 2018 to 207 in 2019. 170 appeals were disposed of leaving a balance of 249 appeals as at 31 December 2019. For habeas corpus cases, 114 appeals were registered and 94 cases were disposed of, leaving a balance of 68 appeals as at 31 December 2019.

On this note, I wish to record my heartfelt gratitude and appreciation to all my sister and brother judges, judicial officers and staff of the Federal Court for their

commitment, dedication and hard work in ensuring the smooth and efficient performance of the Federal Court. My sincere appreciation also goes to the Attorney General's Chambers, the Malaysian Bar and all the stakeholders as the Federal Court's achievements and success in executing its core business would not be possible without their continuous commitment and cooperation.

On a different note, the year 2019 witnessed my appointment as the Chief Justice following the retirement of my predecessor, Tan Sri Richard Malanjum. In assuming this office, I remain committed to continue the reform agenda initiated and implemented by Tan Sri Richard Malanjum.

During Tan Sri Richard Malanjum's tenure as the Chief Justice, a concept of collective leadership was introduced, whereby the Judges holding the four top posts of Chief Justice, President of the Court of Appeal, Chief Judge of Malaya, and Chief Judge of Sabah and Sarawak, were equally empowered to decide on all matters pertaining to policy and management of the judiciary.

Tan Sri Richard Malanjum also introduced and implemented various technological innovations to improve the delivery system at the Federal Court such as e-Review, where the preliminary case management of a case filed in court will be conducted online, and the Queue Management System, where lawyers would be alerted of their cases called up through information displayed on television screens placed at the Palace of Justice, Putrajaya.

In addition, the e-Balloting system was introduced for the empanelling of Federal Court judges to hear cases. This was to avoid any further perception of bias and negative elements in the allocation of cases and the selection of panel of judges. Further, for constitutional or public interest cases, it will be heard by a panel of seven or nine judges comprising judges holding the four top posts while the remaining three or five judges are to be selected through e-Balloting. Other appeal cases will be heard by a panel of five judges and chaired by either the Chief Justice, the President of the Court of Appeal, the Chief Judge of Malaya or the Chief Judge of Sabah and Sarawak. The remaining four judges will also be selected through e-Balloting. Applications for leave to appeal will be heard by a panel of three judges, selected through e-Balloting and subject to availability and seniority. Appeal cases from Sabah and Sarawak to the Court of Appeal and Federal Court will be heard by a panel consisting of at least one judge from Sabah and Sarawak.

Apart from Tan Sri Richard Malanjum, the year 2019 also witnessed the Federal Court bidding farewell to Justice Ahmad Maarop, the former President of the Court of Appeal, Justice Zaharah Ibrahim, the former Chief Judge of Malaya and several members of the Federal Court bench namely, Justice Ramly Ali, Justice Balia Yusuf Wahi and Justice Alizatul Khair Osman Khairuddin. Their hard work, commitment, dedication, invaluable contribution and distinguished service have no doubt been integral to the achievement and success of the Malaysian Judiciary.

2019 was also significant as it saw a series of new appointments. Justice Rohana Yusof was appointed the President of the Court of Appeal with the distinction of being the first female to be appointed to the post since the Court of Appeal was created in 1994. Justice Azahar Mohamed was appointed the Chief Judge of Malaya, succeeding Justice Zaharah Ibrahim upon her retirement. In addition, several Court of Appeal Judges were also promoted to the Federal Court, namely Justice Vernon Ong Lam Kiat, Justice Abdul Rahman Sebli, Justice Zaleha Yusof, Justice Zabariah Mohd Yusof and Justice Hasnah Mohammed Hashim.

I congratulate them on their appointments and look forward to years of fruitful cooperation and contribution to the success of the Malaysian Judiciary.

Chief Justice of Malaysia
Tengku Maimun Tuan Mat

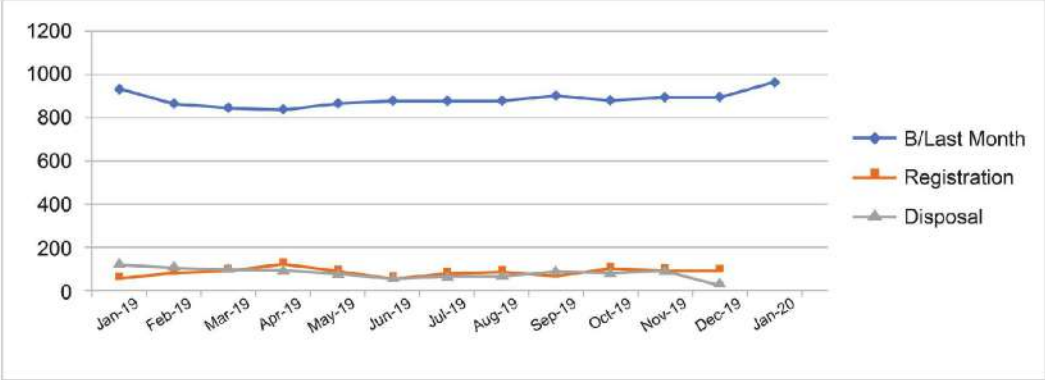
JUDGES OF THE FEDERAL COURT

1. Chief Justice Richard Malanjum
2. Chief Justice Tengku Maimun Tuan Mat
3. Justice Ahmad Maarop
4. Justice Rohana Yusuf
5. Justice Zaharah Ibrahim
6. Justice David Wong Dak Wah
7. Justice Azahar Mohamed
8. Justice Ramly Ali
9. Justice Balia Yusuf Wahi
10. Justice Alizatul Khair Osman Khairuddin
11. Justice Mohd Zawawi Salleh
12. Justice Abang Iskandar Abang Hashim
13. Justice Idrus Harun
14. Justice Nallini Pathmanathan
15. Justice Vernon Ong Lam Kiat
16. Justice Abdul Rahman Sebli
17. Justice Zaleha Yusof
18. Justice Zabariah Mohd Yusof
19. Justice Hasnah Mohammed Hashim

PERFORMANCE OF THE FEDERAL COURT IN 2019

The Federal Court is the final appellate court in both civil and criminal matters. The three main categories of cases in the Federal Court are leave to appeal applications, civil appeals and criminal appeals. In 2019, a total of 1023 cases were registered and 997 cases were disposed of. The percentage of disposal against registration is 97.45%. The overall performance of the Federal Court in 2019 can be seen in Graph A.

GRAPH A
NUMBER OF CASES REGISTERED AND DISPOSED OF IN 2019

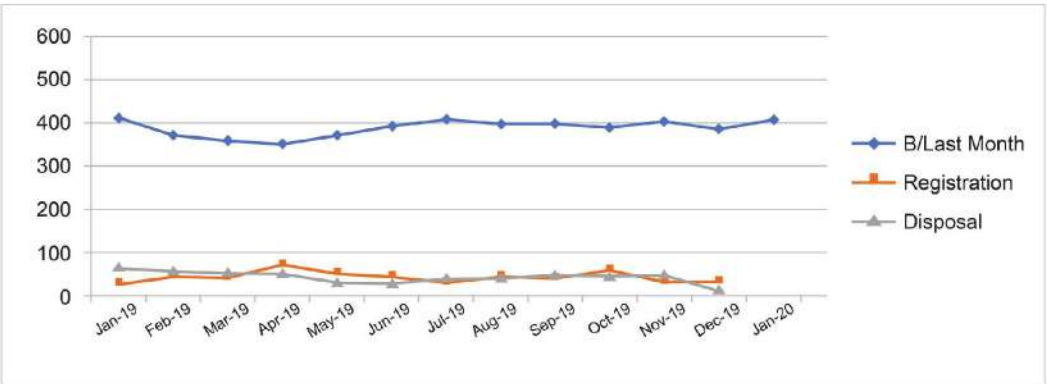


MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-20
BALANCE LAST MONTH	933	871	849	840	868	881	882	886	903	880	898	901	959
REGISTRATION	59	84	92	123	93	59	74	88	65	105	92	89	
DISPOSAL	121	106	101	95	80	58	70	71	88	87	89	31	

Leave Applications

As shown in Graph B, the total registration for leave applications in 2019 was 515 cases. This shows a decrease of 137 cases registered as compared to registration in 2018 which was 652 cases. However, the Federal Court managed to dispose of 520 cases in 2019. The disposal rate of leave applications as against the cases registered is 100.97%. The Federal Court has maintained its performance in disposing of leave applications cases.

GRAPH B
LEAVE APPLICATIONS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING

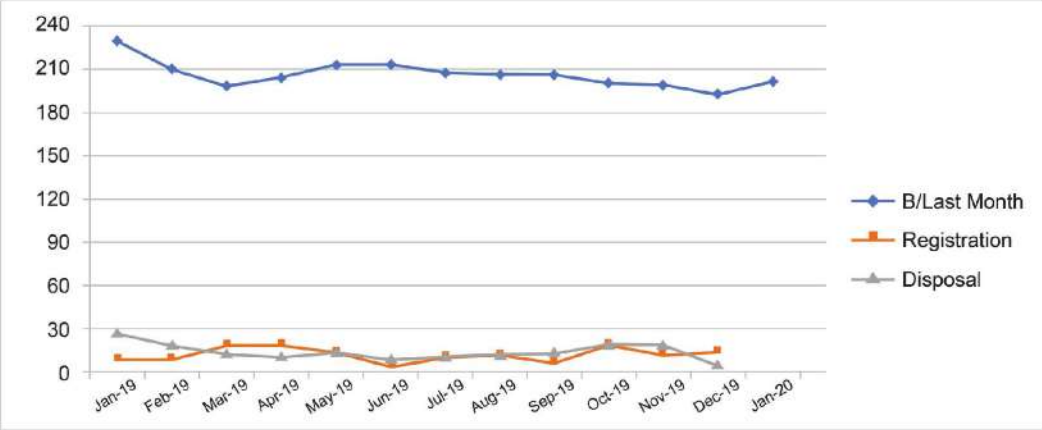


MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-20
BALANCE LAST MONTH	411	372	359	351	371	392	406	398	399	390	402	386	406
REGISTRATION	25	44	43	71	52	44	31	42	40	58	32	33	
DISPOSAL	64	57	51	51	31	30	39	41	49	46	48	13	

Civil Appeals

For civil appeals, a total of 146 cases were registered and 173 cases were disposed of in 2019. The registration showed a reduction of 29 cases as compared to registration in 2018 which was 175 cases. The disposal rate against the cases registered is 118.49% as shown in Graph C.

GRAPH C
CIVIL APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING

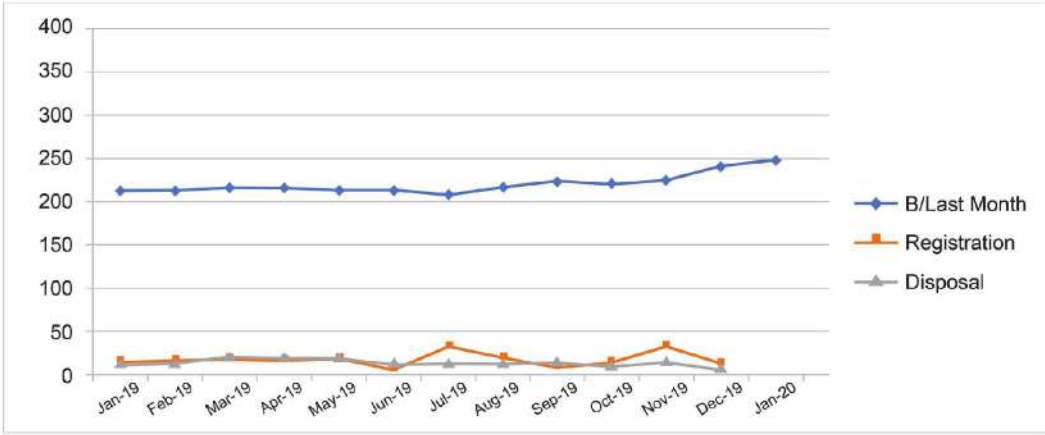


MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-20
BALANCE LAST MONTH	228	210	199	204	213	213	208	207	206	200	199	192	201
REGISTRATION	9	8	18	19	14	4	10	12	7	19	12	14	
DISPOSAL	27	19	13	10	14	9	11	13	13	20	19	5	

Criminal Appeals

For criminal appeals, 207 appeals were registered in 2019. 170 appeals were disposed of leaving a balance of 249 appeals by 31 December 2019. As shown in Graph D, the disposal rate as against the appeals registered is 82.13%.

GRAPH D
CRIMINAL APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING

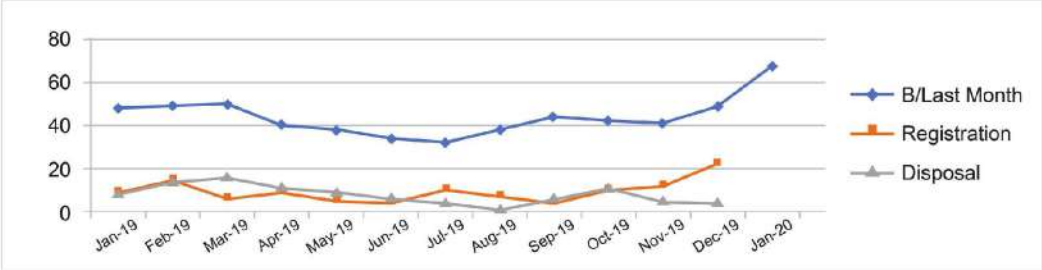


MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-20
BALANCE LAST MONTH	212	214	218	217	214	214	208	217	225	221	225	242	249
REGISTRATION	15	17	19	17	19	6	22	21	11	14	32	14	
DISPOSAL	13	13	20	20	19	12	13	13	15	10	15	7	

Habeas Corpus Appeals

For habeas corpus, 114 appeals were registered in 2019. 94 appeals were disposed of leaving a balance of 68 appeals by 31 December 2019. As shown in Graph E, the disposal rate as against the appeals registered is 82.45%. The disposal rate was higher in 2018 which was 104.4%.

GRAPH E
HABEAS CORPUS APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING

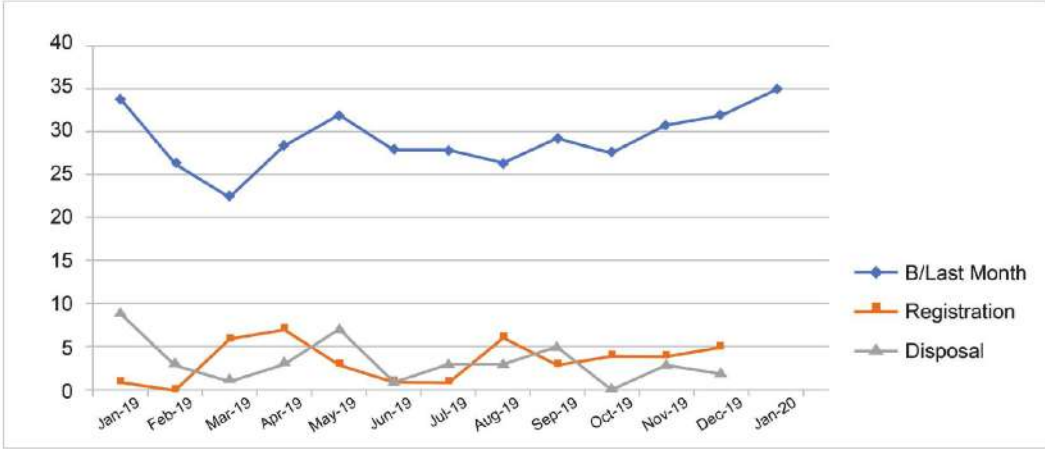


MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-20
BALANCE LAST MONTH	48	49	50	40	38	34	32	38	44	42	41	49	68
REGISTRATION	9	15	6	9	5	4	10	7	4	10	12	23	
DISPOSAL	8	14	16	11	9	6	4	1	6	11	4	4	

Other Matters

For other matters in its original jurisdiction, reference (civil and criminal) jurisdiction, criminal applications and review applications (civil and criminal), a total of 41 cases were registered. 40 cases were disposed of leaving a balance of 35 cases at the end of 2019.

GRAPH F
ORIGINAL JURISDICTION / CIVIL REFERENCE / CRIMINAL REFERENCE / CRIMINAL APPLICATION / REVIEW APPLICATION (CIVIL) / REVIEW APPLICATION (CRIMINAL) IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-20
BALANCE LAST MONTH	34	26	23	28	32	28	28	26	29	27	31	32	35
REGISTRATION	1	0	6	7	3	1	1	6	3	4	4	5	
DISPOSAL	9	3	1	3	7	1	3	3	5	0	3	2	

CHAPTER 3 THE COURT OF APPEAL

STATEMENT BY THE PRESIDENT OF THE COURT OF APPEAL

The President of the Court of Appeal Rohana Yusuf

The Court of Appeal was established by the Constitution (Amendment) Act 1994 (Act A885) as an intermediate appellate court in Malaysian judicial hierarchy. The Court has the jurisdiction to hear appeals against decisions of the High Court in criminal and civil matters. The creation of the Court of Appeal reinstated a three-tier appeal, which ceased with the abolition of appeals to the Privy Council. This new tier of appeal serves to reduce the workload of the apex court.

The Court of Appeal, which comprises the President and a maximum of thirty-two judges, typically sits in a panel of three judges to hear appeals and applications made before it. In addition to the judges of the Court of Appeal, Federal Court judges and High Court judges may, whenever required, be empanelled to sit in the Court of Appeal.

On 5 December 2019, I assumed the post of the President of the Court of Appeal following the retirement of Tan Sri Ahmad Maarop. It is truly an honour to have this opportunity to continue his legacy. The Court of Appeal's performance during his tenure was excellent in terms of efficiency, and it is my hope

that I will countinue to meet the highest standards that he has set.

I would like to congratulate Tan Sri Ahmad Maarop for his achievements and thank him for his contributions when taking helm of the Court of Appeal.

May I also take this opportunity to welcome all newly appointed judges of the Court of Appeal in the year 2019. It is my pleasure to welcome Justice Lee Swee Seng, Justice Azizah Nawawi, Justice Vazeer Alam Mydin Meera, Justice Ravinthran Paramaguru, Justice Hadhariah Syed Ismail, Justice Abu Bakar Jais and Justice Nantha Balan E.S. Moorthy. I look forward to working closely with all of them at the Court of Appeal. I wish them all the very best in discharging their duties. I am confident that their diverse backgrounds and experience will further enhance the performance of the Court of Appeal, and consequently bring it to greater heights.

In the year 2019, we also witnessed the retirement of four esteemed judges of the Court of Appeal. They are Justice Yeoh Wee Siam, Justice Mohtarudin Baki, Justice Stephen Chung Hian Guan and Justice Yew Jen Kie. It has been a pleasure working with them and I am grateful for their support and contribution. I wish all of them a happy and healthy retirement. We also proudly witnessed the elevation of five judges of the Court of Appeal to the Federal Court. May I congratulate Justice Vernon Ong Lam Kiat, Justice Abdul Rahman Sebli, Justice Zaleha Yusof, Justice Zabariah Mohd Yusof and Justice Hasnah Mohammed Hashim on their elevation. I am sure they will continue to contribute towards the development of the law.

2019 was indeed a challenging year. The number of cases filed throughout the year increased enormously. There has been a sharp increase in the registration of cases, where a total number of 5,427 appeals were registered. This increase in registration, unfortunately, did not correspond proportionately to the number of judges. The year 2019 started with 26 judges and by the end of the year, the Court of Appeal was left with 24 judges, as not all of the total of 32 posts of the Court of Appeal judges were filled. It is my hope that the vacancies can be filled to ensure that the backlog of cases can be disposed.

Notwithstanding the steady growth in the number of appeals registered annually, the Court of Appeal performed remarkably well for the year. In the year 2019 a total number of 4,358 appeals have been disposed of amounting to 80.3%, against registered cases for the year.

Efforts have been taken to expedite the disposal of cases, by the setting up of a specialized panel to hear appeals, increasing the number of panels sitting in a month and setting up special panels to be chaired by Federal Court Judges to hear appeals originating from the subordinate court.

I will also continue to supervise and ensure that judges deliver their written judgments within a reasonable time to prevent inordinate delay in the disposal of cases.

It is also pertinent to note that the implementation of the e-Review system which began in 2018 is a significant boon to the Judiciary. Case management is conducted via the exchange of written messages online which does not require parties to attend court. The system allows parties to do the case management of their cases with the registrars timeously without incurring costs. This system has undoubtedly improved the efficiency of the court and has benefited the lawyers tremendously as it saves a tremendous amount of time.

I must also acknowledge that the success of the Court of Appeal in disposing appeals expeditiously could not have been possible without the cooperation and hard work of all judges, officers and staff of the Court of Appeal. The Registry of the Court of Appeal is now being led by the Registrar of the Court of Appeal, Mdm. Norliza Othman. I am thankful for the cooperation and the contribution I have received form her and the staff of the Court of Appeal Registry. It is my sincere hope that they will continue their good work towards disposing all pre-2019 cases by the end of 2020.

The success of the Court of Appeal is not possible without the support and cooperation from the Honourable Attorney General and the officers from Chambers, members of the Malaysian Bar, the Advocates Association of Sarawak and the Sabah Law Society, in maintaining a professional and good relationship with the Court of Appeal. May this relationship prosper in the years to come.

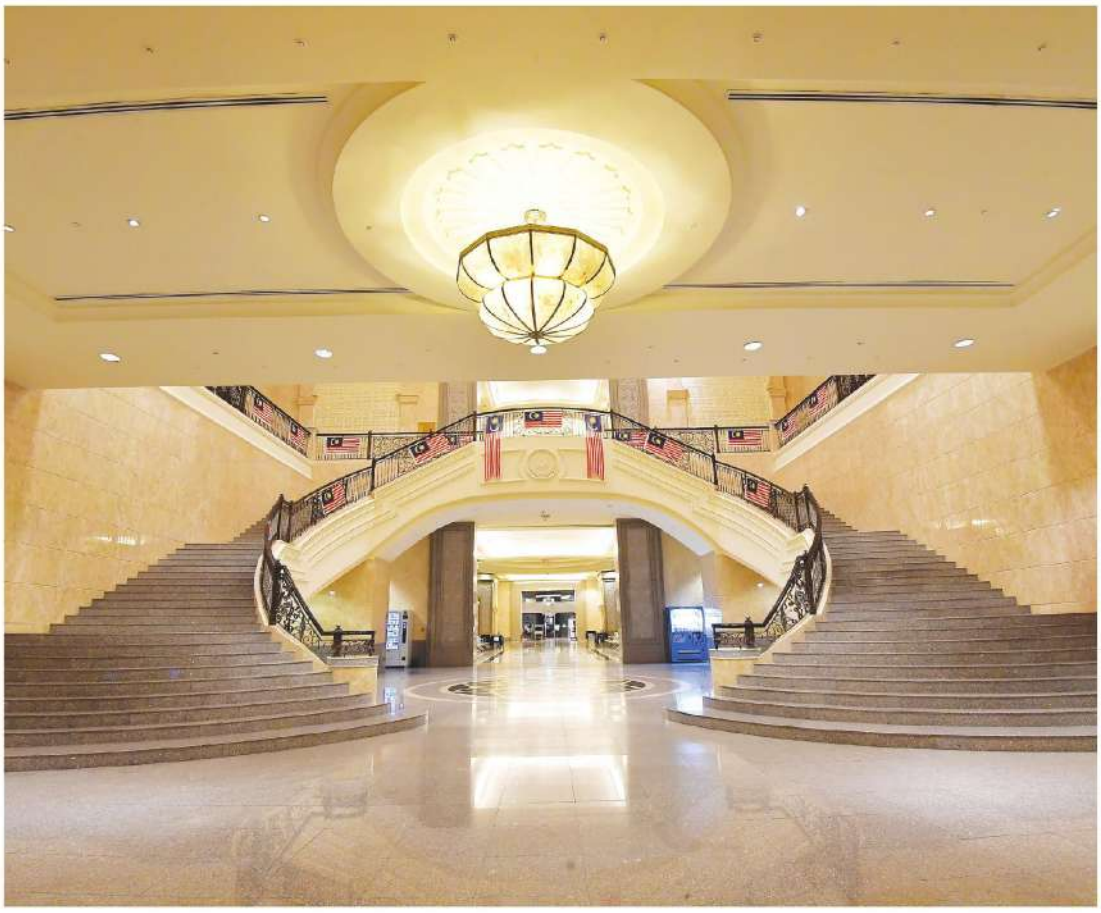
I wish everyone the best in 2020.

Thank you,

President of the Court of Appeal
Rohana Yusuf

JUDGES OF THE COURT OF APPEAL

1. Justice Mohtarudin Baki
2. Justice Hamid Sultan Abu Backer
3. Justice Umi Kalthum Abdul Majid
4. Justice Ahmadi Asnawi
5. Justice Badariah Sahamid
6. Justice Kamardin Hashim
7. Justice Mary Lim Thiam Suan
8. Justice Yaacob Md Sam
9. Justice Harmindar Singh Dhaliwal
10. Justice Abdul Karim Abdul Jalil
11. Justice Suraya Othman
12. Justice Yeoh Wee Siam
13. Justice Rhodzariah Bujang
14. Justice Stephen Chung Hian Guan
15. Justice Hanipah Farikullah
16. Justice Kamaludin Md. Said
17. Justice Lau Bee Lan
18. Justice Mohamad Zabidin Mohd Diah
19. Justice Yew Jen Kie
20. Justice Nor Bee Ariffin
21. Justice Has Zanah Mehat
22. Justice Lee Swee Seng
23. Justice Azizah Nawawi
24. Justice Vazeer Alam Mydin Meera
25. Justice Ravinthran Paramaguru
26. Justice Hadhariah Syed Ismail
27. Justice Abu Bakar Jais
28. Justice Nantha Balan E.S. Moorthy



A Palladian imperial staircase leading to the heart of the Palace of Justice

PERFORMANCE OF THE COURT OF APPEAL IN 2019

For the past 10 years, appeals adjudicated in the Court of Appeal have been broadly categorised into Interlocutory Matters Appeals, Full Trial Civil Appeals and Criminal Appeals. For monitoring purposes, the Full Trial Civil Appeals are further categorised into five sub-categories namely, New Commercial Court Appeals, New Civil Court Appeals, Intellectual Property Appeals, Muamalat Appeals and Admiralty Appeals. In 2014, a new sub-category called Construction Court Appeals was added.

For criminal appeals, the Court of Appeal deals with appeals from the High Court in the exercise of the High Court's original jurisdiction before final appeal to the Federal Court. The Court of Appeal also acts as the apex court for cases that originate from the subordinate courts, such as the Magistrates' Court and the Sessions Court, as well as appeals from statutory bodies.

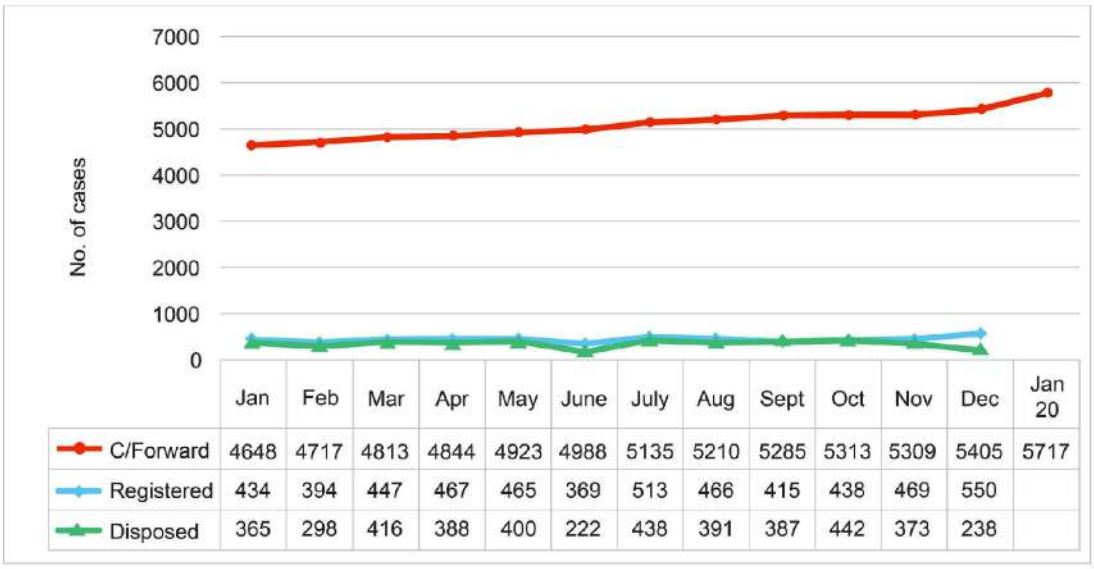
Additionally, the Court of Appeal hears applications for leave to appeal to the Court of Appeal arising from decisions of the subordinate courts.

As at 31 December 2019, there are 5,717 appeals pending in the Court of Appeal out of which 24% are pre-2019 appeals. The rest are 2019 appeals, which constitute 76% of the appeals pending. Thus, except for the 24% , the rest of the appeal cases are current.

In 2019, a total of 4,358 appeals were disposed of, as against 5,427 newly registered cases. The percentage of disposals against registrations was 80.3%. The disposal numbers were slightly lower due to the increase in the number of appeals registered throughout the year 2019.

The overall performance of the Court of Appeal in 2019 can be seen in Graph A:

GRAPH A
NUMBER OF APPEALS REGISTERED AND DISPOSED OF IN 2019



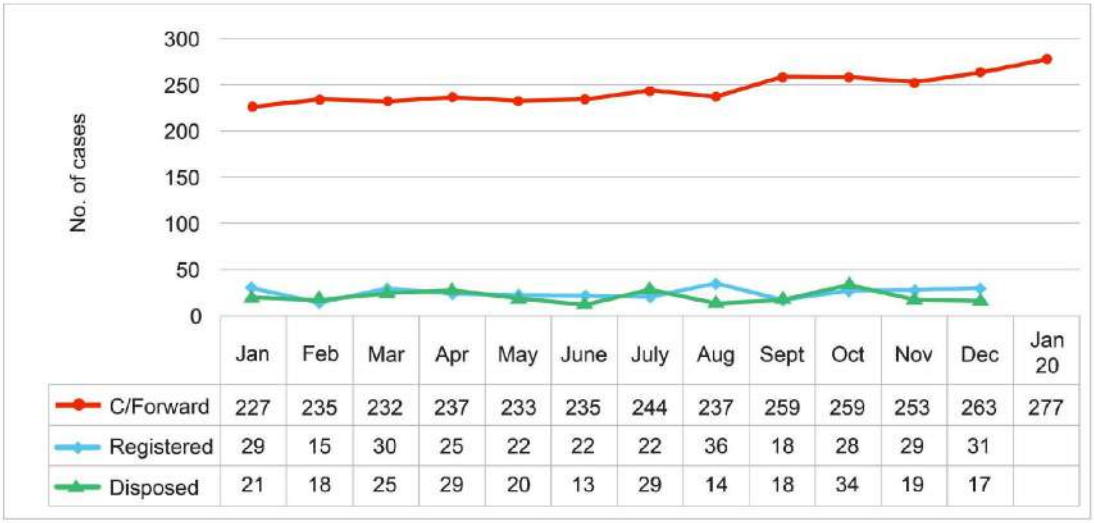
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	4648	4717	4813	4844	4923	4988	5135	5210	5285	5313	5309	5405	5717
Registered	434	394	447	467	465	369	513	466	415	438	469	550	
Disposed	365	298	416	388	400	222	438	391	387	442	373	238	

Interlocutory Matters Appeals

In 2019, a total of 307 Interlocutory Matters Appeals ("IM Appeals") were registered in addition to the 227 IM Appeals that were carried forward from 2018. By the end of 2019, 257 were disposed of leaving 277 appeals. Out of this figure, only 66 were pre-2019 appeals which are expected to be disposed of by the first quarter of 2020. The figures for IM Appeals registered, disposed of and pending for the year 2019 are shown in Graph B.

GRAPH B

INTERLOCUTORY MATTERS APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



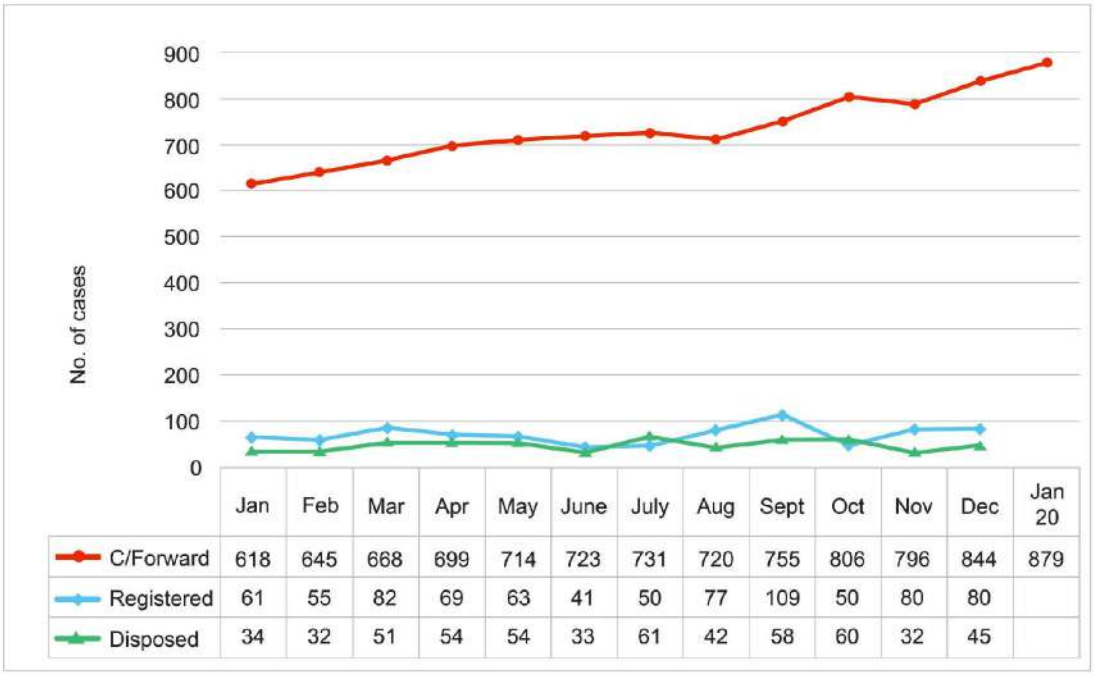
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	227	235	232	237	233	235	244	237	259	259	253	263	277
Registered	29	15	30	25	22	22	22	36	18	28	29	31	
Disposed	21	18	25	29	20	13	29	14	18	34	19	17	

Full Trial Civil Appeals

In 2019, a total of 817 Full Trial Appeals ("FT Appeals") were registered. There were 618 FT Appeals carried forward from 2018. A total of 556 appeals were disposed of leaving 879 appeals on the list. Out of these 879 appeals, 196 are pre-2019 FT Appeals. The figures for FT Appeals are shown in Graph C.

GRAPH C

FULL TRIAL CIVIL APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



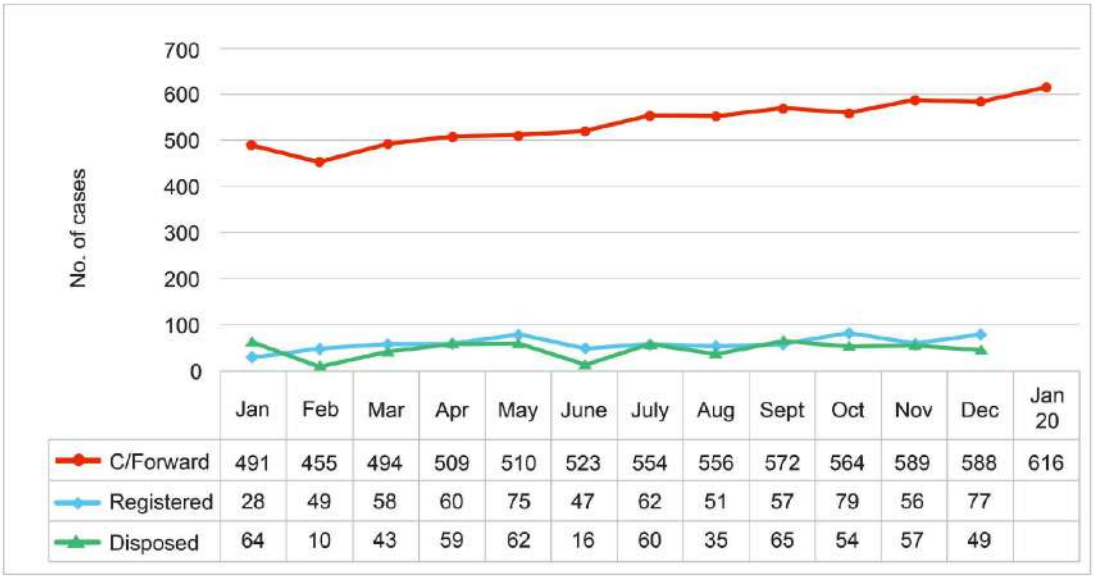
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	618	645	668	699	714	723	731	720	755	806	796	844	879
Registered	61	55	82	69	63	41	50	77	109	50	80	80	
Disposed	34	32	51	54	54	33	61	42	58	60	32	45	

New Commercial Court Appeals

In 2019, a total of 699 New Commercial Court Appeals ("NCC Appeals") were registered. A total of 491 appeals were carried forward from 2018. In 2019, 574 appeals were disposed of. As of 31 December 2019, there are 616 appeals which are still pending before the Court of Appeal. Out of this figure, 115 cases are pre-2019 cases. The number of NCC Appeals registered, disposed of and pending in 2019 is shown in Graph D.

GRAPH D

NEW COMMERCIAL COURTS APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



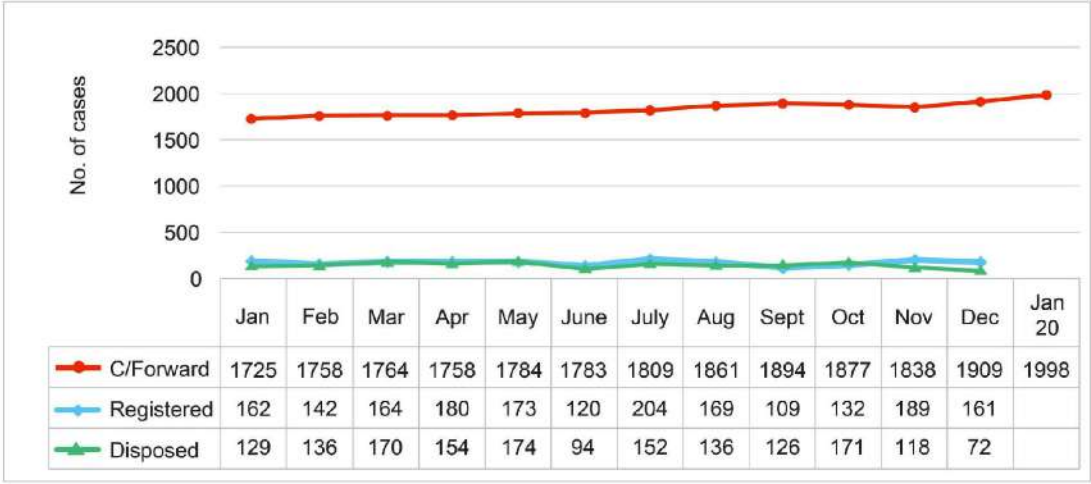
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	491	455	494	509	510	523	554	556	572	564	589	588	616
Registered	28	49	58	60	75	47	62	51	57	79	56	77	
Disposed	64	10	43	59	62	16	60	35	65	54	57	49	

New Civil Court Appeals

There were 1,905 New Civil Court Appeals ("NCvC Appeals") registered in 2019. A total of 1,725 appeals were carried forward from 2018. In 2019, 1,632 NCvC Appeals were disposed of by the end of the year, with a balance of 1,998 cases, of which 511 appeals were pre-2019 appeals. The number of registered, disposed of and pending NCvC appeals in 2019 can be seen in Graph E.

GRAPH E

NEW CIVIL COURTS APPEALS IN 2019
NUMBER CASES OF REGISTERED, DISPOSED OF AND PENDING



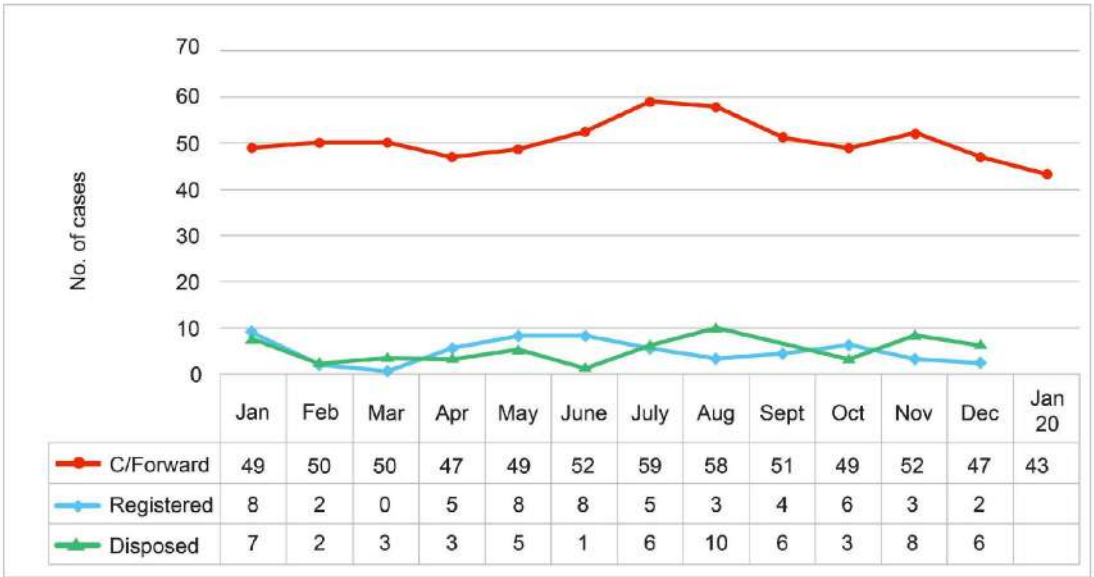
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	1725	1758	1764	1758	1784	1783	1809	1861	1894	1877	1838	1909	1998
Registered	162	142	164	180	173	120	204	169	109	132	189	161	
Disposed	129	136	170	154	174	94	152	136	126	171	118	72	

Muamalat Appeals

Muamalat Appeals are now current. 54 Muamalat appeals were registered in 2019, while 49 appeals were carried forward from the previous year. A total of 60 appeals have been disposed of leaving a balance of 43 appeals pending before the Court of Appeal. Only 7 out of the 43 appeals are pre-2019 appeals. The number of Muamalat Appeals registered, disposed of and pending in 2019 can be seen in Graph F.

GRAPH F

MUAMALAT APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



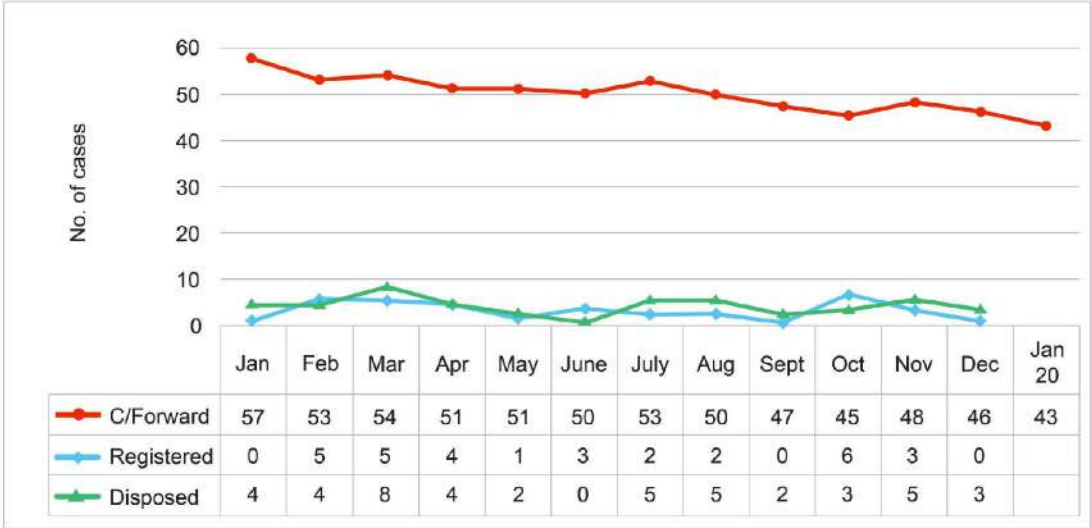
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	49	50	50	47	49	52	59	58	51	49	52	47	43
Registered	8	2	0	5	8	8	5	3	4	6	3	2	
Disposed	7	2	3	3	5	1	6	10	6	3	8	6	

Intellectual Property Appeals

There were 57 Intellectual Property Appeals ("IP Appeals") carried forward from 2018. In addition to that, there were 31 appeals registered in 2019. 45 appeals were disposed of in 2019 leaving a balance of 43 appeals which are still pending. Out of this figure, only 26 appeals were pre-2019 appeals. The figures are shown in Graph G.

GRAPH G

INTELLECTUAL PROPERTY APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



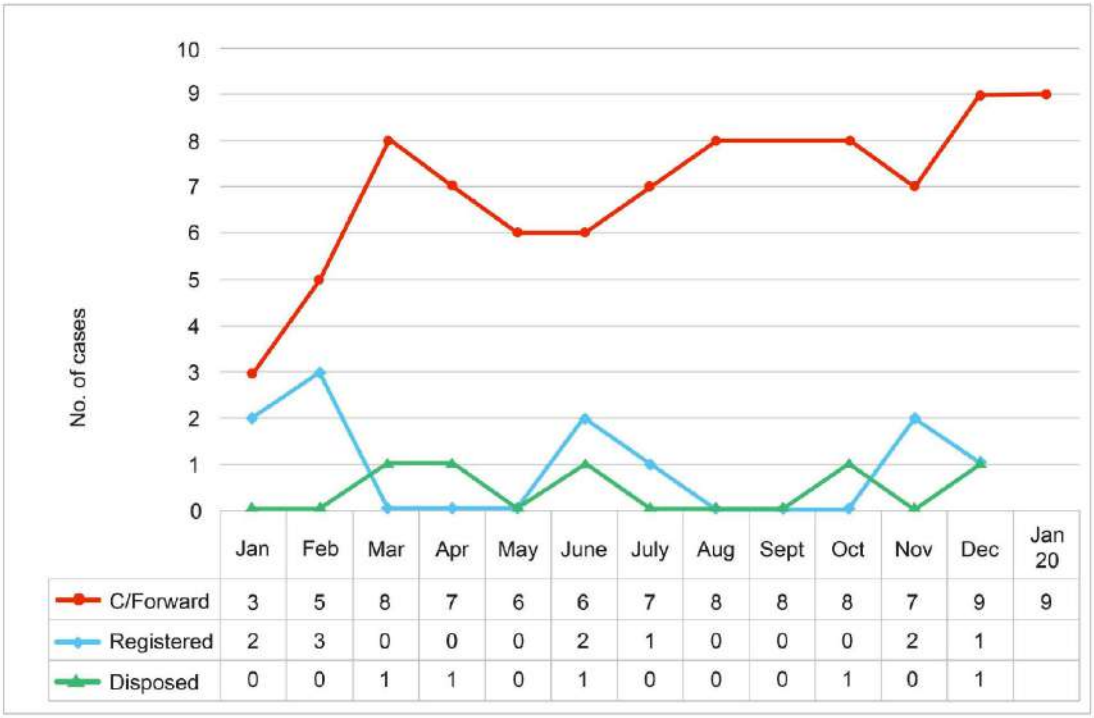
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	57	53	54	51	51	50	53	50	47	45	48	46	43
Registered	0	5	5	4	1	3	2	2	0	6	3	0	
Disposed	4	4	8	4	2	0	5	5	2	3	5	3	

Admiralty Appeals

Admiralty Appeals are now current. In 2019, 11 appeals were registered. In addition to that, there were 3 appeals carried forward from 2018. There were 5 appeals disposed of leaving a balance of 9 pending cases, all of which were registered in 2019, while 1 case was registered in 2018. The performance is as illustrated in Graph H.

GRAPH H

ADMIRALTY APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	3	5	8	7	6	6	7	8	8	8	7	9	9
Registered	2	3	0	0	0	2	1	0	0	0	2	1	
Disposed	0	0	1	1	0	1	0	0	0	1	0	1	

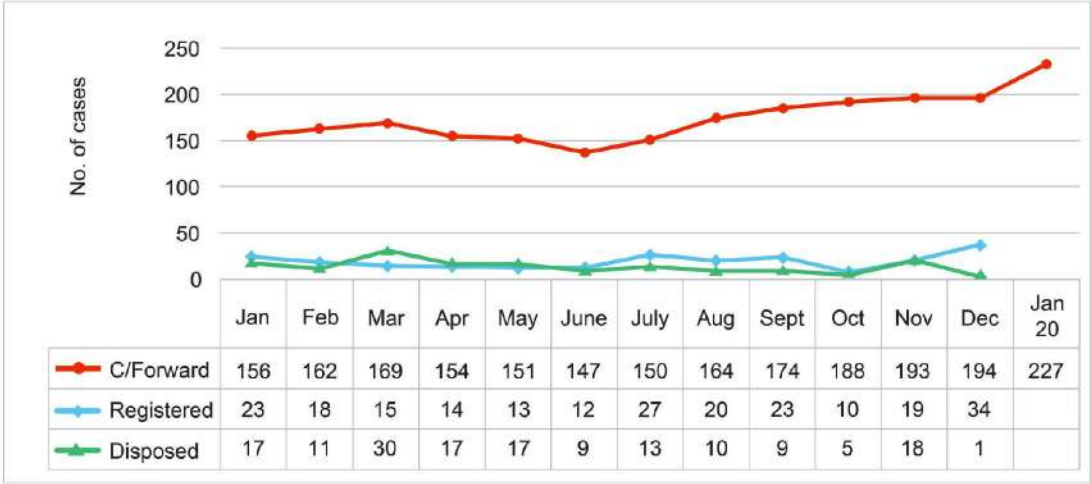
Construction Court Appeals

In 2019, 228 Construction Court Appeals were registered and 156 appeals were carried forward from 2018. A total of 157 appeals were disposed of leaving a balance of 227 appeals. Out of these 227 appeals, 54 appeals were pre-2019. The figures are illustrated in Graph I.

It should be mentioned here that the Construction Court Appeals are adjudicated in a special courtroom equipped with current technology. In this regard, we are grateful to the Construction Industry Development Board ("CIDB") for equipping the courtroom with the latest technology, which has been of great assistance to the court's efficient disposal of Construction Court Appeals.

GRAPH I

CONSTRUCTION COURT APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



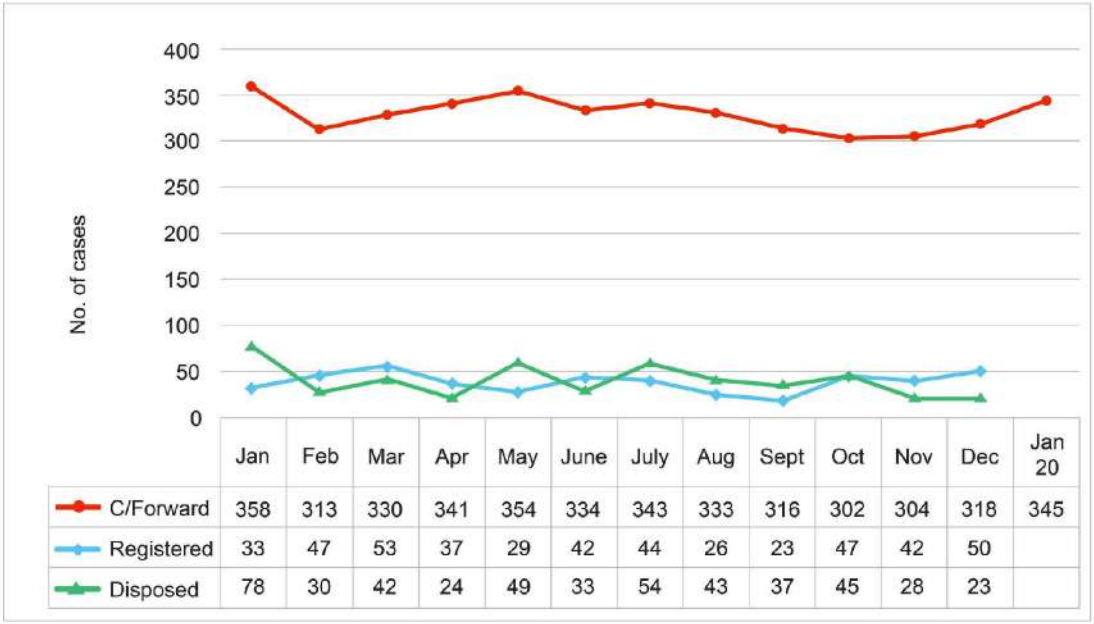
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	156	162	169	154	151	147	150	164	174	188	193	194	227
Registered	23	18	15	14	13	12	27	20	23	10	19	34	
Disposed	17	11	30	17	17	9	13	10	9	5	18	1	

Leave Applications

In 2019, 473 Leave Applications were registered. In addition to that, 358 Leave Applications were carried forward from the previous year. A total of 486 Leave Applications were disposed of leaving a balance of 345 applications. The number of leave applications registered, disposed of and pending in 2019 can be seen in Graph J.

GRAPH J

LEAVE TO APPEAL IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



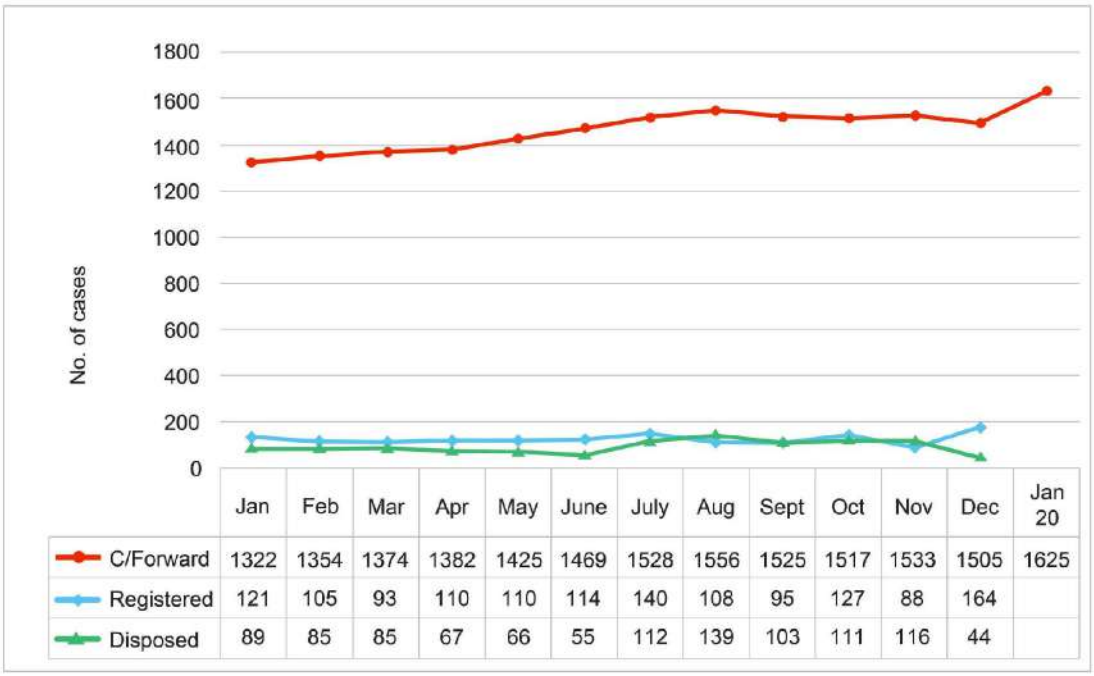
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	358	313	330	341	354	334	343	333	316	302	304	318	345
Registered	33	47	53	37	29	42	44	26	23	47	42	50	
Disposed	78	30	42	24	49	33	54	43	37	45	28	23	

Criminal Appeals

A total of 1,375 Criminal Appeals were registered in 2019. There were 1,322 Criminal Appeals carried forward from 2018. A total of 1,072 appeals were disposed of leaving 1,625 appeals pending as illustrated in Graph K.

GRAPH K

CRIMINAL APPEALS IN 2019
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING

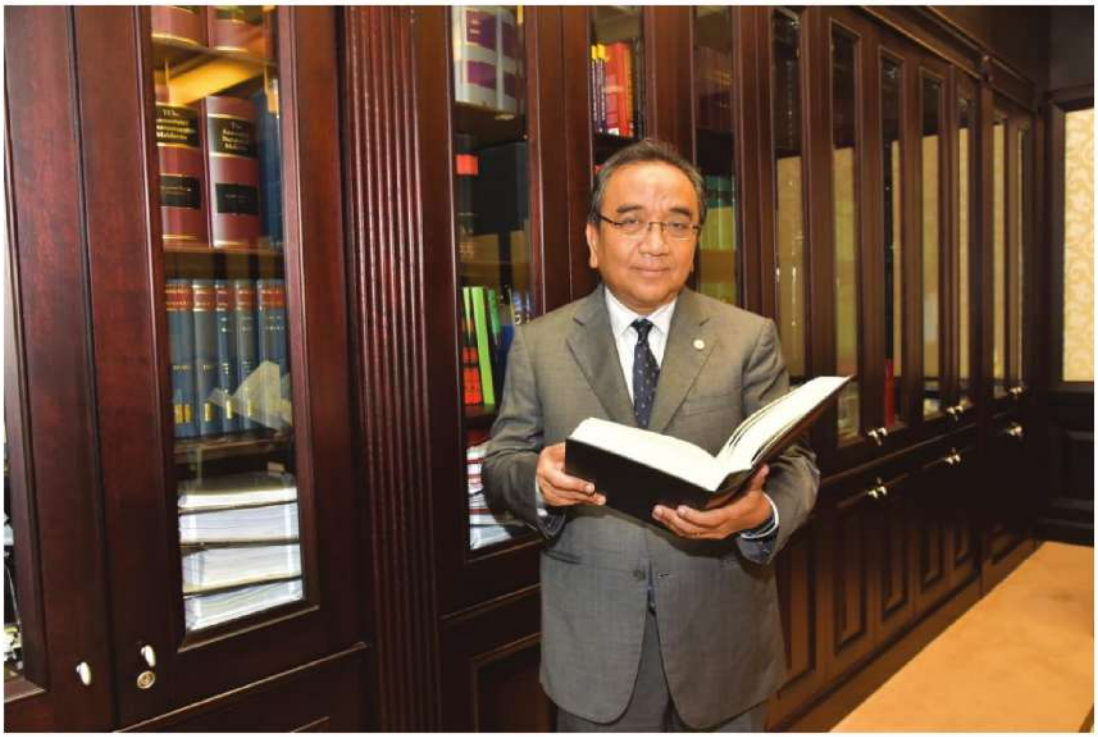


	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan 20
C/Forward	1322	1354	1374	1382	1425	1469	1528	1556	1525	1517	1533	1505	1625
Registered	121	105	93	110	110	114	140	108	95	127	88	164	
Disposed	89	85	85	67	66	55	112	139	103	111	116	44	


ISTANA KEHAKIMAN

CHAPTER 4 THE HIGH COURTS

STATEMENT BY THE CHIEF JUDGE OF MALAYA



The Chief Judge of Malaya Azahar Mohamed

Time flies. As we welcome the year 2020, it is natural for us to reflect and look back on the year that has passed. It gives us a sense of perspective, and allows us to learn from the experiences we have had.

Numbers are often a clear measure of progress. The statistics in 2019 showed a rapidly expanding caseload in the High Court in Malaya. The ever-increasing workload calls for a strengthened workforce. As at 31 December 2019, a total of 53 judges and 32 judicial commissioners, who are equipped with a diversity of experience from both the private and public sectors in different areas of legal practice, were serving on the bench of the High Court in Malaya.

I am glad to report that in 2019, a total of 8,189 criminal cases were registered in the various courts of the High Court in Malaya and 7,728 cases were disposed of, achieving a disposal rate of 94.37%. For civil cases, a total of 91,174 cases were registered and 77,485 cases were disposed of, reaching a disposal rate of 85%.

Every year, the bulk of the cases filed are in the Subordinate Courts in Peninsular Malaysia. In line with current needs, as at 31 December 2019, the total number of Sessions Court judges and Magistrates serving in Peninsular Malaysia stood at 136 and 145 respectively. Although the caseload in the Subordinate Courts is relatively high, I am happy to report that the disposal rates for cases in the Subordinate Courts in Peninsular Malaysia in 2019 were remarkable. A total of 61,643 criminal cases were registered in all of the Sessions Courts in Peninsular Malaysia and 61,358 cases were disposed of, achieving a disposal rate of 99.53%. As for civil cases, a total of 52,859 cases were registered and 51,134 cases were disposed of, reaching a disposal rate of 96.73%.

Additionally, 4,952 criminal applications and applications for execution in civil cases were registered in the Sessions Courts throughout Peninsular Malaysia and 4,751 of such applications were disposed of, reaching a disposal rate of 95.94%.

Similar levels of success were achieved in the Magistrates' Courts throughout Peninsular Malaysia. A total of 242,982 criminal cases were registered and 240,162 cases were disposed of, achieving a disposal rate of 98.83%. For civil cases, 220,317 cases were registered in the Magistrates' Courts and 219,685 cases were disposed of, achieving a disposal rate of 99.71%. In addition, 1,566,793 departmental and traffic summonses as well as applications for execution in civil cases were registered in the Magistrates' Courts throughout Peninsular Malaysia, and 1,621,588 of such cases were disposed of, resulting in an impressive disposal rate of 103.49%.

The high number of cases disposed of by these Courts reflects the hard work and tireless efforts by judges, judicial commissioners and judicial officers in discharging their judicial duties. Besides, the managing judges comprising judges of the appellate courts have greatly assisted me in dealing with administrative issues in both the High Court in Malaya and the Subordinate Courts in Peninsular Malaysia. I wish to place on record my sincere appreciation to all of them. Further, I take this opportunity to express my utmost gratitude to my predecessor, Tan Sri Zaharah Ibrahim, who retired on 16 May 2019, for Her Ladyship's excellent leadership at the helm of the High Court in Malaya and the Subordinate Courts in Peninsular Malaysia.

I must also acknowledge the efforts of our stakeholders, especially the officers of the Attorney General's Chambers and members of the Bar, in working cooperatively with the Bench. I hope that a similar extent of cooperation and support will continue to be extended by all of our stakeholders in 2020 and beyond.

On another note, the year 2019 witnessed the retirement of four judges of the High Court in Malaya, namely Justice Mohd Azman Husin, Justice Siti Khadijah S. Hassan Badjenid, Justice Rosnaini Saub and Justice Su Geok Yiam, as well as four judicial commissioners, namely Judicial Commissioner Mat Ghani Abdullah, Judicial Commissioner Asmadi Husin, Judicial Commissioner Zalita Zaidan and Judicial Commissioner Mohd Ivan Hussein. I take this opportunity to thank them for the services they have rendered to the Judiciary and the country, and wish them a happy and healthy retirement.

Last year, we witnessed the elevation of six judges of the High Court in Malaya to the Court of Appeal, namely Justice Lee Swee Seng, Justice Azizah Nawawi, Justice Vazeer Alam Mydin Meera, Justice Hadhariah Syed Ismail, Justice Abu Bakar Jais and Justice S. Nantha Balan E. S. Moorthy. I would like to congratulate them on their appointment and I am certain that their vast experience will be invaluable to the Court of Appeal.

At the same time I wish to congratulate Justice Rozana Ali Yusoff, Justice Abu Bakar Katar, Justice Hayatul Akmal Abdul Aziz, Justice Faizah Jamaludin, Justice Ahmad Kamal Md. Shahid, Justice Wong Chee Lin, Justice Darryl Goon Siew Chye, Justice Roslan Abu Bakar, Justice Abdul Wahab Mohamed, Justice Hassan Abdul Ghani, Justice Chan Jit Lee, Justice Muhammad Jamil Hussin, Justice Wan Ahmad Farid Wan Salleh, Justice Khadijah Idris, Justice Tun Abd Majid Tun Hamzah and Justice Azmi Abdullah on their appointments as Judges of the High Court in Malaya.

In addition, I am also pleased to welcome the appointment of new judicial commissioners to the High Court in Malaya, namely Judicial Commissioners Latifah Mohd Tahar, Amarjeet Singh Serjit Singh, Awang Armadajaya Awang Mahmud, Muniandy Kannyappan, Dr. Shahnaz Sulaiman, Evrol Mariette Peters, Ong Chee Kwan, Maidzuara Mohammed, Mohd Radzi Abdul Hamid, Aslam Zainuddin, Norsharidah Awang, Julie Lack, Fredrick Indran X.A. Nicholas, Khairil Azmi Mohamad Hasbie, Nadzarin Wok Nordin, George Varughese, Quay Chew Soon, Wong Hok Chong, Atan Mustaffa Yussof Ahmad and Annand Ponnudurai. I am confident that they will contribute immensely to the Judiciary.

In the year 2020, the High Court in Malaya and the Subordinate Courts in Peninsular Malaysia will continue their efforts to hear and dispose of cases without undue delay. In order to achieve this objective, it is important for case management to be well-conducted from the point cases are registered. I hope that can be achieved with the cooperation of members of the Bar and the Attorney General's Chambers, by being better prepared and managing their cases well in advance. The cooperation of those attending the case management sessions is needed in order for the court to fix trial dates and to make realistic estimates of the time required for hearings. Once cases are fixed for hearing or trial, they will be heard and disposed of expeditiously without any adjournments. However, in fulfilling our responsibilities, I would like to emphasise that the expeditious disposal of cases should never be done at the expense of justice.

To keep in step with the times, the Malaysian Judiciary has long been cognisant of the benefits of digital technology in improving the system of delivery and expediting the disposal of cases. Last year, we gathered feedback from our stakeholders regarding the e-Review system that has been implemented in the Commercial Division of the High Court in Kuala Lumpur since 12 March 2019. Undeniably, we received mostly encouraging feedback. This system has streamlined the process of case management. With the e-Review system, litigants need not physically travel to court to attend case management sessions. All case management sessions are conducted via email correspondence and the e-Review online platform. This has resulted in significant savings in terms of time and travel costs for all parties concerned. Therefore, in 2020, we are planning to expand the e-Review system to all the High Courts in Malaya and the Subordinates Courts in Peninsular Malaysia.

In tandem with this initiative is our mission to "go paperless" in the near future. The High Courts in Malaya and the Subordinate Courts in Peninsular Malaysia will place more reliance on virtual documents, whereby hearings and trials may be conducted without any physical documents. Judges, judicial commissioners and judicial officers are encouraged to fully utilise the Case Management System ("CMS"), which is the principal component of the e-Court System of the Malaysian Judiciary. It is an integrated system for the management of cases filed online. As such, documents such as cause papers can be downloaded and viewed from the computer. In fact, all aspects of document management can easily be done from the computer, hence reducing reliance on physical bundles. This removes the need for hard copy bundles of documents which, apart from taking storage space, need to be carried in and out of courtrooms daily. The reduction in paper usage will further reduce the costs of litigation for all parties.

Bearing in mind that any changes will affect our stakeholders, I am aware of the necessity to have regular meetings with members of the Bar, the Attorney General's Chambers and other enforcement agencies to discuss, deliberate and iron out any teething problems they may face in dealing with the High Court in Malaya and the Subordinate Courts in Peninsular Malaysia. This is an approach we continue to adopt.

On a different note, judicial training is an on-going exercise for judges, judicial commissioners as well as judicial officers throughout their judicial career. In this regard, the Judicial Academy (under the aegis of the Judicial Appointments Commission) and the Chief Registrar's Office have continued to organise courses, seminars and workshops on several areas of the law. It is our hope that through such trainings, judges, judicial commissioners and judicial officers would be able to keep abreast with current developments in the law, in order to assist them to perform their judicial functions efficiently.

Finally, I would like to set out our main aims for the year 2020. We shall continue our efforts to ensure that all cases registered in the High Court in Malaya and in the Subordinate Courts in Peninsular Malaysia be disposed of without undue delay but without sacrificing justice. We shall also continue to fully embrace the computerisation of the court system in dispensing justice. And of equal importance, we shall continue to enhance our knowledge in keeping up to date with the development of the law. With these aims in mind, I am optimistic that the judges and judicial commissioners of the High Court in Malaya and the judicial officers of the Subordinate Courts in Peninsular Malaysia will pave the way for improved access to justice by all levels of society, and for greater efficiency and efficacy in the administration of justice.

Let me end by wishing everyone a productive new year. Let us look forward to 2020 brimming with confidence and positivity. Thank you.

Chief Judge of Malaya
Azahar Mohamed

JUDGES OF THE HIGH COURT IN MALAYA

1. Justice Su Geok Yiam
2. Justice Abdul Halim Aman
3. Justice Zulkifli Bakar
4. Justice Mohd Azman Husin
5. Justice Mohd Sofian Abd Razak
6. Justice Ghazali Cha
7. Justice Rosnaini Saub
8. Justice Ahmad Zaidi Ibrahim
9. Justice Mariana Yahya
10. Justice Azman Abdullah
11. Justice Mohd Yazid Mustafa
12. Justice Zainal Azman Ab Aziz
13. Justice Halijah Abbas
14. Justice Akhtar Tahir
15. Justice Nik Hasmat Nik Mohamad
16. Justice See Mee Chun
17. Justice Ahmad Nasfy Yasin
18. Justice Rosilah Yop
19. Justice Hashim Hamzah
20. Justice Siti Khadijah S. Hassan Badjenid
21. Justice Mohd Zaki Abdul Wahab
22. Justice Che Mohd Ruzima Ghazali
23. Justice Azimah Omar
24. Justice Gunalan Muniandy
25. Justice Lim Chong Fong
26. Justice Nordin Hassan
27. Justice Azmi Ariffin
28. Justice Noorin Badaruddin
29. Justin Collin Lawrence Sequerah
30. Justice Azizul Azmi Adnan
31. Justice Mohamed Zaini Mazlan
32. Justice Mohd Nazlan Mohd Ghazali
33. Justice S.M. Komathy Suppiah
34. Justice Ab Karim Ab Rahman
35. Justice Wong Kian Kheong
36. Justice Ahmad Bache
37. Justice Choo Kah Sing
38. Justice Mohd Firuz Jaffril
39. Justice Rozana Ali Yusoff
40. Justice Hayatul Akmal Abdul Aziz
41. Justice Faizah Jamaludin
42. Justice Ahmad Kamal Md Shahid
43. Justice Wong Chee Lin
44. Justice Darryl Goon Siew Chye
45. Justice Roslan Abu Bakar
46. Justice Abdul Wahab Mohamed
47. Justice Hassan Abdul Ghani
48. Justice Chan Jit Li
49. Justice Muhammad Jamil Hussin
50. Justice Wan Ahmad Farid Wan Salleh
51. Justice Khadijah Idris
52. Justice Tun Abdul Majid Tun Hamzah
53. Justice Azmi Abdullah

JUDICIAL COMMISSIONERS OF THE HIGH COURT IN MALAYA

1. Judicial Commissioner Mohamad Shariff Abu Samah
2. Judicial Commissioner Rohani Ismail
3. Judicial Commissioner Mat Ghani Abdullah
4. Judicial Commissioner Asmadi Husin
5. Judicial Commissioner Zalita Zaidan
6. Judicial Commissioner Anselm Charles Fernandis
7. Judicial Commissioner Mohd Ivan Hussein
8. Judicial Commissioner Ahmad Shahrir Mohd Salleh
9. Judicial Commissioner Ahmad Fairuz Zainol Abidin
10. Judicial Commissioner Mohd Radzi Harun
11. Judicial Commissioner Aliza Sulaiman
12. Judicial Commissioner Meor Hashimi Abdul Hamid
13. Judicial Commissioner Latifah Mohd Tahar
14. Judicial Commissioner Amarjeet Singh Serjit Singh
15. Judicial Commissioner Awang Armadajaya Awang Mahmud
16. Judicial Commissioner Muniandy Kannyappan
17. Judicial Commissioner Dr. Shahnaz Sulaiman
18. Judicial Commissioner Evrol Mariette Peters
19. Judicial Commissioner Ong Chee Kwan
20. Judicial Commissioner Maidzuara Mohammed
21. Judicial Commissioner Mohd Radzi Abdul Hamid
22. Judicial Commissioner Aslam Zainuddin
23. Judicial Commissioner Norsharidah Awang
24. Judicial Commissioner Julie Lack
25. Judicial Commissioner Fredrick Indran X.A. Nicholas
26. Judicial Commissioner Khairil Azmi Mohamad Hasbie
27. Judicial Commissioner Nadzarin Wok Nordin
28. Judicial Commissioner George Varughese K.O. Varughese
29. Judicial Commissioner Quay Chew Soon
30. Judicial Commissioner Wong Hok Chong
31. Judicial Commissioner Atan Mustaffa Yussof Ahmad
32. Judicial Commissioner Annand Ponnudurai

STATEMENT BY THE CHIEF JUDGE OF SABAH & SARAWAK

The Chief Judge of Sabah and Sarawak
David Wong Dak Wah

15 November 2019 will go down in the annals of history of the High Court in Sabah and Sarawak as a momentous and significant day, as it was on that day that the administration centre of the same was relocated to the Kota Kinabalu High Court, Sabah. The Registry of the High Court in Sabah and Sarawak had been housed in the Kuching High Court, Sarawak for a period of some 56 years since Malaysia Day. The rationale for the relocation is simply to reflect the equal status of both the Sabah and Sarawak High Courts as enshrined in the Federal Constitution.

It is also a timely relocation, since April 2019, the Kota Kinabalu High Court has been housed in a new 5-storey building equipped with the latest technology. The relocation of the administrative centre between Sabah and Sarawak will be on a 10-year rotation basis.

I take this opportunity to express our gratitude to DYMM Yang di-Pertuan Agong and the immediate past Prime Minister, YAB Tun Dr Mahathir Mohamad, for consenting to our request for relocation. Similar gratitude is due to the immediate past Chief Justice Richard Malanjum, and the present Chief Justice Tengku Maimun Tuan Mat, for supporting the relocation.

2019 was also the year we saw the retirement of the Chief Justice Richard Malanjum, who was my predecessor for 12 years. I take this opportunity to thank him for his service to the High Court in Sabah and Sarawak. There is little doubt that his many footprints of innovation will remain permanent features of the East Malaysian Judiciary. I also thank him for his guidance during my tenure as the Chief Judge of Sabah and Sarawak.

2019 also saw the appointment of a new Chief Justice Tengku Maimun Tuan Mat. Here I would like to express my heartfelt gratitude for the tremendous support given by the Chief Justice in respect of technological developments in the High Court in Sabah and Sarawak. Her Ladyship's endorsement of our efforts in this regard will no doubt serve as a source of encouragement for us to continue to innovate. We are also heartened by how the Chief Justice embraced the ideals of our mobile courts, by walking the talk and joining us in a mobile court outing in Paitan in October 2019 where she camped out at Sekolah Kebangsaan Golong. The Chief Justice personally witnessed how folks in the interior of Sabah were able to claim their basic right of identity through the legal process with the assistance of the mobile court facilities. We look forward to more mobile court outings with the Chief Justice.

Further, in 2019, we introduced the "Urban Mobile Court" concept to cater for folks who live on the fringe

of various towns. The first such project was launched at Kampung Babah Bunduon Community Hall, Penampang on 23 October 2019.

In Sarawak we ventured into the Mulu Caves, where we conducted child offences awareness sessions with the students of Sekolah Kebangsaan Baru Bunyan, Miri.

Education for legal officers continues to be a top priority of the East Malaysian Judiciary. Several seminars were organised namely, seminars on "Effective Prosecution of Anti Money Laundering/ Counter Terrorism Financing" in Kota Kinabalu, Sabah (14-17 May 2019), "Asset Forfeiture: A Tool to Combat Terrorist Financing" in Tuaran, Sabah (25- 27 September 2019) and "Digital Evidence Workshop" in Miri, Sarawak (29-30 August 2019). I would like to express my personal gratitude to Karyn Kelly and Tom Dougherty for their great help and expertise. We also wish them the very best in their next ventures.

In our quest to develop the advocacy skills of the legal profession, we have conducted training sessions in collaboration with the Bar Council Advocacy Training Committee. Effectively, we currently have a few judges and legal officers who are qualified trainers. Courses have been conducted in both Kota Kinabalu and Kuching. Attendance at an advocacy training course is a mandatory condition to be called to the Bar.

Technological enhancement continues to be at the forefront of our mission. Works have been commenced by the IT team in November 2019 to explore potential ways of embracing Artificial Intelligence ("AI") in the decision-making process of the judiciary. Lest it be misunderstood, AI technology is not meant to take over the job of judging, but simply to assist in enhancing the quality of decisions. Two areas have been identified for the incorporation of AI, namely, data sentencing and personal injury damages. With regard to data sentencing, AI is presently used in respect of two offences – drug possession under section 12(2) of the Dangerous Drugs Act 1952 (Act 234) , and rape under section 376(1) of the Penal Code (Act 574). The primary purpose of integrating AI in the sentencing process is to ensure consistency in the sentences meted out by the courts.

With regard to damages for personal injury, the AI recommended an amount that shall be used by the court as a base for mediation between parties, and I have no doubt that it will lead to more private settlements.

Finally let me take this opportunity to say a big thank you to all who have touched my life during my 14 and a half years in the Judiciary family. It is a blessing to have been associated with all of you. To my teams (1.0 and 2.0) and fringe members, a special thank you for your assistance, which has not only been par excellence but beyond that. Your professionalism permeates everything you did for the Judiciary.

I wish everyone the very best in all your endeavours.

Chief Judge of Sabah and Sarawak
David Wong Dak Wah

JUDGES OF THE HIGH COURT IN SABAH & SARAWAK

1. Justice Nurchaya Arshad
2. Justice Supang Lian
3. Justice Lee Heng Cheong
4. Justice Mairin Idang @ Martin
5. Justice Azhahari Kamal Ramli
6. Justice Dr. Alwi Abdul Wahab
7. Justice Ismail Brahim
8. Justice Dean Wayne Daly
9. Justice Celestina Stuel Galid

JUDICIAL COMMISSIONERS OF THE HIGH COURT IN SABAH & SARAWAK

1. Judicial Commissioner Bexter Agas Michael
2. Judicial Commissioner Lim Hock Leng
3. Judicial Commissioner Duncan Sikodol
4. Judicial Commissioner Christoper Chin Soo Yin
5. Judicial Commissioner Wong Siong Tung
6. Judicial Commissioner Leonard David Shim

THE NEW KOTA KINABALU COURT COMPLEX

The signing of the plaque by Tuan Yang Terutama Yang di-Pertua Negeri Sabah Tun Datuk Seri Panglima Haji Juhar bin Haji Mahiruddin, symbolizing the official opening of the new Kota Kinabalu Court Complex

The new Kota Kinabalu Court Complex was officiated on 2 April 2019 by Tuan Yang Terutama Yang di-Pertua Negeri Sabah Tun Datuk Seri Panglima Haji Juhar bin Haji Mahiruddin. Present at the opening ceremony is the Chief Minister Datuk Seri Panglima Shafie Apdal, Chief Justice Richard Malanjum, Minister in the Prime Minister's Department in charge of legal affairs, Datuk Liew Vui Keong, Chief Judge of Sabah and Sarawak, David Wong Dak Wah, as well as judges, court officers, lawyers and distinguished guests.

The construction of the new RM147.9 million Kota Kinabalu Court Complex began in July 2014 on a 2.5-hectare site on the outskirts of the city. The architecture and design of the new Court Complex building encompasses the culture of Sabah's multiple ethnic groups, namely the Kadazan-Dusun, Bajau and Murut while incorporating the elements of the country's national flower, the *hibiscus rosa-sinensis* and Sabah's official flower, the *rafflesia*.

The exterior part of the building emulates the Palace of Justice in Putrajaya. It houses 16 courtrooms - three of which are High Courts, six Sessions Courts with one special court for sexual offences against children, six Magistrates' Courts and a court reserved for Federal Court and Court of Appeal sittings.

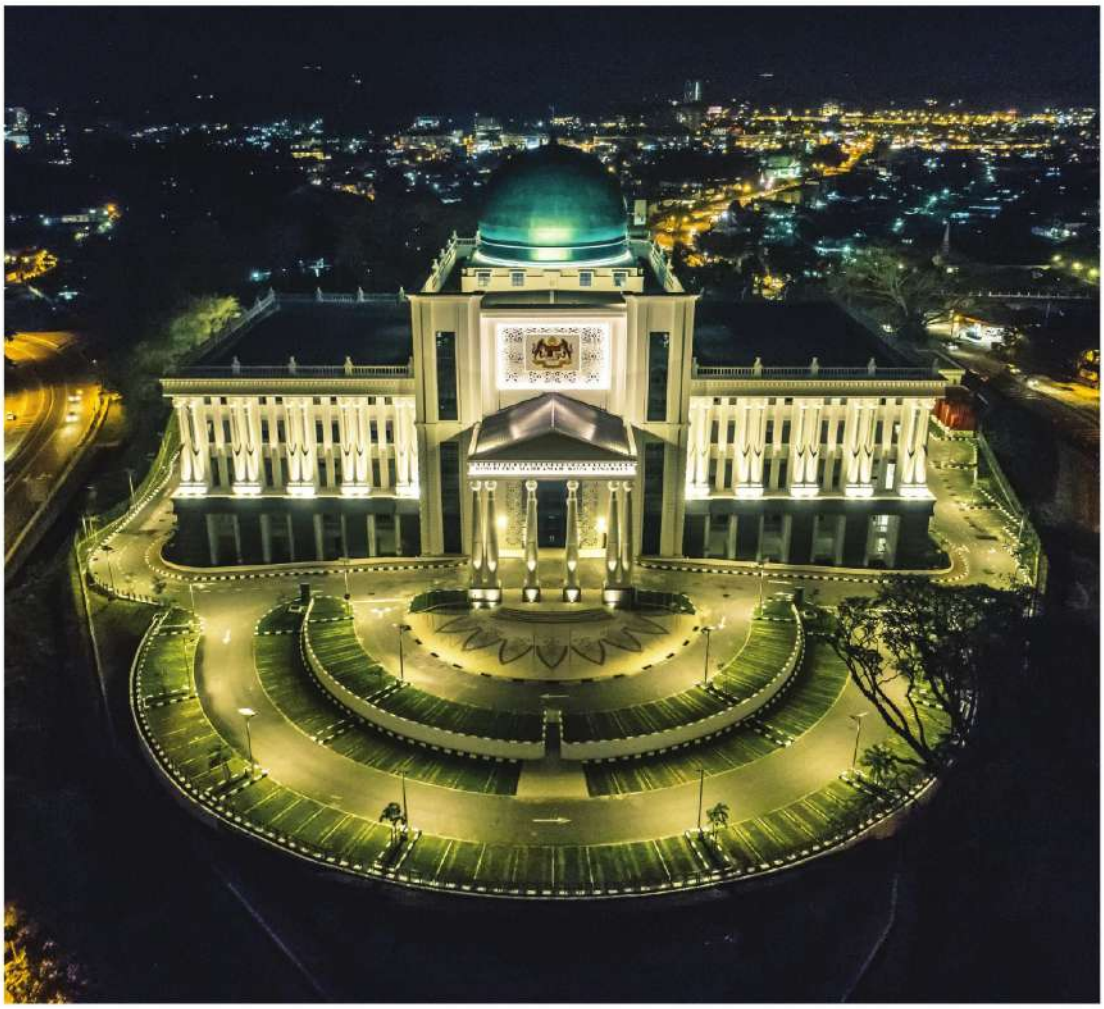
For security reasons, the Court Complex was built with two main entrances equipped with corridors of varying safety measures. There are different routes and entrances for the accused persons and prison detainees and the judges, court personnel and the public. The design of this new Court Complex departs slightly from the conventional designs as the judge's chambers are not attached to the courtrooms. Instead, the judges' chambers are located on the fourth floor whilst the courtrooms on the second floor.

The change in design is deliberate, as it allows for separate routes away from the public for enhanced safety and privacy not only for the judges, but also for the witnesses and accused persons. As an added security measure, laminated tempered glass is used in witness stands.

The Kota Kinabalu Court Complex was built using the Industrialised Building System ("IBS"), a construction method where components are manufactured in the factory or *in situ* in a controlled and monitored environment and transported to the building site. Along with the use of IBS, the building and the area around it were also designed and built to not cause any damage to the surrounding environment.

Rainwater harvesting tanks were used to water the plants nearby where the building was erected. It was a requirement of the Kota Kinabalu City Hall that as many trees as possible were to be saved during the construction process, as Bukit Punai where the court complex stood is one of the few lush green spaces that sits so close to the city. The streetlights within the building parameter are installed with solar panels to ensure self-sustainability and energy saving. "Betoflor" reinforced wall is also used to secure the acreage from erosion as it uses geotextile, allowing plants and grass to grow around the embankment.

As part of an ongoing effort to bridge the gap between the public and the judiciary as well as to educate the public on the history of the Malaysian Judiciary, the new Court Complex houses a Judicial Museum on its 5th floor. The Judicial Museum was set up to resemble a modern-day courtroom. The Royal Court of Arms, previously kept in Sandakan, the Embossing Seal which was used in the 1960s, decades-old books of law and an old court typewriter are among the treasures on display at the museum.



The magnificent Kota Kinabalu Court Complex

THE OFFICE OF THE CHIEF REGISTRAR, FEDERAL COURT OF MALAYSIA

The Chief Registrar of the Federal Court Ahmad Terrirudin Mohd Salleh

2019 has been a remarkable year for the Office of the Chief Registrar with the successful implementation of six key strategies and operational activities throughout the year. The Office of the Chief Registrar underscores the importance in ensuring the highest level of efficiency of the Malaysian Courts in terms of operations and processes. This has been my goal since helming the post of the Chief Registrar on 3 May 2019. A tall order indeed, but Alhamdulillah, all the activities have been implemented successfully. The activities are as follows:

Refining Access to Justice

Launching of the "Urban Mobile Court" services

The "Urban Mobile Court" services at Kampung Babah Bunduon, Penampang, Sabah was launched on 23 October 2019. The Mobile Court involves a system where buses and four-wheel drives bearing the logo 'Justice for One and All' are converted into "mobile courtrooms" traversing into the interior parts of the State to dispense legal aid and justice to the rural folks. Previously, the Mobile Courts only targeted remote areas in Sabah as well as Sarawak and with the increase in rural-urban migration, the Mobile Court services have and will be further expanded to urban centres.

The Sessions Court Judges or Magistrates sitting at the Mobile Court hear civil and criminal matters and perform other judicial duties such as attestation of documents, statutory declarations and filing of cases. One of the main purposes of the Mobile Court is to hear birth extraction and death extraction applications by the rural villagers who were unable to register the birth of a newborn and death of a person with the National Registration Department within a specified time. Failure to register would deny the villagers birth certificates and identification cards leading to inaccessibility to education and employment.

New Court Complexes

New Court Complexes in Kota Kinabalu, Sabah and Kota Bharu, Kelantan were officiated on 2 April 2019 and 23 July 2019, respectively. They are equipped with the latest and modern facilities to ensure justice is served without compromising the safety of the judges, judicial officers and the stakeholders. Apart from building new court complexes, renovations were undertaken at courts nationwide such as the new building at the Kemaman Court Complex which commenced its operation on 15 October 2019.

Launching of the e-Review Module

On 12 March 2019, the Chief Registrar's Office launched the e-Review Module and Video Conferencing at the Kuala Lumpur Court Complex. The e-Review Module and Video Conferencing are platforms allowing for hearings and case management to be conducted online between the Courts, the Deputy Public Prosecutors and lawyers stationed at different locations. For phase 1, the module has been utilised at three court locations, namely Kuala Lumpur, Shah Alam and Pulau Pinang.

Professional Development and Human Capital Building

Whilst providing top notch Court infrastructure and facilities, this Office puts equal emphasis on professional development and human capital building of its officers and staff. Hence, as an initiative to enhance the professional standards and to foster life-long learning, the officers and staff are highly encouraged to pursue their graduate and post-graduate studies to increase their knowledge and proficiency.

Overseas Training/Courses/Seminars

Below is the list of judicial officers' participations in training/courses/seminars for 2019:

No.	Name of courses/seminars	No. of officers
1.	Meeting of the Advisory Board of the Global Judicial Integrity Network	1
2.	Asean-Ustpo Judicial Colloquium on Civil and Criminal Infringement of Intellectual Property	3
3.	Criminal Justice Responses to Returning or Repatriated Foreign Terrorist Fighters (FTFs) and Their Accompanying Family Members Workshop	1
4.	Workshop on Preventing Violent Extremism through Rehabilitation and Reintegration of Violent Extremist and Terrorist Offenders	1
5.	Preparatory Meeting of the 4th Congress of Association of Asian Constitutional Courts and Equivalent Institutions (AACC)	1
6.	International Visitor Leadership Program: Rule of Law and United States Judiciary System	1
7.	South East Asia Regional Exercise on Threat Intelligence Collaboration for Joint Cybercrime and Counter Terrorism Response Programme	1
8.	International Conference on Civil Judgment Enforcement Under Disruptive Technology	1
9.	Workshop on Implementing the Rabat Washington Good Practices on the prevention, detection, intervention and response to homegrown terrorism: with a focus on intervention	2
10.	Asean-Upsto Workshop on utilising ADR in IP Disputes	1
11.	Advisory Board Member Global Judicial Integrity Network Meeting	1
12.	Inaugural Judicial Roundtable on Environmental Adjudication, Rule of Law and Environmental Justice	1
13.	7th Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) 2019	1
14.	5th Joint Judicial Conference	8
15.	Council of Asean Chief Justices (CACJ) Working Group Meetings	2
16.	UNODC 3rd South East Asia Working Group on Countering Online Child Sexual Exploitation	1
17.	4th IT Training	2
18.	Judicial Officers With Leadership Responsibilities Program	2
19.	Board of Members Meeting of Asian Constitutional Courts And Equivalent Institutions (AACC)	3
20.	The Chief Justice of Malaysia Visit to The United State of America Judicial Best Practices	3
21.	7th Council of Asean Chief Justices (CACJ) Meeting and 41st Asean Law Association (ALA) Governing Council Meeting	4

Local Training

Below is the list of agencies that provide training to Judicial officers and staff for 2019:

No.	Agencies
1.	Judicial and Legal Training Institute (ILKAP)
2.	Human Rights Commission of Malaysia (SUHAKAM)
3.	National Institute of Public Administration (INTAN)
4.	United Nations High Commission For Refugees (UNHCR)
5.	Attorney General's Chambers (AGC)
6.	SEARCCT (Ministry of Foreign Affairs)
7.	Prime Minister's Department (JPM)
8.	RIMBA (Department of Wildlife and National Parks Peninsular Malaysia)
9.	Ministry of Domestic Trade and Consumer Affairs (KPDNHEP)
10.	Masjid Wilayah (Malaysian Development of Islamic Development (JAKIM))

In-House Training

Below is the list of courses conducted under the auspices of the Office of the Chief Registrar:

No.	Course title
1.	Kursus Pengurusan Tatatertib Lanjutan II
2.	Kursus Pesuruhjaya Sumpah Seluruh Malaysia
3.	Bengkel Penyediaan Pelan Pengurusan Kesinambungan Perkhidmatan
4.	Kursus Jurubahasa dan Pembantu Tadbir Undang-Undang Mahkamah Persekutuan – "Ke arah pengurusan kes berteknologi terkini"
5.	Program Transformasi Diri Pemangkin Kualiti Organisasi (Kaunseling Kelompok) Negeri Sabah
6.	Program Transformasi Diri Pemangkin Kualiti Organisasi (Kaunseling Kelompok) Negeri Sarawak
7.	Kursus Pemantapan Pelaksanaan *my*PERFORMANCE dan *my*PORTFOLIO
8.	Bengkel Pengenalan EKSA
9.	Kursus Latihan Pangkalan Data Zon Kuala Lumpur
10.	Kursus Latihan Pangkalan Data Zon Putrajaya
11.	Kursus Mengenali Sumber Utama Undang-Undang Untuk Tujuan Penyelidikan Bagi Pustakawan Seluruh Malaysia
12.	Bengkel Dan Task Force Pengurusan Deposit Mahkamah Berdasarkan Zon Di Seluruh Malaysia Bagi Tahun 2019 (Zon Sabah)
13.	Kursus Asas Pengurusan Perolehan Kerajaan Zon Tengah
14.	Kursus Asas Pengurusan Perolehan Kerajaan Zon Selatan

No.	Course title
15.	Kursus Asas Pengurusan Perolehan Kerajaan Zon Sabah
16.	Kursus Asas Pengurusan Perolehan Kerajaan Zon Sarawak
17.	Bengkel Pengurusan TP Admin dan Pengurusan Mahkamah Tinggi Malaya
18.	Program Transformasi Minda L41
19.	Kursus SISPIM Perak
20.	Kursus SISPIM Melaka
21.	Kursus SISPIM Terengganu
22.	Talk on Judicial Temperament and Bench DeCorum
23.	Kursus CLJ Sabah dan Sarawak
24.	Kursus SISPIM Pahang
25.	Kursus Asas Pengurusan Perolehan Kerajaan Zon Utara
26.	Kursus Pengurusan Fail dan Rekod PKPMP
27.	Kursus SISPIM Kedah
28.	Bengkel Penyediaan Ringkasan Kes untuk Pegawai Penyelidik, Pegawai Pejabat Pendaftaran Mahkamah Persekutuan dan Pegawai Unit Penyelidikan Pejabat Ketua Hakim Negara
29.	Kursus Latihan Pangkalan Data Zon Shah Alam
30.	Kursus Komunikasi dan Mesra Pelanggan
31.	Program Pasca AKRAB
32.	Kursus Komunikasi Berkesan dan Keyakinan Diri
33.	Hari Integriti
34.	Kursus Bahasa Inggeris Bagi Pegawai Kehakiman
35.	Bengkel Pengurusan Kes Dan Penyediaan Ringkasan Kes Untuk Pegawai-Pegawai Mahkamah Rayuan Malaysia

Scholarship Applications

Below is the list of post-graduate scholarships applied for by judicial officers and staff for 2019:

No.	Name of scholarships
1.	Biasiswa Japan International Cooperation Agency (JICA) bagi Pengajian Sarjana dan Ph.D. dalam Energy Policy
2.	Hadiah Latihan Persekutuan Separa Biasiswa Sesi 2019/2020 untuk Pegawai Pengurusan dan Profesional Yang Mengikuti Pengajian di Peringkat Sarjana dan Ph.D Secara Separuh Masa
3.	Japanese Government (Monbukagakusho: MEXT) Young Leaders' Programme (YLP) Scholarships For 2020
4.	Biasiswa Tajaan Badan Asing Tahun 2020 - JICA Knowledge Co-Creation Program for Long Term Participants - SDGS Global Leader (JFY2020)
5.	Hadiah Latihan Persekutuan (HLP) Pengajian di Peringkat Sarjana dan Kedoktoran Sepenuh Masa Sesi 2020

The Judicial Clerkship Programme

The Judicial Clerkship Programme seeks to recruit the best talent from local and foreign universities, upon completion of their studies, for attachment with the Judiciary. This Programme provides the Judicial Clerks with insights and the first hand opportunity to work closely with the judges of the Federal Court and Court of Appeal by doing research and preparing legal opinions on various areas of law as well as attending court proceedings on public interest cases, constitutional issues and others.

To enrol in this Programme, candidates will undergo an interview with a panel comprising the Chief Judge of Malaya, judges of the Federal Court or Court of Appeal and the Chief Registrar. Candidates are also required to undergo a writing test to assess their legal knowledge, analytical and writing skill and language proficiency. Successful candidates will be attached to the Research Unit, Office of the Chief Registrar for a period of not exceeding three months subject to renewal.

Excellence Recognition

I am also proud to announce that this Office has won various awards in 2019. During the Innovation and Excellence Day organised by the Prime Minister's Department on 31 October 2019, this Office took home the award of "*Anugerah Peneraju e-Perolehan*" and received Vice Champion for "*Anugerah Inovasi Jabatan Perdana Menteri (AIJPM)*" for ICT Category through the "e-Lelong System". I must congratulate all officers and staff for their continuous pursuit of excellence, and I hope they will continue to practise a good working culture, in the spirit of togetherness and esprit-de-corps.

Improving Information Delivery to the Public

New Judiciary Web Portal

The new Judiciary web portal was launched on 1 February 2020 with a "newspaper design" concept. The Portal emphasises on information sharing with its users and at the same time ensures compliance with the guidelines provided in *Pekeliling Kemajuan Pentadbiran Awam Bil 2 Tahun 2015: Pengurusan Laman Web Agensi Sektor Awam*. The new Judiciary web portal is a project managed by the Information Technology Division, Office of the Chief Registrar and supported by the Corporate Communication Division, Office of the Chief Registrar and the appointed vendor. The improvement to the web portal is made to ensure safety of information, increase in portal access and more organised sharing of information. This project also involves the development of new portal for State Courts by adopting the same concept as the new main Judiciary web portal. The development of the State Courts' web portal involved 12 State Courts in 2 Development Phases. Phase 1 involved web portals for the Courts in the states of Kuala Lumpur, Selangor, Pahang, Kelantan, Perak and Kedah while Phase 2 involved developing State Court web portals for Pulau Pinang, Terengganu, Johor, Perlis, Melaka and Negeri Sembilan. It is my sincere hope that with the new web portal design, important and valid information about court processes can be disseminated to stakeholders more efficiently and effectively.

MyC2C Web Portal

"From Courtroom to Classroom" or "MyC2C programme" is a programme initiated by this Office and was later expanded through collaboration with the Ministry of Education. Launched on 8 April 2019 at SMK Presint 8(1), Putrajaya, this programme aims to give early exposure to students on law and the legislative system in Malaysia as well as to inculcate the need to observe the law. There are 3 modules under this programme which are "Judge to School", "Young Lawyers" and "Visit to the Court". Any school wishing to participate in this programme may apply through the web portal of MyC2C.

Study Tour at the Palace of Justice and State Courts

In its ongoing effort to educate the public about the Malaysian judiciary and the court system, the Corporate Communication Division, Office of the Chief Registrar of the Federal Court organised a study tour for students and visitors to the Palace of Justice. The programme encompasses a visit to the Court Museum, library as well as a meet and greet session with appellate judges. The visitors are also allowed to observe proceedings at the Court of Appeal or the Federal Court. Thus far, the participants of the study tour include students and lecturers from the Multimedia University, Seven

Skies International School, Multimedia University Law Society, Yayasan Alumni Universitas Diponegoro Semarang and Universiti Teknologi Mara (UiTM) Kampus Dengkil as well as Ministries and government bodies such as the Ministry of Health and Maktab PDRM Kuala Lumpur.

This Office also opens its doors by conducting study tour programmes at the Courts throughout Malaysia such as Kuala Lumpur Court Complex, Kota Tinggi Court, Shah Alam Court Complex, and the Ampang Court Complex.

Outreach Programme on Public Education and Awareness on Judicial Functions

This Office has regularly organised Outreach Programmes on Public Education and Judicial Functions to expose the public (particularly at the school level) to the role and functions of the Courts in Malaysia.

The first outreach programme was held at Sekolah Menengah Kebangsaan Sungai Pelek, Sepang Selangor on 17 July 2019 and was subsequently held at Sekolah Menengah Kebangsaan Dengkil, Selangor on 1 August 2019.

The Organization's Social Responsibility (OSR) Programme

In an endeavor to give back to society, this Office advocates volunteering efforts that exemplify a socially responsible organisation that will eventually help boost the employee's morale. Below is the list of places where our OSR programmes took place:

Date	Places
27 May 2019	Rumah Jagaan Orang Tua Al-Ikhlas di Kampung Pulau Meranti, Puchong, Selangor
28 May 2019	Rumah Amal Limpahan Kasih , Kampung Sri Aman, Batu 13, Puchong, Selangor
28 May 2019	Program Ramadhan Basket: From POJ to POJ
29 May 2019	Rumah Pengasih Warga Prihatin, Sungai Ramal Baru, Kajang, Selangor
30 May 2019	Pertubuhan Kebajikan Anak-Anak Yatim& Miskin, Sungai Pinang, Klang, Selangor

Creating Togetherness

Meet and Greet Session

A meet and greet session attended by Superior Court judges, judicial officers and staff was held on 21 June 2019 at the lobby of the Palace of Justice to celebrate the appointment of Tun Tengku Maimun Tuan Mat as the Chief Justice on 2 May 2019.

Working Visits to the States Courts

To ensure that administrative policies are communicated and observed at the grass roots level and as an avenue for dialogue and exchange of ideas with the officers, a series of working visits to the Courts throughout Malaysia were held by the Office of the Chief Justice, Office of the Chief Judge of Malaya, Office of the Chief Judge of Sabah and Sarawak and Office of the Chief Registrar of the Federal Court.

In 2019, working visits were held at the Courts in Kota Bharu, Seremban, Alor Setar, Sungai Petani, Muar, Johor Bharu, Kota Kinabalu, Kuching, Bachok, Besut, Setiu, Kuala Terengganu, Gua Musang, Kuala Krai, Kuala Lipis, Selayang, Kuala Lumpur, Kuala Kubu Baharu, Bentong, Raub, Port Dickson and Tawau.

Apart from working visits, regular online meetings were also held to reach out to officers situated at district Courts.

The officers of the Chief Registrar's Office of the Federal Court of Malaysia at the Innovation and Excellence Day 2019 of the Prime Minister's Department.

"Gotong-Royong" Activity in POJ

The "*gotong-royong*" in Palace of Justice was first held on 5 July 2019 and thereafter once every three months. Officers and staff join hands to clean up their workstation and other common areas.

Weekly Aerobic Exercise

This Office advocates healthy lifestyle among the officers and staff. Thus, a weekly aerobic exercise organised by the Putrajaya Court Sports and Welfare Club is held at the POJ lobby after office hours.

POJ Food Truck Day

Palace of Justice Food Truck Day was first held on 22 August 2019 and has been a regular monthly activity since then. Food truck vendors participated by opening their food truck businesses within the POJ compound during the Food Truck Day.

POJ Sports Day 2019

The Putrajaya Court Sports and Welfare Club had successfully organised the POJ Sports Day 2019 which was held from August to November 2019. Court officers and staff in POJ competed in badminton, futsal, netball, carom, dart and ping pong representing their respective contingents, namely Hang Tuah (Red), Hang Jebat (Green), Hang Kasturi (Blue), Hang Lekiu (Yellow) and Hang Lekir (Purple).

POJ Gala Dinner

Held on 1 November 2019 at Bora Ombak Marina, Putrajaya with the theme "Rangela Nite", the POJ Gala Dinner was co-organized by this Office and the Putrajaya Court Sports and Welfare Club. The dinner was graced by the presence of the Chief Justice, the President of the Court of Appeal and the Chief Judge of Malaya. Attendees were entertained by performances from our very own judicial officers and staff. The highlight of the dinner was the prize-giving ceremony to the winners of the Sports Day. The evening ended with the awards for the King and Queen of Rangela Nite and for best performance.

Officers' Luncheon

In fostering closer ties among the officers of the Palace of Justice, I mooted the idea of holding an officers' luncheon once every three months. Officers contribute a certain amount of money and a division is tasked with organising it. The first officers' luncheon was held on 26 September 2019, hosted by the Strategic Planning Division, followed by the second Officers' Luncheon on 25 November 2019 organised by the Federal Court Registry.

Conclusion

Lastly, I would like to offer my utmost gratitude to the Honourable Judges for their support and trust in me in heading this Office. Special thanks to judicial officers and staff for all their hard work and sacrifice in ensuring the success of the programmes of this office. This journey has been very enriching and I believe with great tenacity and commitment, this Office will continue to soar to greater heights.

Chief Registrar, Federal Court of Malaysia
Ahmad Terrirudin Mohd Salleh

The launch of the "From Courtroom to Classroom" (MYC2C) programme on 8 April 2019 at SMK Presint 8(1), Putrajaya

Chief Justice Tengku Maimun Tuan Mat (centre), Justice David Wong Dak Wah and Mr. Ahmad Terrirudin Mohd Salleh with judicial officers at the Mobile Court Services on 21-22 October 2019 at Paitan in Sandakan, Sabah

The Mobile Court (Urban) Services, on 23 October 2019 at Kg Babah Bunduon, Penampang Sabah-Villagers queuing up to register before being directed to the appropriate officials, mostly for endorsements of late birth registration papers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CHAPTER 5 JUDGES

JUDGES' ELEVATIONS AND APPOINTMENTS

The year 2019 witnessed a total of fifty-eight (58) elevations and appointments to the Superior Courts. This includes the appointments of the new Chief Justice, the President of the Court of Appeal and the Chief Judge of Malaya.

There were thirty-one (31) judges elevated to the Federal Court, the Court of Appeal and the High Courts in Malaya, and in Sabah dan Sarawak. Apart from these elevations, there were also twenty-four (24) judicial commissioners appointed from the Judicial and Legal Service as well as the Malaysian Bar.

The list of judges elevated and judicial commissioners appointed in 2019 is as follows:

Position	Date of Appointment	Name
Chief Justice	2 May 2019	Chief Justice Tengku Maimun Tuan Mat
President of the Court of Appeal	5 December 2019	Justice Rohana Yusuf
Chief Judge of Malaya	8 August 2019	Justice Azahar Mohamed
Judges of the Federal Court	8 August 2019	Justice Vernon Ong Lam Kiat
		Justice Abdul Rahman Sebli
	5 December 2019	Justice Zaleha Yusof
		Justice Zabariah Mohd Yusof
		Justice Hasnah Mohammed Hashim
Judges of the Court of Appeal	8 August 2019	Justice Lee Swee Seng
		Justice Azizah Nawawi
		Justice Vazeer Alam Mydin Meera
		Justice Ravinthran Paramaguru
	5 December 2019	Justice Hadhariah Syed Ismail
		Justice Abu Bakar Jais
		Justice Nantha Balan E.S. Moorthy
Judges of the High Courts	9 April 2019	Justice Rozana Ali Yusoff
		Justice Abu Bakar Katar
		Justice Hayatul Akmal Abdul Aziz
		Justice Faizah Jamaludin
		Justice Ahmad Kamal Md. Shahid
		Justice Wong Chee Lin
		Justice Darryl Goon Siew Chye
		Justice Ismail Brahim
		Justice Dean Wayne Daly
		Justice Celestina Stuel Galid
	8 August 2019	Justice Roslan Abu Bakar
		Justice Abdul Wahab Mohamed
		Justice Hassan Abdul Ghani
		Justice Chan Jit Li
		Justice Muhammad Jamil Hussin
		Justice Wan Ahmad Farid Wan Salleh
		Justice Khadijah Idris

Position	Date of Appointment	Name
	5 December 2019	Justice Tun Abd Majid Tun Hamzah
		Justice Azmi Abdullah
Judicial Commissioners	3 May 2019	Judicial Commissioner Latifah Mohd Tahar
		Judicial Commissioner Amarjeet Singh Serjit Singh
		Judicial Commissioner Awang Armadajaya Awang Mahmud
		Judicial Commissioner Duncan Sikodol
		Judicial Commissioner Muniandy Kannyappan
		Judicial Commissioner Dr. Shahnaz Sulaiman
		Judicial Commissioner Evrol Mariette Peters
		Judicial Commissioner Christopher Chin Soo Yin
		Judicial Commissioner Ong Chee Kwan
		Judicial Commissioner Maidzuara Mohammed
		Judicial Commissioner Mohd Radzi Abdul Hamid
	28 November 2019	Judicial Commissioner Aslam Zainuddin
		Judicial Commissioner Norsharidah Awang
		Judicial Commissioner Julie Lack
		Judicial Commissioner Fredrick Indran X.A. Nicholas
		Judicial Commissioner Wong Siong Tung
		Judicial Commissioner Khairil Azmi Mohamad Hasbie
		Judicial Commissioner Leonard David Shim
		Judicial Commissioner Nadzarin Wok Nordin
		Judicial Commissioner George Varughese K.O. Varughese
		Judicial Commissioner Quay Chew Soon
		Judicial Commissioner Wong Hok Chong
		Judicial Commissioner Atan Mustaffa Yussof Ahmad
		Judicial Commissioner Anand Ponnudurai

The newly appointed Chief Justice of Malaysia Tengku Maimun Tuan Mat receiving her letters of appointment from the Yang di-Pertuan Agong XVI Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah

The Chief Justice Tengku Maimun Tuan Mat signing her letters of appointment

The newly appointed President of the Court of Appeal Rohana Yusuf receiving her letters of appointment from the Yang di-Pertuan Agong XVI Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah

The newly appointed Chief Judge of Malaya Azahar Mohamed receiving his letters of appointment from the Yang di-Pertuan Agong XVI Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah

The Chief Justice Tengku Maimun Tuan Mat, delivering her speech at the Appointment Ceremony of the Chief Justice of Malaysia at the Palace of Justice, Putrajaya on Friday, 17 May 2019

The Chief Justice Tengku Maimun Tuan Mat with the judges of the Federal Court at the Appointment Ceremony of the Chief Justice of Malaysia at the Palace of Justice, Putrajaya
(L-R): Justice Abang Iskandar Abang Hashim, Justice Mohd Zawawi Salleh, President of the Court of Appeal Ahmad Maarop, Chief Justice Tengku Maimun Tuan Mat, Justice Azahar Mohamed, Justice Alizatul Khair Osman Khairuddin, Justice Rohana Yusuf and Justice Nallini Pathmanathan

Justice Vernon Ong Lam Kiat taking the oath of office as a Judge of the Federal Court at the Palace of Justice

Justice Abdul Rahman Sebli taking the oath of office as a Judge of the Federal Court at the Palace of Justice

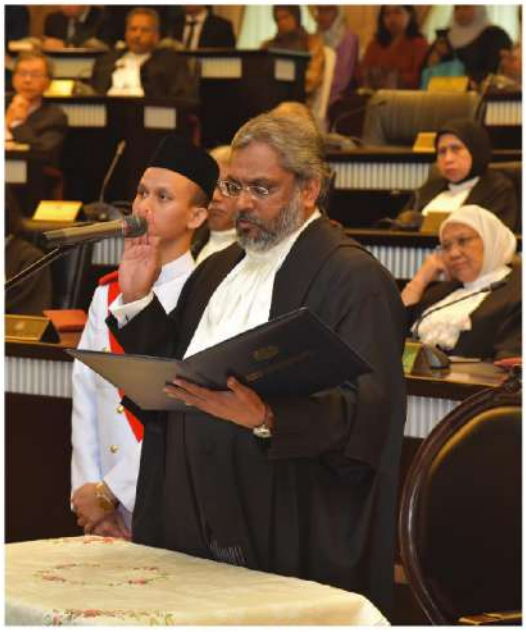
Justice Zaleha Yusof signing the letters of appointment as a Judge of the Federal Court at the Palace of Justice after taking the oath of office

Justice Zabariah Mohd Yusof taking the oath of office as a Judge of the Federal Court at the Palace of Justice

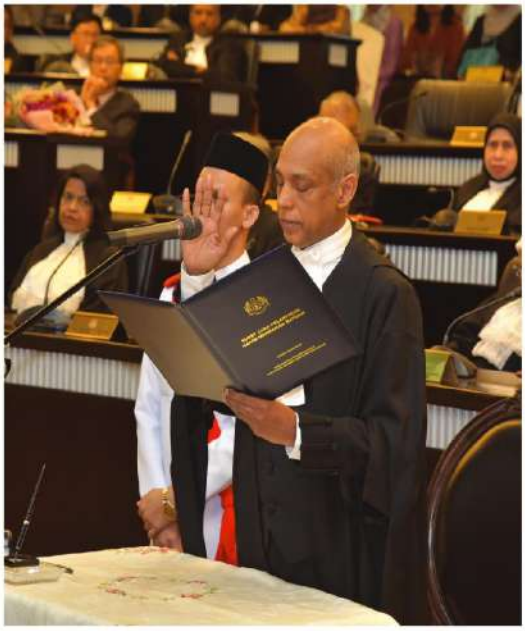
Justice Hasnah Mohammed Hashim taking the oath of office as a Judge of the Federal Court at the Palace of Justice

Justice Lee Swee Seng taking the oath of office as a Judge of the Court of Appeal at the Palace of Justice

Justice Azizah Nawawi taking the oath of office as a Judge of the Court of Appeal at the Palace of Justice



Justice Vazeer Alam Mydin Meera taking the oath of office as a Judge of the Court of Appeal at the Palace of Justice



Justice Ravintharan Paramaguru taking the oath of office as a Judge of the Court of Appeal at the Palace of Justice

Justice Hadhariah Syed Ismail taking the oath of office as a Judge of the Court of Appeal at the Palace of Justice

Justice Abu Bakar Jais taking the oath of office as a Judge of the Court of Appeal at the Palace of Justice

Justice Nantha Balan E.S. Moorthy taking the oath of office as a Judge of the Court of Appeal at the Palace of Justice

Front row (L-R): Chief Judge of Sabah and Sarawak David Wong Dak Wah, President of the Court of Appeal Ahmad Maarop, Chief Justice Richard Malanjum and Chief Judge of Malaya Zaharah Ibrahim with the newly elevated judges of the High Courts at the oath taking ceremony on 9 April 2019
Back row (L-R): Justice Wong Chee Lin, Justice Celestina Stuel Galid, Justice Dean Wayne Daly, Justice Ismail Brahim, Justice Abu Bakar Katar, Justice Rozana Ali Yusoff, Justice Faizah Jamaludin, Justice Ahmad Kamal Md. Shahid, Justice Darryl Goon Siew Chye, Justice Hayatul Akmal Abdul Aziz

Chief Justice Tengku Maimun Tuan Mat with the newly appointed Judicial Commissioners at the oath taking ceremony on 3 May 2019
Front row (L-R): Judicial Commissioners Dr. Shahnaz Sulaiman, Maidzuara Mohammed, Chief Judge of Sabah and Sarawak David Wong Dak Wah, President of the Court of Appeal Ahmad Maarop, Chief Justice Tengku Maimun Tuan Mat, Chief Judge of Malaya Zaharah Ibrahim, Judicial Commissioners Latifah Mohd Tahar, Amarjeet Singh Serjit Singh, Awang Armadajaya Awang Mahmud
Back row (L-R): Judicial Commissioners Ong Chee Kwan, Mohd Radzi Abdul Hamid, Christopher Chin Soo Yin, Evrol Mariette Peters, Muniandy Kannyappan, Duncan Sikodol

Newly elevated Judges of the High Courts at the oath taking ceremony on 8 August 2019
(L-R): Justice Muhammad Jamil Hussin, Justice Hassan Abdul Ghani, Justice Wan Ahmad Farid Wan Salleh, Justice Khadijah Idris, Justice Chan Jit Li, Justice Hayatul Akmal Abdul Aziz, Justice Roslan Abu Bakar, Justice Abdul Wahab Mohamed

Front row (L-R): Chief Judge of Sabah and Sarawak David Wong Dak Wah, Chief Justice Tengku Maimun Tuan Mat, Chief Judge of Malaya Azahar Mohamed, and President of the Court of Appeal Rohana Yusuf with the newly appointed judicial commissioners at the oath taking ceremony on 28 November 2019
Judicial Commissioners Anand Ponnudurai, Khairil Azmi Mohamad Hasbie, Atan Mustaffa Yussof Ahmad, Quay Chew Soon, George Varughese K.O. Varughese, Nadzarin Wok Nordin, Fredrick Indran X.A. Nicholas, Wong Hok Chong, Leonard David Shim, Wong Siong Tung, Julie Lack, Aslam Zainuddin, Norsharidah Awang

Front row (L-R): Justice Azahar Mohamed, Chief Justice Tengku Maimun Tuan Mat, Justice Rohana Yusuf, Justice David Wong Dak Wah with the newly elevated judges of the Federal Court, the Court of Appeal and the High Courts at the oath taking ceremony on 5 December 2019
Back row: Justice Tun Abdul Majid Tun Hamzah, Justice Hasnah Mohammed Hashim, Justice Zabariah Mohd Yusof, Justice Zaleha Yusof, Justice Abu Bakar Jais, Justice Hadhariah Syed Ismail, Justice Azmi Abdullah, Justice Nantha Balan E.S. Moorthy

RETIRED JUDGES

Tan Sri Datuk Seri Panglima Richard Malanjum

A Kadazandusun native born in Tuaran, Sabah on 13 October 1952, Tan Sri Datuk Seri Panglima Richard Malanjum, the 9th Chief Justice of Malaysia is most celebrated for the extensive reforms he brought to the Judiciary. He had his early education in Tuaran before completing his secondary education at La Salle Secondary School, Kota Kinabalu.

In 1972, he graduated from MARA Institute of Technology under the University of London International Programme and in 1975 he obtained his Bachelor of Laws LL.B (Hons) from the University of London. He was admitted as a Barrister-at-Law in Gray's Inn, London in 1976.

Tan Sri Datuk Seri Panglima Richard Malanjum has held various positions. Upon graduation, during his long and distinguished career, he first served as a state administrative officer from November 1975 until 1977. He was then appointed as Deputy Public Prosecutor for the state of Sabah in February 1977 before joining private practice in 1981.

On 1 March 1992, Tan Sri Datuk Seri Panglima Richard Malanjum was appointed a Judicial Commissioner. He was then appointed a High Court Judge on 20 August 1993 and was elevated to the Court of Appeal on 6 August 2002. On 17 June 2005, Tan Sri Richard took office as a Federal Court judge. At the age of 52, he was the youngest-ever judge then to sit at the Malaysia's Apex Court.

On 26 July 2006, Tan Sri Richard Malanjum became the first Sabahan to fill in the post of Chief Judge of Sabah and Sarawak. He held the post for 12 years before creating history once again on 11 July 2018 when he became the first East Malaysian to be appointed the Chief Justice of Malaysia.

As the Chief Judge of Sabah and Sarawak, his foresight brought reforms to the courts in Sabah and Sarawak. He was the man behind the computerisation of the courts that culminated in the birth of the Integrated Court System in 2007. From 2007 to 2018, the system expanded steadily with the introduction of the Case Management System and Community Advocates Portal, Court Recording and Transcribing System, the Stenography System, the Video Conferencing System and innovations such as the e-Monitoring Module, the virtual files, the time sheet and the e-Appeal. Tan Sri Richard Malanjum recognised that digitisation of the court system is crucial to speed up court procedures, standardise work processes and most importantly assure simultaneous access to information.

This system drew the attention of many other jurisdictions. Under his leadership, the Integrated Court System won the United Nations World Summit Award 2009 in the E-Government and Institutions Category.

Another one of his brainchilds is the Mobile Court system. Launched in Pitas in the year 2006, the Mobile Court reflected his devotion to the underprivileged and indigenous peoples of Sabah and Sarawak.

The Mobile Court was initiated to help the marginalised and the vulnerable groups in the interiors of the two states to obtain documents such as birth certificates and identification cards besides providing other court services.

For over a 10-year period up to December 2018, the Mobile Court resolved 87,345 birth certification cases. It became increasingly popular and began attracting the interest of government agencies such as the Ministry of Health, the Ministry of Education, NGOs and even international bodies. The services of the Mobile court are now expanded to providing healthcare, legal aid, books and even used clothing to the rural communities.

As early as 2006, Tan Sri Richard Malanjum was already paving the way to address the inadequacy of access to justice. This is where Tan Sri Richard Malanjum's leadership marked him out. Through his sheer energy and tireless efforts, he led groups of judges, court officials and staff into the areas beyond civilisation, accessible only by four-wheel drives and boats. His humility and sincerity were a source of encouragement and support. He slept in a tent and he mingled with the villagers and his subordinates. In fact, the first thing he did when he held the position of Chief Justice was to reach out to the rank and file. He values people and places utmost importance in communication and trust.

Tan Sri Richard Malanjum's tenure as Chief Justice was relatively short but was very significant. He introduced the policy of collective decision making and responsibility at the highest tier of the Judiciary. The judges appointed to the four most senior posts are given equal responsibility and accountability to deal with administrative and policy matters in the management of the Judiciary. Tan Sri Richard Malanjum believed that leadership must be shared and should not be centralised in the hands of a single individual.

He was also commended by the Malaysian Bar for his initiative in introducing a Consultative Committee comprising the Judiciary, the President of the three Bars and the Attorney General's Chambers who were consulted in the appointment and confirmation of judicial commissioners.

Tan Sri Richard's reforms as Chief Justice were focused on promoting judicial independence, improving standards of performance and enhancing efficiency in the administrative and adjudication processes. Three important innovations stood out– the e-Balloting system, the e-Review system and the video conferencing system.

The e-Balloting was introduced to avoid any allegations of impropriety in the allocation of cases and the empanelling of judges. With the e-Balloting system, case assignment and judge assignment are done by the system, with no human intervention.

The e-Review system that allows judges and judicial officers to conduct case management online without the physical presence of the parties was first implemented at the appellate courts in October 2018 and later expanded to Kuala Lumpur, Penang and Shah Alam.

The use of the video conferencing system for short and simple hearings was also put in place for Kuala Lumpur, Penang and Shah Alam during the tenure of Tan Sri Richard Malanjum.

Under the leadership of Tan Sri Richard Malanjum, the practice of empanelling a panel of seven judges to hear cases of public interest began, while nine-man Benches are convened for matters of constitutional importance. This was one of the measures taken to restore public confidence in the judiciary.

During his 27-year tenure as a Judge, he was appointed to various positions including Chairman of the Preparation of Environmental Resources Committee and Chairman of the Law Revision Committee. He also served as a Committee Member for various commissions such as the Judicial Appointments Commission and the Judicial and the Legal Services Commission. He was also active as a Committee Member for the Malaysian Judicial Academy.

Tan Sri Richard Malanjum was also actively involved in academic matters and was appointed Member of the Committee of Studies, Faculty of Law, University Malaya. He was conferred the title of Adjunct Professor, Faculty of Law, UiTM and University of Northern Malaysia ("UUM"). His tenure as Chief Justice also saw publications of legal guidelines for self-represented litigants, enforcement of judgments and judicial review guidelines for public officers. He was also responsible for the "Courtroom to Classroom" Programme ("MYC2C") which was a product of a collaborative effort with Universiti Teknologi MARA ("UiTM") and the Ministry of Education. Inspired by similar programmes undertaken in America, Britain

and the Philippines, Tan Sri Richard Malanjum holds the view that students in Malaysia should be given early exposure to the law and to comprehend the legislative system so as to educate them on the Federal Constitution and the functioning of government.

Retired Court of Appeal judge Datuk Seri Hishamudin Yunus aptly described Tan Sri Richard Malanjum as a fearless and staunch defender of the integrity of the Federal Constitution and fundamental liberties. Tan Sri Richard Malanjum did not vacillate in writing dissenting or separate judgments as he strongly believed that a diversity of views, especially from the Judiciary, sparked lively debate and the end result would be the betterment of laws particularly in altering repressive laws.

Upon his appointment as the Chief Justice, Tan Sri Richard Malanjum advised judges that they have a "judicial duty to deliver dissenting or separate judgments, whenever the judges in deciding over a case are of the firm opinion that they do not agree with the majority decision; instead of merely concurring with the majority just for the sake of convenience or expediency."

Tan Sri Richard Malanjum's contribution to the development of Malaysian jurisprudence can be seen through his many landmark decisions. His judgments are a reflection of his judicial independence and impartiality.

This is illustrated in his recent judgment of *Alma Nudo Atenza v PP & Another Appeal*[1] where he led the nine-member panel in declaring the unconstitutionality of the long established "double presumption" in section 37A of the Dangerous Drugs Act 1952 (Act 234).

Tan Sri Richard Malanjum is truly a man who walks the talk. When he said that "a judge must be brave to dissent" in his lecture delivered during the "Ahmad Ibrahim Memorial Lecture" at the Kulliyyah of Law, International Islamic University Malaysia in late 2018, he proved to be a man of such bravery.

In many important cases, he dissented with strong propositions of law. This can be seen for example in the case of *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain*,[2] *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors*[3] and *Public Prosecutor v Kok Wah Kuan*.[4] In fact, his dissenting view in *Kok Wah Kuan* in respect of the meaning of judicial power, the independence of judiciary and the separation of powers was cited with approval in the most celebrated Federal Court decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*[5] and subsequently in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*.[6]

For Tan Sri Richard Malanjum, judicial power cannot be limited by what the federal laws provide, for that means a contradiction "to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them". According to him,

> It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country...[7]

Indeed, when Tan Sri Richard Malanjum completed his tenure as a judge on 13 April 2019, he left precious legacies in the administration of justice in Malaysia, particularly in Sabah and Sarawak.

Surely, he will always be remembered for his simplicity and humility as a person, and for his courage and independence in the performance of his duties as a judge.

1 [2019] 5 CLJ 780.

2 [2007] 4 MLJ 585.
3 [2014] 6 CLJ 541.
4 [2008] 1 MLJ 1.
5 [2017] 3 MLJ 561.
6 [2018] 1 MLJ 545.
7 *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

Tan Sri Dato' Sri Ahmad Maarop

Tan Sri Dato' Sri Ahmad Maarop was born in Kampung Serkam, Melaka on 25 May 1953. He received his early education at Sekolah Kebangsaan Jasin, Sekolah Kebangsaan Alor Gajah and Sekolah Kebangsaan Bukit Beruang, Melaka. Tan Sri Dato' Sri Ahmad Maarop then went to Sekolah Dato' Abdul Razak (SDAR) in Tanjung Malim Perak (and later relocated to Seremban Negeri Sembilan) for his secondary education. He obtained his Bachelor of Laws LL.B (Hons) from the University of Malaya in 1978 and was admitted as an Advocate and Solicitor of the High Court of Malaya in 1994.

He started his career in the Judicial and Legal Service as a Magistrate in 1978. Throughout his service, Tan Sri Dato' Sri Ahmad Maarop served in various capacities, as amongst others, Deputy Public Prosecutor, Legal Advisor of the Royal Customs and Excise Department of Malaysia, State Legal Advisor for the State of Perlis and Kelantan, Senior Federal Counsel at the Ministry of Home Affairs and Head of the Prosecution Unit in Penang. He was the Deputy Head of the Advisory and International Affairs Division at the Attorney General's Chambers from 1994 to 1997.

On 1 October 1998, Tan Sri Dato' Sri Ahmad Maarop became one of the seven persons appointed as a Senior Deputy Public Prosecutor by the Honourable Attorney General of Malaysia. Later, Tan Sri Dato' Sri Ahmad Maarop was appointed the Head of Advisory and International Division of the Attorney General's Chambers. His final position in the Judicial and Legal Service was as the Commissioner of the Law Revision and Law Reform Division.

Tan Sri Dato' Sri Ahmad Maarop was appointed a Judicial Commissioner on 1 June 2000 and was confirmed as a High Court Judge in 2002. He served at the High Court in Melaka, Kuala Lumpur and Kuala Terengganu prior to his elevation as a judge of the Court of Appeal in 2007. After four years in the Court of Appeal, Tan Sri Dato' Sri Ahmad Maarop was elevated to the highest court of the land, the Federal Court on 10 August 2011. On 1 April 2017, Tan Sri Dato' Sri Ahmad Maarop was appointed the Chief Judge of Malaya. He was appointed the President of the Court of Appeal Malaysia on 11 July 2018.

During his tenure as a Judge, he was appointed a Committee Member for the Malaysian Judicial Academy, a Member of the Judicial Appointment Commission and a Member of the Judicial and Legal Service Commission. Tan Sri Dato' Sri Ahmad Maarop's tenure ended on 25 November 2019.

Tan Sri Dato' Sri Ahmad Maarop is renowned for his industry and passion for the law. He has written numerous judgments in diverse areas of the law. His vast experience in the area of evidence and criminal law is well illustrated in the Federal Court judgment of *Siew Yoke Keong v PP*[1] on the scope of section 27 of the Evidence Act 1950.

It was held that the word "information" leading to discovery in the said section extends to govern the conduct of the accused person in pointing the whereabout of the incriminating items.

1 [2013] 4 CLJ 149.

A similar approach was given in the case of *Jazlie Jaafar v PP*,[2] his final judgment before his retirement. In this case, Tan Sri Dato' Sri Ahmad delved into the scope and application of section 36 of the Dangerous Drugs Act 1952. In principle, section 36 of the Dangerous Drugs Act 1952 was held to be an exception to the fundamental rule of criminal law that the prosecution must prove all elements of the offence with which the accused is charged. Consequently, the fact that there was no evidence showing a lack of authority on the part of the accused person to have in his possession the incriminating drugs cannot be fatal to the prosecution's case.

Tan Sri Dato' Sri Ahmad Maarop is very conscientious and detail-oriented when writing judgments as evidenced in many of his judgments including the recent cases of *Toh Puan D Heryati Abdul Rahim v. Lau Ban Tin & Anor*,[3] *Affin Bank Bhd v. Jamaludin Jaafar; The Association of Banks in Malaysia & Anor (Interveners)*[4] and *Chong Chieng Jen v. Government of State of Sarawak*.[5]

In the case of *Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd*,[6] the inherent powers of the Court to exercise its review jurisdiction under rule 137 of the Rules of the Federal Court 1995 was brought into perspective and discussed comprehensively.

In delivering the judgment of the Federal Court, Tan Sri Dato' Sri Ahmad Maarop reiterated the position of the law in the following terms:

> Rule 137 cannot be used as a further avenue of appeal. We cannot consider the order of the leave panel as though we are sitting in judgment in an appeal from that decision. It is not for us to consider whether the leave panel had interpreted or applied the law correctly or not. That is a matter of opinion (see Asean Security Paper Mills Sdn Bhd). No leave should be given where the leave panel's decision is challenged on its merits, whether on facts or in law. Even if we are of the view that an important piece of evidence had not been given sufficient weight, or even if we do not agree with the interpretation or application of certain provision of the law, there is no sufficient reason for us to set aside the decision of the leave panel. Just because we may disagree with the leave panel (we do not say whether we agree or disagree with its decision), that is not a ground to warrant us to review the decision. Otherwise, there would be no end to a proceeding (see Chan Yock Cher). Furthermore, in this case there is nothing shown by the defendant that it has a prima facie chance of success.

Being diligent and hardworking, Tan Sri Dato' Ahmad Maarop carried out his duties judiciously and professionally, earning the respect of the Bar and other members of the legal profession.

2 [2020] 2 CLJ 28.
3 [2019] 10 CLJ 421.
4 [2019] 7 CLJ 541.
5 [2019] 1 CLJ 329.
6 [2019] 2 MLJ 609.

Tan Sri Zaharah Ibrahim

Tan Sri Zaharah Ibrahim was born in Johor Bahru, Johor on 17 November 1952. She obtained her Bachelor of Laws LL.B (Hons) from the University of Malaya and began her legal career as an attachment officer in 1977.

She started her career in the Judicial and Legal Service as a Magistrate at Melaka Tengah and Circuit Court for Alor Gajah, Jasin, Masjid Tanah, Merlimau. She was then appointed Senior Assistant Parliamentary Draftsman of the Drafting Division at the Attorney General's Chambers. She held this post for more than 10 years. In 1992, she was appointed the Director of the Intellectual Property Division (cum Registrar of Patents and Registrar of Trademarks) at the Ministry of Domestic Trade and Consumer Affairs and subsequently Deputy Parliamentary Draftsman (II). She served as the State Legal Advisor for the State of Selangor from 1994 to 1996. Tan Sri Zaharah Ibrahim was appointed Deputy Parliamentary Draftsman (I) and later served as Parliamentary Draftsman for 8 years.

Tan Sri Zaharah Ibrahim was appointed a Judicial Commissioner on 1 August 2004 and was elevated to the High Court on 28 July 2006. She took her oath of office as a Judge of the Court of Appeal on 14 April 2010 and as a Judge of the Federal Court on 16 February 2015. On 11 July 2018, she was appointed the Chief Judge of Malaya, making her the second female judge to be appointed to such position after Tan Sri Norma Yaakob in 2005. Tan Sri Zaharah Ibrahim retired on 17 May 2019.

During her tenure as a Judge, she held numerous positions such as a Member of the Legal Profession Qualifying Board, the Judicial Appointments Commission and the Judicial and Legal Service Commission. She was also a member in the Law Revision Committee.

As for her colleagues and officers, Tan Sri Zaharah Ibrahim would always be the right person to turn to when encountering legislative issues in the performance of their duties. Her vast experiences and considerable skills as a Parliamentary Draftsman enabled her to engage in intellectual discourses on the subject.

Her judgments depict precision in the language used and clarity of thought. She also helped improve language proficiency among judicial officers in both Malay and English and inculcated the correct and precise use of language in writings and court proceedings.

Tan Sri Zaharah Ibrahim has a profound knowledge of the law and is articulate in her language, albeit in written or verbal form. This is evident from the Federal Court judgment of *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals*.[1] In deciding claims for exemplary damages for breach of fundamental guarantees under the Federal Constitution, Tan Sri Zaharah Ibrahim provides considerable historical insights and legislative background on sections 7 and 8 of the Civil Law Act 1956.

1 [2018] 3 MLJ 184.

In another case of *Panglima Tentera Laut Diraja Malaysia & Ors v Simathari Somenaidu*,[2] Tan Sri Zaharah Ibrahim highlights the significant duty of the Court to resort to the purposive approach in construing a provision in a statute to ascertain the intention of Parliament. In that case, the construction to be given to section 217(2) of the Armed Forces Act 1972 has been well illustrated.

Her illuminating judgments on various aspects of the law can also be observed in cases of RHB *Bank Bhd (previously known as United Malayan Banking Corp Bhd and then as Sime Bank Bhd) v Wong Kok Leong (as executor and trustee of the estate of Wong Kwong Wah, deceased) & Ors*,[3] *Public Prosecutor v Surbir Gole*[4] and *CTI Group Inc. v International Bulk Carriers SPA*.[5] As a judge, she was always fair and patient. Her even temperament, ability and integrity commanded the respect of those who appeared before her.

Since her retirement, Tan Sri Zaharah Ibrahim was appointed as a member of the Board of Directors at Petroliam Nasional Berhad (Petronas) with effect from 17 August 2020.

2 [2017] 2 MLJ 14.

3 [2017] 4 MLJ 281.
4 [2017] 1 MLJ 549.
5 [2017] 5 MLJ 314.

Tan Sri Zaharah Ibrahim with the lady judges of the Federal Court and the Court of Appeal.

Tan Sri Dato' Sri Ramly Ali

Tan Sri Dato' Sri Ramly Ali was born on 24 February 1953 in Duyong, Melaka. He obtained his LL.B (Hons) from the University of Malaya in 1978.

He embarked on his career in the Judicial and Legal Service in 1978, and was first posted as a Magistrate at Kampar, Perak. Tan Sri Dato' Sri Ramly Ali held several posts in during his career, amongst others, as Deputy Director of Legal Aid Bureau Kuala Terengganu and Selangor/Federal Territory, Deputy Treasury Solicitor to the Ministry of Finance Deputy Registrar of Companies, a Member of Securities Commission Task Force, Securities Licensing Officer and Registrar of the High Court. He was also acting Chief Registrar before he was appointed as the Registrar of Companies in 1994. In 1998, Tan Sri Dato' Sri Ramly Ali was appointed as the Chief Registrar of the Federal Court of Malaysia.

On the 1 June 2000, Tan Sri Dato' Sri Ramly Ali took his oath of office as a Judicial Commissioner, High Court of Malaya and was elevated as a High Court Judge in 2002. During his tenure as a High Court Judge, he has served in the Kuantan High Court and various divisions in Kuala Lumpur High Court including Appellate and Special Powers, Civil and Commercial. Tan Sri Dato' Sri Ramly Ali was appointed as the first Intellectual Property Judge before he was elevated to the Court of Appeal on 15 April 2009. On 30 September 2013, he was subsequently appointed as the Federal Court Judge. Tan Sri Dato' Sri Ramly Ali retired on 24 August 2019.

Tan Sri Dato' Sri Ramly Ali has really made his presence felt by everyone around him. In discharging his duty judiciously, his good time management skills enable him to prioritise, plan and focus on the task at hand in a timely manner. Off the bench, Tan Sri Ramly is well known for his jovial character and humorous stories which made him loved by everyone around him. With his jovial character towards the people around him and quality of his judgeships', his departure from the judiciary was felt by the people in the system.

From 2000 to 2002, Tan Sri Ramly presided over complex commercial and bankruptcy cases during a time when the country was recovering economically. Then there were cases involving industrial design, trademark and patent infringement on the rise with the establishment of the Malaysian Intellectual Property Corporation (MyIPO) in 2003, followed by many arbitration, banking, revenue, trade union, and shareholders disputes cases. The volume and span of his judgment is vast.

Respected by both fellow judges and lawyers, his sound judicial reasoning was often described as being compatible with modern commercial and corporate reality. Delivering the majority ruling of the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd*[1] he eloquently articulated:

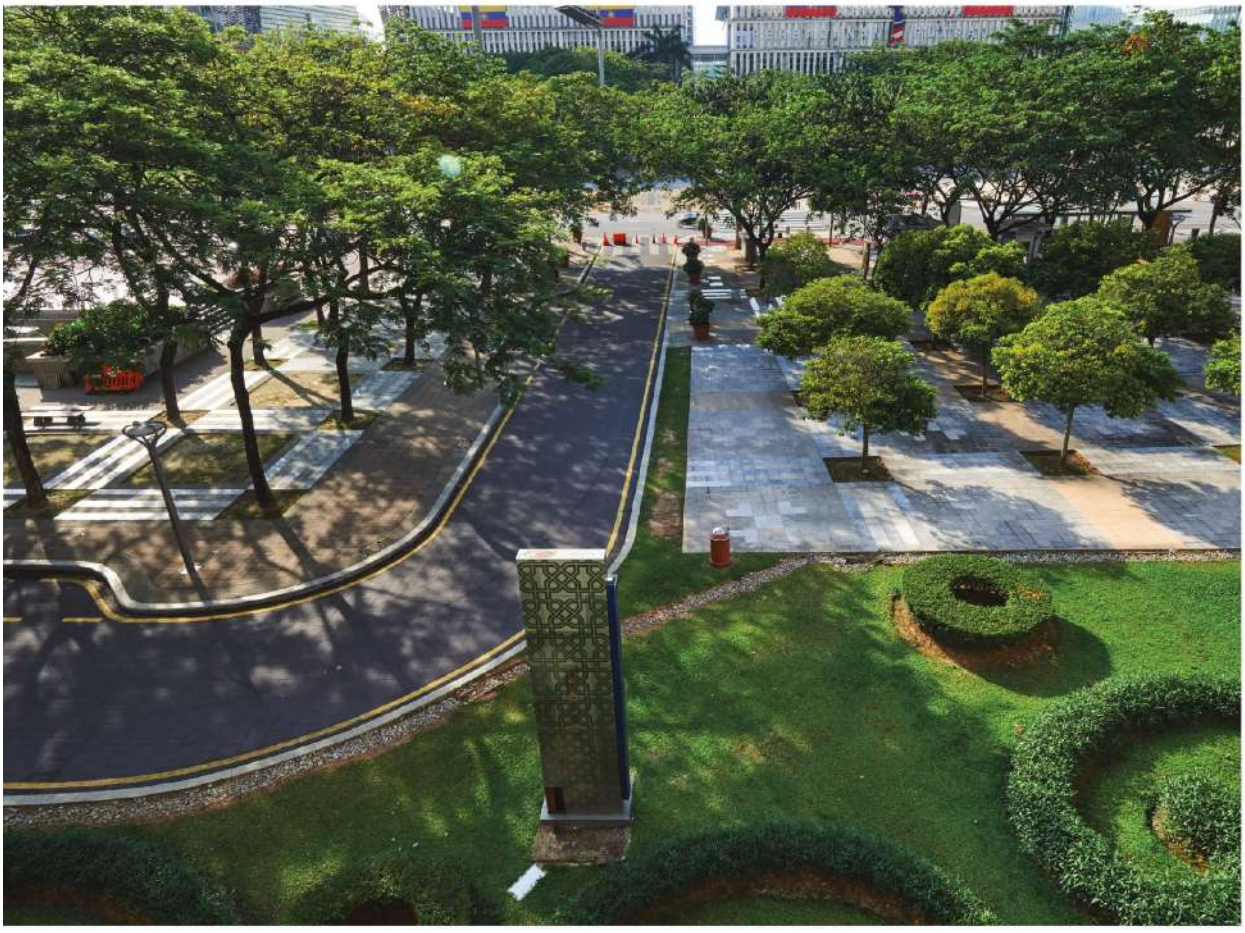
> "[91] In determining what is the dispute or difference the parties intended to submit to arbitration, the arbitration clause ought to be interpreted widely, based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the contract or agreement was made. A proper approach to construction requires the court to give effect, so far as the language used by the parties in the arbitration clause will permit, to the commercial purpose of the arbitration clause."

1 [2016] 9 CLJ 1.

Some of his oft-quoted decisions include *Mohd Syamsul bin Md Yusof & Others and Elias bin Idris*,[2] *Samuel Naik Siang Ting v Public Bank Bhd*,[3] *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and Another Appeal*,[4] *Malayan Flour Mill Bhd v Raja Lope & Tan Co.*,[5] *Genisys Integreted Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors (No. 2)*,[6] *Bank Pertanian Malaysia v Blue Valley Plantation Bhd & Ors*[7] and *Hicom Bhd v Bukit Cahaya Country Resorts Sdn Bhd & Anor*.[8]

Tan Sri Ramly also chaired a five-member panel in *PCP Construction Sdn Bhd and Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)*[9] which held that lawyer Arun Kasi's contemptuous statements were serious and tarnished the good name of the judiciary as a whole, and which undermined public confidence in the judiciary, ridiculed, scandalised and offended the dignity, integrity and impartiality of the court.

2 [2019] 4MLJ 788.
3 [2015] 8 CLJ 944.
4 [2012] 4 MLJ 72.
5 [2000] 7 CLJ 288.
6 [2001] 5 CLJ 556.
7 [2002] 8 CLJ 100.
8 [2005] 8 CLJ 194.
9 [2019] 3 MLRA 429.



Tan Sri Dato' Sri Balia Yusof Wahi

Tan Sri Dato' Sri Balia Yusof Wahi was born on 26 September 1952 in Parit, Perak. He obtained his Bachelor of Laws LL.B (Hons) from the University of Malaya before he embarked on his career in the Judicial and Legal Service in 1977.

He held various important posts during his long career in the Judicial and Legal Service, including Deputy Director at the Legal Aid Bureau of Johor, Deputy Public Prosecutor in the state of Negeri Sembilan and the Royal Malaysian Customs and Excise Department, Federal Counsel in the Ministry of Home Affairs and the Inland Revenue Department, Senior Federal Counsel (Special Unit) in the Attorney General's Chambers, Deputy Parliamentary Draftsman and Selangor State Legal Advisor. In 1994, he was appointed the Treasury Solicitor to the Ministry of Finance and later as the Special Commissioner of Income Tax for the Ministry of Finance.

Tan Sri Dato' Sri Balia Yusof Wahi took his oath of office as a Judicial Commissioner of the High Court of Malaya on 2 January 2002. On 21 December 2004, he was appointed a Judge of the High Court of Malaya until his elevation to the Court of Appeal on 11 May 2011. He was appointed a Federal Court Judge on 21 March 2016.

During his tenure as a Judge, Tan Sri Dato' Sri Balia Yusof Wahi held numerous positions, including the Managing Judge for the state of Perak and a member of the Judicial Academy. In this capacity, he contributed by training newly appointed judges and judicial commissioners at lectures on judge craft and judgment writing organised by the Judicial Academy. Tan Sri Dato' Sri Balia also headed the Delegation of the Malaysian Judiciary to the United States of America for a "Study Tour on Court Security & Judicial Counter-Terrorism Trial Best Practices" from 18 to 28 July 2016. This was a learning platform for the hearing of terrorism cases and reinforcing effective counter terrorism measures.

Firm and fair in his decisions, Tan Sri Dato' Sri Balia has written numerous judgments in diverse areas of the law. In the Federal Court case of *Hassan Marsom & Ors v Mohd Hady Ya'akop*[1] Tan Sri Dato' Sri Balia reiterated the principles on the protection of the rights of a detained person pending investigation under section 117 of the Criminal Procedure Code ("CPC"). In no uncertain terms he held that:

> "It must be emphasised that a magistrate exercising his discretion under section 117 of the CPC is performing a judicial function which is subject to scrutiny. It is incumbent upon him to apply his mind before issuing an order under the said provision. The pre-requisites of sections 117 and 119 of the CPC must be satisfied. The object, purpose and design of the two provisions of the CPC are meant for the protection of the subject. Both provisions are couched in the mandatory terms and must strictly be complied with. Failure to do so may gravely prejudice the liberty of a subject. It cannot be gainsaid that where the liberty of a citizen is affected, the law must be adhered to strictly."

Tan Sri Dato' Sri Balia retired on 25 March 2019. As a judge, Tan Sri Dato' Sri Balia was notable for his wisdom, skill and diligence. Despite being described as a strict and demanding judge, Tan Sri Dato' Sri Balia Yusof Wahi's kindness and humility are greatly admired by his officers.

1 [2018] 7 CLJ 403.

Dato' Alizatul Khair Osman Khairuddin

Dato' Alizatul Khair Osman Khairuddin was born on 22 April 1953 in Ipoh, Perak. She obtained her Bachelor of Laws LL.B (Hons) from the University of Malaya in 1976. She then pursued her Master of Laws LL.M at the London School of Economics, University of London, United Kingdom in 1982.

Prior to her elevation to the High Court of Malaya, Dato' Alizatul Khair served in various capacities in the Judicial and Legal Service, including Federal Counsel, Deputy Director of the Legal Aid Bureau, Senior Assistant Registrar of the High Court in Ipoh and Kuala Lumpur, Legal Advisor to the Ministry of Education, Head of the Arbitration Unit, Head of the Research Unit and Deputy Head of the Civil Division at the Attorney General's Chambers. In 1995, Dato' Alizatul Khair was appointed the State Legal Advisor of Penang.

On 1 May 2003, Dato' Alizatul Khair was appointed a Judicial Commissioner and on 21 December 2004, she was elevated to the position of a Judge of the High Court of Malaya. She served at the Shah Alam High Court and the Kuala Lumpur High Court until her elevation to the Court of Appeal on 11 May 2011. Subsequently on 23 September 2017 she was elevated to the position of a Judge of the Federal Court where she served until her retirement in October 2019.

As a judge, Dato' Alizatul Khair was renowned for her calm disposition, wisdom and conscientious commitment to the cause of justice. This is illustrated, *inter alia*, in the following excerpt of her judgment in the case of *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor*:[1]

> "In our view, the GCA should not be used by the Government or State Government as "a cloak for denial of responsibilities". The lack of a formal contract should not serve as a loophole for the 2nd defendant to deny its contractual responsibilities arising from the logging contract. The conduct of the parties, particularly the defendants who benefitted from the forest produce cess collection, would make it inequitable for the defendants to now claim that there was no contract to begin with. To quote Bose J in Vithaldas v Moreshwar Parashram (supra) at p.243:
>
> We feel that some reasonable meaning must be attached to Art. 299(1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorized contracts. If in fact a contract is unauthorized or in excess of authority it is right that government should be safeguarded.
>
> On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. *In between is a large class of contracts, probably by far the greatest in numbers, which, though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility.* If not, its interest are safeguarded as we think the Constitution intended that they should be."
>
> (Emphasis added)

Dato' Alizatul Khair appreciated the importance of allowing parties and their counsel to be fully heard, treating all who appeared before her with courtesy and unfailing impartiality and fairness. Her dedication as a judge and her hard work in the judiciary earned the respect of her peers from the Bench and the Bar.

1 [2019] 2 MLJ 689.

During her tenure as a judge, Dato' Alizatul Khair served as a member of the Editorial Committee of the Malaysian Judiciary Yearbook as well as the Publication Committee of the Journal of the Malaysian Judiciary.

Dato Alizatul Khair was a member of the International Association of Women Judges ("IAWJ") and attended IAWJ's 13th Biennial International Conference on "Women Judges and the Rule of Law: Assessing the Past, Anticipating the Future" in Washington DC in May 2016.

Since her retirement Dato' Alizatul Khair has been appointed a Commissioner of the Enforcement Agency Integrity Commission (EAIC).

Datuk Wira Mohtarudin Baki

Datuk Wira Mohtarudin Baki was born on 15 May 1953 in Tapah, Perak. He obtained his Bachelor of Laws LL.B (Hons) from the University of Malaya in 1978.

Datuk Wira Mohtarudin Baki had a long and illustrious legal career, spanning over 20 years in the Judicial and Legal Service. During his tenure in service, he held the posts of Magistrate at Alor Setar, Kedah, Senior Assistant Registrar at the High Court of Alor Setar and Ipoh and Judge Advocate of the Courts-Martial, Legal Advisor for the State of Melaka, Senior Federal Counsel at the Anti-Corruption Agency (currently known as the Malaysian Anti-Corruption Commission). In 1996, he returned to the bench as a Sessions Court Judge and was appointed the Director General of the Insolvency Department from 2001 to 2003.

Datuk Wira Mohtarudin Baki took his oath of office as a Judicial Commissioner on 1 May 2003 and was confirmed as a High Court Judge on 21 December 2004. During his tenure as a High Court Judge, he served in the High Courts of Kuala Lumpur, Shah Alam and Melaka. He was also appointed the managing judge for the Shah Alam High Court from 2009 to 2011. Datuk Wira Mohtarudin Baki was subsequently elevated to the Court of Appeal on 10 August 2011. His tenure ended on 14 May 2019.

During his long tenure on the Bench Datuk Wira Mohtarudin Baki was known to be a strict and firm judge. Nevertheless, for those who knew Datuk Wira Mohtarudin Baki personally, he was notable as a kind-hearted person with a great capacity for comradeship. Datuk Wira Mohtarudin Baki believed that putting new knowledge and skills into practice can be one of the best ways to improve oneself. On that account, he always encouraged his officer to seek knowledge no matter where they are.

Datuk Yeoh Wee Siam

Datuk Yeoh Wee Siam was born on 13 February 1953 in Muar, Johor. In 1977, she obtained her Bachelor of Laws LL.B (Hons) from the University of Malaya before embarking on her journey in the Judicial and Legal Service.

She joined the Judicial and Legal Service in 1977 and during her long career she held various important posts such as Federal Counsel at the Advisory Division of the Attorney General's Chambers, Magistrate in Johor Bahru, Senior Assistant Registrar at the Johor Bahru High Court, and Senior Federal Counsel at the Ministry of Human Resources. She was appointed a Senior Assistant Parliamentary Draftsman and later promoted to Deputy Parliamentary Draftsman in 1994. She served in various ministries and government agencies, as among others, Senior Federal Counsel and Head of the Legal Division at the Ministry of Communications and Multimedia, Chairman of the Industrial Court, and covering the post of the President of the Industrial Court in 2006.

Datuk Yeoh Wee Siam was appointed a Judicial Commissioner on 5 January 2009 and was elevated to the High Court on 10 August 2011. She served in the High Courts of Shah Alam at Petaling Jaya (Criminal Division) and of Kuala Lumpur (Family Court, and New Civil Court respectively) during her tenure as a High Court Judge. She started sitting at the Court of Appeal from 1 April 2017, and took her oath of office as a judge of the Court of Appeal on 23 September 2017. She retired on 13 February 2019.

Datuk Yeoh Wee Siam's humility and friendly character made it easy and pleasant for her officers and staff to work with her. She always guided them, corrected their mistakes, and helped them to improve. Datuk Yeoh Wee Siam will always be remembered as a judge who is diligent in her works and is dedicated in all things that she did.

In her tenure on the Bench, she presided over several important cases, one of which involved a long legal battle by a group of former Orang Asli settlers in Johor to recover RM32 million and 57 apartments. On 5 June 2000, the Johor Bharu High Court had ordered the Johor state government to pay RM38,554,111.92 to the Orang Asli villagers in three villages in the district of Kota Tinggi, Johor as compensation for the acquisition of their land for the building of Linggiu dam. Of the amount, RM22 million was held under the Linggui Valley Orang Asli (Jakuns) Trust, and the balance sum was held by Messrs. Khana & Co. The law firm was required to pay the amount to the villagers after deducting legal fees and related costs. But the villagers were unaware of the court decision until 2004, and had in 2009 sued to recover the money. The Court of Appeal, while upholding the decision of the High Court, ruled that the former lawyers were liable for the misuse of funds held in trust for the Orang Asli and have to return missing funds. Court of Appeal judge Datuk Yeoh Wee Siam, who read the judgment, said those who were sued by the Orang Asli community have to pay up all the funds that were "misused, mismanaged or misappropriated", but with the amount payable to be determined via audited accounts.[1]

1 *Tetuan Khana & Co v. Saling Lau Bee Chiang & Other Appeals* [2019] 3 CLJ 1.

Failing to expressly plead the doctrine of non-delegable duty is fatal, as warned by our Court of Appeal in *Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) & Ors and Other Appeals*,[2] where Datuk Yeoh Wee Siam observed:

> More importantly, we note that the issue of non-delegable duty of care was not even pleaded by the Patient and her parents in the first place. Therefore, the issue ought not to have been considered by the learned JC when it was raised at the late stage of the submissions. We do not agree with the submissions of learned counsel for the Patient and her parents who, in relying on the Federal Court decision in Tun Hussein Onn National Eye Hospital v. Megat Noor Ishak bin Megat Ibrahim & 2 Others (Federal Court Civil Appeal No. 01(f) – 26 – 04 /2016(W), submits that even if "the plaintiff had not pleaded direct liability on the Hospital's part for negligence... the essence of a non-delegable duty have been pleaded.
>
> With respect, we are of the opinion that a claim made under the doctrine of nondelegable duty of care must be expressly pleaded against the Hospital. Otherwise from a plain reading of the Counterclaim of the Patient and her parents, it is clear that their claim against the Hospital is based on vicarious liability but not on the cause of action of non-delegable duty of care.

2 [2018] 6 CLJ 334.

Datuk Stephen Chung Hian Guan

Datuk Stephen Chung Hian Guan was born on 22 August 1953 in Sibu, Sarawak. He graduated with a Bachelor of Laws LL.B (Hons) from the University of Adelaide in 1980.

He served as a temporary teacher at Sacred Heart Secondary School, Sibu in 1973 after which he started his legal career as an Articled Clerk at Baker Mc Ewin, Adelaide. In 1981, he was admitted as a Barrister and Solicitor of the Supreme Court of South Australia, the Federal Court of Australia and the High Court of Australia. He was admitted as an Advocate of the High Court of Sarawak in the same year. Datuk Stephen Chung Hian Guan continued his journey by joining the Judicial and Legal Service where he was appointed a First-Class Magistrate at Sibu, Sarawak.

Datuk Stephen Chung Hian Guan resigned to commence private practice under the name of Stephen Chung Advocate in 1983, and subsequently under the name of Stephen Robert & Wong Advocates. In his 26 years of practice, he was appointed the Vice President of the Sarawak Advocates Association and the Chairman of the Sarawak Advocates Association, Sibu Branch, Sarawak.

He was appointed a Judicial Commissioner of the High Court in Sabah and Sarawak on 28 October 2009. On 4 April 2012, Datuk Stephen Chung Hian Guan was elevated as a High Court Judge. He served at Bintulu, Limbang, Miri, Kuching, Sandakan, Tawau, Kota Kinabalu and Labuan High Courts until his elevation to the Court of Appeal on 27 April 2018.

Datuk Stephen Chung Hian Guan is a conscientious and meticulous person with an eye for detail. A man of few words, he will always ensure the task at hand is dealt with swiftly and comprehensively. He is always armed with a smile and his pleasant disposition means he is well-liked by everyone around him. Datuk Stephen Chung Hian Guan mandatorily retired from the Bench on 22 August 2019.

He had a unique adjudication experience in hearing the trial against 30 armed intruders from the Royal Sulu Forces, who occupied Kampung Tanduo in Lahad Datu. The trial was held in a community hall at Kepayan Prison Complex. The prosecution called 166 witnesses while the defence called 20 witnesses. He convicted 9 accused for waging war against the Yang di-Pertuan Agong, 14 accused for being members of a terrorist group, 1 accused for harbouring a person who was a member of a terrorist group, 1 accused for soliciting property for the commission of a terrorist act and 1 accused for soliciting support to a terrorist group. The grounds of judgment can be found in *Public Prosecutor v Atik Hussin bin Abu Bakar and other cases*.[1] Prior to his appointment as a Judicial Commissioner, he was a committee member of the Sarawak Society for the Blind, both for Sibu and the State Level, a member of the board of trustees of Sibu Kidney Foundation and a committee member of Agape Centre, Sibu, providing care and services to children and young adults with special needs.

1 [2016] MLJU 968.

Datuk Yew Jen Kie

Datuk Yew Jen Kie, was from Sibu, Sarawak. She obtained her Bachelor of Laws LL.B (Hons) from the London School of Economics and Political School in 1973. She was admitted as a Barrister-at-Law at the Inner Temple in 1978. During her farewell speech, Datuk Yew said that she had set out to read law without intending to pursue a legal career.

However, she joined the Legal and Judicial Service because she thought it would be quite interesting to be the first lady magistrate in a small town near Sibu called Sarikei. Her mother thought it was a good profession for woman. Unbeknown to her mother, Datuk Yew had a different plan in mind. She just wanted to obtain some work experience and then resign to do something else.

She grew to love her job but was also getting restless, toying with the idea of private practice, which seemed a greener pasture with better monetary rewards. Many events happened until Datuk Yew was finally convinced that her calling was to be in the service of the nation.

Datuk Yew served in many posts in Sarawak including Magistrate, Senior Assistant Registrar and Sessions Court Judge. At her elevation ceremony as the first lady High Court Judge in Sarawak on 8 August 2010, Datuk Yew said:

> The court is the conscience of the society. Independence of judiciary is the kernel of the Rule of Law. It is so important for the public to have confidence in the court that it will apply the law fairly and equally, blind to all creed, colour or religion. For the last thirty years, I have and will continue to labour in the cause of justice with this as the shining guiding light. Judge carefully, without injustice, partiality or bribery. Let not fear direct the decision.

During her tenure as a Judge of the High Court, Datuk Yew heard some challenging cases for example the judicial review of the Election Commission's review of the partitioning of the State of Sarawak into constituencies for the purpose of elections in *Chee How & another v. Pengerusi Suruhanjaya Pilihan Raya Malaysia (Election Commission of Malaysia).*[1]

Besides her passion for her work, singing is her other passion. She mesmerized her fellow judges and the legal fraternity with the rendition of her signature songs the "Think of Me" from the Phantom of the Opera and the "Moon Represents My Heart" during the dinner of the Opening of the Legal Year and Judges' Conference. She also stunned the audience with her impressive performance on Bizet's "Carmen Habanera" during the dinner at the Opening of the Legal Year 2013 in Tawau and at the same event, she won the best dress award.

Datuk Yew cares for the welfare of staff and was involved in staff activities by serving as the President of the Sports, Social and Welfare Club Department of Sarawak. She was also a member of the Sarawak Bureau of Women.

Despite the demanding nature of work as a judge, she always had the time to guide and mentor the people in her team who greatly benefited from her guidance and kindness.

Datuk Yew retired on 15 October 2019 after serving a good 40 years in the judiciary. Her love, humility and wisdom will always be remembered.

1 [2015] 8 CLJ 431.

Datuk Su Geok Giam

Datuk Su Geok Giam was born on 2 August 1953 in Muar Johor. She went on to read law at the University of Malaya and graduated with Bachelor of Laws LL.B (Hons) in 1977. She pursued her Master of Laws LL.M at the University College of London in 1988.

She started her career in the Judicial and Legal Service as an attachment officer in 1977 and continued to hold several posts during her career, as amongst others, Deputy Public Prosecutor, Senior Federal Counsel at the Ministry of Law, Magistrate and Senior Assistant Parliamentary Draftsman. She was also appointed a Senior Federal Counsel of Advisory and International Affairs Division at the Attorney General's Chambers and a Sessions Court Judge in Alor Setar.

Datuk Su Geok Giam took her oath of office as a Judicial Commissioner on 1 June 2000 and as a judge of the High Court on 12 July 2004. During her tenure on the bench, she served in various states including Perak, Pulau Pinang, Selangor and Kuala Lumpur. Datuk Su Geok Giam retired on 2 August 2019.

Datuk Su Geok Yam is known for her strong, strict character on the bench and in chambers. Her Ladyship did not tolerate inadequacies in the conduct of cases. She is wise, tactful and knew how to keep a level-head under stressful situations. Her leadership quality which her officers admired the most is the way she inspired them to utilize their skills and hone them into a strength that they can retain. As a judge, she is fairly stern, but also kind and nurturing.

Dato' Mohd Azman Husin

Dato' Mohd Azman Husin was born on 08 November 1954 in Machang, Kelantan. He graduated with a Bachelor of Laws LL.B (Hons) from the University of Malaya in 1979 and obtained a Certificate in Criminal Law from the Legal Research Training Institute Seoul, Korea & KOICA in 2001.

He served as a Training Officer at the Central Bank of Malaysia before he started his career in the Judicial and Legal Service as a Magistrate in Kuala Lumpur. Throughout his service, Dato' Mohd Azman Husin served in various capacities, as amongst others, Deputy Public Prosecutor in Kelantan and Terengganu, Legal Advisor for the states of Perak and Kelantan, Sessions Court Judge and Head of the Prosecution Unit in Kedah. He also served as the Deputy Commissioner of the Law Revision and Law Reform Divsion at the Attorney General's Chambers.

Dato' Mohd Azman Husin took his oath of office as a Judicial Commissioner on 1 September 2005. He was appointed a judge of the High Court on 11 April 2007. During his tenure on the bench, he served in several states including Perak, Kelantan, Kedah, Kuala Lumpur and Selangor. During his tenure, YA Dato' Azman had presided over many cases among others *Yang Dipertua Majlis Daerah Gua Musang & Ors v*

Pedik Busu & Ors[1] (a case pertaining to native title on customary land); *Associated Rock Industries Sdn Bhd v Bidor Rock Products Sdn Bhd*[2] (a dispute pertaining to quarry extraction) and *Ong Eng Taik v Kota Bharu Securities*[3] (a case on liquidation of margin account).

As a judge, Dato' Mohd Azman Husin was well-regarded beloved by everyone around him. He was known for his humility. He treated everyone with dignity and respect irrespective of their social status. His kindness and generousity was always admired by his officers and staff. Dato' Mohd Azman Hussin retired on 1 January 2019.

1 [2015] 5 MLJ 849.
2 [2007] MLJU 14.
3 [2009] MLJU 0149.

Dato' Rosnaini Saub

Dato' Rosnaini Saub was born on 7 March 1958 in Ipoh, Perak. She studied at the University of Malaya and graduated with a Bachelor of Laws LL.B (Hons) before joining the Judicial and Legal Service in 1982. She began her career in the Judicial and Legal Service as an Assistant Parliamentary Draftsman at the Attorney General's Chambers and assumed the post of Senior Magistrate in 1987. She was appointed a Sessions Court Judge and held that post for 15 years from 1990 to 2005. During her career as a Sessions Court Judge, she served in several states including Perak, Kedah and Penang.

Dato' Rosnaini Saub was appointed a Judicial Commissioner on 1 September 2005. On 5 September 2007, she was elevated as a judge of the High Court. During her tenure as a judge, she served in the states of Selangor (Shah Alam), Negeri Sembilan (Seremban) and Wilayah Persekutuan (Kuala Lumpur).

Dato Rosnaini is a meticulous and detail-oriented person. Although she was perceived to be stern and firm, she was always ready to guide those who were attached to her. She will be remembered by her officers and staff for her guidance and advice. Dato' Rosnaini Saub retired on 1 May 2019.

Datuk Siti Khadijah S. Hassan Badjenid

Datuk Siti Khadijah S. Hassan Badjenid was born on 23 January 1953 in the State of Penang. She studied at the University of Malaya from 1974 to 1978 and obtained her Bachelor of Laws L.L.B (Hons) before joining the Judicial and Legal Service upon graduation. Throughout her career, she held various positions, including, among others, Magistrate in the district of Klang covering Petaling Jaya, Magistrate in the district of Teluk Datuk covering Kuala Selangor and Sungai Besar, Magistrate in the State of Penang from 1979 to 1983, Senior Assistant Registrar at the High Court of Kedah and thereafter President/Senior Sessions Court Judge in various states including Perlis and Kedah from 1985 to August 2001. She served as a Chairman of the Industrial Court in Penang from 2001 to August 2007. Subsequently, she worked as a Sessions Court Judge in Kuala Lumpur from September 2007 to January 2008. In 2008, she was appointed the Deputy Chairman of the Planning Appeal Board Penang established under the Town and Country Planning Act 1976.

Datuk Siti Khadijah S. Hassan Badjenid took her oath of office as a Judicial Commissioner on 14 August 2009. On 21 March 2016, she was appointed a judge of the High Court. Her tenure ended on 23 January 2019.

Dato' Haji Mohamad Shariff Haji Abu Samah

Dato' Haji Mohamad Shariff Haji Abu Samah was born on 1 June 1962 in Kuala Lumpur. He obtained his Bachelor of Laws LL.B (Hons) from the MARA University of Technology and pursued his Post-Graduate Diploma in Syariah Law and Legal Practise (DSLP) at the International Islamic University Malaysia.

He started his career by joining the Judicial and Legal Service in 1987. During his long career, he held various important posts such as Deputy Public Prosecutor, Senior Magistrate at the Kuching Magistrate Court, Senior Assistant Registrar at the Kuala Lumpur High Court, Deputy Public Prosecutor at the Commercial Crime Unit, Kuala Lumpur under the Attorney General's Chambers, Senior Federal Counsel at the Ministry of Finance and Senior Assistant Parliamentary Draftsman at the Attorney General's Chambers. He was appointed the Head of the Prosecution Unit in Pahang before resigning from the Judicial and Legal Service. He was admitted as an advocate and solicitor of the High Court of Malaya and became the managing partner of Messrs. Shariff Asidah Ali & Co from 2008 to 2015.

He was appointed a Judicial Comissioner on 16 December 2015. Dato' Haji Mohamad Shariff Haji Abu Samah's tenure ended on 15 December 2019.

Mr. Mat Ghani Abdullah

Mr. Mat Ghani Abdullah was born on 24 September 1959 in Kuala Terengganu. He read law at the MARA University of Technology and obtained his Diploma in Law in 1986. He pursued his degree at the same university and graduated with a Bachelor of Laws LL.B (Hons) in 1989.

He started his career in the Judicial and Legal Services as a Legal Assistant at the Legal Aid Bureau. Throughout his services, Mr. Mat Ghani Abdullah held various positions, including as Magistrate, Senior Assistant Registrar, Deputy Registrar, Senior Federal Counsel, Legal Adviser of the Prime Minister's Department, Deputy Commissioner of the Law Revision and Law Reform Division at the Attorney General's Chambers. In 2008, he was appointed the Head of Research Unit at the Palace of Justice and later as a Special Officer to the Chief Justice of Malaysia. Mr. Mat Ghani Abdullah served as a Sessions Court judge for four years from 2009 until 2013.

On 27 March 2017, he took his oath of office as a Judicial Commissioner. During his tenure on the bench, he had served in the High Courts at Kuala Lumpur and Shah Alam specializing in commercial crime and corruption cases. His tenure ended on 27 March 2019.

Mr. Asmadi Husin

Mr. Asmadi Husin was born on 9 April 1967 in Pasir Mas, Kelantan. He studied at the University of Malaya and graduated with a Bachelor of Laws LL.B (Hons) in 1991. He was admitted as an Advocate and Solicitor of the High Court of Malaya on 12 July 2019.

Mr. Asmadi Husin began his legal career as a Deputy Director of the Legal Aid Bureau in Kota Bharu Kelantan in 1991. During his career in the Judicial and Legal Service, he held several posts, as amongst others, Federal Counsel, Deputy Registrar, Research officer and Sessions court judge serving in Shah Alam, Klang and Kelantan. In 2015, Mr. Asmadi Husin was appointed the Director of the Courts in Terengganu before he was made the specialized Sessions Court Judge for corruption cases in Teluk Intan in 2016.

Mr. Asmadi Husin was appointed a Judicial Commissioner on 27 March 2017 and was stationed at Taiping High Court. Mr. Asmadi Husin's tenure ended on 27 March 2019.

Mr. Mohd Ivan Hussein

Mr. Mohd Ivan Hussein was born on 27 May 1966 in Simanggang (Sri Aman), Sarawak. He obtained a Diploma in Law from the Mount Royal College, Calgary, Canada in 1984. He then obtained his Bachelor of Laws LL.B (Hons) from the University of Essex, Colchester, United Kingdom and proceeded to complete the Barrister-at-Law examinations at the Council of Legal Education, London in 1989.

He began his legal career as an advocate and solicitor in 1989 as a Legal Assistant in Messrs Wan Junaidi & Co Advocates, Kuching and subsequently at Messrs Lim, Tan & Partners Advocates, Kuching. In 1993, he became one of the partners at Messrs Hamzah & Ong Advocates, Kuching before he set up his own practice as a sole proprietor under the name of Messrs Ivan Hussein Advocates, Kuching.

Mr. Mohd Ivan Hussein took his oath of office as a Judicial Commissioner on 27 March 2017. His tenure ended on 27 March 2019.

Datin Zalita Dato' Haji Zaidan

Datin Zalita Dato' Haji Zaidan was born on 29 December 1968 in Petaling Jaya, Selangor. She graduated with a Bachelor of Laws LL.B (Hons) from the University of Warwick and was admitted as a Barrister-at-Law at Lincoln's Inn, London. In 2000, she pursued her Masters on Public International Law at Nottingham University as a recipient of the British High Commissioner's Award.

She started her career by joining the Judicial and Legal Service on 7 June 1993. During her tenure at the Attorney General's Chambers, she was posted at the Advisory and International Affairs Division. She also served as a Federal Counsel in various ministries and agencies such as the Ministry of International Trade and Industry, the Ministry of Plantation Industries and Commodities and the Ministry of Works. In 2013, she was appointed a Research Officer at the Research Unit, Office of the Chief Justice and later appointed the Director of International Affairs Unit, Office of the Chief Registrar.

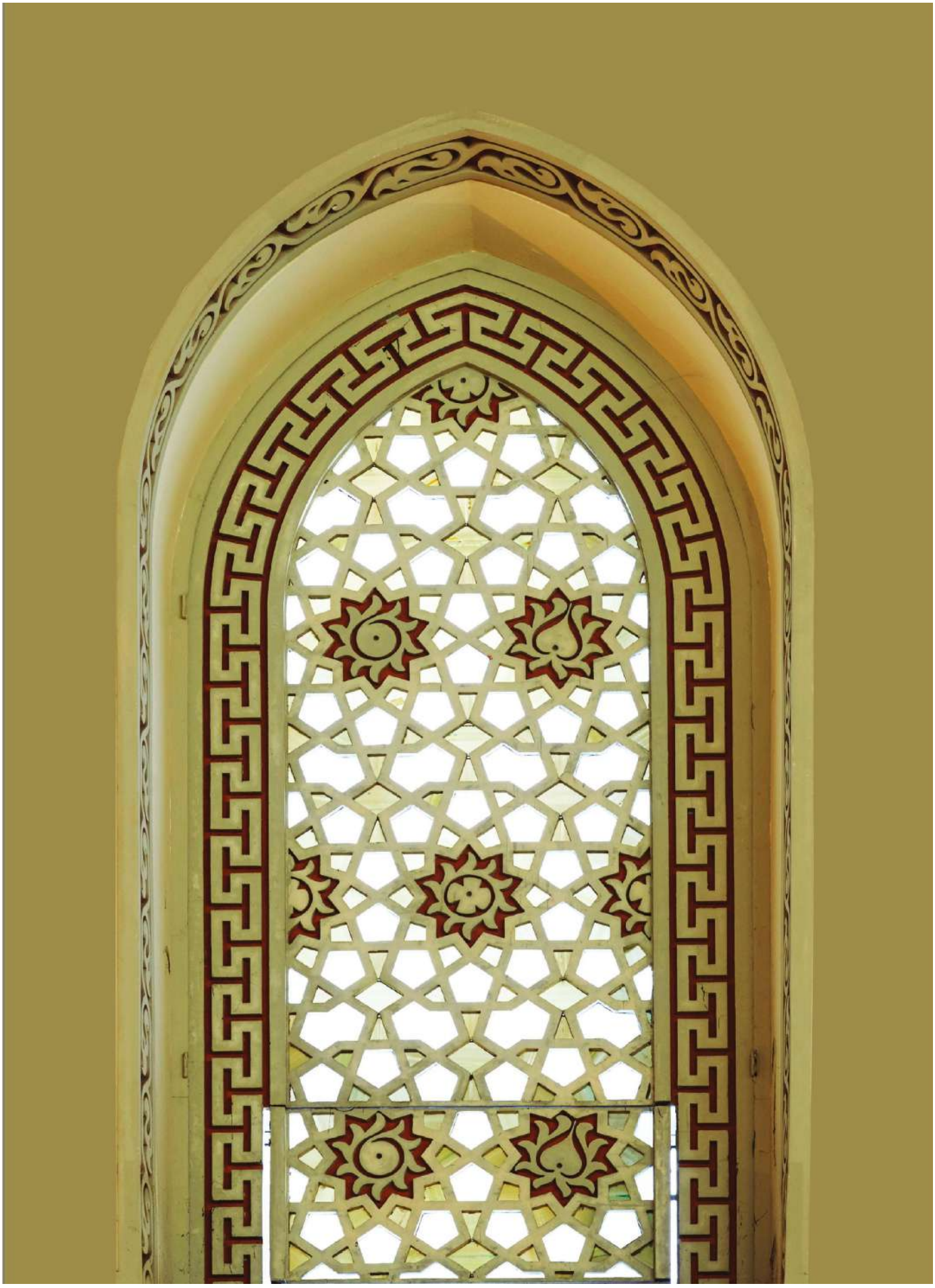
Datin Zalita Dato' Haji Zaidan was appointed a Judicial Commissioner on 27 March 2017 and was stationed at the Shah Alam High Court. Her tenure ended on 27 March 2019.

Mr. Bexter Agas Michael

Mr. Bexter Agas Michael was born on 30 November 1962 in Nonok, Kuching, Sarawak. He obtained his Bachelor of Laws LL.B (Hons) from the University of Malaya in 1986.

He was admitted to the Bar of the High Court of Sabah and Sarawak on 19 February 1991. He was a Partner of Messrs Ee & Lim Advocates and an active member of the Advocates' Association of Sarawak. During his 24 years in practice, he served as a member of the Tribunal for Housing Purchaser Claims of Sarawak and Secretary of the Sarawak advocates Inquiry Committee from 2015 to 2017. Mr. Bexter Agas Michael is also an Accredited Mediator from LEADR, Australia. In 2007, he received his Certificate of Accreditation as a mediator from the Chief Judge of the High Court of Sabah and Sarawak.

Mr. Bexter Agas Michael took his oath of office as a Judicial Commissioner on 27 March 2017. He completed his tenure on 27 March 2019.

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CHAPTER 6 JUDICIAL TRAINING

JUDICIAL TRAINING

The following courses were conducted by the Training Committee of the Judicial Appointments Commission in 2019:

"Principles of Contractual Interpretation"

Two courses on this topic were held in 2019 aimed at familiarising the judges with principles of contractual interpretation. The first course was held on 15 and 16 February 2019 at the Conference Hall of the Palace of Justice, Putrajaya while the second course was held on 20 and 21 September 2019 at the Banquet Room of the Palace of Justice, Putrajaya.

The first course was facilitated by Chief Judge of Sabah and Sarawak David Wong Dak Wah, Judge of the Federal Court Azahar Mohamed who was also the Chairman of the Training Committee of the Malaysian Judicial Academy, Judges of the Court of Appeal Mary Lim Thiam Suan and Hasnah Mohammed Hashim. This course was attended by 23 participants, which comprised 15 judges of the High Court and 8 judicial commissioners.

On the first day of the course, the participants were required to make individual presentations on the assigned topics.

On the second day, the participants were divided into groups and were required to present their analysis on the assigned cases. The courses provided the participants with an opportunity to exchange their knowledge and to learn from the panel of experts who shared their knowledge and experiences.

Discussion session (Group 4) at the 1st course "Principles of Contractual Interpretation"
(L-R): Justice Supang Lian, Justice Azman Abdullah, Justice Choo Kah Sing, Justice Abdul Wahab Mohamed and Justice Wong Chee Lin

Some of the participants at the 2nd course "Principles of Contractual Interpretation"
(L-R): Judicial Commissioner Duncan Sikodol, Justice Meor Hashimi Abdul Hamid, Justice Ahmad Fairuz Zainol Abidin, Justice Chan Jit Li and Justice Celestina Stuel Galid

"Appellate Judgment Writing"

This seminar was held at the Conference Hall of the Palace of Justice, Putrajaya on 21 March 2019 for 19 Court of Appeal judges. Two guest speakers from the Supreme Court of Singapore, Justices of Appeal Judith Prakash and Chao Hick Tin, shared their knowledge and experience with the participants. Besides the guest speakers, Justice Idrus Harun and Justice Nallini Pathmanathan, both Judges of the Federal Court delivered presentations at this seminar.

The opening remarks were delivered by the then Chief Justice Richard Malanjum. The seminar commenced with Justice Nallini Pathmanathan and Justice Judith Prakash sharing their perspectives on writing judgments for civil appeals followed by Justice Idrus Harun and Justice Chao Hick Tin speaking on matters relating to criminal appeals.

Justice Nallini Pathmanathan focused on the need to have a logical flow throughout appellate judgments, with emphasis on syllogistic reasoning and how an argument flows from precedent or text. Justice Nallini cited the case of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd*[1] a landmark judgment written by the then Chief Justice Richard Malanjum, as an example. Justice Nallini advised participants to move away from the standard format which records all the submissions by lawyers, to distinguish between run of the mill cases and complex cases involving novel points of law, because for the former, there should be no need to set out at length the facts and the law which is trite. Further, Justice Nallini advised the appellate judges not to write judgments in cases which do not involve new principles of law and in such cases, they ought to consider handing down an oral judgment (*ex-tempore*) which the lawyers may easily transcribe from the court recording system, if necessary. On the other hand, Justice Judith Prakash drew on several of her own judgments and explained the backdrop and context in which those judgments were written.

Justice Idrus Harun provided appellate judges a guideline on how to write an effective judgment in criminal appeals. Justice Idrus explained the reason why judges must furnish the reasons for their judgments. Turning to the issue of length, Justice Idrus Harun urged judges not to belabour the point when the law is settled. He pointed out that currently, the only contentious issue in criminal appeals in Malaysia is the invocation of the double presumption in dangerous drugs cases (since then this issue has been resolved in *Alma Nudo Atenza v Public Prosecutor and Another Appeal*)[2] Justice Idrus also spoke on an issue which is vital for appellate judges to consider, i.e that they should only intervene where substantial miscarriage of justice has been occasioned. Justice Idrus ended his talk by emphasising that the law allows judicial dissent specifically for criminal appeals. Justice Chao Hick Tin expounded on the need to make judgments comprehensible.

1 [2019] 6 MLJ 15 (FC).

2 [2019] 4 MLJ 1.

The then Chief Justice of Malaysia Richard Malanjum (second from the left) with Justice Chao Hick Tin, Judge of Appeal of the Singapore Supreme Court (far left); Justice Judith Prakash,Judge of Appeal of the Singapore Supreme Court (second from the right) and Justice Nallini Pathmanathan, Judge of the Federal Court (far right). This picture was taken before the start of the seminar entitled "Appellate Judgment Writing" held on 21 March 2019

"How to Read Statutes"

On 5 April 2019, a course on 'How to Read Statutes' was held at the Conference Hall of the Palace of Justice, Putrajaya. This course was facilitated by Justice Nor Bee Ariffin, Judge of the Court of Appeal. A total of 42 participants comprising 11 judges of the Court of Appeal and 31 judges of the High Court attended the course. Chief Judge of Malaya Zaharah Ibrahim, and Justice Idrus Harun, Judge of the Federal Court also participated in the talk.

Justice Nor Bee Ariffin, Judge of the Court of Appeal delivering her talk on 'How to Read Statutes'

Justice Idrus Harun delivering his presentation on Writing Judgments for Criminal Appeals during the seminar entitled "Appellate Judgment Writing" held on 21 March 2019

"Induction Programme for Judicial Commissioners"

The Judicial Appointments Commission conducted the first Induction Programme for judicial commissioners for the year 2019 between 29 April to 3 May 2019 at the Secretary's Office of the Judicial Appointments Commission. This programme involved 11 candidates who were to be appointed judicial commissioners on 3 May 2019. They were Latifah Mohd Tahar, Amarjeet Singh Serjit Singh, Awang Armadajaya Awang Mahmud, Duncan Sikodol, Muniandy Kannyappan, Dr. Shahnaz Sulaiman, Evrol Mariette Peters,

Some of the participants attending the course *"How to Read Statutes"*

Christopher Chin Soo Yin, Ong Chee Kwan, Maidzuara Mohammed and Mohd Radzi Abdul Hamid.

The opening remarks were delivered by Justice Azahar Mohamed, Judge of the Federal Court cum Chairman of the Training Committee of the Malaysian Judicial Academy. The programme consisted of talks delivered mainly by senior judges on topics such as "The Making of a Good Judge"; "Judge Craft"; "Dealings with Conflict and Unexpected Contentious Situations"; "When to Recuse"; "Business of Judging: Practical Workshop"; "Salient Features of the Rules of Court 2012"; "Case Management"; "An Overview to Court-Annexed Mediation"; "Practical Approach to Judgment Writing and Importance of Language"; "How to Read Statutes"; "Criminal Law: Evidence and Procedure"; "Adjudicating Trafficking of Drugs Cases under Section 39B of the Dangerous Drugs Act 1952"; "Adjudicating Cases under Section 302 of the Penal Code"; "Adjudicating Cases under Security Offences (Special Measures) Act 2012 (SOSMA)"; and "Assessing the Credibility and Reliability of Evidence". These topics were selected with the aim of introducing the participants to the scope of their future duties as well as exposing them to best practices which they ought to follow once appointed as judicial commissioners.

Mdm. Hamidah Mohamed Deril, the Head of the e-Court Division introduced the participants to the Judiciary's digital infrastructure in her talk entitled "e-Court System and Practical", while Mdm. Norziatulshima Tajudin, the Head of Administration Division briefed the participants on "Salary, Allowance and Benefits for Judges".

The second programme for 2019 was carried out on 25 to 28 November 2019 for 15 candidates who were to be appointed judicial commissioners on 28 November 2019. They were Aslam Zainuddin, Norsharidah Awang, Rohana Abd Malek, Julie Lack, Fredrick Indran X.A. Nicholas, Tee Geok Hock, Wong Siong Tung, Khairil Azmi Mohamad Hasbie, Leonard David Shim, Nadzarin Wok Nordin, George Varughese K.O. Varughese, Quay Chew Soon, Wong Hok Chong, Atan Mustaffa Yussof Ahmad and Anand Ponnudurai. The talks to the participants were delivered mostly by senior judges and the legal and administrative officers of the judiciary.

Justice Azahar Mohamed, Judge of the Federal Court cum Chairman of the Training Committee of the Malaysian Judicial Academy delivering opening remarks at the Induction Programme for Judicial Commissioners held on 29 April to 3 May 2019

Some of the participants at the "Induction Programme for Judicial Commissioners" held on 25 to 28 November 2019
(L-R): Judicial Commissioners Norsharidah Awang, Julie Lack, Tee Geok Hock, Khairil Azmi Mohamad Hasbie,
Nadzarin Wok Nordin, Quay Chew Soon and Atan Mustaffa Yussof Ahmad

The participants at the "Induction Programme for Judicial Commissioners" with Justice Azahar Mohamed (centre)
Also seen in the picture is Mr. Qalam Zainuddin Sani, the Secretary of the Judicial Appointments Commission (fifth from left)
(L-R): Judicial Commissioners Wong Siong Tung, George Varughese K.O. Varughese, Anand Ponnudurai,
Fredrick Indran X.A. Nicholas, Rohana Abd Malek, Wong Hok Chong, Aslam Zainuddin, Leonard David Shim,
Norsharidah Awang, Tee Geok Hock, Julie Lack, Nadzarin Wok Nordin, Quay Chew Soon, Atan Mustaffa Yussof Ahmad and
Khairil Azmi Mohamad Hasbie

President of the Court of Appeal Ahmad Maarop (right) and Judge of the Federal Court Abang Iskandar Abang Hashim (left) delivering a lecture on "Adjudicating Trafficking of Drugs Cases under Section 39B of the Dangerous Drugs Act 1952" at the Induction Programme for Judicial Commissioners

A view of the set-up of the layout during the course "Criminal Law: Evidence and Procedure"

"Criminal Law: Evidence and Procedure"

This course was held on 5 and 6 July 2019 at Zenith Hotel, Putrajaya. A total of 19 participants, comprising 6 judges of the High Court and 13 judicial commissioners attended the course. This course was facilitated by the President of the Court of Appeal Ahmad Maarop, Judge of the Federal Court Azahar Mohamed who was also the Chairman of the Training Committee of the Malaysian Judicial Academy and Judge of the Court of Appeal Abdul Rahman Sebli.

The opening address was delivered by The Right Honourable the Chief Justice of Malaysia Tengku Maimun Tuan Mat. The participants were divided into groups and given 2 case studies per group. They were required to discuss with the members of the group and to present it on the following day. After the group presentations, the course concluded with a panel discussion on the topics of "Judgment Writing" and "Adjudicating Trafficking of Drugs Cases".

A group photograph of the participants and the facilitators during the course "Criminal Law: Evidence and Procedure" held on 5 and 6 July 2019 at Zenith Hotel, Putrajaya

Discussion session (Group 1) at the course "Criminal Law: Evidence and Procedure" held on 5 and 6 July 2019 at Zenith Hotel, Putrajaya (L-R): Judicial Commissioner Evrol Mariette Peters, Justice Lee Swee Seng, Judicial Commissioners Wan Ahmad Farid Wan Salleh, Amarjeet Singh Serjit Singh and Christopher Chin Soo Yin

"Quantification of Damages"

On 7 September 2019, the Judiciary hosted a seminar entitled "Quantification of Damages" in collaboration with Pricewaterhouse Coopers Malaysia ("PwC"). This seminar benefitted 108 participants comprising 6 judges of the Federal Court, 20 judges of the Court of Appeal, 41 judges of the High Court, 16 judicial commissioners and 25 officers from the Judicial and Legal Service.

The speakers from PwC were Dato' Mohammad Faiz Azmi (Executive Chairman of PwC Malaysia), Mr. Jay Moorthy (Partner - Valuations Leader PwC Malaysia), Mr. Michael Peer (Partner - Dispute Advisory Leader PwC Southeast Asia) and Mr. Justin Lim (Director - Valuations PwC Malaysia).

To start off the seminar, Dato' Mohammad Faiz Azmi's opening remarks ran through several key terms and phrases to give the participants basic understanding of the concepts used by accountants before going into the pith of the seminar. For example, he explained the concept of "a going concern". He also explained the significance of a statement of financial position also known as a balance sheet, a statement of comprehensive income, a statement of changes in equity and a statement of cash flows. This explanation helped the participants to visualise what goes into a balance sheet.

Dato' Mohammad Faiz Azmi explained financial statements and their limitations, common fallacies and the different types of audit opinions. According to him, in Malaysia, accounting standards are law as they are governed by the Financial Reporting Act 1997 unlike in other countries where it is not law. In interpreting the law on accounting standards, we refer to world standard practices as encapsulated in the International Financial Reporting Standards ("IFRS"). Hence, the reporting framework points of reference would be the Malaysian Financial Reporting Standards ("MFRS") for listed companies, the Malaysian Private Entities Reporting Standards ("MPERS") for non-listed companies as well as IFRS.

The common fallacies debunked by Dato' Mohammad Faiz Azmi as being false were:

1. All balance sheet items are measured at market value.
2. All profits are realised in the sense that they are backed by cash.
3. Future profits and losses are reflected in a balance sheet.

4. All assets used by the business are included in the balance sheet.
5. Property have market values, so the values in the balance sheet reflect this.
6. Balance sheets show the Company's true worth.
7. Group balance sheets reflect all the assets that can be sold.

Dato' Mohammad Faiz Azmi also mentioned that in the future, the Companies Commission of Malaysia ("CCM") would go electronic and the benefit of doing so would be that the CCM could assist by generating comparisons of different companies.

Some interesting concepts were advanced for participants to mull over:

1. The value of a company is not found in its financial statements. Value is not audited. It is estimated.
2. The value of a company cannot be derived by merely adding up the values of its assets.
3. Break-up basis versus going-concern basis may yield vastly differing values of the shares of a company.
4. The value of the shares of a public-listed company may be different from the value of the shares of a private company, *ceteris paribus*.
5. Minority shares may not be worth the same as majority shares, *ceteris paribus*.
6. If a company is lossmaking, it is not worth much.
7. A dollar today is worth more than a dollar tomorrow.

The panel ran through some practical case studies and discussed the issue of whether valuers and lawyers are speaking the same language or are on the same page. The "golden rules" for valuers are that an expert should prepare his valuation for court purposes and should give special thought to the appropriateness of the assumptions underlying his work. The valuation for court purposes should be based on verifiable assumptions, as it will always be preferred to those based on theoretical or speculative ones.

The panel discussed the reasons behind disparities between claims, experts' quantification and final award. The gap between claimant and defendant experts is often the result of experts receiving different instructions as well as genuine differences of opinions between them. The panel gave the participants suggestions on how the courts can bridge this gap.

To stimulate interest among the participants, the seminar was interactive and used innovative technology for a different twist to the usual question and answer session at the end of seminars. Throughout the seminar the speakers used the Slido platform to pose polls to be answered by the participants, with the results being displayed live on the screens. This livened up the hall.

Group photo taken after the seminar "Quantification of Damages"
Front row (L-R): Mr. Jay Moorthy, Dato' Mohammad Faiz Azmi, Chief Judge of Malaya Azahar Mohamed, Justice Mohd Zawawi Salleh, Mr. Michael Peer and Mr. Justin Lim

A deliberation during the seminar "Quantification of Damages"
(L-R): Chief Judge of Malaya Azahar Mohamed, President of the Court of Appeal Ahmad Maarop,
Justice Nallini Pathmanathan, Mr. Justin Lim, Mr. Michael Peer, Mr. Jay Moorthy and Dato' Mohammad Faiz Azmi

A bird's-eye view of all the attendees of the seminar "Quantification of Damages" in the Conference Hall,
Palace of Justice, Putrajaya

"Law Reform and The Judiciary"

On 1 November 2019, the Malaysian Judiciary hosted a programme entitled "Law Reform and The Judiciary" in the Conference Hall of the Palace of Justice, Putrajaya. It was jointly delivered by The Right Honourable Lord Justice Nicholas Green, Chair of the Law Commission, United Kingdom and The Honourable Lord Justice Malcolm John David Wallis, Judge of the Supreme Court of Appeal of South Africa, and facilitated by Justice Mary Lim Thiam Suan. A total of 88 participants comprising 2 judges of the Federal Court, 16 judges of the Court of Appeal, 25 judges of the High Court, 5 judicial commissioners and 40 officers from the judiciary benefitted from this programme.

The programme commenced with opening remarks delivered by The Right Honourable the Chief Justice Tengku Maimun Tuan Mat.

Lord Justice Green commenced his speech by introducing the composition of the Law Commission before explaining its function and role. He explained their finding that large teams do not improve efficiency, hence the work of the Law Commission is carried out by four small teams who do intensive research in the area for reform. The Law Commission is not in the business of drafting the law, but their role is focused on identifying a central issue which requires reform. He further explained that the Law Commission produces consultation papers which are lengthier than the final reports as within the papers, they cover the reasons for proposing the options for reform.

Lord Justice Green also commented on the relationship between the Law Commission and the Government. The Government tends to measure success in monetary terms, but the Law Commission is tasked with providing independent advice to the government. Lord Justice Green shared that they have 60 years' worth of track record and their work is favoured with a high trust rating.

The Law Commission's work has contributed to legal certainty, the welfare of vulnerable people and aim at improving the quality of the law. This is because underlying the Law Commission's advisory role is the goal to improve the lives of citizens.

Lord Justice Green gave the participants much food for thought when he posed questions for consideration based on future projects which the Law Commission might undertake. He shared the growing encroachment of artificial intelligence into our daily lives which raises potential problems. For example, would an autonomous ambulance, which is a thing of the future, responding to an emergency call be subject to traffic rules? Another example was the use of artificial intelligence in policy to identify risky individuals, crime spots and to undertake profiling. This is because there may be subtle bias in the manner artificial intelligence makes decisions as it does so based on the data supplied to it. Even further, there are government decisions undertaken by artificial intelligence which might be tainted. There would be an increasing need to resort to tribunals to annul wrongful decisions.

Lord Justice Green also spoke on cryptocurrency which is becoming more widespread but raises important issues such as "are cryptocurrencies property?" The classification of digital assets is a relevant query to undertake as, if they are not property, they would be exempt from many pieces of legislation. Another aspect to consider is the environmental impact of bitcoins which consume a lot of electricity.

Another issue which raises moral and ethical issues is that of assisted suicide and whether the law ought to be reformed to allow it. Lord Justice Green stated that it has to be recognised that since assisted suicide is not legal in the United Kingdom, people who wish to undergo it would have to travel to a country which permits them to end their own lives. Some argued that this is their right to private life so they had the right to choose the quality and the manner in which they end it. Ultimately, the Law Commission decided not to make any proposal as to whether to reform the law to allow assisted suicide as this was better decided by a democratically elected Parliament.

Lord Justice Green acknowledged the politicising of issues sometimes put the Law Commission in a difficult position. He also informed the participants that the Government may sometimes not implement reforms suggested for various reasons, whether political or otherwise, so this is where non-legislative means may be helpful. He explained that judges may implement law reform by way of evolving and developing the law through their judicial determinations.

This was an interesting insight into the workings of the United Kingdom Law Commission. It gave the participants food for thought in terms of understanding the huge efforts put into reforming the law as well as the limitations arising therefrom.

Judge of the Court of Appeal Mary Lim Thiam Suan facilitating the programme entitled "Law Reform and the Judiciary" jointly delivered by The Right Honourable Lord Justice Nicholas Green and The Honourable Lord Justice Malcolm John David Wallis

Presentation of tokens of appreciation to both speakers for the programme on "Law Reform and the Judiciary" (L-R): Justice Mary Lim Thiam Suan, Justice Mohd Zawawi Salleh, Chief Justice Tengku Maimun Tuan Mat, The Right Honourable Lord Justice Nicholas Green and The Honourable Lord Justice Malcolm John David Wallis

CHAPTER 7 HUMAN RIGHTS

Between Two Shores: Courts, The Constitution and The Shariah

by
Emeritus Professor Datuk Dr Shad Saleem Faruqi[*]

Abstract

This essay examines the occasional conflicts that occur in Malaysian courts between constitutional supremacy and the popular notion of the supremacy of Islam. It discusses the doctrine of constitutional primacy and the position of Islam and Shariah authorities under the Federal Constitution. It notes the wide gap between constitutional theory and judicial practice that has developed since the nineties and surveys the civil courts' attitude towards the validity of many controversial laws enacted in the name of the Shariah. Some recommendations to restore the 1957/1963 scheme of constitutional supremacy are also proposed.

I. Introduction

[1] Malaysia's legal and political system is based on a supreme Constitution,[1] a federal-state division of powers,[2] a parliamentary system of government,[3] a constitutional monarchy,[4] and Islam as "the religion of the Federation".[5]

[2] In the last three decades an engaging debate has raged about whether Malaysia is a secular or a theocratic, Islamic state.[6] Is the Federal Constitution the foundation of Malaysia's legal edifice or is the Shariah the country's supreme law? In this debate there is a "problem of semantics"[7] as well as of "hermeneutics"[8] - that is a disagreement about how words or "spoken utterances" are understood differently by different people in accordance with their own linguistic construction or historical context.

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1 Articles 4 (1) and 162 (6) of the Federal Constitution.

2 Articles 73-95E.

3 Article 43.

4 Article 40.

5 Article 3 and Schedule 9 List II, Item 1.

6 Shad Saleem Faruqi, *"Document of Destiny, The Constitution of the Federation of Malaysia"*, (Star Publications, 2008), at pp. 120-137. See generally, G25 Malaysia, *Administration of Matters Pertaining to Islam*, (Dec 2019).

7 Semantics is the historical and psychological study of the meaning of a word, phrase or sentence.

8 Hermeneutics has many meanings. One is that it is our cultural traditions, our language and our nature as historical beings that colour our understanding of words and phrases. We only really understand an object, word or fact when it makes sense within our own life context and thus speaks to us meaningfully.

[3] To most non-Muslims, the term "secular state" implies that the state is governed by laws derived from human institutions and authorities. From a strictly legal point of view, these laws are supreme and their enactment, amendment or repeal in accordance with the felt necessities of the times is in human hands. Malaysia qualifies as a secular state because Article 4(1) of the Federal Constitution proclaims that "this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". In furtherance of the "secular state" argument one can submit that if by an "Islamic state" is meant that the Shariah is the highest law of the land and the litmus test of the validity of all other laws and actions, then the Malaysian Federation is clearly not an Islamic state. In *Che Omar Che Soh v PP*[9] the constitutionality of a drug law was challenged on the ground that as Islam is the religion of the Federation, all laws must honour Islamic fundamentals. The impugned law contained a number of un-Islamic features including a presumption of guilt and a mandatory death sentence for an offence not punishable with death in Islamic criminal law. The Supreme Court upheld the validity of the impugned provisions as they were permissible under the Constitution's Article 149 which deals with subversion. The court also held that the provision in Article 3(1) for Islam as the religion of the Federation was mostly ceremonial and did not make the Shariah the litmus test of the validity of laws.

[4] However, if the notion of a "secular state" implies that there is a separation between the state and religion and the state does not identify with any particular religion, and religion is a private sector affair; and people are not compelled to live by and learn any religious doctrine,[10] then clearly Malaysia is not a secular state – at least not for the 62 or so per cent of the Muslim population that is compulsorily subject to the Shariah in 25 or so areas enumerated in Schedule 9 List II, Item 1.

[5] If – as some Malaysian Muslims mistakenly hold – that by an Islamic or Muslim state is meant that Islam is the official religion of the state; or that Muslims constitute the majority of the population; or that Muslims are in control of the government, then Malaysia may qualify for the description of an Islamic or Muslim state.[11] Much depends on the subjective definition one adopts. Besides the problem of semantics and hermeneutics, the discussion is coloured by the adoption of a dichotomous, "either/or", secular or Islamic approach. In life, as in law, things are often somewhere in between.

[6] The purpose of this essay is to discuss the implication of "constitutional supremacy" in Malaysia's legal system; examine the constitutional position of Islam and Shariah authorities; note the wide gap between theory and reality that has developed since the nineties; and survey the civil courts' attitude towards laws enacted in the name of the Shariah.[12] Are some laws enacted to regulate Islamic affairs consistent with or in conflict with the supreme Constitution? Some recommendations to restore the original scheme of things will also be made.

9 [1988] 2 MLJ 55 (SC).

10 *Noorliyana Yasira Mohd Noor lwn Menteri Pendidikan* [2007] 5 MLJ 65.

11 It is noteworthy that on September 29, 2001 the then Prime Minister, Dato' Seri Dr Mahathir Mohamed, publicly declared that Malaysia is already an Islamic state ("negara Islam"). Debate has raged since then on this issue. See Dr Mohamed Azam Mohamed Adil, "Is Malaysia a Secular State?", *New Straits Times*, December 28, 2018.

12 What is referred to as Shariah laws in Malaysia is actually a fascinating mix of the divine Shariah, the *fiqh* (or juristic interpretation of the jurists of the *Shafii* sect of *Sunni Islam*), Malay *adat* (custom), and rules enacted by elected, secular Assemblies in the name of Islam. Each of the 13 States of the Federation has its own version of Shariah Enactment(s). There is a 14th version for the Federal Territories enacted by the Federal Parliament. The fascinating variety of 14 separate though similar laws enacted in the name of a divine law poses multiple challenges and opportunities for the student of Islamic religion and jurisprudence.

II. Constitutional Position of Islam

Islam's exalted position

[7] Article 3(1) of the Federal Constitution gives Islam an exalted position by making it "the religion of the Federation". The words "Islam", "Syariah" or "Islamic law" are mentioned at least 24 times in the Federal Constitution.[13] No other religion is mentioned by name, though under Article 3(1), all other religions are allowed to be practised in peace and harmony.

Implications of Article 3(1)

[8] As a consequence of Article 3(1), the government adopts legal, social, administrative, educational and economic policies and programmes to promote the religion of Islam. Islamic institutions are established. There are probably a hundred or so of such institutions nationwide, like the 14 Shariah court hierarchies in the 13 states and the federal territories; institutions like the International Islamic University Malaysia, Institute of Islamic Understanding Malaysia (IKIM), Tabung Haji, Islamic Bank, Department of Islamic Development Malaysia (JAKIM), and Malaysian Islamic Strategic Research Institute (IKSIM). Unlike in secular states like the USA, taxpayers' money is used to support Islamic activities including vigorous efforts to convert orang-asli, natives and other non-Muslims to Islam. In Budget 2018, federal Islamic authorities were allocated RM1.03 billion as follows:

- Department of Islamic Development Malaysia (JAKIM), RM 810.890 million[14]
- Department of Federal Territory Islamic Affairs (JAWI), RM119.6m
- Majlis Agama Islam Wilayah Persekutuan, RM21m
- TV Al-Hijrah, RM15.74m
- Department of Waqaf, Zakat and Hajj (JAWHAR), RM15.176m
- Yayasan Dakwah Islamiah Malaysia (YADIM) RM15m
- Institute of Islamic Understanding Malaysia (IKIM), RM14.8m
- Office of the Mufti, RM6.7m
- Muslim Welfare Organisation Malaysia (PERKIM), RM5.49m
- Wasatiyyah Institute Malaysia (IWM),RM 4.56m
- Others, RM845 300[15]

[9] Compulsory instruction is given in Islamic religion to Muslims at all educational levels: Article 12(2). See the case of a father who unsuccessfully tried to get his daughter exempted from Islamic religious education: *Noorliyana Yasira Mohd Noor lwn Menteri Pendidikan.*[16]

[10] From time to time, policies of Islamisation and Islam *hadhari* have been adopted.

13 Articles 3(1), 3(2), 3(3), 3(5), 5(4), 11(4), 12(2), 34(1), 38(2)(b), 38(6)(d), 42(10), 76(2), 97(3), 121(1A), 145(3), 160(6A), 160(2), 161C (now repealed), 161D (now repealed), Fourth Schedule Parts I and II, Eighth Schedule (2)(d), Ninth Schedule List I, Items 4(e) and (k), List II, Item 1 and Tenth Schedule Part III (13).

14 According to The Star Online, October 12, 2019, the allocation went up to 1.3 billion for Budget 2020.

15 The sums above do not include moneys allocated to International Islamic University Malaysia (UIAM) or income from zakat, fitrah, wakafs and the multi-million halal certificate industry.

16 [2007] 5 MLJ 65. See also the recent (unreported, 2019) High Court decision that Jawi was part of Bahasa Malaysia and it is therefore permissible to teach the Jawi script (khat) to pupils in Chinese and Tamil schools.

Head of State & Head of Religion are the Same Person

[11] Under Article 3(5), the Yang di-Pertuan Agong is the head of Islam in seven states. An Islamic Council can be established to advise him.[17] The Sultans are the head of Islam in their (respective states) regions. Secular states do not generally combine the office of the Head of State with the Head of Religion.

Islamic Personal Laws are Allowed

[12] The Federal Constitution permits State Assemblies to create Islamic laws in a limited number of areas and to set up Shariah courts to administer these laws.[18]

Muslims are Compulsorily Subject to the Shariah

[13] All persons who profess the religion of Islam are compulsorily subject to the Shariah in 25 or so areas assigned to the State Assemblies in Schedule 9 List II, Item 1. These "personal and family law" matters are broadly classifiable as follows:

- Betrothal, marriage, divorce, dower, maintenance, guardianship
- Adoption, legitimacy, guardianship
- Property matters including succession, testate and intestate, gifts, partitions and non-charitable trusts, Wakafs, charitable and religious trusts, appointment of trustees
- Malay custom
- Zakat, fitrah, Baitulmal
- Mosques
- Constitution, organization and procedure of Shariah courts
- Determination of matters of Islamic law and doctrine
- Creation and punishment of offences against the precepts of Islam; and, under Article 11(4), control or restriction of propagation of any religious doctrine amongst Muslims

[14] No option is allowed to Muslims to opt out of Islamic laws in these designated areas, mostly of personal laws. However, in other areas like contract, tort, banking, sale of goods, hire purchase, commerce and trusts under the Trustees Act 1949 (Act 208), Muslims are subject to civil laws. In some fields like trusts, bank loans and other banking transactions, they have an option to choose between Shariah laws and civil provisions.

Non-Muslims not Subject to the Shariah

[15] No non-Muslim can be subjected to the jurisdiction of the Shariah courts (Schedule 9, List II, Item 1).

Syariah Courts Exist Under State Laws

[16] These courts are mentioned in the Federal Constitution, but their structure, organisation and powers are legislated by State legislation.

Civil Courts Cannot Interfere With Syariah Courts

[17] The Shariah courts are courts of limited jurisdiction and are not superior or equal to the civil High Court.[19] Nevertheless, Article 121(1A) provides that civil courts cannot interfere with Shariah courts in matters *within the Shariah courts' jurisdiction*.[20]

17 Article 3(5). In actual practice Islamic authorities are established administratively and allocated funds in the annual budget. There is no proof that the very powerful federal religious authorities like Jabatan Kemajuan Islam Malaysia (JAKIM) and Jabatan Agama Islam Wilayah Persekutuan (JAWI) were lawfully established under any law.

18 Schedule 9 List II, Item 1.

19 *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 (FC).

20 It was held by Justice Hishamuddin in *Dato' Kadar Shah Tun Sulaiman v Dutin Fauziah Haron* [2008] 4CLJ 504 that "jurisdiction" means "exclusive jurisdiction". Thus, if a matter before the courts covers both Shariah law and civil law, the civil courts are not barred by Article 121(1A). Will Article 75 apply?

Preaching to Muslims Can Be Regulated

[18] Freedom of religion under Article 11(1) includes the right to profess, practise and preach one's religion. However, as part of the "negotiated settlement" between the Malays and the non-Malays, Article 11(4) permits the States to restrict the preaching of any religious doctrine to Muslims – whether the preaching is done by non-Muslims or unauthorized Muslims.

Islam in State Constitutions

[19] All States, other than Sarawak adopt Islam as the State religion.[21]

Some Fundamental Rights are Explicitly Subjected to Islamic Law Exceptions

[20] The chapter on Fundamental Liberties in Articles 5 to 13 explicitly provides a number of exceptions in favour of Islamic law. Firstly, equality before the law in Article 8 is subject to an exception on the ground of personal laws.[22] Secondly, Article 11 on freedom of religion is subject to the rule against proselytization of Muslims in Article 11(4).

MBs in Malay States Must Be Muslims

[21] All nine "Malay State Constitutions" require the Chief Minister (*Menteri Besar, "MB"*) to be a Muslim unless the Sultan permits an exception. This discriminatory state provision is possibly saved by Article 8(5)(e).

Concept of a Malay

[22] In Article 160(2) the concept of a Malay is not based on ethnicity but is intertwined with the religion of Islam, Malay custom and Malay language.

Islamic Education

[23] Under Article 12(2), it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

[24] Despite the above religious features, the provision for Islam in Article 3(1) does not convert Malaysia into a theocratic, Islamic state. One notes that in 48 or so states around the world, adoption of an official religion does not necessarily convert the state into a theocracy. Of the 23 Muslim, 16 Christian, 7 Buddhist, 1 Hindu and 1 Jewish nation that adopt an official religion, most do not describe themselves as a theocratic state. For example, in the United Kingdom ("UK"), there is a Church of England of which the Queen is the Head and yet the UK does not describe itself as a theocratic, Christian state. The position in Malaysia is that we have a constitutional state with a hybrid legal system that recognizes juridical and legal diversity. The legal system is a rich blend of many sources, among them:

- The supreme Federal Constitution
- State Constitutions that must comply with some "essential provisions" outlined in Schedule Eight
- Enacted federal laws, both primary and secondary
- Enacted state laws, both primary and secondary
- Judicial precedents of the Malaysian courts
- English common law under the Civil Law Act 1956 (Act 67)
- Shariah provisions in 25 areas that are enumerated in Schedule 9 List II, Item 1
- Malay custom
- Customs of the natives of Sabah and Sarawak

21 On the formation of Malaysia in 1963, both Sabah and Sarawak did not have an official state religion. Sabah later amended its Constitution to incorporate an Article 5A to make Islam as the religion of the state.

22 Article 8(5)(a) of the Federal Constitution.

[25] These multiple sources enrich Malaysia's legal landscape. However, in the last few decades, the importance of Islam in the affairs of the state has grown. Islam has become an important factor in law, politics, economics and education and most institutions of the state including the federal judiciary, parliament, civil service, police and public universities have become co-opted to swim in the tide of Islamisation.

[26] Whether this tide has cleansed corruption and other social ills, improved accountability, answerability and responsibility in government, enhanced human dignity, strengthened the social fabric of Malaysia's inter-ethnic, inter-religious and inter-regional relationships or brought a good name to Islam, is another matter. Many say it has polarized the society, radicalized some youth, caused a lowering of the standards of education and created a religious basis for unquestioning loyalty to religious and political leaders irrespective of their moral or political misconduct.

III. Constitutional Supremacy

[27] Unlike the UK, Malaysia has a written and supreme Constitution. There are significant implications of having a written charter as our basic law.

The Constitution is the Highest Law

[28] Article 4(1) declares that this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void. Article 4(1) is strengthened by Article 162(6), which subordinates all pre-Merdeka laws to the supreme Constitution. The implication of Articles 4(1) and 162(6) is that any law, whether federal[23] or state,[24] secular or religious, pre[25] or post Merdeka, primary or secondary, in times of emergency[26] or in times of peace, is subordinate to the supreme Constitution.

Parliament is Not Supreme

[29] Parliament's legislative powers are prescribed by the Constitution.[27] It cannot violate the Constitution or trespass on State powers. It cannot transgress fundamental rights.[28] It is bound by procedural requirements in making laws[29] or amending the Constitution.[30]

State Assemblies are Likewise Not Supreme

[30] State powers are confined to 13 topics in the State List and 14 topics in the Concurrent List.

Despite Article 3(1), Malaysia is Not An Islamic State

[31] Article 3(1) does not say that the Shariah is the basic or the highest law of the land. It does not make the Shariah the litmus test of validity of any law or regulation: *Che Omar Che Soh v PP;*[31] *Hajjah Halimatussaadiah v PSC;*[32] *Meor Atiqulrahman v Fatimah Sihi.*[33] Article 3(1) does not say that Malaysia is an Islamic state. In fact, Article 3(1) is accompanied by Article 3(4) which states that nothing in Article 3(1) derogates from any other provision of the Constitution. The implications of Article 3(4) appear to be

23 *Mamat Daud v Government of Malaysia* [1988] 1 MLJ 119 (FC).
24 *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1992] 1 MLJ 697 (SC).
25 *Surinder Singh Kanda v The Federation of Malaya* [1962] MLJ 169 (PC).
26 *Teh Cheng Poh v PP* [1979] 1 MLJ 50 (PC).
27 Articles 73-79.
28 Articles 5-13.
29 Articles 66-68.
30 Articles 159, 161E, 2(b).
31 [1988] 2 MLJ 55.
32 [1992] 1 MLJ 513.
33 [2000] 5 MLJ 375. See also *Ainan v Syed Abu Bakar* [1939] 1 MLJ 209.

that the provision about Islam is not superior to or independent of, the rest of the Constitution; Article 3(1) does not derogate from any provision in the chapter on fundamental liberties unless expressly so provided;[34] Article 3(1) is not independent of the federal-state division of powers in Schedule 9, List II, Item 1. Thus, Islamic laws can be enacted only in the 25 permitted areas of Schedule 9, List II, Item 1.

Definition of 'Law'

[32] Under Article 160(2), the term "law" is defined and is restricted to written law, common law and custom to the extent recognized. The rich and extensive body of Shariah law is not self-executing. It needs to be enacted by a federal or state legislature or adopted by the courts in a precedent.

Article 11(5)

[33] All religions, including Islam, are subject to regulation by Article 11(5) on the grounds of public order, public health and morality. Federal legislation can be enacted on these grounds to regulate all religious activities including those associated with Islam.[35]

Fundamental rights

[34] All citizens, including Muslims, are entitled to some fundamental rights which operate as a check on legislative and executive powers. It is submitted that despite a popular perception that Islamic institutions like Shariah authorities and Shariah courts are not bound by the chapter on fundamental liberties, Article 3(4) suggests otherwise. Nothing in Article 3(1) derogates from any other provision of the Constitution. Note can be taken of Article 5(4) whereby arrests for offences under Shariah laws are subject to the same constitutional guarantees as are available in civil courts. In *Minister v Jamaluddin Othman*[36] a Muslim who had converted out of Islam and was preaching to other Muslims was detained preventively under the Internal Security Act 1960 (Act 82) ("ISA"). The writ of habeas corpus was issued, as a detention under the ISA should not be resorted to, for exercising freedom of religion.

[35] In *Maqsood Ahmad v Ketua Pegawai Penguatkuasa Agama,*[37] by a Selangor State fatwa, the Ahmadiyya Muslim Jama'at (a religious sect) had been declared to be outside the faith of Islam. The Selangor Shariah authorities then issued an order to compel the Ahmadiyyas to appear in the Shariah court. It was held, and correctly so, that as the jurisdiction of the Shariah court is confined to Muslims, the order to the Ahmadiyyas was illegal under Article 11 and Schedule 9, List II, Item 1.

[36] Under Article 12(4) "a parent or guardian" has a right to determine his/her child's religion. A 17-year old girl cannot convert to Islam without her father's consent: *Teoh Eng Huat v Kadhi Pasir Mas.*[38] In *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak*[39] it was held that the words "a parent or guardian" when read in the light of the Eleventh Schedule section 2(95), mean both parents. Therefore, unilateral conversions of children by one parent are illegal. Consent of both parents is needed. The action of the Registrar of Mu'allafs (converts) was quashed.

[37] In *Dato Seri Syed Hamid Syed Jaafar Albar v SIS Forum (Malaysia)*[40] the book, "Muslim Women and the Challenge of Islamic Extremism" was banned by the Home Minister because seven pages of the book did not follow JAKIM's guidelines. The Court of Appeal upheld the High Court decision that JAKIM's guidelines are irrelevant to the issue of whether the book was a threat to public order. The Minister had acted irrationally by acting under the dictation of JAKIM.

34 Judicial practice is, however, conflicting. To many civil court judges, Article 3 regulates the interpretation and ambit of all other laws.

35 The recent controversy about child marriages has not explored the possibility of prohibition of such marriages on the Article 11(5) ground of public health or morality. It is submitted that child marriages, which are permitted in Islamic tradition and under the plethora of native laws in Sabah and Sarawak, can be criminalized under Art 11(5).

36 [1989] 1 MLJ 418 (SC).

37 [2019] 9 MLJ 596.

38 [1990] 2 MLJ 300.

39 [2018] 1 MLJ 545 (FC).

40 [2012] 9 CLJ 297.

Limited Applicability of the Shariah

[38] There are two major misconceptions about the applicability of Islam in the Malaysian legal system. First, that due to Article 3(1)'s adoption of Islam as the religion of the Federation, the Shariah is applicable in its entirety. The legal position is that the Shariah applies only in those 25 enumerated areas specifically allocated to the State Assemblies in Schedule 9 List II, Item 1.

[39] A second major misunderstanding is that all matters of Islam are in State hands. Actually, only 25 areas of Islamic personal and family law like marriage, divorce, custody, etc. are allocated to the States. Ordinary crimes, contracts, tort, commercial law, banking (whether conventional or Islamic), the law of evidence and even the sacred *Hajj* are matters of federal law under Schedule 9, List I.

Islamic offences

[40] Offences against the precepts of Islam can be punished in the Shariah courts but subject to the following significant restrictions prescribed in Schedule 9 List II Item 1:

(a) The offence must be against "the precepts of Islam"

[41] In *PP v Mohd Noor Jaafar*[41] there was a violation of section 5(1) of the Islamic Religious Schools (Malacca) Enactment 2002. It was correctly held that the offence did not relate to the precepts of Islam, and is therefore not within the jurisdiction of the Shariah court. However, the judicial proceeding fell short in one area: the constitutionality of the Malacca Enactment was not raised or examined, despite Item 13 of the Federal List in Schedule 9 which allocates education to the federal Parliament. Even if one takes note of Article 12(2) which provides that it is permissible for the States to establish, maintain or assist Islamic institutions or to provide instruction in the religion of Islam and incur expenditure for the purpose, it is nevertheless submitted that the entire field of education is in federal hands and the states and all Islamic religious schools are subject to the jurisdiction of the federal government under Schedule 9 List I Item 13.

[42] In contrast with the narrow view of "precepts of Islam" in *Mohd Noor Jaafar*, the Federal Court in the case of *Sulaiman Takrib v Kerajaan Terengganu*[42] interpreted the term "precepts" very broadly. The Court had been invited to confine the words to the essentials of Islam[43] and to distinguish between the divine Shariah and the juristic *fiqh*. The court was advised that following a fatwa unquestioningly was not a precept of Islam and no such crime existed in Islamic law. Yet, Tun Hamid (the then Chief Justice), defined 'precepts' to cover all aspects of Islamic *aqida,*[44] *Shariah*[45] *and akhlaq.*[46] Most amazingly the learned Chief Justice also held that in Malaysia the word Shariah includes *fiqh* (juristic interpretations) and also provisions from common law! The significance of including *fiqh* as part of the concept of "precepts of Islam" is that not only the divine Shariah but also man-made rules and interpretations are given infallibility, and disobedience to them can be criminalized.

41 [2005] 6 MLJ 745.

42 [2009] 6 MLJ 354.

43 Essentials of Islam are generally understood to refer to the Five Pillars of Islam and the Six Pillars of Faith. The Five Pillars of Islam are: (i) *Tawheed* (Belief that there is no deity worthy of worship except Allah and that Muhammad is His messenger (ii) Prayers (iii) zakat (iv) fasting and (v) Hajj. The Six Pillars of Faith are (i) Belief in Allah (ii) Belief in Angels (iii) Belief in all the Revealed Scriptures including the Torah, Gospel, Psalms, the Scriptures of Abraham and the Holy Qur'an (iv) Belief in all the Messengers mentioned in the Qur'an including Noah, Abraham, Moses, Jesus and Muhammad (v) Belief in the Last Day and (vi) Belief in Divine Determination or Al-Qadar.

44 *Aqida* refers to articles of faith, tenet, doctrine, dogma, creed, belief, conviction.

45 The learned Chief Justice defined Shariah broadly to include all Islamic law or *Hukum Syarak* including the fiqh (juristic interpretations) of scholars. In most scholarly discourse, Shariah is confined to the Holy Qur'an and the authenticated traditions of Prophet Muhammad.

46 *Akhlaq* refers to disposition, nature, temper, ethics, morals, manners, practice of virtue.

(b) Only persons who profess the religion of Islam can be subjected to the jurisdiction of the Shariah courts

[43] What amounts to "professing" is a matter of interpretation but one can generally state that it refers to affirmation of one's faith in, or avowing allegiance to, or declaring, announcing, proclaiming, asserting, or stating one's belief in some principles or precepts. It is noteworthy that the Constitution uses the word "profess" and not "those who were born Muslims" or "registered as Muslims" or "regarded by society as Muslims". Regrettably, in a number of Muslim apostasy cases, civil courts have paid no deference to the word "profess". If a person is born a Muslim or converts to Islam, no exit is allowed except with the permission of the Shariah courts[47] – a permission many Shariah judges do not wish to grant because that would make them complicit in a most heinous religious offence.

(c) Crimes punishable in Shariah courts cannot relate to any matter in the Federal List[48] or covered by federal law[49]

[44] This means that any offence within the power of the federal Parliament or already dealt with by federal law, is outside the jurisdiction of the State Assembly and the Shariah Courts. Offences like treason, corruption, murder, robbery, theft, rape, homosexuality between males, cheating, betting, blasphemy and lotteries etc. are all outside the powers of the State, even if they are part of the jurisprudence of Islam.

(d) The jurisdiction of the Shariah courts in respect of offences must be conferred by federal law

[45] Jurisdiction refers to three aspects:

- Who may be tried? This is explicitly mandated in Schedule 9 List II Item 1 that only those professing the religion of Islam may be tried in Shariah courts.
- What offences may be tried? Federal law is in abdication on this issue as no list of "precept offences" is supplied, giving the State Assemblies blanket power to create more and more offences, even if they trespass on fundamental rights or the federal-state division of powers.
- What penalties may be prescribed? The Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) provides that the Shariah courts may try any offences punishable under the 3-6-5 formula – 3 years jail, 6 strokes of the cane and RM5,000 fine. In comparative terms, this is the power of Second Class Magistrates. Clearly the intention in 1965 was to allow Shariah courts to try only minor offences.

(e) The power of the Federal Parliament and the State Assemblies to legislate on Shariah matters is subject to the supremacy of the Federal Constitution

[46] This means that laws in the name of Islam cannot violate the chapter on fundamental liberties and the federal-state division of powers, unless there is express authority to legislate contrary to any provision of the Constitution.

Judicial Review

[47] The superior courts have the power to review the constitutionality of any legislative or executive act on the litmus test of constitutionality. Recently, the Federal Court in the *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak*[50] declared the actions of the Registrar of Mu'allafs as violative of the Federal Constitution as well as the relevant Perak statute.

47 *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585 (FC).
48 Schedule 9, List II Item 1; Schedule 9 List I, Item 4(h).
49 Schedule 9, List I, Item 4(h).
50 [2018] 2 AMR 313.

Recognised Sources of Law

[48] In Article 160(2), the Constitution recognizes three primary sources of law.

- Legislation
- Common law
- Custom, to the extent recognized

[49] It is notable that the Shariah per se, is not a source of law in our Constitution. The Shariah has to be adopted in a federal statute or state enactment to have the force of law.

Shariah and Adat

[50] In some areas, the Shariah competes with the Malay *adat* in the Malay states and with the customs of the natives in the States of Sabah and Sarawak. The law and practice are not uniform from state to state. In Negeri Sembilan, *adat* prevails in property matters. In Sabah and Sarawak, the Shariah is supposed to displace native custom if the parties are Muslims. In practice, many Muslims who are also natives, subject themselves to the native courts which accept jurisdiction.

Islam Not a Pre-Condition for Holding Office

[51] Except for the Yang di-Pertuan Agong and the Sultans, Islam is not a prerequisite for citizenship or for the post of Prime Minister. For membership of the cabinet, legislature, judiciary, public services, police, armed forces, universities and constitutional Commissions, the oath of office in the 6th Schedule is religiously neutral.

IV. Gap Between Theory & Reality

[52] A wide gap has developed between the theory of constitutional supremacy and the powers of the Shariah authorities. Malaysian superior courts are extremely reluctant to enforce constitutional supremacy in legislative and executive matters involving the Shariah. Not only Shariah courts which are shielded by Article 121(1A) but also Shariah authorities are allowed to behave as if the Constitution is not applicable to Shariah matters because of the existence of Article 3(1) and Schedule 9 List II, Item 1.

Article 3(1)

[53] Article 3(1) declares that Islam is the religion of the Federation. However, Article 3(4) cautions that "nothing in this Article derogates from any other provision of this Constitution". In a ground-breaking judgment, Tun Salleh LP held in *Che Omar Che Soh* that the reference to Islam in Article 3(1) was primarily for ceremonial purposes and therefore the Shariah is not the test of the validity of any law. The supreme Constitution is.

[54] Despite this clear ruling, and the explicit provision of Article 3(4), many superior court judges in subsequent years have used Article 3(1) as an interpretative guide to the scope and extent of the powers of Shariah authorities.[51] In judicial circles it is politically incorrect to cite *Che Omar Che Soh* anymore.

51 *Sulaiman Takrib v Kerajaaan Terengganu* [2009] 2 CLJ 54; *Titular Roman Catholic Archbishop KL v Menteri Dalam Negeri* [2014] 4 MLJ 765; *Zi Publications v Kerajaan Negeri Selangor* [2016] 1 MLJ 153; *Fathul Bari Mat Jahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 MLJ 281.

Article 4(1)

[55] This Article boldly proclaims that any post Merdeka law that is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. The supremacy of the Constitution in Article 4(1) must be enforced by way of the procedures of Articles 4(3), 4(4) and 128(1). These procedures are explained in *Ah Thian v Government of Malaysia*[52] where Suffian LP held that under our Constitution, the court has power to declare any federal or state law invalid on any of the following three grounds: (1) because the federal or state law relates to a matter with respect to which Parliament or the State Legislature has no power to make law; (2) in the case of both federal and state law, because it is inconsistent with the Constitution; and (3) in the case of state law, because it is inconsistent with federal law under Article 75. The learned LP also explained that any challenge on ground (2), that a federal or state law violates the federal-state division of powers, is subject to a number of procedural restrictions:

- such a challenge can only be brought in proceedings for a declaration
- the proceedings must be between the federation and the state or states concerned
- any private party seeking to invalidate law on this ground must first obtain leave of a Federal Court judge to commence these proceedings, and the federation as well as any state that would be affected shall be entitled to be a party to such proceedings
- only the Federal Court has jurisdiction to decide whether any law made by Parliament or a State legislature is invalid on the ground that it relates to a matter on which the relevant legislature has no power to make law[53]

[56] In *Ah Thian*, as the applicant was seeking to challenge the Firearms (Increased Penalties) Act 1971 on the basis that it contravened Article 8(1) of the Federal Constitution guaranteeing the right to equality before the law, it was held that Articles 4(4) and 128(1) did not apply "and the point may be raised in the ordinary way in the course of submission, and determined in the High Court, without reference to the Federal Court, and there is no need for leave of a judge of the Federal Court". This ruling in *Ah Thian* clearly established that a challenge to laws on the ground of violation of fundamental rights need not go through the special procedures of Articles 4(3), 4(4) and 128(1). Cases like *Nordin Salleh v Dewan Undangan Negeri Kelantan*,[54] *Muhammad Hilman Idham v Kerajaan Malaysia*[55] and *Nik Nazmi Nik Ahmad v PP*[56] illustrate this point significantly.

[57] Despite the *Ah Thian* ruling that complaints of fundamental rights violation can be heard in any proceedings and in any courts, the apex court in a number of cases has abdicated its responsibility to hear complaints of violation of fundamental rights on the questionable ground that the procedures of Articles 4(4) and 128(1) had not been complied with. In *Muhammad Juzaili Mohd Khamis v Govt of Negeri Sembilan*[57] (the transgender case) a Negeri Sembilan Enactment criminalising cross-dressing was challenged on the grounds that it violated Article 5 (life and personal liberty), Article 8 (equality), and Article 10 (freedom of speech and expression). In a bold, creative and widely applauded judicial decision, the Court of Appeal upheld the challenge and struck down the Negeri Sembilan law on constitutional grounds. Negeri Sembilan appealed to the Federal Court. In a questionable manner, the lawyers for the appellant introduced an argument that had not been raised in the High Court or the Court of Appeal, that the aggrieved citizens had not complied with Article 4(4) and therefore the High Court and the Court of Appeal decisions were without jurisdiction. The apex court bent over backwards to accept this unfair submission and ruled that the case should never have been commenced at the High Court level and should have gone straight to the Federal Court under Article 4(4). A string of precedents where

52 [1976] 2 MLJ 112.

53 Wilson Tay Tze Vern, "The Use and Misuse of Articles 4(3) and 4(4) of the Federal Constitution" [2015] 2 MLJ cliv; Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Oxford, Hart Publishing, 2012), p 138.

54 [1992] 1 MLJ 343.

55 [2011] 6 MLJ 507.

56 [2014] 4 MLJ 157. See also Wilson Tay Tze Vern, "The Use and Misuse of Articles 4(3) and 4(4) of the Federal Constitution", [2015] 2 MLJ cliv at clxiv-clxvi.

57 [2015] 8 CLJ 975.

fundamental rights issues were successfully raised and adjudicated directly in the High Court were adroitly evaded and avoided. The Federal Court denied the victimized parties the fruits of their Court of Appeal victory. More significantly, the apex court evaded ruling on the Shariah law's validity and avoided the controversial issue of transgender rights. Fortunately, its strained decision to impose the Article 4(4) procedure on all constitutional challenges was disowned soon after by the apex court in *Gin Poh Holdings v Govt of Penang*[58] where the validity of one federal and one state law was in question. Raus Sharif, (who had sat on the *Juzaili* Bench but was the then CJ) delivering the judgment of the court, held that the exclusive jurisdiction of the Federal Court relates only to a trespass by the federal or state legislatures on each other's jurisdiction. Issues of fundamental rights violation can be raised in the High Court, and even in the lower courts.[59]

Fundamental rights

[58] Are the fundamental liberties in Part II, guaranteed by the Constitution to Muslims and non-Muslims alike, subject to the provision for Islam in Article 3(1) and the power of the States to legislate about Islam in Schedule 9 List II Item 1? Or is Article 3(1) and List I in Schedule 9 subject to the chapter on fundamental liberties?[60]

[59] Some provisions of Part II are indeed subject to Article 3(1). Among them are:

- Article 8(5)(a) – personal law is exempt from the equality provision in Article 8. Though the words "personal law" are not defined, one can seek some guidance from the Ninth Schedule, List I, Item 4(e)(ii) which describes personal law to refer to "marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate"
- Art 11(4) – right to propagate any religion to Muslims may be regulated by State law

[60] All other fundamental liberties are left untouched and apply against all laws and all authorities whether religious or civil. For example, in Article 5(4) the safeguard of production of an arrestee before a Magistrate is explicitly applicable to arrests under Shariah laws.

[61] However, some civil courts and almost all Shariah authorities behave as if all fundamental rights, whether of Muslims or non-Muslims, are subordinated to Article 3(1) on Islam. The legal provision in Article 3(4) that "nothing in this Article derogates from any other provision of this Constitution" is adroitly ignored.

[62] Often, what is permitted by the Constitution is prohibited by Shariah Enactments and the matter is validated by the civil courts. For example, despite Article 11 on freedom of religion and Article 152 on Malay as the national language, Bibles in the national language are seized by State authorities. State Enactments, like those in Selangor, presumably under the authority of Article 11(4), are prohibiting non-Muslims from using many Arabic and Malay words. Among them are the words Allah, Nabi, Kitab, Rasul. A significant case is *Titular Roman Catholic Archbishop of KL v Menteri*[61] (the Herald case). From a human rights point of view, this decision is a serious violation of free speech, freedom of religion and right to equality. Nobody has a right to tell another how to address the object of his devotion. The word Allah is not exclusive to Islam. In fact, it is pre-Islamic. It is used by Arabic speaking non-Muslims in the Middle East. It is used by the Sikhs in their Holy Books. In Sabah and Sarawak, the Malay-speaking Christians have used it for decades. The Minister was singling out the Christian Church for discrimination for it is well known that other religions like Sikhism use the word Allah in their scriptures. What is disappointing is that the court

58 [2018] 4 CLJ 1.

59 "Legally Discerning. Selected Judgments of Tun Raus Sharif with Commentaries". Sweet & Maxwell, p.86. On Article 4(3) and 4(4), reference may also be made to *Sulaiman Takrib v Kerajaaan Terengganu* [2009] 2 CLJ 54; *Kerajaan Negeri Kelantan v Wong Meng Yit* [2012] 6 MLJ 57; *Titular Roman Catholic Archbishop KL v Menteri Dalam Negeri* [2014] 4 MLJ 765; and *Zi Publications v Kerajaan Negeri Selangor* [2016] 1 MLJ 153.

60 See *Zi Publications v Kerajaan Negeri Selangor* [2016] 1 MLJ 153; *Fathul Bari Mat Jahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 MLJ 281; *State Govt of Negeri Sembilan v Muhammad Juzaili Mohd Khamis* [2015] 6 MLJ 736.

61 [2014] 4 MLJ 765.

used the test of "reasonableness" to justify the Minister's imposition of the restriction on the use of the word Allah. It is submitted that discrimination on ground of religion is prohibited by the Constitution's Article 8(2). A ground prohibited by the Constitution cannot be declared by the court as a rational basis for differentiation. Further, the possible reliance on Article 11(4) is also not convincing. Article 11(4) permits control or restriction of propagation of any religious doctrine or belief among Muslims. Use of a word or two cannot amount to propagation. The "danger" of Muslims being converted or misguided if they hear a non-Muslim using the word Allah is imaginary and far-fetched. The danger must be "clear and present". The rule of clear and present danger originated in *Schenck v United States*[62] in an attempt by Justice Holmes to formulate a principle for the limitation of liberty with a conscious, intelligent weighing of the opposed societal interests.

[63] In some situations, what is prohibited by the Constitution is permitted by Shariah Enactments and the civil courts look the other way. We can again take Article 8(2) as an example. Except as expressly authorized by the Constitution, religious discrimination is forbidden by Article 8(2) in any law, in the appointment to any office or employment under a public authority, or the carrying on of any profession or vocation. Despite this constitutional safeguard, the Federal Court *in Majlis Agama Islam WP v Victoria Jayaseele Martin*[63]("Victoria's case") permitted a ban on a qualified, non-Muslim lawyer who wished to practise law in the Shariah courts. The reasoning adopted was that the classification created by a piece of retrospective subsidiary legislation between Muslims and non-Muslims was "reasonable". In so ruling, the apex court overruled a sensible and just Court of Appeal decision. It is humbly submitted that the judicially created intelligible differentia between Muslims and non-Muslims cannot override the constitutional ban on religious discrimination in Article 8(2) except for personal laws.[64] A better reasoning would have been to bring Victoria's case under the explicit permission of Article 8(5)(b) – provision or practice restricting office connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

[64] Some states ban *ratu cantik* contests for women. There is a clear violation of Article 8 because men are not equally restrained. It is also debatable whether taking part in a beauty contest is an "offence against the precepts of Islam". Could the words "offences against the precepts of Islam" also authorize laws to criminalise not wearing hijab, forbidding women from leaving the house or going abroad without a muhrim, banning co-education, banning girls from driving cars, taking part in sports, acting as Master of Ceremonies. Will fundamental rights in Articles 5 to 13 permit challenge to the constitutionality of these laws or are fundamental rights subordinate to Article 3(1) and Schedule 9 List II? Basically, if it comes to any matter with a whiff of Islam, the courts tend to lean in favour of state authorities.

Personal Liberty

[65] In *Minister v Jamaluddin Othman*[65] habeas corpus was awarded to the applicant who was arrested under the ISA because he had converted out of Islam and was propagating Christianity to other Muslims. In *Mohd Juzaili Mohd Khamis*[66] (the cross-dressers' case) the aggrieved citizens, who suffered from Gender Identity Disorder ("GID") sought protection for their livelihood. Constant harassment and arrests by the Shariah authorities were affecting their ability to hold on to permanent jobs. The Court of Appeal held that the constitutional right to 'life' in Article 5(1) includes the right to livelihood. Section 66 of the Enactment interferes with the personal liberty of the aggrieved citizens because it prevents them from moving about in public places to reach their respective places of work. Additionally, the impugned s 66 was inconsistent with Article 8 of the Constitution because it unfairly subjected GID sufferers to the same provisions as other normal males. It was further discriminatory because it singled out males who dressed like females and said nothing about females who dress like males. Section 66 affects the aggrieved citizens' right to

62 249 U.S. 47, 39 S. Ct 247 (1919).
63 [2016] 2 MLJ 309.
64 See Article 8(5)(a).
65 [1989] 1 MLJ 418.
66 [2015] 6 MLJ 736.

freedom of expression, in that they are prohibited from expressing themselves in the way dictated by their psychological make-up. On this and many other grounds the State law was invalidated. Regrettably, this remarkable decision was overturned by the Federal Court on a most unconvincing, technical and strained ground that the aggrieved citizens had violated Article 4(4) by going to the High Court and not commencing proceedings in the apex court.

[66] In *Majlis Agama Islam WP v Victoria Jayaseele Martin*[67] a non-Muslim lawyer with shariah qualification was prevented from being enrolled to practise in a Shariah court. Her submission that livelihood was affected found no sympathy in the court.

Right to Equality and Article 8

[67] In the same *Victoria Jayaseele Martin* case a non-Muslim holder of a Shariah qualification was forbidden by a subsidiary legislation, retrospectively created to bar her entry, from being called to the Shariah Bar. The court held that Article 8 does not bar reasonable or rational classification on the ground of religion. It is submitted that the decision is in disregard of Article 8(2) but could have been justified under Article 8(5)(b).

[68] In the famous transgender, cross-dressing case of *Muhamad Juzaili*, Justice Hishamudin penned the unanimous opinion that section 66 of the Negri Sembilan Enactment which penalises men who dress like women, but does not impose similar punishment on women who dress like men, was a violation of the equality doctrine. His decision was overturned by the apex court.

[69] On another note, if the decisions in *Sulaiman Takrib* and *Fathul Bari* are correct that Schedule 9 List I Item 1 on "offences against the precepts of Islam" includes all issues of *aqida, Shariah and akhlaq*, then there is grave danger to the Muslim women's rights. If the court-sanctioned power of the States to create crimes against the precept of Islam is virtually unlimited, then in the name of Islam, women who do not wear tudung, work at night shifts, drive cars, receive higher education in coeducational institutions, or go abroad without a *muhrim* may be punished if a religious authority rules that these liberal practices are against Islamic akhlaq.

Freedom of speech and Article 10

[70] In the *Muhammmad Hilman Idham v. Kerajaan Malaysia*[68] case Hishamudin and Linton Albert JJ held that section 15(5)(a) of the Universities and University Colleges Act, which forbade students from expressing any sympathy or support for any political party, was contrary to the Constitution's guarantees in Article 10. The decision emphasized that Parliament is not supreme, and the restrictions imposed on free speech must be confined to the restrictions enumerated in Article 10(2). However, in *Fathul Bari*[69] a law criminalising any discourse about Islam without a *tauliah* was upheld as within the powers of the States to create and punish offences against the precepts of Islam. Judicial decisions of this sort have facilitated a drift towards intellectual intolerance.[70] In 2018 internationally acclaimed Turkish Islamic intellectual Mustafa Akyol was detained by the Federal Territories Islamic Affairs Department (JAWI) for giving a talk on Islam without prior accreditation from the relevant Religious Teaching Supervisory Committee. His host, Dr Ahmad Farouk Musa of the Islamic Renaissance Front, was investigated for abetting him. One wonders how in a country with a supreme Constitution, any civil or criminal, federal or state, secular or religious law can be enacted to confer absolute powers on anyone.

67 [2016] 3 MLRA.

68 [2011] 9 CLJ 50.

69 [2012] 4 MLJ 284.

70 See Shad Saleem Faruqi, Reflecting On The Law, The Star, Thursday, October 12, 2017.

[71] In *Berjaya Books Sdn Bhd v Jabatan Agama Islam WP*[71] the Borders Bookstore was raided by Shariah officers from JAWI who seized several copies of the Malay version of the book *Allah, Liberty and Love* by Canadian author Irshad Manji. The book had not been banned by the Home Ministry under the Printing Presses and Publications Act 1984 (Act 301). Both Muslim and non-Muslim employees of the store were questioned. One Muslim employee was arrested who was a mere store manager and not responsible for the selection of books. In a learned judgment that upheld the supremacy of the Constitution, Zaleha Yusof J held that though the impugned Act 559 was a law for Muslims only, that did not take away the jurisdiction of the High Court because fundamental liberties were involved. The respondent's actions against the non-Muslims were *ultra vires*. The arrest of the Muslim store manager was unreasonable and irrational because she was not responsible for selecting the books. The seizure of the books was illegal because the book had not been banned by the Home Ministry. This also rendered the prosecution in the Shariah court unconstitutional and in violation of Article 7(1). On the federal-state division of powers, the learned judge held that matters pertaining to publications fell within the Federal List.

[72] Regrettably in a similar case, *Zi Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor(Kerajaan Malaysia & Anor, Interverner)*[72] ("Zi Publications") the apex court gave a totally different decision. The Jabatan Agama Islam Selangor had raided a publisher's office and seized 180 copies of the Malay version of the book *Allah, Liberty and Love* by Canadian author Irshad Manji. The apex court dismissed the challenge to section 16 of the State Enactment on several grounds. First, there was no violation of the Federal List because the section punished an offence against the precepts of Islam. Second, freedom of expression is limited by the sanctity of Islam in Article 3(1). In so ruling, the court was departing from *Che Omar Che Soh's* restrictive view of Article 3. According to the judges in *Zi Publications,* Article 3 is not restricted to rituals and ceremonies but assumes an expansive meaning and provides a rationale for curtailing fundamental rights. Third, Article 10 must be read in the light of Articles 3(1), 11, 74(2), and 121. The apex court stated that "Taking the Federal Constitution as a whole, it is clear that the intention of the framers was to allow Muslims in this country to be also governed by Islamic personal law".

[73] In *Muhamad Juzaili bin Mohd Khamis v. State of Negeri Sembilan*[73] the appellants were Muslim men who, because of a gender identity disorder, had been expressing themselves as women by wearing female clothes and make up. Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 makes it an offence for any male Muslim to wear a woman's attire or to pose as a woman. The appellants had been repeatedly detained, arrested and prosecuted by the religious authority. They challenged the constitutionality of section 66. The High Court dismissed the challenge. It was held by the Court of Appeal, with Justice Hishamudin penning the opinion, that section 66 interferes with the personal liberty of the appellants because it prevents them from moving about in public places to reach their respective work places. The right to work is part of their right to life in Article 5(1). Additionally, section 66 is inconsistent with Article 8 of the Constitution because it unfairly subjected GID sufferers to the same provisions as other normal males. It is further discriminatory because it singled out males who dressed like females and said nothing about females who dress like males. Section 66 effects the appellants' right to freedom of expression, in that they are prohibited from expressing themselves in the way dictated by their psychological make-up.

Freedom of Religion and Article 11(1)

[74] This provision has generated a very large number of cases. In *Minister v Jamaluddin Othman*[74] (preventive detention of a person who converted out of Islam and was trying to convert others), habeas corpus was issued. In *Halimatussaadiah v PSC*[75] (civil servant wearing purdah); *Ahmad Yani Ismail v*

71 [2014] 1 MLJ 138.
72 [2016] 1 MLJ 153.
73 [2015] 3 MLJ 513.
74 [1989] 1 MLJ 418.
75 [1994] 3 AMR 1866.

Ketua Polis Negara[76] and *Zakaria Abdul Rahman v Ketua Polis Negara*[77] (polygamous police officers), it was held that reasonable public service regulations could not be defied simply because practices like purdah or polygamy were permitted by Islam. Article 11(1) only protected mandatory practices of religion. Similar reasoning applied in *Meor Atiqulrahman Ishak v Fatimah Sihi*[78] (where a school pupil was disciplined for insisting on wearing a serban to the school assembly). In all these cases, judicial decisions were balanced and not swayed by religious considerations.

[75] However, in a number of other areas like apostasy, proselytisation of Muslims, and offences against the precepts of Islam, the civil courts have generally preferred "political correctness" over the constitutional guarantee of freedom of conscience.[79] In *Kamariah Ali v Kerajaan Negeri Kelantan*[80] and *Lina Joy v Majlis Agama Islam*[81] attempted apostasy by Muslims was not regarded as part of freedom of religion in Article 11.[82]

[76] In the matter of freedom of religion, Article 11(1) grants to every person "the right to profess and practise his religion and, subject to clause (4), to propagate it". However, clause 4 provides that "State law ... may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam". This unique restriction in Article 11(4) was part of the "negotiated settlement" between the Malays and non-Malays to shield Muslims from well-organised evangelical groups that had gained a foothold during colonial days. The constitutional problem is that since the eighties, Article 11(4) has been used by the States to frame catch-all laws against any intellectual discourse on Islam without prior permission of Shariah authorities. Take section 11 of the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) which provides that "any person who teaches or professes to teach *any matter relating to the religion of Islam* without a *tauliah* (accreditation) ... shall be guilty of an offence ...". This is the provision used against Mustafa Akyol. The words "any matter relating to the religion of Islam" cover the whole range of Islamic thought. If section 11 is to be interpreted literally, then any lecturer of Islamic theology, law, economics, banking, commerce, history, good governance and philosophy or any participant in a seminar or workshop on any aspect of Islam must first obtain a *tauliah* or risk a RM5,000 fine or three years jail! Under their enabling laws, all public and private universities have statutory powers to recruit staff and allocate subjects to be taught. Must the universities and all lecturers in Islam-related subjects seek clearance from the Shariah authorities first? It is understandable if there is a law against "false doctrine" as in section 4, but the section 11 catch-all provision is an overkill, and clearly is in conflict with Article 11(4), Article 10(1)(a) and all statutes empowering universities and schools.

[77] Courts have given blank-cheque powers to Shariah authorities to control "divergent practices" and "differing concepts of Islamic religion". There is judicial sanction for stamping out all diversity of thought within the ummah that digresses from the official opinion: *SIS Forum(Malaysia) dan JK Fatwa Negeri Selangor* (2019). Freedom of speech and freedom of religion are subordinated to Article 11(4) and Schedule 9 List II. In *SIS Forum Malaysia* (2019) a Selangor fatwa declared SIS to be a deviationist group and asked federal departments to suppress publications by SIS. An application to the High Court for a declaration failed on the ground that the impugned fatwa was within the powers of the fatwa committee under Schedule 9 List II Item 1 – creation and punishment of offences against the precepts of Islam.

[78] In some State Enactments, children can be given away in marriage because religious tradition permits children to marry. Actually, Article 11(5) permits all religions and religious practices, to be subjected to public order, public health and morality.

76 [2004] 5 AMR 571.

77 [2001] 3 MLJ 385.

78 [2005] 2 MLJ 25.

79 See Justice Dato' Rhodzariah Bujang, "Conversion of Minors – An Uncertainty No More"(2019) Journal of the Malaysian Judiciary at p 33. The article contains a list of many cases of attempted apostasy by Muslims.

80 [2002] 3 MLJ 657.

81 [2007] 4 MLJ 585.

82 See also: *PP v Krishnan a/l Muthu Magistrates Court* case No MA-83 146-2002.

Parent's Rights Over Religious Education

[79] In *Noorliyana Yasira Mohd Noor lwn Menteri Pendidikan*[83] a father tried unsuccessfully to assert his right under Article 12(4) to determine his daughter's Islamic education. But in *Teoh Eng Huat*[84] the father succeeded in obtaining a declaration that his daughter below 18 cannot convert to Islam without his permission.

[80] A very large number of unilateral conversion of children cases have gone to the superior courts and the near unanimous view was that issues about the unilateral conversion of a child to Islam were within the powers of the Syariah courts. This is so even though one of the parents was a non-Muslim![85] These decisions were all overruled by the 2018 landmark case of *Indira Gandhi Mutho*[86].

Federal-State Division of Legislative Powers is in Tatters

[81] *In PP v Mohd Noor Jaafar* (2005) it was correctly held that the administration of a Muslim religious school is not a Shariah matter and therefore cannot be tried in the Shariah courts. In *Gin Poh Holdings v Govt of Penang*[87] it was held that the entries in the Legislative Lists do not on their own confer legislative power. They are enabling provisions to permit the legislature concerned to enact legislation. It was also held that the competence of a legislative body to enact law on a particular matter does not exclude the power of the courts to examine the constitutional validity of the law by reference to other provisions of the Constitution.

[82] The reality, however, is that on matters that have an Islamic element, State Assemblies often pass laws that violate the federal-state division of power. Courts are reluctant to censure the state authority.

[83] In *Mamat Daud v Government of Malaysia*[88] a federal amendment to the Penal Code by adding a new section 298A was struck down because it was not a law on public order but a law on Islam within state jurisdiction. According to the majority, section 298A of the Penal Code was a trespass on the power of the states to enact laws about Islam. A look at the section may reveal otherwise. Section 298A is titled "Causing disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing the maintenance of harmony or unity on grounds of religion". The section is broadly drafted to apply to all religions and says nothing specific about Islam, Shariah or Muslims. Sub-section 8 of section 298A says: "If in any proceedings under this section any question arises with regard to the interpretation of any aspect of, or any matter in relation to, *any religion*, the court shall accept the interpretation given by *any religious authority* referred to in subsection (6), being *a religious authority in respect of that religion*". The majority on the Bench, however, felt that on the doctrine of pith and substance, section 298A was about Islamic offences and therefore outside the jurisdiction of the Federal Parliament. It is submitted that the minority was correct. The law was, in its pith and substance, about public order. It applied to all citizens. Even if it was partly about Islamic affairs, that does not, *ipso facto* empower the State Assemblies. Under our Constitution, not all matters of Islamic crime (e.g. murder, theft, robbery, rape, treason) are in the State hands. *Mamat Daud* can be credited or blamed for starting the judicial trend of Islamisation of the Malaysian Constitution; of interpreting State powers on Islam expansively; of promoting the false idea that "if it relates to Islam it is in State hands"; and of interpreting the term "precepts of Islam" too broadly. The devastating decisions in *Sulaiman Takrib* and *Fathul Bari* are inheritors of the *Mamat Daud* tradition.

83 [2007] 5 MLJ 65.

84 [1990] 2 MLJ 306.

85 See *Chan Ah Mee v Jabatan Hal Ehwal Agama Islam Sabah* [2003] 5 MLJ 106; *Shamala Sathiyaseelan v Dr Jeyaganesh Mogarajah* [2004] 2 MLJ 648. See also Justice Dato' Rhodzariah Bujang, "Conversion of Minors – An Uncertainty No More"(2019) Journal of the Malaysian Judiciary at p 33.

86 [2018] 2 AMR 313.

87 [2018] 4 CLJ 1.

88 [1988] 1 MLJ 119.

[84] Many states pass laws to regulate Muslim religious schools even though all education is in federal hands. Most States punish homosexuality between males, betting and lotteries. All three matters are in federal jurisdiction. Halal-haram offences are regulated by the States even though they are possibly covered by the Trade Description Act. Muslims wishing to marry are required to take HIV test even though medicine and health and infectious diseases are federal matters.

[85] *In Kelantan v Wong Meng Yit,*[89] a non-Muslim book shop in Kota Bharu was prosecuted for violating local authority rules against selling lottery items. Betting and lotteries are in federal jurisdiction.[90]

[86] In the *Re Bin Abdullah* case,[91] Justice Abdul Rahman Sebli (now FCJ) in a Court of Appeal panel chaired by Justice Tengku Maimun Tuan Mat (as the CJ was then), in a landmark decision unanimously ruled that under the federal Births and Deaths Registration Act 1957, an illegitimate child was entitled to carry his father's name if the father acknowledges paternity and the mother has no objection. Despite the court ruling, the Director-General of the National Registration Department declared that he was instead bound by a fatwa (religious edict) issued by the National Fatwa Committee to give the Abdullah surname to a child conceived out of wedlock.

[87] Blatantly unconstitutional *hudud* laws have been passed by the states of Terengganu and Kelantan in violation of Schedule 9 List II and the Syariah Courts (Criminal Jurisdiction) Act 1965. The state laws punish federal crimes and impose sentences far beyond the 3-6-5 formula permitted by the 1965 Act. In 2017, YB Hadi Awang's RUU355 (the hudud law) had many unconstitutional provisions but was embraced by the former government.

[88] In *ZI Publications Sdn Bhd*[92] the Selangor religious authority, JAIS raided the office of ZI Publications and seized 180 copies of the book *Allah, Kebebasan dan Cinta* by Irshad Manji even though publications and presses are in federal jurisdiction and the book had not been banned by the Home Ministry. In the recent decision of *SIS Forum (Malaysia) dan JK Fatwa Negeri Selangor* (2019) a very expansive view of the powers of the Selangor Fatwa Committee to act under Article 11(4) was affirmed. SIS, a Muslim women's organization, was declared to be "sesat". The Selangor Fatwa committee prohibited the publishing of material that has elements of liberalism and pluralism and sought to seize these materials. Such a power of prohibition and seizure actually belongs to a federal Minister under the Printing Presses and Publications Act 1984. The Fatwa Committee also directed the Malaysian Communication and Multi-Media Commission (a federal body) to block the SIS social website. SIS complained of trespass on federal powers, but the High Court rejected the complaints out of hand without much reasoning.

[89] "Offences against the precepts of Islam" can be punished by the States. The Federal Court in the cases of *Sulaiman Takrib* and *Fathul Bari* did not confine the terms to refer to the essentials of Islam but interpreted the words broadly to mean anything about Islamic *aqida, Shariah and akhlaq*.

Power of the States to Enact Islamic Criminal Law

[90] Schedule 9 contains the federal and state lists of legislative powers. Item 1 of the State List empowers the States to create and punish "offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List". Item 1 when read along with Article 11(4), empowers the States to control the propagation of doctrines and beliefs among persons professing the religion of Islam.

89 [2012] 6 MLJ 57.

90 Schedule 9 List I Item 4(I).

91 Jabatan Pendaftaran Negara and Seorang Kanak-Kanak, Civil Appeal No 21 on 14 Nov 2019.

92 [2016] 1 MLJ 153.

[91] In *Sulaiman Takrib v. Kerajaan Negeri Terengganu*[93] the petitioner, a Muslim was charged with offences under sections 10 and 14 Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ("SCOT") and section 51 of the Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 ("AIRA"). He was granted leave to commence proceedings for a declaration pursuant to Article 4(4) of the Federal Constitution that these laws were null and void.

[92] The charge under section 10 SCOT was for acting in contempt of a religious authority by defying or disobeying the fatwa regarding the teaching and belief of Ayah Pin that was published in the Government Gazette of the State of Terengganu on 4 December 1997, while the charge under section 14 SCOT was for possession of a VCD the content of which was contrary to the *Hukum Syarak*.

[93] Among the petitioner's contentions were that the power to create offences under Item 1 of List II of the 9th Schedule was limited to the creation of offences against 'the precepts of Islam'. The court was urged to confine "precepts of Islam" to the "five pillars of Islam" which are: (i) *Tawheed* (Belief that there is no deity worthy of worship except Allah and that Muhammad is His messenger (ii) Prayers (iii) zakat (iv) fasting and (v) Hajj. It was submitted that as the offences were not "offences against the precepts of Islam", the State Assembly was not empowered to enact the said provisions.

[94] The court rejected both submissions. Abdul Hamid CJ chose a very broad definition of "precepts of Islam" to include (i) Aqidah (articles of faith), (ii) Shariah (the revealed law), and akhlaq (ethics, morals and manners). What is remarkable about his exposition is that he included within the Shariah the ideas of fiqh (juristic interpretations). On his definition, any fatwa or juristic ruling would be a precept of Islam. Further, according to him, in Malaysia the Shariah includes all 'Islamic law' and 'Hukum Syarak'.

[95] *Sulaiman Takrib* was followed in *Fathul Bari Mat Jahya & Anor v Majlis Agama Negeri Sembilan*. The issue in this case was whether the state can impose a *tauliah* (accreditation) requirement before a Muslim speaks about Islam to anyone other than his family members. The tauliah requirement was challenged as a violation of freedom of speech in Article 10 and as outside the power of the Assembly to punish offences against the "precepts of Islam". The judges followed *Sulaiman Takrib* and upheld the validity of the *tauliah* requirement.

[96] *Fathul Bari* has been criticised on several scores. First, the requirement of a *tauliah* is not a precept of Islam. Several expert witnesses had testified to that, but the judges embraced the expansive view. As opposed to religious absolutism, there is a spirit of *shura* (consultation) and reasoned dissent within the Islamic tradition. Prophet Muhammad once said: "There is mercy in the differences of my community." Second, what is disturbing about this decision is that the actual content of a speech or presentation is irrelevant. Intent to indulge in deviationism is not needed. Any intellectual discourse, no matter how learned and respectful, is a crime unless there is prior permission. The authorities can act against anyone they wish. It is on record that the late Dr Kassim Ahmad, the ex-Mufti of Perlis (as he was then) and MP Khalid Abdul Samad have been charged for speaking without a *tauliah*. Third, the view of the learned judges in *Fathul Bari* that diversity of views may lead to deviationism and that, in turn, may lead to disharmony and disorder is fanciful and is not supported by social reality or logic. Fourth, the provisions of Schedule 9 are subject to the chapter on fundamental liberties. An unfettered power to impose prior restraint and censorship goes far beyond the permitted restrictions on freedom of religion (Article 11) and freedom of speech (Article 10). The *tauliah* requirement imposes thought-control and cripples free speech and diversity of views. Criminalising any questioning of a fatwa is a violation of Articles 10(1)(a) and 10(2)(a).[94] Fifth, there is a sufficient body of opinion that the reasonableness and proportionality of restrictions on human rights are reviewable by the courts: *Sivarasa v Badan Peguam Malaysia & Anor*[95]

93 [2009] 2 CLJ 54.

94 See also *Muhammad Juzaili Mohd Khamis* [2015] 8 CLJ 975.

95 [2010] 2 AMR 301.

and *Alma Nudo Atenza v PP*.[96] Sixth, the *tauliah* law denigrates all Muslims as servile subjects who must speak about Islam only when allowed to do so and who are so gullible that they are likely to be confused by unlicensed thinkers who must therefore be controlled by prior restraints. Seventh, fatwas by State Fatwa Committees are a form of subsidiary legislation under the authority of the State Enactment. For our courts to allow a subsidiary law to override the supreme Constitution's chapter on fundamental liberties is indeed exceptional.

[97] The dark shadow of *Sulaiman Takrib* and *Fathul Bari* was evident in the recent decision of *SIS Forum(Malaysia) dan JK Fatwa Negeri Selangor* (2019). A 2014 Selangor fatwa that had declared Sisters in Islam (SIS) as a deviant organisation for subscribing to "religious liberalism and pluralism" was upheld by the High Court. Justice Nordin ruled that the High Court does not have the jurisdiction to rule on the case based on Article 121(1A) of the Federal Constitution, where such matters should have been referred to the Syariah Court. "The said fatwa is within the limits of the constitution as stipulated under Article 74 and the Second Schedule of the Federal Constitution. This court is not clothed to hear the present application due to jurisdictional issues. The court also finds the decision dated July 14, 2014 is not tainted with illegality and proportionality," said Justice Nordin.[97] It was held that the Constitution must be read as a whole and that Article 10(1)(a) must be read in the light of Article 3(1), 11(4) and Schedule 9 List II.[98] The learned judge is absolutely correct in approving a holistic approach to interpretation and calling for the provisions to be read together. But he contradicts his own recommendations by putting Article 11(4) above all else and giving no importance to Article 10(1) and (2) and Schedule 9 List II. Article 10(1) and (2) provide the permissible grounds of prohibition on free speech. Schedule 9 List II Item 1 allows creation of offences *only if* they are against the precepts of Islam. Further, the banning of "liberalism" and "pluralism" without defining these terms precisely appears unconstitutional and ultra vires. The learned judge's reliance on Article 3(1) without mentioning Article 3(4)'s non-derogation provision indicates a selective reading of Article 3.

[98] Because of the reluctance of civil courts to apply constitutional principles to cases involving the Shariah, State Enactments are now extending the concept of "precepts of Islam" to more and more areas: skipping Friday prayers, failing to observe the fast; attempting apostasy. Some Muslim groups like the Shias are condemned as "deviationists", continuously harassed and vilified. Others like the Ahmadiyyas and Qadiyanis are declared as outside the pale of Islam. Yet their activities are still sought to be regulated by the Syariah authorities: *Maqsood Ahmad v Ketua Pegawai Penguatkuasa*.[99] It is submitted that the dangerously expansive interpretation of the words "precepts of Islam" by *Sulaiman Takrib* and *Fathul Bari* confers a blank-cheque power on State legislatures and Shariah authorities to legislate on and criminalise virtually any aspect of the personal or public behavior of a Muslim. One can anticipate that as a result of these unfortunate decisions in *Sulaiman Takrib* and *Fathul Bari*, more and more conflicts will emerge in the future between the Federal Constitution and Syariah laws and between federal laws and state laws. Controversial issues of jurisdiction will bedevil the superior courts. In the matter of creating crimes, State Assemblies will become supreme. All fundamental rights of Muslims will be at the mercy of either the State Assembly or delegates of the Assembly, like the fatwa committees.

[99] Signs of such assertiveness are already visible. The women's rights group Sisters in Islam has been declared deviant. The entire Shia community is demonized. Muslims who support "liberalism", "secularism" and "pluralism" are declared to be deviants. The Muslim retired civil servants group, G25, has been described by the PAS President as worse than a terrorist group. A Muslim girl caught for drinking beer in a public place was convicted and ordered to be whipped. The practice of Yoga was declared to be haram. Muslims are forbidden to send Christmas greetings to Christians or to attend any ceremony connected with the pongal harvest festival. In shopping malls in some states, separate lines must exist at payment counters

96 [2019] MLRAU 118.

97 Hafiz Yatim, "Selangor Fatwa declaring Sisters in Islam as a deviant group stands – High Court", theedgemarkets.com, August 27, 2019.

98 *Sulaiman Takrib v Terengganu* [2009] 1AMR 644; *ZI Publications v Kerajaan Selangor* [2016] 1 MLJ 153.

99 [2019] 9 MLJ 596.

for males and females. It is conceivable that in the future, if a Muslim girl trims her hair or wears pants or drives a car or travels abroad unaccompanied by a *muhrim*, or attends co-educational facilities, and a Shariah authority decrees by way of a *fatwa* that these "liberal" forms of behavior or dressing are against Islamic *akhlaq,* and subject to a penalty, there will be questions about whether the protection of the civil courts could be invoked? If a Muslim girl with a degree in mass communication who is prevented by religious law from becoming an emcee at a public function, wishes to go to the High Court to enforce her fundamental right to life (which includes livelihood), liberty and freedom of expression, will her Part II rights be subordinated to the power of the State authorities to criminalise any conduct against *Islamic akhlaq* as determined by unelected Shariah authorities? Will Shariah Courts have exclusive jurisdiction under Article 121(1A) or will civil courts have the power to examine the constitutional issues and test the validity of the *fatwas*? Could Article 4(1) and Articles 5 to 13 be invoked to examine the validity of religious rulings?

[100] It is submitted that in the overall scheme of the Constitution, Shariah legislation and Shariah authorities cannot, unless explicitly permitted[100] by the Federal Constitution, violate the fundamental rights enshrined in Part II of the Constitution. Unless expressly provided, all Muslims, like their non-Muslim counterparts, are entitled to all facets of personal liberty. See for example explicit applicability of Article 5(4) to Shariah courts. It would be unthinkable in 2020 for Shariah legislation, purportedly relying on religious traditions, to go against constitutional provisions relating to abolition of slavery and forced labour (Article 6), protection against retrospective criminal laws (Article 7), protection against double jeopardy (Article 7), right to equality save where explicitly allowed (Article 8), freedom of movement (Article 9), freedom of speech and expression (Article 10), freedom of religion (Article 11), rights in respect of education (Article 12) and right to property (Article 13).

Non-Muslims and Shariah Courts

[101] Under Schedule 9 List II, Islamic law and Islamic courts cannot apply to non-Muslims. Yet Shariah courts dissolve non-Muslim marriages and grant custody, guardianship and unilateral conversion orders that devastate non-Muslim lives. What is extremely painful about most of these proceedings is that they are ex-parte. Yet, when the affected party knocks on the doors of civil courts, jurisdiction is often refused.

Article 121(1) and 121(1A)

[102] Article 121(1A) provides that civil courts cannot interfere with Shariah courts in matters within Shariah court jurisdiction. Unfortunately, it is not always clear whether a matter falls in civil or Shariah court jurisdiction. When that happens, our civil courts are deeply divided. Over the last 30 years, painful jurisdictional issues have arisen in such matters as:

- Dissolution of a non-Muslim marriage when one party converts to Islam
- Unilateral conversion of non-Muslim children to Islam
- Custody and guardianship of infants in a marriage where one party has converted to Islam
- Cases of apostasy. In numerous cases the civil courts have held that whether a person has converted out of Islam is not a matter of the fundamental right in Article 11(1) but a matter within the exclusive jurisdiction of the Shariah courts[101]
- Fatwa to declare individuals and groups as deviationists

[103] Some civil judges transfer any case with the slightest whiff of Islam to the Shariah courts. In *Mohammad Habibullah Mahmood v Faridah Dato Talib*[102] (a request for an injunction in a domestic abuse case), the High Court regarded the crime of domestic violence as outside its jurisdiction and in the jurisdiction of the Shariah court because the couple were Muslims.

100 For such explicit provisions see Articles 8(5)(a) and (b), 11(4), 12(2).

101 See *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam* [1992] 1 MLJ 1; *Md Hakim Lee v Majlis Agama Islam* [1998] 1 AMR 74; *Soon Singh v Pertubuhan Kebajikan Islam* [1999] 1 MLJ 489; *Tey Siew Choo@Nur Aishah Tey v Teo Eng Hua* [1999] 2 AMR 2779; *Lina Joy v Majlis Agama Islam WP* [2007] 3 AMR 693.

102 [1992] 2 MLJ 793.

[104] Other civil judges assert that questions of constitutionality, disputes as to jurisdiction, matters involving fundamental liberties and issues affecting non-Muslims must be tried in the civil courts. Justices Zaleha Yusuf, Hishamudin Yunus and Zainun Ali are in this distinguished minority. In the case of *Dato' Kadar Shah Tun Sulaiman* v *Datin Fauziah Haron*[103] Hishamudin Yunus J ruled that a trust, even between Muslims, was a matter within federal jurisdiction. Even though the Defendant was arguing that there was a Muslim gift (a topic in the State List) and not a trust (a topic in the Federal List), there was no ouster of the civil court's jurisdiction. The learned judge laid down a number of guidelines. (1) Where there is an issue of competing jurisdiction between the civil court and Shariah Court, the proceedings before the High Court must take precedence over the Shariah Court. (2) Whether this case involved a Muslim gift (a Shariah court matter) or a civil trust (a civil court matter) is an issue that is not severable and therefore in the civil court's jurisdiction. (3) Questions of breach of trust came within the jurisdiction of the High Court. Any dispute pertaining to the Law of Trusts is outside the jurisdiction of the Syariah courts (4) The High Courts are superior courts and the Shariah Courts are inferior tribunals existing under State law. As such the High Court has supervisory jurisdiction over all inferior tribunals, including Shariah Courts. (5) Article 121(1) and (1A) must not be interpreted literally or rigidly but must be interpreted purposively. (6) Civil courts are ousted only if the Shariah Court has exclusive jurisdiction.

[105] In *Siti Hasnah Vangarama Abdullah* v *Tun Dr Mahthir Mohamad (As the President of Perkim)*[104] a seven-year-old child born into a Hindu family was converted to Islam by Muslim religious authorities in Penang without the consent of her parents. On reaching maturity she challenged the constitutionality of her conversion. A question arose whether the civil court or the Shariah court had jurisdiction over the matter. Justice Hishamudin held that: (1) A subject matter does not cease to be within the jurisdiction of the civil courts just because it has an Islamic element in it. (2) There was an allegation that the child was made to renounce her religion in an unconstitutional and illegal manner. As such, the fundamental rights of the parents and the child under Articles 11 and 12 were involved and the civil High Court had exclusive jurisdiction. (3) A High Court must be extremely cautious and slow in declining jurisdiction, and in coming to the conclusion that the subject matter of an action falls within the exclusive jurisdiction of the Shariah Courts, especially if fundamental rights are involved. (4) The civil courts cannot interfere with the Shariah court only if the matter is within the exclusive jurisdiction of the Shariah court.

[106] Justice Zainun Ali's classic decision in *Indira Gandhi a/p Mutho*[105] is authority for the proposition that Shariah courts are not of equal status to the superior civil courts. This was a case of unilateral conversion of children to Islam by a Hindu husband who had embraced Islam. The Court of Appeal had ruled that all matters concerned were in the exclusive jurisdiction of the Shariah court. Writing for a unanimous Federal Court, Zainun Ali FCJ held that:

(1) The powers of the Shariah courts must be expressly conferred by state law. Section (3)(b)(x) of the Perak Enactment specifically conferred jurisdiction on the Shariah Courts to issue a declaration that 'a person is no longer Muslim'. This would be applicable in a case where a person renounced his Islamic faith. However, the issue in the present appeals concerned the validity of the certificates of conversion issued by the registrar in respect of the children's conversion to Islam. Nowhere was there any express provision in section 50(3)(b), which conferred jurisdiction on the Shariah Court to determine the validity of a person's conversion to Islam.

(2) The amendment inserting clause (1A) in Article 121 did not oust the jurisdiction of the civil courts nor did it confer judicial power on the Shariah Courts. The jurisdiction to review the actions of public authorities, and the interpretation of the relevant state or federal legislation as well as the Constitution, would lie squarely within the jurisdiction of the civil courts. This jurisdiction could not be excluded from the civil courts and conferred upon the Shariah Courts by virtue of Article 121(1A) of the Federal Constitution.

(3) The wife as a non-Muslim had no locus to appear before the Shariah Court and the Shariah Court did not have the power to expand its own jurisdiction to choose to hear the wife's application. In these circumstances the High Court had jurisdiction, to the exclusion of the Shariah Court, to hear the matter.

103 [2008] 4 CLJ 504.

104 [2012] 7 CLJ 845.

105 [2018] 1 MLJ 545.

(4) The issuance of certificates of conversion by the registrar was an exercise of a statutory power. If an exercise of power under a statute exceeded the four corners of that statute, it would be ultra vires and a civil court ought to be able to hold it as such. Though section 101 of the Perak Enactment provided that the decision of the Registrar of Mu'allafs was final, nevertheless, it was settled law that the supervisory jurisdiction of High Court to determine the legality of administrative action could not be excluded even by an express ouster clause.

(5) Based on the undisputed evidence, the requirement in section 96(1) had not been fulfilled in that the children had not uttered the two clauses of the affirmation of faith and had not been present before the registrar before the certificate of conversion was issued. As such, the issuance of the certificates despite the non-fulfilment of the mandatory statutory requirement was an act which the registrar had no power to do under the Enactment and the registrar had acted beyond the scope of his power.

(6) Under the Guardianship of Infants Act 1961 (Act 351) ("GIA"), both parents had equal rights in relation to the custody and upbringing of the infant children and the wishes of both parents were to be taken into consideration. The conversion of the husband to Islam did not alter the antecedent legal position, nor did it bring the children out of the ambit of the GIA.

(7) Based on a purposive interpretation of Article 12(4) read with the Eleventh Schedule of the Federal Constitution, and on an application of sections 5 and 11 of the GIA, the consent of both parents was required before a certificate of conversion to Islam could be issued in respect of the children.

(8) (Per Zulkefli PCA, supporting) In the present case upholding the rule of law required the court to decide on the issue strictly on the basis of the relevant laws, case authorities and the provisions of both the state and the Federal Constitution governing the particular issue without being swayed by any religious convictions or sentiment.

[107] The scintillating *Indira Gandhi* (and the earlier *Semenyih* ruling)[106] that a non-judicial body cannot bind the superior courts has, however, been diluted by the recent decision in *JRI Resources Sdn Bhd v Kuwait Finance House (KFH).*[107] The case involved a civil lawsuit filed in 2013 by KFH against JRI Resources for recovery of an outstanding amount of RM118,822,066.59 due to the former, for four (4) "Ijarah Facilities" agreements and one (1) "Murabahah Tawarruq" agreement, negotiated in 2008 and 2009. KFH also instituted a claim against the three (3) guarantors. A monumental issue of constitutional and administrative law importance in this case was whether sections 56 and 57 of the Central Bank of Malaysia Act 2009 were constitutional, for impinging on judicial powers. Under these provisions, the Shariah Advisory Council ("SAC") is the sole authoritative body on Shariah matters pertaining to Islamic banking, takaful and Islamic finance. The rulings of the SAC shall prevail over any contradictory ruling given by a Shariah body or committee constituted in Malaysia. All courts and arbitrators are also required to refer to the rulings of the SAC for any proceedings relating to Islamic financial business. The rulings of the SAC are binding on all authorities including the courts. These sections implied that the rulings by the Shariah Advisory Council (SAC) on Islamic finance bind the Civil High Court even though the Council is not a judicial body. By a 5-4 majority, the court held that any determination by the SAC is binding on civil courts. *JRI*, while not overruling *Indira* or *Semenyih*, held that in the interest of certainty and uniformity of Islamic doctrine, sections 56 and 57 of the Central Bank of Malaysia Act 2009 (Act 701) which allow the Bank's Shariah Advisory Council to make a final "determination" on Shariah matters, which determination is then binding on the civil courts, is not unconstitutional. The four dissenting judges were, however, of the opinion that section 57 of the Central Bank of Malaysia Act 2009, which gives the SAC its "judicial power", contravenes Article 121 of the Federal Constitution which touches on the exclusive judicial power of the civil courts. "The effect of the section (57) is to vest judicial power in the SAC to the exclusion of the High Court on Shariah matters. The section must be struck down as unconstitutional and void," said Justice Malanjum in a summary of the minority judgment.

[108] A few observations are in order. First, banking is a federal matter. Second, though the Federal Court in *JRI Resources Sdn Bhd v Kuwait Finance House (KFH)* did not explicitly overrule the authority of *Semenyih* and *Indira Gandhi*, these earlier cases have been undermined. The bold assertion in *Semenyih* that a non-judicial body cannot usurp the power of the superior civil courts seems to have been weakened.

[109] Third, if Syariah authorities can bind the civil courts with their expert findings, is it not possible to argue that native court authorities in Sabah and Sarawak should be given the same treatment. Their expertise

106 *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 (FC).
107 [2019] MLJU 275.

and experience should also bind the civil courts. This will overturn the whole apple cart of judicial review of native court decisions.

[110] Not much respect for the *Indira* decision was shown in the most recent *SIS Forum (Malaysia) v Jawatankuasa Fatwa Negeri Selangor* (2019) case. In this case, the concepts of liberalism and pluralism were declared by Selangor to be against the teachings of Islam. The Plaintiffs were declared to be "*sesat dan menyeleweng daripada ajaran Islam*". They argued: (i) that their constitutional rights under Articles 10 and 11 were being violated. (ii) Further, the provision in the Selangor Enactment giving judicial review power to the Shariah High Court was a violation of the civil High Court's inherent powers under Article 121(1) as affirmed by *Semenyih* and *Indira Gandhi*. Nordin Hassan J rejected both arguments. While conceding that a decision that is *ultra vires* may be reviewed,[108] he ruled that the Fatwa Committee was well within its powers under Article 11(4). Therefore, the decision in *Indira Gandhi* did not apply and the application for judicial review was refused.

V. Summary & Conclusion

[111] The courts are clearly split about whether constitutional principles and provisions apply to the growing body of Islamic law. The prominent decisions which subject Islamic law and Islamic authorities to the Constitution are *Che Omar Che Soh, Minister v Jamaluddin, Maqsood, Teoh Eng Huat (Susie Teoh), Halimatussaadiah, Meor Atiqul Rahman, Ahmad Yani, Zakaria, Mohd Noor Jaafar, SIS Forum* (2012), *Berjaya Books, Siti Hasnah, Dato' Kadar Shah, Re Bin Abdullah* and *Indira Gandhi Muthu.*

[112] On the other hand, there are many areas where judicial decisions expand the horizons of the Shariah courts and confer unlimited power on Shariah authorities:

- All unilateral conversion cases (till *Indira Gandhi* 2018)
- All Muslim apostasy cases like *Lina Joy* – whether successful or unsuccessful
- Broad interpretation of the powers to create and punish offences under Schedule 9 List II, even though the intention of the drafters was to allow only minor, non-federal offences to be tried by Shariah courts. The catch-all interpretation of "precepts of Islam" subordinates all fundamental rights to state power: *Mamat Daud; Sulaiman Takrib; SIS Forum* 2019*; Fathul Bari; Mohd Juzaili; Titular Roman Catholic; Victoria Jayaseele; Lina Joy; Kamariah; and Mohammad Habibullah*
- Cases where implied powers are conferred on Shariah courts
- Jurisdictional conflicts between Shariah and civil courts are mostly resolved in favour of Shariah courts (save in rare situations like *Indira Gandhi* 2018)
- Even on matters in the federal list, civil courts are bound by the determination of Shariah authorities like the SAC. This is a clear departure from *Semenyih* and *Indira Gandhi Mutho*
- In many cases where the constitutionality of a state law is challenged, the superior courts cleverly avoid or evade issues by hiding behind questionable procedural matters. In the *Herald* case, leave was refused by the Federal Court even though many monumental issues of constitutional and administrative law were at stake. In *Juzaili*, a learned Court of Appeal decision in favour of the cross-dressers on the basis of Articles 5, 8 and 10 was neutralized by the Federal Court by a not so acceptable argument raised by the defendant state that because of Article 4(4) the case should have never been brought to the High Court and the Court of Appeal and should have gone straight to the apex tribunal. On this point *Juzaili* was wrongly decided if we take note of *Ah Thian* and the later *Gin Poh Holdings* which demolished the view that all challenges to a legislation's constitutionality must go straight to the Federal Court

108 Reliance was placed on *Peguam Negara v Chin Chee Kow* [2019] MLJU 202.

[113] In most of the above cases the tide of Islamic law is too strong for the judges to resist. Our Constitution is at a crossroads. Only the future will tell whether Malaysia will go the way of Saudi Arabia, Pakistan and Aceh. Or perhaps we will become "one country with two systems" - a Shariah system for all Muslims and a subordinate, constitutional system for non-Muslims.

VI. Recommendations

[114] Article 121(1A) states that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah courts". This Article should be suitably amended to clarify that "jurisdiction" means "exclusive jurisdiction". In cases where (i) there are constitutional issues, or (ii) the matter involves conflicting or concurrent jurisdiction of civil and Shariah courts, or (iii) one of the parties is a non-Muslim, or (iv) there is a dispute about the jurisdiction of the Shariah court, the civil court should have the power to review the proceedings. This recommendation is in line with the recent Federal Court decision in *Indira Gandhi a/p Mutho v Pathmanathan a/l Krishnan* and the earlier dissenting opinion of Hamid Sultan JCA in the same case at the Court of Appeal.

[115] Schedule 9 List II Item 1 should be amended to provide an authoritative and precise definition of the term an "offence against the precepts of Islam".

[116] The Syariah Courts (Criminal Jurisdiction) Act 1965 must be amended to provide an authoritative and precise definition of the term an "offence against the precepts of Islam".

[117] The Syariah Courts (Criminal Jurisdiction) Act 1965 should be amended to specify the actual crimes on which Shariah courts may exercise jurisdiction. This recommendation is based on Schedule 9 List II Para 1 that Shariah courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law". This amendment will correct some unconstitutional tendencies prevalent in Malaysian Shariah legislation.

[118] All State legislation that violates the federal-state division of power in Schedule 9 must be reviewed by the Attorney-General's office and either amended to conform to the Federal Constitution or be challenged in the Federal Court under Articles 4(3) and 128.

[119] When a non-Muslim in a civil marriage converts to Islam and seeks the dissolution of his civil marriage and custody and guardianship of his children, it is a gross violation of the letter and spirit of the Constitution in Schedule 9 List II Para 1 if the Shariah courts adjudicate on the rights and duties of the non-converting spouse. Schedule 9 List II Para 1 is crystal clear that the Shariah courts "shall have jurisdiction only over persons professing the religion of Islam". The relevant civil family laws should be suitably amended to clarify that a marriage solemnized under civil law must be dissolved under civil law by a civil court after all ancillary matters have been resolved.

[120] In all countries with legal pluralism, conflict of laws is common. Malaysia needs to acknowledge that these conflicts between civil and Shariah courts and Native and Syariah courts exist and to work out equitable legal solutions that provide a delicate balancing of conflicting interests. Since the 90s, the prioritizing of Islam and the application of Islamic principles, even in conflict of law situations has not helped justice and has sullied the image of Islam.

[121] As long as an Islamic authority like JAKIM exists by way of executive fiat, its law enforcement powers shall remain questionable. At the federal level, Shariah authorities should be created by federal legislation under Article 3(5) and their jurisdiction clearly demarcated and defined.

[122] Rehabilitation centres run by State Shariah authorities are unconstitutional and must be handed over to the federal authorities. All prisons, reformatories, remand homes, places of detention are in the Federal List (List I, Para 3(b)).

[123] There are individual officers within federal Shariah institutions who mislead the Muslim public into believing that because Islam is the religion of the Federation, therefore Islamic legislation and the Islamic bureaucracy are not subject to the supremacy of the Constitution. Some of them spread the poison that because of Islam's position as the official religion, the government has no duty to protect any other religion. This is in conflict with Islam's respect for diversity and our Constitution's protection for all faiths. The judiciary should not allow itself to be influenced by such opinions.

The magnificent Kota Kinabalu Court Complex

CHAPTER 8 SPECIAL FEATURES

FORMER LORD PRESIDENTS/ CHIEF JUSTICES OF MALAYSIA (1963 – PRESENT)

THE RT. HON. TUN SIR JAMES BEVERIDGE THOMSON
16 September 1963 – 31 May 1966
(THE 1ST LORD PRESIDENT)

THE RT. HON. TUN SYED SHEH HASSAN BARAKBAH
1 June 1966 – 9 September 1968
(THE 2ND LORD PRESIDENT)

THE RT. HON. TUN DATO' MOHAMED AZMI MOHAMED
10 September 1968 – 30 April 1974
(THE 3RD LORD PRESIDENT)

THE RT. HON. TUN MOHAMED SUFFIAN MOHAMED HASHIM
1 May 1974 – 12 November 1982
(THE 4TH LORD PRESIDENT)

THE RT. HON. RAJA AZLAN
SHAH IBNI ALMARHUM SULTAN
YUSSUF IZZUDDIN SHAH
12 November 1982 – 2 February 1984
(THE 5TH LORD PRESIDENT)

THE RT. HON. TUN DATO'
MOHAMED SALLEH ABAS
3 February 1984 – 8 August 1988
(THE 6TH LORD PRESIDENT)

THE RT. HON. TUN DATO' SERI
ABDUL HAMID OMAR
9 AUGUST 1988 – 9 NOVEMBER 1988
(ACTING LORD PRESIDENT)
10 November 1988 – 24 September 1994
(THE 7TH LORD PRESIDENT /
THE 1ST CHIEF JUSTICE)

THE RT. HON. TUN DATO' SERI
MOHD EUSOFF CHIN
25 September 1994 – 19 December 2000
(THE 2ND CHIEF JUSTICE)

THE RT. HON. TUN DATO' SERI MOHAMED DZAIDDIN ABDULLAH
20 December 2000 – 14 March 2003
(THE 3RD CHIEF JUSTICE)

THE RT. HON. TUN DATO' SRI AHMAD FAIRUZ DATO' SHEIKH ABDUL HALIM
16 March 2003 – 1 November 2007
(THE 4TH CHIEF JUSTICE)

THE RT. HON. TUN ABDUL HAMID MOHAMAD
2 November 2007 – 17 October 2008
(THE 5TH CHIEF JUSTICE)

THE RT. HON. TUN DATO' SERI ZAKI TUN AZMI
18 October 2008 – 9 September 2011
(THE 6TH CHIEF JUSTICE)

THE RT. HON. TUN ARIFIN ZAKARIA
12 September 2011 – 31 March 2017
(THE 7TH CHIEF JUSTICE)

THE RT. HON. TUN RAUS SHARIF
1 April 2017 – 10 July 2018
(THE 8TH CHIEF JUSTICE)

THE RT. HON. TAN SRI DATUK SERI PANGLIMA RICHARD MALANJUM
11 July 2018 – 12 April 2019
(THE 9TH CHIEF JUSTICE)

THE RT. HON. TAN SRI TENGKU MAIMUN TUAN MAT
2 May 2019 - PRESENT
(THE 10TH CHIEF JUSTICE)

'Memoirs of 1988'

An Interview with
Tun Dato' Dr. Mohamed Salleh Abas
(The Sixth Lord President, Supreme Court of Malaysia)

by Wan Aima, Iriane and Ainna

We were privileged this year to interview the sixth Lord President of Malaysia, Tun Mohamed Salleh Abas. We present below a report of that exclusive interview as well as some of Tun Salleh's personal perspectives on his life and the law.

The Life of Tun Salleh

For Tun Salleh Abas, the most punishing event in his life was his removal as Lord President. He explained how the year 1988 shook the foundations of both his judicial career as well as the Malaysian judiciary. Three judges were removed from office that year – himself as the sixth Lord President of Malaysia, Tan Sri Wan Suleiman Pawan Teh and Datuk George Seah. It was an unprecedented event in scale and form. An unfamiliar one, at least in the Commonwealth countries of Asia and Africa. It left an indelible mark on the history of the Malaysian judiciary.

The story took form in the most unlikely way[1] and it is said to have led to the controversial amendment[2] of the Federal Constitution in that year. The Bill to amend the Constitution, according to Tun Salleh Abas, attempted to abrogate the judicial power of the Federation.

To unveil the events of that fateful year 1988, we revisited the written history with the man of the hour, Tun Salleh, who narrated the key events in his own inimitable way.

At the time, tension was brewing between the executive and the judiciary. This led to a meeting being convened by Tun Salleh amongst the judges. The outcome was that Tun Salleh, assisted by three other senior judges

1 See A.J. Harding, "The 1988 Constitutional Crisis in Malaysia" (1990) 39 I.C.L.Q. 57; *Mohamed Noor bin Othman and Ors v Mohamed Yusoff Jaafar and Ors* [1988] 2 MLJ 129.

2 See *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311.

wrote a letter to the Yang di-Pertuan Agong ("YDPA") asking for His Majesty's intervention in the situation in order to reduce the tension.

Two months later, Tun Salleh was suspended from office and five charges were preferred against him, including one pertaining to the issuance of the letter to the YDPA. A tribunal was appointed pursuant to Article 125 of the Federal Constitution to determine whether he was guilty or otherwise of the said charges. Tun Salleh took the position that the very constitution of the Tribunal was illegal. He refused to recognise the legitimacy of the Tribunal. Nonetheless, his fate rested in their hands.

An application was filed in the High Court seeking an interim order to prevent the tribunal from submitting its report to the YDPA. That application was refused. The application was then renewed and the Supreme Court heard that application. Unanimously, the Supreme Court comprising Wan Suleiman Pawan Teh, George Seah, Azmi Kamaruddin, Eusoffe Abdoolcader and Wan Hamzah SCJJ granted an order restraining the Tribunal from submitting any recommendations, report or advice to the YDPA until further order.

That restraining order, despite being served on the Tribunal was ignored. The Tribunal continued with its hearing, notwithstanding Tun Salleh's absence. The five Supreme Court judges who heard Tun Salleh's application were also suspended on the same day. The restraining order obtained by Tun Salleh was also set aside. It was held that the order was made without jurisdiction and that the Tribunal was only an investigative body and not a deciding body; restraining it would have the effect of restraining the YDPA from receiving the Tribunal's report. The Tribunal completed its deliberations on 7 July 1988.

On 6 August 1988, Tun Salleh was removed from office with pension rights, on the recommendation of the Tribunal. On record, the Tribunal reported that Tun Salleh was found guilty of the five charges, one of which related to his letter to the YDPA.

Tun Salleh's ignominious removal was redressed to some extent in 2008 when the government finally made an ex gratia payment to Tun Salleh for his contributions to the judiciary. That was a moral victory for Tun Salleh.

In the course of narrating these events, Tun Salleh appeared calm and collected, while he reminisced. His memory is remarkable as he could recollect minutiae in relation to that period. He spoke with spirit and vigour, very much the dignified and composed man of letters and the law, who had once helmed the Judiciary.

He attributed his ability to rise above those difficult times to his strong conviction in the law, his conscience and religious belief, coupled with great support from his family.

Tun Salleh was born to humble origins on 25 August 1929 in Kampung Raja, Besut, Terengganu. His father, Haji Abas was a sailor-cum-village trader while his mother, Hajjah Wan Tijah was a homemaker. Tun Salleh is the third-born of seven siblings.

Although he was born and brought up in relatively straitened circumstances, Tun Salleh Abbas was always a persistent seeker of knowledge. He sought and absorbed both divine and academic knowledge avidly. After spending some time in a Malay medium school (Sekolah Melayu Kampung Raja, Besut), Tun Salleh went to an English school in Kuala Terengganu, the Sultan Sulaiman English School. Tun Salleh learnt the Arabic language and Islamic studies at a religious school in his hometown.

At a relatively young age, his scholastic aptitude was already apparent. His English school headmaster, one Mr Machado, recognised his considerable potential. He motivated Tun Salleh to continue with his studies, as Tun Salleh was minded at the time to stop studying and start working in order to earn money for his family. Mr Machado assisted Tun Salleh obtain funding from the Terengganu state government for his monthly expenses. His confidence in Tun Salleh was borne out by Tun Salleh's examination results in the Senior Cambridge Examination in 1948, where he obtained a Grade 1.

A doting son and brother, Tun Salleh joined the public service immediately after graduating from the Sultan Sulaiman English School to help support his family. Tun Salleh was initially a clerk before he was accepted as an administrative officer in Terengganu. He was then appointed Assistant District Officer in 1949 until 1950.

It was during his tenure in the public service that Tun Salleh was offered a scholarship from the Sultan of

Tun Salleh in his full academic regalia on his obtaining the Bachelor of Laws degree from the University of Aberystwyth, Wales

Terengganu to further his studies in England. It was something that had never crossed his mind, and he was initially uncertain. However, he summoned up his courage to brave the unknown, and flew across the seas to read law at the University of Aberystwyth, Wales. Upon his graduation with a Bachelor of Laws Degree with Honours in 1954, Tun Salleh was called to the Bar at the Middle Temple, in 1955.

Tun Salleh returned to Malaya in 1957 and joined the judicial and legal services. He began his legal career as a Magistrate in Kota Bharu. Soon after independence, he was transferred to Kuala Lumpur where he served as a Deputy Public Prosecutor. While he was at the Attorney General's Chambers (AGC), Tun Salleh further studied and obtained his master's degree in International and Constitutional Law from the University of London in 1960. Upon returning home, Tun Salleh continued to serve in the AGC, as among others, State Legal Adviser, President of the Sessions Court, Legal Advisor, Senior Federal Counsel and Parliamentary Draftsman. The position that Tun Salleh held the longest was as Solicitor-General from the year 1966 to 1979. It was then also the highest position in the Judicial and Legal Service.

Tun Salleh in his younger days, seen with his colleagues at the University of Aberystwyth, Wales

Tun Salleh leading the Malaysian Delegation in an international negotiation held in Vienna, Austria when helming the post of Solicitor General

In 1979, Tun Salleh was appointed directly to the Federal Court. The appointment was unprecedented, the first of its kind in the history of the Malaysian judiciary. He was then appointed the Chief Judge of Malaya in 1983. On 3 February 1984, he was made Lord President of the Supreme Court of Malaysia. On his remarkable ascent to the highest position in the Judiciary, Tunku Abdul Rahman Putra Al-Haj commented:

> "A man does not climb that long ladder to the pinnacle of our judicial system without proving himself every inch of the way to be upright, and extremely fastidious about his honour. His integrity must have been proven again and again in his judicial actions, his private life and all his work in the public domain. Any man who was any less than that could not have even approached that position which, by its very nature, presupposes character of the greatest probity and rectitude. The very act of appointing such a man means that he is beyond reproach."

During those times, Tun Salleh did not confine himself to solely serve in the judiciary. He took the liberty to teach at the University of Malaya from 1964 to 1967 as a part time lecturer, teaching constitutional law to the students at the History Department. He was also an external examiner for the faculty of law at the University of Malaya and the National University of Singapore.

For his many accomplishments and contributions to the law and academia, Tun Salleh was conferred honours by both local and foreign universities, namely a Doctorate in Letters by Universiti Putra Malaysia and University of Malaya, a fellowship from the University of Harvard in 1971, a fellowship from the East-West Center, Honolulu, Hawaii in 1979 and a fellowship from his alma mater, the University of Wales in 1989. He was also appointed a visiting Professor of the University of Monash and the University of Melbourne, Australia.

Tun Salleh Abas seated fourth from right with the Federal Court and High Court Judges.
Tun Salleh marks history when he was appointed directly to the Federal Court in 1979 subsequent to him holding the Solicitor General post.

Tun Salleh sitting 5th from the right next to the Yang di-Pertuan Agong,
Sultan Haji Ahmad Shah Al-Musta'in Billah ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al-Mu'azzam Shah
at the official opening ceremony of the Supreme Court 26 March 1984

On the conferment of "Darjah Panglima Mangku Negara" to Tun Salleh by Sultan Haji Ahmad Shah Al-Musta'in Billah ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al-Mu'azzam Shah, the seventh Yang di-Pertuan Agong of Malaysia on 1 June 1983

Tun Salleh's judgments are often cited as landmark authorities and constitute a major contribution to Malaysian jurisprudence. His judgments showcased his judicial independence accompanied by legal clarity and intellectual analysis, as may be noted in his judgment concurring with the majority in *Mamat bin Daud & Ors v Government of Malaysia*[3] and *Government of Malaysia v Lim Kit Siang*.[4] His judgment in *Che Omar bin Che Soh v Public Prosecutor*;[5] *Public Prosecutor v Rajappan*;[6] *Public Prosecutor v Zainuddin & Anor*;[7] as well as his dissenting judgment in *Malaysian Bar & Anor v Government of Malaysia*[8] and *Public Prosecutor v Dato' Yap Peng*[9] equally reflect his legal expertise.

His concept of the role of the court is beautifully recorded in *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad*[10] as follows:

> "When we speak of government it must be remembered that this comprises three branches, namely, the legislature, executive and the judiciary. The Courts have a constitutional function to perform and they are the guardian of the constitution within the terms and structure of the constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review - a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of Judges over legislators but of the constitution over both. The Courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated, then it will be seen that the Courts have a duty to perform in accordance with the oath taken by Judges to uphold the constitution and act within the provisions of and in accordance with the law."

Tun Salleh looking resolute in full Court dress. A bewigged judge is to lend anonymity to the judge, this tradition however was dispensed with in 1990

3 [1988] 1 MLJ 119.
4 [1988] 2 MLJ 12.
5 [1988] 2 MLJ 55.
6 [1986] 1 MLJ 152.
7 [1986] 2 MLJ 100.
8 [1987] 2 MLJ 165.
9 [1987] 2 MLJ 311.
10 [1987] CLJ Rep 168; [1987] 1 MLJ 383.

In matters relating to the Constitution, the court during Tun Salleh's time was acknowledged as an activist constitutional court.[11] His legal prowess and love of the law remain undiminished, despite his age, as Tun Salleh still appears in the courts, largely the appellate courts, to defend a variety of clients. In his spare time, Tun Salleh gardens, farms and travels.

When asked about his physical stamina and health, he advised that while there is no secret to a long life, nutrition is important. He eats in strict moderation and exercises discipline in all aspects of his life. Importantly, he emphasizes strengthening one's spiritual needs and obligations. He maintained that his peace of mind and dedication are attributable to his attention to his religious obligations.

Tun Salleh summarised his most important life lesson as recognizing and accepting that trials and tribulations are inevitable – albeit in different forms and immensity. It is strength and patience that are most important in enduring life's challenges.

11 Emeritus Professor Datuk Dr Hj Shad Saleem Faruqi, "Thirtieth Anniversary of the 1988 Judicial Crisis: Lessons about the Importance of Judicial Independence and Impartiality" 5th Raja Aziz Addruse Memorial Lecture.

Live Excerpts from the Interview

Q: Tun Salleh, what first piqued your interest in the law?

A: Well, it was the Sultan of Terengganu who gave me the scholarship to study in England. In the first place I never thought of going to England. The very interesting thing is, when I went to England, I did not go in a normal way. In those days, there was a Korean War. A lot of British soldiers and aircraft were coming from Korea, the southern area. So, in order to go to England, the British Advisor of Terengganu at that time placed me as a passenger on one of those trips to the United Kingdom. You know, the planes were very slow in those days. It is not like today in 12 hours you can reach London. In those days, it took one week to get to London, stopping practically at many places, because you cannot fly at night. You only fly during the day and the day is getting shorter as you go west.

Q: So, when you received the scholarship, had you already decided to study law?

A: The British advisor in Terengganu at that time wanted me to study public administration. So, I went to UK on the basis of a scholarship in public administration. But when I got to the UK, I had to report to the colonial office. The colonial office looked after all the students from the Commonwealth countries then, or the British empire, as it was then described. So I went to the colonial office where I was asked what I wanted to study. So I told them, I wanted to study law. I was fortunate that there was a place available for law in Wales, at the University of Aberystwyth. So I was sent to a *kampung*. The journey from London, from Paddington station to Wales at that time took one whole day. You left at 8 o'clock in the morning, and you arrived there at 5 in the evening.

Q: Leaving the village of Besut in Terengganu to England must have been daunting. How did you adjust to living in a foreign land?

A: Let me tell you a very strange thing. The first thing that I wanted to do was to go back to the *kampung* because everything was so strange. I had a problem recognizing European faces. They looked all alike to me you know. I could only distinguish between them after a long time. And then the other thing, the lectures were in English and the English people, they speak very fast. So I had difficulty following them but I made it up with the textbooks. Alhamdulillah with all the difficulties, I managed to get through the first term, the second term, the third term and 3 years later, I managed to obtain my LLB.

Q: Do you still practice Tun? How do you feel when submitting before the court given that you were once the Lord President?

A: Well, I am at ease as a lawyer because I am there as an advocate. In any event, it is a profession and I am there to fulfil my duty as such. Just one thing, when you go to court, you have to be well prepared. You must know your case at your fingertips. So when the judges ask you a question, you should be able to answer in great detail.

Q: What do you like doing these days?

A: My mind is still lucid but my body is slow. I spend time watching television. I like to watch documentary films, things that occur in other parts of the world, Africa, China, Aljazeera news. Aljazeera is very instructive, and Palestine...Apart from that I don't do very much. *Duduk diam saja.* I cannot do much exercise anymore.

Q: Tun, can we go back to the events of 1988. Now that 32 years have lapsed how do you feel about the entire incident?

A: Now, so many years have passed, I do not feel as strongly as I did then. That incident was very serious. It affected the judiciary very seriously. Our judiciary in those days, at that time our judiciary was the best, east of India. India has a very good judiciary. It has the Supreme Court and I think we came second after that. And only then Hong Kong. Hong Kong came after us. And we were among the best. I was very proud of our Judiciary then. But now I do not know. You yourself know it. *Boleh timbang lah*, can evaluate it. Many lawyers whom I met said the judiciary is not as it was when you were there...When I appear in court, the lawyers treat me with great respect. They like to take pictures with me, especially the young lawyers, the ladies.

Q: Why was Malaysia ranked second after India at that time?

A: In those days, it was. Now, I don't know. My greatest misfortune was that I did everything and I believed that nothing would happen to me when I did. The first thing I did was cutting off the relationship with the Privy Council. In those days, our appeals went to the Privy Council. The judges there are members of the House of Lords in London. That was my misfortune. That worked against me. After my dismissal, I was invited by Lord Ackner to give a speech at London University. It was very well attended. So Lord Ackner said to me, if Malaysia had not cut off its relationship with the Privy Council, you would not have been dismissed. Lord Ackner was a member of the House of Lords.

Q: How did you handle the situation after your removal?

A: After my removal, I felt that I became more religious. Only God helped me. No other persons. I studied more about religion, Islamic Law and I also became a chairman in one of the mosques here. A beautiful mosque at Jalan Damai, opposite a Chinese school. That was how I am. I figured this just as a passing incident. *Tidaklah ambil berat sangat. Yang beratnya hubungan kita dengan Allah Taala. Itu yang mustahak. Kalau kita ingat, sayang kepada dunia, sayang kepada kerja kita, sayang kepada pangkat kita, boleh jadi gila. Itu dia. Tapi Alhamdulillah, saya terpelihara dari penyakit itu. Saya tidak ingat apa pun, nothing. It is just history, takda benda...The effect of the incident on me, I takda apa pun. My late wife was a very understanding woman. Bukan dia kaki nak menonjol-nonjol pun. But she can easily make friends with people. She was an uneducated woman but she went very far, to the highest level dia boleh pergi, dengan sesiapa pun, that was the quality of my late wife.*

Tun Salleh Abas with his late wife Toh Puan Hjh. Azimah bt. Hj. Ali when he was bestowed with the title "Dato' Paduka Mahkota Terengganu" by Al-Marhum Tuanku Ismail Nasiruddin Shah ibni Al-Marhum Sultan Zainal Abidin, the fourth Yang di-Pertuan Agong and also the Sultan of Terengganu.

Q: How was your family's acceptance? Your children?

A: I don't think they are concerned about it. I never discussed it with them, with my children. At that time, I was staying in government quarters that were very well furnished. It was at Jalan Conlay that used to be the centre of arbitration. There was a huge area at the back of the house which I utilized as a farming place. I *pelihara itik, ayam, pagi-pagi telur itik merata. Lepas tu,* the moment I got the letter I was dismissed, I *tinggal semua apa*

yang hak kerajaan I *tinggal, satu sudu pun I tak ambil. Tinggal semua and then balik rumah my sister kat sini Jalan Damai. Pada masa itu, Jalan Damai tu* was being rented to Australian embassy. I *cakap dengan* Australian embassy that I need a house very badly. They were very understanding. So, what happened was, they gave up the house to me and they found another house for their staff. I *baliklah rumah tu, duduk lah di situ dalam setahun lebih juga lepas tu balik Terengganu, rumah sendiri di Bukit Payong. Di Terengganu I ada pokok rambutan, pokok durian, ada pelihara itik, pelihara ayam, ayam hutan.*

Q: What are your future hopes for the Malaysian Judiciary?

A: Well, I hope the Malaysian judiciary will do well and one day be well recognized, may not be throughout the world, but part of this world, meaning Malaysia, Hong Kong, and East Asia. Maybe Malaysian law is different from the law of other countries but if people believe there is justice to be done and easy to get justice here, then people will come here. People will come and embody in their contract the application of Malaysian law that in any dispute to be decided by the Malaysian court, or decided in accordance with Malaysian law. That would be good for the country.

And of judges. You cannot separate judges, and lawyers and the law. Judges are the great authority. The personality of a judge, he carries the law with him, isn't it? If the judge does not know the law, MasyaAllah, may God help him. It is part and parcel of the judges' personality, embodied in the law itself, *barulah jadi, kata orang, berpalut.*

And one thing I just say for this purpose, it will be better if judges write judgments because it is through written judgments that the law is developed further and further, not only studied by the lawyers but also by the academicians as well. From there, you know the strength of the law. I suggest that they write.

Picture taken in Justice Nallini Pathmanathan's chambers, Palace of Justice.
Tun Salleh with Chief Justice Tengku Maimun Tuan Mat and the editorial team of the Yearbook 2019.
Standing (L-R): Mdm. Natlrah Tun Salleh, Justice Azizul Azmi Adnan, Justice Mohd Zawawi Salleh, Justice Nallini Pathmanathan, Justice Rhodzariah Bujang, Justice Vernon Ong Lam Kiat, Justice Ravinthran Paramaguru.
Sitting (L-R): Chief Justice Tengku Maimun Tuan Mat, Tun Salleh Abas, Toh Puan Wan Junaidah Wan Jusoh

Chief Justice Tengku Maimun Tuan Mat in a conversation with Tun Salleh during the High Tea held to commemorate Tun Salleh as the Special Feature in the 2019 Yearbook

Tun Salleh at his home after the interview with his family and the members of the editorial committee. (L-R): Ainna, Wan Aima, Dr. Iriane, Tun Salleh, wife Toh Puan Wan Junaidah Wan Jusoh and daughter Mdm. Natlrah Tun Salleh

An Interview with Tan Sri Datuk Zainun Ali, Former Judge of the Federal Court

by Ng Siew Wee and Saif Bhatti

Q: Traditionally, judges are perceived to be reclusive. You however, have been complimented as being very accessible – ie someone who maintains an excellent relationship with extra-judicial entities while at the same time maintaining judicial decorum. What is your view on this and what do you consider to be the ideal character of a judge?

A: The Holy Grail for judges has always been silence and circumspection. But the dark hues of aloofness lose their shading in this day and age when every news story or sound bite is immediate and loud.

The paradox is the judicial role calls for reserve and yet our lives are in the public eye.

Modern judges are not remote and stuffy. Rightly so as there is a seismic change in how the public perceives judges. It is important for the latter to put their pulse on the heartbeat of the public. Be detached if one must but not completely so. Judges must live in their time. If they insist on existing in splendid isolation, they will lose touch and cannot get to grips with reality.

Our lives are very much an open book. Judges do not court public controversy, even while we are called upon to adjudicate on matters of controversy. Yet the proceedings are held in open court, the court records are public documents and our particulars are sometimes covered in the public forum. As judges, we have to submit to this inveterate rule of "open justice".

I eased into this mode of engaging with stakeholders rather easily because I am accustomed to interacting with a varied spectrum of people when I was legal adviser in various Ministries and Chief Registrar of the Federal Court before being appointed to the Bench. Thus my world view of the judicial system is tempered by concerns raised by the people around me.

In fact in my job as Registrar of Companies, legal adviser to Ministries and Chief Registrar of the Federal Court, I suppose I had that intuitive flash of understanding which enkindles a connection between people and the knack to deal with them, individually or collectively. This comes from years of having to manage wilful officers, pompous officials and temperamental judges. As the Chief Registrar, I required a multitude of skills to countenance the different dynamics. I did wonder sometimes, whether some of them could see the not so subtle difference between having a "judicial temperament" and being "judicially temperamental".

In that connection, the question of what makes an ideal judge assumes great significance.

In my view, the overarching ideal attribute of a judge encompasses the discipline of integrity. Integrity is the bedrock of our existence as judges. Judges have to perform vital and often difficult functions. In most cases, they have to face up to powerful interests. Yet they have to soldier on despite the volley of opposition. This is why it is essential that judges have integrity.

To understand all these, one must go back to first principles. If you recall the works of great philosophers such as Rosseau in The Social Contract, John Locke in his Second Treatise on Government and the more recent A Theory of Justice by John Rawls, you will see an undeniable theory that human society is basically a cooperative compact among its members, undertaken for mutual benefit.

Thus judicial integrity is bound up in the larger issues of governance. This can only work if the judge enjoys judicial independence and accountability. He will know that his independence depends on two important criteria: first, his moral and intellectual

(L-R): Tan Sri Zainun Ali (then Chief Registrar of the Federal Court) with Tan Sri Aziah Ali (then Registrar of the High Court of Malaya and now retired Federal Court Judge) and Tan Sri Anuar Zainal Abidin (the then Chief Judge of Malaya)

calibre and secondly the trust and faith the public has in him – this is because the power of judges is held for the benefit of the community; and the necessary conduct of judges is that which will maintain the community's trust.

Public support is crucial to courts. Judges are there to give dispassionate decisions, uninfluenced by the strong forces that can rise and swell and then retreat again in popular opinion. Since judges serve the community of citizens, it is important for judges to be aware of changing moral, social, technological values in the community and in a general sense, to keep up with the times.

The judiciary is in the unique position of being the conscience of the nation. We uphold the Constitution, the rule of law and due process in our duty in interposing between the rich and the poor, the mighty and the weak, the citizen and the State.

It is important for us to understand that judicial independence is not a luxury. It is essential and is a constitutional imperative. Hence it is critical for judges to set great store by understanding the concept of judgeship. In other words, judges should continually engage in introspection and ask what does it take to make our time on the Bench worthwhile? Do we have the wherewithal?

Following this, the next element of judgeship is crucial – that of giving reasons for your decision. Fairness requires that the parties (especially the losing party) should be left in no doubt why the case was decided the way it was. The process of reasoning must be manifested as clearly as is possible, so that all concerned may understand what principles and practice of law and logic are guiding the courts, so that full publicity may be achieved. This will also protect the judge from insidious accusations of bias and improbity.

The giving of reasons also allows and encourages the judge to utilise his writing skills. He will visualise his audience (the litigants and lawyers) who will read his judgments, including the bystander who wants to know what the case is all about; the judge will then formulate his judgment accordingly. It is surely exciting that you have the full range of your understanding, knowledge and intellect in shaping the judgments which are yours and yours alone to fashion as you will.

Judicial conduct on or off the Bench has been intensely debated in various forums. Let us begin with judicial conduct in court. This is bound up with the issue of judicial appointments, since the person of the judge, the manner with which he decides his cases and so on, fall back on the question of who we appoint as judges. The Judicial Appointments Commission ("JAC") understands only too well the ultimate value of appointing suitable judicial candidates. The principal beneficiary of judicial competence is not the judges themselves, but society as a whole. So, all things being equal, I am sure one of the imperatives is that the judge is possessed of integrity, intellect, impartiality and courage – which to my mind are supreme judicial virtues.

In the same sphere, judges should be brave to speak up in a dissenting voice in a given case, even when the majority overwhelmingly stands its ground. Stand up and be counted if you believe in the correctness and truthfulness of the issues at hand. For otherwise, the abdication of the judicial function is plainly unwarranted and unacceptable.

There is another dimension of judgeship which calls for comment. It relates to how judges behave on the Bench.

In my view and this is personal – nothing negates judicial dignity more directly and visibly than judges and their conduct on the Bench, vis-à-vis counsel and litigants. Judges at whichever level, have no greater claim to bad behaviour than the people who appear before them since circumspection, courtesy and decorum in all things we do as judges should be observed. Even in the face of adversity.

In these present times when our judgments no longer command uncritical deference, it is important that we should guard our dignity and honour and to act responsibly. This also includes never to make inappropriate remarks about the judiciary after one has retired, as some judges are wont to do.

Scandalising our former brethren is bad behaviour indeed and speaks volumes about one's character, for it contradicts the hallmarks of distinction a judge should have attained. Surely judicial reticence is a small price to pay for our standing and prestige as one of His Majesty's judges. There is a lot to be said about maintaining solidarity within the profession (with members of the Bar, academics and the like), for otherwise the vulnerability of the Judicial Institution to bare.

(L-R): Tan Sri Zainun Ali (then Chief Registrar of the Federal Court) with Tun Eusoff Chin (the then Chief Justice of Malaysia) and Tuan Puat Nelson bin Hj. Mohamed Sam (then Special Officer to Tun Eusoff Chin)

The Yearbook Editorial Committee for the year 2012.
Standing (L-R): Justice Mah Weng Kwai (Court of Appeal Judge) and Justice Azahar Mohamed (then Court of Appeal Judge and now Chief Judge of Malaya)
Sitting (L-R): Justice Nallini Pathmanathan (then Court of Appeal Judge and now Federal Court Judge), Justice Zainun Ali (Federal Court Judge and Chairman of the Yearbook Editorial Committee), Justice Alizatul Khair Osman Khairuddin (then Court of Appeal Judge and now retired Federal Court Judge) and Justice Lim Yee Lan (then Court of Appeal Judge)

Thus pulling all these threads together, I am clear in my belief that these are some traits of what makes an ideal judge. I have faith in the importance of being earnest on the Bench.

Q: You were the Chief Editor of both the Yearbook and Journal of the Malaysian Judiciary ("JMJ"). What prompted you to lead these projects and why do you consider them important for the Judiciary?

A: The position as Editor of the Yearbook landed on me, quite by chance, if not by divine intervention! It was the year 2010. The then Chief Justice Tun Zaki Tun Azmi had just established the system of Managing Judges, where selected senior judges were assigned to assist him in the administration of the courts nationwide.

The then Chief Judge of Malaya, Tan Sri Arifin Zakaria (now Tun Arifin) wanted to assign me the position of Managing Judge for Johor. I was hesitant. Although I understood the importance of overcoming the backlog of cases, I felt that I can contribute towards the administration of justice in a different way. I demurred and so Tun Arifin asked to me think it over. The next day, my prayers were answered when the Chief Justice Tun Zaki in his Lordship's usual fashion wanted me to produce the 2010 Annual Report to be ready in under four months!

Despite the impossible deadline, I accepted the assignment gladly, grateful that Providence has spared me. In all I edited nine Annual Reports (which we later call the Yearbook) and two Journals of the Malaysian Judiciary.

To begin with, the 2010 Annual Report was a misnomer actually since Tun Zaki wanted an expansive, sprawling bumper of a book. He demonstrated to us the degree he would go to ensure that the vitality of the judiciary was captured and preserved. Tall order indeed! Thus, the Annual Report morphed and took on a life of its own – that we called it the Yearbook and for the first one we gave it the title "The Malaysian Judiciary: A Perspective".

The coming together of the editorial committee members was unique in its own way. It pulled us all up together into a tight knot – for we were really entangled in the web and weave of getting

the chapters in the Yearbook out of the way. Since none of us had any experience in publication, our efforts felt rather like describing a colour we have never seen!

The desire to get the correct answers takes on greater urgency, the blunt rejection of copies is wounding, the fragile sensibilities one has to deal with in engagements with various people to get our materials is distressing, the full bloom of problems of having to cope with the minutest of details are agonising. Also, the fact that there is no such thing as a "one size fits all" syndrome here is earth-shattering. The staggering amount of blank pages having to be filled is worrying, the endless search for photographs is mind boggling, the tension of making sure there is good writing for the chapters is unsparing. The list goes on.

As the change of pace quickens, we were delighted when the chapters came to life. With extraordinary dexterity, our team crafted and created a credible story of the judiciary – our history, our geography, our cases and our humanity. All were exquisitely illustrated in all their glory. The outcome was that it had a certain iridescence and the glow was reflected in the joy we felt.

The publication of our Yearbook gave us all an incredible impetus. We wanted to showcase our achievements, our successes and our triumphs. Even our failures too, for we believed in being guardians of judicial truths.

The Yearbook is therefore tangible evidence of our year's work as arbiters and dispensers of justice as it illustrates our time on or off the bench. It chronicles our past, demonstrates our present and portends our future.

The yearly policy statements by the top judges remain vital in themselves, for they set the tone for our judicial philosophy. They could also tell the reader at a glance, the physical state of the Malaysian Judiciary, because the statistics do not lie.

Since I wanted a more personal dimension to these publications, the committee agreed to introduce a chapter where judges' views are given pride of place. There is really nothing quite like having judges writing about their concerns, especially on problems they encounter in the hurly burly of the life they lead as judges.

The editorial committee felt that it was important that in chronicling the issues of judgeship, it is not just the contemporary issues that are to be realised. We felt the need to expand the scope and range of our narratives, since stories of the past are just as, if not more important than the present, for they impact our future. In this regard, the committee felt it was crucial to chronicle the lives and times of our judicial luminaries as we have done for our former Lord Presidents, Tun Thomson, Tun Azmi, His Highness Sultan Azlan Shah, Tun Suffian, to name some. They are our icons and national treasures.

This historical theme resonates with our philosophy of having judges and judicial officers being introduced to our rich past. In my view, it is critical that they imbibe a sense of our judicial history. The stitching together of our antecedents will also lead them and our readers to a deeper connection with the judicial system and a clearer understanding of the evolution of our jurisprudence.

The JMJ on the other hand, is a collection of articles by judges, both locally and abroad, academicians and lawyers, whose wide perspectives reflect our understanding and interpretation of the law. This expanded spectrum has validated our worth, for it provides interaction and opportunity for intellectual engagement with lawyers and judges outside of the Malaysian Judiciary. The diversity of perspectives alone is compelling. It allows debate and analysis and more importantly, recognition and understanding of our jurisprudence. Thus, it is important that we maintain the healthy flow of access and networking with other jurisdictions. Another aspect which is often overlooked is that this publication provides publicity for the talent we have. In my view, fundamental to maintaining and building confidence in our judiciary is publicising the work we do. That it is only through such publications that we are globally received and where other people will come to recognise our standing as judges. There is no reason why any of our judges cannot be a household name among the global legal fraternity. In this regard we need not be self-deprecating.

Justice Alizatul Khair Osman Khairuddin (then Court of Appeal Judge and now retired Federal Court Judge) with Justice Zainun Ali (then a Federal Court Judge) at a conference held by the International Association of Women Judges in Washington DC, United States of America in 2016

Associate Justice of the Supreme Court of the United States, Ruth Bader Ginsburg addressing women judges from all over the world at a conference held by the International Association of Women Judges in Washington DC, United States of America in 2016

As described by the legal luminary (the now late) Justice Ruth Bader Ginsburg, "for both men and women the first step in getting power is to become visible to others and then to put on an impressive show." I was so fortunate in having met the incredible Justice Ruth Bader Ginsburg when both Dato' Alizatul Khair (former Federal Court Judge) and I attended the International Women Judges' Conference in Washington in 2016.

As a matter of interest, several United States Supreme Court Justices generally graduated from elite law schools and most of them served as editors or worked in publication for their law reviews. Does not this say something? In my view, the judicial officers in the editorial committee get a heads-up for being involved in the Yearbook and JMJ's publication. They are ahead of the pack, so to speak, for they will learn the importance of discipline, infinite patience and teamwork. This will prepare them for the hard work which lies ahead as they rise up the rank.

Tenacity is actually built into the system in producing these publications. The openness and transparency of the Malaysian Judiciary as gracefully captured in these publications reflect the very qualities which is emblematic of our quest for accountability and integrity.

Q: As a person and Judge, you have a penchant for literature and art. This is apparent in the manner in which you wrote your judgments. In your view, what is the relationship between law and literature and what influence did that relationship have on you and your judicial philosophy?

A: I read all sorts of books and my pursuits can be random – ranging from books on art and philosophy, religion, love, nature, history and even architecture. They are instruments of self-exploration. Life is

complex enough as it were. So reading the classics and great works of literature will to a large extent, gradually expand one's mind, refine one's spirit and most importantly, prepare one for the duties of life.

Reading will introduce us to the best and to the worst of human nature. Plus, the beauty of words, the sound and fall of sentences, the author's voice emerging from the pages all go towards giving us one of life's lasting pleasures.

To begin with, law and literature or rather the symbiosis of these is not a new phenomenon. I have always thought that the nexus between the two is strong. Both disciplines have language as their mainstay. As our tool of trade, we need to familiarise ourselves with the intricacies, semantics, nuances and meanings of the written word. Or unwritten word, as the case may be. We need to master it, so that we can, in our daily life as lawyers especially, use them confidently and unflinchingly.

Both the disciplines of law and literature depend on narrative. The argument and internal logic are critical to both a work of fiction and a legal opinion. The education always starts by planting our young minds with the seeds of piety, the capacity to be inspired by noble ideas, the conception of right and wrong and good and evil. In fact to learn it is important to have strong clear lessons, with unambiguous moral points, for the end which will bring us into the fullest and roundest development of our powers as human beings.

Reading works of literature such as those by Alexander Dumas, Daniel Defoe, Evelyn Waugh, Honoré de Balzac, Henry Fielding, Charles Dickens, Stendhal, The Bronte Sisters, Jane Austen, George Eliot, Ernest Hemingway, Thomas Hardy, etc and enjoying the exquisite works and poems from Rumi to Rendra, Pablo Neruda to PB Shelly, Blake to Byron, Keats to Kafka for instance, will transport us to the joys and agonies of what it means to be human. Reading the classics, even lesser known works will lead to an independence of mind which will build up a solid knowledge and capacity for critical thinking.

How has reading all these great works influenced me and my judicial philosophy? By reading them, I feel I have truly understood that law and literature have a connection, whose total effect is greater than the sum of its parts for the legal issues I am faced with, assume a particular dimension. This is because in its sense, law deals with the great themes of human relationships which are played out daily in our courts and in our work. In other words, law deals with life itself. The various permutations and combinations of the human condition, emotions and fact patterns or matrix (as it is so fondly referred to by us), would all, sooner or later, become entangled in the law.

Thus in my view, the art of judging is not so much about deciding a case but one in which a judge should keep his faculties keen, tempered by the moderating principles of equity and discretion, learnt as it were from great works of literature with its encompassing humanity.

Q: What is your personal view on the status of women empowerment in Malaysia and what role do you think the law and the Judiciary can play to eradicate gender inequality?

A: I will have to say this – that women are often disbelieved, simply because they are women. Although I find this difficult to accept, it is a truth almost universally acknowledged. A large number of women have informed of their experiences where they have been routinely humiliated and patronised. Even 'enlightened' men, have been known to be condescending and pretended that women do not exist. This is what 'misogyny' looks like.

It does not help either that the common law itself in the case of *Longman v The Queen*[1] still requires judges to warn juries that considerable caution is required in any sexual complaint of acting on the word of the complainant alone. Since most sexual complainants are women, this would contribute to the impression that judges denigrate the evidence of female witnesses. Why is this so?

For millions of years, the culture of women being suppressed in the backrooms have been forged, played out in various tribes, peoples, religions and beliefs. It is clear that male chauvinism has had an ancient pedigree, I am afraid.

1 [1989] 168 CLR 79 at p 94.

Although it is acknowledged that men and women have different skills and biological attributes, countless cultural forces influence how men and women think and act. Each gender has its own range of abilities and each is a living archive of its distinctive past. Yet the prejudice of gender inequality remains steadfast, where women must constantly have to prove their worth, power and abilities. The rise of gender rhetoric has been increasingly strident and the deep distrust of women's abilities have remained unabated. We are seen as the bête-noire and men would only be too happy to assign us the same fate as Ophelia and say: "Get thee to a nunnery!"

I believe that if only the doors of bias are cleansed, everything would be finite. However, women are indefatigable. Women have run the show for ever – both at home and in the workplace. To multitask every day of their lives, women possess natural leadership skills. They are a dab hand at managing crisis and change, seamlessly. This is because women have good instincts and can neutralise any sense of danger well before it invades their path. Women understand survival and are not afraid to fight for what they believe in.

The best is yet to come. It is this. Generally, women do not allow their egos to stand in the way of good collaboration with their colleagues. Women just want to get things done and they enjoy the ability to influence positive outcomes with maximum impact.

Given the dynamics above, is it any wonder then that in the recent times the Government has at last recognised the value of empowering women? This shift in the basic assumption and the trust and recognition given to women by placing them in key positions in the government and private sectors, is phenomenal.

There is no doubt about the advantages a society enjoys by empowering women. At last, women are given a voice – to speak up and share their vision of leadership.

In the few months that have seen the unprecedented appointment of women in top strategic and key positions in this country, the legal and business world have begun to feel the positive impact of women's leadership skills.

Yet it is said that the issue of gender inequality will not go away. However, it is not likely to simply roll over and play dead either. So it is up to us to manage, manoeuvre and manipulate this conundrum. I am not too sure how much the law can play a role in eliminating this tiresome issue. Even if the statute books are packed to the rafters with provisions favourable to women (and even children), the problem lies in their execution and implementation which harks back to attitudes, mind sets and cultural dogmatisms.

The question as to how we can eliminate gender inequality is still up in the air. Just two decades ago, we lamented the yawning gap of gender diversity in the Judiciary. We wondered why the large pool of talented women lawyers have not produced a pipeline to power for women in the Judiciary. We questioned what does it take to move women from minority to parity?

To begin with, the exercise of judicial power is ensconced in powerful cultural norms of masculinity. I believe it was no accident that a few decades ago, women were excluded from the Superior Courts 'club' in Malaysia. Those were the 'bad' old days, when we just had one female judge in the entire galaxy of male ones.

As I see it, the championing of a gender diverse bench began unobtrusively enough. We were in luck. Our recent few Chief Justices – starting from Tun Fairuz, Tun Dzaiddin, Tun Zaki, Tun Arifin, Tun Raus and Tan Sri Richard were all "Renaissance Men". There was a sort of policy meltdown in the appointment of women to the Bench. These Chief Justices considered merit selection as the most important component to the judicial route.

It can, if we are sincere in wanting it to happen. It will help greatly if we have our own fearless trailblazer in the form of Justice Ruth Bader Ginsburg (RBG) whose abiding commitment to civility, to institutional norms, to the possibilities of cooperation and conversations, to promote equality and stem discrimination is strong. We should be able to have our own Women's Rights Project such as the Malaysian Civil Liberties Union.

If there was that lone palm tree representing women in the Superior Courts in the past, there is now a whole avenue! We have flourished in spectacular fashion, culminating in the appointment of the first woman Chief Justice in the Malaysian Judiciary. This is indeed phenomenal and historical in equal measure. The tribute to women has indeed come full circle.

Speaking the truth, our truth is perhaps the most powerful tool women have as judges. Women's perception of the law and the of the judiciary itself may be different. It may be less patriarchal and complacent. When judges take 'ownership' of their cases and understand justice and fair play and their connections, there is a good chance that the Judiciary can help blunt the sharp edges of gender inequality.

For it is a truism that women judges and leaders are almost always inclusive, for they are linked. Not ranked. By deciding sensibly, women judges engender respect and their presence will change the dynamics of the Bench. I have no doubt that women judges and leaders will bring a cutting-edge confidence wherever they are and create a positive milieu in which they operate. In so doing, these women will earn the respect and regard of others and hopefully the biases that have long plagued womanhood will eventually dissipate and disappear altogether.

Q: What has life been like for you, post-retirement from the Bench? You are the Chairman of Malaysia Airport Holdings Berhad and a board member of Permodalan Nasional Berhad. These roles are so vastly different from your previous role. How do you manage?

A: Life in the corporate sector? If I can be frank, I am like a cat on a hot tin roof! I know that sounds dramatic, but it is not far from the truth. Life in the corporate sector is life in the fast lane – of market hazards, ruthless governance, fearsome regulators, finicky stakeholders, sharp businesses, formidable operators – all things that are anathema to order and method, discipline and decorum one is accustomed to, in the courtroom. But the essence is, both dimensions require certain attributes that are similar; ie, passion for the work that you do and immense courage.

I had just then retired after having served decades in the Service and the Bench, where I could feel the burden of being overbooked and overscheduled. Thus my post retirement plans were visions of tranquillity of culture and leisure.

Right after retirement I went on a much needed holiday to Japan. But perfect evenings seemed too perfect to last. As I was drifting along in the wake of a scurrying geisha in Kyoto, I was brought down to earth by a persistent phone call.

Fast forward, here I am, appointed as a board member of the Permodalan Nasional Berhad (PNB) and Chairman of Malaysia Airports Holdings Berhad (MAHB). These are two of the country's most critical establishments, whose standing and prestige are second to none.

There is no turning back though, since it is a privilege to be asked to serve one's country, if in a totally different capacity.

I had some experience in corporate law as I was Registrar of Companies for some years and chaired the NCC panel when it was first established in the Court of Appeal. So you could say that I am not a complete novice. However nothing prepared me for the huge difference between hearing corporate cases in the still of the courtroom and the deafening sounds they make in the real world outside.

It must be said at the outset that both the companies (PNB and MAHB) are gilt-edged. They are different, yet similar. Both companies serve the public. PNB's investments and issues are linear, clear and uncomplicated, whereas MAHB's issues are organic and have an intensity all of its own – for the airport is a front-liner in every respect. The issues at the airport are almost always moving parts and going by the sheer number, a high degree of vigilance is called for, since security, safety and lives of people are critical and assume greater magnitude.

Contextually it is imperative to put in place what it takes for MAHB to manage the airports. There are 39 airports to mind, plus one in Istanbul which is wholly owned by us. We also operate the systems network at Hamad International Airport in Doha. With 10,000 employees, shareholders, stakeholders, retailers, encompassing operations,

airlines, security, etc, life at Malaysia Airports can be devilishly difficult or supremely sublime, whichever way one looks at it.

As to your question on how I manage – my answer to that is that leadership is never an easy thing. In fact leadership is a creative discipline and it varies from one organisation to another. In my view, leadership is an art form which requires immense patience, dedication and passion. Much like being a judge. In that sense I am not completely out of my depth.

A leader just as an artist will reflect a view on how to lead and what one can do differently to improve, I am sure you know that works of art are notoriously unfinished; just where one work stops, the next begins – more vibrant, more penetrating and bolder.

What it boils down to is that leadership is about common sense, how you deal with people and balance the need of the company and the need of the work force. In much the same way as a judge, these are important criteria too. The character of the judge, as that of a leader is important. They encompass basic traits of compassion, humour, humility, sincerity and integrity.

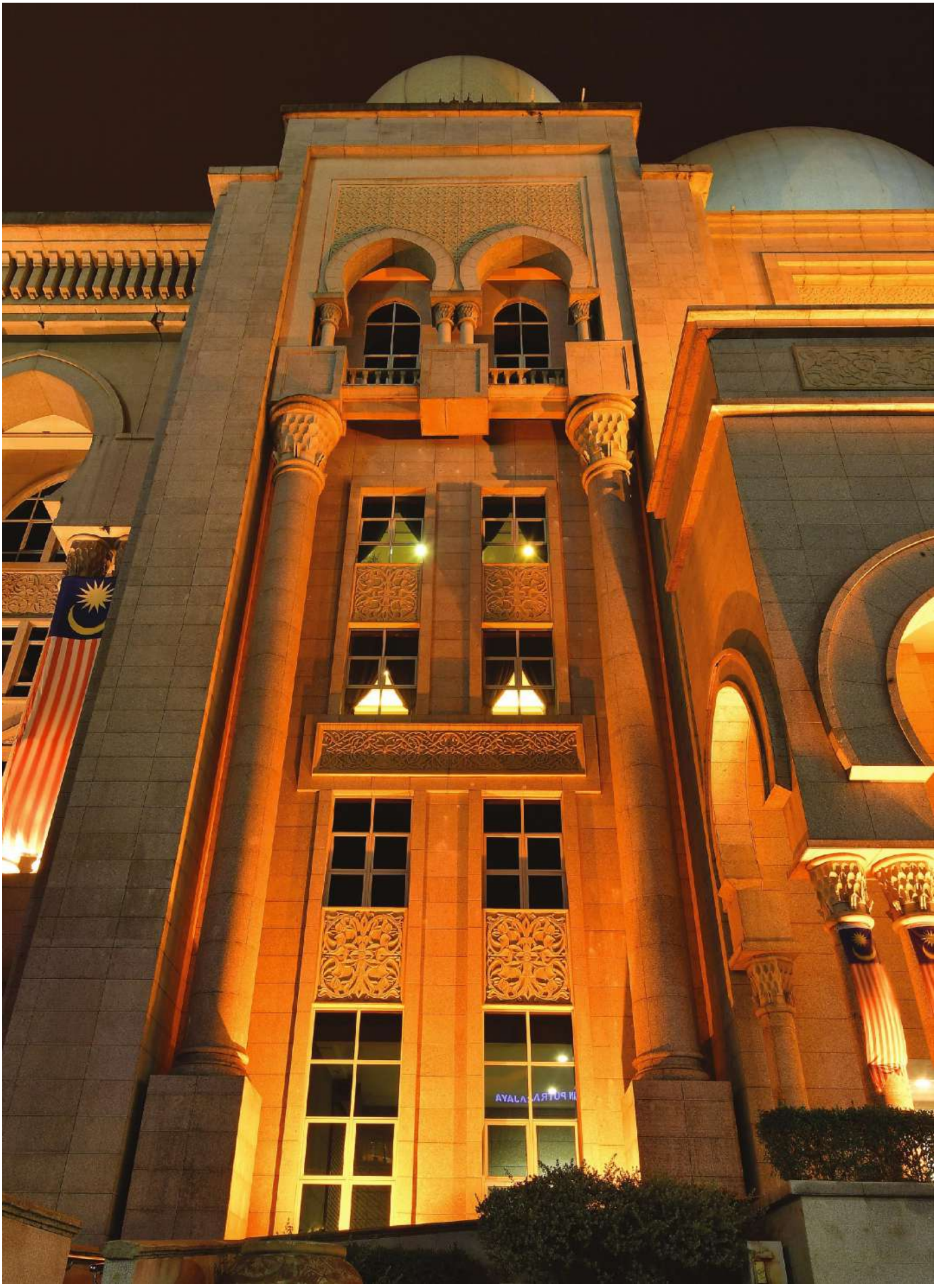
Collectively, these attributes make great leadership possible or in their absence, difficult. Their presence does not assure excellence in leadership, but it does set the range of potential. I shall be ruthless here that by saying the above, I am saying that what it means is that some people will never excel at leadership because their character will not allow them to develop fully or to execute actions with nuance, intelligence and sensitivity. In other words, it is important for leaders to accept feedback from others and to acknowledge their employees' efforts. These are important to learning and spurring motivation which is critical to leadership development and execution.

How this philosophy applies to business is important. We have to have results. Just as on the Bench where we need to deliver justice, as a Director and Chairman of these two companies, we need to deliver results and profits. And we must be aware that the workforce and stakeholders depend on us. In looking at you as a leader, they expect more of you than what is apparent or implied by your job description or title, no matter how lofty your title may sound.

These employees must live with the successes or failures of your work as a leader. To me, it matters a great deal how well you do it, because they will later look at the evidence and make their own findings as to whether the director or chairman label you have, should be duly honoured or forfeited. There is really no escaping the profound responsibility that comes with leadership – as it is with judgeship. So yes, the Bench and the corporate sector may be different in space and dimension but what matters most is your personality and the value you bring to each.

In the end, it is the expectation of those who count on you to practise your art well, that matters.

Tan Sri Zainun Ali leading the Board of Directors of Malaysia Airports Holdings Berhad in her capacity as Chairman of the Board



CHAPTER 9 JUDICIAL INSIGHTS

LITTLE WOMEN, NO MORE?

by
Justice Noorin Badaruddin

I raise my voice - not so I can shout, but so that those without a voice can be heard... we cannot succeed when half of us are held back.

-Malala Yousafzai

[1] Women's contribution to society at large can no longer be underestimated. Women are key to driving growth and sustainability. In the Malaysian judiciary landscape, in May 2019, the country received its tenth Chief Justice, Tun Tengku Maimun Tuan Mat, the first woman to ascend to the highest judicial office of the country. In December 2019, history was created again with the top two posts in the judiciary being held by female judges with the elevation of Tan Sri Rohana Yusuf as the President of the Court of Appeal. The appointments are indeed a recognition of the critical role played by women in the administration of justice. By now, the society understands that women's mindsets, behaviours, conversations and actions have impacted the larger society. It can no longer be gainsaid to be just a female thing.

[2] The first International Women's Day celebrated on March 8 every year was first held in the form of a gathering in 1911.[1] The gathering was stated to have been supported by over a million people. International Women's Day celebrates the social, economic, cultural and political achievements of women with the main objective of accelerating women's equality.

1 International Women's Day, retrieved from <https://www.internationalwomensday.com/>.

[3] On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") was adopted by the United Nations General Assembly. It came into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions. The Convention was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights. The Commission's work has been instrumental in bringing to light all the areas in which women are denied equality with men. These efforts for the advancement of women have resulted in several declarations and conventions, of which CEDAW is central and stated to be the most comprehensive document.[2]

[4] Malaysia is a signatory to CEDAW and ratified it in 1995 with certain reservations. The ratification is seen to be a watershed for the advancement of women in the country. Six years later, Malaysia decided to review the provision in the Federal Constitution on discrimination. In 2001, after submissions from *inter alia* SUHAKAM and Women NGOs, the government decided to amend Article 8(2) of the Federal Constitution by including gender as a basis for non-discrimination. Article 8(2) of the Federal Constitution provides:

> **Equality**
> 8. (1) ...
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment

[5] The word "gender" was added to Article 8(2) by the Constitution (Amendment) (No.2) Act 2001 (Act A1130), which came into force on September 28, 2001.

[6] The two defining events i.e. the ratification of CEDAW and the amendment to Article 8(2) of the Federal Constitution provide the constitutional human rights safeguards that the women of Malaysia had been struggling for. However, it is stated that the battle is yet to be over because the ratification of CEDAW and the Article 8(2) amendment meant that several laws and enactments in the country need to be brought in line with these two instruments.[3]

[7] Article 1 of CEDAW defines "discrimination against women" as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

2 Women's Aid Organisation (WAO) and the Joint Action Group for Gender Equality (JAG), *NGO Shadow Report: The Status of Women's Human Rights: 24 Years of CEDAW in Malaysia*, (2019).

3 Ibid.

[8] Article 11(1)(b) of CEDAW provides that state parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to the same employment opportunity, including the application of the same criteria for selection in matters of employment.[4]

[9] In Article 11(2) (a) of CEDAW,[5] it provides that State Parties shall take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the grounds *inter alia*, of pregnancy.

[10] CEDAW focuses on three main areas of women rights:

i. Civil rights and the legal status of women (including the right to vote, to hold public office, and right to non-discrimination in education and employment).
ii. Reproductive rights (including shared responsibility for child-rearing by both sexes and right to maternity protection and childcare and right to reproductive choice).
iii. Cultural factors influencing gender relations (including need to modify traditional roles of women and men in the family and society to eliminate gender bias; and the need to remove gender stereotypes from school programmes, textbooks and teaching methods).

[11] Some of the positive measures taken by the Malaysian government since its 2006 review by the CEDAW Committed include:[6]

i. Amendments to the Penal Code to increase the penalties for offence relating to rape and incest in 2006;
ii. Introduction of the Anti-Trafficking in Persons Act 2007, and subsequent amendments (as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act of 2007) in 2010 and 2015;
iii. Amendments to the Domestic Violence Act of 1994 to widen the definition of domestic violence to include emotional, mental and psychological forms of violence in 2011, and amendments to improve protection for survivors of abuse in 2017;
iv. Amendments to the Employment Act of 1955 to prohibit sexual harassment in the workplace and to extend maternity leave benefits for all women employees in 2012;
v. Ratification of the Convention on the Rights of Persons with Disabilities in 2010; the Optional Protocol to the Convention on the Rights of the Child on the involvement of children armed conflict in 2012; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2012.

[12] According to the Shadow Report on "The Status of Women's Human Rights: 24 years of CEDAW in Malaysia" prepared and coordinated by the Women's Aid Organisation ("WAO") and the Joint Action Group for Gender Equality ("JAG") (this report was prepared for submission to the CEDAW committee in anticipation of Malaysia's review during the Committee's 69th session to Geneva in February 2018

4 Article 11 CEDAW:
1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
(a) The right to work as an inalienable right of all human beings;
(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining,including apprenticeships, advanced vocational training and recurrent training;
(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

5 Article 11(2)(a) CEDAW:
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:
(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discriminatons in dismissals on the basis of marital status.

6 Supra, n 2.

highlighting critical issues related to women's human rights and Malaysia's implementation of its obligations, with corresponding recommendations) the central issue is that Malaysian government has not incorporated the CEDAW Convention into national law. The report further states that there is no gender equality legislation in place providing for the comprehensive realization of substantive equality of women with men in both public and private spheres of life. According to the Shadow Report, it is at the core the lack of a framework for equality and non-discrimination in Malaysia that continues to impact negatively on women's lives. The NGO Shadow Report highlighted these material effects, which include:

- Continued under-representation of women in politics and decision-making position and the lack of success of plans attempting to address this;
- Low women's labour force participation rate;
- Lack of labour rights afforded to migrant domestic workers and their continued vulnerability to abuse;
- Non-recognition of refugees' legal status;
- Legal permissibility of child marriage;
- Moral policing;
- Lack of comprehensive, rights-based sex education;
- Difficulty women face in accessing their reproductive right to decide to have a child and to access high quality services;
- Continued non-recognition of marital rape;
- Ongoing arrests, harassment and violence against trans women; and
- Lack of uniform implementation of laws protecting against violence against women, both online and offline

[13] In the Shadow Report three decisions of the Malaysian Superior Courts were mentioned.

[14] In the case of *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor*,[7] Beatrice (the appellant) was an employee to Malaysian Airlines System (the respondent) as a Grade B flight stewardess. The collective agreement dated 3 May 1998 governed her terms and conditions of service. Article 2(3) of the First Schedule to the collective agreement requires all stewardesses (in the same category as Beatrice) to resign upon becoming pregnant. The first respondent shall have the right to terminate her services in the event if she refuses to resign. The appellant refused to resign when she became pregnant and was terminated by the respondent. In the High Court it was submitted that the provisions of the collective agreement were discriminatory in nature and therefore contravened Article 8 of the Federal Constitution rendering the collective agreement void. The High Court dismissed her application. By the time the appellant's case was heard before the Court of Appeal, the constitutional amendment prohibiting gender discrimination had been passed. The decision of the High Court was upheld by the Court of Appeal. The appellant then applied for leave to appeal to the Federal Court.

[15] Five issues of law were raised before the Federal Court as follows:

(a) whether Article 8 of the Federal Constitution is applicable to terms and conditions of a collective agreement between an employer and a trade union recognised by the Industrial Court where the terms and conditions are discriminatory in nature;
(b) whether paragraph (3) of clause 2 and clause 14 in the First Schedule to the collective agreement dated May 3, 1988 between the first respondent and the second respondent is in violation of Article 8 of the Federal Constitution which protects against discrimination;
(c) whether paragraph (3) of clause 2 and clause 14 in the First Schedule of the collective agreement dated May 3, 1988 is ultra vires the provisions of the Employment Act 1955;
(d) whether Article 5 of the Federal Constitution and the Employment Act 1955 guarantees the applicant the right to work and the right for continued employment during her pregnancy and to the enjoyment benefits of a female employee;
(e) whether the United Nations Convention on the Elimination of all Forms of Discrimination against Women 1979 is applicable to the terms and conditions of a collective agreement between the employer and a trade union which is recognised by the Industrial Court where terms and conditions are discriminatory in nature.

7 [2005] 2 CLJ 713.

[16] The Federal Court found that it is simply not possible to expand the scope of Article 8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke Article 8 of the Federal Constitution, the Federal Court was of the view that the applicant must show that some law or action of the executive discriminates against her so as to controvert her rights under the said Article. The Federal Court stated that Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. The Federal Court was of the view that constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the Federal Court stated that the reference to the 'law' in Article 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen. The Federal Court also observed that the job requirements of flight stewardesses are quite different from that of women in other occupations including the other categories of women employees in the same collective agreement. According to the Federal Court, there are occupational benefits peculiar to the job which are not available in other occupations. The Federal Court was of the view that there were special conditions applicable peculiarly in this occupation, which the first respondent as the employer was entitled to impose. The Federal Court further stated that it was not difficult to understand why airlines cannot have pregnant stewardesses working like other pregnant women employees. The Court took judicial notice that the nature of the job requires flight stewardesses to work long hours and often flying across different time zones. The stewardesses were observed to have to do much walking on board flying aircraft and that it is certainly not a conducive place for pregnant women to be. The collective agreement requires the resignation, or termination in the event of refusal to resign, if a stewardess becomes pregnant and it was the finding of the Court that this was a lawful contract between private parties. According to the Court, there is no definite special clause in the collective agreement that discriminates against the applicant for any reason which will justify judicial intervention. The Federal Court was of the view that in construing Article 8 of the Federal Constitution, the Court's hands are tied. The equal protection in clause (1) of Article 8 thereof extends only to persons in the same class. It recognises that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. The Court stated that regardless of how it tried to interpret Article 8 of the Federal Constitution, it could only come to the conclusion that there was obviously no contravention.

[17] It was the Court's view that the applicant chose to join the first respondent as a flight stewardess and agreed to be bound by the collective agreement. The Federal Court was of the further view that it would have been different if she had joined the first respondent as a member of its administrative staff. The Federal Court was of the further view that the applicant cannot compare herself with the ground staff or with the senior chief stewardesses or chief stewardesses as they were not employed in the same category of work. It was further found that the collective agreement was obviously not an "agreement to negotiate". It was an agreement binding on all women who agreed to be employed as flight stewardesses working for the first respondent. The Court stated that while working for the first respondent, the appellant would no doubt had enjoyed all the benefits accrued under the collective agreement. It was further stated that regardless of how the Court's view and review Article 8 of the Federal Constitution, it could only come to the same conclusion as the courts below that the collective agreement does not in any way contravene the Federal Constitution.

[18] Leave to appeal was refused by the Court. The Federal Court however did not address the issue on the applicability of CEDAW.

[19] Seven years later, in *Noorfadillla binti Ahmad Saikin v Chayed bin Basirun and Ors*,[8] the plaintiff therein had applied to the Education office to be employed as an untrained teacher, also known as *Guru Sandaran Tidak Terlatih* ("GSTT"). GSTT is a step taken by the Ministry of Education ("Ministry") to overcome the problem of shortage of teachers in Malaysia by employing untrained teachers. The employment of GSTT

8 [2012] 1 CLJ 769.

is temporary in nature, on a month to month basis with monthly allowance. At the time the plaintiff reported at the school where she was placed, she admitted that she was three months pregnant when asked during a briefing session. Her placement was later withdrawn. Upon the plaintiff's inquiry as to the reasons of her placement withdrawal, the Ministry, relying upon the circular stating that a pregnant woman cannot be employed to the GSTT post further stated *inter alia* that:

i. The period between the time of delivery to full health is too long (two months);
ii. A pregnant woman as a GSTT may not frequently be able to attend to her job due to various health reasons;
iii. When she gives birth, she needs to be replaced by a new teacher who will require further briefings;
iv. A GSTT post cannot be filled with 'replacement' teachers.

[20] In addition, the Ministry stated that the purpose of employing a GSTT is to help overcome the shortage of teachers and not to add to the problem.

[21] The main issue before the Court was whether the action/directive of the defendants in refusing to allow pregnant woman to be employed as GSTT is gender discrimination in violation of Article 8(2) of the Federal Constitution.

[22] In interpreting Article 8(2) of the Federal Constitution, the learned High Court Judge in that case was of the opinion that it is the court's duty to take into account the Government commitment and obligation to an international level especially under an international convention, like CEDAW, to which Malaysia is a party. The learned High Court Judge stated further that the court has no choice but to refer to CEDAW in clarifying the term "equality" and gender discrimination under Article 8(2) of the Federal Constitution. The Court further held that the principle of reasonable classification is only applicable to Article 8(1), which provides that all persons are equal before the law and entitled to the equal protection of the law, and does not apply to Article 8(2) of the Federal Constitution.

[23] The High Court's decision in *Noorfadillla*[9] was lauded upon by the NGO. However, according to the Shadow Report, the positive impact of *Noorfadilla*[10] in which the Court found that her termination based on pregnancy constituted discrimination was diminished when the Government appealed and the High Court's initial award of RM300,000 was subsequently reduced to RM30,000 to prevent profiteering.[11] The Shadow Report commented the reduction of the initial award had undermined what appeared to be the judiciary's commitment to implement CEDAW and eliminate discrimination against women. The Shadow Report further stated that although Article 8(2) of the Federal Constitution was amended in 2001 to include gender as a prohibited ground for discrimination, that was not accompanied by a comprehensive review of all laws, including provisions within the Federal Constitution which is said to continue to be discriminatory.

[24] Barely two years later, in *Air Asia Berhad v Rafizah Shima binti Mohamed Aris*,[12] where the appellant terminated a trainee due to her pregnancy, the Court of Appeal found that Article 8(2) of the Federal Constitution had not been violated. In that case the respondent was an employee of the appellant. On October 19, 2006, the respondent was chosen to undergo an Engineering Training Programme. The respondent executed an agreement known as "Training Agreement and Bond" ("Agreement"). A material term in the Agreement was that the respondent must not get pregnant during the duration of the training period. The training period was approximately four years from the effective date. Effective date was when the respondent first attended the training course. The relevant clause reads as follows:

9 Ibid.
10 Ibid.
11 Supra, n 2.
12 [2014] 5 MLJ 318.

Clause 5.1
It is a fundamental term and condition of the Agreement that none of the following events or circumstances shall occur after execution of this Agreement. The occurrence of any of the following events and circumstances shall constitute a repudiatory of the Agreement

(4) (This clause is only applicable to female Engineering Trainee) when Engineering Trainee gets pregnant during the course.

[25] In the month of June 2010, the respondent's pregnancy was disclosed. Since she was expected to deliver at the end of 2010, she wanted to continue with her training. However, by a letter dated 1 July 2010, the Agreement and the employment of the respondent were terminated. At the hearing of the Originating Summons ("OS") in the High Court, the respondent had elected to rely on Articles 8 and 11 of the Federal Constitution and CEDAW.

[26] In the Court of Appeal, on behalf of the appellant, it was submitted that the learned High Court Judge fell into serious error when she failed to apply the principle decided in the *Beatrice*[13] case to the respondent's OS. It was the contention of the learned counsel that the parties in the respondent's OS are private parties and as such, the provisions of the Federal Constitution had no application. According to the learned counsel, constitutional law as a branch of public law only addresses the contravention of an individual's rights by a public authority. It was argued that, however, when the rights of a private individual are infringed by another private individual, constitutional law will take no recognisance of it. It is not in dispute that appellant is a private limited liability company.

[27] Learned counsel for the appellant further submitted that the learned judge erred in relying on the decision of the High Court in *Noorfadilla's*[14] case which held that the provisions of CEDAW are binding on Malaysia and the same procured the amendment to the Federal Constitution with the introduction of the word "gender" in Article 8(2) of the Federal Constitution.

[28] In reply, learned counsel for the respondent submitted that the respondent was seeking a declaratory relief under the Specific Relief Act 1950 (Act 137), *inter alia*, to declare that clause 5.1(4) of the Agreement was void/illegal because it contravened Articles 8 and 11 of the Federal Constitution and CEDAW. It was the contention of learned counsel for the respondent that what the respondent was seeking was an individual remedy and not constitutional remedy.

[29] Learned counsel for the respondent further submitted that the decision in *Beatrice's*[15] case could be distinguished on the following grounds:

(i) *Beatrice's*[16] case placed reliance on a view expressed by Dr. Durga Das Basu in his book, "Comparative Constitutional Law". The court must be guarded against simply applying part of decisions from courts of other jurisdictions and adopting the same as part of our written law. It is clearly evident that Article 8(1) or (2) of the Federal Constitution does not make any reference to "State", unlike the Indian Constitution;

(ii) *Beatrice's*[17] case was decided without taking into account the amendment to the Federal Constitution wherein the word "gender" was added to Article 8(2) by the Federal Constitution (Amendment) (No.2) Act 2001 (Act A1130) which came into force on the 28 September 2001; and

13 Supra, n 7.
14 Supra, n 8.
15 Supra, n 7.
16 Ibid.
17 Ibid.

(iii) *Beatrice's*[18] case was different from the present case in that as an engineering trainee, the respondent is not required to work long hours (depending on the flight schedules) and she was not required to fly in different time zones and required much walking in a tight narrow alley in the flight as she was a ground crew and more importantly, as an engineering trainee, she could work until delivery, unlike a flight stewardess.

[30] It was the Court of Appeal's view that the interpretation accorded by *Beatrice's*[19] case on the constitutional effect is called "vertical effect" which essentially stipulates that constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority and as such since *Beatrice's*[20] case was a decision of the highest Court in the land, it must be followed.

[31] The Court of Appeal was of the considered view that CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation. On the international law and local law aspects the Court of Appeal had the followings to say:

[38] In theoretical terms, the application of international legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism).

[39] According to the doctrine of incorporation, international law is simply two components of single body of knowledge called 'law'. 'Law' is seen as a single entity of which 'international' and 'municipal' versions are merely particular manifestation. A judge can declare a municipal law invalid if it contradicts an international law because, in some States, the latter is said to prevail.

[40] The doctrine of transformation, on the other hand, holds that the two systems of law, international law and municipal law, are completely separate. A rule of international law can only become part of municipal law if and when it is transformed into municipal law by the passing of local legislation. (See Dinah Shelton (ed), "International Law in Domestic Legal System: Incorporation, Transformation and Persuasion" (Oxford University Press, 2011); Brownlie, I, "Principles of International Law," 3rd edn, London, 1996, Chapter 4).

[41] The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the Executive possesses the treaty-making capacity while the power to give effect domestically rests with Parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by Parliament.

[42] The Federal Constitution of Malaysia contains no express provision with regards to the status of international law, or indeed any mention of international law at all. It does, however, contain certain provisions dealing with 'treaty-making capacity' in Malaysia.

[43] The combined effect of art. 74(1) and the 'Federal List' in Ninth Schedule to the Constitution is that the Federal Parliament has exclusive power to make laws relating to external affairs and relations with other countries (including through treaties, agreements and conventions), as well as the power to implement treaties, agreements and conventions. With regard to the Executive power of the Federation, art. 39 provides that it shall be vested in 'the Yang di-Pertuan Agong and exercisable... by him or by the Cabinet or by any Minister authorised by the Cabinet'. Since art. 80 ensures that the Executive authority of the Federation extends to all matters with respect to which Parliament may make laws, this means that the Cabinet or its authorised Minister is effectively vested with the power to do all acts necessary for negotiating, making, signing and ratifying treaties and other agreements entered into with other countries.

[44] When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia, legislation passed by Parliament is a must. This is despite suggestions that there may be some treaties which could be implemented locally without any necessity for the introduction of a statute. (See Heliliah Haji Yusof, "Internal Application of International Law in Malaysia and Singapore ", [1969] Singapore Law Review, 62-71 at p. 65). In other words, even though the Executive has ratified a treaty and the treaty binds the Government under international law, it has no legal effect domestically unless the legislature passes a law to give effect to that treaty.

18 Ibid.
19 Ibid.
20 Ibid.

[32] The Court of Appeal was of the considered view that in Malaysia, unless a treaty is domesticated, it cannot be enforced. In other words, without express incorporation into domestic law by an act of Parliament following ratification of CEDAW, the provisions of the international obligations in the said Convention do not have any binding effect. Ratification alone does not make the provisions of treaties applicable for municipal law.

[33] Following the decisions, the Shadow Report recorded that the efficacy of Article 8(2) in protecting against gender discrimination has been limited by the courts' interpretation that Article 8(2) does not apply to discrimination by private actors. According to the Shadow Report further, this distinction between state and private actors hampers the full enjoyment of women's rights.[21]

[34] The Courts could not be gainsaid to have erred or somehow limited the efficacy of protecting women against discrimination by its interpretation of the law. It is of the considered view that the interpretation of Article 8(2) of the Federal Constitution by the Court of Appeal in *Air Asia Berhad v Rafizah Shima binti Mohamed Aris*[22] is valid as that is the correct position of the law. The Court's interpretation must be exercised in terms of the existing provision of the law and in this instant, the Federal Constitution. The Court cannot exercise its power or jurisdiction dehors the statutory law. The inclusion of gender discrimination in Article 8(2) of the Federal Constitution, can safely be said to transcend both female and male in their appointment to any office or employment under a public authority. The fact that only "public authority" is stated in the provision of Article 8(2) of the Federal Constitution, it does not cover acts or omissions of private actors. Therefore, if indeed the rights of women against discrimination in terms of employment is lacking in the private sectors, perhaps, the government can be requested to fully implement its duty of due diligence when it comes to acts and omissions of private actors. The amendment to Article 8(2) must be accompanied by a comprehensive review of all laws and again, perhaps, within the Federal Constitution itself.

[35] Discrimination against women continues to be debated and many opine that gender equality is a faltering quest in Malaysia in our constitutional democracy. Legal provisions are legislated but whether they are sufficiently significant to counter the prevalent opinion of bias and oppression on women in this country remain to be questioned and argued. As it is, discrimination itself is yet to be defined under the law. On the other hand, the concept of equality could also mean more than treating all persons in the same way.

[36] Undoubtedly, gender bias is still deeply embedded in cultures, economies, political and social institutions around the world. Women and girls face unacceptable levels of discrimination and abuse, which prevent them from playing a full part in society and decision-making.[23] Around the globe, discrimination against women persists.[24] Certain forms of discrimination against women remain widespread. In many countries, women are still barred from fully contributing to social and economic life. Women, principally in the male-dominated fields are still battling harassment, discrimination and bullying in various forms.[25]

[37] In many countries like Malaysia for instance, women are achieving equality in many areas. Yet, it is also said that progress of gender equality and equity in economic and professional opportunity have yet to be seen fully achieved both in the public as well as the private sectors.[26] Women are consistently trailing men in economic resources and other formal labour force participation.[27] Therefore, empowering women is the key to social transformation. It becomes necessary to sustain development of a society. It also enhances both the quality and quantity of human resources available for development of a nation.[28]

21 Supra, n 2.

22 Supra, n 12.

23 Jenny Hawley, International Institute for Environment and Development, – "Why Women's Empowerment is Essential for Sustainable Development", <https://www.iied.org/why-womens-empowerment-essential-for-sustainable-development>, (accessed February 2, 2016).

24 The Organisation for Economic Co-operation and Development (OECD), Final Report to the Ministerial Council Meeting 2012: Gender Equality in Education, Employment and Entrepreneurship. Retrieved from <https://www.oecd.org/employment/50423364.pdf>.

25 Ibid.

26 Supra, n 23.

27 Supra, n 24.

28 Press statement: Malay Mail 2 April 2020 by Academy of Medicine Malaysia (AMM).

[38] The impressive work already done by the CEDAW committee as the women's human rights monitoring body may well come to a focal point to address not only social but must also include legal issues involving women in their pursuit of achieving substantive equality. Substantive equality requires consideration to be given to the ways in which the different roles and position of men and women in society, generally known as gender, impact upon women's ability to claim and enjoy their human rights. There must be monitoring, through measurable indicators, the impact of laws, policies and action plans and to evaluate progress achieved towards the practical realization of women's substantive equality with men.[29] Efforts must be directed towards addressing the situational imbalances to achieve equal treatments in unequal scenarios. Gender equality is not only moral but a legal imperative. It is the right thing to do. Malaysia is therefore obliged to ensure that there will be no more discriminatory laws or practices against women as well as in society at large.[30] Respect and responsibility must stand among pillars of leadership both in organization and in the home as a woman's value goes beyond servitude to another.[31]

29 Azerbaijan, Concluding Comments of The Committee on CEDAW, 37th Session, held from 15 January to 2 February 2007. Retrieved from <https:// https://www.un.org/womenwatch/daw/cedaw/37sess.htm/>.

30 Supra, n 2.

31 Press statement:Malay Mail 2April 2020 by Academy of Medicine Malaysia (AMM).

AN INTRODUCTION TO SPORTS ARBITRATION

by
Justice Mohd Firuz Jaffril

[1] The pervasiveness of sporting endeavours and activities in modern life has meant that sports is now no longer seen in the traditional sense, as merely a recreational activity or pastime or simply a means to attain a healthy lifestyle. In the case of Malaysia, it forms the bedrock of the nation's dream to achieve the ever elusive first Olympic gold medal. Unsurprisingly, sports in its truest form is synonymous with personal sacrifices—often with sweat, blood and tears, where athletes trained for hundreds of hours and where guts and glory collides. Against all this, one must not forget that sports is a billion dollar industry not only generating and spawning a multitude of businesses in the likes of broadcasting, sponsorship and merchandising but also providing employment to not only the professional sportsmen and women but hundreds of thousands of people all over the world.

[2] Some sports such as football or soccer as Americans call it with names like Cristiano Ronaldo, Neymar de Silva Santos Junior and Lionel Messi, golf with Tiger Woods and cricket with Sachin Tendulkar and Shane Waugh are billion dollar industries even on their own.

[3] In February 2020, the province of Wuhan, China saw the birth of the New Corona Virus Pandemic which resulted in a lockdown of the city of Hubei and other surrounding districts for 40 days. In March 2020, the spill over of the virus from Wuhan spread throughout Asia, Europe and North America causing a lockdown of almost all major cities in the world. The net effect of the lockdown caused the closure of

all non-essential services which included the business of sports ranging from all major football league including the EPL, La Liga, Serie A just to name a few, the prestigious NBA (the most lucrative basketball league in the world), the NHL (the richest ice hockey league in the world), Major League Baseball and the major professional golf tours ranging from the PGA Tour, European Tour and the Asian Tour, which provides employment and entertainment to hundreds of thousands of people all over the world. This led not to sports on cable TV being limited to re-runs only but also salary cuts and loss of employment.

[4] The sheer size and pervasiveness of the multi billion dollar business that is sports means that it is important to attain a working understanding of the legal infrastructure that underpins the industry.

I. Introduction

[5] There is no single statute that can be effectively called sports law.[1] As of today, most sport structures tend to be incorporated as private law companies. In England for example, the Football Association Limited is a company limited by shares and incorporated as early as 23 June 1903. Many sports clubs in England are constituted as either public or private share companies, such as Manchester United Limited and Newcastle United Plc. The idea of going incorporated is to stress its commercial and profit-oriented nature.

[6] With sports becoming a huge business and evolving into a separate and distinct industry, naturally a distinct body of statutory and case law involving sports developed alongside the general body of law.[2] Hence, sports have evolved and developed into distinct characteristics and structures as well as an idiosyncratic culture.[3]

[7] As sports has the capacity to motivate vast populations that is nothing less than fabulous, it naturally exercises a powerful attraction on those who would use its charms for their own interest. The craving for power, political influence and money transform the heart inside the business suit with a force as primal as that of the dreams of triumph. In other words, the realm of sport has been transformed into a precious and desired commodity or even to a larger extent – into a different beast. Hence, there is a need for proper structure and mechanism to regulate and promote this dynamic change of the phenomenon.

[8] The pressure on professionalism in sports has called for the need to regularise this industry which is witnessing a phenomenal growth from the last century. However, the task to regularise this industry is not an easy one as the application of law to the sports sector is complex, demanding and controversial because sports has some peculiarities which distinguishes it from regular businesses. The market conditions under which sports operate often differ from other industries, since sports and the related organisations have a vested interest in the strength and survival of their rivals.

[9] Albeit the dearth of statutory legislation on sports law, disputes involving sports have always been determined using the basic principle of fairness whereby there is always a winning and losing party involved. In any sports, there are basic rules that need to be observed and athlete etiquette that needs to be complied with. Failure to adhere these specific rules (some are obscure in nature) will result in dissatisfaction and sometimes end up in dispute. Where disputes are a subject to the courts, the courts are confronted with the difficult task of considering the peculiarities of sports and the complexity to draw a distinction between the sporting and economic aspects of sports. Hence, a proper avenue to deal with any issue relating to sports law should be made available.

1 Zaidi Hassim, *An Introduction to Sports Law in Malaysia: Legal Guide for Sportspersons and Sports Administrators*, (Malayan Law Journal, 2005).

2 Li, M., Hofacre, S., and Mahony, DF., *Economics of Sport*, (Morgantown, Fitness Information Technology Inc, 2001).

3 Lewis, Adam and Taylor, Jonathan., *Sport: Law and Practice*, 2nd edn (Tottel Publishing, 2002).

II. International Mechanism of Sports Arbitration

[10] The concept of sports arbitration can be traced back to early as the 1980s. At the beginning of the 1980s, the regular increase in the number of international sports-related disputes and the absence of any independent authority specialising in sports-related problems and authorised to pronounce binding decisions led the top sports organisations to reflect on the question of sports dispute resolution.[4] In 1981, after being appointed as the President of International Olympic Committee ("IOC"), Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction. The following year, Samaranch together with Judge Keba Mbaye (an IOC member and judge on the International Court of Justice) started a working group to prepare the statutes for "Court of Arbitration for Sport" ("CAS").[5]

[11] The idea of creating an arbitral jurisdiction devoted to resolve disputes directly or indirectly related to sport was finally launched in 1984. Aside from setting up such an arbitral institution to meet the need to create a specialised authority capable of settling international disputes, this venue also offered a flexible, quick and inexpensive procedure for any sports dispute. CAS is an independent body and separate from IOC which received affirmation by the Swiss Federal Tribunal in 2003. CAS is being recognised as the 'true Supreme Court in the world sport' and offered all the guarantees of independent and impartiality to be regarded as a real court of arbitration, whose awards are comparable to the judgement of a state court.[6]

[12] Before we go further in depth, one should know that the idea of arbitration is derived from Alternative Dispute Resolution ("ADR") process. ADR relates to the methodology and concepts used for dispute resolution such as Arbitration, Mediation, Conciliation, and Adjudication. The notion of arbitration can be defined as a way in which a dispute is settled by a third person. All arbitrators are required to remain impartial and independent. These following treaties such as the United Nations Commission on International Trade Law ("UNCITRAL"), the International Chamber of Commerce ("ICC") and the London Court of International Arbitration ("LCIA") lay down the rules of emphasizing the importance of impartial and independent arbitrators.[7]

[13] As the fame of sport continues to bloom globally, litigation among athletes, coaches, corporate sponsors, broadcast networks, the International Federation, the National Bodies, International Olympic Committee has also increased exponentially.[8] Thus, the need for a judicial mechanism to settle the increase in disputes pushed for the establishment of a specialised international body specifically designed to resolve international sports disputes through arbitration.[9] The establishment and development of the CAS has provided an effective mechanism for resolving Olympic and international sports disputes in an expert and internationally coherent manner, thereby largely avoiding the problems of inconsistent rulings by national courts unfamiliar with international sports association governance and rules.[10]

[14] CAS generally provides four separate and diverse dispute resolution services which are ordinary arbitration, appeals arbitration, ad hoc expedited arbitration at major sporting events and mediation. The dispute may only be submitted to the CAS if there is an arbitration agreement between the parties which specifies recourse to the CAS.

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4 Retrieved from <https://www.tas-cas.org/en/general-information/history-of-the-cas.html/>.

5 Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *The Court of Arbitration for Sport (1984-2004)*, 1st edn (ASSER Press, 2006) at p 31-39.

6 Tribunal Federal [TF] [Swiss Federal Tribunal], *Arrets du Tribunal Fdddral Suisse [ATF] 129 III 445* (May 27, 2003), translated into English in Matthieu Reeb, *Digest of CAS Awards III*, (2001-2003) 688 545 (2004). 6. Court of Arbitration.

7 The UNCITRAL (United Nations Commission on International Trade Law), the ICC (International Chamber of Commerce), and the LCIA (London Court of International Arbitration) are the three most widely accepted international arbitration rule making bodies.

8 Adam Samuel & Richard Gearhart, "Sporting Arbitration and the International Olympic Committee's Court of Arbitration for Sport"(1989) 6 J. INT'L ARB. 39.

9 Jan Paulsson, "Arbitration of International Sports Disputes" (1993) 9 ARB. INT'L 359 at p 364.

10 Matthew J. Mitten, "Sports Law: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution" (2010) 85 TUL. L. REv. 269 at p 292.

[15] The disputes resolved by the CAS are extremely diverse in nature and can vary between straightforward commercial disputes, from a sporting context, to very sport-specific disputes concerning actions or incidents arising on the field of play. There are two types of dispute that may be submitted to the CAS – the first being of a commercial nature and the second, of a disciplinary nature.

[16] For the first type of dispute which is commercial in nature, it usually arises from the execution of a contract such as relating to sponsorship, the sale of television rights, the staging of sports events, player transfers and relations between players or coaches and clubs. The most common cases before the CAS are appeals from decisions of FIFA, the world governing body for football, which has its own internal judicial system. This type of dispute typically arises from the termination of the employment contracts of players or coaches or the movement of players between clubs. As a consequence of such movement, remuneration is generally payable to the player's previous clubs, either pursuant to contractual agreements between the parties or according to the complex series of regulations that apply to football transfers, both in a national and international context.[11] Besides that, CAS also hears disputes relating to civil liability such as accidents to athletes during sports competitions.

[17] Meanwhile for the second type of dispute which is disciplinary in nature, the most common type of dispute before the CAS are appeals against disciplinary sanctions, the largest subsection being appeals against sanctions for anti-doping rule violations. CAS also hear various disciplinary cases such as violence on the field of play and abuse of a referee.

[18] The main distinct concept of sports arbitration is to be speedy in nature. The dispute must be resolved before a particular competition takes place save for instance Ad Hoc Rules for the Olympic Games. The arbitral awards should be issued within 24 hours of the lodging of the application for arbitration and the equivalent time limit for the FIFA World Cup is 48 hours. The prompt resolution of these disputes allows the competition to proceed on schedule and ensures the integrity of the final sporting results by avoiding retroactive appeals or protests to change sporting results.

[19] Secondly, sports arbitration has a special expertise. The presence of experienced arbitrators and counsel generally assists the arbitration process. Furthermore, it was held by the Swiss Supreme Court in *Lazutina's* case that the CAS arbitrators are specialists in the area of sports and thus able to issue fast and consistent decisions.[12]

[20] On top of that, the emergence of CAS has provided for greater consistency between legal decisions in the sports world and has created a body of case law (*lex sportiva*) upon which sports arbitration users can rely. One of the most interesting aspects of sports arbitration is that awards issued by an arbitral tribunal tend to be regarded as authoritative precedent by subsequent arbitral tribunals from the same sports arbitration institution. While sports arbitration awards are not binding legal precedents, previous awards are regarded as being of highly persuasive value, and as such, arbitral tribunals that deviate from an established line of 'jurisprudence' are generally expected to provide reasons for such a deviation in the text of their award.[13]

[21] The most essential advantage of sports arbitration is that the cost for referring the dispute is reasonable. As many athletes or players already feel significant pressure not to enter into a legal dispute with their employer or their sport's governing body especially athletes who are often entirely dependent upon government subsidies or minor sponsorship agreements, in view of the dominant position, sports arbitration is just a perfect place for settling their dispute. With respect to arbitration costs, the positive

11 See, for example, the FIFA Regulations on the Status and Transfer of Players.

12 Decision by the Swiss Supreme Court of 27 May 2003, reported in ATF 129 III 445, Larissa Lazutina & Olga Danilova v CIO, FIS & CAS, at para. 3.3.3.2, Yearbook Comm. Arb'n XXIX (2004), p. 206, 219. The complete original French text is reported in ASA Bull. 2003, p. 601 et seq.

13 Retrieved from <http://jurisprudence.tas-cas.org/sites/caselaw/help/home.aspx/>.

financial aspect for athletes related to arbitration costs concerns those athletes who are involved in "decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports body", commonly anti-doping cases. In such cases, article R65 of the CAS Code provides that no arbitration costs shall be paid by the parties.[14]

[22] Last but not least, the award given by sports arbitration are enforceable in nature and pursuant to the New York Convention.[15] On top of that, it is rarely necessary to pursue enforcing the award, as sports governing bodies spontaneously comply with arbitral awards and have sufficient internal authority and enforcement mechanisms to impose the awards against their members.[16]

[23] Other than CAS, there are many other international sports federations which have their own system of dispute resolution. They appoint tribunals for the resolution of disputes arising in their sport such as Basketball Arbitral Tribunal ("BAT"), which was set up by the world governing body for basketball ("FIBA").

[24] In a nutshell, arbitration is recognised as an extremely successful method of resolving sports disputes. This proven method of settling disputes has gained the favour and confidence of the sporting world. This favourable result has inevitably led to a massive growth in the number of sports arbitrations in recent years.

III. Sports Arbitration in Malaysia

[25] Having stated the position of sport arbitration in the international scene, I now come to the position in Malaysia.

[26] Prior to the independence of Malaysia in 1957, the general development in the sports law area was at a leisurely pace of the global development and based on the principles of natural justice.[17]

[27] The first statute related to sports in Malaysia, was the Merdeka Stadium Corporation Act 1963 (Act 433).[18] This Act was repealed by the Perbadanan Stadium Malaysia Act 2010 (Act 717) on 1 March 2011,[19] which introduced statutory provisions for the management and maintenance of the Merdeka Stadium, as the premier stadium in this country. The Act also covers the areas of sports, sportsmen and related activities that are carried out at the stadium.[20]

[28] Then, in 1971, the National Sports Council of Malaysia Act 1971 (Act 29) came into operation on 29 April 1971. This Act also provides some aspects of the management of sports in Malaysia[21] and was intended for matters connected with the National Sports Council of Malaysia such as to formulate a national policy on sports and to coordinate all government and non-governmental agencies, sports associations, sports councils, higher learning institutions, and volunteerism organisations.[22]

14 It should also be noted that even in cases where the parties are required to pay the arbitration costs, CAS arbitrators work for an hourly rate that is generally significantly less than their usual commercial rate.

15 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

16 The New York Convention plays an important role in excluding the jurisdiction of State courts to hear actions on the merits where there is a CAS arbitration agreement.

17 Supra, n 1.

18 Ibid.

19 Section 40 of the Perbadanan Stadium Malaysia Act 2010 (Act 717).

20 Ibid.

21 Supra, n 17, p 35.

22 See official website of the NSC, <http://enwww.nsc.gov.my/index.php>.

[29] Nevertheless, it should be noted that Act 29 gave more emphasis on the performance rather than legal governance for the development of sports in general, and specifically in the area of law. Ergo, areas such as professional sports, advertisements, sponsorship and other substantive law peculiar to sports were not trivial and there was no awareness regarding these issues at that point in time. For some time, no tangible action was taken to address this and despite the great strides made in sports law internationally, Malaysia remained oblivious to these changes and therefore tended to continue in its archaic ways of management. This resulted in some instances of miscarriage of justice and the continuing failure to recognise the need to address the situation caused stagnation in the development in many aspects of sports.[23]

[30] On the executive front, the responsibility for sports is entrusted to the Ministry of Youth and Sports which is also known as the regulator for all national governing sports bodies. These governing sports bodies are recognised as having a separate autonomous role only for the organisation of sports activity in a specifically competitive sense creating an evolutionary genesis like a pyramid structure for itself so as to create its own governance at the national level and to be able to belong to the assembly of international federations and to Olympic Council of Malaysia ("OCM"). The Constitution and by-laws in the real sense present the essential elements of organisation and regulation.

[31] On 1 January 1998, new legislation came into force namely Sports Development Act 1997 (Act 576). This act was enacted to promote and facilitate the development and administration of sports in Malaysia and to provide for matters incidental thereto.

[32] Section 8 of the Sports Development Act 1997 provides that OCM is recognised as the National Olympic Committee for Malaysia. OCM is responsible for ensuring that the participation of Malaysia in the Olympic Games, Asian Games, Commonwealth Games, South East Asian Games and other international athletics competitions in accordance with the rules and regulations of the International Olympic Committee, the Olympic Council of Asia, the Commonwealth Games Federation, the South East Asian Games Federation and other international sports bodies to which the Olympic Council of Malaysia is affiliated.[24] OCM being the mother of all sports bodies in Malaysia, has on record about 55 sports associations registered under the Ministry of Youth and Sports in 2014, ranging from Football Association of Malaysia ("FAM") to relative newcomers like the Malaysia Woodball Association.

[33] According to paragraph 5.13 of the OCM Constitution, it provides the object of OCM is to do all things necessary with regard to settling a dispute or disputes as between a Member and the OCM, or as between a Member and another Member, or as between a Member and its members. This provision basically gives OCM the power to control any dispute arising in the sports arena. Besides paragraph 5.13, paragraphs 5.14, 5.15 and Article 22 of the OCM Constitution are relevant. It should be highlighted that settlement reached through mediation or arbitration is final and cannot be appealed to the court for further adjudication.

[34] Article 22 of the said Constitution provides the procedure on how a dispute is to be handled. In the event that mediation fails, paragraph 22.3 provides that the unresolved dispute shall be referred either to the Minister of Youth and Sports where his decision shall be final in accordance with section 24 of Act 576 or to arbitration where the parties to the dispute shall agree and consent to abide by the KLRCA Sports Arbitration Rules.

[35] Any decision after the process of arbitration may be submitted exclusively by way of an appeal to the International Court of Arbitration for Sport ("ICAS") in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of Sports-Related Arbitration. The time limit for appeal is twenty-one (21) days after the reception of the decision concerning the appeal.[25]

23 Article by Azman Ujang. Retrieved from <https://www.bernama.com> (accessed on October 1, 2006).

24 Subsection 8(2) of the Sports Development Act 1997 (Act 576).

25 Article 22.6 of the OCM Constitution.

[36] Section 23 of Act 576 empowers the National Sports Bodies to resolve any dispute that arose among its members or with its committee in accordance with its internal procedure as prescribed in the regulations and constitution.

[37] Continuing from section 23 of Act 576, failure to resolve the dispute in accordance with the internal procedures, can be referred to the Sports Dispute Committee as provided in section 24. Any further appeal can be made to the Minister in accordance with subsection 24A(1) of the same Act. The decision of the Minister shall be final.[26]

[38] The establishment of the Sports Dispute Committee was to ensure any sports dispute including athletes be given an affordable, just and speedy means of resolution. This is provided in section 27 of Act 576. The appointment of the members of the Sports Dispute Committee is spelled out in section 28 of the same Act, the said Committee consisting of a Chairman and 4 members who hold office for a period not exceeding two years.

IV. Court Cases Related to Sports

[39] Like most former colonies of Britain and now under the umbrella of the Commonwealth nations, the Malaysian legal system is largely based on the English legal system. The English common law forms part of the Malaysian law and therefore sets precedent for Malaysian courts to follow. By virtue of paragraph 3(1)(a) of the Civil Law Act 1956, the courts in Peninsular Malaysia shall apply common law and the law of equity as administered in England on 7 April 1956.

[40] The extent of the application of the English law is explained in the following cases. In *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor*,[27] it was held that any development in English common law after 1956 should apply to Malaysia. In *Smith Kline & French Laboratories Ltd v Salim (Malaysia) Sdn Bhd*,[28] it was decided that the courts have the authority to put aside any common law or law of equity which cannot be applied in Malaysia. Hence, based on the above decided cases, it is concluded that any legal issues arising from sports law in Malaysia are subject to the courts of Malaysia like any other dispute.

[41] On the areas of criminal law transgression in sport such as corruption, these issues are also dealt by the courts in accordance with criminal law. Parties dissatisfied with the decision of the court at first instance, can appeal to a higher court(s). On the issue of corruption, in the case of *PP v Matlan Marjan* (unreported), a national footballer along with five others, were arrested on the suspicion of match fixing in 1995. Due to insufficient evidence, the charges were dropped and were withdrawn wherein the accused was subsequently placed under the Restricted Residence Enactment and banned from being involved in football. It is worth mentioning that in Malaysia's football folklore, Matlan is considered a hero for his feat in scoring two goals in the match against England in 1991. Malaysia was then 3 goals down during the first half with the match ending 4-2 in England's favour. Not surprisingly as England was a team far superior and had taken fourth placing in the 1990 World Cup the previous year.

[42] For civil disputes involving decisions of individual sports bodies as well as government bodies related to sports, the mechanism of judicial review comes into play. The mechanism operates in such a way that public bodies are required to exercise their powers in accordance with established legal principles of natural justice which emphasises on the right to be heard and rules against bias. Individuals and organisations can seek to challenge the decision, action or failure to act by a public body. Judicial review extends its scope of authority by ordering a public body to act, or to issue a prohibiting order, or quash an act which the court feels is unjustified, or making a declaration of sorts. The basis of a judicial order is the

26 Subsection 24A(3) of the Sports Development Act 1997 (Act 576).
27 [1990] 1 MLJ 475.
28 [1989] 2 MLJ 380.

application of natural justice concerned with the legal decisions made by public bodies. In this respect, an ADR decision is also subject to a judicial review.

[43] In *Council of Civil Service Unions and others v Minister for the Civil Service*,[29] Lord Diplock established the basis for which a judicial review claim could be brought and also established that the executive prerogative powers could be judicially reviewed in much the same manner as a statute.

[44] If an aggrieved party disagrees with a public body on the above ground, he may challenge the decision by taking judicial review proceedings to the High Court. In seeking a remedy, the options are as follows: the court will order the public body concerned to change its decision or to reassess the decision, or in some instances, damages may be awarded. An application for leave must be made to the High Court, which will only grant permission if there is an arguable case provided that there is no undue delay by the applicant in seeking leave for judicial review. Generally, the courts are reluctant to allow the application of judicial review in sports unless there is a concern of substantial injustice in the decision of a sports governing body.

[45] In the case of *Tan Sri Haji Muhyiddin bin Haji Mohd Yassin v Dollah bin Salleh*,[30] a disciplinary action taken by the state body, Johor Football Association ("JFA") led to the banning of the defendant from playing football for the state as well as at national level. Following this ruling, FAM, which is the national football association of Malaysia, informed all other member associations to abide by the ruling. The respondent appealed against the decision alleging that FAM had acted ultra vires and thus, the order to ban him from playing in any other state cannot be imposed. It was held that the respondent was only liable to the JFA and not to the FAM. Hence, that order was null and void.

[46] Another example involving the process of judicial review is the case of *Haji Osman bin Haji Aroff & Anor v Abdul Karim bin Pin*.[31] Here, the respondent was issued a five-year ban by his employer, the Kedah Football Association, for tendering a 24-hours notice of resignation. The respondent, then applied to the High Court for a declaratory order that the decision to ban him was a nullity as he was not given a fair chance to defend himself and that he was only notified of the ban via a newspaper publication. The High Court hearing the application for judicial review held that the resignation was valid and that the respondent was no longer subject to the Kedah State Football Association. Nevertheless, the Court of Appeal held otherwise by holding that the 24-hours notice resignation given by the respondent was not valid as his contract of employment required him to give a three months' notice.

V. Malaysian Sports Arbitration Tribunal

[47] In April 2015, a meeting for the introduction of Malaysian Sports Arbitration Tribunal ("MSAT") was held. With the establishment of MSAT, the sports ministry and associations alike will be able to pass on the intricacies of dealing with sporting disputes to the newly formed body and in turn focus on the development and capacity refinement of their respective portfolio.

[48] In line with the setting up of the MSAT, the Sports Development Act 1997 was amended in 2018. The proposed amendment to the Sports Development Act 1997 was tabled for the first reading in Parliament on 27 March 2018. In his opening speech during the second reading of the proposed amendment Act on 3 April 2018 in Parliament, the then Minister of Sports and Youth Affairs stated that to ensure domestic disputes can be resolved in an amicable and justified manner, there was a need for the establishment of Sports Dispute Committee. It is this Committee that will assist in resolving issues relating to sports bodies which cannot be resolved by the sports bodies themselves.

29 [1984] 3 All ER 935.
30 [1989] 3 MLJ 484.
31 [1988] MLJ 425.

[49] Under the proposed amendments to the Sports Development Act 1997, a new provision section 24 was introduced, providing for referral of disputes to the Sports Dispute Committee unlike the existing provisions of the Act which only gives such power to the Minister. Besides that, the introduction of a new section 24A of the Act provides for appeals against decisions of the Sports Dispute Committee.[32] This amendment came into operation on 1 March 2019.

[50] In relation to the above amendment of the Sports Development Act 1997, I had the opportunity of deliberating a case in relation to the new section 24A(1) which provided that the party dissatisfied with the decision of a Sports Dispute Committee may appeal to the Minister and that the decision of the Minister shall be final. In KLHC Suit No. WA-24NCVC-18979-09/2019, the plaintiff filed an Originating Summon ("OS") against the Paralympic Council of Malaysia (defendant) *inter alia*, for an injunction to refrain the defendant from convening an EGM which was to be held on 18 September 2019. At the hearing of the OS, the defendant raised the following preliminary objections: (i) that the defendant cannot be sued under the name of Paralympic Council of Malaysia ("PCM") as PCM has no legal status; and (ii) that the plaintiff had failed to appeal to the Minister of Youth and Sports Affairs as the other alternative remedy provided by the Act but instead proceeded to commence the suit in the High Court. As the plaintiff had failed to exhaust the statutory dispute resolution mechanism under the Act by appealing to the Minister first, the preliminary objection was upheld resulting in the OS being dismissed with costs of RM10,000.00. In deciding so, the Court gave effect to the statutory provisions under Act 576, hence discouraging dissatisfied parties from coming to court as a primary means to settle a sport dispute whenever one arises.

VI. Conclusion

[51] Whilst Malaysia continues with its pursuit for the first elusive Olympic gold medal and the ongoing dream to have our national football team play in the World Cup finals, there can be no doubt that the governing of sports bodies in Malaysia to cater and regulate all sports issues from funding, organising of events, selection of athletes and their current and post welfare is a matter that has to be dealt with on a professional level.

[52] It is with this background in mind that the need for an efficient body to carry out sports arbitration in this country becomes paramount. With sports no longer in the traditional sense, with international sponsors, distributors, investors, the elite class having an interest in our sports and they are keen to cooperate with us. Hence, with a multimillion sports industry providing employment to thousands of Malaysians, we should aspire to operate similar to the international level. As the amendment to Sports Development Act has been passed by Parliament in order to give room for the Sports Dispute Committee to ensure any disputes resolved in an amicable manner and serving justice in a speedy manner, this step should augur well for the general development of sports arbitration in Malaysia.

[53] The presence and availability of such a mechanism will to a large extent contribute to ensure that our international sporting events such the Sepang Circuit Motor GP, the Malaysian Open Badminton Championship and the Tour de Langkawi continue to receive worldwide participation and recognition. It is on such a world stage platform that our professional athletes can continue to compete with the best in the world and for Malaysia to continue producing world class sporting heroes in the likes of Datuk Lee Chong Wei in badminton, Datuk Nicole Ann David in squash and Azizul Hasni Awang @ "*The Pocket Rocketman*" in indoor cycling. Perhaps one day, the nation can realise its dream of achieving that elusive first Olympic gold medal – sooner rather than later.

"MAJULAH SUKAN UNTUK NEGARA".

32 Act A1570.

THE REGULATORY STRUCTURE OF GENERAL AVIATION

by
Judicial Commissioner Dr. Shahnaz Sulaiman

[1] This article will examine the regulatory structure of general aviation. In doing this, this writer will first define the meaning of regulation and then proceed to discuss the concepts and types of regulatory theories. This essay will then continue to define general aviation and ensue to describe a brief history of general aviation before examining the regulatory structure of general aviation in the United Kingdom, and also the European Union as well as Malaysia.

I. Definition of Regulation

[2] Regulation is a traditional function of the state or government. Regulation has been defined as a "sustained and focused control exercised by a public agency over activities that are valued by a community".[1] According to Baldwin, Scott and Hood, regulation at its simplest refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for promoting compliance with these rules.[2] In simple terms, regulation refers to the involvement or the control of a state or government in an individual's or society's life.

1 Selznick, P., "Focusing Organisational Research on Regulation" in Noll, R., "Regulatory Policy and the Social Sciences" (1985) as cited in Ogus, A., *Regulation Legal Reform and Economic Theory*, (Clarendon Law Series, 1994).

2 Baldwin.R, Scott.C, and Hood.C, *A Reader on Regulation*, (Oxford Socio-Legal Studies, 1998).

[3] Generally, regulation is considered as an activity that restricts behaviour and prevents the occurrence of unwanted and undesirable incident.[3] However, it must be noted that there are occasions where regulation has an enabling conduct. An example of this would be where the airways are regulated to allow broadcasting in an orderly manner as opposed to an unruly market.[4]

[4] Ogus himself, however, refrains from attempting to define regulation. Ogus merely states that the expression is commonly found in both legal and non-legal contexts and that it is occasionally used to signify any form of behavioural control, regardless of origin.

[5] Stigler, on the other hand, contends that a state or government has the power to help or hurt industries, and as such, is a potential resource or threat to every industry in society.[5] He further argues that regulation may be requested by an industry or it may be forced upon the industry.[6]

[6] From an economists' point of view, regulation has in general aimed at restraints on market actors' behaviour that have originated from law, or otherwise have been codified in law, and are then expanded by administrative agencies and courts respectively.[7]

II. Theories of Regulation

[7] Generally, there are two main theoretical frameworks which exist. The first is public interest theory of regulation and the other is economic theory of regulation. The public interest theory of regulation contends that regulation is justified in order to correct perceived wrongs or insufficiency in the market.[8] This theory aims to improve social and economic welfare.

[8] The public interest theory of regulation is the idea that people need protection from business abuses or other market failures. This theory assumes that regulation serves the public's interest by restricting harmful business activities. It assumes that regulation arises as an answer to some market failure, and that it is carried out in "the public interest." Public interest explanations of regulation are a form of normative analysis because they validate the existence of regulation through assertions that regulatory answer to specific situations end in progress and enhancement to social welfare. Thus, the proponents of regulation act as agents for the public interest.[9] The development of the theory of public interest was largely due to public utilities such as transportation and electricity which was always seen as the duty of the state or government to provide to the public.

[9] According to Trebing,[10] the public interest theory is based on five major assumptions. These proposals include firstly, that industries result in concentrations of power, increased uncertainty, failed performances, uncompensated costs and adverse distributional effects which the state or government is required to correct. The second assumption is that monetary or market-oriented measures are unable to encourage social values to the optimal, which is why state or government intervention is called for. Third, it presupposes that proper regulation will result in higher and better level of efficiency as well as better individual choice. The fourth assumption is that the success of regulation in promoting public interest is dependent upon a popular consensus pertaining to the need for action and political support for the regulator. The last assumption is that the form of regulation may change due to the evolutionary nature of the regulatory process.

3 Baldwin, R. & Cave, M., *Understanding Regulation: Theory, Strategy and Practice*, (Oxford University Press, 1999).

4 Ibid.

5 Stigler, George J.,"The Theory of Economic Regulation" (1971) The Bell Journal of Economics and Management Science 2(1).

6 Ibid.

7 Hagg, P. Goran T., "Theories on the Economics of Regulation: A Survey of the Literature from a European Perspective" (1997) European Journal of Law and Economics, p 337.

8 Ogus, Anthony, I., *Regulation: Legal Form and Economic Theory*, (Clarendon Law Series, 1994).

9 Supra, n 3.

10 Trebing, H., "Regulation of an Industry: An Institutional Approach" (1987) Journal of Economic Issues 21, p 1707 as cited in Sinha, Dipendra, "The Regulation and Deregulation of US Airlines" The Journal of Transport History, 20(1) p 46.

[10] However, what is considered "public interest" remains vague and contentious. Ogus argues that it would be a futile attempt to formulate a comprehensive list of public interest goals to be used to justify regulation as what constitutes "public interest" would vary depending on the time, place and specific values held by society.[11] The conception of public interest may be hard to identify, and many may argue that regulation takes place within clashes of public interest perceptions.[12]

[11] The second theoretical framework is the economic theory of regulation which suggests that regulation should aim to satisfy the demands of private interests. It contends that regulation is an economic good of value to certain groups in society, and that various levels of government are suppliers of this good. Some authors have asserted that the economic theory of regulation as proposed by Stigler in the early 1970s is actually the economist's view of the capture theory of regulation. The fundamental premise of the theory is that a small group tends to benefit from regulation rather than the whole of society, whose interests are varied and dispersed.[13] The capture theory of regulation were advanced in the 1950s and 1960s by political scientists, whose studies of regulatory agencies debated the public interest theory of regulation and challenged its assumption of a benevolent regulator.[14] Following the phase when regulations were based on public interest considerations, the analysts found that the regulatory agencies were drawn closer to the industry they were supposed to regulate and away from serving the public interest.[15]

[12] Hence, it can be contended that the economic theory of regulation provides theoretical underpinnings for the notion that regulators are often "captured" by the very firms and industries they are supposed to control.

[13] An example of the two theories of regulation can be observed in the United States aviation industry. It was the public interest theory that led to the regulation of the airline industry soon after the presentation of the Federal Aviation Commission report in 1935 in the United States.[16] The United States Government was encouraged and persuaded that a regulated airline industry would ensure a safe and efficient service.[17] Hence, a regulated competition was favoured in order to promote public interest. The establishment of the Civil Aeronautics Board in 1938 confirmed the philosophy of the then government. Nonetheless, analysts then argued that the airline regulation did not encourage public interest as the airline industry was inherently competitive in nature.[18] Soon economists argued that even though the government had introduced regulations to support public interest, airlines had established an imperfect cartel and benefitted from a monopoly.[19] Therefore, evidence of the capture theory of regulation was found in the US airline industry.[20]

[14] Other than the two main theories of regulation, some writers have proposed that there are other theories of regulation. Baldwin and Cave[21] suggests besides the basic theories of regulation known as public interest theory and economic interest (this theory is referred to as private interest), other theories of regulation would include interest group theory, force of idea theory and institutional theory.

11 Supra, n 8.
12 Supra, n 3.
13 Sinha, Dipendra, "The Regulation and Deregulation of US Airlines" The Journal of Transport History 20(1), p 46.
14 Etzioni, Amitai, "The Capture Theory of Regulations Revisited" (2009) 46 Soc, p 319–323.
15 Ibid.
16 Supra, n 13.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.
21 Supra, n 3.

[15] It is argued that the interest group theory of regulation would emphasise regulation as a product of a relationship between certain groups and the state or government.[22] This differs from the public interest theory of regulation as it is seen as a competition for power and not regulatory behaviour instilled with public tendencies.[23]

[16] The force of idea theory of regulation is based on the concept that the role of ideas will steer regulatory developments.[24] This theory is based on the deregulation programmes of the Reagan and Thatcher administrations which prompted arguments that such change in regulation did not result from private interests groups, but instead was an intellectually guided process.[25] Ideas in this context refer to intellectual conceptions which express how and why the state or government should manage businesses.[26]

[17] The institutional theory of regulation's basis is the influence of organisational rule and social setting on regulation.[27] This theory argues that institutional frameworks and organisation considerably shape regulation. This theory of regulation sees actors as not purely individuals, but as shaped in action, knowledge and preference by organisational rule and social environments.[28]

III. Definition of General Aviation

[18] General Aviation has generally been defined as all aviation other than commercial and military aviation.[29] The aircrafts range from small, single-engine planes to midsize turboprops to the larger turbofans capable of flying from New York to Tokyo.[30] Based on this definition of general aviation, this writer contends that an aircraft as large as an Airbus A 380 which is used for private purposes is subject to general aviation regulations. This is due to the fact that what determines the applicable regulations is the purpose or usage of the aircraft and not the size of the aircraft.

[19] The Civil Aviation Authority of United Kingdom's Regulatory Review of General Aviation in the United Kingdom defined general aviation to mean a civil aircraft operation other than a commercial air transport operation.[31] According to the International Council of Aircraft Owners and Pilots Association in a paper presented at the Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety in Montreal from 20 to 22 March 2006, General Aviation comprises all worldwide non-commercial civil aviation, representing four-fifths of all civil aircraft and two-thirds of all pilots.[32]

[20] General Aviation activities encompass private flying, aerial work and recreational flying involving all types of aircraft.[33] A study by the International Civil Aviation Organisation Secretariat on International and Business Aviation Access to Airports in August 2005 defines General Aviation as comprising all aircraft that are not operated by commercial aviation or by the military. In the United States, Section 2 of the General Aviation Revitalization Act of 1994 ("GARA") defines General Aviation Aircraft as "any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under part A of subtitle VII of title 49, United States Code at the time of the accident."

22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Schwartz, Victor E. & Lorber, Leah, "The General Aviation Revitalization Act : How Rational Civil Justice Reform Revitalized An Industry" (2002) 67 Journal of Air Law and Commerce 1269 at p 1271.
30 Ibid.
31 Civil Aviation Authority of United Kingdom, *Final Report of the Regulatory Review of General Aviation*,(June 7, 2006).
32 International Civil Aviation Organisation document DGCA/06-WP/21.
33 General Aviation, UK Civil Aviation Authority. Retrieved from <https://www.caa.co.uk/ga>.

[21] The United Kingdom's Department of Transport's Scoping Document on Developing a Sustainable Framework for UK aviation states in paragraph 2.7 that General Aviation covers a wide range of activities from commercial operators of business jets and helicopters through to leisure users, such as micro-lights.[34] It also notes that General Aviation affords training for pilots and technicians.[35]

[22] In its report, the Civil Aviation Authority of United Kingdom's Strategic Review of General Aviation in the United Kingdom stated that the General Aviation sector covers a very wide range of activities comprising of recreational flying, personal and business transport encompassing different types of operation.[36] There are those that operate from relatively small sites that may not even be readily recognisable as airfields such as balloons, gliders, hang gliders, microlights, gyrocopters and small helicopter and then there are also corporate jets. In between are thousands of aircraft of all shapes and sizes from amateur-built to mass-produced touring aircraft to ex-military fast jets.[37]

[23] General Aviation includes all aircraft apart from commercial air carriers and military aircraft.[38] According to Boswell and Coats, General Aviation is defined as all private-sector aviation that does not involve regularly scheduled passenger traffic.[39] In fact, areas that commercial airlines are not willing or not able to service, are serviced by General Aviation carriers providing passenger services.[40] Bednarek declares that the best probable way to define General Aviation is to list what it is not.[41] She goes on further to say that General Aviation is not military aviation and it is not scheduled commercial aviation.[42]

[24] The definitions of General Aviation quoted above seem to imply that General Aviation is that which does not include commercial aviation and military aircraft. That is to say that General Aviation would include everything else but commercial aviation and military aircraft. Hence, General Aviation would include the smallest of aircraft with a single engine and hot air balloon rides, while on the other side of the spectrum; General Aviation would also include turbo powered business jets. In addition, other aircraft used in General Aviation would include helicopters, restored war birds and homebuilt aircraft designed to use advanced composite technology.[43]

[25] The uses of General Aviation would also include a broad range. These would include but would not be limited to private and sport flying, aerial photography and surveying, crop-dusting, business flying, medical evacuation, flight training, and the police and fire-fighting uses of aircraft.[44]

34 Retrieved from <https://www.dft.gov.uk/consultations/open/2011-09/consultationdocument.pdf> (accessed April 7, 2011).

35 Ibid.

36 Civil Aviation Authority of United Kingdom, *Final Report of the Strategic Review of General Aviation,* July 2006.

37 Ibid.

38 Key, Chad., "General Aviation in the New Millennium: Promising Rebirth – Or Imminent Extinction?" (2000-2001) 66 Journal of Air Law and Commerce, 789 at p 792.

39 Boswell, John H. & Coats, George Andrew., "Saving the General Aviation Industry: Putting Tort Reform to the Test" (1995) 60 Journal of Air Law and Commerce, 533 at p 535.

40 Tarry, Scott E. & Truitt, Lawrence J., "Rhetoric & Reality: Tort Reform and the Uncertain Future of General Aviation" (1995) 61 Journal of Air Law and Commerce, 163 at p 167.

41 Bednarek, Janet., "General Aviation – An Overview" <https://www.centennialofflight.gov/essay/GENERAL_AVIATION/OV.htm> (accessed December 6, 2010).

42 Ibid.

43 Ibid.

44 Ibid.

[26] As far as the rights of General Aviation aircraft under the Chicago Convention are concerned, Article 5 of the Chicago Convention 1944 provides that:

> **Article 5**
>
> **Right of non-scheduled flight**
>
> Each Contracting State agrees that all aircraft of the other Contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of the Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each Contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7 (Cabotage), have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

[27] Provisions pertaining to international General Aviation operations are found in Annex 6 Part II of the Chicago Convention 1944 which sets out the International Standards and Recommended Practices.[45] The spirit of Annex 6 is to ensure that the operation of aircraft engaged in international air transport should be standardised as much as possible to make certain safety and efficiency of the highest degree.[46] The International Standards and Recommended Practices were first adopted by the International Civil Aviation Organisation Council in 1948.[47] Part II to Annex 6 was introduced only in September 1969 so as to deal exclusively with General Aviation, taking into consideration the development in the General Aviation industry.[48] According to the International Civil Aviation Organisation, the provisions have mainly remained unchanged since 1968 even though the General Aviation industry has now seen rapid expansion.

IV. History of General Aviation

[28] It was during the 1950s that the term General Aviation came into being, even though it was in the mid 1920s that General Aviation as we now know it fully emerged.[49] However, prior to that experiments with regard to the uses of flight technology had begun, which later would become parts of General Aviation.[50] This is evidenced by the use of airplanes for crop treatment, aerial surveying, and corporate flying, all of which predated the mid-1920s.[51]

[29] In fact, it could be argued, based on the current accepted definition of General Aviation, that the first hot air balloon flight across Paris or that Otto Lilienthal's first glider flight in 1891 or that the Wright Brothers' first flight was indeed a General Aviation flight, as both were neither scheduled commercial flights nor were they military flights. In Versailles, on 19 September 1783, the Montgolfiers brothers flew the first passengers (a sheep, a rooster, and a duck) in a basket suspended below a hot-air balloon.[52] The flight took place in front of Louis XVI, Marie Antoinette, and the French court, as well as a crowd of about

45 Retrieved from <https://www.icao.int/eshop/pub/anx_info/an06_info_en.pdf>.
46 Ibid.
47 Ibid.
48 Ibid.
49 Supra, n 41.
50 Ibid.
51 Ibid.
52 "Early Balloon Flight in Europe" <http://www.centennialofflight.gov/essay/Lighter_than_Air/Early_Ballon_Flight_in_Europe/LTA1/htm> (accessed January 6, 2011).

130,000 and lasted for eight minutes.[53] The balloon flew nearly 2 miles (3.2 kilometres) before returning the occupants safely to earth.[54] As such, it would be fair to suggest that General Aviation has been present since the very beginning of the aviation industry!

[30] General Aviation received a very great improvement with the trans-Atlantic flight of Charles Lindbergh in the late 1920s which encouraged many people to continue to explore the different exploitations of aviation technology.[55] Simultaneously, despite the growth of aviation as an activity, government regulations made the access to flight more complicated by demanding that pilots earn licences and that aircraft receive certification, all of these measures for purposes of making General Aviation safer.[56]

[31] The late 1920s and the 1930s saw the growth of the General Aviation industry such as crop dusting which spread throughout the United States and consisted of the treatment of forested areas as well as the development of business travel which enabled businessman and women to travel at the time most convenient to them.[57]

[32] World War II had an impact on the aviation industry. It established both a challenge and an opportunity for General Aviation as most of the General Aviation fleet were grounded.[58] Despite that, the General Aviation pilots and manufacturers managed to participate in the war by organising a Civil Air Patrol which ultimately developed into an auxiliary of the Army Air Forces.[59] McAllister contends that from the aftermath of the World War II, there was an abundance of trained pilots, aircraft mechanics and aero-engineers that were eager to try their innovative and entrepreneurial spirits in the industry of General Aviation manufacturing.[60]

[33] General Aviation encountered a vigorous development in the period following World War II.[61] The reason for this was partly due to the pilots that had flown in the military in World War II wanted to continue flying after being discharged.[62] Moreover, the public savoured and delighted in the idea of flying for leisure activities and around the country for vacations.[63] Private companies started manufacturing small aircraft.[64] According to Key, this era could be described as the golden age of general aviation.

[34] After World War II, General Aviation persisted to expand and increase, especially in the area of business aviation which continued to be a main part of the General Aviation scenario.[65] Other than that, post World War II also saw the introduction of turbine engines for both jets and turbo props.[66] The introduction of helicopters was evident in the late 1940s, which although did not succeed in becoming a common form of personal transport, was however successful in the performance of medical evacuation and law enforcement.[67]

53 Ibid.
54 Ibid.
55 Supra, n 41.
56 Ibid.
57 Ibid.
58 Ibid.
59 Ibid.
60 McAllister, Timothy S., "A "Tail" of Liability Reform : General Aviation Revitalization Act of 1994 & the General Aviation Industry in the United States" (1995) 23 Transp. L.J 301 at p 304 as cited in Anton, Jennifer L., "A Critical Evaluation of the General Aviation Revitalisation Act of 1994" (1997-1998) 63 Journal of Air Law and Commerce 759 at p 765.
61 Supra, n 38, p 793.
62 Ibid.
63 Ibid.
64 Ibid.
65 Supra, n 41.
66 Ibid.
67 Ibid.

[35] The last two decades of the twentieth century witnessed the General Aviation industry struggle and suffer, especially with regard to personal aircraft.[68] The mid-1980s saw many things changing and the General Aviation industry began to suffer troubled and turbulent times.[69] The exorbitant cost connected with the owning and operating a small aircraft are amongst the reasons for the deterioration of the General Aviation industry.[70]

[36] Other reasons associated with the decline in the General Aviation industry include the possibility that the aircraft manufacturers produced too many aircrafts which in turn saturated the limited market.[71] However, many people from within the General Aviation industry blamed the strict product liability for the massive recession in the industry.[72] The number of lawsuits against aircraft manufacturers escalated.[73] It was argued that due to the product liability actions, the cost of the General Aviation industry's liability insurance skyrocketed which was included into the cost of aircraft production which in turn led to the price of most small aircraft to be extremely high.[74] Despite this glum stance, the Civil Aviation Authority of United Kingdom's Strategic Review of General Aviation in the United Kingdom dated July 2006 found no evidence of this.[75] Based on the available data at that time, the Civil Aviation Authority of United Kingdom's Strategic Review of General Aviation in the United Kingdom found that General Aviation growth was most robust with corporate and business aviation while the use of helicopters and microlights were growing swiftly.[76] However, there was little or no growth in the bulk of General Aviation activity is in the use of traditional, fixed-wing touring aircraft.[77]

[37] In the United States, there has been a renewal and revival of the General Aviation industry since the mid-1990s.[78] This turnaround in events has been attributed to the General Aviation Revitalisation Act of 1994 which creates a uniform national eighteen-year statute repose limiting the liability of aircraft and component part manufacturers after their products have been in service for a number of years.[79]

[38] One other cause of the renewed interest in General Aviation is the growing demand for commercial airline pilots.[80] Conventionally, most of the airline pilots obtained their original pilot licences, training and logged flight time in the military.[81] However, due to the end of the cold war, the number of pilots the military has been training has decreased and this has consequentially resulted in fewer commercial airline pilots.[82] As such, individuals see the private licence as a first step to obtaining a commercial airline's licence.[83] According to McCarthy, "more than half of all domestic carrier pilots now come out of general aviation."[84] In order to be considered for employment with large airlines, these pilots must have generally logged at least 800 to 1,000 hours.[85]

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68 Ibid.
69 Supra, n 38, p 793.
70 Ibid.
71 Ibid at p 794.
72 Ibid.
73 Supra, n 41.
74 Supra, n 38, p 794.
75 Supra, n 36.
76 Ibid.
77 Ibid.
78 Supra, n 38, p 797.
79 Ibid.
80 Ibid at p 799.
81 Ibid.
82 Ibid.
83 Ibid.
84 McCarthy, John, "Aviation Interests Rebounds, More Planes Being Built, More People Learning to Fly" FLA, TODAY, July 25, 1999 as cited in Key, Chad, "General Aviation in the New Millennium: Promising Rebirth – Or Imminent Extinction?" (2000-2001) 66 Journal of Air Law and Commerce 789 at p 798.
85 Ibid.

[39] New sections of the society are also now more interested in flying as many new pilots are businessmen or women who use their planes as they would their cars for business reasons.[86] This segment of the population is of the view that General Aviation flying allows them to avoid the inconvenience of scheduled air service, greater flexibility, more freedom and a cost savings over commercial flights in many cases.[87] Furthermore, weekend trips in small planes are seen as a symbol of freedom for fast-moving Americans.[88]

[40] In addition, many corporations are keener on buying and flying their own company aircraft, especially business jets.[89] Key argues that although GARA played a responsibility in the revival of the General Aviation industry, the boom in the economy has also played its role in the increased growth of the General Aviation industry.[90]

V. United Kingdom Regulatory Structure

[41] In the United Kingdom, the task of regulating the aviation industry has been assigned to the Civil Aviation Authority (hereinafter referred to as "CAA"). The CAA was originally created by the Civil Aviation Act 1971 as a statutory corporation, which has since been repealed and replaced by the Civil Aviation Act 1982. Section 2 of the Civil Aviation Act 1982 provides for the CAA's existence. The CAA derives its authority to regulate from the Civil Aviation Act 1982. Section 3 of the Civil Aviation Act 1982 provides as follows:

> **3. Functions of CAA.**
>
> The functions of the CAA shall be—
>
> (a) the functions conferred on it by the following provisions of this Part of this Act;
>
> (b) the functions conferred on it by or under this Act with respect to the licensing of air transport, the licensing of the provision of accommodation in aircraft, the provision of air navigation services, the operation of aerodromes and the provision of assistance and information;
>
> (c) such functions as are for the time being conferred on it by or under Air Navigation Orders with respect to the registration of aircraft, the safety of air navigation and aircraft (including airworthiness, the health of persons on board aircraft), the control of air traffic, the certification of operators of aircraft and the licensing of air crews and aerodromes;
>
> (d) such other functions as are for the time being conferred on it by virtue of this Act or any other enactment; and nothing in this Act relating to the CAA shall be construed as derogating from any power exercisable by virtue of any enactment whatsoever (including an enactment contained in this Act) to make an Order in Council or other instrument conferring a function on the CAA.

[42] Thus, the responsibilities of the CAA as the United Kingdom's specialist regulator include air safety, economic regulation, airspace regulation, consumer protection and environmental research and consultancy.[91]

[43] The United Kingdom aviation legislation has two origins, the first being the United Kingdom Act of Parliament and the other the European Union Regulations. However, prior to 1991, the United Kingdom aviation legislation was found in the United Kingdom domestic law only. This domestic law was mainly in the form of statute law together with certain common law concepts such as nuisance, trespass, negligence

86 Supra, n 38, p 799.

87 Gribble, Roger A, "Small Planes Gain in Popularity, Good Economy Puts More People in the Sky Lanes" WIS. St.J., July 20, 1999 as cited in Key, Chad, "General Aviation in the New Millennium: Promising Rebirth – Or Imminent Extinction?" (2000-2001) 66 Journal of Air Law and Commerce, p789 at p 799.

88 Ibid.

89 Supra, n 38, p 800.

90 Ibid.

91 Civil Aviation Authority <https://www.caa.co.uk> (accessed March 29, 2011).

and recklessness.[92] The principal piece of primary legislation for aviation is the Civil Aviation Act 1982. Consequently, Section 60 of the Civil Aviation Act 1982 provides the enabling power for the making of an Air Navigation Order, while Section 61 of the Civil Aviation Act 1982 provides for criminal enforcement of the Air Navigation Order. The Air Navigation Order may be used to implement the Annexes to the Chicago Convention 1944 and for regulating air navigation. The Air Navigation Order 2005 consists mostly of specific aviation provisions. Some Articles of the Air Navigation Order provide further powers enabling detailed Regulations to be made. Regulations such as Rules of the Air Regulation 1996, Air Navigation (General) Regulations 2006 and Air Navigation (Dangerous Goods) Regulations 2002 were all made pursuant to certain Articles of the Air Navigation Order 2005.

[44] The United Kingdom left the European Union on 31 January 2020. As a result of this departure from the European Union, the United Kingdom and the European Union will negotiate terms of a treaty that will chart the United Kingdom's future relationship with the European Union. One of the many sectors affected by the decision to leave the European Union is the aviation sector.

[45] What does the future of the United Kingdom aviation industry hold? According to the CAA, from 31 January 2020 the United Kingdom aviation industry will enter a transition period.[93] During this transition period, the United Kingdom will continue to apply European Union laws and the United Kingdom and its aviation sector will continue to participate in the European Aviation Safety Agency ("EASA") system while the future of the United Kingdom and European Union relationship on aviation is determined.[94]

[46] The United Kingdom will continue to be party to the European Union Air Services Regulation and mutual recognition provisions established under the EASA Basic Regulation throughout the transition period. This arrangement extends to existing agreements between the European Union and third countries, for instance pertaining to air connectivity and aviation safety. In short, there is no expected change to the aviation sector during the transition period from 31 January 2020 to 31 December 2020.

[47] Nonetheless, on 7 March 2020 Transport Secretary Grant Shapps confirmed that the United Kingdom would leave EASA after the transition period. This presages that after 31 December 2020 the United Kingdom would no longer depend on EASA for the certification of the airworthiness of aircraft. In other words, the United Kingdom may be required to certify its aircraft separately.

[48] The industry reaction to the Transport Secretary's announcement was cautious. One body representing more than 1,000 United Kingdom businesses in the aerospace, defence, security and space sectors, ADS stated that this could potentially mean that the products would need to be certified more than once. Commercial aircraft would be certified by EASA for use in the European Union (and some non-European Union countries) and the same commercial aircraft would be required to be certified by the United Kingdom aviation regulator.

[49] ADS have further estimated that it will cost up to £40 million annually and 10 years to establish a safety authority with the expertise of EASA. Clearly ADS' stand is that remaining in the EASA regulatory framework would be the best option to maintain competitiveness of the industry.

[50] Other industry players such as British Airways stated that it was "disappointed" with the decision as it was if the view that the CAA "does not have the expertise required to operate as a world class safety and technical operator".[95] The owners of British Airways, IAG went on to state "The CAA will require fundamental restructuring from top to bottom which will take time. There is no way that it can be done by 31 December."[96]

92 Civil Aviation Authority of United Kingdom, *Final Report of the Regulatory Review of General Aviation*, (June 7, 2006).

93 The transition period is the period when the United Kingdom will remain in both the European Union customs' union and single market. The intention of the transition period is to allow some time for the United Kingdom-European Union negotiations to occur. See <https://www.bbc.com/news/uk-politics>.

94 Retrieved from <https://info.caa.co.uk/brexit/>.

95 Retrieved from <https://www.bbc.com/news/business/>.

96 Ibid.

[51] Other airlines such as EasyJet and Ryanair said that it supported continued membership of EASA, however not at the risk of the United Kingdom becoming a follower of European Union rules.

[52] Following from the Transport Secretary's announcement on 7 March 2020, it remains to be seen whether the United Kingdom will be able to have its own certification process in place by the end of the transition period. It is also sceptical that the CAA will have the numbers and expertise to carry out an onerous task such as this.

[53] The CAA has taken the view that the future relationship between the United Kingdom and the European Union on aviation at the end of the transition period is a matter for the United Kingdom Government in its negotiations with the European Union. In the interim, the CAA has developed a microsite[97] to be a central source of information for the aviation and aerospace industries pertaining to actions required to be prepared for the transition period ending with the United Kingdom no longer being an EASA participant and without continued mutual recognition of safety certificates and licences.

[54] In the final analysis, the CAA needs to ensure that a scenario which excludes the United Kingdom from EASA does not result in inconvenience to the passengers. The CAA must ensure there would be maximum continuity and stability for passengers and the aviation and aerospace sectors.

VI. European Union Regulatory Structure

[55] Since 1991 however, the United Kingdom has now become subject to certain European legislation. European law consists of Regulations and Directives. The European Regulations are binding throughout the European Community and is intended to be applied directly. In other words, European Regulations are given the power of national or domestic law basically as it stands. Therefore, the European Regulations lend themselves to be implemented by reference. An example of this would include the Basic European Aviation Safety Agency (hereinafter referred to as "EASA") Regulation or (EC) No 216/2008.

[56] Directives, on the other hand, are not generally binding directly. The Directive basically requires each Member State to amend its domestic legislation to ensure that the domestic legislation accomplishes the purpose of the Directive. Thus, Directives would be incorporated into the national or domestic law by using the form and method of implementation which is most appropriate, taking into account the relevant national legislation.

[57] European Union aviation legislation is found in Basic Regulation (EC) 216/2008 related to the common rules in the field of civil aviation and the establishment of a European Aviation Safety Agency. Prior to (EC) 216/2008, EASA became operational in 2003 on the basis of a European Parliament and Council Regulation (1592/2002). At that time, EASA's operations related to rulemaking competencies, airworthiness certification and related standardisation activities.[98] With the introduction of (EC) 216/2008, EASA's main tasks now include:

- Rulemaking: drafting aviation safety legislation and providing technical advice to the European Commission and to the Member States;
- Inspections, training and standardisation programmes to ensure uniform implementation of European aviation safety legislation in all Member States;
- Safety and environmental type-certification of aircraft, engines and parts;
- Approval of aircraft design organisations world-wide as and of production and maintenance organisations outside the EU; Canada and US;
- Authorization of third-country (non-EU) operators;

97 This microsite is aimed at individuals in the aviation and aerospace industries.

98 EASA Annual Report, 2009.

- Coordination of the European Community programme SAFA (Safety Assessment of Foreign Aircraft) regarding the safety of foreign aircraft using Community airports;
- Data collection, analysis and research to improve aviation safety.[99]

[58] On 14 December 2009, Regulation (EC) 1108/2009 came into force. This regulation brought about the safety regulation of air traffic management, air navigation services and aerodromes into the realm of EASA.[100] Pursuant to this, EASA's new tasks also included rulemaking and standardisation inspections.

[59] The European Union Regulation (EC) No 216/2008 which came into force on 8 April 2008 is implemented by way of two implementing rules, namely Regulation No 1702/2003 and Regulation No 2042/2003. Regulation No 1702/2003 deals with airworthiness and environmental certification of aircraft and related products such as parts and appliances. It also deals with the certification of design and production organisations. This is achieved by way of Part 21 of the EASA which relates to the Acceptable Means of Compliance, Guidance Material and General Acceptable Means of Compliance for Airworthiness of Products, Parts and Appliance. Other than that, Regulation No 1702/2003 is accomplished by Certification specifications using airworthiness codes.

[60] On the other hand, Regulation No 2042/2003 deals with the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and also on the approval of organisations and personnel involved in these tasks. This is achieved by way of Acceptable Means of Compliance and Guidance Material of which relates to Part M-Continuing Airworthiness, Part 145- Maintenance Organisations Approval, Part 66- Certifying Staff, Part 147-Training Organisations Requirements and also General Acceptable Means of Compliance for Airworthiness of Products, Parts and Appliance.

[61] Since 31 January 2020, the United Kingdom has left the European Union. Accordingly, the United Kingdom is now regarded as a Third Country. During this transition period,[101] the law of the European Union will apply for the United Kingdom.[102] What this entails essentially is that the United Kingdom will be treated as a European Union member state but will not partake in any decision making or decision shaping activities at EASA.[103]

VII. Malaysian Regulatory Structure

[62] In Malaysia, the civil aviation industry is regulated by two regulators, namely, the Civil Aviation Authority of Malaysia ("CAAM")[104] and the Malaysian Aviation Commission ("MAVCOM").[105] Succinctly, CAAM is responsible for regulating technical, maintenance and safety matters while MAVCOM is an entity regulating economic and commercial matters in Malaysia.

[63] Having two regulators for the aviation industry is unique and uncommon. Typically, countries have one regulator for the aviation industry who will be responsible for the technical, safety and security aspects of the aviation industry as well as the economic facet of the industry. In the United Kingdom, for instance, the specialist aviation regulator is the Civil Aviation Authority United Kingdom. In Singapore, the regulator of the aviation industry is the Civil Aviation Authority of Singapore.

[64] At the point of inception of the MAVCOM, factors that led to the establishment of MAVCOM were the need for an independent regulator to consider the economic aspect of the Malaysian civil aviation industry. However, as mentioned earlier, this dual regulator for the aviation industry is somewhat peculiar and

99 Retrieved from <https://www.easa.eu.int/> (accessed, April11, 2011).
100 EASA Annual Report, 2009.
101 Until 31 December 2020.
102 Under the terms of its Withdrawal Agreement, European Union law will apply for the UK during a transition period until 31/12/2020.
103 The principle of non-participation.
104 Established on 19 February 2018. The Civil Aviation Authority of Malaysia was formerly known as the Department of Civil Aviation.
105 Established on 1 March 2016.

unusual. An examination of the aviation industry regulators globally will show that the majority of countries have a single aviation regulator.

[65] MAVCOM has been in operation since March 2016. How has the Malaysian aviation industry dual regulator system worked and has it been a success? One criticism of having two regulators for the aviation industry is that applications for licences or permits take a longer period as applicants are required to deal with two regulators as opposed to one regulator. This denotes a lengthy and tedious process. Applicants for licences or permits are required to deal with two authorities instead of one. MAVCOM which has been tasked as the economic regulator of the aviation industry will consider the applicant's proposal from an economic perspective. The CAAM on the other hand, being the technical regulator of the aviation industry will consider safety and security aspects prior to approval of the licence or permit. This is burdensome for applicants who have to deal with two regulators.

[66] Another issue which may arise from having two regulators for the aviation industry is the possibility that the regulators may differ in their views pertaining to the aviation sector. Whilst ostensibly both regulators appear to have clearly defined functions which separate their tasks, there may be situations where the stance of the regulators may differ. An example of this would be the issuance of licences. MAVCOM may decide to approve the granting of a licence to an applicant based on the applicant's economic position. Yet, CAAM may decide to reject the same applicant's application for a licence based on safety and security concerns. In such a circumstance, which regulator would have the final say?

[67] This writer would humbly suggest that the role of both regulators and the aviation industry as a whole would be better served if MAVCOM and CAAM were merged into one aviation regulator. As mentioned earlier, most countries have one aviation regulator to deal with all aspects of the aviation industry. Furthermore, this would lessen the possibility of two separate regulators having opposing positions on the same matter. Stakeholders too will find it less burdensome to deal with one regulator.

[68] In December 2019, the Transport Minister announced that MAVCOM and CAAM would merge. Since then there has been abundant views on this matter, either supporting or opposing the merger. MAVCOM itself was unsatisfied with the manner in which the decision to merge the two regulators came about as according to MAVCOM, it was not consulted. At the time of writing this paper, the decision to merge both entities remains.

[69] While Malaysia has two aviation regulators, matters pertaining to the General Aviation sector of the industry are regulated by the Civil Aviation Authority of Malaysia. As the General Aviation sector is largely non-commercial, the task of regulating that sector lies with the Civil Aviation Authority of Malaysia and not the Malaysian Aviation Commission which is charged with the economic regulation of the aviation industry.

[70] The Civil Aviation Authority of Malaysia is governed by the Civil Aviation Authority Act 2017 and the Civil Aviation Act 1969.

[71] Section 16 (1) of the Civil Aviation Authority of Malaysia Act 2017 provides that the functions of the Authority are:

(a) to ensure that the provisions of this Act, the Civil Aviation Act 1969 and any subsidiary legislation made under the Civil Aviation Act 1969 are administered, enforced, given effect to, carried out and complied with;

(b) to regulate the safety and security of the civil aviation including the establishment of standards and their enforcement;

(c) to safeguard civil aviation against any acts of unlawful interference;

(d) to exercise safety regulatory oversight of the civil aviation in Malaysia and outside Malaysia;

(e) to regulate the operation of aerodrome and the provision of aerodrome services and facilities in Malaysia;

(f) to provide air navigation services within the Kuala Lumpur and Kota Kinabalu Flight Information Regions and such other area as the Minister may authorize;

(g) to provide or co-ordinate search and rescue services to aircraft in distress within the Kuala Lumpur and Kota Kinabalu Search and Rescue Regions and such other area as the Minister may authorize;

(h) to co-operate with any authority in charge of investigation of aircraft accident and serious incident;

(i) to encourage, promote, facilitate and assist in the development and improvement of civil aviation capabilities, skills and services in Malaysia;

(j) to provide technical and consultancy services relating to civil aviation;

(k) to represent the Government internationally in respect of matters relating to civil aviation;

(l) to discharge or facilitate the discharge of international obligations of the Government in respect of civil aviation;

(m) to promote education and training in respect of any matter relating to civil aviation;

(n) to advise the Government on all matters relating to civil aviation;

(o) to encourage the understanding of civil aviation policies and programmes;

(p) to encourage research and development on any matter relating to civil aviation;

(q) to encourage the development of airways, aerodrome and air navigation facilities for civil aviation;

(r) to carry out such other functions and duties as are conferred or imposed on the Authority under this Act, the Civil Aviation Act 1969 and any subsidiary legislation made under the Civil Aviation Act 1969; and

(s) to perform any other functions that are incidental or consequential to any of its functions under this Act.

[72] However, with regard to the power to give effect to the Chicago Convention 1944 and to regulate civil aviation, section 3 of the Civil Aviation Act 1969 provides for the Minister to make such regulations as he considers necessary or expedient to give effect to the objects and purposes of the Act. Pursuant to this section, the Minister made the Civil Aviation Regulations 1996 and the Civil Aviation Regulations 2016. The details pertaining to the regulation of civil aviation in Malaysia can be found in the Civil Aviation Regulations 1996 and the Civil Aviation Regulations 2016. The Civil Aviation Regulations 1996 and 2016 have been modelled against the United Kingdom's Air Navigation Order.

[73] Also, section 24O of the Civil Aviation Act 1969 makes the following provision:

(1) The Chief Executive Officer may issue any notice, circular, requirement, directive or information for the purposes of this Act or any subsidiary legislation made under this Act.

(2) Every notice, circular, requirement, directive or information issued under this Act or under any subsidiary legislation made under this Act shall be published by the Chief Executive Officer in such manner as in his opinion will ensure that the notice, circular, requirement, directive or information is brought to the attention of the person who has to comply with the notice, circular, requirement, directive or information.

(3) The Chief Executive Officer may, subject to such terms and conditions as he thinks fit and after he is satisfied that the safety and security of the civil aviation is not jeopardized, exempt any aircraft, flight or person or classes of aircrafts, flights or persons from all or any provisions of any notice, circular, requirement, directive or information issued by him under this Act or any subsidiary legislation made under this Act.

(4) Any person who contravenes any notice, circular, requirement, directive or information issued by the Chief Executive Officer commits an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[74] To this end, section 24O allows the aviation industry to comply with the requirement of the International Civil Aviation Council by the issuance of notices, directives, seculars and information. These can be found in the form of Airworthiness Directives, Airport Standards Directives, Air Traffic Inspectorate Directive, Air Information Publication and Air Information Circulars. These instruments, besides the Civil Aviation Act 1969 and the Civil Aviation Regulations 1996 ensure that Malaysia is able to fulfil the requirements of the International Civil Aviation Organisation.

[75] Section 24O was inserted into the Civil Aviation Act 1969 to enable the Chief Executive Officer (previously the Director General) to issue the notices, directives, seculars and information. The rationale behind this provision is that technical developments within the aviation industry were fast paced. As a result of the technical developments, laws would need to be updated urgently, particularly since the technical advancements relate to safety and security matters. In order to bring into force the result of such technical developments, section 24O was deemed the most efficient manner. Thus far, section 24O has accomplished this.

[76] The Civil Aviation (Amendment) Act 2017 [Act A1526] introduced a new section 24P which reads as follows:

(1) The Chief Executive Officer may issue any safety directive relating to any aspect of safety or security in civil aviation, including-

(a) the safety of any aircraft operation in Malaysia and the operation of Malaysian aircraft outside Malaysia;

(b) the inspection, overhaul, repair, replacement, modification or maintenance of aircraft or aircraft components;

(c) any matter relating to persons issued with any licence, certificate, permit, approval, authorisation, permission or other document issued under this Act or under any subsidiary legislation made under this Act; or

(d) the operation and management of an aerodrome.

(2) Every safety directive issued under this Act shall be published by the Chief Executive Officer in such manner as in his opinion will ensure that the safety directive is brought to the attention of the person who has to comply with the safety directive.

(3) Any person who contravenes any safety directive commits an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[77] Similar to section 24O, section 24P allows the Chief Executive Officer of the Civil Aviation Authority of Malaysia to issue Safety Directives to enable the industry to be informed of safety measures in an effective and expeditious manner. As safety is paramount in the aviation industry, any development or changes to safety requirements must be communicated to the industry in an effective and expedient method. The Safety Directives issued pursuant to section 24P allows this to materialise.

VIII. Conclusion

[78] The regulatory framework for General Aviation in the United Kingdom has changed over the years. As the United Kingdom is now a member of the European Union, the provisions of the Rome Treaty apply to the United Kingdom. Article 249 of the Rome Treaty provides that a regulation shall have general application and be directly applicable in all member states. Hence, a European Union regulation will apply directly to all member states without the regulation having to be incorporated by national legislation. The same Article also provides that directives are binding as to the effect that is to be achieved, but leaves the choice of form and method to the member states. As such, directives need be incorporated into national law but are however more flexible than regulations. This is because regulations do not allow any form of discretion for the introduction of national needs and differences. However, directives may give rise to problems of interpretation and the improper exercise of discretion.

[79] Despite this, actors in the general aviation industry are not pleased with the current scenario.[106] For example, Regulation (EC) No 300/2008 applies to all airports or parts of airports located in the United Kingdom and to all operators providing services at these airports. This regulation sets out the common rules to protect civil aviation against acts of unlawful interference that jeopardise the security of civil aviation. Unfortunately, civil aviation is defined in the regulation as "any air operation carried out by civil aircraft, excluding operation carried out by the state aircraft referred to in Article 3 of the Chicago Convention on International Civil Aviation." This would mean, *prima facie*, that the regulation would apply to both a commercial jet airline such as an A380 and a glider, and the General Aviation industry would be under pressure.

[80] Another grouse[107] against EASA is that EASA has turned against further consultations on rulemaking. Due to a large number of responses from aviation industry bodies, timescales for the implementation of the regulations are not met, as all new rulemaking proposals must be accompanied by a Comment Response Document. EASA's response to that has been to propose to discontinue the Comment Response Document instead of admitting that the proposed rules are flawed.

[81] It has been argued[108] that EASA's regulatory proposals seem to prefer a clean and tidy Europe airspace where aircraft know their place instead of meeting the requirements of real people who have real human and transportation needs. As a result, there exists a regime whose focus is on process, rather than the right outcome. Therefore, some actors in the General Aviation industry are of the view that the legislation is both wrong and detrimental to the United Kingdom. An example of this is found in the grounding of General Aviation aircraft during the volcanic ash event, even though the majority of General Aviation has piston engines which were not at risk during that time, and as such there was really no need and no evidence for the grounding of the General Aviation aircrafts.

[82] As far as regulatory theories are concerned, the United Kingdom and European Union seem to prefer the economic theory of regulation. At the beginning of the process of regulating the aviation industry though, it seemed that the public interest theory of regulation had prevailed. At that time, aviation, like transport was very much a state owned industry and the issue of safety. However, with the current sentiments from the industry it would seem that the industry would prefer to be more involved in the regulatory process of aviation, particularly that of General Aviation.

[83] As for Malaysia, the regulatory structure has been primarily based on the public interest theory of regulation. Legislators and law makers have made it their role to ensure that the well being of society at large is maintained. Recently, that appears to be a shift in this stance. The Department of Civil Aviation in Malaysia, a government regulatory department, has since been replaced with a statutory body in the

106 Retrieved from <https://www.airleague.co.uk> (accessed April 7, 2011).
107 Ibid.
108 Ibid.

form of the Civil Aviation Authority of Malaysia. This position puts Malaysia on par with other countries such as the United Kingdom where the Civil Aviation Authority is a statutory body.

[84] It appears that Malaysia seems to be shifting from the public interest theory of regulation for aviation to one that is more inclined towards the economic theory of regulation. This is evident firstly from the establishment of the Malaysian Aviation Commission in March 2016. The Malaysian Aviation Commission was established to regulate economic matters relating to the civil aviation industry and to provide for its functions and powers and related matters.[109]

[85] Moreover, the Government has since transformed the Department of Civil Aviation into a statutory body in the form of the Civil Aviation Authority of Malaysia. This is the introduction of a civil aviation authority which has more autonomy in regulating the industry.

[86] Aside from the formation of the two civil aviation regulators, the law and regulations have, in the last few years, been updated. For instance, the Civil Aviation Act 1969 was amended in 2017 to introduce further safeguards for the industry.

[87] These developments in the civil aviation industry in Malaysia point towards an industry that is sustainable and competitive whilst maintaining the need for safety and security. In this way, it is humbly suggested that perhaps a combination of the public interest theory of regulation and the economic theory of regulation would best serve the needs of Malaysia. The objective is for the civil aviation industry to be sustainable and economically viable, and at the same time ensuring the safety and security of the civil aviation industry. This would allow the civil aviation industry, especially the General Aviation sector to soar.

109 Long Title, Malaysian Aviation Commission Act 2015 (Act 771).

CHAPTER 10 CASES OF INTEREST

CASES OF INTEREST: CIVIL

Retention sums under construction contract would not be treated as monies held on trust for the sub-contractors in absence of express terms in the construction contract for the creation of the trust.

SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Another Appeal [2019] 4 CLJ 590 (FC)

This Federal Court decision is significant as it overruled the decision of the Court of Appeal in *Qimonda Malaysia Sdn Bhd (In Liquidation) v Sediabena Sdn Bhd*[1] ("Qimonda") and affirmed the decision of the Court of Appeal in *Pembinaan Legenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal*[2] ("Geohan").

In Qimonda, it was held that there was a trust of the retention sum despite the absence of express trust clause or words to that effect in the contract and there were no unusual terms as well. In that case, no fund was set aside before the liquidation, nor had the contractor requested it. The Court of Appeal held that even though the "requisites" of a valid trust were present, there seemed to be no evidence of either intention or trust property. Retention monies are by their nature and purpose, trust monies held by the appellant for the respondents for a specific purpose i.e., for payment on the costs incurred by the appellant to rectify defective works by the respondents or to complete the works left uncompleted. The failure to separate the retention monies from the common funds prior to liquidation cannot defeat the trust.

In Geohan, the respondent engaged Geohan Sdn Bhd and the appellants to carry out sub-contract works in relation to two different projects. Although the sub-contract works have already been completed since 12 December 2013, and the respective certificates of practical completion were issued by the architect, the appellants have not received any response or payment from the respondent in respect of the retention sum. Both the sub-contracts contained a clause which provided for the deduction and release of the retention sum. Despite the expiration of the defect's liability period and legal demands from the sub-contractors, the respondent failed to release the retention sum.

1 [2012] 3 MLJ 422.
2 [2018] MLJU 196.

On 2 November 2015, the shareholders of the respondent passed a special resolution for the voluntary winding up of the respondent. Based on the respondent's statement of affairs as at 8 October 2015, there were about 250 creditors, out of which 128 were creditors claiming retention sums. The total amount owed to creditors for retention monies was RM8,230,087.61. (Note: The High Court judgment stated a sum of RM489,490.75 and RM58,295.25 as retention sum.) This included the amounts owed to the appellants. The respondent did not open any separate bank account for the retention monies including the amounts owed to the appellants.

Relying on the decision of Qimonda, the High Court held that the retention sums were held on trust by the respondent. Whilst there was no express clause providing for the creation of a trust over the retention monies, a trust could still arise due to the fact that there was a provision for the release of the retention monies upon the completion of any rectification work on any defects and no notice was received from the respondent requiring any defects to be rectified.

The Court of Appeal reversed the decision of the High Court and held that there could not be a trust because of the lack of an express clause or clear conduct from the parties, as well as the fact that the retention monies were never segregated. The Court of Appeal took the view that a trust cannot be implied purely from the nature and purpose of retention monies per se, and that the concept of a trust is not inherent in the use of the word "deductions". It went on to hold that most construction contracts do not operate via a trust, unless otherwise expressly stated. The court also observed that there is no general proposition of law in a building contract that retention monies are as a rule, held by way of trust between an employer and a contractor.

In dismissing the appeal, the Federal Court affirmed the Court of Appeal's approach and overruled the decision of Qimonda due to the absence of express contractual words or conduct of the parties suggesting a trust had been intended. Furthermore, the source of the trust property from which the retention sums may be derived was not identifiable since the respondent had not taken any steps to segregate the retention sums that might then indicate that the retention sums should be considered as trust monies. Hence, there was no certainty of the subject matter.

> [48] ... the retention sums in the instant appeals cannot be said to be subject to a trust owing to an absence of express contractual words or conduct of the parties suggesting otherwise. Thus, the element of certainty of intention to constitute an express private trust fails. Furthermore, the source of the trust property from which the retention sums may be derived is not identifiable. There is consequently no certainty of subject matter. On the facts, implying a trust over the retention monies also runs counter to the pari passu principle now that the respondent is insolvent and would result in injustice to the other unsecured creditors.
>
> *per Justice Richard Malanjum, Chief Justice*

A judge who has resigned holds no judicial post and so cannot pronounce any judgment after his retirement. A judgment so pronounced cannot at all be featured, relied upon, concurred with or adopted as it gives rise to the inference that the "mind of the court" is that of a judge who has lost his jurisdiction.

Bellajade v CME Group & Tan Sri Dato' Lim Cheng Pow [2019] 8 CLJ 1 (FC)

The respondents entered into a tenancy agreement with the applicant wherein the applicant is the landlord. CME Group Berhad ("the 1st Respondent") is the tenant and Tan Sri Dato' Sri Lim Cheng Pow ("the 2nd Respondent") is the guarantor. The applicant initiated an action at the High Court for a breach of the tenancy agreement arising from non-payment of monthly rental. The 1st Respondent counterclaimed for refund of rentals paid. The High Court dismissed the applicant's claim and allowed the 1st Respondent's counterclaim. The Court of Appeal set aside the decision of the High Court.

In March 2018, a panel of five judges of the Federal Court heard the appeal. Judgment was reserved. In July 2018, Zulkefli Ahmad Makinudin PCA (as His Lordship then was), then a member of the panel, resigned from office. In September 2018, the judgment of the Federal Court was delivered by the four remaining Judges of the original panel ("the impugned judgment"). The impugned judgment was authored by the former PCA, Justice Zulkefli Ahmad Makinudin. Three of the remaining judges (i.e. the majority) purported to "concur and adopt" the impugned judgment which dismissed the applicant's appeal. One judge dissented.

The applicant then filed an application at the Federal Court to review and set aside the impugned judgment pursuant to rule 137 of the Rules of the Federal Court 1995 on the grounds of, *inter alia*, coram failure. The applicant contended that the majority of the remaining judges could not concur and adopt the judgment of the former PCA, premised on section 78 of the Courts of Judicature Act 1964 (Act 91), which provides that where judgment is reserved and where before the delivery of judgment any judge hearing the matter is unable, through illness or any other cause, to attend the proceeding or exercise his functions as a judge, the reserved judgment is to be delivered by the remaining judges (not being less than two) and the proceeding is to be determined in accordance with the opinion of the majority of the remaining judges.

The Federal Court allowed the applicant's application. The Federal Court also set out in a non-exhaustive manner the circumstances under which it would exercise its inherent power of review. Apart from coram failure, the exceptional circumstances justifying interference include cases where the earlier decision was obtained by fraud or suppression of material evidence, was made in clear infringement of law, where bias is established, breach of natural justice and lack of jurisdiction.

The Federal Court held that the effective date of a judgment is the date of its pronouncement. In concurring with and adopting the impugned judgment as at the date of its pronouncement: (a) there was an inference that the impugned judgment was not that of the majority of the remaining judges but of a judge who had lost his jurisdiction to decide as a judge by reason of his resignation; and (b) at the time of pronouncement, the impugned judgment did not in law exist following the resignation of the then PCA and as such, the majority of the remaining judges could not do what was done. The appeal was ordered to be reheard by a differently constituted panel of the Federal Court.

> [28] The judgment of [the retired PCA] in our view in law did not exist and cannot exist as there was no such Judge in the coram so to speak. Hence, any attempt to "concur and adopt" by the three majority Judges was an exercise in futility as there was no such judgment in existence... Section 78(2) of the CJA, which requires judgment to be determined in accordance with the opinion of only the majority of the remaining Judges.
>
> *per Justice David Wong Dak Wah, Chief Judge of Sabah & Sarawak*

When an independent claim in a patent is held to be invalid, it does not necessarily follow that all dependent claims which refer to such independent claim will automatically fail. The invalidity notwithstanding, the trial court is still duty bound to consider the validity of dependent claims based on the merits of the respective claims. The Federal Court departed from its own decision in SKB Shutters Manufacturing Sdn Bhd v. Seng Kong Shutter Industries Sdn Bhd & Anor [2015] 9 CLJ 405 ("SKB Shutters").

Merck Sharp & Dohme Group & Anor v Hovid Bhd [2019] 9 CLJ 1 (FC)

The sole legal issue that falls for consideration in this appeal is whether, in the case where the adjudication of an independent claim is found invalid, it automatically renders claims which are dependent on the independent claim invalid, without the need for the court to consider separately the validity of each and every dependent claim(s).

The appellants own a patent on the dosing regimen of alendronate ("the 194 Patent"). The invention relates to the use of alendronate in oral form as a medicament for inhibiting bone resorption in humans. The appellants

sued the respondent for patent infringement. The claim comprises of 1 independent claim and 21 dependent claims. The respondent denied the alleged infringement and counterclaimed for a declaration that the 194 Patent was invalid on several grounds, most notably that it did not contain the obligatory 'inventive step' to warrant protection.

The High Court dismissed the infringement claim against the respondent and declared that the 194 Patent was invalid on the ground of obviousness. Following the principle in SKB Shutters, the High Court went on to hold that all dependent claims related to the 194 Patent are invalid as well. The said decision was upheld by the Court of Appeal.

The appellants has appealed to the Federal Court, where the Court had and departed from the landmark decision of SKB Shutters as it has failed to consider the myriad of other claims and bases of the challenge that routinely arise in patent adjudication. In arriving at its decision, the majority in the Federal Court found that dependent claims fall within two categories; the first being those that are subsidiaries of an independent claim, and the second being those which hold additional information or features. The latter form of claim, the court decided, must be addressed individually should their respective independent claim fall, as they were not rendered meaningless because of this. Thus, the appeal was allowed, and the case has been remitted to the High Court to separately evaluate the appellant's dependent claims.

> [136] The validity of these dependent claims will ultimately depend on the form of claim used, whether Type 1 or Type 2, and the basis of the challenge to their validity. A trial court can only ascertain the type of claim before it through undertaking the evidential process of examining each claim separately. If it fails to do so, the trial court may well overlook any additional features embedded within a dependent claim that could render such claim invalid. The serious consequence... is that a patentable invention would not be protected.
>
> [140] ... the principle established in SKB Shutters that when an independent claim is invalid, all dependent claims dependent on the said independent claim also fall with it, fails to take into account the myriad of other claims and bases of challenge that routinely arise in patent adjudication."
>
> *per Justice Nallini Pathmanathan, Federal Court Judge*

The Controller of Housing has no power under the Housing Development (Control and Licensing) Act 1966 (Act 118) or the Housing Development (Control and Licencing) Regulations 1989 to modify the statutory contract of sale entered into by house buyers under the Act and certainly cannot extend the statutory completion period of 36 months prescribed under the contract.

Ang Ming Lee & Ors. v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and Other Appeals [2020] 1 CLJ 162 (FC)

On 14 May 2019, the Federal Court heard 6 appeals brought by the house buyers ("purchasers") and BHL Construction Sdn Bhd, the developer of a development known as Sri Istana Condominium ("the Project"). The appeals concerned the validity of a 12 months extension of time granted by a named individual, purportedly on behalf of the Controller of Housing ("the Controller"), for its completion of the Project.

The developer had entered into various Sale and Purchase Agreements ("SPAs") with the purchasers of units in the Project. The SPAs were made in the prescribed form for the contract of sale under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ("the Regulations"). Paragraph 25(2) of Schedule H of the Regulations provides that if a developer fails to deliver vacant possession within 36 months from the date of signing of the SPA, the developer would be liable to pay liquidated damages ("LAD") to the purchasers for late delivery.

Before the expiry of the 36 months period, the developer applied to the Controller for an extension of time pursuant to regulation 11(3) of the Regulations, which confers power on the Controller to waive or modify the provisions of a prescribed contract of sale if the Controller is satisfied that owing to special circumstances or hardship or necessity, it is impracticable or unnecessary to comply with the provisions of such contract. The application was rejected. Dissatisfied, the developer lodged an appeal to the Minister of Urban Wellbeing, Housing and Local Government ("the Minister") pursuant to regulation 12 of the Regulations. The Minister had allowed the appeal. The extension, however, was made vide a letter signed by an officer on behalf of the Controller. As a result of the extension, the purchasers were unable to claim for LAD as provided for under the SPAs. The purchasers filed an application for judicial review

against the Minister, the Controller and the developer to quash the decision contained in the impugned letter.

In allowing the purchasers' appeal, the Federal Court held that regulation 11(3) of the Regulations was void as it was *ultra vires* the parent Act. Tengku Maimun Tuan Mat CJ held that where a statute confers discretionary powers upon a person, it indicates that Parliament had reposed trust in that person's judgment and discretion. Accordingly, that person must exercise the powers personally unless contrary indications are found in the language and the scope or object of the statute that the powers may be sub-delegated. The Federal Court noted that section 24 of the Housing Development (Control and Licensing) Act 1966 ("the Act") allows the Minister to regulate the rules, terms, and conditions of the contract of sale between a purchaser and developer and is expected to apply his own mind to the matter. The power to regulate does not include the power to delegate. There are no contrary indications to this effect in the Act that the Minister could delegate such responsibility to the Controller. Therefore, the Minister's action, in delegating the power to modify the terms and conditions of the contract of sale, must be construed as having exceeded what was intended by the Parliament.

The apex court recognised the Act as a social legislation designed to protect or safeguard the interest of the purchasers. By granting an extension of time or by allowing modifications to the prescribed terms and conditions of the SPAs, the Controller had denied the purchasers' right to claim for LAD, which is against the intention of Parliament.

> [56] By delegating the power, vide regulation 11(3) to the Controller to waive or modify the prescribed terms and conditions of the sale of contract, it is now the Controller who has been entrusted to regulate the terms and conditions of the contract of sale. Further, by modifying the prescribed terms and conditions and by granting the developer the extension of time, the Controller has denied the purchasers' right to claim for LAD. This modification and the granting of extension of time to the developer, does not appear to us to protect or safeguard the purchasers but rather the developer and this militates the intention of Parliament.
>
> [60] ... section 24 of the Act does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H contract of sale to the Controller. And it is not open to us to read into the section an implied power enabling the Minister to do so. We consequently hold that regulation 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is ultra vires the Act.
>
> *per Justice Tengku Maimun Tuan Mat, Chief Justice*

Judicial and revenue stamps issued during the Federated Malay States for payment of duties in matters of probate

In determining whether the Prime Minister or a Minister is a "public officer" for the purpose of the tort of misfeasance in public office, the court is not limited by the definition of "public officer" in section 3 of the Interpretation Acts 1948 and 1967 (Act 388) read with Articles 132 and 160 of the Federal Constitution but may look further at the common law definition of "public officer". An interpretation so limited or restricted would render immune the holders of the highest offices in administration and is repugnant to common sense and the rule of law. The Prime Minister, being a public officer holding a public office in law, may be liable for such tort and is therefore susceptible to a like suit undertaken by a citizen or a taxpayer.

Tony Pua Kiam Wee v Government of Malaysia & Another Appeal [2020] 1 CLJ 337 (FC)

In 2017 the appellant sued the then Prime Minister Najib Razak and the Government of Malaysia ("Government"), premised on the common law tort of misfeasance, which means the wrongful use of lawful authority, in public office over the 1Malaysia Development Bhd (1MDB) fiasco. It was contended that Najib Razak had abused his public office by personally benefitting or profiting or both, from the receipt of monies from 1MDB, which are public funds.

The plantiff sought to make the Goverment vicariously liable if the tort is proven against the former Prime Minister at trial.

The High Court struck out the actions on the ground that Najib Razak was not a "public officer" or a "person holding public office" as contemplated under the tort of misfeasance in public office. The Court of Appeal upheld the decision of the High Court. The Federal Court, in a unanimous landmark decision dated 19 November 2019, reinstated the two actions. Accordingly, the appellant is not shut out from the opportunity to establish his case at trial.

The Federal Court, in allowing the appeals, answered leave question (1) in the negative and leave question (2) in the affirmative. The questions are:

1. Whether a court, in determining if the Prime Minister or any other Minister is a public officer for the purpose of the tort of misfeasance in public office, is limited by the definition of 'public officer' in section 3 of the Interpretation Acts 1948 and 1967, read together with Articles 132 and 160 of the Federal Constitution?

2. Whether the Prime Minister or any other Minister is a public officer within section 5 of the Government Proceedings Act 1956 ("the GPA") for the purpose of the tort of misfeasance in public officer?

The Federal Court ruled that a Prime Minister or any other Minister are public officers within section 5 of the GPA as there was no express legislative intent in either the Federal Constitution or the Interpretation Acts 1948 and 1967 which alters and substitutes the common law tort of misfeasance in public office. The Federal Court clarified that the Interpretation Acts 1948 and 1967 and the Federal Constitution draw a clear distinction between the written law and the common law and both branches "exist as independent streams of law" save that the common law applicable in Malaysia is capable of amendment, modification and abrogation by written law. Also, it is "neither tenable nor prudent" at common law to give an exhaustive definition of the term "public officer" to cover all scenarios of abuse of power, a matter which would probably stultify the vitality of the tort. Accordingly, "the definition of the key ingredient of 'public officer' and the ambit of that definition" was the crucial issue.

Here, the Federal Court agreed with earlier Malaysian decisions and decisions of other jurisdictions that at common law: (a) the rationale of the tort in a legal system based on the rule of law is that executive and administrative powers may only be exercised for the public good and not for ulterior and improper purposes; and (b) the ambit of the term 'public officer' is not confined merely to persons employed in the public service.

The Federal Court held that the crucial question before it was whether: (a) Section 3 of the Interpretation Acts 1948 and 1967 and Articles 132(1) and 132(3) of the Federal Constitution were specifically enacted for the purpose of abrogating or modifying the common law tort of misfeasance in public office with reference to the definition of a "public officer" or "a person who holds public office"; or (b) the provisions are of general application only and were not expressly or impliedly enacted for the purpose of abrogating or modifying the definition at common law.

In reversing the decisions of the courts below, several grounds were advanced by the Federal Court. The grounds included that: (a) there is a common law presumption that the common law will continue to apply until written law is passed with the express intention of excluding its continued application; (b) the provisions did not expressly state an intention to abrogate the common law tort as being applicable to Ministers; (c) the provisions also did not do so implicitly by adopting a legal scheme applicable to Ministers that is incompatible with the continued application of the common law tort; (d) the Interpretation Acts 1948 and 1967 manifest Parliament's intention that the said legislation is for the interpretation of written law only and further, Article 160(1) of the Federal Constitution reinforces the legislative scheme that the Articles of the Constitution must be construed contextually and within its framework; and (e) an examination of the genesis of Part X of the Constitution dealing with 'Public Services' yields the answers as to why the Constitution purposively separated "members of the administration" from members of the public service — the purposes are: (i) to provide for an efficient administrative structure; and (ii) create a public service that is "free from executive influence..."

> [130] ... while Ministers are not 'public officers' under the Federal Constitution, they are no less holders of 'public office' for the purposes and in the context of misfeasance in public office. They derive their salary from the public purse and carry out their functions with a public purpose.

[141] ...the tort of misfeasance in public office is grounded on the rule of law. Amongst the fundamental aspects of the rule of law is that: The law is supreme over the acts of both government and private persons. That law is one and it is applicable to all. To that end, no man is above the law and all are equal before the law...

[146] The doctrines of the rule of law and the separation of powers underpin and comprise the 'internal architecture' of our Constitution... So, to conclude that the definition of public officer in Malaysia excludes members of the administration such as a Prime Minister, so that members of the administration... may allegedly act with impunity, so as to knowingly and/or recklessly dissipate public funds and remain immune to civil action under this tort, is anathema to the doctrine of the rule of law and the fundamental basis of the Federal Constitution. Such a construction of the term 'public officer' which erodes the rule of law, is repugnant and cannot prevail.

[152] The essential tenets of the rule of law remain of fundamental importance in Malaysia. As the tort of misfeasance in public office encapsulates the essence of the rule of law, it is applicable in its original form without modification under Section 3 of the CLA...

[153] If anything, the importation and subsistence of the original tort should be strengthened and applied more stringently to address the subsisting problem of corruption in public office. However, it must be borne in mind that it remains a tort which requires several elements to be made out including material damage to the plaintiff bringing the action.

per Justice Nallini Pathmanathan,
Federal Court Judge

The Federal Court held that the term "public officer" in section 5 of the GPA should be construed in accordance with the GPA and not by reference to section 3 the Interpretation Acts 1948 and 1967 because: (a) using the definition of "public officer" in section 3 of the Interpretation Acts 1948 and 1967 would render the definition of "officer" in section 2 of the GPA otiose and Parliament does not legislate in vain; and (b) section 2(3) of the Interpretation Acts 1948 and 1967 expressly provides that the definition of "public officer" does not apply if there is: (a) an express provision to the contrary, or (b) something in the subject or context is inconsistent with or repugnant to its application.

... the purpose of the GPA is to establish vicarious liability on the part of the Government (which is borne out by the express provisions of section 5) it follows that importing the definition of 'public officer' in section 3 of the Interpretation Acts would render the underlying purpose of the GPA meaningless. In other words, despite express provisions creating such vicarious liability, this may be circumvented by importing a definition from another statute, namely the Interpretation Acts. Any construction which allows for the express circumvention of the very purpose for which the statutory provision was established is perverse and cannot be sustained. Therefore, section 3 of the Interpretation Acts cannot be imported to construe section 5 of the GPA.

per Justice Nallini Pathmanathan,
Federal Court Judge

Wilful and contumacious conduct on the part of a tenant is not a condition precedent to found a claim for double rental under section 28(4)(a) of the Civil Law Act 1956 (Act 67). The rent is chargeable upon the tenant's failure per se to give up possession and upon his continuing to hold over without the landlord's consent.

Rohasassets Sdn Bhd v. Weatherford (M) Sdn Bhd & Anor [2020] 1 CLJ 638

In this case, the Federal Court had to consider whether there is a need for the landlord to prove wilful and contumacious conduct on the part of the tenant, to entitle the landlord to charge double rent under section 28(4)(a) of the Civil Law Act 1956 (Act 67) ("CLA") if the tenant holds over after the expiry of the tenancy.

The appellant is the owner of a commercial building. The respondents were tenants who occupied a few floors in the building. Before the expiry of the tenancies, the parties began negotiations on the renewal of the tenancies. The negotiation process proceeded for some 2 years after the expiry of the tenancies. The appellant expressly reserved its right to charge double rent and consistently reminded the respondents, both before and after the expiry of the tenancies to make payment but the respondents did not do so. The respondents knew of the appellant's right to charge double rent and in fact pleaded for it to be waived, especially in the event of a renewal of the tenancies. This is evidenced by the correspondences and the meetings between the parties. Negotiations for new tenancies failed, after which, the appellant terminated the tenancies and gave notices to the respondents to quit and deliver vacant possession of the premises by 1 October 2011. The respondents did not challenge the termination or the notices to quit, but took an additional one month to vacate the premises by delivering vacant possession only on 31 October 2011. Double rent was claimed for the period commencing from the expiry of the tenancies

on 31 March 2009, 30 April 2009 and 31 January 2011 up to the date of delivery of vacant possession on 31 October 2011.

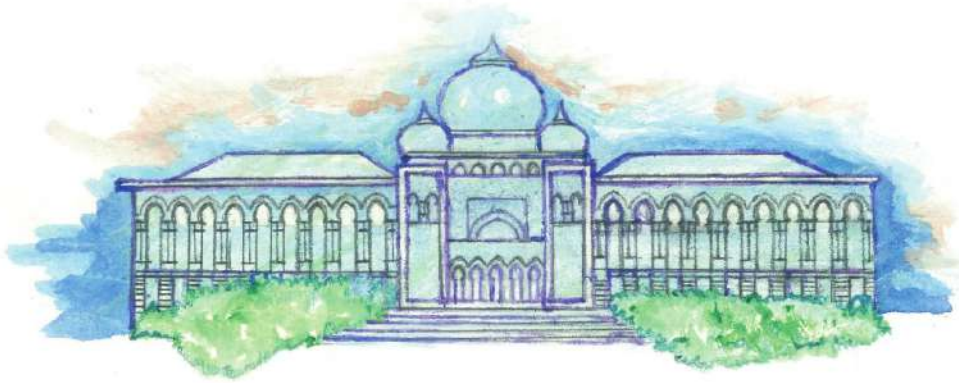
The appellant's claim was dismissed by the High Court which found that the appellant had failed to prove that the respondents' holding over of the premises was wilful or contumacious. The dictionary meaning of the word "contumacious" is "stubbornly or wilfully disobedient to authority".

The Court of Appeal agreed with the High Court that it is incumbent on the appellant to prove wilful or contumacious holding over on the part of the respondents in order to bring an action seeking double rent under section 28(4)(a) of the CLA against the respondents. On the fact of the case, the Court of Appeal overturned the High Court decision and found the appellant to be entitled to receive double rent, not from the date of expiry of the tenancies as claimed by the appellant, but only from the date of the expiry of the notice to quit, that is on 1 October 2011 until the date when vacant possession of the premises was delivered back to the appellant, namely on 31 October 2011.

The Federal Court, in dismissing the appeal, answered the legal question posed in the negative. The Federal Court held that it is not incumbent on a landlord to show wilful and contumacious conduct on the part of the tenant in order to charge double rent. The Federal Court opined that to entitle a landlord to charge double rent, there must be a failure or refusal by the tenant to give up possession after being told to do so by the landlord. The court's duty is to determine whether the option to charge double rent had been exercised properly and lawfully by the landlord, and is not concerned with contumacious conduct on the part of the tenant who holds over. In other words, even if the tenant is not guilty of contumacious conduct, the tenant is still liable to pay double rent if the landlord has decided to charge double rent and does not consent to the tenant's holding over and has asked the former tenant to vacate the premises.

In the present appeal, the Federal Court found that based on the facts of the case, that the respondents had held over the premises after the expiry of the tenancies with the tacit approval of the appellant. In this regard, the Federal Court took into consideration the fact that the appellant did not make its intention clear to the respondents that it did not wish to renew the tenancies and wanted the respondents to give up possession after the expiry of the tenancies. It was held that by agreeing to negotiate for renewal of the tenancies, the appellant had evinced an intention to renew the tenancies subject to the finalisation of the terms. The Federal Court further found that the appellant did not make it clear to the respondents that it would not allow the respondents to hold over the premises without paying double rent while negotiations for renewal of the tenancies were ongoing, but only issued the notice to quit after negotiations had failed.

> [89] ... To entitle the landlord to charge double rent, there must be failure or refusal by the tenant to give up possession after being told to do so by the landlord. This has to be so because the landlord's claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss the tenant causes the landlord in refusing to give up possession: ...
>
> [90] ... The court is not concerned with contumacious conduct on the part of the tenant who holds over. Even if the tenant is not guilty of contumacious conduct, the tenant is still liable to pay double rent if the landlord has decided to charge double rent and does not consent to the tenant's holding over and has asked the former tenant to vacate the premises."
>
> *per Justice Abdul Rahman Sebli,*
> *Federal Court Judge*



CASES OF INTEREST: CRIMINAL

A pillory, formerly used for punishment by public humiliation is displayed in the museum of the Palace of Justice, Putrajaya

Section 37A of the Dangerous Drugs Act 1952 which allows the application of double presumptions for an offence of trafficking under section 39B of the same Act was declared unconstitutional for violating Article 5(1) read with Article 8(1) of the Federal Constitution.

Alma Nudo Atenza v Public Prosecutor and Another Appeal [2019] 4 MLJ 1

This case is about double presumptions in drug trafficking convictions. The Federal Court was tasked with determining whether section 37A of the Dangerous Drugs Act 1952 (Act 234) ("DDA") was constitutional *vis a vis* Articles 5, 8 and 121 of the Federal Constitution ("FC"). Section 37A allows the presumptions in sections 37(d) and 37(da) of the DDA to be applied together against an accused in a drug trafficking trial. To this effect, custody and control of drugs raises the presumption of possession and knowledge, which in turn raises the presumption of trafficking which, then, mandates the death penalty. The first and second appellants were both charged, convicted and sentenced to death for the offence of drug trafficking under section 39B of the DDA by two different trial judges. The Court of Appeal dismissed their appeal against conviction and sentence. Since both appeals were premised on one common and crucial issue, the Federal Court proceeded to hear them together.

At the commencement of the hearing of these appeals, the respondent raised a preliminary objection that the appellants had not obtained leave of the Federal Court under Article 4(4) of the FC to mount the constitutionality challenge of section 37A. In reply, the appellants argued that the validity of section 37A is not challenged on the ground that it relates to the legislative competence of Parliament to enact the

section. Therefore, the challenge does not fall within the scope of Article 4(4) and leave is not required. Reading Article 121(1) together with Article 74(1) of the FC, Parliament is empowered to make law and not to declare law. The enactment of section 37A was an impermissible act of declaring law. The appellants further submitted that by enacting section 37A which reverses the decision of the Federal Court in *Muhammed bin Hassan v PP*[1] Parliament had usurped the judicial power of the Federation and thus contravened Article 121(1) of the FC.

On the merit of the appeal, it was the appellants' case that section 37A of the DDA has the effect of reversing the burden onto an accused to prove his or her innocence. Where double presumptions are applied, it has been held that the burden on the appellants to rebut both presumptions on the balance of probabilities is oppressive, unduly harsh, and unfair. Section 37A offends the requirement of fairness housed under Articles 5 and 8 of the FC.

In the attempt to establish that section 37A was validly enacted, the respondent submitted that the objective of the section was to streamline the DDA with the ruling of the Federal Court in *Muhammed bin Hassan v PP*[2] so as to enable the application of the double presumptions. Section 37A does not encroach upon the judicial power of the courts since it gives the court the discretion to apply any presumption in addition to or in conjunction with any other presumptions. Section 37A does not offend the right to equality under Article 8 of the FC since it is a provision of general application to all persons under like circumstances. According to the respondent, the imposition of presumptions rebuttable by an accused on a balance of probabilities strikes a balance between the public interest in curbing crime and the protection of fundamental rights.

The Federal Court held that the respondent's preliminary objection had no merit. Since the validity of section 37A is not challenged on the ground that it relates to a matter on which Parliament has no power to make laws, the challenge does not fall within the scope of Article 4(4) and thus, leave is not required from the court. It was also further held that section 37A does not purport to overrule the decision of the Federal Court in *Muhammed bin Hassan v PP*[3] but only complying with the opinion of the Federal Court therein which states that sections 37(d) and 37(da) should only be construed to permit the application of a presumption with another presumption if the intention of Parliament was clear from the wordings of the statute.

Despite the insertion of section 37A, a plain reading of the wording in sections 37(d) and 37(da) does not permit the concurrent application of both the said presumptions in the prosecution of a drug trafficking offence. There was no amendment made to the original wording in section 37(da). The effect of section 37A is that it violates the presumption of innocence since it permits an accused to be convicted while a reasonable doubt may exist. It follows that section 37A was disproportionate to the legislative aim it served. Therefore, the Federal Court held that section 37A was unconstitutional for violating Article 5(1) read with Article 8(1) of the FC and was hereby struck down. Accordingly, the Federal Court quashed the convictions and sentences of both the appellants under section 39B of the DDA and substituted their respective convictions to one of possession under section 12(1) of the same Act.

> [139] The effect of s 37A on the operation of the two presumptions is therefore as follows:
>
> (a) once the prosecution proves that an accused had the custody and control of a thing containing a dangerous drug, the accused is presumed to have possession and knowledge of the drug under sub-s 37(d). The 'deemed possession', presumed by virtue of sub-s 37(d), is then used to invoke a further presumption of trafficking under sub-s 37(da), if the quantity of the drug involved exceeds the statutory weight limit;
>
> (b) section 37A thus permits a 'presumption upon a presumption' (as aptly described in Muhammad bin Hassan at p 291); and
>
> (c) as such for a charge of drug trafficking all that is required of the prosecution to establish a prima facie case is to prove custody and control on the part of the accused and the weight of the drug. The legal burden then shifts to the accused to disprove the presumptions of possession and knowledge (sub-s 37(d)) and trafficking (sub-s 37(da)) on a balance of probabilities.
>
> ...
>
> [141] Hence, for the above reasons we are of the view that s 37A prima facie violates the presumption of innocence since it permits an accused to be convicted while a reasonable doubt may exist.
>
> ...

1 [1998] 2 MLJ 273.
2 Ibid.
3 Ibid.

[143] The first stage in the proportionality assessment is to establish whether there is a sufficiently important objective to justify the infringement of the right, in this case the right to presumption of innocence. The legislative objective in inserting s 37A is to overcome the problem of the prosecution failing to prove the element of trafficking as defined in the DDA. Drug trafficking has been a major problem in the country. It needs to be curbed. One way is to secure convictions of drug traffickers which can be considered a sufficiently important objective and one which is substantial and pressing.

...

[146] The presumptions under sub-ss 37(d) and (da) relate to the three central and essential elements of the offence of drug trafficking, namely, possession of a drug, knowledge of the drug, and trafficking. We have already discussed this point earlier in this judgment. The actual effect of the presumptions is that an accused does not merely bear an evidential burden to adduce evidence in rebuttal of the presumptions. Once the essential ingredients of the offence are presumed, the accused is placed under a legal burden to rebut the presumptions on a balance of probabilities. In our view it is a grave erosion to the presumption of innocence housed in art 5(1) of the FC.

[147] But the most severe effect, tantamount to being harsh and oppressive, arising from the application of a 'presumption upon a presumption' is that the presumed element of possession under sub-s 37(d) is used to invoke the presumption of trafficking under sub-s 37(da) without any consideration that the element of possession in sub-s 37(da) requires a 'found' possession and not a 'deemed' possession. The phrase 'any person who is found in possession of' entails an affirmative finding of possession based on adduced evidence

...

[149] Further, the application of what may be termed the 'double presumptions' under the two subsections gives rise to a real risk that an accused may be convicted of drug trafficking in circumstances where a significant reasonable doubt remains as to the main elements of the offence. In such circumstance, it cannot be said that the responsibility remains primarily on the prosecution to prove the guilt of the accused beyond a reasonable doubt.

[150] Based on the factors above — the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions — we consider that s 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves. It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art 5. In light of the seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art 8(1).

per Justice Richard Malanjum, Chief Justice

Where a person had been unlawfully killed and the court finds that the offence of murder under section 300 of the Penal Code has not be established, the offence of culpable homicide under section 299 of the same Code will come to play and the court will determine, based upon the evidence before it, under which limb of section 299 the acts or omissions fall under.

Fong Kong Meng & Anor v Public Prosecutor [2019] 12 MLJ 110

This case concerns the power of the Federal Court in criminal appeals. The applicants were jointly charged, convicted and sentenced by the High Court under section 302 of the Penal Code (Act 574) ("PC") for the murder of their maid through a long period of abuse, neglect and starvation. The prosecution relied on section 300(d) of the PC in proving its case. The Court of Appeal maintained both the conviction for murder and the death sentence. Upon further appeal by the applicants, the Federal Court ("the earlier panel") found that a case under section 300(d) of the PC had not been made out against the applicants and proceeded to find the applicants guilty of culpable homicide under section 304(a) of the PC where the applicants were both sentenced to 20 years imprisonment. Pursuant to rule 137 of the Rules of the Federal Court 1995, the applicants filed a review to set aside the earlier panel's decision contending that they should have been convicted and sentenced under section 304(b) of the PC which carries a lighter punishment.

In support of this application, the applicant relied on the case of *Soh Chew Thong & Anor v Public Prosecutor* (unreported) and submitted that when the earlier panel found that section 300(d) was not proved, the applicants cannot be found guilty of culpable homicide under section 304(a) which speaks of intention and not "knowledge" as required in section 300(d). It was further submitted that the correct provision under which the applicants should be found guilty of was section 304(b) which also speaks of "knowledge" as is provided for in section 300(d). Since the whole foundation of the prosecution's case and the rationale of both the High Court and the Court of Appeal were premised on "knowledge" pursuant to section 300(d), the earlier panel in reducing the charge against the applicants can only consider a substitution of conviction and sentence under section 304(b) and not section 304(a).

The Federal Court expounded that, in criminal appeals, it possesses the same powers as the High Court and the Court of Appeal. The court is duty bound to evaluate the facts in its totality, re-evaluate the evidence afresh and then make a determination as to whether the conviction is safe. If the conviction is unsafe, the court is then duty bound to decide whether the evaluated facts justify a conviction under another provision of the Code. As in this case, where someone had been unlawfully killed, sections 299 and 300 of the PC come into play. In the event, a court finds that a section 300 offence (murder) has not been made out, section 299 (culpable homicide) offences come into play for the court to determine, based on the facts found, under which limb of section 299 do the acts and omissions fall under.

The court further reasoned that the ingredients set out in sections 299 and 300 of the PC vary in degree and that different considerations apply to each offence. The court's mind must then focus on the totality of the evidence to determine which limb in section 299 the accused could be found guilty of. Whatever discussions relating to the ingredients of section 300(d) in the High Court and the Court of Appeal are no longer of relevance in the process of determining guilt under section 299 of the PC. The court is of the view that what the earlier panel did was perfectly in order and that event if the earlier panel had wrongly applied the facts to the law, the applicant does not meet threshold to apply for a review under rule 137. Accordingly, the court dismissed the review application.

> [20] Though there are no written grounds by the earlier panel, there is little doubt as to what the earlier panel did. Upon finding that s 300(d) had not been proved, the earlier panel, as intimated by us earlier, then embarked on a process of re-evaluation of the facts and made a determination on which relevant provision under the Code were the applicants guilty of, upon the application of the fresh finding of facts.
>
> ...
>
> [22] That was what the earlier panel did. They evaluated the evidence again as they are empowered to do so under s 86 of the CJA, in order to find guilt either under limb 1 or 2 or 3 of s 299. If it is an offence under limb 1 or 2, then it would draw punishment under s 304(a) of the Code. If it is a limb 3 offence, then it would draw punishment under s 304(b) of the Code.
>
> ...
>
> [26] The case of Soh Chew Thong & Anor v Public Prosecutor was relied on heavily by the learned counsel for the applicants. We do not have the benefit of the grounds but it must be remembered that every decision of the courts depends substantially on the peculiarity of each case as the facts would invariably be different and subject to different inferences leading to different opinions of the courts. Even if the facts are the same, this court is entitled to make a fresh finding of fact in a guilt finding process. Further, this court is not bound by its own earlier decision especially when the appeal relates to finding of facts.
>
> [27] The applicants had been sentenced to 20 years imprisonment instead of a death sentence. Taking into consideration of the cruel treatment by one human being to another which eventually led to an untimely and tragic death of the latter, any reasonable tribunal would find the aforesaid imposed sentence to be appropriate as it reflected squarely on the seriousness of the offence. Both applicants had the benefit of three court hearings and legal representations hence one cannot say in fairness that there has been a miscarriage of justice.
>
> [28] In sum, there was no error on the part of the earlier panel. Rather, the error lies on the part of the applicants who saw the nexus as between s 304 of the Code and s 300 of the Code, when in fact, the true nexus only exists between s 304 of the Code and s 299 of the Code. The language employed by the drafters in s 299 of the Code cannot be clearer in terms of stipulating which offence it has been legislated to provide punishments for. To our minds, as alluded to in the preceding paragraphs above, s 304 of the Code has nothing to do with s 300 of the Code. It has everything to do with s 299 of the Code.
>
> *per Justice David Wong Dak Wah,*
> *Chief Judge of Sabah and Sarawak*

The amended section 13(1)(a) of the Criminal Procedure Code which casts a duty on the public to furnish information about the possible commission of an offence under the Penal Code or any other written law does not apply retrospectively.

Jusninawati binti Abdul Ghani v Pendakwa Raya [2019] 10 CLJ 589

This case is about the legal obligation to furnish information concerning a possible terrorist act. The appellant, a policewoman with the rank of corporal, was charged, convicted and sentenced to seven years imprisonment by the High Court for an offence of omitting to disclose information pertaining to a possible terrorist act under section 130M of the PC. The case against the appellant was that she possessed information about the plans of two individuals; Nor Azimah bt Adnan ("SP1") and one Abdul Ghani bin Yaacob (also known as "Abu Kedah") to travel to Syria and to commit terrorist acts by joining the military movement of the Islamic State ("IS"). In September 2015, SP1 arranged for the appellant to meet with

Abu Kedah and during the said meeting, Abu Kedah had informed the appellant of his intention to travel to Syria with SP1. SP1 testified that she had received a text message from Abu Kedah through Whatsapp application informing SP1 that the appellant had also aspired to go to Syria but her intention was aborted due to financial problems. SP1's plan to travel to Syria did not materialise because her marriage with Abu Kedah only lasted for five days and she was involved in a road accident in November 2015.

The appellant's cautioned statements stated that she had utilised social media platforms such as Facebook and Telegram to communicate with other IS members and she was informed by Abu Kedah of his plan to take SP1 to Syria. The prosecution adduced evidence that Abu Kedah had travelled to Syria and was killed in a battle at the Al Khair province. In her defence, relying on the case of *Chiew Poh Kiong v Public Prosecutor*[4] the appellant submitted that she did not report the information to her superior officers because she regarded Abu Kedah's plans as "empty talk" and that section 13(1) of the Criminal Procedure Code (Act 593) ("CPC") only requires a person to furnish information in respect of offences specifically mentioned therein. The High Court held that pursuant to sections 3(3) and 20(3) of the Police Act 1967 (Act 344) and sections 103 and 104 of the CPC, the appellant has a legal duty to report the information received to her superiors.

4 [2001] 4 MLJ 280.

The conviction and sentence were upheld by the Court of Appeal and the appellant further appealed to the Federal Court.

The Federal Court observed that the appellant was alleged to have committed the offence prior to the effective date of the amendment to section 13(1)(a) of the CPC which is on 23 December 2016. Therefore, the new provision of section 13(1)(a) of the CPC which casts a duty on the public to give information about the commission of an offence punishable under the PC or any other written law, is inapplicable to the case against the appellant. The court held that the appellant was not obliged to report the information concerned. Accordingly, the court allowed the appellant's appeal and set aside the conviction and sentence imposed. The appellant was acquitted and discharged.

> [26] So too here. The old s 13(1)(a) of the CPC imposes a duty on every person, including the appellant, who is aware of the commission of the offence enumerated in that section, to give information to the nearest police station or police officer or penghulu. Once there is an omission, such persons become criminally liable. Certain offences are mentioned in s 13(1)(a) of the CPC, but it does not refer to the offence of travelling to a foreign country to commit terrorist acts under s 130JA of the PC, with which we are concerned here. Thus, the appellant was not obliged to report the information concerned.
>
> [27] It is a well-established principle of statutory interpretation that Parliament is not presumed to have

intended to limit or interfere with the personal liberty of a citizen, unless it indicates this intention in clear, unmistakable and unambiguous terms. It is trite that criminal and penal statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted. Therefore, no act or omission is to be deemed criminal unless it is clearly made so by words of the statute concerned (see Maxwell on Interpretation of Statutes, 12th edn, at pp. 239 to 240 and Craies on Statute Law, 7th edn, at p. 529).

[28] In our considered view, unless the contrary intention appears, Parliament could not have intended under the old s. 13(1)(a) of the CPC to impose a legal obligation on persons to furnish information in respect of the possible commission of s. 130JA offence. On that score, we were in agreement with the Court of Appeal that the learned JC had erred in his reliance on the old s. 13(1)(a) of the CPC. In light of above discussion, it was our considered view that the prosecution of the appellant for non-reporting the possible commission of s. 130JA offence by SP1 and "Abu Kedah", under s. 130M of the Penal Code was unsustainable in law.

per Justice Mohd Zawawi Salleh,
Judge of the Federal Court

Witness statements recorded under section 112 of the CPC are not privileged from disclosure. Witness statements must be furnished to the accused if requested under section 51 of the CPC. The court, in exercising the discretion under section 51 of the CPC, must have regard to the justice of the case.

Siti Aisyah v. Public Prosecutor [2019] 4 MLJ 46

This case relates to the right of an accused person to access statements recorded under section 112 of the CPC of witnesses not called by the prosecution but offered to the defence. The appellant was charged with an offence under section 302 of the PC. At the end of the prosecution's case after the defence had been called and witnesses offered to the defence, the appellant applied pursuant to section 51(1) of the CPC for an order to direct the prosecution to provide copies of witness statements ("police statements") recorded under section 112 of the CPC. These police statements were made by seven witnesses who were not called by the prosecution but who were offered to the defence. The issue before the High Court was whether the word "document" in section 51 of the CPC can also include statement recorded under section 112 of the CPC.

In dismissing the application, the High Court held that a police statement is a privileged document, the disclosure of which can never be ordered at any stage of the proceedings and that the prosecution is under no duty to supply a copy of the statement taken to the defence unless the prosecution waived the privilege over the witness statements. It was further held that even if the appellant's application for discovery of the witness statement was dismissed by the court, the appellant's right to a fair trial had not been deprived or compromised because after having been alerted to and having accepted the offer of the witnesses, the appellant will have the right to interview the offered witnesses and to decide whether to call them as defence witnesses or otherwise.

Before the Court of Appeal, the appellant submitted that witness statements are not privileged documents and that the Federal Court decision in *Husdi v PP*[5] on the privileged status of the same ought not to be followed as the law since then has moved on in other common law jurisdictions. In reply, the respondent echoed what was held by the High Court judge and maintained that it had always been the policy of the Public Prosecutor to never provide the witness statements even for witnesses offered after the prosecution had closed their case.

The Court of Appeal is of the opinion that witness statements were never intended to be privileged document under the CPC and section 32 of the Evidence Act 1950 (Act 56). The court distinguished the facts in *Husdi v PP*[6] by stating that the police statements in that case were sought prior to the commencement of the trial and that the correctness of the finding of the learned High Court judge on the privileged status of witness statements was not considered by the Federal Court in that case.

Accordingly, the Court of Appeal held that there was a duty on the prosecution to disclose to the defence the police statements of the witnesses offered to the defence which were necessary and desirable to their case. The duty as a prosecutor should never be one bent on securing a conviction at all costs thus risking injustice. There would certainly be a miscarriage of justice if the police statements from especially the deceased persons and others who cannot be brought to court as witnesses were not provided to the defence.

5 [1980] 2 MLJ 80.
6 Ibid.

[20] Be that as it may, the law in relation to admissibility of police statements was amended in 2007 through two Amendment Acts (Act A1274 and Act A1304) where s 113 of the CPC was substituted with a completely new provision. By this amendment, the court can intervene and order production of s 112 of the CPC statements for the purposes of challenging and impeaching the credit of witnesses as provided in s 113(2) of the CPC. A police statement under s 112 of the CPC can also be admitted in evidence in other situations as provided in sub-ss 113(3), (4) and (5). Since statutory law allows such police statements to be admitted in evidence in certain circumstances, it seems to us that such police statements were never intended to be privileged documents.

...

[51] With that being the position, it can hardly be disputed that police statements can be admitted under both paras (i) and (j) although para (j) will apply only to a statement made by a public officer which may not be relevant to the present case. So, provided the police statements fall within the four categories of persons mentioned in s 32(1) of the Evidence Act 1950, such statements will be rendered admissible. In our view, this clearly negates the proposition that such police statements are privileged as statutory law now deems them to be potentially admissible in evidence.

[52] In the instant case, we noted, as did the learned judge, that of the seven witness statements sought, one of the witnesses is now deceased whilst four others cannot be produced. If these witnesses are unavailable to provide their testimonies, the defence may be able to avail themselves of the exceptions as to the hearsay rule under s 32 of the Evidence Act 1950. It will be a miscarriage of justice if it turns out that the contents of the witness statements of the missing witnesses can exonerate the appellant or at least cast a doubt on the case for the prosecution.

...

[63] The jurisprudence in relation to s 51 of the CPC is not controversial. Apart from satisfying the dual requirements of necessity and desirability as provided under s 51 itself, the stage at which the application for disclosure is made is of primary importance. If the application is made before the commencement of the trial, the disclosure is limited to matters as stated in the charge. Anything more would be tantamount to the defence having inspection of the evidence of the prosecution prior to trial. Pre-trial disclosure in criminal cases cannot be equated to the pre-trial discovery and inspection of documents in a civil proceeding. In exercising the discretion under s 51 of the CPC, the court must have regard to the justice of the case (see Raymond Chia (supra) and Anwar Ibrahim (supra)).

...

[65] It is unfortunate that in the instant case, the learned judge did not consider whether the requirements of necessity and desirability have been established. In our view, based on what was disclosed as to the role of the witnesses and the relevance of their evidence, the police statements are certainly necessary and desirable for the defence to advance their case.

...

[68] Simply put, the duty of the prosecution is to act fairly. They are certainly not obliged to lead evidence which may undermine their case, but fairness requires the unused material in its possession, which may undermine its case, or be helpful to its adversary, be disclosed to the defence. The duty as a prosecutor should never be one bent on securing a conviction at all costs thus risking injustice.

[69] In the end, the paramount duty of ensuring a fair trial falls on the court. In this context, and in the context of this appeal, a balance has to be struck between adequate prosecutorial disclosure and the public interest of the detection and punishment of crime. The process of the trial must not be undermined by unnecessary disclosure. But if the demands of a fair trial so require, the court will not hesitate to invoke its inherent jurisdiction to prevent injustice or miscarriage of justice or abuse of process.

...

[77] In other words, statements recorded in investigations, such as the police statements in the present case, are not made in 'official confidence' but by the coercive process of the law. There is no quid pro quo of communicating information on the basis of secrecy and confidence here. There was no duty to preserve confidence and there cannot then be any breach of confidence."

per Justice Harmindar Singh Dhaliwal,
Judge of the Court of Appeal

Straits Settlements.

ORDINANCE No. XXI OF 1900.

Ordinance to establish a Code of Criminal Procedure being an Ordinance to amend "The Criminal Procedure Code 1892."

[6th November, 1900.]

The Officer Administering the Government.

WHEREAS a Code of Criminal Procedure was in the year 1892 prepared by the Honourable Sir EDWARD LOUGHLIN O'MALLEY Knight Chief Justice of the Straits Settlements the Honourable JOHN WINFIELD BONSER Attorney-General for the Straits Settlements the Honourable JOHN TANKERVILLE GOLDNEY a Judge of the Straits Settlements the Honourable JOHN BERRINSHAW a member of the Legislative Council of the Straits Settlements and CHARLES EUGENE VELGE Esquire Registrar of the Supreme Court of the Straits Settlements and it is expedient that the said Code with certain modifications should be adopted as law:

It is hereby enacted by the Governor of the Straits Settlements with the advice and consent of the Legislative Council thereof as follows:—

PART I.
PRELIMINARY.

CHAPTER I.

Short title. Commencement.

1. This Ordinance may be cited as "The Criminal Procedure Code 1900" and is generally referred to hereinafter as "this Code" and shall not come into operation unless and until the Governor notifies by Proclamation that it is Her Majesty's pleasure not to disallow the same and thereafter shall come into operation on such day as may be fixed by order of the Governor in Council.

Interpretation.

2. (1)—In this Code unless a different intention appears from the subject or context:—

"Complaint"

(*a*) "Complaint" means the allegation made orally or in writing to a Police Court with a view to its taking action under this Code that some person whether known or unknown has committed or is guilty of an offence.

"Inquiry."

(*b*) "Inquiry" includes every inquiry conducted under this Code before a Police Court.

"Judicial proceeding."

(*c*) "Judicial Proceeding" means any proceeding in the course of which evidence is or may be legally taken.

"Writing." "Written."

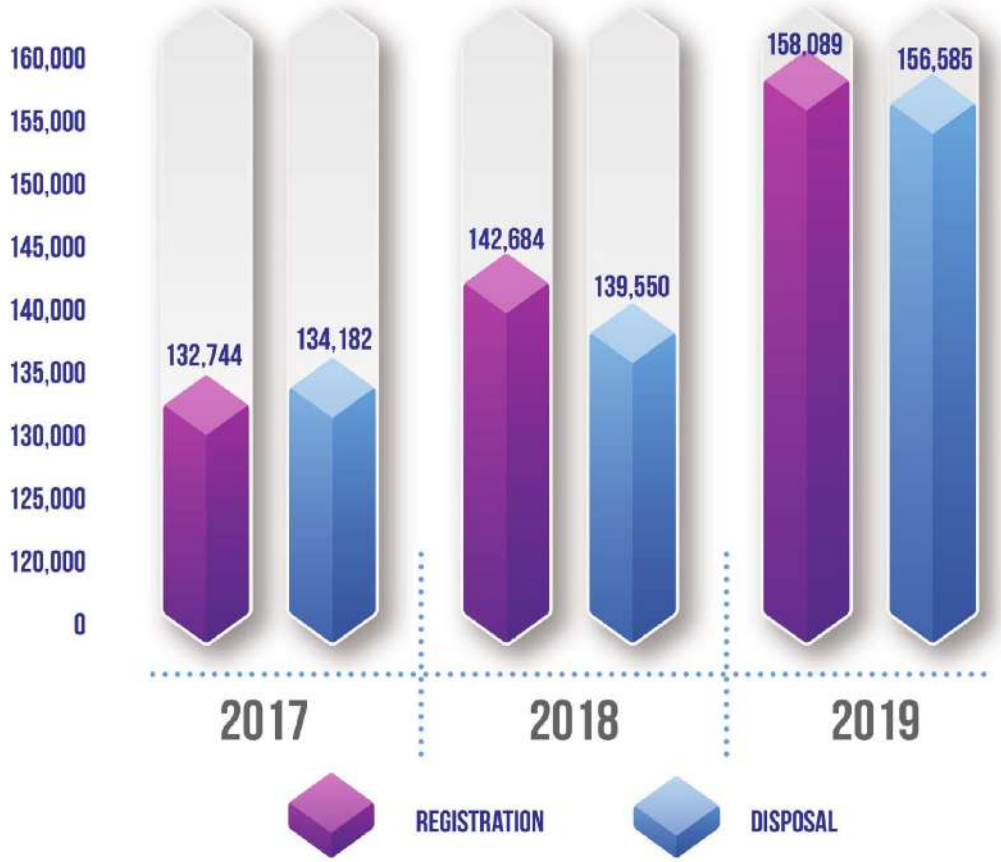
(*d*) "Writing" and "written" include printing lithography photography engraving and every other mode in which words or figures can be expressed on paper or on any substance.

Straits Settlements Ordinance no. XX1 of 1900 - An Ordinance to establish a Criminal Procedure Code being an Ordinance to amend the Criminal Procedure Code 1892


MAHKAMAH
RAYUAN MALAYSIA

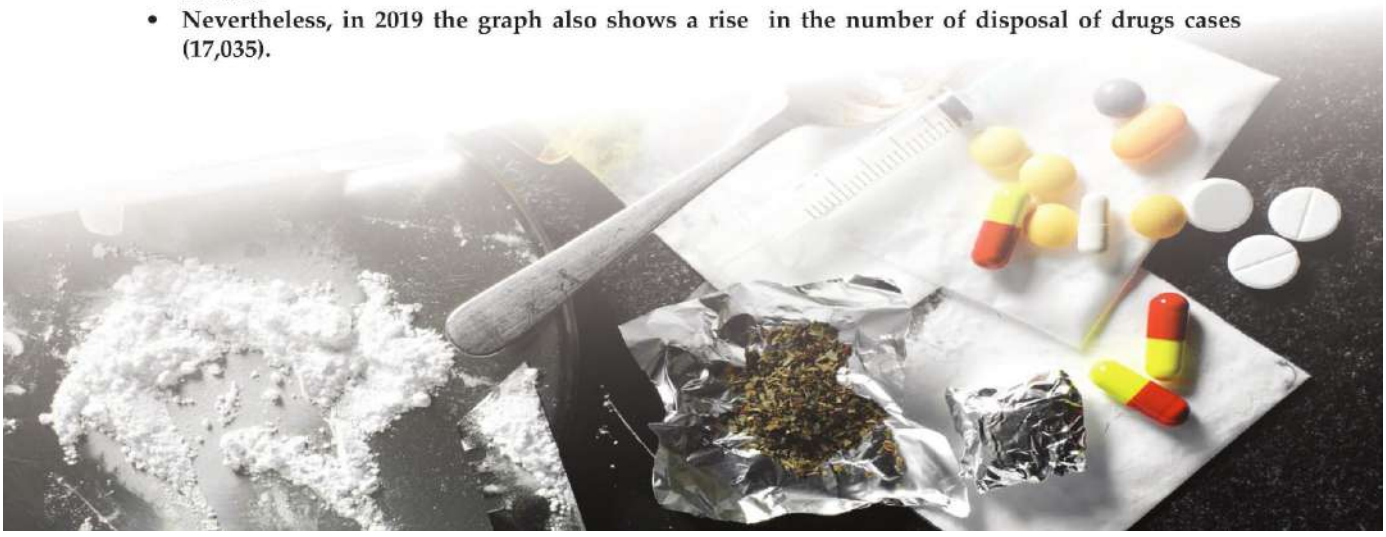
APPENDIX

DRUGS CASES IN MALAYSIA

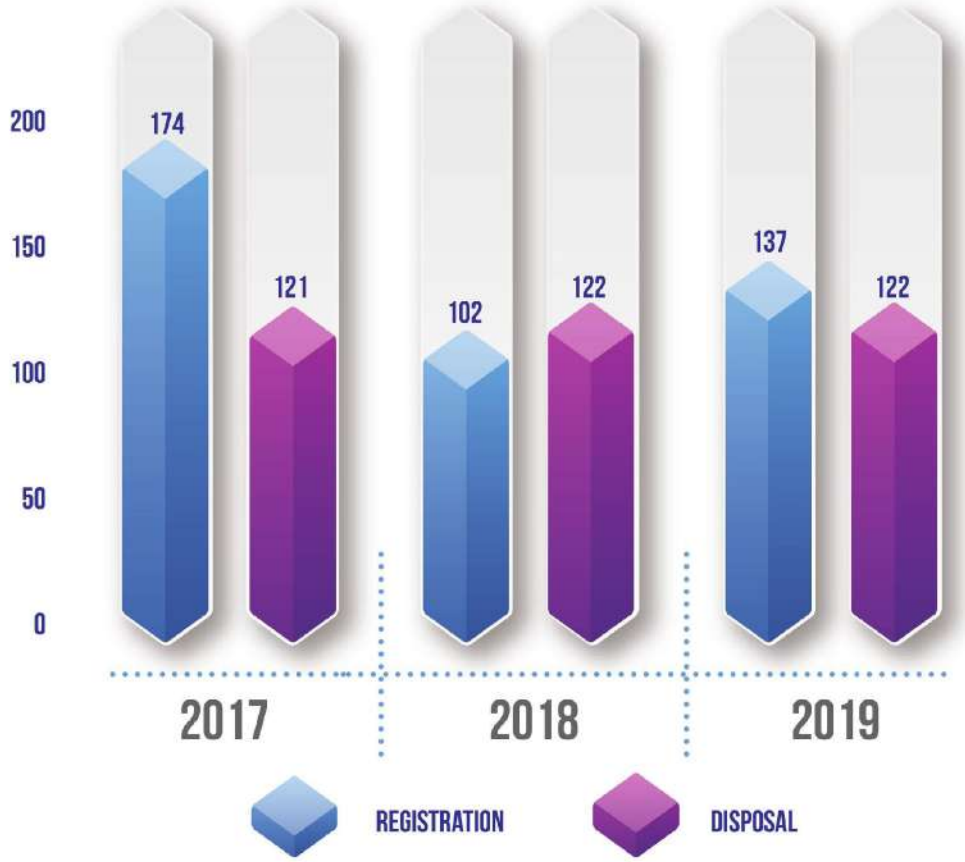


Explanatory Notes:

- The graph shows the registration and disposal of drugs cases in Malaysia from 2017 to 2019.
- There was an increase of 15,405 cases (10.8%) in the registration of drugs cases in 2019 as compared to 2018.
- Nevertheless, in 2019 the graph also shows a rise in the number of disposal of drugs cases (17,035).



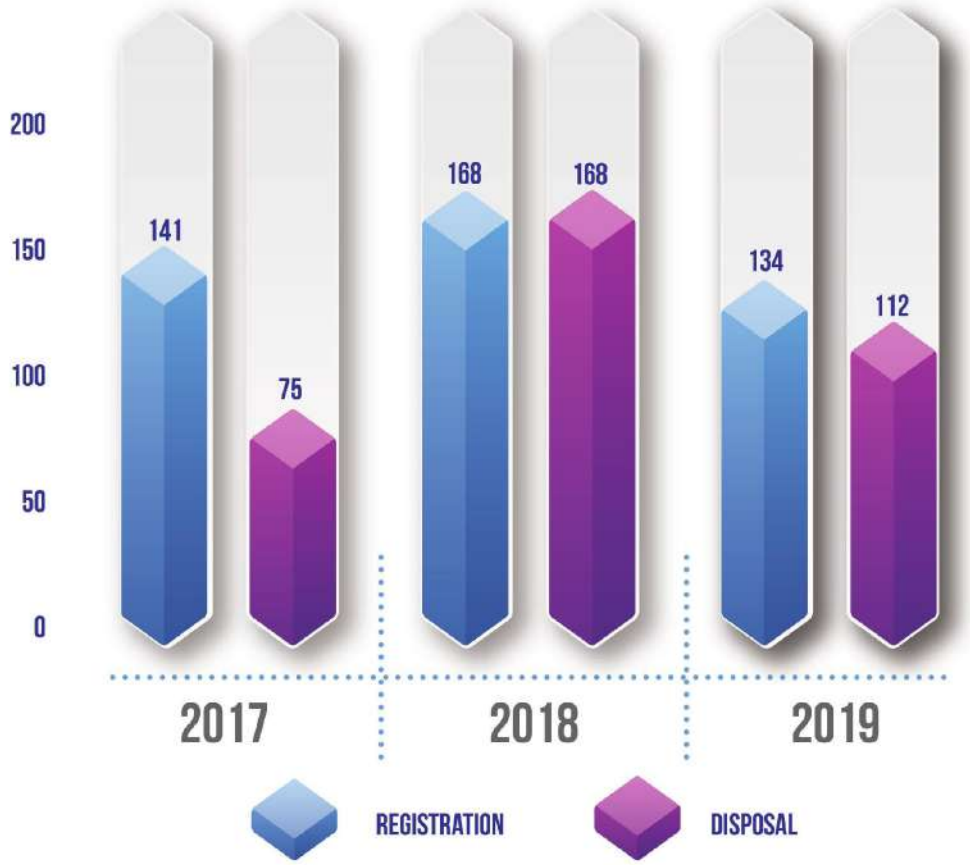
CYBER (CRIMINAL) CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration and the disposal of cyber (criminal) cases in Malaysia from 2017 to 2019.
- In 2019, 137 cases were registered. This is an increase of 34.3% as compared to the previous year.

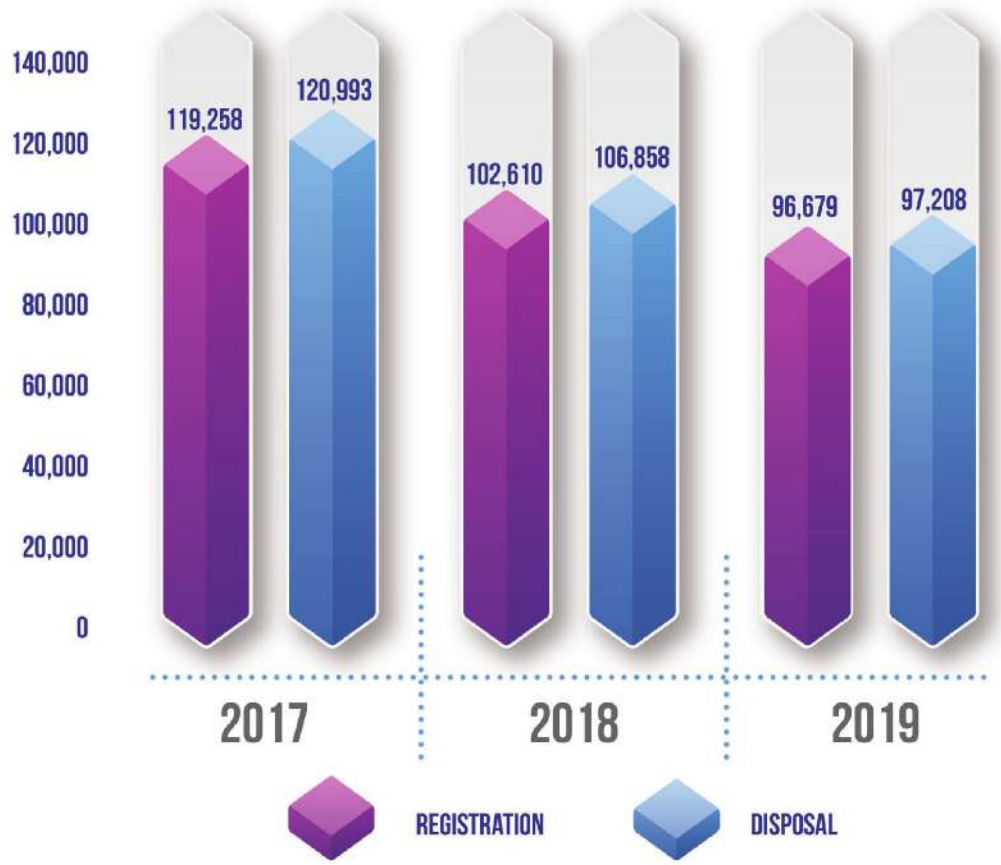
CYBER (CIVIL) CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration and the disposal of cyber (civil) cases in Malaysia from 2017 to 2019.
- The year 2018 showed the highest registration of cyber (civil) cases in Malaysia (168 cases). The registration decreased by 20.2% to only 134 cases the following year.

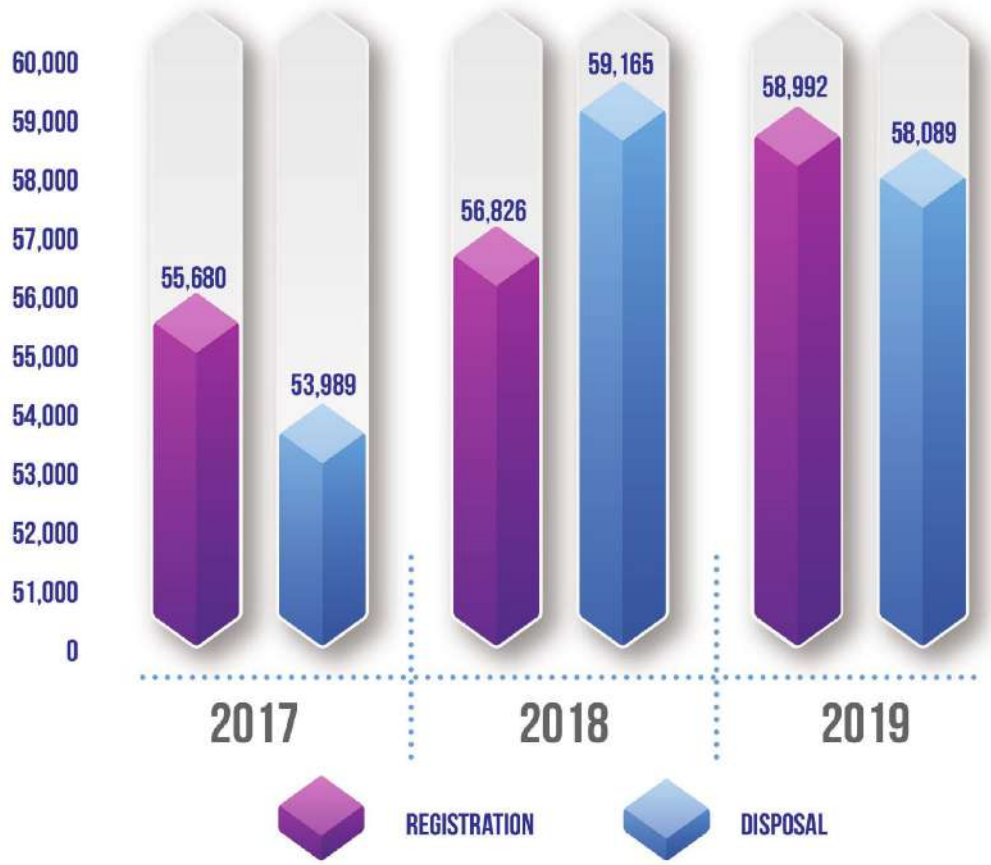
COMMERCIAL CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration and the disposal of commercial cases in Malaysia from 2017 to 2019.
- The graph shows that the registration of commercial cases in Malaysia has been decreasing every year.

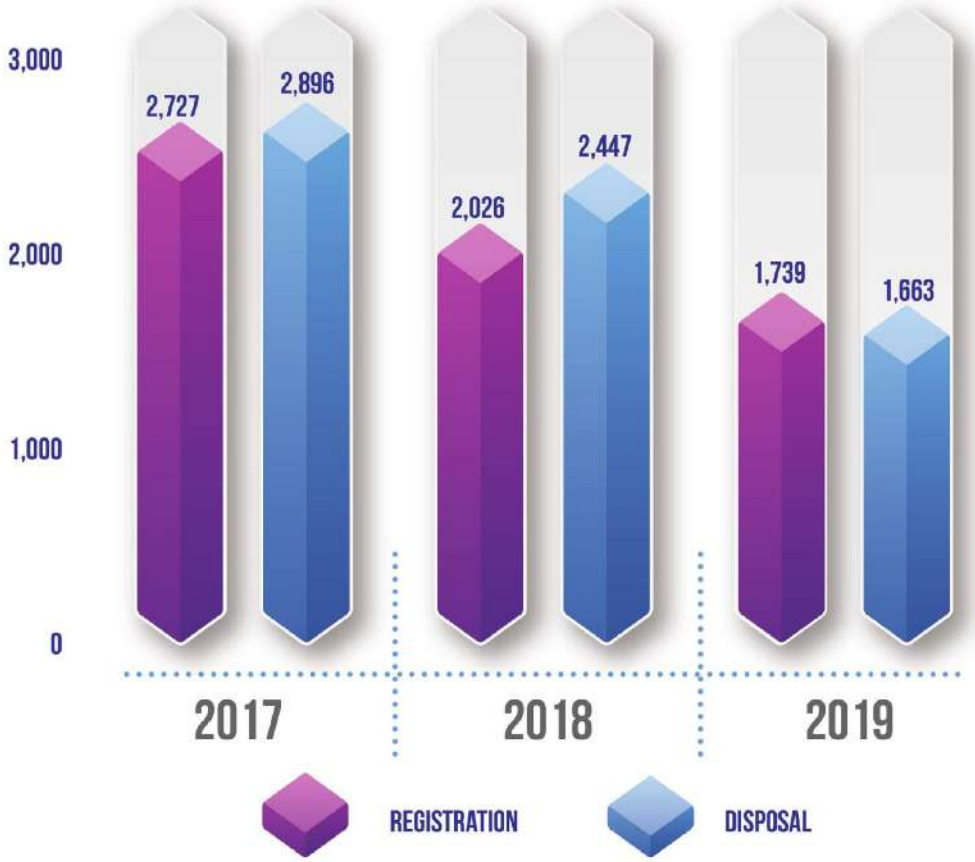
NEW CIVIL COURT (NCVC) CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration and the disposal of NCVC cases in Malaysia from 2017 to 2019.
- The registration of NCVC cases rose by 3.8% in 2019 from the previous year.
- The highest disposal was recorded in 2018 (a total of 59,165 cases were disposed of).

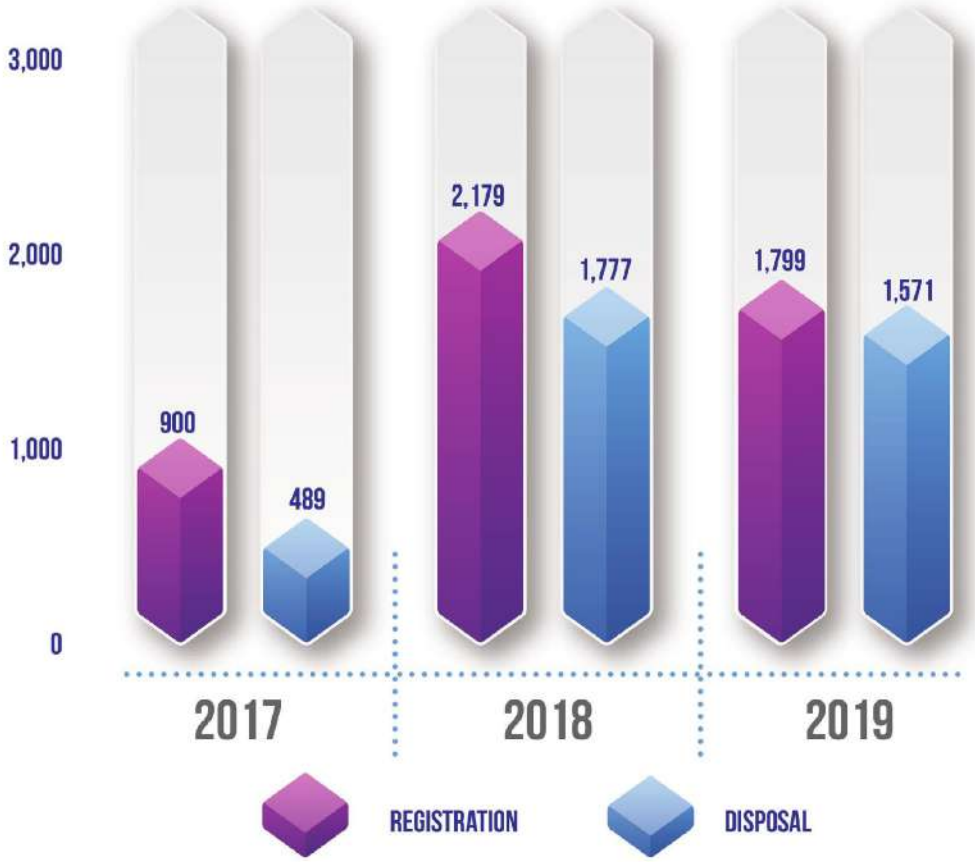
SEXUAL OFFENCES (GENERAL CASES) IN MALAYSIA



Explanatory Notes:

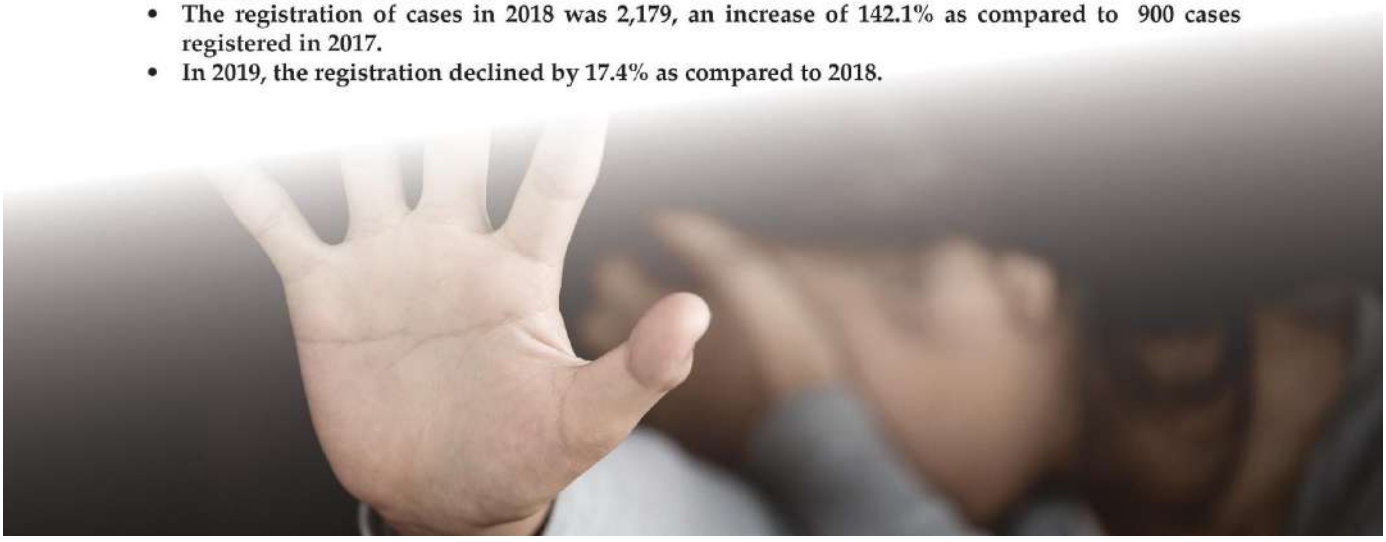
- The graph shows the registration of sexual offences (general cases) in Malaysia from 2017 to 2019.
- The graph shows a decrease in the number of registrations for each year.

SEXUAL OFFENCES CASES AGAINST CHILDREN IN MALAYSIA

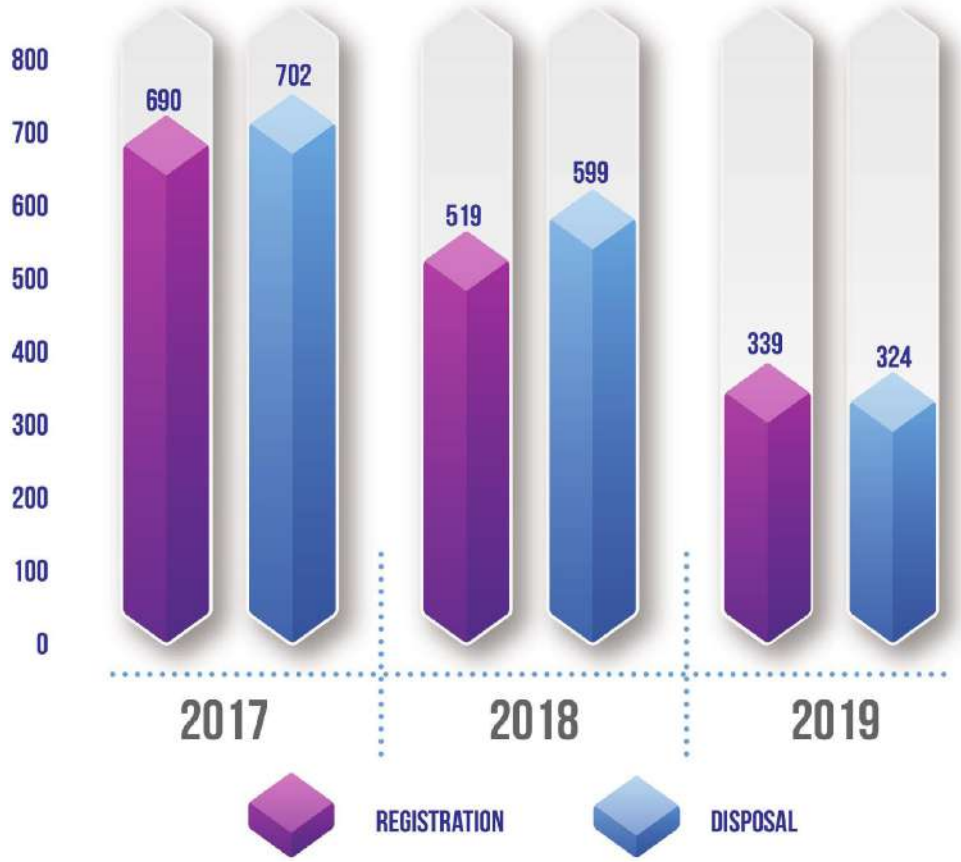


Explanatory Notes:

- The graph shows the registration of sexual offences cases (against children specifically) in Malaysia from 2017 to 2019.
- The registration of cases in 2018 was 2,179, an increase of 142.1% as compared to 900 cases registered in 2017.
- In 2019, the registration declined by 17.4% as compared to 2018.

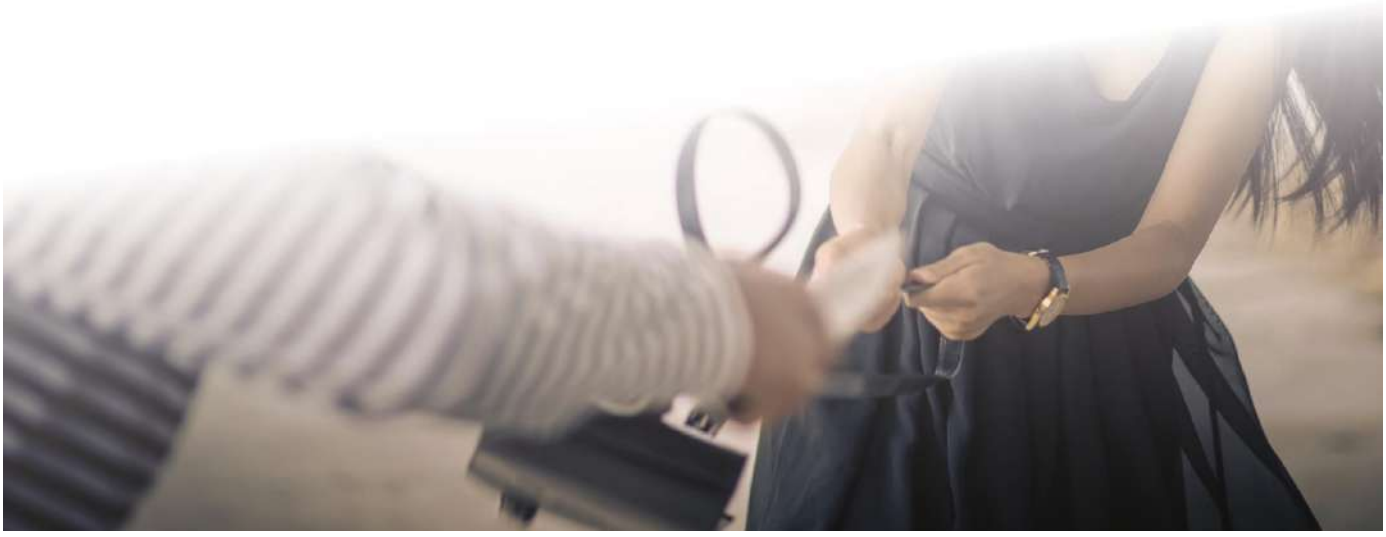


STREET CRIMES CASES IN MALAYSIA

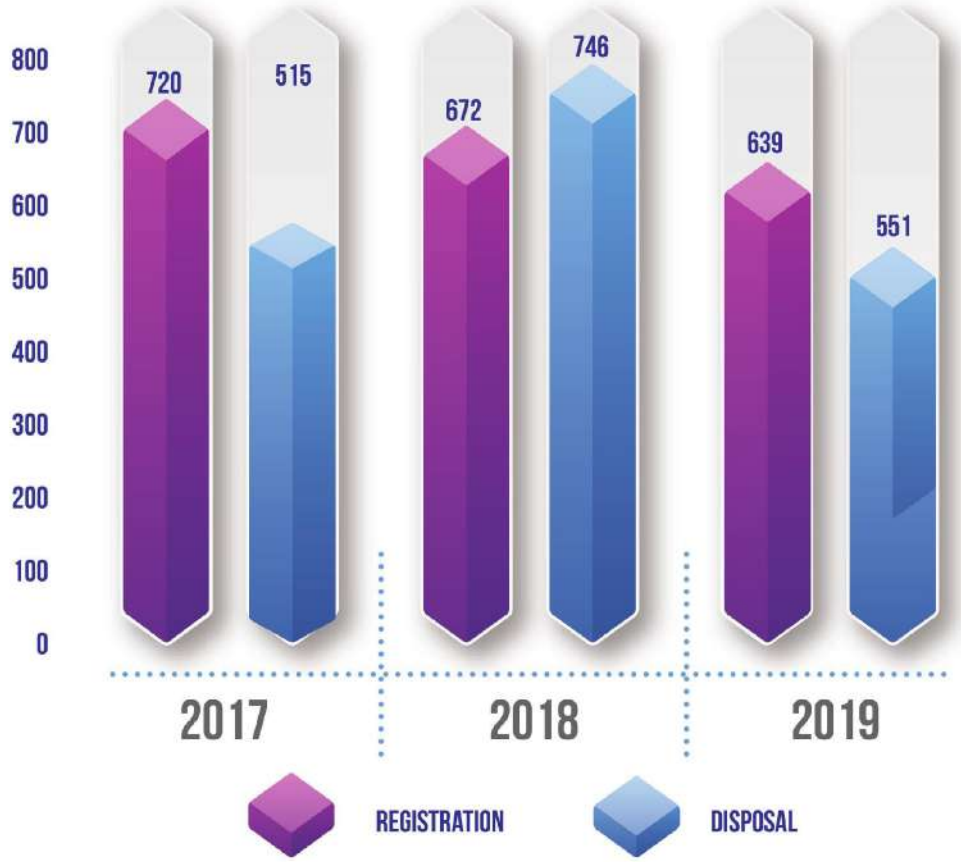


Explanatory Notes:

- The graph shows the registration of street crimes in Malaysia from 2017 to 2019.
- The graph shows a decline in the number of registrations from year to year.



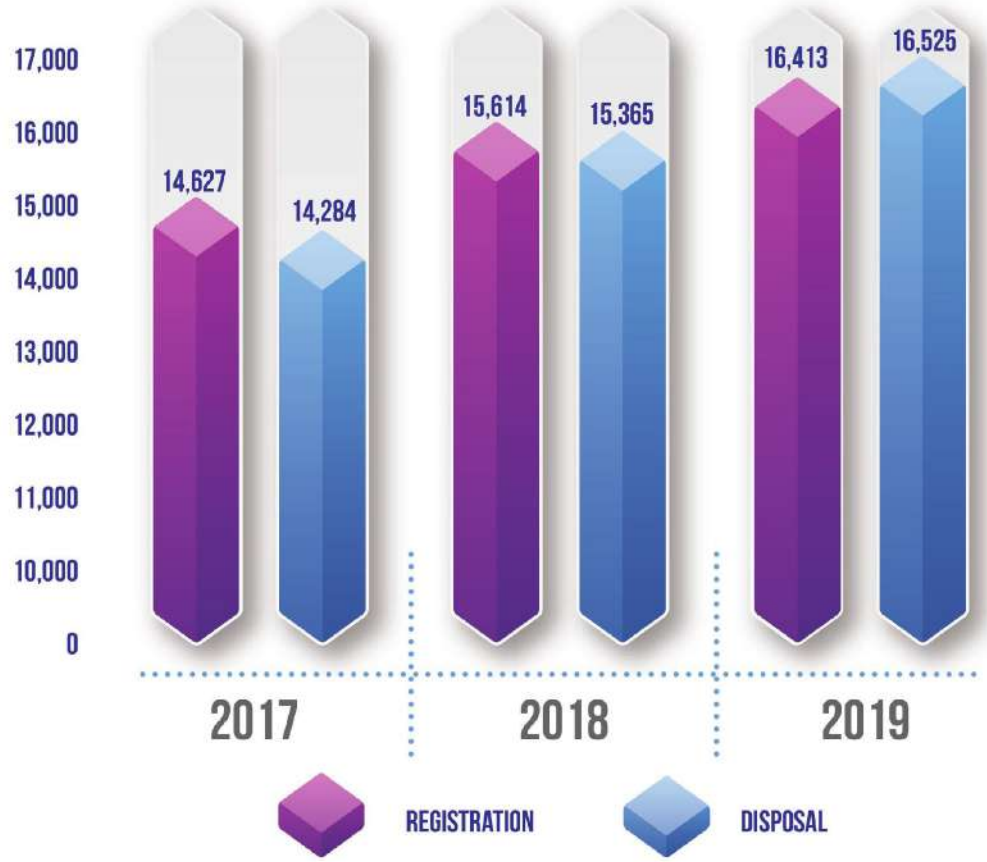
CORRUPTION CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration of corruption cases in Malaysia from 2017 to 2019.
- The graph shows a drop in the number of registrations from year to year.

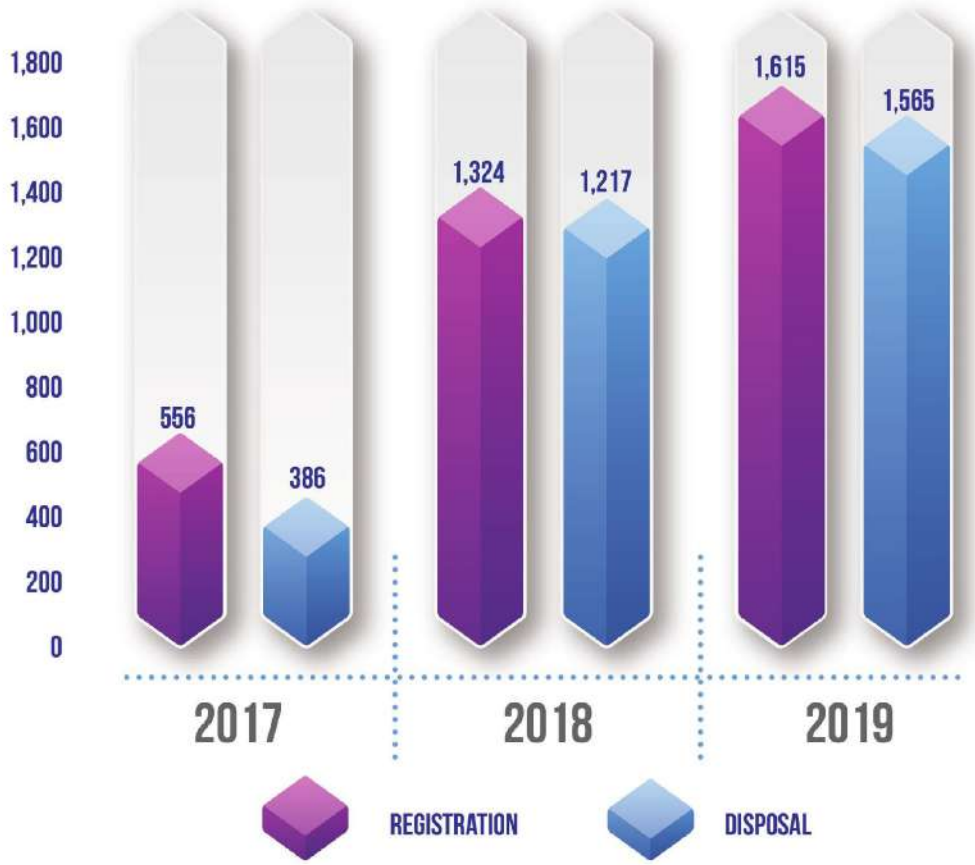
FAMILY CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration of family cases in Malaysia from 2017 to 2019.
- In 2018, the registration increased by 6.7% as 15,614 cases were registered, compared to 14,627 cases the previous year.
- Registration also rose to 5.1% in 2019 from 2018.

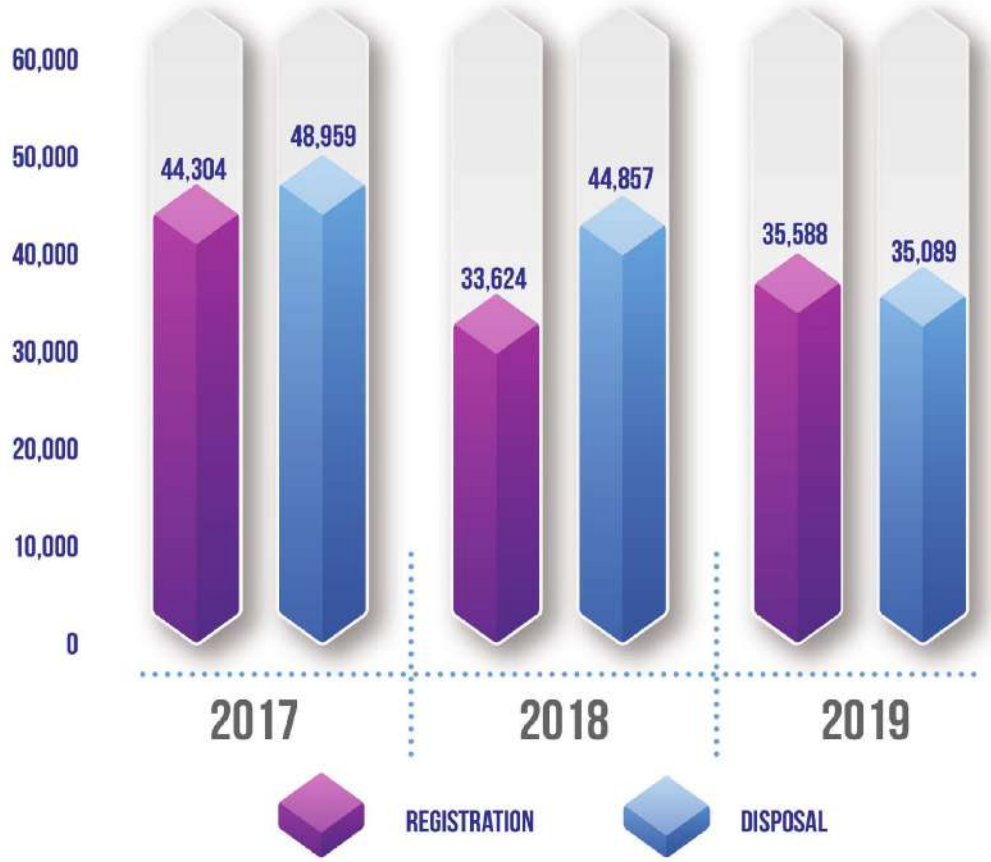
INSOLVENCY CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration of insolvency cases in Malaysia from 2017 to 2019.
- The graph shows an increase in the number of registrations from year to year.

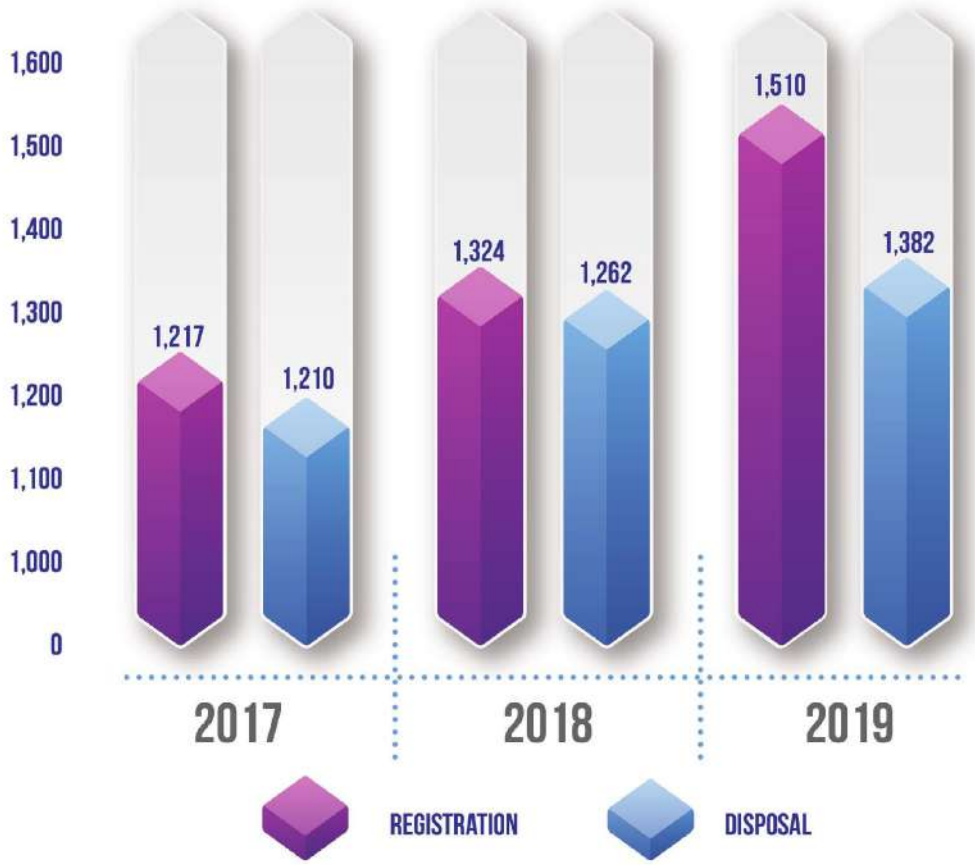
REGISTRATION AND DISPOSAL OF BANKRUPTCY CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration of bankruptcy cases in Malaysia from 2017 to 2019.
- The graph shows an increase of 5.8% in the number of registrations in 2019 from the previous year.

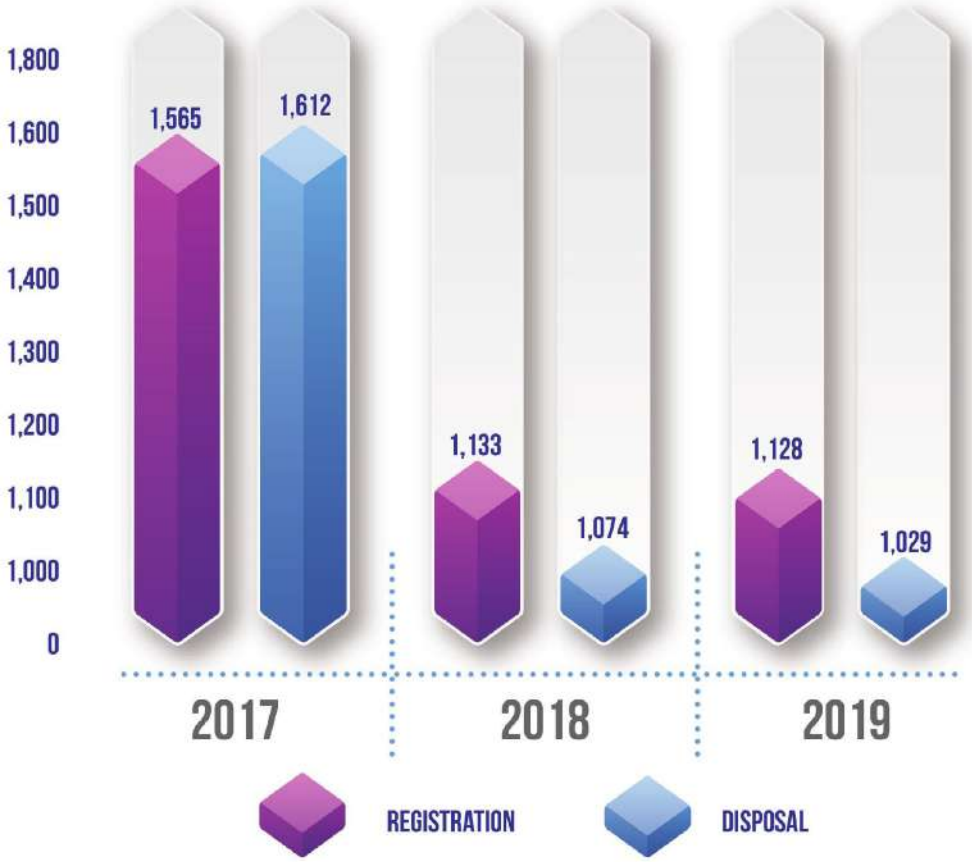
CONSTRUCTION CASES IN MALAYSIA



Explanatory Notes:

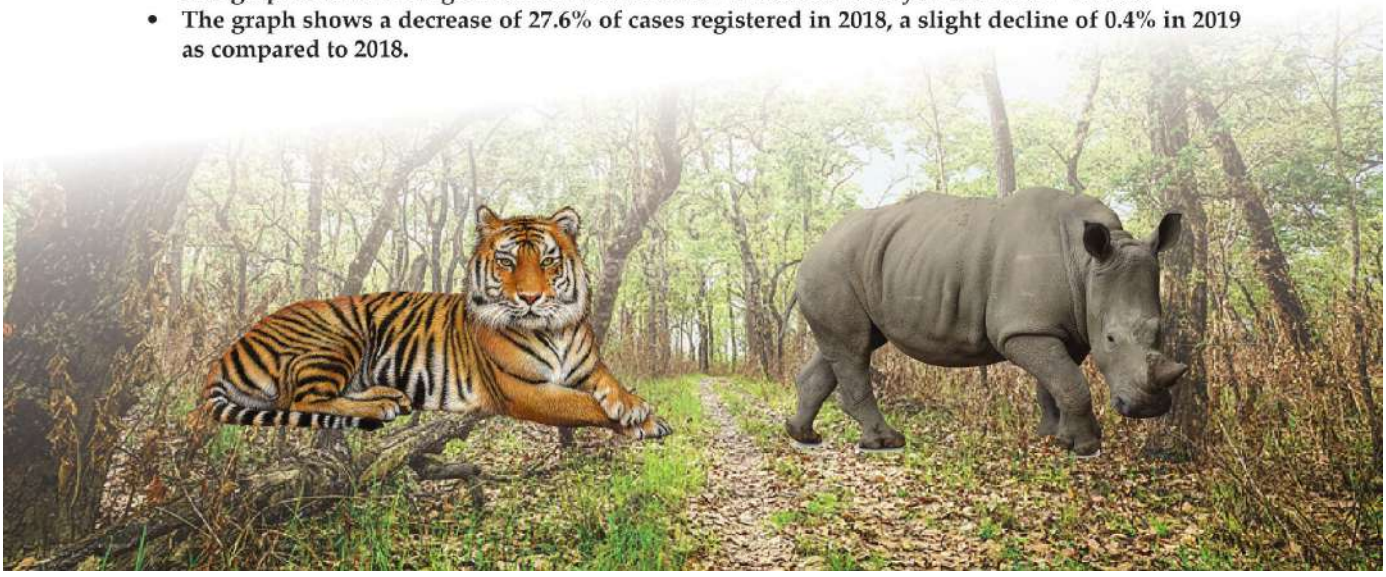
- The graph shows the registration of construction cases in Malaysia from 2017 to 2019.
- The graph shows an increase in the number of registrations from year to year.
- In 2019 the percentage of registrations has increased by 14.0% from 2018.

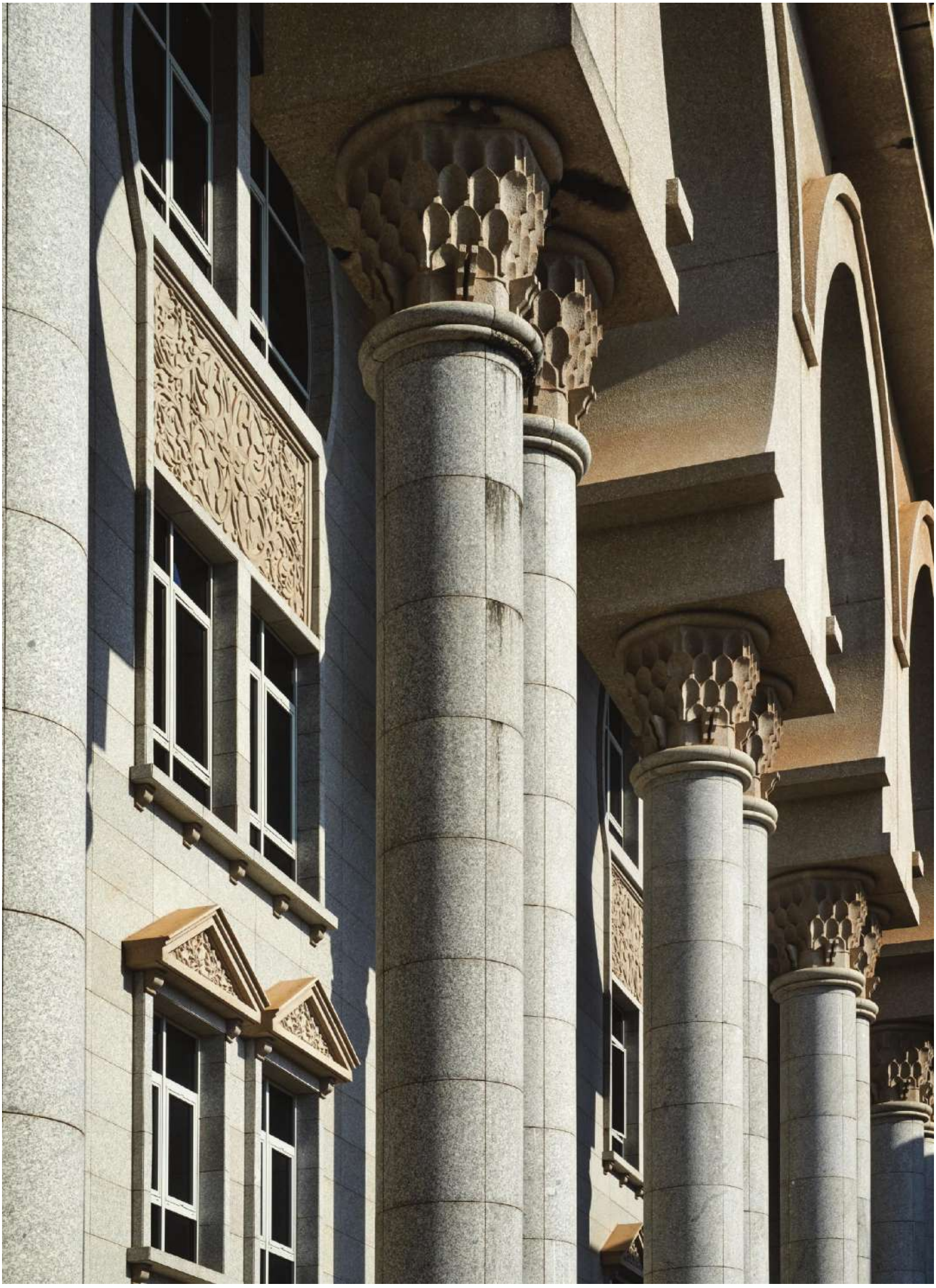
ENVIRONMENTAL CASES IN MALAYSIA



Explanatory Notes:

- The graph shows the registration of environmental cases in Malaysia from 2017 to 2019.
- The graph shows a decrease of 27.6% of cases registered in 2018, a slight decline of 0.4% in 2019 as compared to 2018.





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