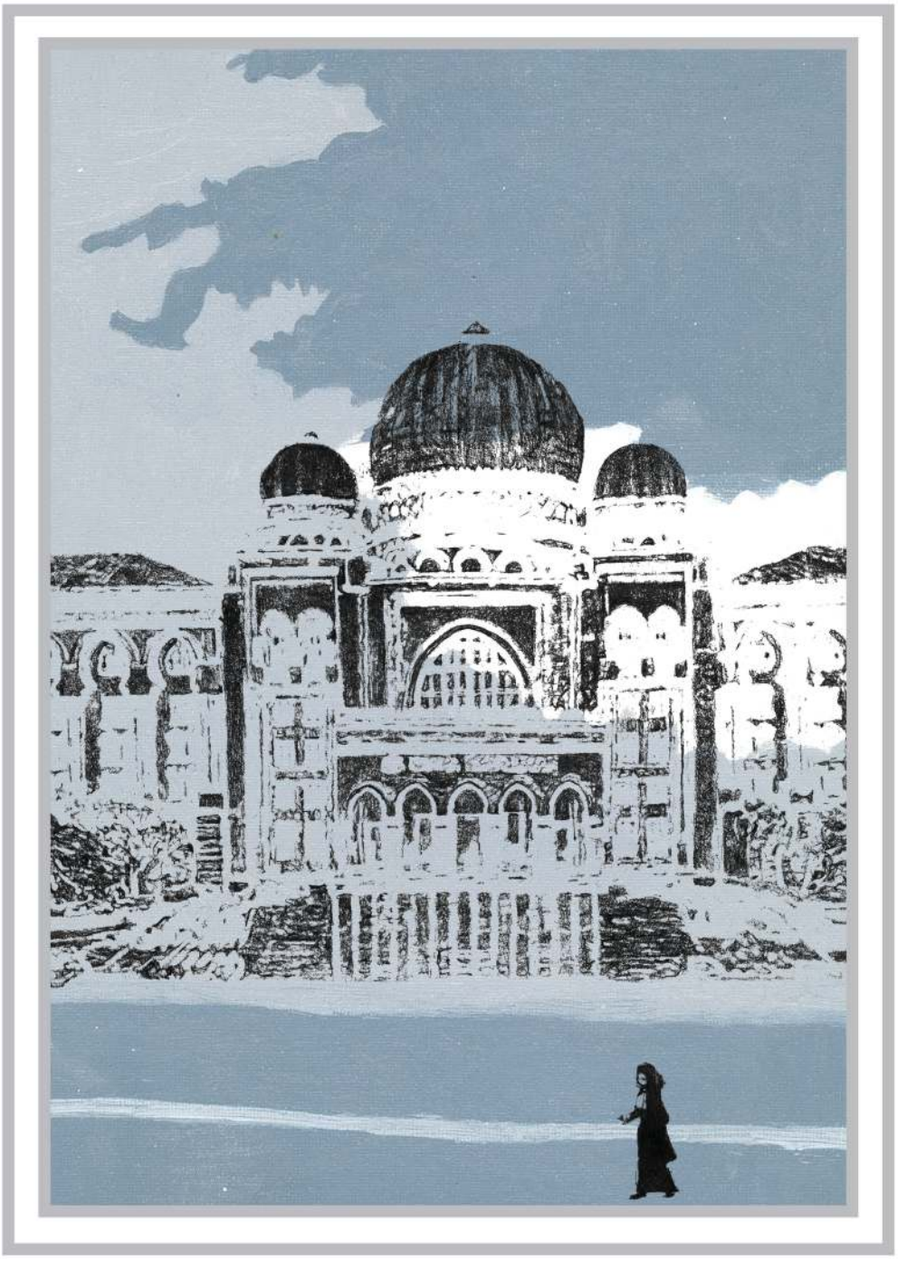
THE MALAYSIAN JUDICIARY

YEARBOOK 2020



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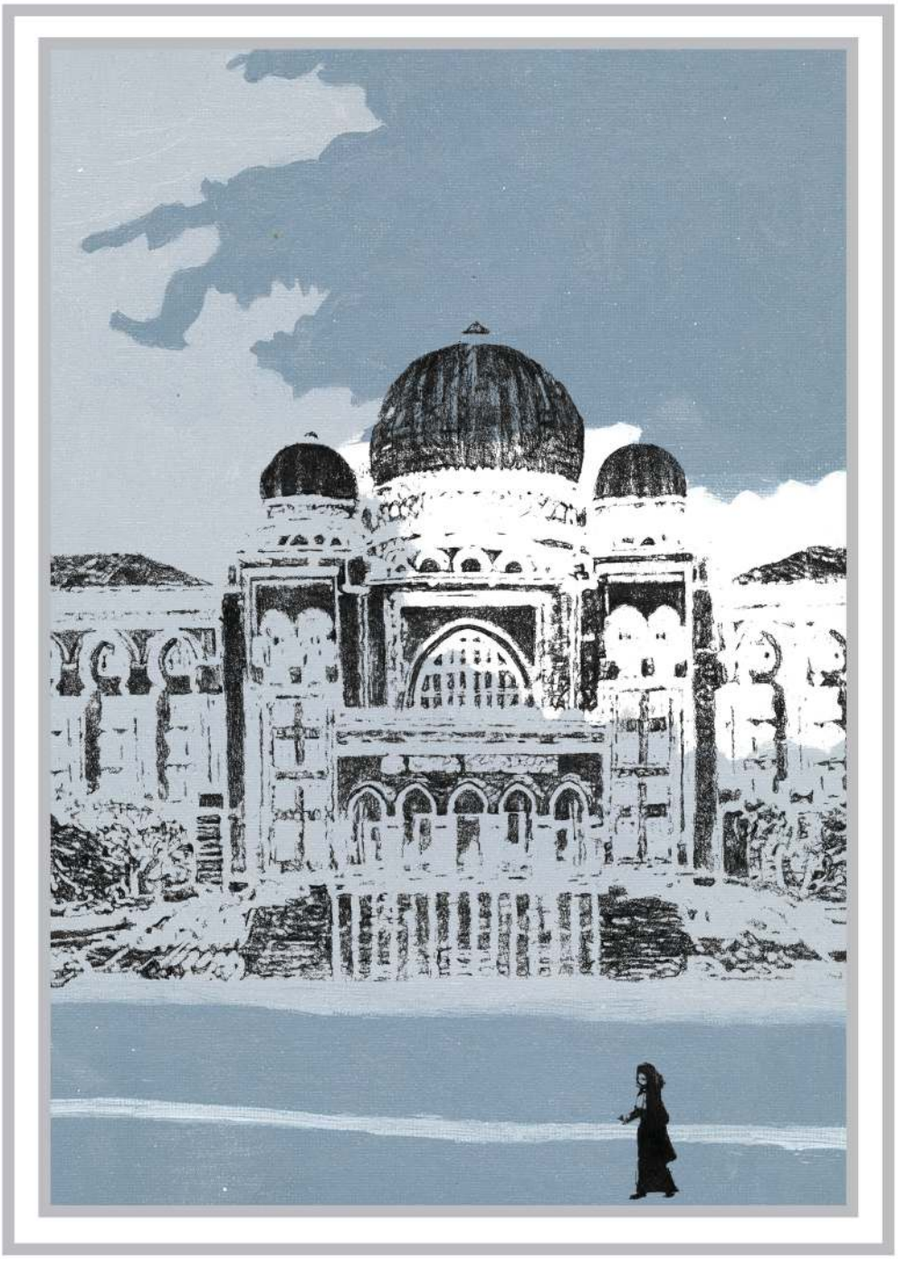
Cover

“The Palace of Justice" by Hazimi Khalil (Jimmy)



THE MALAYSIAN JUDICIARY

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Foreword

By The Right Honourable Tun Tengku Maimun Tuan Mat

Chief Justice of Malaysia

The year 2020 has been a year like no other. It will be remembered as a watershed year as the COVID-19 pandemic severely impacted human health and caused dramatic lifestyle changes through social distancing and isolation at home. The judiciaries across the world were left with no other option but to pivot to and harness technology to ensure that the administration of justice does not grind to a halt. The Malaysian Judiciary was not spared.

Prior to the pandemic, the Malaysian Judiciary was already in a paradigm shift towards digitalisation of court proceedings, starting in 2010 with the roll-out of Phase 1 of the e-Courts system. Since then, the Malaysian Judiciary has continued to keep up with the changes in modern technology to improve and enhance the quality and efficiency of the Malaysian justice system. As at March 2020, Malaysian courts have in place the e-Courts platform which encompasses a widescale digitalisation of its services and processes such as e-Filing, case management system and e-Review.

As COVID-19 took hold, the Malaysian courts' responses and measures that were deployed were based on the various lockdown rules imposed by the Government of Malaysia. During the first phase ("the Movement Control Order" – "MCO") which took effect

from March 18, 2020 to May 3, 2020, the courts were closed to the judges, court staff and the public as the courts were not listed as "essential services". However, urgent matters on the civil front were dealt with remotely whilst urgent applications in criminal matters continued to be dealt with by way of physical hearings conducted in strict compliance with COVID-19 health protocols.

In the second phase ("the Conditional Movement Control Order" – "CMCO") which began in May 2020, the restrictions were relaxed, and the court re-opened partially and resumed operations throughout the country in several stages subject to strict standard operating procedures ("SOPs"). Even so, the courts continued to rely heavily on remote technology for their operations and working from office for judges and court staff was only allowed on a rotation basis.

In the third phase ("the Recovery Movement Control Order" – "RMCO") which took effect on June 10, 2020, all national operations and almost all businesses were allowed to recommence subject to strict SOPs. The courts followed suit and resumed full operations beginning July 1, 2020. Unfortunately, due to the staggering surge in the number of COVID-19 cases in the States of Selangor, Sabah and the Federal Territories of Kuala Lumpur and Putrajaya, the courts reverted to the second phase measures as the Government of Malaysia imposed CMCO in those states towards the end of year 2020. Throughout these various lockdown phases, several comprehensive SOPs have been issued to set out the guidelines for the continuous and proper functioning of the courts' administration of justice.

Embracing and implementing new ways and practices to provide and improve court procedures as well as access to justice in the midst of this global pandemic did not come easy. The immediate challenge revolved around striking a balance between ensuring the availability of judicial services and enforcing public health measures to keep everyone safe and healthy, particularly the judges, lawyers, litigants and court staff.

Despite the unexpected challenges in 2020, the Malaysian Judiciary continued its initiatives and efforts to enhance the judicial and technological innovations across the Judiciary. Amongst others, the e-Courts system was expanded to all court locations in Peninsular Malaysia and the system was enhanced to include new functions such as alert function for pending grounds of judgments and for cases exceeding disposal timelines. In Sabah and Sarawak, the e-KSS was expanded to include, among others, artificial intelligence application in sentencing and pleading guilty online (e-PG).

The year 2020 also marked several notable events. In April 2020, the Court of Appeal held its first online appeal which was live streamed and viewed nationwide. Since then, the appellate courts have been conducting online appeal hearings via video conferencing. Towards the end of 2020, significant amendments were made to relevant laws such as the Courts of Judicature Act 1964, the Subordinate Courts Act 1948, the Rules of the Federal Court 1995, the Rules of the Court of Appeal 1994 and the Rules of Court 2012 to include online hearings as a mode of disposing of cases. These amendments mark the milestone of adopting remote communication technology within and throughout the Malaysian justice system.

In hindsight, a silver lining can be seen in that the COVID-19 pandemic has accelerated the transition towards the digitalisation of court proceedings as evidenced by the landscape of online hearings and the enhanced role of technology in 2020. This shift has also shown how future judicial systems might operate in the far future.

To all members of the Judiciary and the judicial and legal service as well as the members in the legal profession: Thank you for your continuous commitment, cooperation and hard work over the past year. It has been a demanding time, but I am proud to say that you have all risen to the task. One thing has never been clearer: the strong tripartite synergy between the Judiciary, the Bar and the Attorney General's Chambers is the main reason the Malaysian Judiciary successfully met most of the challenges faced

in these trying times. May we continue to strengthen our dynamic collaboration and cooperation in the years ahead, particularly in realising our common goal, i.e. upholding the rule of law and dispensing justice.

I would also like to thank each and every one of the contributors and the Yearbook committee led by Federal Court Judge, Datuk Nallini Pathmanathan for their considerable efforts and invaluable contributions in putting together this volume. The success of the Yearbook publication would not be possible without their relentless commitment and dedication.

I hope that the publication of this Yearbook is further evidence of the Judiciary's commitment to long-term thinking. What may appear to be a mere set of reflections on a working year is, in reality, an endeavour to systematise institutional memory. Although such a task is inherent to the judicial function in a common law system, it has not – until very recently – been a focus in relation to the background work required to keep the machinery of justice working. This Yearbook is our contribution to the knowledge of judges in generations to come.

Tun Tengku Maimun Tuan Mat
Chief Justice of Malaysia


KOMPLEKS MAHKAMAH KOTA KINABALU

Preface

By Justice Nallini Pathmanathan
Judge of the Federal Court,
Editor of the Malaysian Judiciary Yearbook 2020

The year 2020 did not provide relief from the COVID-19 pandemic. The virus continued to sweep through society the world over, metamorphosing ingeniously to avoid the specific vaccine-induced antibodies designed to eradicate it.

Our legal realm, initially upended at the outset of the pandemic, continued to evolve to meet the need for enduring access to justice. As Charles Darwin the renowned evolutionist and philosopher said:

> It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is the most adaptable to change.

And change we did.

From the dark grimness of disease, suffering and difficulty, great beginnings start, leading to great innovation. The Judiciary persevered with its journey towards making access to justice a reality by innovating in terms of where we worked, how we worked and the hours we worked. While an accumulation of cases – an inevitable consequence of the pandemic – is unavoidable, the progress we made in limiting and now reducing it, has been innovatory. The clear message that came through was that recovery and change would have to be digital.

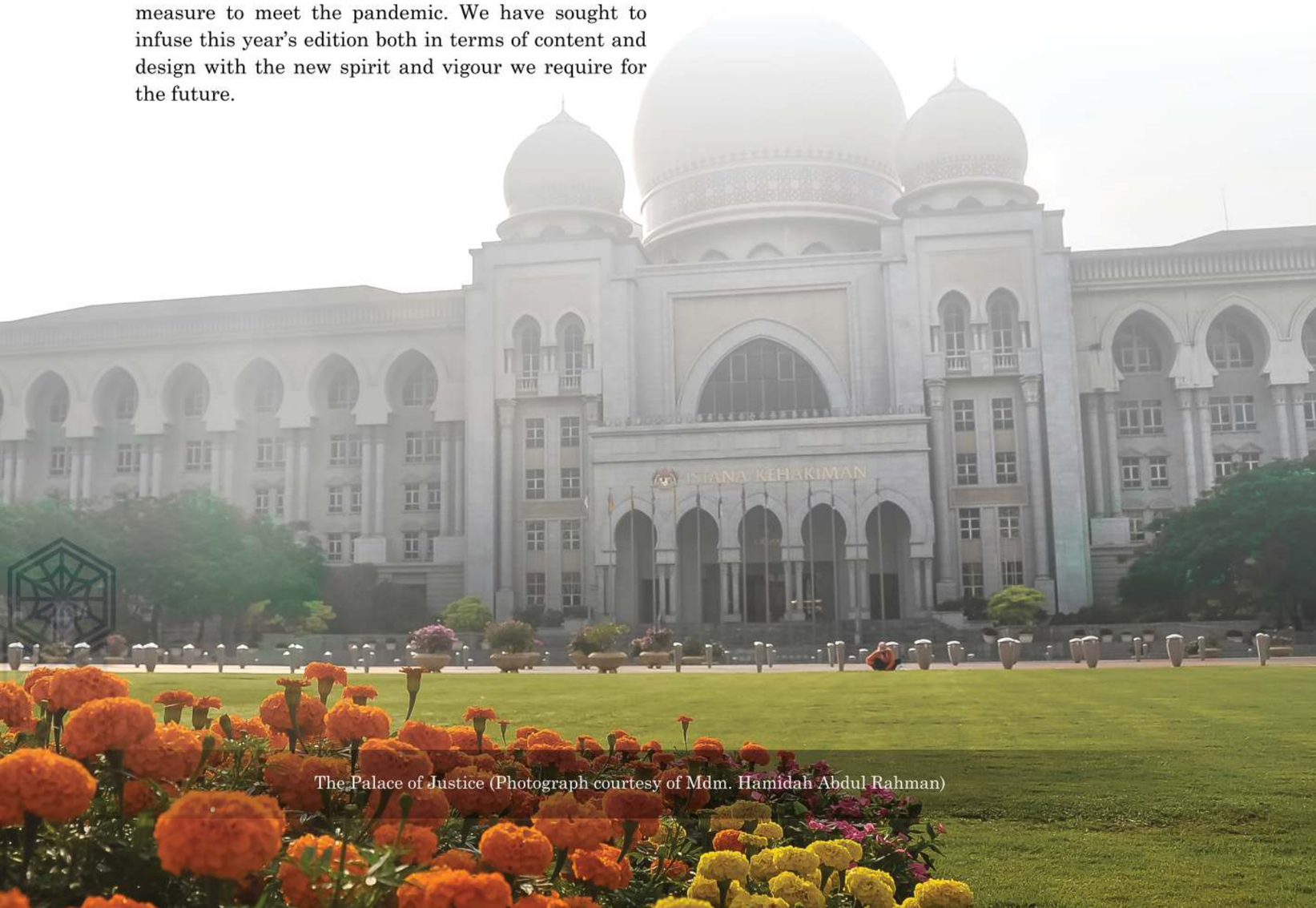
Today, digital transformation is a discipline and a philosophy that underpins the Judiciary's path to recovery, and more significantly, beyond that.

In this context, the pandemic achieved what would have taken us at least a decade to accept and implement. It invoked cognizance in the legal community as a whole that we were lagging behind in terms of entry into the digital era that the rest of the world was already immersed in. As is evident in the several accounts in this edition, we transformed credibly and significantly from our age-old reliance on physical hearings for interlocutory applications, trials and appeals to online virtual hearings, even for civil trials. So too the stakeholders adapted to meet the changing environment which has taken hold, not only domestically but internationally.

This year's report narrates the transformation the Judiciary undertook in order to lead the battle to make digital transformation more than just a temporary measure to meet the pandemic. We have sought to infuse this year's edition both in terms of content and design with the new spirit and vigour we require for the future.

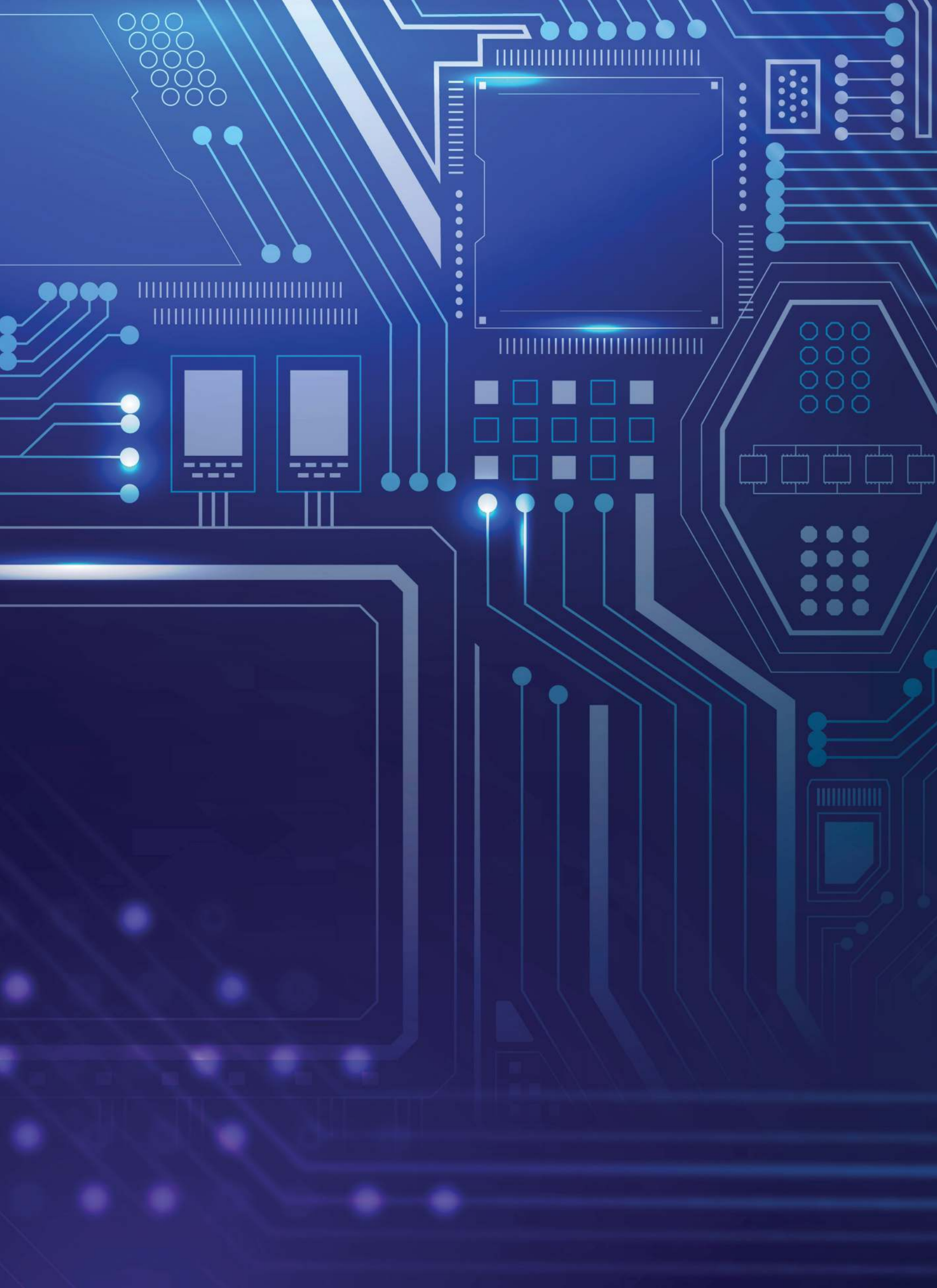
For this I have to pay tribute to the hard work of the team of judges and judicial officers who have worked hard to produce this year's edition. Much like last year, we were hampered in no small measure by the lockdowns we had to endure during the course of the year, which considerably slowed down our progress. Particular acknowledgement and credit must go to Azniza Mohd Ali and Chang Lisia who led the team and ensured the quality of both content and design. I thank my valued sister and brother judges, Justice Ravinthran Paramaguru, Justice Nantha Balan E.S. Moorthy, Justice Azizul Azmi Adnan and Justice Faizah Jamaludin for their concerted efforts in producing this report. I also thank Hazimi Khalil (Jimmy) and Thomson Reuters for the design and editing of this year's edition. On behalf of the Committee, I hope you will find this edition illuminating.

Justice Nallini Pathmanathan
Editor



The Palace of Justice (Photograph courtesy of Mdm. Hamidah Abdul Rahman)

The Kota Kinabalu Court Complex in a digital watercolour



CHAPTER 01

THE OPENING OF THE LEGAL YEAR 2020 AND THE APPELLATE JUDGES' RETREAT

THE OPENING OF THE LEGAL YEAR 2020

Opening of the Legal Year 2020

The Opening of the Legal Year for the year 2020 ("OLY 2020") ceremony for Peninsular Malaysia was held at the Putrajaya International Convention Centre on January 10, 2020. The phrase *"Moving Forward"* was chosen as the theme for the event.

OLY 2020 was attended by the judges of the Federal Court, Court of Appeal and High Courts, and judicial commissioners. Invited guests who attended the event included the then Speaker of the Dewan Rakyat, YB Tan Sri Dato' Mohamad Ariff Md Yusof; the then Attorney General of Malaysia, the Honourable Tuan (now Tan Sri) Tommy Thomas; the Deputy Minister in the Prime Minister's Department, YB Tuan Mohamed Hanipa bin Maidin; and the then President of the Malaysian Bar, Dato' Abdul Fareed Abdul Ghafoor.

The Judiciary were honoured with the presence of the Chief Justice of the Republic of Singapore, the Honourable Mr. Justice Sundaresh Menon; the Chief Justice of the Constitutional Court of the Republic of Indonesia, the Honourable Dr. Anwar Usman, and the Deputy Chief Justice of Non-Judicial Affairs of the Supreme Court of the Republic of Indonesia who was representing the Chief Justice of the Supreme Court of Indonesia, the Honourable Dr. Sunarto, at OLY 2020.

OLY 2020 commenced with a ceremonial procession by the judges and judicial commissioners at 9.00 a.m., followed by a speech by the then President of the Malaysian Bar, Dato' Abdul Fareed Abdul Ghafoor. Dato' Abdul Fareed began his speech by highlighting the momentous occasion for the nation in the year 2019 with the appointment of the Right Honourable Tan Sri (now Tun) Tengku Maimun binti Tuan Mat as the first lady Chief Justice of Malaysia.

He went on to congratulate Justice Dato' Rohana binti Yusuf on her appointment as the President of the Court of Appeal and Justice Tan Sri Azahar bin Mohamed on his appointment as the Chief Judge of Malaya. Dato' Fareed also extended the Bar's congratulations to Justice Dato' Zaleha Yusof, Justice Dato' Zabariah Mohd Yusof and Justice Datuk Hasnah Dato' Mohammed Hashim on their elevation to the Federal Court. He said that the appointment of these

three lady judges to the Federal Court was another progressive milestone towards gender diversity in the Malaysian Judiciary. In his speech, Dato' Fareed also discussed the recent development of the law following the decisions of the Federal Court in the cases of *Semenyih Jaya* in 2017, *Indira Ghandi* in 2018 and *Alma Nudo Atenza* in 2019. He concluded his speech by undertaking, on behalf of the Bar, to take all necessary and relevant efforts to strengthen and maintain a good professional relationship with the Judiciary as equal partners in the administration of justice. Dato' Fareed said that the Bar will accord the necessary assistance and support to the Judiciary on its proposed reforms in improving capacity-building of human capital, embracing and improving information technology, and embarking on the development of better infrastructure towards providing higher quality legal services.

The next speech was by the Attorney General of Malaysia. In his speech, Tuan (now Tan Sri) Tommy Thomas reiterated that through the Federal Court's landmark decisions in the cases of *Indira Gandhi* and *Semenyih Jaya*, the supreme law of the land is given its rightful and proper place in the country's jurisprudence. He highlighted some of the legislative reforms that had taken place, including the amendment made to the Federal Constitution to lower the voting age of 21 years to 18 years old and the Bill presented to Parliament to amend the Federal Constitution to limit the term of the office of the Prime Minister to two terms. He also spoke of the numerous public interest cases in which 27 criminal cases have been brought against high-profile individuals. He said that these cases were managed by a team of senior, well-experienced deputy public prosecutors to ensure that the prosecution of these cases will be handled in the most competent manner.

The final speech at OLY 2020 was that of the Chief Justice of Malaysia. The Rt. Hon. the Chief Justice Tengku Maimun began her speech by thanking all the guests who had graced the event and by congratulating The Rt. Hon. Justice Dato' Rohana binti Yusuf and The Rt. Hon. Justice Tan Sri Azahar bin Mohamed on their appointments as President of the Court Appeal and Chief Judge of Malaya respectively.

The Chief Justice reinforced the importance of the Judiciary, being the third arm of government, as the key instrument in upholding the principles and values of the Federal Constitution for Malaysia. Her Ladyship reminded all those present that the Judiciary was not the sole guardian and custodian of the law within the

Ceremonial procession of judges and judicial commissioners at the Putrajaya International Convention Centre

Malaysian justice system. Her Ladyship emphasised that lawyers too have a role to discharge as the custodians of law by first being the officers of the courts in ensuring justice is dispensed. Her Ladyship reminded the lawyers that it was important for them to observe the highest standard of ethical conduct especially in representing their clients in courts. Her Ladyship said that officers from the Attorney General's Chambers ("AGC") also played an equally pivotal role as lawyers, given that they are entrusted with the position of being the primary line of advisers in ensuring that the government of the day conducts their affairs within the scope of the law.

In line with the spirit of the event themed; "Moving Forward", the Chief Justice also highlighted the need for judicial reforms that require a strong tripartite synergy between the Judiciary, the Bar and the AGC in order to continue enhancing the adherence to and respect of the rule of law, strengthening judicial independence and improving the overall efficiency of the judicial system.

Her Ladyship said that one of the Judiciary's proposed reforms was the establishment of a Judicial Academy, which will provide the necessary training for judges so as to help them keep updated with the necessary legal skills and improve the quality and content of their judgments. It also included substantive improvements to the judicial machinery and reform of the civil procedure with the amendments of the Rules of Court 2012, in order to enhance access to justice. Her Ladyship said that steps have also been taken to limit appeals from interlocutory applications to a higher court, in order to help clear the backlog of cases pending in the originating court whilst the appeals are being disposed of.

Another proposed reform touched upon by the Chief Justice was the improvisation of court procedure through digitalisation. Her Ladyship said that since 2009, the e-Court initiatives that have been implemented were the Court Recording System, the Case Management System, the Queue Management System and the e-Filing system. Further, Her Ladyship announced that there were plans in 2020 to establish more e-Courts in Peninsular Malaysia and to apply e-Reviews at all levels of court, including the subordinate courts.

The proposed reforms included the implementation of the online auction system, e-Lelong, in all High Courts in Peninsular Malaysia, the introduction of the Quick Response Code Authentication for verification of the authenticity of court orders, e-Jamin to enable bailors to make bail payments via online transactions and also the opening of more courtrooms throughout Peninsular Malaysia as a means of providing the public better access to justice. After delivering her speech, the Chief Justice launched the e-Jamin, the e-Appellate, the expansion of e-Review to all courts, as well as the e-Lelong platforms. This concluded the event.

The Rt. Hon. the Chief Justice Tun Tengku Maimun delivering the final speech

Opening speech by Dato' Abdul Fareed Abdul Ghafoor

Procession of judges of the High Court walking into the hall at Putrajaya International Convention Centre

Procession of judicial commissioners walking into the hall at Putrajaya International Convention Centre

From L–R: Tan Sri Datuk Zainun Ali, former judge of the Federal Court; Justice Rohana Yusuf, PCA; Chief Justice Tengku Maimun Tuan Mat; Justice Nallini Pathmanathan, FCJ and Dato' Alizatul Khair Osman Khairuddin, former judge of the Federal Court

Guests enjoying light refreshments

THE OPENING OF THE LEGAL YEAR 2020 — SABAH AND SARAWAK

It was an early start for the Opening of the Legal Year for Sabah and Sarawak (OLY 2020) ceremony, which took place on January 17, 2020 at the Kuching High Court Complex. The theme selected for the OLY 2020 was "Justice and Beyond".

The OLY 2020 ceremony commenced at 7.30 a.m. with an hour-long ceremonial procession by approximately 1,000 participants consisting of judges, judicial officers and lawyers, from the Sarawak State Legislative Assembly (DUN) Complex to the Kuching High Court Complex. The procession was led by The Rt. Hon. the Chief Justice of Malaysia, Tan Sri (now Tun) Tengku Maimun binti Tuan Mat and together with her Ladyship was the Rt. Hon. Court of Appeal President, Dato' (now Tan Sri) Rohana binti Yusuf, the then Rt. Hon. Chief Judge of Sabah and Sarawak, Tan Sri David Wong Dak Wah, the Rt. Hon.Chief Judge of Malaya, Tan Sri Azahar bin Mohamed, the then Honourable Attorney General of Malaysia Tuan (now Tan Sri) Tommy Thomas and the Honourable State Attorney General of Sarawak, Datuk Talat Mahmood Abdul Rashid. The arrival of the procession at the Kuching High Court Complex at 8.30 a.m. was greeted with a cultural dance performance, followed by the singing of the national and state anthems.

Guests at the OLY 2020 included the Honourable Deputy Sabah State Attorney General Datuk Nor Asiah Mohd Yusof, Sarawak DUN Speaker, YB Datuk Amar Mohamad Asfia Awang Nassar, Deputy Speaker, YB Datuk Gerawat Gala, Mr. Martin Tommy, representative of the then Minister in the Prime Minister's Department (the late) YB Datuk Liew Vui Keong, President of the Advocates Association of Sarawak, Mr. Ranbir Singh, President of Sabah Law Society, Mr. Roger Chin and the then President of the Malaysian Bar, Dato' Abdul Fareed Abdul Ghafoor. The event was also graced by the President of the Law Society of Singapore, Mr. Gregory Vijayendran, the President of the Taiwan Bar, Mr. Ruey-Cherng Lin and the Vice President of the Law Society of Hong Kong, Mr. Chan Chak Meng.

Justice David Wong Dak Wah delivered his final speech as the Chief Judge of Sabah and Sarawak. His Lordship

The procession of the Opening of Legal Year for Sabah and Sarawak 2020.

Ceremonial procession led by the Chief Justice, The Rt. Hon. Tun Tengku Maimun to Kuching High Court complex

retired approximately a month after the OLY 2020 on February 19, 2020. In his speech, Justice David shared the excellent experience he had working with the team from SAINS, a Sarawak home grown IT solutions company that had worked closely with the Judiciary of Sabah and Sarawak in transforming the systems of the Sabah and Sarawak courts from a manual to a digital system. The transformation program from a manual to a digital system was initiated in 2006 by his predecessor the then Chief Judge of Sabah and Sarawak, Tan Sri Richard Malanjum. Justice David remarked:

> It is undeniable that if not for the cooperation extended to the judiciary during the early years of transformation, we would not have achieved what we have today. We now have an application for the judiciary of East Malaysia which allows Judges and lawyers to manage their work. For the lawyers, they can access their files, file in documents and check on the status of their cases from that app from anywhere in the world. For Judges, they are also able to access their files with details as to their status in terms of timelines for finishing their trials, delivery of decisions and grounds.

Justice David also touched upon the Malaysia Agreement 1963 and the significance of the Agreement in the working of the courts in Peninsular Malaysia and Sabah and Sarawak. He emphasised the importance of the presence of a judge possessing Borneo judicial experience in an appellate panel at the Federal Court and the Court of Appeal.

As can be seen from the excerpt of his speech below, whilst the practice has been for the Chief Justice to include a judge from Borneo as one of the judges on appellate panels, Justice David expressed the hope for the practice to be made law one day:

> Of course the law as it stands now does not require the Chief Justice to empanel a member of the appellate court of possessing Borneo judicial experience. Speaking personally, it is my hope that one day this will be changed. That said we are fortunate and grateful that the Chief Justice has seen fit to continue the practice of her predecessor in requiring the presence of the judge of Borneo judicial experience in an appellate panel.

The OLY 2020 theme of "Justice and Beyond" was put to life by the launch of three new applications at the ceremony, which were the Artificial Intelligence (AI) for sentencing; Self-Representing Litigants App; and the Social Media pages for the East Malaysian courts. The Judiciary in Sabah and Sarawak had taken steps in introducing the AI system in criminal cases to assist magistrates and judges in determining the appropriate sentences to be imposed by the courts. As Justice David said in his speech, "When used appropriately, AI will increase efficiency of a process and raises the quality and consistency of our decisions."

His Lordship also made good the undertaking by the courts in Sabah and Sarawak to go into the rural areas with mobile courts. This is to ensure that the people in the rural areas of Sabah and Sarawak have access to justice.

The OLY 2020 ceremony concluded with a gala dinner held at the Riverside Majestic Hotel, Kuching.

Cultural performance by local dancers
From L-R: Tan Sri Datuk Amar Mohamad Asfia Awang Nassar;
Justice Azahar Mohamed, CJM; Justice Rohana Yusuf, PCA;
Chief Justice Tengku Maimun Tuan Mat; Justice David Wong Dak Wah, CJSS;
Mr. Tommy Thomas, the Attorney General and Dato Gerawat Gala

Customary speeches delivered by the representatives of the legal fraternity
in an open court proceedings setting which was presided by the
Chief Justice Tun Tengku Maimun Tuan Mat. The reply speech was delivered by the
Chief Judge of Sabah and Sarawak David Wong Dak Wah, on behalf of the Judiciary

THE APPELLATE JUDGES' RETREAT

The Appellate Judges' Retreat was held from February 21 to 23, 2020 at the Swiss-Garden Hotel & Residences, Genting Highlands.

On Friday, February 21, 2020, after the judges had checked into the hotel, Mdm Wan Aima Nadzihah Wan Sulaiman, the Head of the Research Unit under the Chief Registrar's Office, gave a presentation on the e-Research Repository system. The system is a newly created database, where legal opinions prepared by the research officers will be stored for future reference, given that the same or similar issues may arise again. Access to this database is limited only to the appellate judges, the Chief Registrar of the Federal Court of Malaysia, the Policy and Legal Division, and research officers. In the course of her introduction on the system, Mdm Wan Aima Nadzihah also gave the judges a briefing on the available manpower at the Research Unit at that time and their workflow process.

Mdm Wan Aima Nadzihah then explained the workings of the e-Judgment portal, which is used by judges' secretaries to upload the judges' grounds of judgment directly onto the Judiciary's website. This portal is used by all levels of the Judiciary, from the Magistrates' Court to the Federal Court. She informed the judges that after the grounds of judgment are uploaded, members of the public can readily access and read them. Grounds of judgment uploaded on the e-Judgment portal can be located by searching for details of the judgment, such as the date of judgment, the name of the judge, and the level of court that gave the judgment. Cases can also be searched by keywords but only if the judges' secretaries had uploaded the grounds of judgments with the relevant keywords. The Research Unit has taken on the role of assisting in this regard by curating previously uploaded grounds of judgment and providing keywords for those which are lacking. Due to the vast volume of grounds of judgment already on the portal and the fact that they continue to be uploaded daily, as well as the fluctuating manpower at the Research Unit, this is understandably an ongoing process. Mdm Wan Aima Nadzihah explained that the fluctuation in the manpower in the Research Unit is due to the fact that the number of judicial clerks placed at the unit tend to increase during university semester breaks and correspondingly decrease during term time.

Mdm Wan Aima Nadzihah stated that the e-Judgment portal increases the accessibility of written grounds of judgments as not all members of the public would have access to physical copies of law journals, which due to its high cost can only be found in libraries of large law firms and universities. The online version of law journals are also only accessible by fee-paying members or subscribers. The portal also increases the speed of dissemination of written grounds of judgment as once uploaded onto the Judiciary website, it is accessible by members of the public. This is in contrast to the law journals, which are unable to instantaneously publish grounds of judgment as the grounds of judgment have to undergo an editorial process, where headnotes and case summaries have to be prepared before the judgments can be published.

The next day, on February 22, 2020, Justice Azahar Mohamed, Chief Judge of Malaya, addressed the appellate judges on the topic of "Appellate Judging", which is highly relevant to the appellate judges. At the outset, Justice Azahar stated that instead of covering the legal principles governing appellate intervention, the principal objective of the session was to inform the appellate court judges how to enhance their judicial decision-making process to arrive at a decision that is factually and legally correct. His Lordship outlined the differences between sitting as a single judge and sitting as part of a panel in the appellate courts. His Lordship said notwithstanding the role played by the chairman of the panel in presiding over the hearing of the appeal, the ultimate decision is made by all the judges on the panel as a group, whereby collegiality among the panel members would come into play in their collective working and collective decision-making. Justice Azahar lauded the benefits of group thinking as the diversity of backgrounds of the judges in a panel would improve the nature and quality of their decision-making.

His Lordship encouraged judges to challenge their colleagues on judicial opinions but urged judges to conduct themselves with civility in doing so in order to uphold a sense of mutual respect among the appellate judges. This conduct ought to be maintained on and off the Bench.

Justice Azahar also read out an excerpt detailing the week of a United Kingdom ("UK") Court of Appeal judge from the book "Sitting in Judgment: The Working Lives of Judges" by Penny Darbyshire, Professor of Law at Kingston University to illustrate

The top four judges during the first session of the Appellate Judges' Retreat on February 22, 2020
(L–R): Justice Azahar Mohamed, CJM ; The Rt. Hon. the Chief Justice of Malaysia Tengku Maimun Tuan Mat;
Justice Rohana Yusuf, PCA ; Justice Abang Iskandar Abang Hashim, CJSS

the busy life of an appellate court judge. His Lordship acknowledged the heavy pressure and workload of appellate court judges and encouraged them to read before the hearing as this would aid their decision-making. His Lordship also devoted some time to explain that pre-hearing deliberations ought to be held only with the aim of sharing preliminary views among the panel and to identify issues or problems which ought to be addressed, and not more. His Lordship cautioned judges not to pre-judge, i.e. make up their mind before the oral hearing. Judges ought not to close their mind before hearing the parties submit as parties are entitled to a fair hearing.

Justice Azahar also touched upon the basic aspects of decision-making such as post-hearing deliberations, allocation of responsibility for writing grounds of judgment and preparation of draft grounds of judgment.

At the end of the talk, the appellate court judges posed for a group photo, which served as a record of the fond memories of the retreat. Approximately two weeks after this conference, Justice Idrus Harun was appointed as the Attorney General of Malaysia on March 6, 2020 and at the end of 2020, two judges of the Court of Appeal – Justice Umi Kalthum Abdul Majid and Justice Dr. Badariah Sahamid – retired.

The appellate judges were then divided into separate sessions to discuss issues unique to the Federal Court and the Court of Appeal respectively.

Federal Court

First, Mr Azhaniz Teh Azman Teh, the Director of the Strategic Development and Training Division, delivered a presentation to the Federal Court Judges on a newly created function of the Case Management System, which is a database for questions of law posed in applications for leave to appeal to the Federal Court. The new feature provides an additional option for registrars to search this database for questions of law by keyword. This is to enable the efficient disposal of leave to appeal applications by bringing to the judges' attention previously decided or pending cases where the questions of law were the same or similar. As this function did not exist previously, there was a possibility of there being inconsistent decisions made by different panels of the Federal Court as to whether to allow leave to appeal on the same or similar questions or law. Additionally, the function would also allow for grouping of cases involving similar questions of law to be heard one after another on the same date.

However, this new function has a limitation as the database only extracts keywords from questions of law in cases which were filed electronically with e-Review Forms where the applicants' lawyers have filled in the space allocated for questions of law. The filing of questions of law electronically with e-Review Forms was only implemented from October 22, 2018. Therefore, the database does not encompass questions of law in the older applications for leave to appeal to the Federal Court which were filed manually without e-Review Forms. Mr Azhaniz Teh said that the Judiciary may want to consider entering into a collaboration with an external publisher to expand this database.

Furthermore, if the applicants' lawyers do not accurately complete the e-Review Form, their proposed questions would not be reflected in the database. The registrars have the responsibility to check the e-Review Form filed in each case to ensure that it is accurate.

This was followed by a presentation on the Federal Court statistics by Mdm Jumirah Marjuki, Registrar of the Federal Court before the Federal Court judges discussed the role and work of the Federal Court registry officers in order to increase efficiency.

Several important decisions were made on proposals put forward at this conference and implemented by the registry, such as The Rt. Hon. the Chief Justice of Malaysia's proposal to reduce backlog by reducing the number of judges on the panel for appeals proper from five to three. Formerly, leave applications were heard by panels of three judges while civil and criminal appeals were heard by panels of five judges or more depending on the complexity of the matter. The judges also agreed to the issuance of a practice direction to the effect that submissions filed out of time will be considered not filed and that in lieu of written submissions filed within time, counsel will be allotted a specific amount of time for oral submissions, to be determined by the panel hearing the matter.

The Rt. Hon. the Chief Justice of Malaysia directed the registry to monitor the collection of allocatur collected for the government for purposes of reference so that the Judiciary can keep the government informed of its contribution to revenue. Besides that, such information would also prove useful for procuring a proportionate budget.

Court of Appeal

In this session, the Court of Appeal judges discussed issues relevant to judges, registry and the Bar/Attorney General's Chambers ("AGC"). Statistics of the Court of Appeal were discussed. The judges also discussed administrative matters of the Court of Appeal registry and proposed changes in order for the registry to be more efficient.

One of the main issues raised by the Court of Appeal judges was the uneven fixing of cases by the registrars without due regard to weightage. This was also a problem faced by the Federal Court judges even though the former Chief Justice Richard Malanjum had implemented a weightage system (now abolished) where Federal Court judges would quickly scan cases before the fixing of hearing dates and inform the registry of the weight to be attached to the same. The solution proposed by the Court of Appeal judges was to train registrars to accurately assess weightage. This would prevent adjournment of cases due to lack of time to complete hearings within the day and enable judges to do justice to the cases before them.

The Court of Appeal judges generally agreed that their registrars could do more to assist the judges with their heavy workload.

A common issue faced by the Court of Appeal judges was the late filing of written submissions which prevents judges from adequately preparing for the hearing. Deputy public prosecutors were especially guilty of filing late submissions on the eve of the hearing. They resolved that this issue ought to be discussed with the Bar and the AGC.

The issue of forum shopping among the lawyers from the Bar was raised. It was proposed that registrars were to properly investigate the reasons proposed by lawyers for recusal of judges in order to ensure that the reason is valid or genuine.

On the final day (February 23, 2020), the judges had a session with The Rt. Hon. the Chief Justice of Malaysia.

The main agenda was a proposal entitled "Research and Documentation Work within the Appellate Courts" presented by Justice Nallini Pathmanathan. This

proposal aimed to enhance the institutional capacity of the Appellate Courts' Research Unit which is generally charged with the task of assisting the judges with research as well as compiling and maintaining an analytical overview of the appellate courts' case law repository. Her Ladyship's proposal was two-fold; first, to enhance the Judicial Clerkship programme with the goal of placing one judicial clerk with each appellate judge and secondly, to ensure that the officers placed in the Research Unit are the best and brightest. The purpose of having good personnel in this unit is to reduce the workload of the judges, speed up court proceedings as well as delivery of judgments and enhance the quality of the grounds of judgment. This proposal received support and the Chief Registrar was instructed to take the necessary steps to implement this proposal.

After a few other judges discussed miscellaneous issues, the conference ended with The Rt. Hon. the Chief Justice expressing her gratitude to all judges who participated and contributed their views and ideas for the future betterment of the Judiciary.

Some of the appellate court judges during the time allocated for question and answer in the first session of the Appellate Judges' Retreat on February 22, 2020
(L–R): Justice Dr. Badariah Sahamid (now retired), Justice Mary Lim Thiam Suan (now Judge of the Federal Court) and Justice Harmindar Singh Dhaliwal (now Judge of the Federal Court)

(L–R): Justice Idrus Harun (now the Attorney-General of Malaysia), Justice Vernon Ong Lam Kiat, Justice Azahar Mohamed, CJM and Justice Kamaludin Md Said. This was the last conference attended by Justice Idrus Harun before his appointment as the Attorney General of Malaysia two weeks later, on March 6, 2020

Mr Ahmad Terrirudin Mohd Salleh, the Chief Registrar of the Federal Court of Malaysia welcoming the appellate court judges to the retreat at Swiss-Garden Hotel & Residences, Genting Highlands

(L–R): Justice Suraya Othman, Justice Kamardin Hashim, Justice Yaacob Md Sam, Chief Justice Tengku Maimun Tuan Mat, Justice Hadhariah Syed Ismail, Justice Nallini Pathmanathan (hidden), Justice Azizah Nawawi and Justice Rhodzariah Bujang (facing away from camera)

Group photo of some of the female appellate court justices

(L-R):Justice Nallini Pathmanathan; Justice Hadhariah Syed Ismail; Justice Zaleha Yusof, Justice Badariah Sahamid; Justice Suraya Othman, Chief Justice Tengku Maimun Tuan Mat, Justice Lau Bee Lan, Justice Umi Kalthum Abdul Majid, Justice Hanipah Farikullah, Justice Zabariah Mohd Yusof, Justice Nor Bee Ariffin, Justice Rodzariah Bujang, Justice Rohana Yusuf, PCA; Justice Azizah Nawawi, and Justice Hasnah Mohammed Hashim

The male appellate court judges singing during dinner

Justice Umi Kalthum Abdul Majid (seated) speaking to Mdm Nik Serene Nik Hashim, Deputy Registrar of the Court of Appeal. This was the last conference attended by her Ladyship before her retirement a few months later on July 10, 2020

Group photo of the appellate court judges at the Appellate Judges' Retreat held at the Swiss-Garden Hotel & Residences, Genting Highlands

Judges of the Federal Court

Seated (L–R): Justices: Zabariah Mohd Yusof; Abdul Rahman Sebli; Nallini Pathmanathan; Mohd Zawawi Salleh; Chief Judge of Malaya Azahar Mohamed; Chief Justice Tengku Maimun Tuan Mat, President of the Court of Appeal Rohana Yusuf; Chief Judge of Sabah & Sarawak Abang Iskandar Abang Hashim; Idrus Harun (now the Attorney General of Malaysia), Vernon Ong Lam Kiat, Zaleha Yusof and Hasnah Mohammed Hashim

Judges of the Court of Appeal

1st row (L–R): Justices: Kamardin Hashim; Mohamad Zabidin Mohd Diah; Nor Bee Ariffin; Hadhariah Syed Ismail, Badariah Sahamid; Suraya Othman; Hanipah Farikullah; Lau Bee Lan; Rhodzariah Bujang; Azizah Nawawi, Has Zanah Mehat and Umi Kalthum Abdul Majid

2nd row (L–R): Justices: Abdul Karim Abdul Jalil; Vazeer Alam Mydin Meera; Yaacob Hj Md Sam; Mary Lim Thiam Suan; Harmindar Singh Dhaliwal; Abu Bakar Jais; Kamaludin Md Said; Ravinthran N. Paramaguru; Lee Swee Seng and Nantha Balan a/l E.S. Moorthy

CHAPTER

02

THE FEDERAL COURT

The aerial view of the Kota Kinabalu Court Complex.

STATEMENT BY THE RT. HON THE CHIEF JUSTICE OF MALAYSIA

The Chief Justice Tun Tengku Maimun Tuan Mat

Malaysia faced many challenges caused by the COVID-19 global health crisis in 2020. Public and private operations, including the justice system, had to adapt to face these very difficult challenges.

In dealing with these challenges, the Federal Court remains steadfast in ensuring that the administration of justice is not brought to a halt and access to justice unimpeded whilst at the same time ensuring that the safety of the public, the litigants and court staff is not jeopardised.

The Federal Court's measures and responses were adjusted according to the different phases of lockdowns or movement restriction orders imposed by the Government of Malaysia, namely, the Movement Control Order ("MCO'), the Conditional Movement Control Order ("CMCO") and the Recovery Movement Control ("RMCO"). During these periods, the Federal Court expanded and increased the use of technology in court proceedings.

Following the MCO on March 18, 2020, the Federal Court was closed and all civil and criminal appeals which had been fixed for hearing were adjourned. However, the e-Filing system remained operational for the filing of documents. Case managements were conducted using the e-Review system and urgent matters were handled by specially assigned officers, who sought instructions from the Chief Justice on a case-to-case basis.

During the CMCO and RMCO periods, online hearings through the e-Review system, exchange of e-mails and/or video conferencing were conducted for civil cases with the consent of parties. The requirement for consent of parties was rendered unnecessary after the coming into force of the amendments to the Courts of Judicature Act 1964 and the Subordinate Courts Act 1948 on October 22, 2020. These amendments allow for both civil and criminal court proceedings to be heard using live video links or electronic communication. To further supplement this, Practice Directions were issued to serve as guidelines.

Noting the significant changes to the law, on November 9, 2020, the Federal Court conducted the hearing of civil cases through video conferencing in Open Court at the Federal Court Room 1 on a pilot basis. The Federal Court also heard criminal appeal cases involving habeas corpus applications through online hearings.

The Federal Court also implemented several salient measures, among others, staggered timing for the hearing of cases, only two lawyers per party were allowed to be present in court for hearings, and in the event more lawyers needed to be present, prior application had to be made to the court with proper justification and with social distancing to be practised in accordance with the guidelines.

Despite a health crisis that has upended our lives, we managed to minimise the disruption of the business of the Federal Court which is the Apex Court. With the use of technology, and with guidelines and measures in place to ensure the safety of all parties, it soon became business as usual at the Federal Court.

In 2020, a total of 762 cases were registered. This is a decrease compared to 2019, which saw 1,023 cases registered. The Federal Court disposed of 947 cases in 2020 which brings the percentage of disposal against registration to 124.28%.

For leave applications, a total of 430 cases were filed in 2020 compared to 515 cases in 2019. There was a decrease of 85 cases. Nevertheless, the Federal Court maintained its performance by disposing of 526 leave applications in 2020, making its performance 122.31% against registration in 2020.

Out of the total number of cases registered for 2020, 133 cases were civil appeals. This is a reduction from the 146 cases in 2019. The disposal rate against cases registered is 116.54% as the Federal Court disposed of 155 cases.

2020 saw a significant decrease in the registration of criminal appeals, compared to 2019. Only 81 appeals were registered in 2020 whereas we had 217 cases in 2019. 139 appeals were disposed of, leaving a balance of 191 appeals as at December 31, 2020.

For habeas corpus cases, 98 appeals were registered and 87 cases were disposed of, leaving a balance of 79 appeals as at December 31, 2020.

In these challenging times, it is imperative that we remain united and continue working together, as we always do. It is clear that effective communication, collaborative action, dedication and cooperation among Judges, judicial officers and staff of the Federal Court as well as members of the Attorney General's Chambers, Malaysian Bar, Sabah Law Society and Advocates Association of Sarawak and all other stakeholders are key to the smooth and efficient performance of the Federal Court. On this note, I wish to record my heartfelt gratitude and appreciation to all and each one of them.

Unlike 2019 where the Federal Court bade farewell to several members of the Federal Court bench, the year 2020 witnessed and welcomed new members, namely Justice Mary Lim Thiam Suan, Justice Harmindar Singh Dhaliwal and Justice Rhodzariah binti Bujang. I congratulate them on their appointments and wish them all the best.

Justice Tengku Maimun Tuan Mat
Chief Justice of Malaysia

JUDGES OF THE FEDERAL COURT

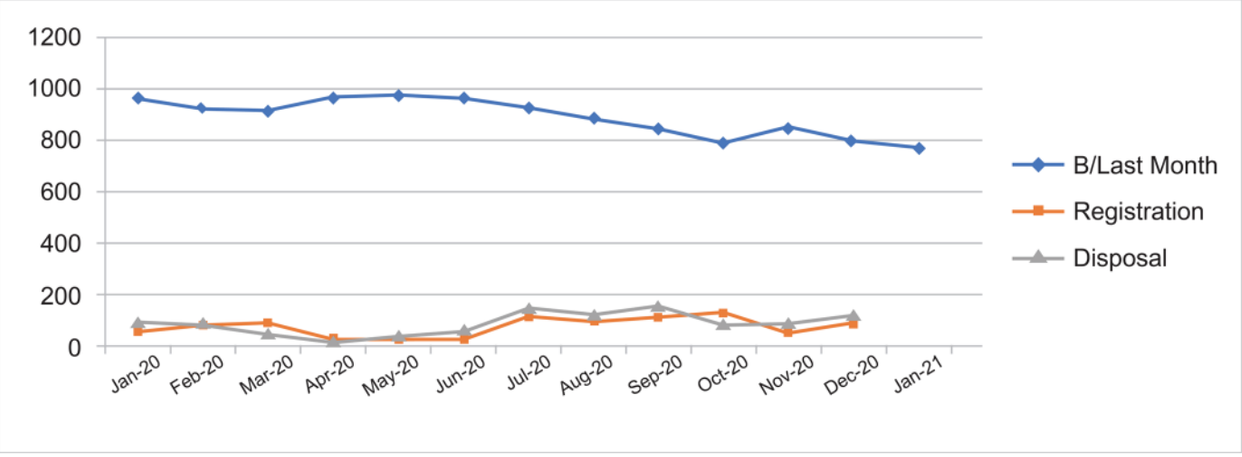
1. Chief Justice Tengku Maimun Tuan Mat
2. Justice Rohana Yusuf
3. Justice Azahar Mohamed
4. Justice Abang Iskandar Abang Hashim
5. Justice Mohd Zawawi Salleh
6. Justice Nallini Pathmanathan
7. Justice Vernon Ong Lam Kiat
8. Justice Abdul Rahman Sebli
9. Justice Zaleha Yusof
10. Justice Zabariah Mohd Yusof
11. Justice Hasnah Mohammed Hashim
12. Justice Mary Lim Thiam Suan
13. Justice Harmindar Singh Dhaliwal
14. Justice Rhodzariah Bujang

PERFORMANCE OF THE FEDERAL COURT IN 2020

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 applications for leave to appeal, civil appeals and criminal appeals. In 2020, a total of 762 cases were registered and 947 cases were disposed of. The percentage of disposal against registration is 124.28%. The overall performance of the Federal Court in 2020 can be seen in Graph A above.

GRAPH A

NUMBER OF CASES REGISTERED AND DISPOSED OF IN 2020



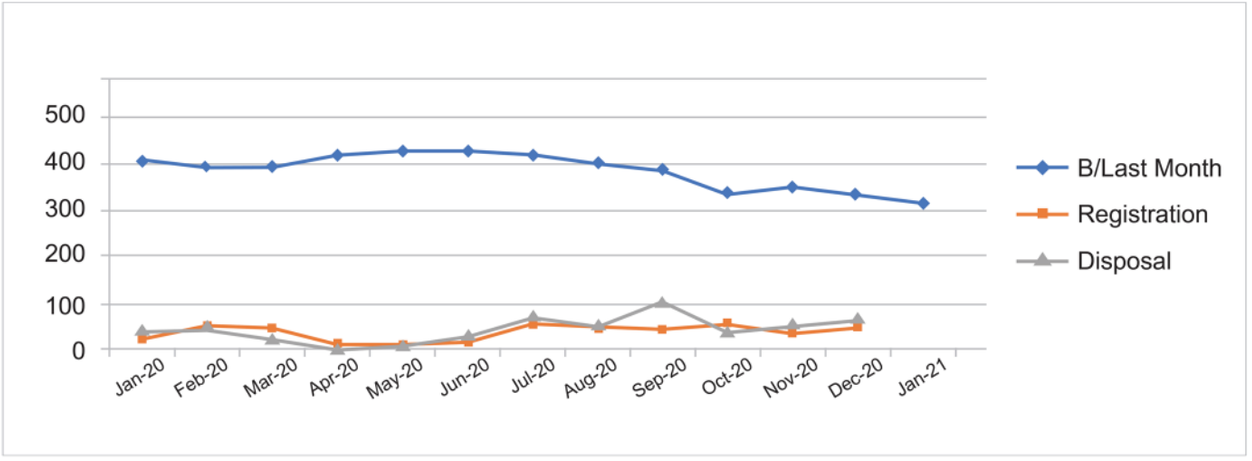
MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-21
BALANCE LAST MONTH	959	925	918	961	970	961	925	888	856	797	839	800	774
REGISTRATION	48	70	81	16	16	23	92	78	95	111	47	85	
DISPOSAL	82	77	38	7	25	59	129	110	154	69	86	111	

Leave Applications

As shown in Graph B, the total registration of leave applications in 2020 was 430 cases. This shows a decrease of 85 cases registered as compared to registration in 2019 which was 515 cases. However, the Federal Court had managed to dispose of 526 cases in 2020. The disposal rate of leave applications as against the cases registered is 122.31%. The Federal Court has maintained its performance in disposing of leave applications.

GRAPH B

NUMBER OF LEAVE APPLICATIONS REGISTERED, DISPOSED OF AND PENDING IN 2020



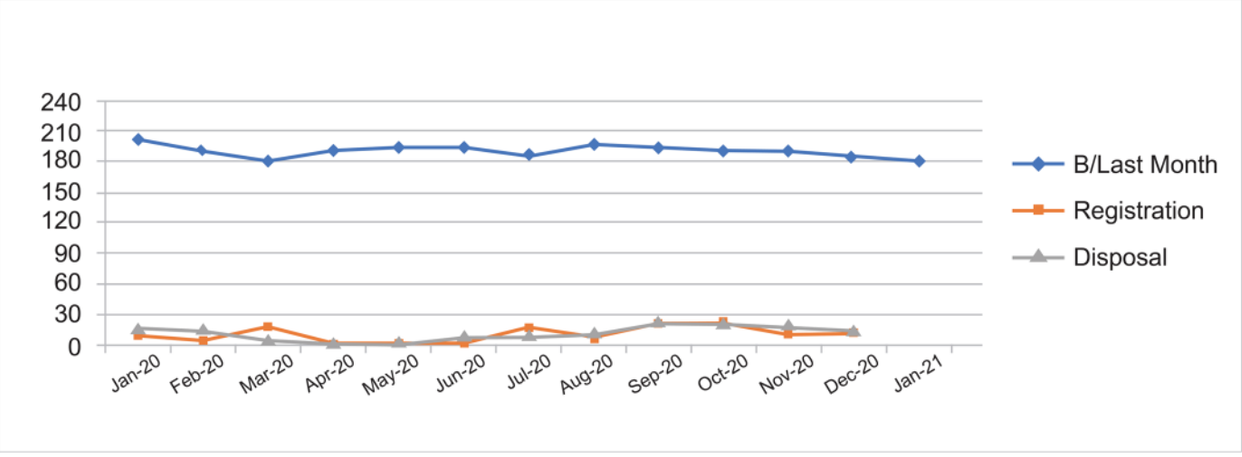
MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-21
BALANCE LAST MONTH	406	388	392	421	428	428	408	386	383	327	351	324	310
REGISTRATION	22	49	47	8	11	15	54	47	42	53	27	55	
DISPOSAL	40	45	18	1	11	35	76	50	98	29	54	69	

Civil Appeals

For civil appeals, a total of 133 cases were registered and 155 cases were disposed of in 2020. The registration showed a reduction of 13 cases as compared to registration in 2019 which was 146 cases. The disposal rate against the cases registered is 116.54%.

GRAPH C

NUMBER OF CIVIL APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



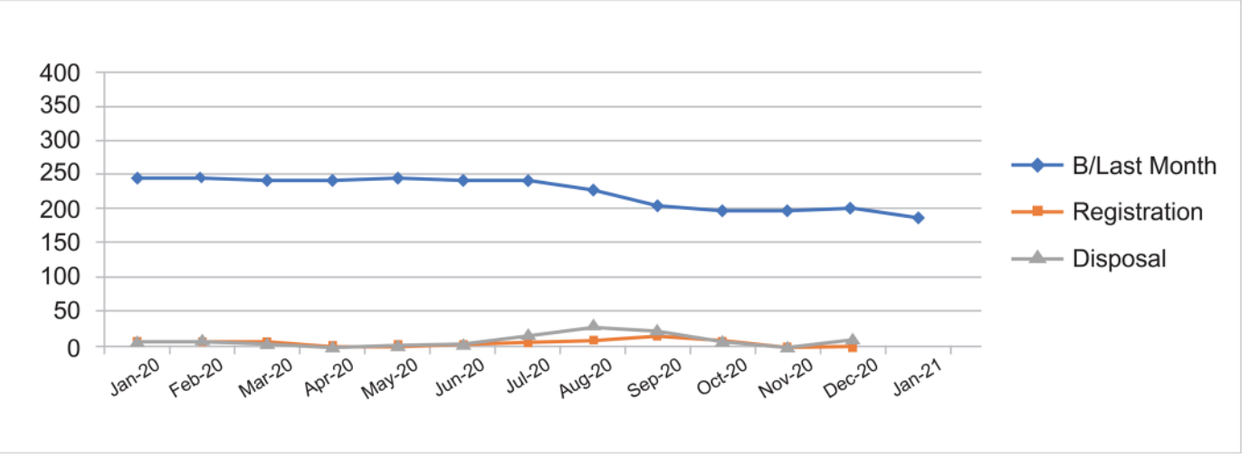
MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-21
BALANCE LAST MONTH	201	191	180	193	193	195	188	198	194	191	192	184	179
REGISTRATION	11	6	17	3	3	2	19	9	20	22	10	11	
DISPOSAL	21	17	4	3	1	9	9	13	23	21	18	16	

Criminal Appeals

For criminal appeals, 81 appeals were registered in 2020. 139 appeals were disposed of leaving a balance of 191 appeals by December 31, 2020. As shown in Graph D, the disposal rate of criminal appeals as against the appeals registered is 171.60%.

GRAPH D

NUMBER OF CRIMINAL APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



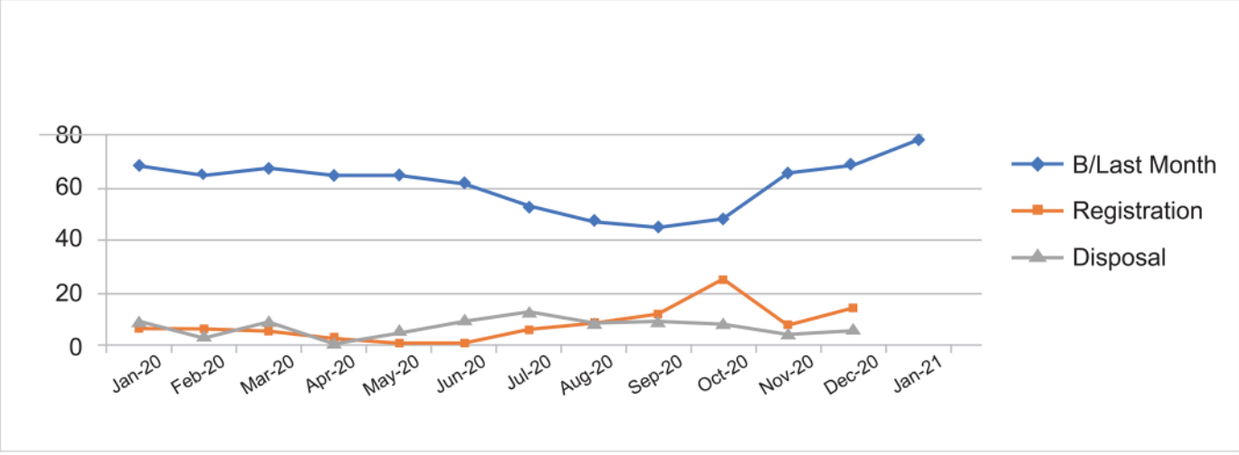
MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-21
BALANCE LAST MONTH	249	246	242	246	247	243	242	227	205	202	202	202	191
REGISTRATION	6	6	9	2	1	4	9	13	18	8	1	4	
DISPOSAL	9	10	5	1	5	5	24	35	21	8	1	15	

Habeas Corpus Appeals

For habeas corpus, 98 appeals were registered in 2020. 87 appeals were disposed of leaving a balance of 79 appeals by December 31, 2020. As shown in Graph E, the disposal rate of habeas corpus appeals as against the appeals registered is 88.78%. The disposal rate was higher than in 2019 which was 82.45%.

GRAPH E

NUMBER OF HABEAS CORPUS APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



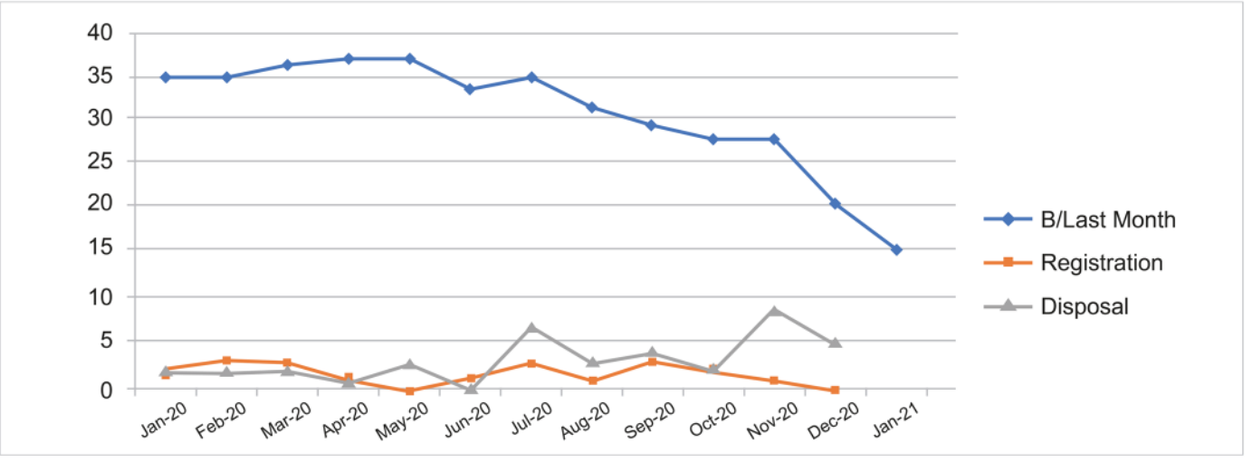
MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-21
BALANCE LAST MONTH	68	65	68	64	65	61	52	46	45	49	66	70	79
REGISTRATION	7	6	5	2	1	1	7	8	12	26	8	15	
DISPOSAL	10	3	9	1	5	10	13	9	8	9	4	6	

Other Matters

For other matters comprising original jurisdiction, reference (civil and criminal), criminal applications and review applications (civil and criminal), a total of 20 cases were registered. 40 cases were disposed of leaving a balance of 15 cases at the end of 2020.

GRAPH F

NUMBER OF ORIGINAL JURISDICTION / CIVIL REFERENCE / CRIMINAL REFERENCE / CRIMINAL APPLICATION / REVIEW APPLICATION (CIVIL) / REVIEW APPLICATION (CRIMINAL) CASES REGISTERED, DISPOSED OF AND PENDING IN 2020



MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-21
BALANCE LAST MONTH	35	35	36	37	37	34	35	31	29	28	28	20	15
REGISTRATION	2	3	3	1	0	1	3	1	3	2	1	0	
DISPOSAL	2	2	2	1	3	0	7	3	4	2	9	5	

Inner recess, Palace of Justice

CHAPTER 03

THE COURT OF APPEAL

The national flower of Malaysia, hibiscus motif decorates the ceiling of the court

STATEMENT BY THE PRESIDENT OF THE COURT OF APPEAL

The President of the Court of Appeal Rohana Yusuf

The Court of Appeal is an appellate court and is the second highest court in the hierarchy of the superior court system. It was established in 1994. It is the appellate court for all High Court matters regardless of whether the High Court was exercising its original or appellate jurisdiction. The Court of Appeal's jurisdiction on criminal appeals is prescribed by section 50 of the Courts of Judicature Act 1964 (Revised 1972) (Act 91) ("CJA") whereas the jurisdiction on civil matters is to be found in sections 67 and 68 of the CJA. The Court of Appeal hears appeals against decisions of the High Court and is also the apex court for appeals emanating from the subordinate courts, i.e. the Sessions Court and the Magistrates' Court.

Three Judges of the Court of Appeal retired in 2020. They are Justice Umi Kalthum binti Abdul Majid, Justice Ahmadi bin Asnawi and Justice Badariah binti Sahamid. I would like to thank them for their support, dedication and hard work whilst serving as Judges of the Court of Appeal. I wish them happy retirement and my very best wishes in their future endeavours. As they say, "retirement is not the end of the road; it is the beginning of the open highway".

In 2020, we also witnessed the elevation of three Judges of the Court of Appeal to the Federal Court. They are Justice Mary Lim Thiam Suan, Justice Harmindar Singh Dhaliwal and Justice Rhodzariah binti Bujang. I extend my heartiest congratulations on their elevation to the Federal Court. I would like to thank all of them for their support and contribution whilst they were in the Court of Appeal. I wish them all the very best.

At the same time, I would like to welcome all the newly appointed Judges of the Court of Appeal in 2020, namely Justice Mohd Sofian bin Tan Sri Abd Razak, Justice Supang Lian, Justice Lee Heng Cheong, Justice Ahmad Nasfy bin Yasin, Justice Che Mohd Ruzima bin Ghazali, Justice Gunalan a/l Muniandy, Justice Nordin bin Hassan and Justice Darryl Goon Siew Chye. I have no doubt that with their diverse backgrounds and experience, they will be able to make meaningful contributions towards the Court of Appeal's efficiency, competency, and the development of jurisprudence.

It would be an understatement to say that 2020 was a challenging year for the Malaysian Judiciary, including the Court of Appeal. This was due to the COVID-19 pandemic. Notwithstanding the pandemic, we saw an increase in the number of appeal cases which were filed during the first three months of the year. However, the number subsequently decreased from April to June. This was in tandem with the implementation of the Movement Control Order ("MCO") which began on March 18, 2020. The number of registrations then spiked from July to October but later dropped in November and December 2020.

In 2020, there were 4,082 appeals which were registered compared to 5,427 appeals which were registered in 2019. Specifically, there were 3,256 civil appeals which were registered in 2020 whereas 4,052 civil appeals were registered in 2019. There was a decrease of 19.6%. Likewise, the registration of criminal appeals saw a decline of 39.9% in that only 826 criminal appeals were registered in 2020 as compared to 1,375 in 2019.

The disposal of appeals suffered a serious setback in 2020. The Court of Appeal was only able to dispose of 2,478 civil appeals, which is a decrease of 23.9% from 3,259 appeals which were disposed of in 2019. Similarly, there was a 33.4% decrease in the disposal of criminal appeals in that only 713 criminal appeals were disposed of as compared to 1,072 in 2019.

With the implementation of the first MCO, most civil appeals which had been fixed for hearing could not be disposed of as scheduled.

Although the Court of Appeal was ready to conduct appeals online, 26% of the cases which had been fixed for online hearing had to be postponed because many law firms experienced logistical and infrastructural/ technical problems with regard to online hearings. Essentially, the law firms were not ready to conduct online hearings. Most of the criminal appeals also could not proceed. This was mostly due to logistical challenges in that the accused persons could not be brought to court because the prisons were seriously affected by the COVID-19 pandemic. In 2020, 40% of the registered criminal appeals were adjourned.

The unavoidable adjournments both in civil and criminal appeals contributed to the Court of Appeal's inability to achieve its target of disposing of all pre-2019 appeals. By the end of 2020, 684 of the pre-2019 appeals consisting of 201 criminal appeals and 483 civil appeals were still pending. As at December 31, 2020, there were 6,608 appeals pending in the Court of Appeal out of which 46.6% were pre-2020 appeals. It is my hope that with our combined effort and commitment, all pre-2020 appeals will be disposed of by the end of 2021.

It is obvious that the pandemic caught everyone off-guard. The sudden emergence of the COVID-19 infection forced the Malaysian Judiciary to innovate. Thus, we resorted to the use of remote communication technology to ensure that access to justice and the smooth flow of cases was not hampered by the pandemic. The response of the Judiciary was almost immediate. Steps to implement online hearings were taken as soon as the MCO was imposed. This presented itself as an immediate solution to overcome the movement restrictions. Thus, online hearing of appeals has become not just the viable or necessary alternative, but rather the new norm.

The CJA was amended and section 15A was inserted to enable the Courts, including the Court of Appeal, to conduct proceedings via remote communication technology. The amendments which took effect on October 22, 2020, focussed mainly on online court proceedings. Likewise, necessary amendments were also made to the Rules of the Court of Appeal 1994 [P.U. (A) 524/1994]. The Rules of the Court of Appeal (Amendment) 2020 [P.U. (A) 352/2020] came into operation on December 15, 2020 introducing a new rule 95A regarding hearing via remote communication technology. This brings the Malaysian Judiciary to a whole new era of remote hearing. As I have said, this is the new norm, as we are nowhere near the end of the COVID-19 pandemic.

Initially, legal practitioners were not prepared to conduct their appeals online. They were reluctant to go online. However, after three months or so, the legal practitioners accepted the reality of the situation, and proceeded to engage in online hearings. Presently, almost all civil appeals in the Court of Appeal are being heard online.

In line with the continuous efforts taken by the Judiciary in maximising the use of remote communication technology, the Court of Appeal has continuously been making efforts to ensure that appeals which have been fixed for hearing do proceed without any delay or disruption.

The Court of Appeal achieved an important milestone in conducting its first online hearing on April 23, 2020,

where all the three judges involved conducted the hearing through the Zoom platform from their respective residences.

To achieve a more efficient disposal of appeals, the civil panels have been streamlined into specialist panels, e.g. commercial, civil, construction, intellectual property, and leave/interlocutory matters.

These specialist panels will be reviewed and the composition changed every six months so as to ensure that the Court of Appeal Judges are given equal opportunity to adjudicate all types of cases and attain a well-rounded experience.

The number of sittings was also increased. Judges were also reminded to deliver their written judgments within reasonable time and to deliver their *Curia Advisari Vult* (CAV) decisions latest within four (4) months after the conclusion of the hearing to avoid any delay of disposal of appeals at the Federal Court.

Despite the COVID-19 pandemic, continuous efforts had been taken by the Judiciary as well as the Court of Appeal. I would say that despite all the hurdles and challenges, the Court of Appeal performed reasonably well for the year. In 2020, the Court of Appeal achieved a disposal rate of 78.1% for both civil and criminal appeals, against the registered appeal cases for the year.

It is undeniable that the ability of the Court of Appeal in disposing of the appeals within the stipulated time was very much subject to how well its members communicated and handled tasks together. Clearly, teamwork and hard work on the part of all the Court of Appeal Judges, as well as the officers and staff of the Court of Appeal contributed tremendously to its overall performance. I am thankful to the Registrar of the Court of Appeal, Puan Norliza binti Othman, the officers and staff at the Registry of the Court of Appeal for their cooperation and contribution in maintaining and increasing the efficiency of the Court of Appeal.

Looking back, 2020 was truly a demanding and challenging year for the Judiciary and equally demanding for the Court of Appeal. Nevertheless, the Court of Appeal continued to operate within the constraints of the prevailing circumstances to ensure that there was no unreasonable delay or disruption in the disposal of appeals and that justice was not sacrificed at the altar of expediency or necessity.

The Court of Appeal's achievement in this regard would not have been possible without the support and cooperation of the Hon. Attorney General and officers of the Attorney General's Chambers, members of the Malaysian Bar, the Advocates Association of Sarawak and the Sabah Law Society.

I am gratified by the fact that the stakeholders made genuine efforts to render their full cooperation and maintained a professional and courteous relationship with the Court of Appeal. It is hoped that all the stakeholders will continue to lend their unrelenting support and continue to cooperate with the Court of Appeal in the years to come.

I wish everyone the very best in 2021.
Thank you.

Justice Rohana Yusuf
President of the Court of Appeal

Judges of the Court of Appeal

1. Justice Hamid Sultan bin Abu Backer
2. Justice Umi Kalthum binti Abdul Majid
3. Justice Ahmadi bin Haji Asnawi
4. Justice Badariah binti Sahamid
5. Justice Kamardin bin Hashim
6. Justice Yaacob bin Haji Md Sam
7. Justice Abdul Karim bin Abdul Jalil
8. Justice Suraya binti Othman
9. Justice Hanipah binti Farikullah
10. Justice Kamaludin bin Md. Said
11. Justice Lau Bee Lan
12. Justice Mohamad Zabidin bin Mohd Diah
13. Justice Nor Bee binti Ariffin
14. Justice Has Zanah binti Mehat
15. Justice Lee Swee Seng
16. Justice Azizah binti Haji Nawawi
17. Justice Vazeer Alam bin Mydin Meera
18. Justice Ravinthran a/l Paramaguru
19. Justice Hadhariah binti Syed Ismail
20. Justice Abu Bakar bin Jais
21. Justice Nantha Balan a/l E.S. Moorthy
22. Justice Mohd Sofian bin Tan Sri Abd Razak
23. Justice Supang Lian
24. Justice Lee Heng Cheong
25. Justice Ahmad Nasfy bin Yasin
26. Justice Che Mohd Ruzima bin Ghazali
27. Justice Gunalan a/l Muniandy
28. Justice Nordin bin Hassan
29. Justice Darryl Goon Siew Chye

The corridor leading to the banquet hall and the conference hall in the Palace of Justice

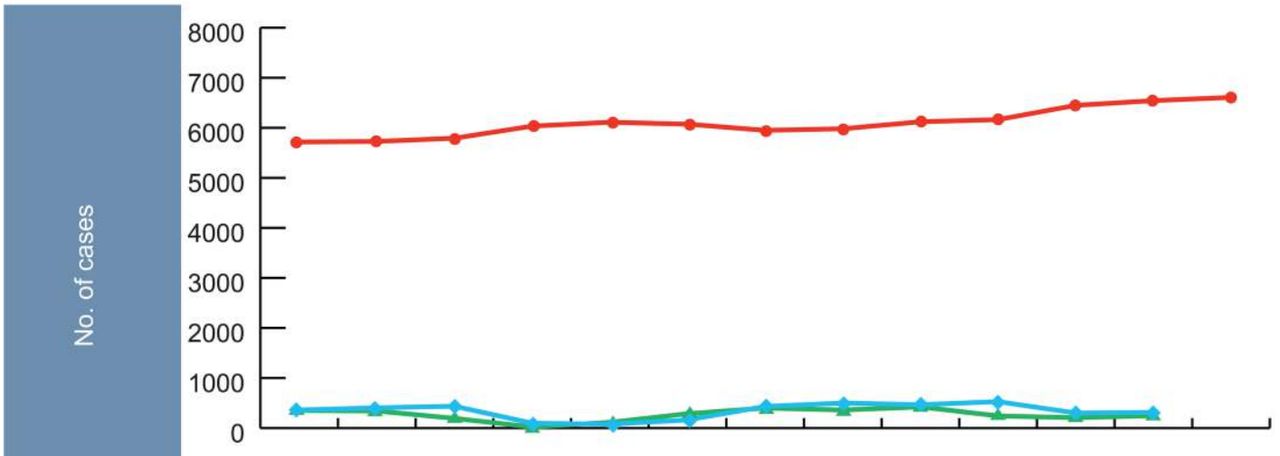
PERFORMANCE OF THE COURT OF APPEAL IN 2020

As at 31 December 2020, there were 6,608 appeals pending in the Court of Appeal. Out of the 6,608 appeals pending, 46.6% are pre-2020 appeals. The rest are 2020 appeals, which constitute 53.4% of the appeals pending.

In 2020, a total of 3,191 appeals were disposed of, as against 4,082 newly registered cases. The percentage of disposal against registration was 78%. The disposal numbers were slightly lower due to the Covid -19 pandemic in the year 2020.

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 2020



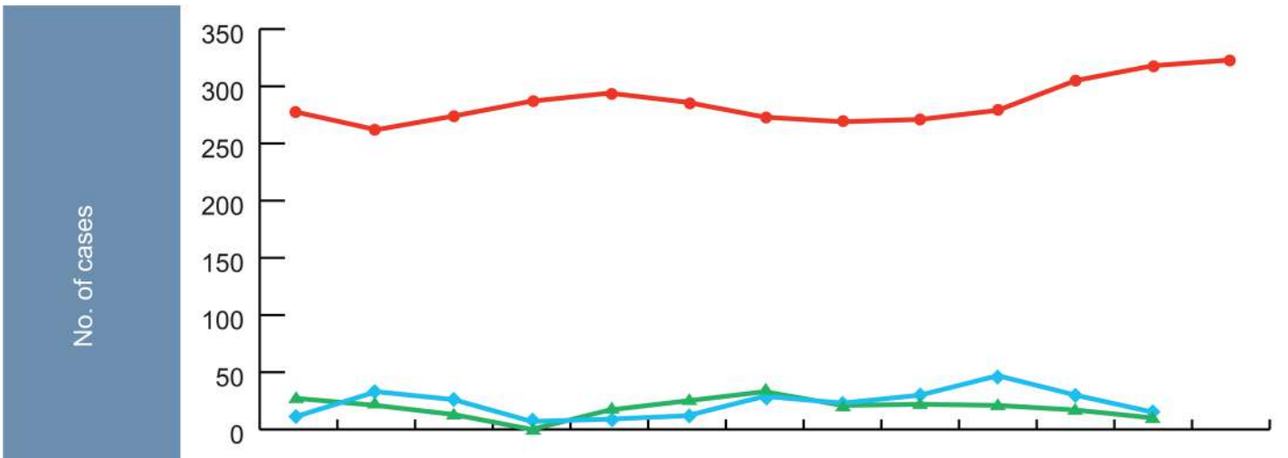
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	5717	5728	5792	6034	6111	6073	5949	5981	6120	6164	6449	6543	6608
Registration	362	405	436	98	76	163	432	500	467	528	301	314	
Disposal	351	341	194	21	114	287	400	361	423	243	207	249	

Interlocutory Appeals

In 2020, a total of 273 Interlocutory Appeals (IM Appeals) were registered. Added to that, there were 277 IM Appeals carried forward from 2019. By the end of 2020, 227 appeals were disposed of leaving 323 appeals which are still pending. Out of this figure, only 93 were pre-2020 appeals which are expected to be disposed of by the first quarter of 2021. The figures of the IM Appeals registered, disposed of and pending for the year 2020 are shown in Graph B.

GRAPH B

NUMBER OF INTERLOCUTORY APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



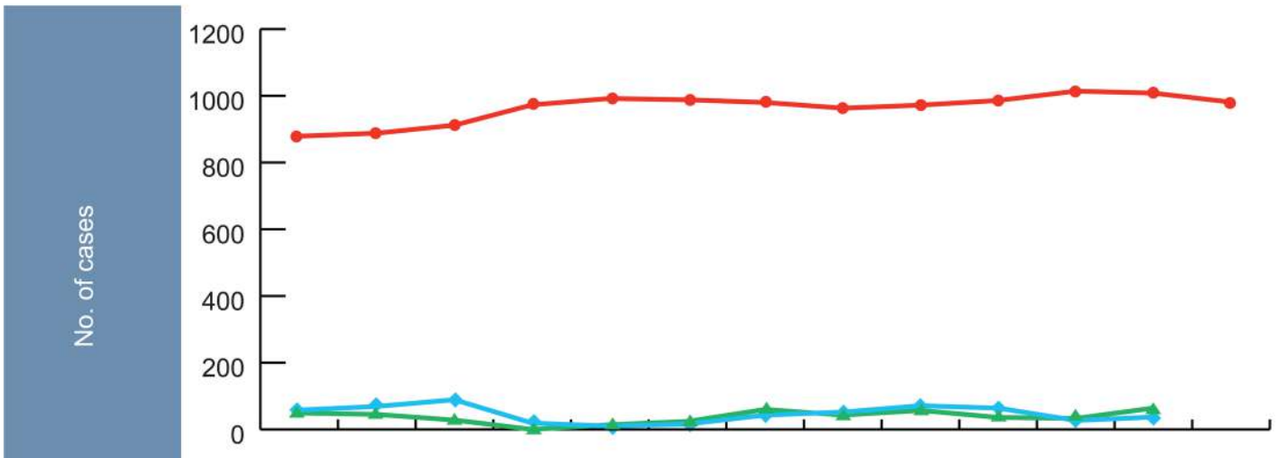
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	277	262	274	287	294	286	273	269	271	279	305	318	323
Registration	12	33	26	7	9	12	29	23	30	47	30	15	
Disposal	27	21	13	0	17	25	33	21	22	21	17	10	

Full Trial Civil Appeals

In 2020, a total of 555 Full Trial Civil Appeals (FT Appeals) were registered. There were 879 FT Appeals carried forward from 2019. A total of 453 appeals were disposed of leaving 981 appeals on the list. Out of these 981 appeals, 479 are pre-2020 FT Appeals. The Court of Appeal's performance in relation to FT Appeals is shown in Graph C.

GRAPH C

NUMBER OF FULL TRIAL CIVIL APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



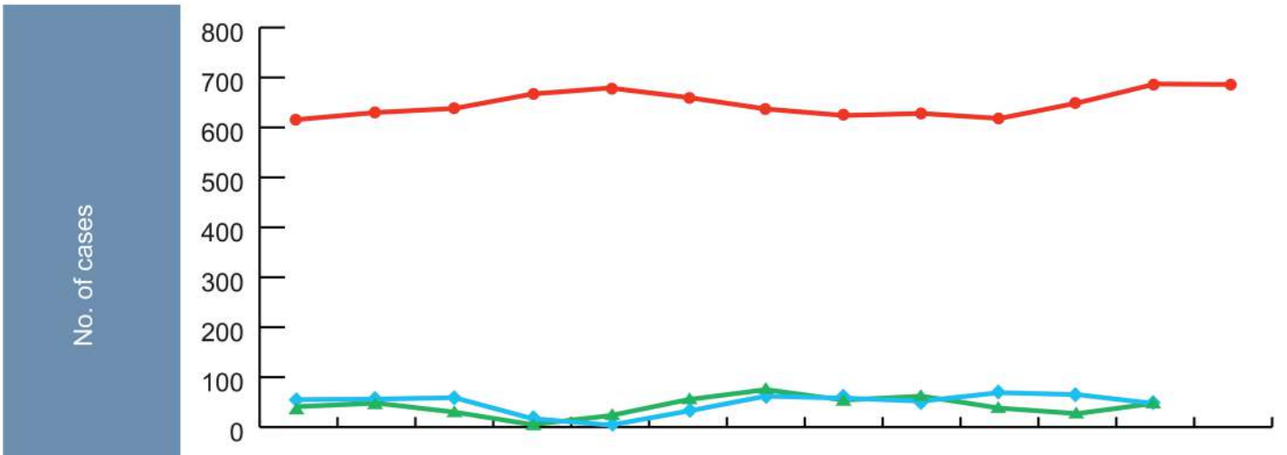
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	879	888	912	973	992	988	980	963	972	986	1014	1008	981
Registration	58	69	89	19	10	16	43	52	71	64	27	37	
Disposal	49	45	28	0	14	24	60	43	57	36	33	64	

Commercial Court Appeals

In 2020, a total of 576 Commercial Court Appeals (NCC Appeals) were registered. A total of 616 appeals were carried forward from 2019. Out of these appeals, 506 appeals were disposed of. There were 686 appeals which are still pending before the Court of Appeal. Out of this figure, 245 cases are pre-2020 cases. The number of NCC Appeals registered, disposed of and pending in 2020 is shown in Graph D below:

GRAPH D

NUMBER OF COMMERCIAL COURT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



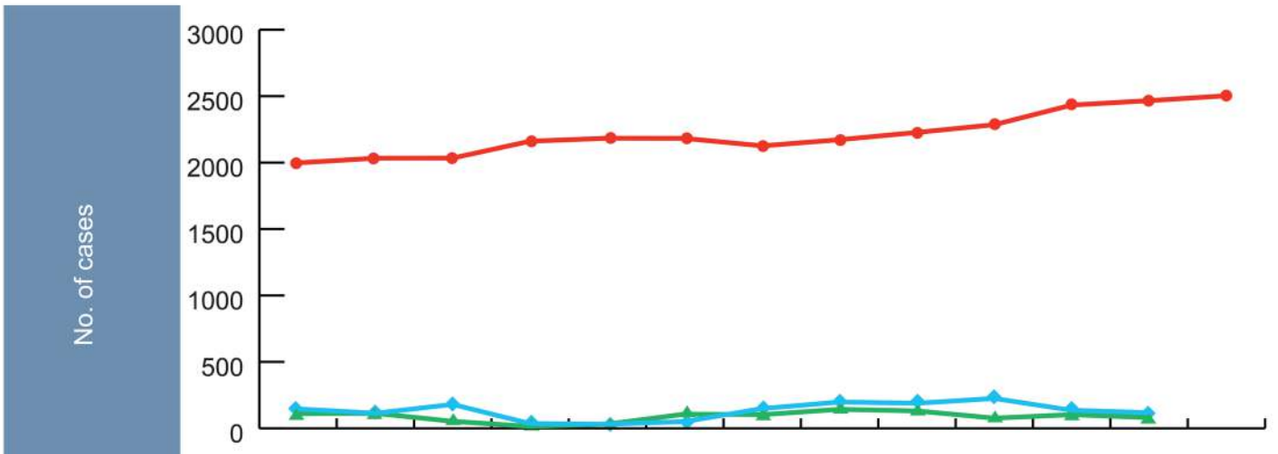
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	616	630	638	667	679	660	637	624	628	618	649	687	686
Registration	55	56	59	17	4	32	62	58	52	69	65	47	
Disposal	41	48	30	5	23	55	75	54	62	38	27	48	

New Civil Court Appeals

There were 1,573 New Civil Court Appeals (NCvC Appeals) registered in 2020. A total of 1,998 appeals were carried forward from 2019. Out of these appeals, 1,068 were disposed of by the end of the year, with a balance of 2,503 cases, of which 1,129 appeals were pre-2020 appeals. The number of NCvC appeals registered, disposed of and pending in 2020 can be seen in Graph E.

GRAPH E

NUMBER OF NEW CIVIL COURT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



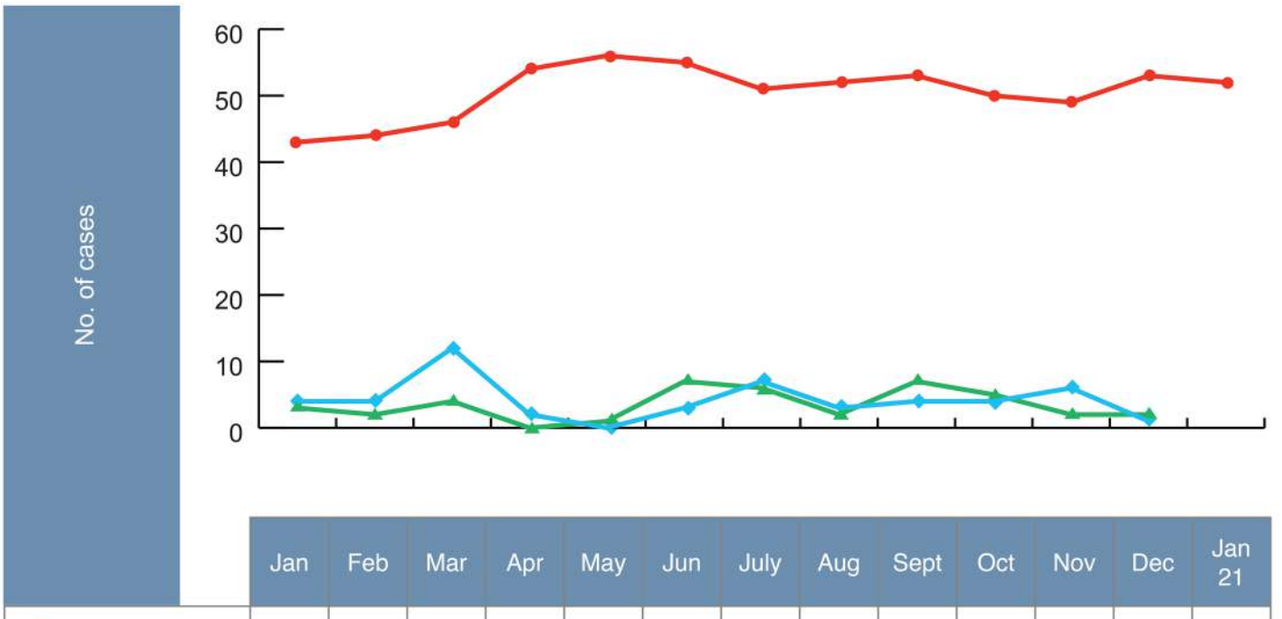
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	1998	2033	2034	2161	2183	2182	2126	2172	2227	2285	2433	2466	2503
Registration	146	114	180	36	31	51	149	198	189	225	136	118	
Disposal	111	113	53	14	32	107	103	143	131	77	103	81	

Muamalat Appeals

Muamalat Appeals are now current. 50 Muamalat appeals were registered in 2020 in addition to 43 appeals carried forward from the previous year. A total of 41 appeals had been disposed of leaving a balance of 52 appeals pending before the Court of Appeal. 14 out of the 52 appeals are pre-2020 appeals. The number of Muamalat Appeals registered, disposed of and pending in 2020 can be seen in Graph F.

GRAPH F

NUMBER OF MUAMALAT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



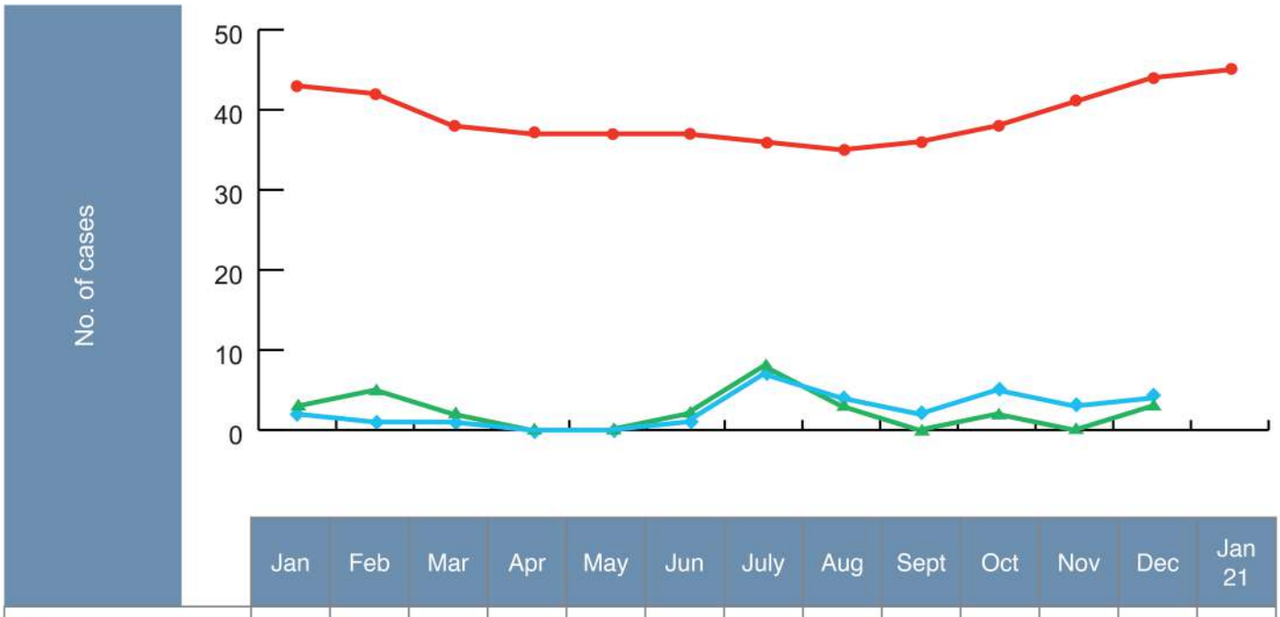
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	43	44	46	54	56	55	51	52	53	50	49	53	52
Registration	4	4	12	2	0	3	7	3	4	4	6	1	
Disposal	3	2	4	0	1	7	6	2	7	5	2	2	

Intellectual Property Appeals

There were 43 Intellectual Property Appeals (IP Appeals) carried forward from 2019. In addition to that, there were 30 appeals registered in 2020. Out of these appeals, 28 appeals were disposed of leaving a balance of 45 appeals which are still pending. Out of this figure, only 19 appeals were pre-2020. These figures are shown in Graph G below:

GRAPH G

NUMBER OF INTELLECTUAL PROPERTY APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



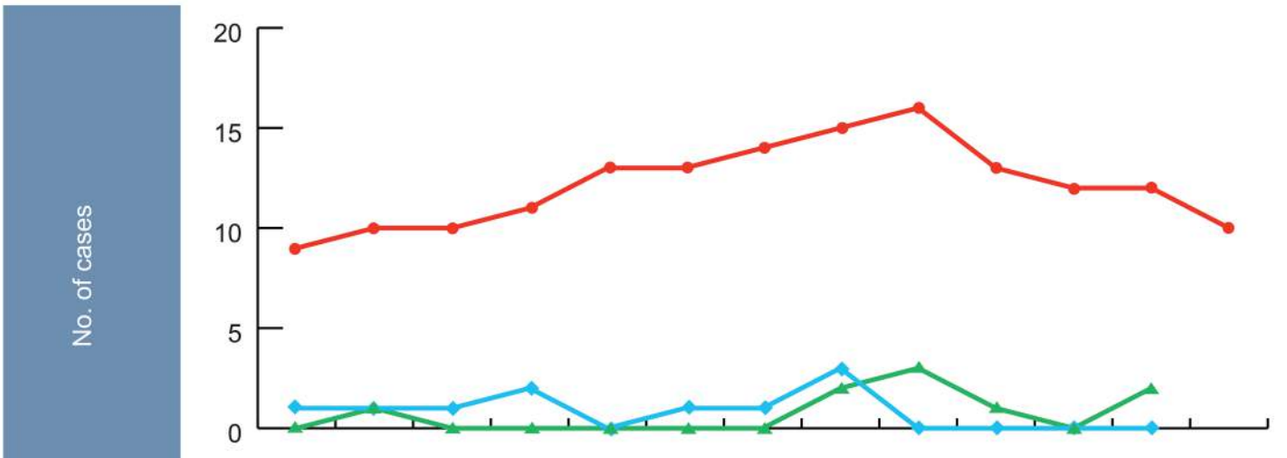
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	43	42	38	37	37	37	36	35	36	38	41	44	45
Registration	2	1	1	0	0	1	7	4	2	5	3	4	
Disposal	3	5	2	0	0	2	8	3	0	2	0	3	

Admiralty Appeals

Admiralty Appeals are now current. In 2020, 10 appeals were registered. In addition to that, there were 9 appeals carried forward from 2019. There were 9 appeals disposed of, leaving a balance of 10 appeals pending, of which 4 are pre 2020 appeals and 6 appeals registered in 2020. The performance is as illustrated in Graph H below:

GRAPH H

NUMBER OF ADMIRALTY APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



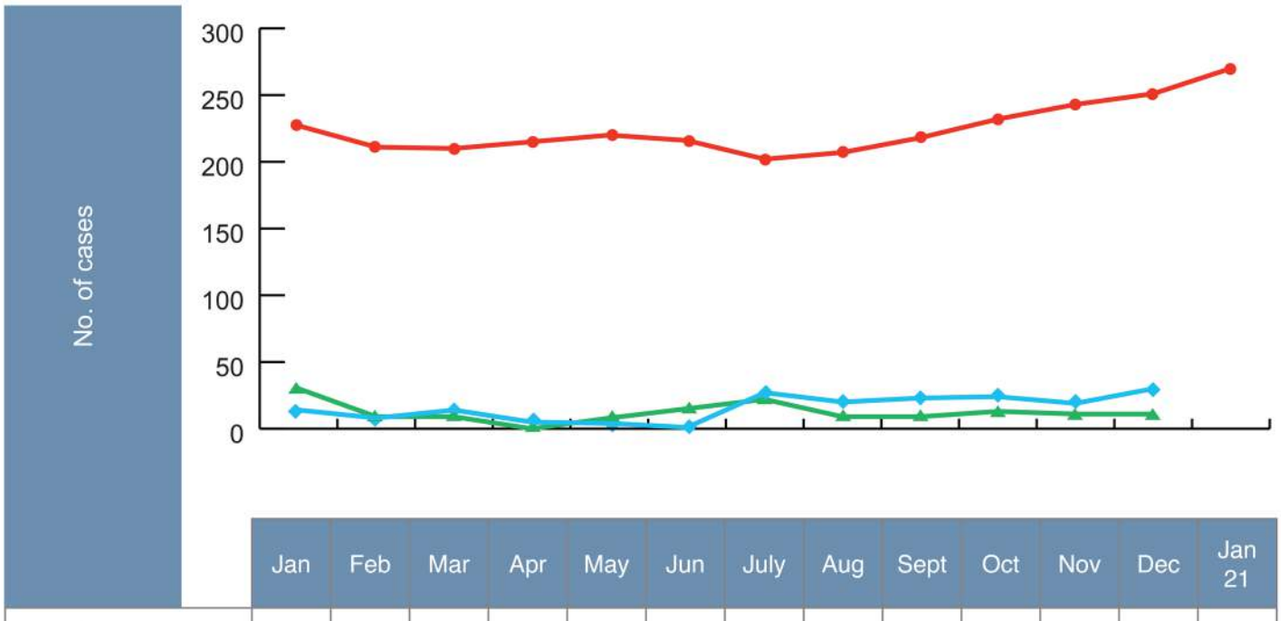
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	9	10	10	11	13	13	14	15	16	13	12	12	10
Registration	1	1	1	2	0	1	1	3	0	0	0	0	
Disposal	0	1	0	0	0	0	0	2	3	1	0	2	

Construction Court Appeals

In 2020, 189 Construction Court Appeals were registered and 227 appeals were carried forward from 2019. A total of 146 appeals were disposed of leaving a balance of 270 appeals. Out of these 270 appeals, 102 appeals were pre-2020.

GRAPH I

NUMBER OF CONSTRUCTION COURT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



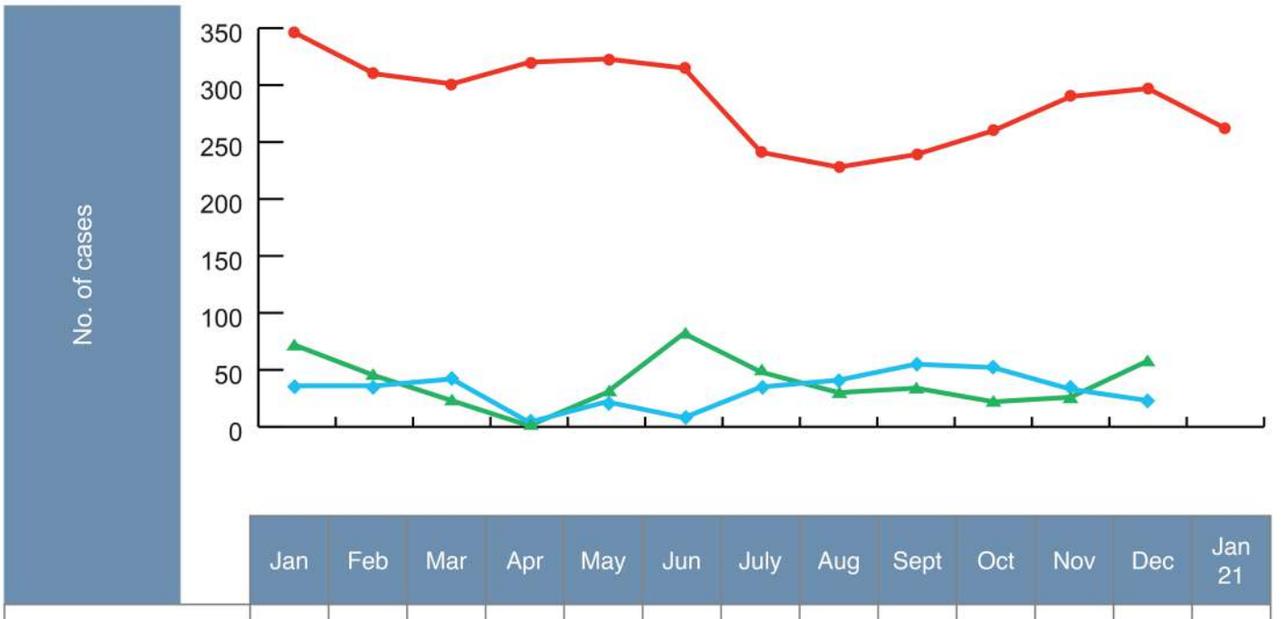
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	227	211	210	215	220	216	202	207	218	232	243	251	270
Registration	14	8	14	5	4	1	27	20	23	24	19	30	
Disposal	30	9	9	0	8	15	22	9	9	13	11	11	

Leave Applications

In 2020, 387 Leave Applications were registered. In addition to that, 345 Leave Applications were carried forward from the previous year. A total of 470 Leave Applications were disposed of leaving a balance of 262 applications. The number of registered, disposed of and pending Leave Applications in 2020 can be seen in Graph J.

GRAPH J

NUMBER OF LEAVE APPLICATIONS REGISTERED, DISPOSED OF AND PENDING IN 2020



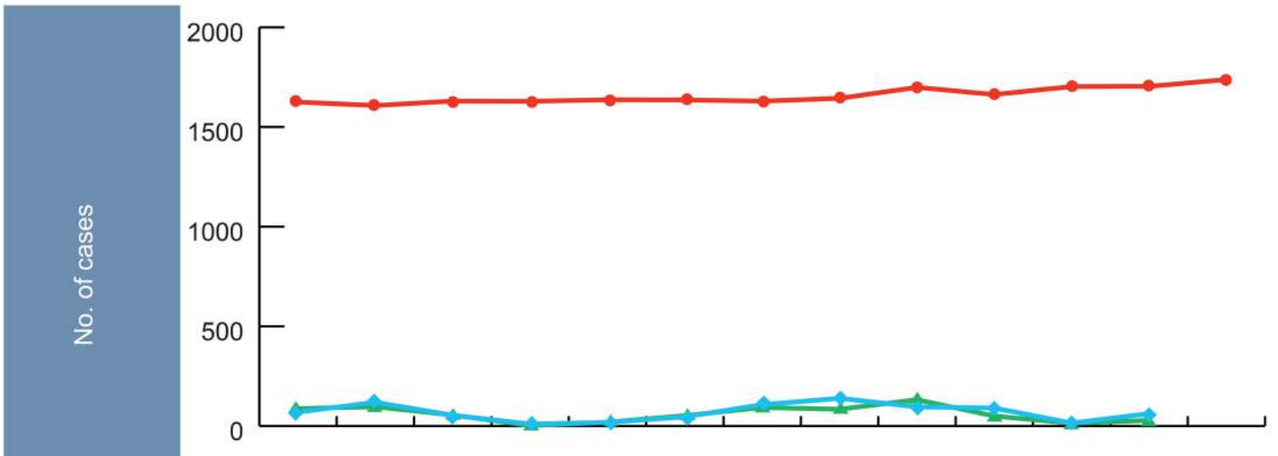
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	345	310	301	320	323	315	241	228	239	260	290	297	262
Registration	36	36	42	4	22	8	35	41	55	52	33	23	
Disposal	71	45	23	1	30	82	48	30	34	22	26	58	

Criminal Appeals

A total 826 Criminal Appeals were registered in 2020. There were 1,625 Criminal Appeals carried forward from 2019. A total of 713 appeals were disposed of leaving 1,738 appeals pending as illustrated in Graph K below:

GRAPH K

NUMBER OF CRIMINAL APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2020



	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 21
C/Forward	1625	1608	1630	1629	1637	1636	1630	1644	1699	1663	1703	1704	1738
Registration	70	119	54	10	18	46	107	139	96	90	15	62	
Disposal	87	97	55	2	19	52	93	84	132	50	14	28	


KELUAR
KELUAR

CHAPTER

04

THE HIGH COURT OF MALAYA AND THE HIGH COURT OF SABAH AND SARAWAK

The Kota Kinabalu Court Complex at night

STATEMENT BY THE CHIEF JUDGE OF MALAYA

The Chief Judge of Malaya Azahar Mohamed

As we look back, 2020 was an extraordinary and unprecedented year. We faced a real challenge. The COVID-19 pandemic that started in the early days of 2020 had posed serious challenges in the way that we work. The impact was so sudden and pervasive. This resulted in far-reaching implications in the operation of the courts and the administration of justice system. The delivery of justice has proved difficult during the pandemic.

At the start of the pandemic, the High Court in Malaya performed its constitutional functions through 88 courts throughout Peninsular Malaysia, presided over by 51 High Court judges and 33 Judicial Commissioners. As for the subordinate courts, there are 141 Sessions Courts and 173 Magistrates' Courts in Peninsular Malaysia, presided over by 133 Sessions Court judges and 135 magistrates respectively.

In the earlier days of COVID-19, as the danger became more apparent and when the nation went into lockdown, it was unrealistic and impossible for the High Court and the subordinate courts to operate in the usual way. But then we recognised that the administration of justice cannot come to a grinding halt. To that end, a limited number of courts continued to operate with a more limited scope. The Magistrates' criminal courts still heard remand and bail applications as well as fresh charges. I pay tribute to the magistrates and the staff who have kept the courts running to administer justice in the middle of the pandemic. In respect of the civil and commercial cases, the two systems, e-Filing and e-Review were up and running by this time, so our operations did not grind to a complete halt. The e-Filing mechanism, which has been in operation for many years and enables the online filing of documents and cause papers, continued to operate as usual amid the COVID-19 pandemic.

As the country worked to cope with the challenges brought by COVID-19, the tumultuous year of 2020 resulted in the introduction of unprecedented measures to keep the wheels of the justice system turning. We faced the challenges with resilience and flexibility

and recognised the need to maintain access to justice. We reacted to these changing times by making many important policy decisions to tackle the challenges presented by the pandemic. In order to adapt we came up with many proactive measures. This has only been achievable through close co-operation and teamwork involving the Chief Registrar of the Federal Court, the Registrar of the High Court Malaya and the Registrar of the Subordinate Courts Malaya. This kind of team effort is evident in the administering and managing of the guidelines and the standard operating procedures across the justice system, including the judges, staff, lawyers and other court users.

The biggest challenge in the past year was balancing between open court justice and public health concerns. In whatever policy decisions we made on the operation of the courts, the paramount consideration was always to ensure public health and safety with emphasis on the wellbeing of judges, officers, court staff and other users of the courts. It was a very delicate balance: we had to ensure continuous delivery of our judicial services while keeping safe at the same time. It was our priority to get the judges, judicial officers, staff and court users back to court safely. In everything we did we consulted all stakeholders and ensured the decisions we took were the best ones possible. Another challenge was that we had to constantly adjust the operations of the courts for states and districts under Movement Control Order, Conditional Movement Control Order or Recovery Movement Control Order as announced by the government from time to time. Flexibility and adaptability were the keys to keep things going.

In this respect, I would like to take this opportunity to acknowledge the professionalism of the Chief Registrar of the Federal Court who was responsible in coordinating with our stakeholders on a number of important initiatives and in assisting my office in addressing the challenges in the administration of justice during this pandemic. I would also like to express my appreciation to the Attorney General's Chambers and the Bar and other major stakeholders for their commitment and cooperation in supporting the measures we took. There had been remarkable efforts from all sides to keep the justice system functioning.

I summarise below some of the range of measures taken during these difficult times in response to the COVID-19 pandemic:

(a) Providing access to justice by conducting proceedings through remote communication technology or commonly known as online hearings.
(b) Setting a timetable for a phased reopening of the courts in several stages. Initially only a limited number of courts were allowed to operate on a rotational or shift basis.
(c) If cases were to be heard in a physical courtroom, judges were required to start their open court hearings at staggered times. This meant that only counsel and parties related to the case were allowed into the courtroom. This measure served to reduce the number of people in a courtroom at any given time.
(d) Initially the number of cases in a given courtroom in any one session was reduced. This served to avoid a large gathering of lawyers, litigants and the public. Those in the public gallery were required to comply with seating arrangements suitable to social distancing.
(e) For judges who were not sitting, we put in place a more flexible working set-up: they and their supporting staff were required to work from home and continue to conduct remote hearing, where possible.
(f) Virtual hearings of Petitions for Admission as an Advocate and Solicitor of the High Court of Malaya.
(g) Virtual mediation in courts. Online mediation sessions were undertaken as an alternative to the mediation conducted at the court Mediation Centre.

Every crisis presents an opportunity. Before the pandemic, in terms of ICT infrastructure, the shift towards using technology had been gradual, incorporating new innovations incrementally according to the times. The pandemic created an urgent and immediate necessity for a more radical change to ensure hearings could still proceed during these unusual times. I must thank the Office of the Chief Registrar of the Federal Court for its efficiency and hardwork in getting the ICT system working and for moving quickly in adapting technology to deal with the fallout of the pandemic. In this respect, for the period between January and December 2020 the High Court in Malaya had disposed of a total of 4,966 cases out of 6,154 cases fixed to be heard online. This gives a good

disposal rate of about 80.7%. As for the Magistrates' and Sessions Courts throughout Malaya, 13,010 cases were to be heard online, out of which 5,749 cases have been disposed of; these courts achieved a disposal rate of 44.2%. Unexpectedly, we turned this COVID-19 crisis into a window of opportunity. Before 2020, it would have been inconceivable for courts across the country to replace face-to-face hearings with hearings via video-conferencing.

While we were focused on coping with the pandemic, we also opened the following courts to enhance access to justice:

(a) We established a High Court in Sungai Petani and a Sessions Court in Langkawi. Litigants there will no longer need to travel to Alor Setar to have their legal disputes heard and resolved and accused persons need no longer be ferried to Alor Setar.
(b) We established a High Court in Klang so that cases in this locale need not be handled by the High Court in Shah Alam.
(c) An additional High Court is now operating in Muar to cater for the gradual increase of the registration of new cases there.
(d) A new Sessions Court was established in Besut and is now fully operational to hear cases arising there and in the district of Setiu. Previously, litigants and members of the public had to travel 100 kilometers, a two hour-long journey, to get to the Kuala Terengganu Sessions Court.
(e) A new Sessions Court was also established in Kuala Selangor to hear cases in this locale for two days in a week. In the past, such cases were heard in the Klang Sessions Court.

To enhance efficiency, we have invoked section 2 of the Law Reform (Marriage and Divorce) Act 1976 that empowers the Yang di Pertuan Agong on the advice of the Chief Judge to confer upon any Sessions Court judge, the jurisdiction to deal with any matter under the Act. Selected Sessions Court judges have been appointed to hear uncontested High Court family law matters. They have been given special training on how to handle these cases. The primary reason behind the delegating of work of High Court judges to the Sessions Court where practicable to hear uncontested family law matters is to assist the High Court in dealing with the high volume of such cases in the High Court. This will allow the High Court judges to focus on the more contentious matters.

As a result of the pandemic, the volume of outstanding cases has grown before the High Courts and the subordinate courts. Trial dates are now given further and further into the future. We cannot avoid dealing with this backlog. The position is not sustainable, especially in criminal cases in the context of an accused person's right to a speedy trial. These criminal cases must be the priority to promote timely justice. This pandemic could be long lasting. To address these problems, more than ever, we depend heavily on digital technology to maintain the administration of justice and to address this problem. Prior to the pandemic, overall the High Courts and the subordinate courts had already successfully achieved our target of disposing of all cases within a time frame of less than a year from the date of registration. To enable us to dispose of more cases, we now need to increase our efficiency by using technology to hear more cases remotely. The current pandemic crisis has shown just how that investment in digital technology is more important than ever. Enhanced technology is being installed in the High Courts and the subordinate courts to shape the next steps of modernisation of our courts. The Recording & Voice to Text System ("RVT") is replacing the Court Recording Transcription ("CRT"). The goal is that ultimately the RVT system will be able to correctly and automatically transcribe witnesses' testimonies and oral submissions into written form. This in turn will facilitate speedy and efficient disposal of cases.

At the same time, I am very confident that the judges and the judicial officers will work exceptionally hard in this current year at ensuring the speedy and effective resolution of cases within the timeline stipulated in order to address the backlog of cases as undue delay affects the justice of a case. We have to ensure a continuous delivery of our judicial services while keeping safe.

Last year witnessed the elevation of Justice Mohd. Sofian Abd Razak, Justice Ahmad Nasfy Yasin, Justice Che Mohd Ruzima Ghazali, Justice Gunalan Muniandy, Justice Nordin Hassan and Justice Darryl Goon Siew Chye to the Court of Appeal. I congratulate them and extend my sincere appreciation for all the contributions rendered during their tenure as judges of the High Court in Malaya. Undoubtedly, their vast experience and knowledge in the diverse fields of the law will be invaluable to the Court of Appeal.

I also congratulate Justice Rohani Ismail, Justice Anselm Charles Fernandis, Justice Ahmad Fairuz

Zainol Abidin, Justice Mohd Radzi Harun, Justice Aliza Sulaiman, Justice Meor Hashimi Abdul Hamid and Justice Ahmad Shahrir Mohd Salleh on their appointments as judges of the High Court of Malaya.

I am also delighted to welcome the appointment of new judicial commissioners to the High Court of Malaya, comprising those who are equipped with a diversity of private and public sector experience in various areas of legal practice, namely Judicial Commissioner Rohana Abd Malek, Judicial Commissioner Tee Geok Hock, Judicial Commissioner Azhar Abdul Hamid, Judicial Commissioner Arik Sanusi Yeop Johari, Judicial Commissioner Amirudin Abd Rahman, Judicial Commissioner Mahazan Mat Taib, Judicial Commissioner Bhupindar Singh Gurcharan Singh Preet, Judicial Commissioner Alice Loke Yee Ching, Judicial Commissioner Ahmad Murad Abdul Aziz, Judicial Commissioner Liza Chan Sow Keng, Judicial Commissioner Wan Muhammad Amin Wan Yahya, Judicial Commissioner Nurulhuda Nur'aini Mohamad Nor and Judicial Commissioner Su Tiang Joo. I welcome and congratulate them on their appointment.

As a parting note, I would like to take this opportunity to convey my sincere appreciation and thanks to all the Managing Judges in assisting me to discharge my administrative role and responsibility. I would like to record my deep appreciation and gratitude to all the judges, judicial commissioners, judicial officers and staff of the High Court in Malaya for their continuous commitment and hard work to continue delivering the highest standard of service in the administration of justice in the midst of a particularly trying period.

I also wish to express my sincere gratitude to the Chief Registrar of the Federal Court, the Registrar of the High Court in Malaya and the Registrar of the Subordinate Courts in Malaya for their commitment and creativity in ensuring the administration of justice does not come to a complete halt and that the justice delivery system continues to function during this difficult period.

Finally, in looking forward to 2021, let us all pray and hope that COVID-19 in time will pass to enable us to go back to some semblance of normalcy. But as the pandemic could be long lasting we have to learn to live with it and continue to adopt and adapt in discharging our constitutional obligations to ensure continuous access to justice to the public. I am quite confident that all the judges, judicial commissioners and judicial officers will make every effort to deliver their best in discharging their judicial functions under this challenging new norm towards accomplishing greater achievement in 2021.

I wish everyone the very best in 2021.

Justice Azahar Mohamed
Chief Judge of Malaya

JUDGES OF THE HIGH COURT IN MALAYA 2020

1. Justice Abdul Halim Aman
2. Justice Zulkifli Bakar
3. Justice Ghazali Cha
4. Justice Ahmad Zaidi Ibrahim
5. Justice Mariana Yahya
6. Justice Azman Abdullah
7. Justice Mohd Yazid Mustafa
8. Justice Zainal Azman Ab Aziz
9. Justice Halijah Abbas
10. Justice Akhtar Tahir
11. Justice Nik Hasmat Nik Mohamad
12. Justice See Mee Chun
13. Justice Rosilah Yop
14. Justice Hashim Hamzah
15. Justice Mohd Zaki Abdul Wahab
16. Justice Azimah Omar
17. Justice Lim Chong Fong
18. Justice Azmi Ariffin
19. Justice Noorin Badaruddin
20. Justin Collin Lawrence Sequerah
21. Justice Azizul Azmi Adnan
22. Justice Mohamed Zaini Mazlan
23. Justice Mohd Nazlan Mohd Ghazali
24. Justice S.M. Komathy Suppiah
25. Justice Ab Karim Ab Rahman
26. Justice Wong Kian Kheong
27. Justice Choo Kah Sing
28. Justice Ahmad Bache
29. Justice Mohd Firuz Jaffril
30. Justice Rozana Ali Yusoff
31. Justice Abu Bakar Katar
32. Justice Hayatul Akmal Abdul Aziz
33. Justice Faizah Jamaludin
34. Justice Ahmad Kamal Md Shahid
35. Justice Wong Chee Lin
36. Justice Roslan Abu Bakar
37. Justice Abdul Wahab Mohamed
38. Justice Hassan Abdul Ghani
39. Justice Chan Jit Li
40. Justice Muhammad Jamil Hussin

41. Justice Wan Ahmad Farid Wan Salleh
42. Justice Khadijah Idris
43. Justice Tun Abdul Majid Tun Hamzah
44. Justice Azmi Abdullah
45. Justice Rohani Ismail
46. Justice Anselm Charles Fernandis
47. Justice Ahmad Fairuz Zainol Abidin
48. Justice Mohd Radzi Harun
49. Justice Aliza Sulaiman
50. Justice Meor Hashimi Abdul Hamid
51. Justice Ahmad Shahrir Mohd Salleh

JUDICIAL COMMISSIONERS OF THE HIGH COURT IN MALAYA 2020

1. Judicial Commissioner Latifah Mohd Tahar
2. Judicial Commissioner Amarjeet Singh Serjit Singh
3. Judicial Commissioner Awang Armadajaya Awang Mahmud
4. Judicial Commissioner Muniandy Kannyappan
5. Judicial Commissioner Shahnaz Sulaiman
6. Judicial Commissioner Evrol Mariette Peters
7. Judicial Commissioner Ong Chee Kwan
8. Judicial Commissioner Maidzuara Mohammed
9. Judicial Commissioner Mohd Radzi Abdul Hamid
10. Judicial Commissioner Aslam Zainuddin
11. Judicial Commissioner Norsharidah Awang
12. Judicial Commissioner Julie Lack
13. Judicial Commissioner Fredrick Indran X.A. Nicholas
14. Judicial Commissioner Khairil Azmi Mohamad Hasbie
15. Judicial Commissioner Nadzarin Wok Nordin
16. Judicial Commissioner George Varughese
17. Judicial Commissioner Quay Chew Soon
18. Judicial Commissioner Wong Hok Chong
19. Judicial Commissioner Atan Mustaffa Yussof Ahmad
20. Judicial Commissioner Anand Ponnudurai
21. Judicial Commissioner Rohana Abd Malek
22. Judicial Commissioner Tee Geok Hock
23. Judicial Commissioner Azhar Abdul Hamid
24. Judicial Commissioner Arik Sanusi Yeop Johari
25. Judicial Commissioner Amirudin Abd Rahman
26. Judicial Commissioner Mahazan Mat Taib
27. Judicial Commissioner Bhupindar Singh Gurcharan Singh Preet
28. Judicial Commissioner Alice Loke Yee Ching
29. Judicial Commissioner Ahmad Murad Abdul Aziz
30. Judicial Commissioner Liza Chan Sow Keng
31. Judicial Commissioner Wan Muhammad Amin Wan Yahya
32. Judicial Commissioner Nurulhuda Nur'aini Mohamad Nor
33. Judicial Commissioner Su Tiang Joo

The Penang High Court (Photograph courtesy of Mdm. Hamidah Abdul Rahman)

STATEMENT BY THE CHIEF JUDGE OF SABAH AND SARAWAK

Chief Judge of Sabah and Sarawak Abang Iskandar Abang Hashim

As we welcome the year 2021, it is also time for us to reflect upon the events of the previous year, appreciate our achievements and acknowledge our shortcomings, of which I am sure there are a few, with the view to improving on our future performance and further building on our successes.

The relocation of the centre of administration from Kuching High Court to the Kota Kinabalu High Court, served to reflect the equal status of both (Sabah and Sarawak) High Courts, as enshrined in the Federal Constitution. The timing of the event could not have been more opportune as in April of the same year, the new five-storey building which now houses the Kota Kinabalu High Court was being commissioned. The Office of the Registrar of the High Court of Sabah and Sarawak will revert to Kuching again in 2030!

At the outset of the year 2020, we were faced with the unprecedented challenge brought upon the world by the COVID-19 pandemic. That had put into focus the theme that had been chosen prior, for the year 2020 – "Striving for Judicial Excellence". There are five main strategies involved in putting this theme into action, namely Improving Access, Strengthening Administration, Leveraging on Technology, Building Bridges and Connecting Communities, and Enhancing Quality.

(i) Improving access

The improvement of access to justice involves the expansion of the Mobile Courts to the suburban and rural poor population. This is to alleviate logistical limitations for those residing in remote areas, as well as those who ordinarily cannot afford the transportation costs to seek legal redress. One of the main priorities was to assist in resolving problems related to late registration of birth certificates, especially those living in the interior parts of Sabah. Therefore, we are committed to conducting more Mobile Court operations in an effort to render the needed service.

(ii) Strengthening administration

It is also crucial to note that strengthening the administration of justice is always a priority and to recognise it as an essential component of enhancing the rule of law. In view of the increasing number of court users every single day, as well as the need of keeping the general public informed on the goings-on in our court rooms, we have introduced a dedicated centre referred to as Court Services and Public Information Centre or simply COSPIC, in short. The centre assists self-represented litigants ("SRL") to file their cases, handles public complaints and disseminates information through social media platforms.

(iii) Leveraging on the use of digital technology

Part of the reason why the constant internal improvement could take place despite these trying times has been due to our ability to leverage on the use of technology. Since 2007, there has been a steady stream of improvement on the digital front in the way how our courts were able to perform its duties. Leveraging on the use of digital technology is essentially an expansion to what has already been put in place in 2007. In August of 2020, an upgrade to the current Case Management System or CMS was approved which includes the main portal, the e-Filing system, e-Practising certificate, a platform for court officials to manage cases, e-Book for Record of Appeals, a channel for the SRLs, Exhibit Presentation System, Vulnerable Witness Video Link (VWVL), Court Recording and Transcribing System, Plead Guilty Online, online payment and chatbox, I-Kiosk, mobile app, e-Review and integrations of Court of Appeal and Federal Court. The most innovative initiative within the e-Kehakiman Sabah and Sarawak ("e-KSS") expansion is sentencing using the Artificial Intelligence ("AI") application. These various functions allow the e-KSS to act as a one stop centre for the services provided which are beneficial for the relevant parties and stakeholders such as lawyers, government departments, judges, judicial officers and members of the public.

(iv) Building bridges and connecting communities

With the intensive use of technology, our courts have become more visible and transparent to the public. It has become part of our mission to educate the youth on the important role played by the Judiciary in the bigger scheme of things which may impact their lives. We have always welcomed field trips organised by schools in both States to the courts. On that note, this year's application had been encouraging, with applications coming in to visit the courts in Kota Kinabalu, Tawau and Kuching. However, this program has currently been temporarily shelved due to the pandemic. Of course, we hope to resume this programme once it is safe to do so. Also, in the pipeline has been the MYC2C program (From Courtroom to Classroom) whereby judges will visit the selected schools with a view to sharing with the students the basic knowledge of the law as well as instilling early awareness and learning of our Federal Constitution.

In line with the courts' aim at creating awareness among the public about the role of the judiciary, the newly launched Sabah and Sarawak Judicial Museum located at Level 5 of the Kota Kinabalu High Court complex is the first of its kind in East Malaysia. Our aim is to educate the public of the two States' history in terms of how the court system had developed over the years. It plays a crucial role in preserving our legal artifacts and history and enriches society by sharing with them the invaluable legacy. It is our hope that once the pandemic is under control, we will able to acquire more materials and undertake intensive research on our legal history to enhance the utility of the museum to the general public.

(v) Enhancing quality

One of the United States of America's famed Presidents was once quoted as saying: "We Celebrate the Past to Awaken the Future". It is only with an acute understanding of how our tasks were carried out in the past that we are able to implement change and evolve into who we are today. We are the gatekeepers; we hold the keys both to the past as well as to the future. As the use of AI is new in Asia, we are paving the way as pioneers in utilising that technology in the workplace.

In step with our ongoing continuing legal education for judges and judicial officers, we had throughout the last year, selected courses, including attending specific Webinar Series organised by US Department of Justice-OPDATE on:

(a) Evidentiary and Courtroom Issues Concerning Digital Evidence and Artificial Intelligence
(b) Overview of Artificial Intelligence
(c) Evidentiary and Trial Issues Concerning Digital Evidence.

In view of the ongoing pandemic and the attendant restrictions that have been put in place, we will

continue with organising webinars and registering them for online conferences as well as online seminars throughout 2021.

The COVID-19 pandemic has forced us to adapt. It has forced us to adapt to a new normal, whether we are ready or not. With available internet connectivity we were able to conduct video conferencing by utilising our existing infrastructure which had been put in place since 2007, and we were also able to resort to using online platforms such as Zoom, Skype and Google Meet to conduct the civil cases with the consent of parties. The lawyers were in their chambers or their homes. The online platform was also used for administrative work insofar as was possible.

As a result, we had to significantly change the way we conducted hearings due to the need for compliance with the Standard Operating Procedures ("SOPs") implemented by the authorities. With the improvement in virtual hearings, the courts in Sabah and Sarawak have managed to maintain a high number of hearings conducted, with almost 15,550 cases heard via remote communication technology. Based on the statistics, it can be deduced from those figures that, by and large, all judges and judicial officers have been constantly using online platforms for hearings. To me, this is a significant achievement that all judges and judicial officers can be proud of. The figures do not portray only the level of readiness and adaptability to move to technology-based justice from the court's side but more importantly the level of acceptance and cooperation from our stakeholders, particularly members of the Bar. Of course, the next level needed to be achieved must be the level of preparedness with which the members of the general public could be meaningfully engaged as self-represented litigants before our courts. That challenge is two-fold. One is acceptability and two, the extent of internet penetration. The statistics have proven that remote hearings are effective and successful in ensuring continued operation of the courts and administration of justice. Through online hearing, both civil and part of the criminal cases could be disposed of safely during the pandemic. Further assuring the public that the gears of the judicial system were able to function effectively, the seven election petition cases that were filed following the State Election of Sabah held on September 26, 2020 were heard via online platforms by the three assigned Election Judges from Sarawak. All the seven cases were heard and disposed of within the statutory timeline prescribed under the Election Offences Act 1954.

Alluding to the utilisation of technology, the use of AI in the sentencing process has been very encouraging. Sentences are meted out after considering the recommendations by the AI application. It needs to be stressed that the magistrates are not bound to follow the recommendations proposed by the AI machines, and their discretion in meting out the appropriate sentences befitting the circumstances surrounding the commission of the offences remains unaffected and intact.

As of today, the AI is actively being used in both States as as a guide to judicial officers in determining appropriate sentences for certain criminal offences, as well as to improve efficiency and consistency in sentencing – specifically for drug possession under section 12 of the Dangerous Drug Act 1952 and rape under section 376 of the Penal Code.

Since its implementation on the historic date of February 19, 2020, we have successfully used the technology and sentenced a total of 1,222 accused persons from August 2020 to December 2020. The use of AI naturally requires certain information prior to the system's ability to deliver the recommendation required. Specific information required for drug offences relate to the background of the accused, namely status of employment, age, marital status, nationality, gender, type of drugs, weight of drugs, whether the accused is a repeat offender and whether he pleaded guilty at first opportunity. For sexual offences, the information required would of course be different. Alongside the standard information such as the age and other information related to the accused, the other required information would be the victim's age and relationship with the accused as well as the extent of trauma – be it physical or psychological that the victim had to endure. As the AI application is a system that learns from the amount of data that is being fed into it, the availability of more data will result in sentencing recommendations that are appropriate to the accused person in question.

The rationale behind making use of AI technology to make recommendations in the sentencing process is to narrow the gap in terms of disparity of sentences in similar offences. Of course no two cases are identical in their factual matrix, but too wide a gap in their sentences will invariably cause a good deal of harm to public confidence in any criminal justice system.

There are also further plans for the AI application to be utilised in civil cases involving damages in personal

injury cases via an online compendium of cases in order to save time and that project will be underway in 2021. Lest we forget, the year 2020 started like any other year before the onset of the pandemic created a perfect storm. Programmes were already lined up awaiting their due implementation. Indeed in January and February 2020, we managed to carry out two activities successfully. The High Court of Sabah and Sarawak in collaboration with the United Nations Development Programme (UNDP) had organised two major colloquiums on access to justice and environment held separately in Kuching and Kota Kinabalu. The National Colloquium Access to Justice was held on January 16, 2020 on the eve of the Opening of the Legal Year of Sabah and Sarawak. The Colloquium brought together judges, high-ranking government officials, lawyers and foreign speakers. The areas of discussion covered topics on bringing justice to rural and remote communities, improving legal aid through enhanced and legal financial structure, enhancing the experience of self-represented litigants and using technological advancement for affordable and easy access to justice. The Borneo Colloquium on Environmental Justice was held on February 15, 2020, jointly organised by the Kota Kinabalu Court Working Group on Environment (KKCWGE). The discussion was focused on three main areas for the adjudication of environmental cases: learning from international experience, strengthening the rules and procedures in environmental cases and the role of individuals and organisations in protecting the environment. There were seven panellists, including a judge from the Environment Court of New Zealand, invited to share their experience and expertise in their respective fields, which included geology, wildlife protection, environmental law and enforcement.

It is unfortunate that due to COVID-19 restrictions, the Mobile Courts could not be deployed. There was only one programme organised in February 2020 at Kampung Salimpodon, Pitas, Sabah. However, it is hoped that 2021 will see the re-deployment of our Mobile Courts. But, it is not that we are relinquishing our tasks because late birth registration cases are still being heard at the court house located in every district. People living in rural areas will be assisted as best we can, via other means available to us, within the constraints imposed by COVID-19. For 2021, more trips have been planned subject to the restrictions in terms of the SOPs put in place in the various parts of Sabah and Sarawak.

Before I end, I would like to thank all judges and officers and staff in both Sabah and Sarawak courts for their selfless sacrifice and unending dedication in disposing of judicial matters despite the COVID-19 pandemic, thereby ensuring that the wheels of justice continued in motion and did not come to a complete halt.

Once again, lest we forget, Justice is "suum cuique", a Latin motto which fairly translated into English means, "giving each his due". Even so, history is not certain to whom credit is due for this Latin motto; whether to Cicero or Plato (The Republic). That debate may continue yet. But much is owed to my predecessor YAA Tan Sri David Wong Dak Wah especially in the implementation of the AI technology into the magistrates' judicial work in Sabah and Sarawak. Today, even a magistrate sitting in Lawas or Lundu in Sarawak or her counterpart in Kudat or Kota Belud in Sabah can utilise AI recommendations before finally meting out the appropriate sentence on a drug offender found guilty of unlawful possession of the deleterious substance. Due credit must be given to YAA Tan Sri David Wong Dak Wah for the AI initiative.

With that, may I take this opportunity to wish everyone a happy, prosperous & productive year ahead.

Justice Abang Iskandar Abang Hashim
Chief Judge of Sabah and Sarawak

JUDGES OF THE HIGH COURT IN SABAH AND SARAWAK

1. Justice Nurchaya Arshad
2. Justice Mairin Idang @ Martin
3. Justice Azhahari Kamal Ramli
4. Justice Alwi Abdul Wahab
5. Justice Ismail Brahim
6. Justice Dean Wayne Daly
7. Justice Celestina Stuel Galid
8. Justice Lim Hock Leng

JUDICIAL COMMISSIONERS OF THE HIGH COURT IN SABAH AND SARAWAK

1. Judicial Commissioner Duncan Sikodol
2. Judicial Commissioner Christopher Chin Soo Yin
3. Judicial Commissioner Wong Siong Tung
4. Judicial Commissioner Leonard David Shim
5. Judicial Commissioner Zaleha Rose Haji Pandin
6. Judicial Commissioner Alexander Siew How Wai

THE OFFICE OF THE CHIEF REGISTRAR, FEDERAL COURT OF MALAYSIA

The Chief Registrar Mr. Ahmad Terrirudin Mohd Salleh

The COVID-19 pandemic has had severe negative impact on the global economy in 2020 and presented an unprecedented challenge to our normal daily lives. The economic and social disruption caused by the pandemic has also affected the progress of legal proceedings and the administration of justice. Nevertheless, the Office of the Chief Registrar continued to thrive to ensure that the delivery of justice was not halted despite the increase in the number of COVID-19 cases and the enforcement of the Movement Control Order ("MCO") by the government.

The Office of the Chief Registrar was always proactive and worked to maximise the use of technology in adapting to the new normal to ensure the administration of justice was not disrupted.

Among the actions undertaken and accomplishments by the Office of the Chief Registrar in 2020 are as follows:

Opening of the Legal Year 2020

The Opening of Legal Year 2020 held on January 10, 2020 at the Putrajaya International Convention Centre marked the first ceremony for The Right Honourable Tun Tengku Maimun who has held the post of Chief Justice since May 2, 2019. The ceremony was also attended by Justice Tan Sri Rohana binti Yusuf (President of Court of Appeal), Justice Tan Sri Dato' Sri Azahar bin Mohamed (Chief Judge of Malaya), Justice Tan Sri Datuk Seri Panglima David Wong Dak Wah (Chief Judge of Sabah and Sarawak), judges of the Federal Court, the Court of Appeal and the High Court, judicial commissioners, legal practitioners, as well as judicial and legal officers.

Also present during the event were the Chief Justice of Singapore, the Chief Justice of the Constitutional Court of the Republic of Indonesia, the Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia as well as international judges and legal practitioners.

The launching of the "From Courtroom to Classroom" Programme (MyC2C)

The "From Courtroom to Classroom" or "MyC2C Programme" which was launched in 2019 in collaboration with the Ministry of Education continued with the participation of Maktab Sultan Ismail, Kota Bharu, Kelantan on February 2, 2020. The Programme was officiated by The Right Honourable Tun Tengku Maimun binti Tuan Mat, Chief Justice of Malaysia. The programme aims to give early exposure to students on law and the legislative system in Malaysia. The modules "Judge in School" and "Young Lawyers" were carried out during this programme. Through the presentation of these modules, students had the opportunity to re-enact the characters and roles as judges and lawyers and participate in mock trials.

From Courtroom to Classroom (MyC2C) - Students from Maktab Sultan Ismail, Kota Bharu, Kelantan conducting a mock trial

COVID-19 outbreak prevention

The Office of the Chief Registrar issued and circulated several procedure guidelines, and operating procedures to ensure the continued functioning of the justice system and equal access to fair, timely, and effective judicial services. The guidelines and procedures were circulated in conjunction with the directives and Standard Operating Procedures ("SOPs") issued by the Ministry of Health and the National Security Council. The guidelines and procedures are as follows:

MONTH	GUIDELINES
March 2020	Panduan Pengendalian Kes-Kes di Mahkamah Seluruh Malaysia Berikutan Perintah Kawalan Pergerakan di Bawah Akta Pencegahan dan Pengawalan Penyakit 1988 dan Akta Polis 1967 (17.3.2020)
	Statistik Pendaftaran Kes Berkaitan Perintah Kawalan Pergerakan (PKP) 2020 (24.03.2020)
	Pemakluman Pendengaran Kes Secara Dalam Talian Semasa Perintah Kawalan Pergerakan 2020 (26.03.2020)
April 2020	Pengendalian Reman oleh Majistret dan Pendaftar Mahkamah di Balai-Balai Polis Seluruh Malaysia Sepanjang Tempoh Perintah Kawalan Pergerakan (02.04.2020)
	Pemakluman Pendengaran Kes Secara Dalam Talian Semasa Tempoh Perintah Kawalan Pergerakan Tahun 2020 (24.04.2020)
May 2020	Pemakluman Penutupan Mahkamah Sepanjang Tempoh Perintah Kawalan Pergerakan (02.05.2020)
	Pemakluman Operasi Mahkamah Semasa Tempoh Kawalan Pergerakan Bersyarat (PKPB) dan Pasca Perintah Kawalan Pergerakan (PKP) (03.05.2020)
	Penggunaan Sistem Pengesanan Pelawat Mahkamah Bermula 1 Jun 2020 (29.05.2020)

June 2020	Prosedur Pengendalian Mediasi (02.06.2020)
September 2020	Pemakluman Operasi Mahkamah Semasa Tempoh PKPP (09.06.2020)
	Pengendalian Kes-Kes di Mahkamah Alor Setar Selaras dengan PKPD secara Pentadbiran Dari 11–25 September 2020 (14.09.2020)
	Pengendalian Kes-Kes di Mahkamah Tawau, Lahad Datu dan Mahkamah-Mahkamah Litaran yang Berkaitan Selaras Dengan PKPB Dari 29 September – 12 Oktober 2020 (29.09.2020)
October 2020	Pengendalian Kes-Kes di Mahkamah Kota Kinabalu selaras dengan Perintah Kawalan Pergerakan Bersyarat (PKPB) (05.10.2020)
	Pengendalian Kes-kes Pelanjutan Reman di Bawah Seksyen 259 Kanun Tatacara Jenayah Melalui Sidang Video (07.10.2020)
	Pengendalian Kes-kes di Mahkamah Seluruh Negeri Sabah Selaras Dengan PKPB dari 13 Oktober hingga 26 Oktober 2020 (13.10.2020)
	Pemakluman Pengendalian Kes-Kes di Mahkamah Wilayah Persekutuan Putrajaya, Wilayah Persekutuan Kuala Lumpur dan Negeri Selangor Selaras Dengan PKPB dari 13 Oktober hingga 26 Oktober 2020 (13.10.2020)
	Pengendalian Kes-Kes di Mahkamah Seluruh Negeri Sabah Selaras Sambungan PKPB hingga 9 November 2020 (26.10.2020)
	Pengendalian Kes-Kes di Mahkamah Selangor, WPKL dan WP Putrajaya Selaras Sambungan PKPB (27.10.2020)
	Penangguhan Sementara Operasi Mahkamah Johor Bahru (31.10.2020)
November 2020	Pemakluman Pengendalian Kes-Kes di Mahkamah di Daerah Seremban dan Mahkamah PATI Lenggeng selaras PKPB (04.11.2020)
	Pemakluman Pengendalian Kes-Kes di Mahkamah Parit Buntar, Perak selaras dengan PKPB bermula dari 07.11.2020 hingga 20.11.2020 (06.11.2020)
	Kenyataan Media PKPMP – Pengendalian kes selaras PKPB di Mahkamah Terengganu, N9, Johor, Perak, Kedah, Penang dan Melaka serta Sambungan PKPB Mahkamah Selangor, KL dan Putrajaya (08.11.2020)
	Pengendalian Kes-Kes Di Mahkamah-mahkamah di Daerah Kuching Sarawak Selaras dengan PKPB (9.11.2020)
	Pengendalian Kes-Kes di Mahkamah Seluruh Negeri Sabah Selaras Sambungan PKPB Hingga 6 Disember 2020 (10.11.2020)
	Pendengaran Permohonan Untuk Menerima Masuk dan Mendaftaraikan Pempetisyen Sebagai Peguambela dan Peguamcara di Mahkamah Tinggi Malaya Secara Dalam Talian Semasa PKPB (19.11.2020)
	Pengendalian Kes di Mahkamah Kelantan Kelantan Selaras PKPB dan Pengendalian Kes di Mahkamah Negeri Terengganu, Johor, Kedah dan Melaka Selaras Penamatan PKPB (21.11.2020)
	Pengendalian Kes Selaras PKPB di Mahkamah-mahkamah di Daerah Kuching, Sarawak (23.11.2020)

Access to justice through information technology

Live streaming of the elevation of judges and judicial commissioners

With the spread of COVID-19 and the announcement of the MCO by the government, the Malaysian Judiciary decided that the swearing in and oath taking for the judicial commissioners is to be held in private whilst observing the necessary SOPs. As such, the Office of the Chief Registrar assisted in carrying out the ceremony via live streaming for public viewing. The ceremony was held on March 25, 2020 at the Palace of Justice, Putrajaya comprising seven newly appointed judicial commissioners and was shown live to the public through the Malaysian Judiciary YouTube channel.

The ceremony was attended only by the Chief Justice of Malaysia, the President of the Court of Appeal, the Chief Judge of Malaya, the Chief Judge of Sabah and Sarawak as well as the judges appointed together with their spouses.

Live streaming of online hearings of appellate courts

The newly inserted section 15A of the Courts of Judicature Act 1964 now enables both civil and criminal court proceedings to be heard using live video links or electronic communication. Online hearing via video-conferencing is a bid to ensure continued access to justice, amid the COVID-19 pandemic that has disrupted court cases.

The live streaming of online hearings is to enable the public to view the hearing of cases as if it were conducted in open court. The first live streaming of a Court of Appeal case was held on April 23, 2020 which was broadcasted through The Malaysian Judiciary YouTube channel.

Online hearings via video-conferencing for Federal Court and Court of Appeal sittings in Sabah and Sarawak

The Office of the Chief Registrar introduced trials conducted via video-conferencing for the Federal Court and the Court of Appeal sittings in Sabah and Sarawak. This method will be used for hearing appeals and applications in civil and criminal cases in the Federal Court and the Court of Appeal sittings in Sabah and Sarawak using the Zoom software or any other software determined by the courts. Online hearings via video-conferencing for the Court of Appeal began on June 15, 2020 in Sabah and on June 22, 2020 in Sarawak, while those for the Federal Court began on July 6, 2020 in Sabah and August 10, 2020 in Sarawak.

Call to the Bar of advocates and solicitors in the High Court of Malaya via video-conferencing

The Office of the Chief Registrar introduced the first virtual call to the Bar ceremony for new lawyers to be admitted to the High Court of Malaya through video-conferencing. The online hearings during the Conditional Movement Control Order marked a historic moment for the Judiciary.

Live broadcast of Nora Anne Quoirin's inquest proceedings

The inquest proceedings of Nora Anne Quoirin was broadcast live via the Malaysian Judiciary YouTube channel for public viewing.

Continuous digitalisation initiatives

e-Appellate system

On June 9, 2020, the Federal Court of Malaysia conducted the first criminal trial through the e-Appellate system. Under this system, the courts and the parties will henceforth need to refer to digital copies of documents (instead of physical copies) during oral submissions. Judges as well as counsel will conduct the appeal hearing by referring to the digital copies of the documents through their respective iPads or notebooks.

e-Bicara system

The e-Bicara system is a paperless system for the hearing of civil and criminal appeals at the High Court of Malaya. With the e-Bicara system, all copies of documents that parties wish to present to the court are digital copies displayed on a LED television screen using a wireless presenter. The system will be implemented in stages in the High Courts of Malaya and the lower courts of Malaya. The first appeal case via e-Bicara was conducted on December 8, 2020 in the High Court of Kuala Lumpur (Civil) (NCvC 7).

e-Review system

The e-Review system is an online forum within the e-Court system which enables judicial officers and legal representatives in a case to conduct case management via the exchange of written messages without having to attend court. The system was expanded to all 20 court locations in Peninsular Malaysia in 2020. The system

A virtual call to the Bar ceremony for new lawyers to be admitted to the High Court of Malaya through video-conferencing

aims to reduce court appearances (in person) for case managements before the registrars at the Court of Appeal and the Federal Court as well as to save time and expense of having to attend court in person to deal with preliminary matters.

e-Lelong system

The e-Lelong system is the online system in Malaysia that conducts public auctions of immoveable property for foreclosure proceedings in the High Court of Malaya. The descriptions of properties that are to be auctioned off under orders for sale issued by the High Court of Malaya will be shown in the system. The e-Lelong system facilitates public auction activities, improves the quality of the services provided by the court and replaces the manual public auction. The e-Lelong system enables the bidders to place their bids online without being present in court.

e-Jamin system

The e-Jamin system is a digital system that assists the bail payment process in courts throughout Malaysia. This system is an efficient mode of payment which supports guarantors as they no longer need to go to the bank to deposit the bail amount since such payment of bail can be made online through the e-Jamin portal. The e-Jamin system has been launched and operates in 138 courts throughout Malaysia.

Virtual court platform

The Office of the Chief Registrar launched the Palace of Justice virtual court platform in 2020. Through this platform, members of the public are able to take a virtual tour through the Palace of Justice, appreciate the architectural beauty of the building and explore the functions and facilities provided in the Palace of Justice.

Infrastructure, professional development and human capital building

New court complexes

Two new Sessions Courts were established in Langkawi and Kuala Selangor, on January 6, 2020 and October 6, 2020, respectively. With the opening of these courts, the public and interested parties residing near Langkawi and Kuala Selangor will no longer need to travel all the way to Alor Setar and Klang to attend their court proceedings.

In addition to the above, the Office of the Chief Registrar also held the opening of the new Sessions Court in Setiu on July 15, 2020. Previously all Sessions Court cases in Setiu were referred to the Sessions Court in Besut.

The Office of the Chief Registrar also organised the opening of the High Court of Sungai Petani on July 13, 2020. The launching of this new court building

equipped with the latest and modern facilities will ensure equal access to justice for people residing in that locality.

In addition to the above, the re-opening of the Mahkamah Sesyen Khas PATI in Semenyih and Kemayan took place on January 6, 2020 and March 1, 2020 respectively to handle cases involving illegal immigrants. This is in line with the Immigration Act 1959 (Act 155) and aims to expedite the disposal of cases involving the arrest of illegal immigrants by the Immigration Department.

Attachment programme

The Malaysian Judiciary's attachment programme is a programme that offers opportunities to law students or graduates from local and foreign universities to be attached with a judicial commissioner, or any of the judges of the High Court, the Court of Appeal or the Federal Court. The Malaysian Judiciary received a total of 334 attachment students for the programme in 2020.

Amendments to Legislation/Acts

The outbreak of the COVID-19 pandemic has posed a big challenge to the Malaysian Judiciary as its essential services had to continue to operate while adhering to the relevant SOPs. In this regard, the Malaysian Judiciary managed to overcome this test to ensure that access to justice is continuously delivered. This was made possible through the amendments to the following legislation:

i. Courts of Judicature Act 1964 (Act 91);
ii. Rules of Court 2012;
iii. Rules of the Federal Court 1995; and
iv. Rules of the Court of Appeal 1994.

The first appeal case via e-Bicara conducted on December 8, 2020 in the High Court of Kuala Lumpur

The amendments made are to provide for, among others, the conduct of hearings and trials via remote communication technology or online hearings.

Conclusion

Finally, I would like to extend my utmost sincere gratitude first and foremost to The Right Honourable Tun Tengku Maimun binti Tuan Mat, Chief Justice of Malaysia, Justice Tan Sri Rohana binti Yusuf, President of the Court of Appeal, Justice Tan Sri Dato' Sri Azahar bin Mohamed, Chief Judge of Malaya, and Justice Dato' Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak and the honourable judges for their support and trust. I would also like to thank and congratulate the judicial officers and staff for their hard work and tremendous dedication in assisting the Malaysian Judiciary and ensuring that the delivery of justice is not halted. The COVID-19 pandemic has presented an unprecedented opportunity for this Office to progress and advance towards digitalising the judicial system. I believe with hard work and determination this Office will continue to thrive in making judicial history.

Chief Registrar, Federal Court of Malaysia
Ahmad Terrirudin Mohd Salleh

A group photo of the distinguished guests and the officers of the Chief Registrar's office during the launching of the "From Courtroom to Classroom" Programme (MyC2C)

Seen in this photo: first row, (L-R) Chief Judge of Malaya Azahar Mohamed (3rd from left), YB Mohamed Hanipa Maidin, Deputy Minister in the Prime Minister's Department (4th from left); Chief Justice Tengku Maimun (centre); YB Teo Nie Ching, Deputy Education Minister (6th from left); President of the Court of Appeal Rohana Yusuf (7th from left) and Mr Ahmad Terrirudin Mohd Salleh, the Chief Registrar of the Federal Court (on the right)

Maktab Sultan Ismail's school band welcoming guests to the launching of From Courtroom to Classroom Programme (MyC2C)

Students listening to a talk on the Malaysian legal system

A memorable moment with The Rt. Hon. the Chief Justice, Tun Tengku Maimun. Seen in this picture – Deputy Minister in the Prime Minister's Department YB Mohamed Hanipa Maidin and Deputy Education Minister YB Teo Nie Ching

CHAPTER 05

JUDGES

JUDGES' APPOINTMENTS AND ELEVATIONS

In 2020, there were 35 appointments and elevations to the superior courts. The highest appointment that took place in 2020 was the appointment of the present Chief Judge of Sabah and Sarawak, followed by the elevation of three judges to the Federal Court and eight judges to the Court of Appeal, the confirmation of eight High Court judges and the appointment of 15 judicial commissioners. The full list of appointments and elevations in 2020 appears below:

Position	Date of Appointment	Name
Chief Judge of Sabah and Sarawak	February 25, 2020	Justice Abang Iskandar Abang Hashim
Judge of the Federal Court	March 25, 2020	Justice Mary Lim Thiam Suan
		Justice Harmindar Singh Dhaliwal
		Justice Rhodzariah Bujang
Judge of the Court of Appeal	March 25, 2020	Justice Indera Mohd. Sofian Tan Sri Abd Razak
		Justice Supang Lian
		Justice Lee Heng Cheong
		Justice Haji Ahmad Nasfy Haji Yasin
		Justice Che Mohd Ruzima Ghazali
		Justice Gunalan a/l Muniandy
		Justice Nordin Hassan
		Justice Darryl Goon Siew Chye
Judge of the High Court	March 25, 2020	Justice Rohani Ismail
		Justice Anselm Charles Fernandis
		Justice Ahmad Fairuz Zainol Abidin
		Justice Mohd Radzi Harun
		Justice Hajah Aliza Sulaiman
		Justice Meor Hashimi Abdul Hamid
		Justice Dr. Lim Hock Leng
	December 10, 2020	Justice Ahmad Shahrir Mohd Salleh
Judicial Commissioner	January 3, 2020	Judicial Commissioner Rohana Abd Malek
		Judicial Commissioner Tee Geok Hock
	July 10, 2020	Judicial Commissioner Hajah Zaleha Rose Datuk Haji Pandin
		Judicial Commissioner Azhar Abdul Hamid
		Judicial Commissioner Dr. Arik Sanusi Yeop Johari
		Judicial Commissioner Amirudin Abd Rahman
		Judicial Commissioner Mahazan Mat Taib
		Judicial Commissioner Bhupindar Singh a/l Gurcharan Singh Preet
		Judicial Commissioner Alice Loke Yee Ching
		Judicial Commissioner Ahmad Murad Abdul Aziz
		Judicial Commissioner Liza Chan Sow Keng
		Judicial Commissioner Wan Muhammad Amin Wan Yahya
		Judicial Commissioner Alexander Siew How Wai
	August 3, 2020	Judicial Commissioner Nurulhuda Nur'aini Mohamad Nor
	September 1, 2020	Judicial Commissioner Su Tiang Joo

Chief Judge of Sabah and Sarawak Abang Iskandar Abang Hashim
receiving the letter 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

Chief Judge of Sabah and Sarawak Abang Iskandar Abang Hashim
signing the letter of appointment

Group photo of the judges who were elevated to the Court of Appeal and Federal Court on March 25, 2020

L–R (seated): Justice Azahar Mohamed, CJM; Chief Justice Tengku Maimun Tuan Mat; Justice Rohana Yusuf, PCA; and Justice Abang Iskandar Abang Hashim,CJSS

L–R (standing, 1st row): Justice Lee Heng Cheong, Justice Indera Mohd. Sofian Tan Sri Abd Razak, Justice Harmindar Singh Dhaliwal, Justice Mary Lim Thiam Suan, Justice Rhodzariah Bujang, Justice Supang Lian and Justice Haji Ahmad Nasfy Haji Yasin

L–R (standing, 2nd row): Justice Nordin Hassan, Justice Che Mohd Ruzima Ghazali, Justice Gunalan a/l Muniandy (masked) and Justice Darryl Goon Siew Chye

Group photo of the seven judicial commissioners who were confirmed as High Court Judges on March 25, 2020
L–R (seated): Justice Azahar Mohamed, CJM; Chief Justice Tengku Maimun Tuan Mat;
Justice Rohana Yusuf, PCA; and Justice Abang Iskandar Abang Hashim, CJSS

L–R (standing): Justices: Ahmad Fairuz Zainol Abidin, Mohd Radzi Harun, Rohani Ismail,
Anselm Charles Fernandis, Aliza Sulaiman; Meor Hashimi Abdul Hamid; and Lim Hock Leng

Group photo of the judicial commissioners who were appointed on July 10, 2020
L–R (seated): Justice Azahar Mohamed, CJM; Chief Justice Tengku Maimun Tuan Mat;
Justice Rohana Yusuf, PCA; and Justice Abang Iskandar Abang Hashim, CJSS
L–R (standing, 1st row)-Judicial Commissioners: Amirudin Abd Rahman; Azhar Abdul Hamid;
Zaleha Rose Pandin; Arik Sanusi Yeop Johari and Mahazan Mat Taib
L–R (standing, 2nd row)- Judicial Commissioners: Wan Muhammad Amin Wan Yahya; Ahmad Murad Abdul Aziz;
Bhupindar Singh a/l Gurcharan Singh Preet; Alice Loke Yee Ching; Liza Chan Sow Keng; and
Alexander Siew How Wai

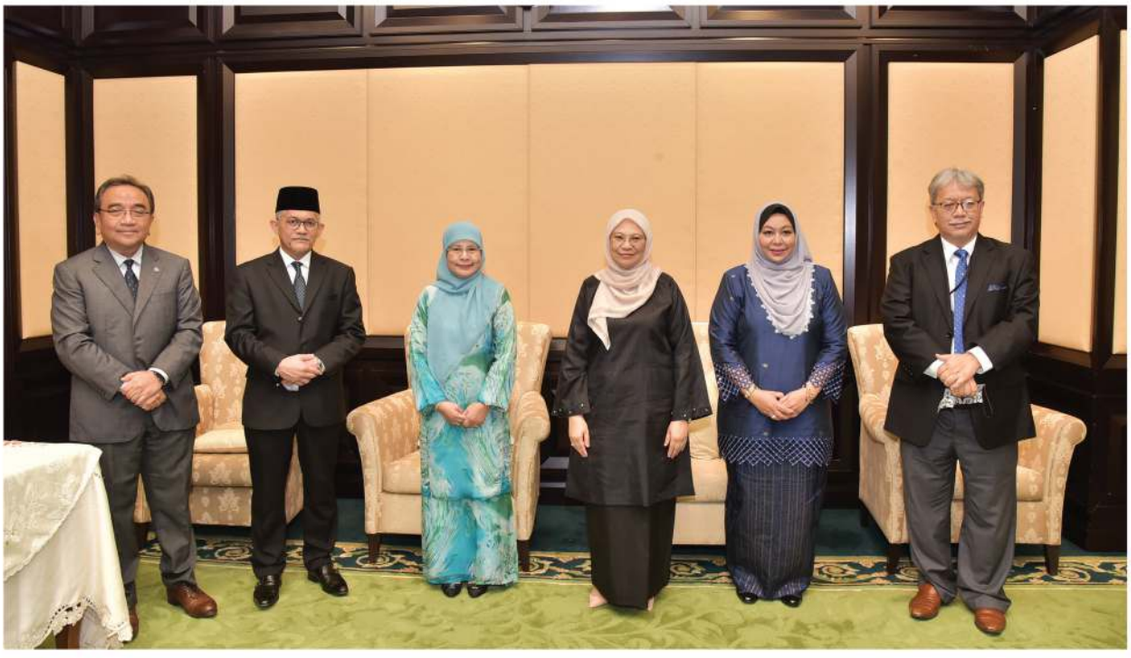


Photo taken on 10 December 2020, after the appointment ceremony of Justice Ahmad Shahrir Mohd Salleh as a High Court judge

L–R: Justice Azahar Mohamed, CJM; Justice Ahmad Shahrir Mohd Salleh;
Chief Justice Tengku Maimun Tuan Mat; Justice Rohana Yusuf, PCA; Datin Rozita binti Ramli,
spouse of Justice Ahmad Shahrir Mohd Salleh and Justice Abang Iskandar Abang Hashim, CJSS

Photo taken on September 1, 2020, after the appointment ceremony of Judicial Commissioner Su Tiang Joo.
L – R: Justice Azahar Mohamed, CJM; Chief Justice Tengku Maimun Tuan Mat;
Judicial Commissioner Su Tiang Joo; Justice Rohana Yusuf, PCA;
and Justice Abang Iskandar Abang Hashim, CJSS

The Kota Kinabalu Court Complex at night

RETIRED JUDGES

Tan Sri Datuk Seri Panglima David Wong

Tan Sri Datuk Seri Panglima David Wong hails from a small coastal town on the Eastern side of Sabah, Sandakan, once the capital of North Borneo as Sabah was then known. Though he left Sandakan at an early age to study in Australia, he returned to his hometown to establish roots for his family and legal career.

Early years

He completed his early education in Sung Siew Primary / St Cecilia Primary School and St Mary's Secondary School, Sandakan before completing his secondary education in St John's College, Woodlawn, Lismore, New South Wales, Australia.

In 1976, Tan Sri Datuk Seri Panglima David Wong graduated with a Bachelor of Commerce (B.Com) majoring in Accountancy from the University of New South Wales, Sydney, Australia. In the following year 1977, Tan Sri also obtained a Bachelor of Laws (LL.B) from the same university.

From 1978 to 1979, Tan Sri was attached to a Public Accounting Firm in Sydney as a Qualified Auditor. In 1979, Tan Sri was admitted as a Barrister-at-Law of the New South Wales Supreme Court in Australia.

In 1980, Tan Sri was admitted to the Sabah Bar and he practised as an advocate and solicitor in Sandakan until 1992. In 1993, Tan Sri commenced practice in Sydney and practised there until 1996. In 1997, Tan Sri returned to Sandakan, Sabah, Malaysia to continue practising as an advocate and solicitor until 2005.

A Sabahan Chinese of many firsts in legal history

Tan Sri is the first person of Chinese ethnicity in Sabah's legal history who rose through the ranks of the Malaysian Judiciary to one of its top posts. He was appointed as a Judicial Commissioner on September 29, 2005, High Court Judge on April 11, 2007, Judge of the Court of Appeal on January 8, 2013, Judge of the Federal Court on April 27, 2018 and the Chief Judge of Sabah and Sarawak on July 11, 2018 where he served until his retirement on February 20, 2020.

A judge who embraced modern technology

During his tenure as a judge in East Malaysia, he was hand-picked by the then Chief Judge of Sabah and Sarawak in 2006 to head the IT team in transforming the manual system of the courts in Sabah and Sarawak into a fully digitalised system. From 2006 till 2013, Tan Sri together with his IT team were given the task to create appropriate programs to be housed on the Judiciary's platform. During that period, a case management system comprising electronic filing of court papers, e-monitoring by judges and lawyers, video conferencing facilities, and virtual files was created.

Tan Sri, in ensuring that the digitalisation of the court system would be accepted by the legal profession, went to the ground with his IT team to conduct numerous roadshows for the legal profession in the two Borneo States. In Tan Sri's view, those roadshows were vital to the success of the digitalisation exercise as he was able to demonstrate that the power of advanced information technology was fundamental to support an increasingly challenging and sophisticated legal market.

Tan Sri, with his foresight of the power of modern technology, introduced Artificial Intelligence ("AI") technology in 2019 which is aimed at helping judges and magistrates to make analyses on the appropriate punishments to be imposed on those found guilty of certain criminal offences without affecting the right of the public prosecutor and the defence counsel to submit and comment on the sentencing guidelines generated by the AI system. Tan Sri also put into place the use of AI for the assessment on damages in personal injury claims arising from accidents. He also believes that this particular model is very effective in facilitating mediation and negotiation between the parties.

Acknowledging the significance of advanced technology in the justice delivery system, the present Chief Justice Tun Tengku Maimun binti Tuan Mat once remarked that "Sabah and Sarawak were ahead in terms of advanced technology which was started much earlier back in 2007. We are in fact learning from Sabah and Sarawak in terms of technology".

Just before his retirement, Tan Sri had also launched the Court's Mobile App and e-Civil Appeal Management through the e-filing system, enhancing technological advancements in all court buildings in Sabah and Sarawak.

A Chief who encouraged oral advocacy and judicial transparency

As the Chief Judge of Sabah and Sarawak, he understood the importance of transparency and accountability in the judicial system and for those reasons, upon taking office, he issued Practice Direction No. 1 of 2018 to all judicial officers and judges in Sabah and Sarawak where he, with a view of nurturing a quality local Bar, required counsel to make their oral submission in all contested civil cases and criminal cases on all salient points of facts, issues and laws of the case at hand on top of the written submissions filed. In that Practice Direction, judges and legal officers are also required to furnish a summary / brief grounds of decision on the delivery of a decision on an interlocutory application followed by full grounds of decision thereof within one month from the date the interlocutory application was allowed, and within two months in respect of a decision made after trial so that they will become prolific in writing judgments.

A Chief who ensured easier access to justice

Tan Sri also understood the importance of the Mobile Courts program initiated by his predecessor to the first peoples of Sabah and Sarawak and ensured that this program was continued with the same fervour. He also saw the need to create the Urban Mobile Court to cater to those first peoples who had migrated to the urban area and had issues with the registration of their birth certificates which are vital to access education and other facilities taken for granted by the more fortunate.

A judge of great humility

Tan Sri dedicated a significant part of his career and life to the nation through his service in the Judiciary for about 15 years. During his tenure as Chief Judge, he held numerous positions such as a Member of the Rules Committee and the Judicial Appointments Commission.

To his colleagues, Tan Sri practised an "open door" policy for a chat on anything, be it work or otherwise. He always treated his colleagues as friends and always lived by the motto "respect cannot be demanded; it can only be commanded". When on the Bench, Tan Sri's conduct exemplified the words of that motto.

A judge who upheld constitutional supremacy

The judgments penned by Tan Sri are numerous and many of his judgments reported in the law reports stand as testimony to their significance in legal resources for the legal and judicial fraternity. Many landmark judgments were delivered by Tan Sri during his judicial career. In the High Court, he expanded the realm of "locus standi" in constitutional challenges and this was how Tan Sri put it in the case of *Robert Linggi v The Government of Malaysia* [2011] 1 MLRH 389:

> [11] The plaintiff, as a Sabahan, in my view is genuinely concerned with the erosion of the rights of Sabah in so far as "the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court" and since it concerns an attempt to uphold the Federal Constitution, I have no hesitation in finding that the plaintiff has the "locus standi" to bring this action. I am fully aware of the argument

> that this may encourage litigation but in my view when there is a challenge concerning any dismantling of the Supreme Law of the country, litigation should be encouraged. In any event, all Malaysians have a duty to protect our constitution.

In the Court of Appeal, in the case of *Datuk Seri Khalid Abu Bakar & Ors v N Indra P Nallathamby & Another Appeal* [2014] 6 MLRA 489, Tan Sri saw fit to find that when there is a breach of a constitutional right to life, which in this case one Mr Kugan's life was taken away while in detention, section 8(2) of the Civil Law Act 1956 which prohibits claiming for exemplary damages did not apply.

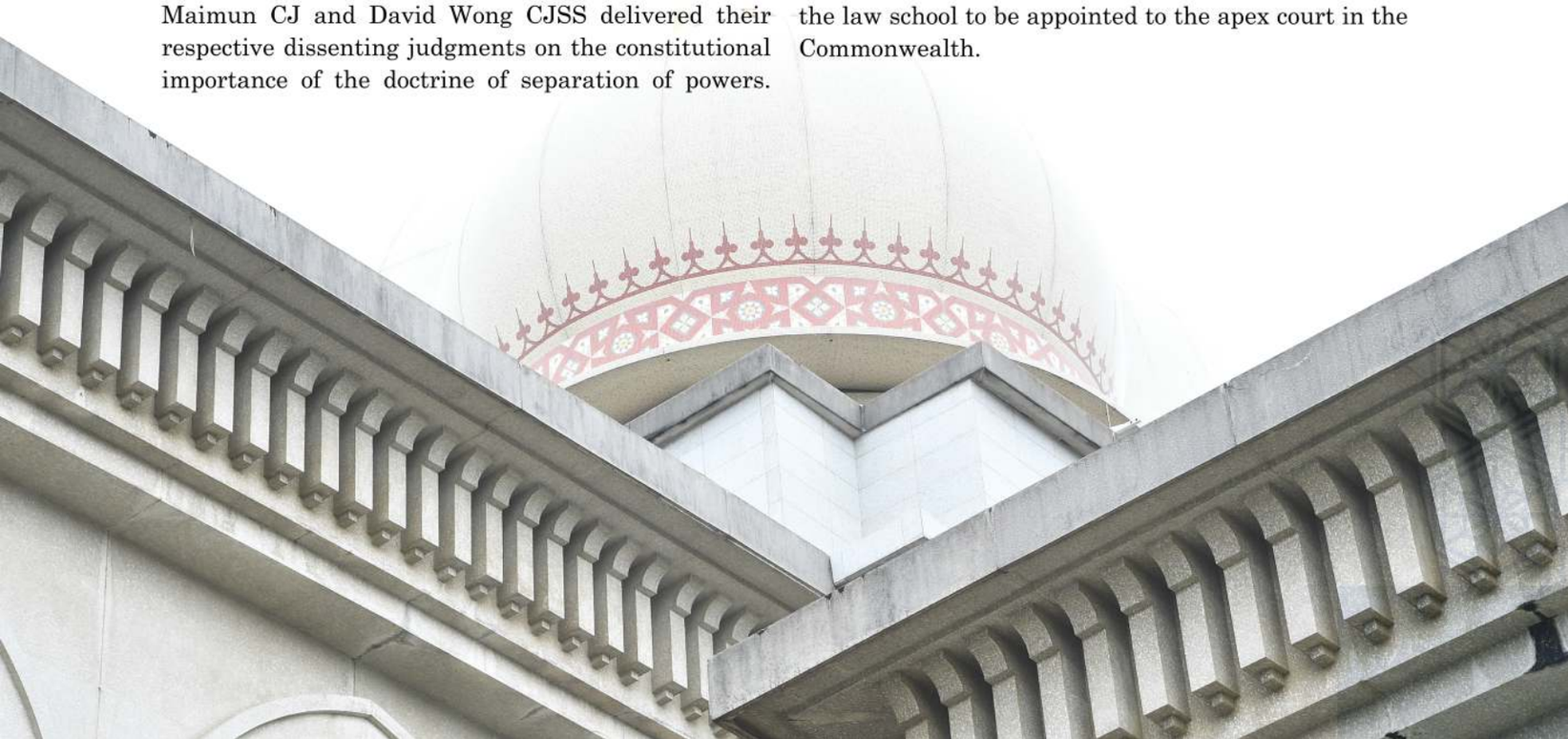
During his short stint at the Federal Court, Tan Sri David Wong continued to showcase his independent philosophy of law, justice and the constitution with his judgments: (1) *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd* [2019] 5 CLJ 569 (a panel of nine judges) where he and the former Chief Justice Tan Sri Richard Malanjum in their respective dissenting judgments ruled that the Shariah Advisory Council's ruling had the effect of taking away the judicial power of the civil courts and violated the doctrine of separation of powers; (2) *Superintendent of Land & Survey Department v Ratnawati Hasbi* [2020] 2 CLJ 425 where a dissenting judgment was delivered by David Wong CJSS on the constitutional importance of Article 13 of the Federal Constitution in respect of compulsory acquisition of land in Sarawak; (3) *Bellajade Sdn Bhd v CME Group Bhd* [2019] 8 CLJ 1 where an earlier decision of the Federal Court was set aside due to coram failure; (4) *The Speaker of Dewan Undangan Negeri of Sarawak v Ting Tiong Choon & Ors* [2020] 4 MLJ 303 where Tengku Maimun CJ and David Wong CJSS delivered their respective dissenting judgments on the constitutional importance of the doctrine of separation of powers.

On February 11, 2020, in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 3 CLJ 593, David Wong CJSS (in his dissenting judgment concurred with by Tengku Maimum CJ) ruled that the National Security Council Act 2016 is unconstitutional as it did not comply with the procedure set out in Article 149(1) of the Federal Constitution and that it violated the freedom of movement as guaranteed by Article 9 of the Federal Constitution. The majority decision of the aforesaid case was subsequently set aside when the Federal Court allowed the application for a rehearing [2020] 1 LNS 2116.

As the CJSS, Tan Sri in his minority decision in *Sarawak Director of Forest v TR Sandah ak Tabau* [2017] 2 MLJ 281 found that Article 26(4) of Chapter 3 of the Report of the Inter-Governmental Committee 1962 read together with section 74 of the Courts of Judicature Act 1964 requires the Chief Justice to empanel a judge with sufficient Bornean experience to be member of an appellate panel for cases arising from the Borneo States.

Undoubtedly many of the judgments delivered by Tan Sri would be of fundamental importance to judicial interpretation on our constitutional frameworks and jurisprudence in future cases for many years to come. He will forever be regarded as a champion of access to justice and the judge who, at all times, remained steadfast to his oath of office in upholding constitutional supremacy.

In June 2020, Tan Sri was awarded the 2020 Alumni Award for Professional Achievement by the University of New South Wales for his outstanding career achievements. He is the first alumni member from the law school to be appointed to the apex court in the Commonwealth.



Dato' Umi Kalthum binti Abdul Majid

Dato' Umi Kalthum binti Abdul Majid was born on July 10, 1954 in Raub, Pahang. She received her primary and secondary school education in missionary schools. From Standard 1 until Standard 5, she studied at Methodist Girls' Primary School in Ipoh, Perak where her family was then based at. She later completed her Standard 6 year at Assunta Girls' Primary School. As for her secondary school education, she first studied at Assunta Girls' Secondary School and later at the Bukit Bintang Girls Secondary School. Dato' Umi chose to read law and obtained her LLB (Hons) from University of Malaya in 1978.

She was immediately accepted into the Judicial and Legal Service in 1978. Her first posting was in the Drafting Division of the Attorney General's Chambers, Kuala Lumpur as an Assistant Parliamentary Draftsman. Under the tutelage of Tan Sri Dato' Abdul Aziz bin Mohamad, who was then the senior Assistant Parliamentary Draftsman, Dato' Umi was first exposed to the art of legislating law. She served the Drafting Division until 1982.

She was then appointed as the Assistant Treasury Solicitor in the Ministry of Finance, Kuala Lumpur and served the said Ministry from 1982 until 1985. Subsequently, she was appointed as a Senior Federal Counsel in the Advisory and International Law Division from 1985 to 1986. She then pursued her LLM course at the London School of Economics, University of London, United Kingdom, where she studied several specialised subjects on international laws. Upon her return, she was transferred back to the Advisory and International Law Division and served the said Division from 1987 until 1990.

From 1990 to 1992, she was Senior Federal Counsel specifically in charge of the General Agreement on Tariffs and Trade ("GATT") where she served as Malaysian legal advisor to the then Ministry of Trade and Industry's officers, negotiating the various draft Agreements under the auspices of GATT leading to the establishment of the World Trade Organisation ("WTO").

This was an important chapter in Dato' Umi's career in the Judicial and Legal Service because as a result of the negotiation of the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement, several important statutes were passed by Malaysia such as the Layout-Design of Integrated Circuits Act 2000 (Act 601), the Geographical Indications Act 2000 (Act 602) and the Intellectual Property Corporation of Malaysia Act 2002 (Act 617).

After the successful stint in GATT, Justice Dato' Umi was then appointed as the Head of the Arbitration Unit in the Civil Division of the Attorney General's Chambers from 1992 until 1994. She was then appointed as a Sessions Court Judge in Kuala Lumpur from 1994 to 1996. In 1999 until 2000, once again Dato' Umi was asked to render her expertise in matters involving international affairs and was assigned as Senior Federal Counsel / Legal Advisor to the Ministry of Foreign Affairs, Kuala Lumpur. From 2000 to 2003, Dato' Umi was appointed on promotion as the State Legal Advisor of Johor. She was the first female legal officer to be appointed to these posts.

Subsequently, she was appointed as the Deputy Head 1 of the Civil Division, of the Attorney General's Chambers from the year 2003 until 2004. She later became the Head of Civil Division from 2004 until 2006. Her last,

but not least important, post in the Judicial and Legal Service was as the President of the Industrial Court of Malaysia from 2006 until 2009 where she further honed her administrative and people skills.

Dato' Umi's career in the superior courts started in 2009. She was appointed as Judicial Commissioner of the High Court in 2009. She was then appointed as a Judge of the High Court in Malaya in 2011.

After less than four years at the High Court, Dato' Umi was elevated to the Court of Appeal in 2013 and served as Justice of the Court of Appeal until she reached her mandatory retirement age of 66 years in July 2020.

Throughout her career Dato' Umi demonstrated a serious commitment to judicial integrity and a disciplined mind. She consistently undertook a rigorous analysis of the facts, the legal issues and the arguments on all the cases before her.

The intricate Moorish-inspired dome at the foyer of the Palace of Justice

Datuk Dr. Badariah Hj. Sahamid

Datuk Dr. Badariah Sahamid was born on September 11, 1954 in Temanggan, Kelantan. She graduated from University of Malaya with a Bachelor of Laws (LL.B) (First Class Hons.) in 1978. She obtained a Master of Laws (LL.M) from the London School of Economics and Political Science (LSE) in 1979, and a Ph.D. from University of Malaya in 2001. Datuk Dr. Badariah was admitted as an Advocate and Solicitor of the High Court in Malaya in 1988.

Datuk Dr. Badariah began her legal career as a tutor and lecturer in the Law Faculty, University of Malaya in 1980. She was appointed Associate Professor in 1992, and Professor in 2006. Her field of specialisation includes Jurisprudence and Legal Philosophy, Corporate Bonds, Securities Regulation and Law of Banking and Negotiable Instruments. She is the author of a the book: *Jurisprudens dan Teori Undang-Undang Dalam Konteks Malaysia*, Sweet & Maxwell Asia (2005).

During the more than 27 years of service in University of Malaya, Datuk Dr. Badariah had served in various academic and administrative positions, among them: Professor; Dean, Faculty of Law; Chairman, Student Disciplinary Committee; Member, Professional Qualifying Board; Chairman, Committee of Deans; Head of Legal Unit, University of Malaya; Member, Editorial Advisory Board, Halsbury's Laws of Malaysia, Malayan Law Journal; Member, Editorial Board, Journal of Malaysian and Comparative Laws (JMCL).

During her tenure at the University of Malaya, Datuk Dr. Badariah was appointed Visiting Scholar at Harvard Law School, USA under the Fulbright Scholar Award (1985). She was also an External Examiner for the University of Hong Kong (2002-2005) and a Member of the "Expert Working Group", United Nations International Drug Control Program (UNDCP) in Vienna, Austria (2002) which was tasked to draft model legislation for the Organisation of Islamic Countries (OIC).

Datuk Dr. Badariah retired from University of Malaya on the grounds of national service when she was appointed judicial commissioner on March 1, 2007. She was appointed a judge of the High Court of Malaya in 2010. During her tenure in the High Court at Kuala Lumpur, Datuk Dr. Badariah served in the Commercial and Civil Divisions. She later served in the Criminal Division of the High Court at Shah Alam, Selangor.

Datuk Dr. Badariah was elevated to the Court of Appeal in September of 2014. While serving as a judge of the Court of Appeal, she held the position of Director of the Judicial Academy (2014-2016) which was established by the Judicial Appointments Commission (JAC) to foster judicial education. During her tenure as Director of the Judicial Academy, she was involved in preparing courses for judicial commissioners, as well as judges of the High Court and the Sessions Court. In 2016, the Board of Commonwealth Judicial Education Institute of Canada ("CJEI") appointed Datuk Dr. Badariah as a Director of the CJEI.

In 2014 Datuk Dr. Badariah was appointed an Adjunct Professor of the Faculty of Law, UiTM at Shah Alam. Datuk Dr. Badariah also served as a member of the Editorial Committee of The Malaysian Judiciary Yearbook as well as a member of the Editorial Committee of the Journal of the Malaysian Judiciary (2012-2020).

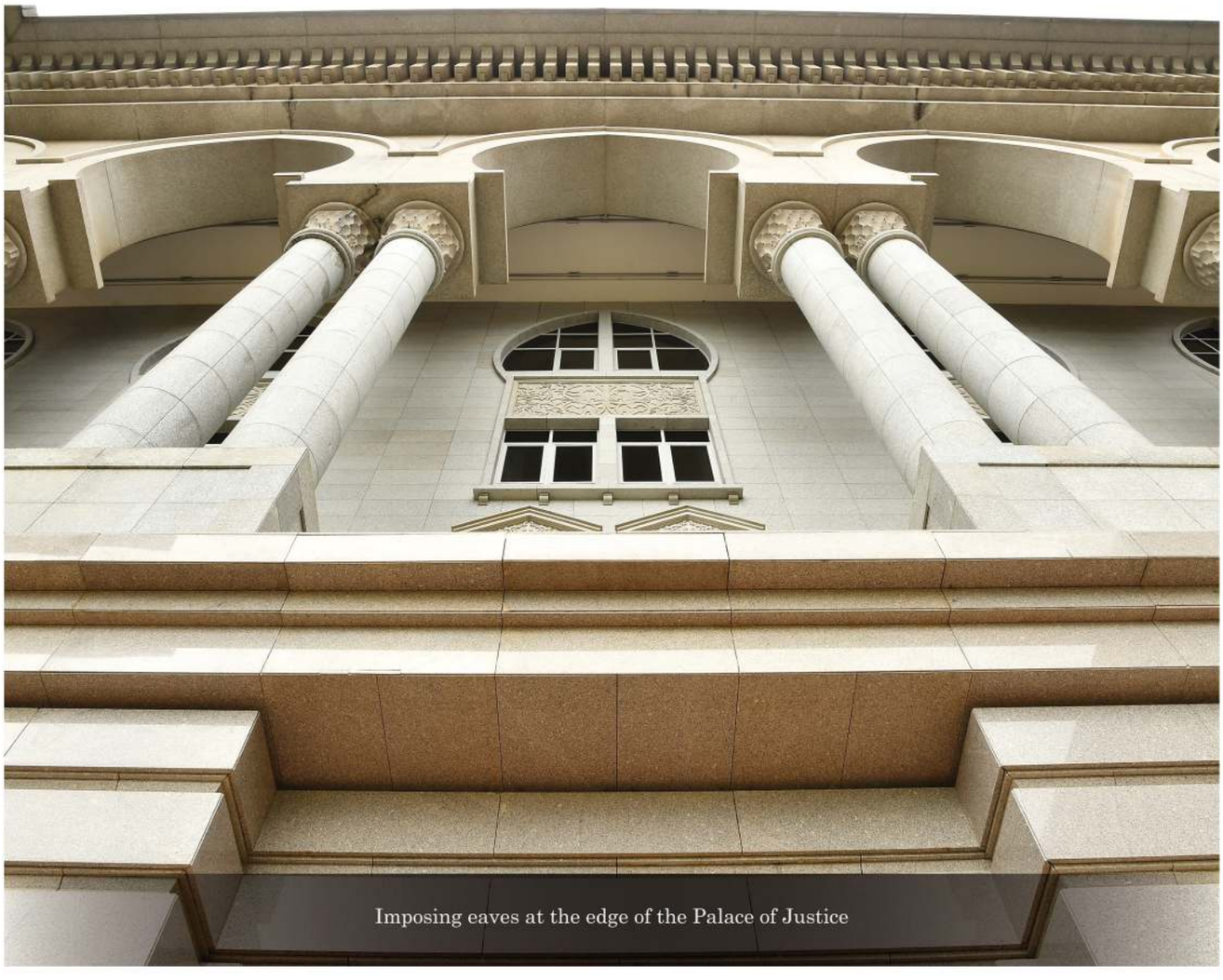
By the date of her mandatory retirement from the Judiciary on September 11, 2020, Datuk Dr. Badariah had been in public service for more than 41 years: 27 years and eight months as an academician in the Law Faculty of University of Malaya, and 13 years and six months as a judge of the superior courts.

During her tenure on the Bench, Datuk Dr. Badariah presided in a number of landmark cases including *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd* [2008] 5 CLJ 654 ("*Aras Jalinan*"); *Tenaga Nasional Bhd v Mayaria Bhd & Anor* [2019] 8 CLJ 786 ("*TNB*") and Ketua Pegawai Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors and Another Appeal [2020] 10 CLJ 784 ("*Maqsood*").

The case of *Aras Jalinan* raised the issue of whether Malaysian courts have jurisdiction in matters where the seat of arbitration is outside Malaysia as the Arbitration Act 2005 is silent on the matter.

The case of *TNB* concerned the power of TNB to disconnect electricity pursuant to section 38(1) of the Electricity Supply Act 1990.

The *Maqsood* case raised significant issues on freedom of religion, jurisdiction of the Syariah courts and the effect of gazetted *fatwas* of the State of Selangor on the Ahmadiyya.



Imposing eaves at the edge of the Palace of Justice

Dato' Ahmadi bin Asnawi

Dato' Ahmadi bin Asnawi was born and raised in the small town of Bagan Datuk in 1954, then a sleepy hollow in Perak. Like any other Perakian at that time, he went through primary and secondary school within the boundaries of his hometown, after which he moved to Kuala Lumpur to further his studies at University of Malaya ("UM") and graduated with a LL.B Hons in 1978. During his time as an officer of the Attorney General's Chambers in 1988, he took time off to read his Master of Law at University College, London.

Dato' Ahmadi is a man of service through and through. He joined the Attorney General's Chambers fresh upon completion of his studies at UM. He began his career as a magistrate in Alor Gajah, Melaka in 1978. Thereafter, he served in various capacities. The positions he held include Federal Counsel, Sessions Court judge, State Legal Advisor of Negeri Sembilan and Selangor, Director General of the Legal Aid Bureau, Head of Prosecution Division Wilayah Persekutuan Prosecution Office, Chairman of the Advisory Board in the Prime Minister's Department, and further as Chairman of the Industrial Court. He was thereafter appointed as the Director General of the Insolvency Department before being appointed as a judicial commissioner of the High Court of Malaya.

Dato' Ahmadi began his career in the superior courts in August 2007 where he was appointed as a judicial commissioner. He presided in the High Court of Malaya at Muar; hearing both criminal and civil matters. After a three-year stint as a judicial commissioner, he was elevated as a High Court judge in 2010 where he continued to sit in the Muar High Court and later in the Shah Alam High Court. Four years later, in 2014, he was elevated to the Court of Appeal.

Lawyers would agree that Dato' Ahmadi adopted a firm and no-nonsense approach on the bench. Justice Dato' Ahmadi thoroughly read his files and also had the ability to immediately see through the essential issues in a case while hearing submissions from counsels. Although, Dato' appeared stern and serious, he always attempted to temper justice with mercy, whenever and wherever possible. He was a firm believer in the adage that justice must not only be done but seen to be done. Officers and staff who worked under Dato' would attest to the fact that despite being a strict boss, he was kind and was always appreciative of the good work of his subordinates.

All cases were important to Dato' Ahmadi; whether it is the case of a farmer facing a traffic offence, or a political or corporate bigwig charged with robbing the country of its wealth or a common criminal facing a capital punishment charge. Whatever the nature of the case was, it was of paramount importance that justice should reign supreme. This approach of Dato' was well illustrated in the case of *Great Eastern Life Assurance (Malaysia) v Prakasa Rao a/l Samachulu* [2019] 6 MLJ 350. In that case, the behemoth commercial entity rejected the insurance claim of a mechanic who suffered total and permanent disability. Dato' Ahmadi granted judgment in favour of the mechanic by scrutinising the definition of total and permanent disability in the insurance agreement. Dato' Ahmadi believed that all who appeared before him irrespective of their standing in society should be given equal treatment and access to justice.

Dato' Ahmadi delivered many prominent judgments in criminal matters. Some of these cases merit brief mention here.

1. In *Derrick Randall v Pendakwa Raya* [2019] 2 MLJ 124, the appellant was convicted at the High Court for the offence of drug trafficking. However, the trial judge omitted to consider the exculpatory cautioned statement of the appellant when finding him guilty at the end of the case for the defence. Dato' Ahmadi said in his judgment that the omission of the trial judge to consider the cautioned statement contravened section 182A of the Criminal Procedure Code. It meant that not all the evidence was taken into account in convicting the appellant. The conviction was quashed.

2. In *Caniete Robelyn Mastelero lwn PP* [2019] 1 LNS 397, Dato' Ahmadi considered the definition of trafficking in section 2 of the Dangerous Drugs Act 1952, particularly the word "carrying". It was argued that merely carrying without any "overt act" does not come within the definition of section 2. Justice Dato' held that carrying the drugs in question from Macau to Malaysia constitutes "an overt act".

3. In *PP v Ng Nai Lim* [2011] 1 LNS 487, Dato' restated the important principle that there is no legal presumption that an interested witness should not be believed. In that case, the defence called the son of the accused to testify. However, after carefully considering the testimony of the son, Dato' rejected it as being biased. Dato' did not hesitate to dissent from the views of his brother and sister judges.

4. In *Hooman Khanloo v PP* [2015] 5 MLJ 199, Dato' Ahmadi gave a different interpretation on the purport and application of section 37(d) of the Dangerous Drugs Act 1952.

5. In *Rasoul Bagherbejandi Ahmad v PP & Another* Case [2015] 1 LNS 772, upon discovering that the trial judge's grounds of decision was cursory, in applying the principle that an appeal is a continuation of proceedings by way rehearing, Dato' Ahmadi decided to minutely comb through the evidence to address the issues of fact in the appeal.

After an illustrious career of almost 42 years both in the Attorney General's Chambers and the Judiciary, his Lordship finally hung up his robe on February 5, 2020. Currently he spends his years in retirement along with his loving family; enjoying most of his time playing with his beautiful grandchildren in Shah Alam, and from time to time commuting to his durian orchard located somewhere in Batang Kali.

The Islamic geometric iron decorates the wall of the Palace of Justice.

Datuk Mairin bin Idang @ Martin

Datuk Mairin bin Idang @ Martin was born on August 21, 1954. He began his career in the Lands and Surveys Department of Sabah. He was later given the opportunity to study law at University of Buckingham in the United Kingdom in 1979. Datuk Martin was called to the English Bar in 1981 and returned to Sabah to resume his career in the State Civil Service. He held senior positions in the State Civil Service such as Assistant Collector of Land Revenue, District Officer and Registrar of Land Titles.

In 1985, Datuk Martin left the government service to join the ranks of private practitioners. Initially, he commenced practice with the law firm of Malanjum, Idang and Rantau. He later started his own solo practice styled as Messrs Idang & Co. As a lawyer, Datuk Martin handled both conveyancing and litigation matters.

Datuk Martin was appointed a Judicial Commissioner of the High Court of Sabah and Sarawak on December 2, 2013. His Lordship served as a judicial commissioner in Kuching, Miri and Sandakan before being elevated as a High Court Judge on April 30, 2018. He was then transferred to Kota Kinabalu High Court. Datuk Martin presided over several public interest cases in his judicial career. Among the notable cases are *Government of Malaysia v Nurhima Kiram Fornan & Ors* [2020] MLJU 425, *Euggine Kausai v Yapidmas Plantation Sdn Bhd & Ors* [2020] MLJU 1001 and *Marvelgold Development Sdn Bhd v Majlis Daerah Penampang & Anor (Penampang District Council & Anor)* [2020] MLJU 2123.

Datuk Martin officially retired on November 21, 2020.

Errata:
The Yearbook 2019 article on retired judges contained errors in the spelling of Datuk Su Geok Yiam's name. We apologise for the inadvertent mistake and any discomfort this might have caused Datuk Su.


KOMPLEKS MAHKAMAH KOTA KINABALU

A scenic view of the entrance of the Palace of Justice (Photograph courtesy of Mdm. Hamidah Abdul Rahman)

JUDICIAL TRAINING: COURSES ORGANISED BY THE JUDICIAL ACADEMY

The following courses were conducted by the Training Committee of the Judicial Appointments Commission in 2020:

Interpretation of statutes

This one-day course had the objective of enhancing knowledge of the High Court judges in interpreting statutes. It was held on March 6, 2020 in the Banquet Hall of the Palace of Justice, Putrajaya. The facilitators of this course were Justice Zaleha Yusof, Judge of the Federal Court and Justice Umi Kalthum Abdul Majid, judge of the Court of Appeal. Twenty-three judges comprising six High Court judges and 17 judicial commissioners participated in this course.

The Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat delivered the opening remarks before Justice Zaleha Yusof delivered the talk on the course subject matter. Next, Justice Umi Kalthum Abdul Majid guided the participants in a group discussion session on the case studies assigned to each group before the participants presented the results of their discussion.

The Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat (third from left) delivering the opening remarks for the course entitled "Interpretation of Statutes"

Also seen in photo are (L–R): Justice Zaleha Yusof, FCJ and course facilitator; Justice Rohana Yusuf, PCA and Justice Haji Mohd Zawawi Salleh, FCJ and Chairman of the Training Committee of the Judicial Academy

Justice Zaleha Yusof, FCJ and course facilitator,
speaking at the course entitled "Interpretation of Statutes"

Justice Umi Kalthum Abdul Majid, JCA and course facilitator (second from right), addressing participants of the course entitled "Interpretation of Statutes" during the group discussion

Also with her are (L–R): Justice Rohana Yusuf, PCA; Chief Justice Tengku Maimun Tuan Mat (hidden); Justice Haji Mohd Zawawi Salleh, FCJ and Chairman of the Training Committee of the Judicial Academy and Justice Hasnah Mohamed Hashim, FCJ and a member of the Training Committee of the Judicial Academy

Group photo of the participants of the course entitled "Interpretation of Statutes" held on March 6, 2020, before the Movement Control Order took effect on March 18, 2020

L–R (seated): Justice Abd Wahab Mohamed; Justice Azmi Ariffin; Justice Mary Lim Thiam Suan; Justice Zaleha Yusof; Justice Mohd Zawawi Salleh; The Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat; Justice Rohana Yusuf, PCA; Justice Umi Kalthum Abdul Majid; Justice Halijah Abbas; Justice Ismail Brahim and Justice Dean Wayne Daly

L–R (standing): Judicial Commissioners Aslam Zainuddin; Shahnaz Sulaiman; Rohana Abd Malek; Julie Lack; George Varughese a/l K.O. Varughese; Quay Chew Soon; Khairil Azmi Haji Mohamad Hasbie; Wong Hok Chong; Nadzarin Wok Nordin; Wong Siong Tung; Fredrick Indran X.A. Nicholas; Tee Geok Hock; Justice Muhammad Jamil Hussin; Judicial Commissioner Atan Mustaffa Yussof Ahmad; Justice Hassan Abdul Ghani; Judicial Commissioners Leonard David Shim; Latifah Haji Mohd Tahar; Norsharidah Awang and Evrol Mariette Peters

Induction programme for judicial commissioners

This programme was held from July 6 to 9, 2020 in the Conference Hall of the Palace of Justice, Putrajaya. Despite only lasting three and a half days long, this programme covered many topics relevant to the 13 participants who would soon be appointed as judicial commissioners.

The Rt. Hon. the Chief Justice Tun Tengku Maimun Tuan Mat delivered the opening remarks before a course briefing by Justice Haji Mohd Zawawi Salleh, Judge of the Federal Court and the Chairman of the Training Committee of the Judicial Academy. Over the next couple of days, appellate judges spoke to the participants on the following topics: "Salient Features of the Rules of Court 2012"; "When to Recuse"; "Committal Proceedings"; "Dealing with Conflict and Unexpected Contentious Situations"; "Arbitration and Construction Industry Payment and Adjudication Act 2012 (CIPAA)"; "Case Management in Civil Cases and Court-Annexed Mediation"; "How to Read Statutes"; "Judge Craft"; "Business of Judging: Practical Workshop"; "Adjudicating Criminal Cases"; and "Judgment Writing [Section 39B of the Dangerous Drugs Act 1952 and Section 302 of the Penal Code]".

Two members of the Judicial Appointments Commission also addressed the participants. Dato' Mah Weng Kwai, former Judge of the Court of Appeal spoke on "The Art of Judging" while Datuk Emeritus Professor Dr. Shad Saleem Faruqi, Professor of Law at the University of Malaya and constitutional expert spoke on the topic "Constitutional Interpretation".

Besides that, the talks entitled "e-Court System and e-Review" as well as "Salary, Allowance and Benefits for Judges" were delivered by officers and administrative staff from the Office of the Chief Registrar of the Federal Court of Malaysia.

This programme was conducted in the form of lectures followed by question and answer sessions. Notably, this programme was the first to be organised by the

On July 6, 2020, Justice Hasnah Mohamed Hashim (left) and Justice Mary Lim Thiam Suan (right), Judges of the Federal Court and members of the Training Committee of the Judicial Academy jointly delivered a talk entitled "Salient Features of the Rules of Court 2012" to participants of the induction programme

The participants of the Induction Programme for Judicial Commissioners were seated apart in order to comply with social distancing rules

Judicial Academy after the outbreak of COVID-19 in Malaysia, and was held in compliance with the standard operating procedures and guidelines under the Recovery Movement Control Order.

Expert evidence

This course was held with the objective of giving participants an overview on the admissibility of and methods of analysing expert evidence in order for them to better understand the issues involved. A total of 16 High Court judges participated in this course which lasted one and a half days, from August 7 to 8, 2020 in the Banquet Hall of the Palace of Justice, Putrajaya. Justice Lee Swee Seng and Justice Darryl Goon Siew Chye, both judges of the Court of Appeal, facilitated this course.

The Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat delivered the opening remarks before a course briefing by Justice Haji Mohd Zawawi Salleh, Judge of the Federal Court and the Chairman of the Training Committee of the Judicial Academy. Other appellate judges also attended the course, namely Justice Rohana binti Yusuf, President of the Court of Appeal; Justice Azahar Mohamed, Chief Judge of Malaya; Justice Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak; Justice Hasnah Dato' Mohammed Hashim and Justice Mary Lim Thiam Suan, Judges of the Federal Court; and members of the Training Committee of the Judicial Academy.

The next session comprised of individual presentations by the participants. Eight participants were selected to present on topics such as "The Jurisprudential Aspect of Expert Evidence"; "Managing Expert Witnesses"; "Hot-tubbing or the Concurrent Giving of Evidence"; and expert evidence. This session was structured to allow participants to begin presenting with the abstract jurisprudential aspect before moving on to the practical aspect of handling expert witnesses during trials. The participants were introduced to the method of hot-tubbing expert witnesses, which is gaining popularity in courts globally and in arbitration proceedings. The participants then turned to a consideration of the specific issues raised by expert evidence when it is adduced in various areas of law such as medico-legal cases, intellectual property cases, corporate and commercial cases, construction cases and criminal cases.

Guest speaker Dato' Mah Weng Kwai, member of the Judicial Appointments Commission and former Judge of the Court of Appeal speaking to the participants on the "Role of Expert Witnesses"

Chief Justice Tengku Maimun Tuan Mat (left) presenting the guest speaker, Haji Mohamed Zaini Abdul Rahman, Director-General of the Department of Chemistry, Malaysia (right) with a token of appreciation for delivering his talk entitled "Expert Evidence in Dangerous Drugs Analysis". Accompanying the Chief Justice is Justice Mohd Zawawi Salleh, FCJ and Chairman of the Training Committee of the Judicial Academy (centre)

(L–R): Justice Mary Lim Thiam Suan, FCJ and member of the Training Committee of the Judicial Academy; Justice Mohd Zawawi Salleh, FCJ and Chairman of the Training Committee of the Judicial Academy; Justice Lee Swee Seng, JCA and Justice Darryl Goon Siew Chye, JCA and facilitators of the course "Expert Evidence"

A group photo of the participants of the course entitled "Expert Evidence". The top four judges, members of the Training Committee of the Judicial Academy and the facilitators stood in the first row together with the guest speaker, Mohamed Zaini Abdul Rahman, Director-General of the Department of Chemistry, Malaysia (first on the left). The rows behind comprised the participants gathered around their tables allocated for group discussion

On the second day of the course, guest speaker, Dato' Mah Weng Kwai, member of the Judicial Appointments Commission and former Judge of the Court of Appeal spoke to the participants on the "Role of Expert Witnesses". The course was concluded after a group discussion on assigned case studies.

Writing better judgments

The objective of this course was to introduce participants to the main concepts of judgment writing using the 5C's approach, i.e. clear, concise, comprehensive, coherent and convincing. The programme was modelled on the Writing Better Judgment module organised by the Pacific Judicial Development Program in Adelaide, Australia which was attended by Justice Vernon Ong Lam Kiat, Judge of the Federal Court and Justice Vazeer Alam Mydin Meera, Judge of the Court of Appeal. This course was held from September 17 to 19, 2020 in the Cashmere Ballroom, Zenith Hotel, Putrajaya and benefitted 19 judges and judicial commissioners.

The Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat delivered the opening remarks before a course briefing by Justice Haji Mohd Zawawi Salleh, Judge of the Federal Court and the Chairman of the Training Committee of the Judicial Academy. There were 12 facilitators for this course which spanned 10 sessions, as summarised in the table below:

Date	Session	Title	Facilitator
September 17, 2020	1	Why Good Judgments Matter?	Justice Azahar Mohamed, Chief Judge of Malaya Justice Abang Iskandar Abang Hashim, Chief Judge of Sabah and Sarawak
	2	Issues-Based Approach to Judgment Writing: The Conceptual Framework	Justice Nallini Pathmanathan, Judge of the Federal Court
	3	The First Page and Creating Headings	Justice Vazeer Alam Mydin Meera, Judge of the Court of Appeal
	4	Individual Feedback Session and Exercise on Re-writing the First Page and Creating Headings Page and Creating Headings	Justice Vernon Ong Lam Kiat, Judge of the Federal Court All facilitators
	5	The Structural Construct of an Issues-Based Judgment	Justice Lee Swee Seng, Judge of the Court of Appeal Justice Vazeer Alam Mydin Meera, Judge of the Court of Appeal
September 18, 2020	6	The Road to Judgment	Justice Rohana Yusuf, President of the Court of Appeal
	7	Workshop on Practical Issue Identification	All facilitators
	8	Workshop – Review of the Re-written First Page and List of Headings	All facilitators
	9	Last-minute cancellation by external speaker. Session 10 was brought forward.	
	10	Managing Procrastination and Competing Priorities	Justice Haji Mohd Zawawi Salleh, Judge of the Federal Court and the Chairman of the Training Committee of the Judicial Academy
September 19, 2020	11	Workshop – Review of the Re-written Submitted Judgment	All facilitators

[Other judges who served as facilitators but did not have individual topics above were Justice Zaleha Yusof and Justice Hasnah Dato' Mohammed Hashim, both Judges of the Federal Court, and Justice Nor Bee Ariffin and Justice Hajah Azizah Haji Nawawi, both Judges of the Court of Appeal.]

The Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat delivering the opening remarks for the course entitled "Writing Better Judgments" on September 17, 2020

As the main feature of this course, participants were asked to draft grounds of judgment on the spot. The draft grounds of judgment had to be between 10 to 20 pages long and around 7,000 words in length. Under the facilitators' guidance, the participants redrafted their grounds of judgment based on the principles learnt during the course, taking into account the feedback of their respective facilitators and submitted their redrafted grounds.

The course ended with closing remarks by Justice Rohana Yusuf, President of the Court of Appeal. The participants were able to improve their judgment-writing skills through this course and the Judicial Academy resolved to organise similar courses on this subject every year.

Justice Rohana Yusuf, PCA speaking to the participants on the topic
"The Road to Judgment" on September 18, 2020. On her right is Justice Abang Iskandar Abang Hashim, CJSS

L–R: Justice Azahar Mohamed, CJM and Justice Abang Iskandar Abang Hashim, CJSS speaking to participants during their joint session "Why Good Judgments Matter?" on September 17, 2020

Group photo of some of the facilitators for the course "Writing Better Judgments"

L–R (standing): Justice Haji Mohd Zawawi Salleh, Judge of the Federal Court and Chairman of the Training Committee of the Judicial Academy and Justice Hasnah Dato' Mohammed Hashim, Judge of the Federal Court
L–R (seated): Justice Hajah Azizah Haji Nawawi and Justice Nor Bee Ariffin, both Judges of the Court of Appeal

Justice Vernon Ong Lam Kiat, Judge of the Federal Court speaking on the topic
"The First Page and Creating Headings" on September 17, 2020

Justice Lee Swee Seng, JCA speaking during the joint session entitled
"The Structural Construct of an Issues-Based Judgment" on September 17, 2020
Also seen in the photo is Justice Hasnah Dato' Mohammed Hashim, FCJ, another facilitator of this course

CHAPTER

06

JUSTICE IN THE DIGITAL AGE

THE RISE OF THE MACHINES: JUDGES vs ARTIFICIAL INTELLIGENCE FROM THE MALAYSIAN PERSPECTIVE

by
The Right Honourable Dato' Abang Iskandar Abang Hashim
Chief Judge of Sabah and Sarawak *
delivered at the
6th Joint Judicial Conference – Brunei, Malaysia, Singapore
on July 22, 2021

The Right Honourable Chief Justice of Brunei Darussalam,
The Right Honourable the Chief Justice of Malaysia,
The Honourable the Chief Justice of Singapore,
President of the Court of Appeal and Chief Judge of Malaya,
Honourable Judges of the Superior Courts and Subordinate Court Officers from Brunei, Malaysia and Singapore, and of course, learned Judge Aedit Abdullah from the Supreme Court of Singapore,
Ladies and Gentlemen, a very good afternoon to all.
It gives me great pleasure to present before you all a topical paper entitled, "The Rise of the Machines: Judges vs Artificial Intelligence from the Malaysian Perspective".

Introduction

We are now witnessing the rise of the digital world. One of the significant emerging new technologies is the growing development of artificial intelligence ("AI"). There is no generally accepted definition of AI, but at its core, AI is the science of teaching computers how to "learn, reason, perceive, infer, communicate, and make decisions like humans do".[1] The initial goal was called machine learning, where the machine (a computer) begins to make decisions with minimal programming. The first known documented genesis of AI began in 1950 when Alan Turing, a young British polymath explored the mathematical possibility of AI, when presenting his paper "Computing Machinery and Intelligence". Six years later, in 1956, the term AI was first coined by John McCarthy when he hosted the fateful "Dartmouth Summer Research Project on Artificial Intelligence Conference" in the United States of America ("US").[2]

Industries foraging AI the most

Since then, there has been a relentless race to harness the power of AI. Businesses, researchers, and innovators are continually assessing the practical applications and economic potentials of AI. As of today, there are at least nine (9) industries that are using AI the most, namely entertainment, real estate, retail and commerce, travel, banking and financial services, manufacturing, food tech, healthcare, logistics and transportation.[3] AI has now quietly, but surely, become a part of our everyday lives in ways we never thought possible before.

AI in judicial systems around the globe

Although AI technology emerged 50 years ago, it was not until the late 1990s that some judiciaries around the world began embracing it as a factor in the implementation of their daily judicial functions. Countries like the US, Estonia, India and China are but a few examples of judicial systems that have developed their AI systems.

* I would like to thank my Special Officer, Mohd Aizuddin Zolkeply for his assistance in preparing this speech.

1 Sterling Miller, "Artificial intelligence and its impact on legal technology: To boldly go where no legal department has gone before", Thomson Reuters Legal, <https://legal.thomsonreuters.com/en/insights/articles/ai-and-its-impact-on-legal-technology> (accessed July 20, 2021).

2 Rockwell Anyoha, "The History of Artificial Intelligence", Harvard University, The Graduate School of Arts and Science, < https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/> (accessed July 20, 2021).

3 Akash Takyar, "AI Applications Across Major Industries", LeewayHertz, <https://www.leewayhertz.co.m/ai-applications-across-major-industries/> (accessed July 19, 2021).

AI in judicial systems: To what extent it is used or adopted by the courts around the world

I will now briefly explore the extent of the use of AI in those four (4) countries and Malaysia. In the US, the system is called COMPAS and it is being used by 60 courts across a few states.[4] It was first developed in 1998 and has been revised over the years.[5] Its function is to assess the likelihood of a defendant becoming a recidivist or a repeat offender. During sentencing hearings, the court may refer to COMPAS before imposing the appropriate sentence against the accused. The system has, however, been challenged in the famous case of *Loomis v Wisconsin*[6] on the ground of alleged infringement of the accused's right to an individualised sentence and his right to be sentenced on accurate information. On appeal to the Supreme Court of Wisconsin, the court affirmed the trial court's decision and further held that judges must, however, proceed with caution when using such risk assessments. To ensure that judges weigh risk assessments appropriately, the court prescribed how these assessments must be presented to trial courts and the extent to which judges may use them.[7]

In India, the Supreme Court had recently launched an AI-based software called SUPACE. This system seeks to assist judges to collect relevant facts, discovery of facts, and laws from the voluminous documents filed daily in court. The system is not used for decision making. The autonomy and discretion of judges remain intact with no interference from the software.[8]

In Estonia, the AI-powered judge was developed to handle disputes at Small Claims Courts below Euro 7,000. The system which was developed in 2019 helps generate decisions based on particulars of claim and documents filed by the parties. Aggrieved parties, however, have the right to appeal against the decision to the human judge.[9]

4 Ngoc Chi Nguyen, Van Quan Nguyen, Sébastien Lafrance, "The Role of Artificial Intelligence in the Impartiality of the Judiciary", Journal of Critical Reviews Vol 7, Issue 17, 2020, May 1, 2020.

5 Practitioner's Guide to COMPAS Core, Northpointe, 2015.

6 881 N.W.2d 749 (Wis. 2016).

7 "State v Loomis: Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing", Harvard Law Review; Criminal Law, March 10, 2017.

8 Shanthi S, "Behind SUPACE: The AI Portal of The Supreme Court of India", https://analyticsindiamag.com/behind-supace-the-ai-portal-of-the-supreme-court-of-india/ (accessed July 19, 2021).

9 Aleš Završnik, "Criminal justice, artificial intelligence systems, and human rights", ERA Forum, Journal of the Academy of European Law, <https://link.springer.com/article/10.1007/s12027-020-00602-0> (accessed July 19, 2021).

The People's Republic of China courts have embarked on what is called "Internet Court" or "Smart Court" in some provinces, including Beijing. This mechanism called Online Dispute Resolution is a fully digitalised court from the stage of filing of documents until decision is delivered. The system embeds AI in its application such as identity authentication, litigation risk assessment, real-time voice recognition and others.[10]

Malaysia's AI model

Having explored the use of AI in the four (4) different judicial systems, I will now proceed to share with you the AI system model that we employ in Malaysia. Our AI system, called "AiCOS" – Artificial Intelligence in Court Sentencing – which is being used in the Sabah and Sarawak courts, was first mooted by Tan Sri David Wong Dak Wah, former Chief Judge of Sabah and Sarawak. The idea was quickly taken on board. The court officers, together with SAINS, formed the AI Committee,[11] whose members huddled together for six months to realise the "virtual" challenge. From such endeavour, AiCOS was created. AiCOS was developed to assist magistrates by recommending the appropriate sentences based on sentencing trends from previous cases. Currently, AiCOS is being used for possession of drug offences under section 12(2) of the Dangerous Drugs Act 1952.

Stages of development

There are six stages of development for AiCOS which began with data analysis (September 2019–October 2019), data collection and extraction (November 2019–December 2019), machine learning and software development (December 2019–January 2020), consultation with court users and stakeholders (February 1, 2020–February 18, 2020), execution (February 19, 2020) and last but not least monitoring and maintenance (February 19, 2020 until present). It took six months from the date of data analysis until AiCOS was finally deployed in February 2020.

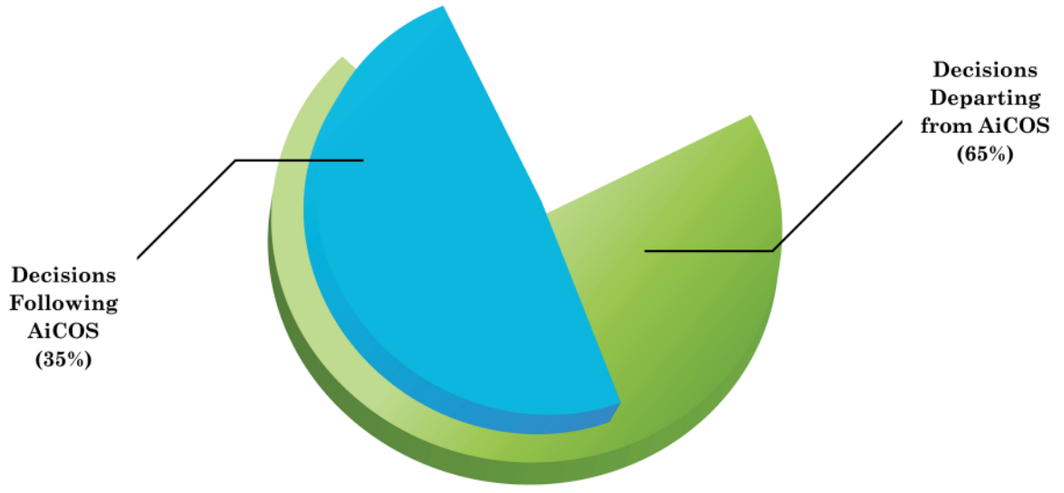
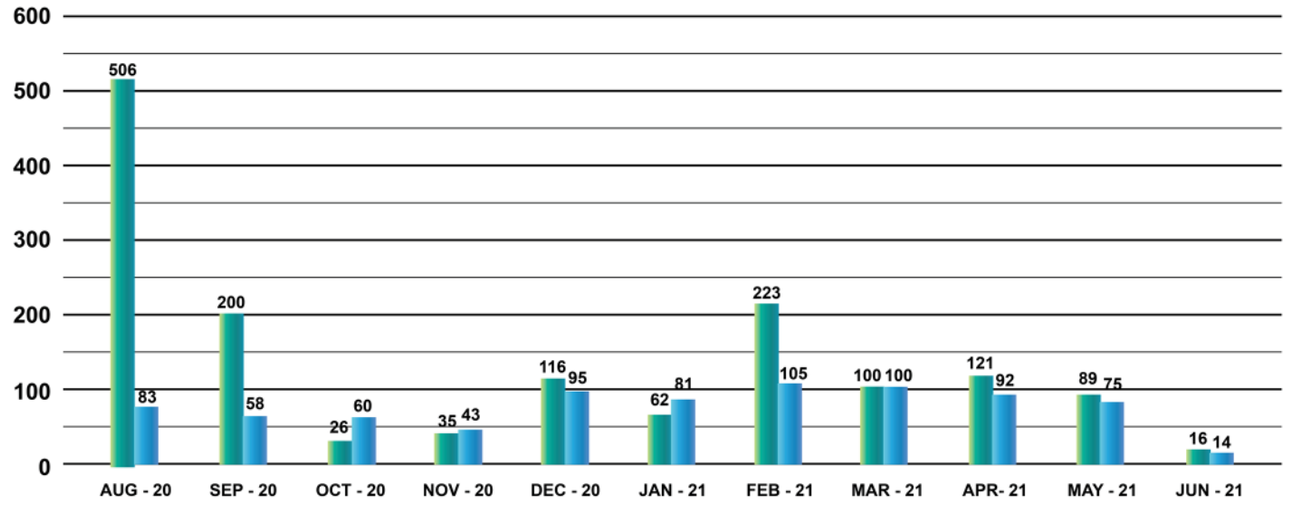


CHART 1

10 Bryan Lynn, "Robot Justice: The Rise of China's 'Internet Courts'", VOA Learning English: Science and Technology, Dec 11, 2019, <https://learningenglish.voanews.com/a/robot-justice-the-rise-of-china-s-internet-courts-/5201677.html> (accessed July 19, 2021).

11 SAINS has been the e-Court service provider for the Sabah and Sarawak courts since 2007. A private company wholly-owned by the Sarawak State Government, SAINS has been instrumental in the success of AiCOS development. AiCOS was a proof of concept pilot project commissioned by the courtesy of SAINS. The Court Committee consisted of Dayang Ellyn Narisa Abang Ahmad, Shafiza Abdul Razak Tready, Zaiton Anuar and Mohd Syukri Mokhtar from the Kuching Courts. The Committee has since been expanded, consisting of Justice Dean Wayne Daly and Justice Amelati Parnell as Co-Advisors, Mr Nixon Kennedy Kumbong as Chairman, Mr Marutin Pagan as Coordinator, Mr Minda James, Mr Samuel Cheng and Dr Chong Nguan Soon as Technical Committees, Ms Elsie Primus, Mr Amir Shah bin Amir Hassan, Ms Shafiza Abdul Razak Tready, Ms Wan Farrah Farriza Wan Ghazali, Ms Jessica Ombou Kakayun, Ms Zaiton Anuar, Mr Afiq Agoes and Mr Mohd Syukri Mokhtar as Committee Members from the Sabah and Sarawak courts and the Office of the Chief Judge of Sabah and Sarawak as Secretariat.

GRAPH DEPICTING DECISIONS FOLLOWING AND DEPARTING FROM AiCOS



How does AiCOS work?

AiCOS works in two scenarios, namely for the accused who pleads guilty and the accused who is found guilty after a full trial. The magistrate will record the plea of mitigation and aggravating factors submitted by the parties and then enter five (5) parameters as to the offence, such as weight and type of drugs as well as background of the accused such as age, gender, employment status, marital status, previous record and whether the accused pleads guilty or whether he is found guilty. The screen displaying the notes of proceeding will be shown to the parties from the start until the end of proceedings. Having entered the relevant details, AiCOS will generate recommendation of sentences based on degree of probability. The recommended sentence will be shown to the parties and they are asked if they have further submissions to make having seen the recommendation by AiCOS. After final submissions have been made, the court will mete out the sentence and it will state whether it follows or departs from the AiCOS recommendation. The court must state reasons for any departure from the recommendation. In ensuring the procedure of applying AI is observed and in order to maintain judicial transparency, all sentencing courts must strictly follow the standard operating procedure which was issued by the Office of the Registrar of the High Court of Sabah and Sarawak.

Impact of the system

The impact of the system can be seen from the two charts above. The Pie Chart (Chart 1) highlights the usage of AI, where out of 2,300 cases (decided from August 2020 until June 2021), only 35 percent followed the recommendation of AiCOS while 65 percent departed from it. The Bar Chart (Chart 2) shows the number of cases that followed or departed from AiCOS recommendations according to months in both the Sabah and Sarawak courts. The impact of this system can be seen from two (2) perspectives. Firstly, the system has managed to streamline and set the trend of sentencing in the courts. Secondly, it remains only as guidelines as magistrates are still using human intelligence in meting out the most appropriate sentence on a case-by-case basis despite the recommendations by AiCOS. There has not been any abdication of sentencing discretion to AI.

Moving forward

Data is the fuel for AI. It works best when large amounts of rich, big data are made available in the system. The more facets the data covers, the faster the algorithms can learn and fine-tune their predictive analyses.There is no minimum amount of data needed but the database should at least contain a few thousand entries. The Malaysian Judiciary will continue to leverage the use of Big Data and analytics from our current case management system to expand the application of AI for administrative and other non-judicial purposes as well, for instance in budget preparation. Currently, AiCOS is being expanded to include other offences. At the same time, the AI Committee

is presently developing a new AI system for personal injury claims in civil cases. Its function is to recommend appropriate damages in personal injury claims. The prototype is called "e-Compendium". It will be given a proper name once commissioned. I am also happy to report that the courts in Peninsular Malaysia, i.e. the Klang Valley, will begin implementing their pilot project drawing from AI technology, in sentencing matters involving twenty (20) identified offences under various statutes.

Conclusion

The potential applications of AI are already being explored by many judicial systems around the world and many have embarked on their very own AI journeys. It has been proven based on the current use of AI in some judicial systems that the processing of judicial data by AI-based systems or methods are likely to improve transparency in meting out criminal justice by improving predictability in the application of the law and thus promoting consistency in sentencing similar offences.

The AI machines are created by humans and by the look of things, they are here to stay. But it is not our intention that they take over completely the very judicial function that we, humans, have been dispensing. They are created to assist us, not to replace us. While they may be highly "intelligent", they lack human empathy, an innate human quality so critical in our judging process. They are with us, but they are not us … at least, not yet. May the force be with us!

Thank you for your kind attention and indulgence.

ADOPTION OF TECHNOLOGY BY THE MALAYSIAN JUDICIARY DURING THE COVID-19 PANDEMIC IN 2020

"The Chinese use two brush strokes to write the word 'crisis.'
One brush stroke stands for danger; the other for opportunity. In a crisis, be aware of the danger – but recognize the opportunity."
- John F. Kennedy

Every dark cloud has a silver lining. The COVID-19 pandemic significantly impacted almost all aspects of our lives. The justice system was also affected by the pandemic. The pandemic made it necessary for the business of the courts to be drastically changed in a significant way. Indeed, the pandemic precipitated an expeditious application of digital technology to bring about dramatic changes and reshape the way the courts work. Whilst the pandemic impeded the conduct of in-person court hearings, it also created opportunities for innovation and became an accelerator for everyone to quickly adopt digital and remote technology. Under normal circumstances, the risk and fear of failure would have overridden argument for change but in a crisis, the real risk lies in doing nothing. Without the COVID-19 pandemic, many technological adaptations made by the Malaysian Judiciary in 2020 may have taken many more years to become reality.

Status of the use of technology by the Malaysian Judiciary in early 2020

To understand the Malaysian Judiciary's response to the COVID-19 pandemic, it is essential to provide a brief background on the existing court case management system and the implementation of information and communications technology ("ICT") within the Judiciary. Since 2010, the Judiciary has operated two different digital court systems for e-filing of court documents, and case management in the courts in Peninsular Malaysia and in Sabah and Sarawak. Unlike Sabah and Sarawak where the implementation of the Integrated Court System has reached all courtrooms, the changes to create an e-Court system in courts in Peninsular Malaysia have not been uniform.

This is because in Peninsular Malaysia, the e-Court system was implemented incrementally through phase deliverables. Phase 1 of the e-Court system was rolled out in 2010 with a focus on installing and implementing the network infrastructure, common information technology ("IT") infrastructure, office automation and installation of court recording and transcription equipment in 418 court rooms throughout Peninsular Malaysia.

The main e-Court application system comprises the case management system ("CMS"), the queue management system and the e-Filing system. These softwares were proprietary and during Phase 1, the e-Court system was rolled out to only eight main locations where the courts were the busiest and received the heaviest caseload. Being proprietary software, additional costs would have been incurred to obtain licences for their use in other court locations. Since 2012, the Judiciary planned to extend the e-Court system to all 102 court locations throughout Peninsular Malaysia. However, with budget constraints under the 11th Malaysia Plan, this was only partly achieved when the system was replaced with Phase 2 of the e-Court system in 2016.

Phase 2 of the e-Court system was rolled out in December 2016 and involved replacing the IT infrastructure, hardware, and software of phase 1. It also covered a wider scope and included expansion to courts with criminal and appellate jurisdictions. Again, due to budget constraints, Phase 2 of the e-Court system was only able to support the infrastructure and systems management capabilities for 20 court locations, inclusive of the eight locations involved in Phase 1. By contrast to phase 1, the software being the property of the government, allowed a planned expansion to the remaining 82 court locations, to be completed by 2018.

However, by 2018, the eight year-long gap in digital implementation created an obvious disparity between the 20 court locations that were equipped with the e-Court system, and the 82 locations that were not. The lapse of time meant that any implementation of procedural and organisational measures for the expansion of the e-Court system would depend heavily on the degree of a court's pre-existing technological infrastructure and office automation. This meant that the existing hardware might not have been able to support the operation of the new e-Court system. Despite persistent requests and appeals by the Judiciary, no additional budget was allocated by the government for the e-Court expansion until 2020.

As at March 2020, only 271 courts at 20 major cities in Peninsular Malaysia operated on the e-Court system, whereas the remaining 121 courts in 82 locations continued to operate manually. Due to this digital divide, the court's early responses to the pandemic varied. Some parts of the court system were able to proceed with online hearings whilst others saw a dramatic reduction in their ability to deal with cases.

The Judiciary's response to COVID-19 *vis-à-vis* the functioning of the courts can be categorised into four initiatives:

(a) *Organisational* – providing minimal services, by reducing operational hours and occupancy capacity, to limit face-to-face interactions and contact with the public;

(b) *Physical* – re-organising workspaces to accommodate social distancing, disinfecting, and adopting the use of personal protective equipment, face shields, acrylic barriers and face masks;

(c) *Technological* – using digital tools and remote access technology for court proceedings; and

(d) *Procedural* – introducing deadlines and associated procedural steps for the functioning of the courts, as well as amending the relevant legislation to provide for hearings through remote communication technology.

This write-up will only focus on technological initiatives and digital solutions implemented by the Judiciary, and the challenges faced during their implementation. When the government introduced the first Movement Control

Order ("MCO") on March 18, 2020 to curb the spread of COVID-19, all non-essential services were required to close. The judicial and legal services as well as the operation of legal firms were excluded from the list of essential services, which prevented courts from operating during the first MCO, which lasted until May 3, 2020.

Landscape of the online hearing transition and enhanced role of technology in 2020

In response to the MCO, the Judiciary undertook various measures to ensure public access to justice. Most notably, the reliance on and making the best possible use of the existing digital solutions and remote communication technology to conduct online hearings. As at March 2020, the pre-existing systems included the following:

(i) *e-Filing system* – enabling lawyers and agencies carry out filing, e-payment, and online extraction of court documents;
(ii) *Case management system* – containing virtual files of the courts' caseload which is accessible online by judges, judicial officers and court users;
(iii) *e-Review system* – an online forum within the e-Court system which enables judicial officers and legal representatives in a case to conduct case management via the exchange of written messages without physical court attendance;
(iv) *e-Appellate system* – paperless proceedings for appeal hearings and applications at the Federal Court and the Court of Appeal;
(v) *Enterprise messaging and communication* – Skype for Business 2015 video conferencing system ("SfB") hosted by the Judiciary's IT Division:
(vi) *e-mail system*.

Initially, during the first two weeks of the first MCO, the Judiciary postponed all trials and hearings, except for urgent applications. The filing of documents was allowed through the e-Filing system, and case management for civil matters continued via the e-Review system.

Thereafter, the Judiciary issued a notice on March 26, 2020 allowing parties to apply to the courts to conduct online hearings of civil matters via exchange of e-mails, e-Review, or video conference, subject to certain limitations. As evident from the statistics released by the Judiciary on April 15, 2020, the measures adopted were well received across all levels of the court hierarchy.

To demonstrate that the principles of open justice remain paramount during the pandemic, a Court of Appeal hearing of a civil appeal was conducted via video conferencing on March 23, 2020, and, for the first time in Malaysia's history, the proceedings was broadcast live on the internet via the Judiciary's website and YouTube channel. Following that, civil appeal hearings at the Federal Court and the Court of Appeal have been conducted via video conferencing (SfB), whereas case management for criminal cases were conducted online via Microsoft Teams. Since then, video conferencing for appeal hearings have become widespread at the appellate courts.

This approach continued for several weeks until restrictions were eased and the MCO was replaced by the condtional MCO in May 2020. The Judiciary announced on May 12, 2020 that online hearings were to be the norm as far as possible, although physical hearings were possible when interests of justice would require, taking into consideration the nature of the matter, public health and safety. Where physical hearings were conducted, they were done in accordance with the standard operating procedures that were issued from time to time.

At the initial stage of the implementation of online hearings, the usage of the Zoom platform was excluded due to some security issues which remained unresolved at the time. Those issues were later rectified, which allowed for Zoom to be introduced as an option for the courts. By June 2020, the high demand for use of video conferencing platforms for online hearings led to the IT Division purchasing a number of Zoom software licences.

On June 9, 2020, a panel of nine Federal Court judges heard four criminal appeals through the e-Appellate platform. This was a milestone for the Judiciary. The hearing via the e-Appellate platform illustrated the

Malaysian Judiciary's unwavering commitment to a seamless migration and transition into totally paperless proceedings at the appellate courts.

Thereafter, on June 12, 2020, the Judiciary announced that online hearings for appeals and applications for all civil and criminal cases are to be adopted for the Court of Appeal and the Federal Court in Sabah and Sarawak. On June 15, 2020, the Court of Appeal in Sabah began online hearings and the first appeal conducted online was live-streamed, whereas for Sarawak, online hearings for cases began on June 22, 2020. Federal Court hearings for cases in Sabah and Sarawak were scheduled to begin slightly later, i.e. July and August 2020.

Another achievement worth mentioning was that between August 2020 and December 2020, an inquest, which attracted significant public interest, was conducted by a Coroner's Court in Seremban over Zoom and broadcasted on YouTube.

Virtual petitions for admission to the Bar also began in December 2020. In addition to allowing calls to the Bar to take place, the digital setting also made it straightforward for the petition hearings to be streamed on YouTube, allowing newly admitted lawyers' family and friends to witness the special occasion together.

In the early stages, the use of remote communication technology in the courts was considered an interim stopgap measure which was primarily adopted based on the consent of the parties. It was only on December 15, 2020 that the use of remote technology finally became a permanent feature in the administration of justice in Malaysia, when amendments to key court legislation came into force. This included changes to the Courts of Judicature Act 1964, the Subordinate Courts Act 1948, the Rules of Court 2012, the Rules of the Court of Appeal 1994, and the Rules of the Federal Court 1995.

Expansion of e-Court system to all courts in Peninsular Malaysia

As mentioned earlier, under normal circumstances, the fear of failure and risk aversion hinder change from happening. In balancing the risks between system performance failure and the intense need for the use of online hearings, the Judiciary decided to proceed with the expansion of the e-Court system to the remaining 82 court locations (including circuit courts) throughout Peninsular Malaysia which, at the time, still managed their cases manually. This expansion was necessary despite having to rely on the existing office automation equipment at those locations which were mostly outdated and obsolete.

The extensive and intensive expansion programme was carried out within a short period of five months starting from September 22, 2020 in the Klang Valley. Numerous training sessions and system roll-out events were carried out simultaneously at several locations by the Special Task Force teams, comprising officers from the e-Kehakiman Division, IT Division, and representatives from the nearest e-Court locations which included registrars, interpreters and registry staff. At the same time, intensive crash courses were also given by the e-Kehakiman and IT Divisions to all stakeholders, including government and enforcement agencies and lawyers, in those locations.

Enhancement of the e-Court system

The e-Court system itself has been enhanced to include new functions which facilitate case management and case monitoring. These include:

(i) enhanced features in the e-Review module, enabling online case management through the messaging functionality in the CMS system at all levels of the courts;
(ii) alert function for pending grounds of judgment;
(iii) alert function for cases exceeding disposal timelines; and

(iv) enhancements to the e-Filing system, which now includes a display of all documents filed by parties in court. This enhancement has tremendously improved access for parties to view all documents available in the court's file through their e-Filing account. Previously, parties had to go through the tedious process of conducting a file search.

(v) e-Complaints – complaint management system operated by the Corporate Communications Unit.

Implementation of other ICT programmes

Apart from these core systems, there were several ICT programmes carried out in 2020 to ensure efficient and effective service delivery such as the following programmes:

(i) e-Jamin – digital payment services provided by Bank Islam for posting bail through online banking services;

(ii) court document QR codes – a QR code function used for verifying the authenticity of court documents;

(iii) e-Bench Book – The updated *Bench Book* is provided digitally for the convenient reference of all judicial officers;

(iv) judicial tracing QR code – court visitors' tracking information system installed at every court premises;

(v) e-Complaints – complaint management system operated by the Corporate Communications Unit.

Furthermore, programmes that are still considered to be a work-in-progress, but are in the pipeline, include:

(i) Artificial intelligence ("AI") sentencing database – a sentencing database using AI hosted on the CMS;

(ii) Online plea for criminal summons (e-PG) – online proceedings for guilty plea for traffic cases using the e-Court portal platform;

(iii) e-Practice direction – digital repository to facilitate searches for and reference to practice directions, circulars and letters;

(iv) Online mediation – online platform for mediation;

(v) e-Library – digital access to books and reference materials hosted by PKPMP's library;

(vi) e-Commissioner for Oaths – online platform for application and conduct of examinations for the appointment of Commissioners for Oaths;

(vii) e-Attachment – online platform for attachment applications and industrial training for law students;

(viii) Content collaboration platform – on-site cloud storage of cause papers for e-Appellate cases in the Federal Court and the Court of Appeal;

(ix) Court recording and voice-to-text system – a new court recording system with voice-to-text application has been rolled out from October 2020 and will continue until June 2022 to replace the existing court recording and transcription system.

Challenges and technical difficulties

The existing landscape of the Judiciary's digitisation up to 2020 shows that technology has long played a part in the justice system. At the same time, it cannot be denied that the additional infrastructure required during the ongoing pandemic has required a rapid and unprecedented acceleration in the Judiciary's efforts to bring the courts into the 21st century. The speed with which the justice system has managed to adjust to digital justice is striking, and both the courts and their stakeholders have been forced to quickly adapt to this new landscape under compelling circumstances.

Undoubtedly, challenges and technical difficulties are inevitable. They can be summarised as follows:

(i) Digital divide and access to justice

The digital divide includes access to equipment and infrastructure, connectivity to the internet and knowledge and skills to use digital platforms.

- The Federal Court, the Court of Appeal, the High Courts and the subordinates courts at the 20 locations which have been using the e-Court system since 2017 or earlier, were more prepared for online hearings and remote working arrangements. However, the remaining 82 court locations have lagged behind in terms of infrastructure and access to the e-Court system, and have not been able to provide effective online services to the extent anticipated;
- Some legal firms or government agencies rely heavily on the network and IT equipment (such as desktops, printers and scanners) available in their offices and this hinders the use of e-Court facilities and participation in online hearings from home;
- The public does not have access to the e-Court system and service counters at the courthouse, which are operating at a minimum capacity;
- Self-represented litigants do not have technological resources compared to legal firms;
- Criminal matters – Enforcement agencies and the Prisons Department do not have the infrastructure or sufficient facilities to support widespread online hearings.

(ii) Access to support and resources

- Judges – Despite trying their best to adopt and adapt to the digital age, judges still require support or resources to conduct online hearings or work remotely;
- Judicial officers, interpreters, and staff – Lack of computers or stable internet connectivity makes it difficult to conduct online hearings or to work remotely from home;
- Physical access to hardcopy documents stored in the office, including clients' files are required. Lawyers need assistance from their legal clerks to carryout online filing and support them during online hearings, for example, by sharing documents on Zoom.

(iii) Open justice

- Selective online proceedings for live broadcasts and generally online hearings generally are only accessible by lawyers handling the particular cases. The parties, media and public do not have access to online hearings. Permission for parties and the media to have access is given on a case-by-case basis.

(iv) Technology limitation

- Online platform – Users need equipment and infrastructure that meet the minimum requirements to run the relevant softwares, as well as the skills to operate them. Online hearings are vulnerable to technical hiccups or technological failures and without immediate access to technical support, online proceedings might need to be adjourned.
- Digital connectivity – Poor connections or technical glitches may interrupt online hearings conducted over video conferencing software, especially during peak hours.

(v) Data protection, privacy and storage

- Third party softwares were used for online hearings, and there could be issues relating to data protection and privacy especially in cases involving sensitive materials. Furthermore, at the initial stage, there were not enough paid subscriptions to the video conferencing platform to meet the demand for daily online hearings at every courtroom. Some courts had to use the free subscription versions with limited features such as a time limit of 40 minutes per session. Users of the free subscriptions had to keep their own recordings of the online proceedings, which used up significant storage space on their devices.

(vi) Technology adaptation

- The judges, registrars and court staff worked under immense pressure due to unrelenting circumstances solely to keep the justice system moving. For the apex courts, the transition to operating remotely was seamless as the registrars were available to provide support, even though the judges had to contend with technical glitches and learned to work digitally on the go.
- However, the situation was different at the subordinate courts. Some local courts were struggling with the

The sitting of the Court of Appeal via online hearing at the Multimedia & Technology Court (MTC), Palace of Justice for cases from East Malaysia

sudden shift to remote working, while others in major cities seemed to be switching over with little fuss. There were insufficient virtual courtrooms on Zoom Business for them to be made available to all trial courts. It all depended on the creativity and proactive measures undertaken by the judicial officers at the first instance courts to navigate the transition to digital working and online hearings.

Online hearings – The learning curve for the Judiciary

The significant amount of preparation required for online hearings meant that the courts could not simply adopt the court schedules for planned physical proceedings. Some of the additional work carried out by the judicial officers, registrars, and staff to conduct online hearing can be highlighted as follows:

(i) Ascertain which proceedings were appropriate to be conducted remotely – There were different categories of proceedings which were given different priority levels. Several directions and guidelines were issued by the Chief Justice on this matter to facilitate compliance with the MCO;

(ii) Selecting and implementing the technology – The choice of technology, whether e-mail, e-Review, or conferencing, depended on the availability of adequate IT facilities to the courts and individual judicial officers. This included internet connectivity, computers with cameras, scanners, printers, and suitable audio equipment. Important factors to be considered were:

  (a) the ability of parties to navigate the technology without difficulty and without support from court personnel to give instructions during the proceedings; and

  (b) their ability to make arrangements for submissions and presentation of documentary evidence, and use visual aids – all participants must have access to the same technology, as those who do not, may be denied an equal opportunity to present their cases;

(iii) Scheduling and notice of remote proceedings – Courts needed to switch their schedules from having multiple hearings at the same time, to having staggered scheduling with time-specified proceedings to provide more certainty and transparency to litigants;

(iv) Issuance of notice of hearings – Court staff had to issue notice of hearings to all parties via e-mail several days in advance to ensure all parties have the necessary hearing and login information, and are able to prepare for other matters incidental to the hearing. The notice, among others, contained information on the method of the hearing, i.e. via e-Review, e-mail or video-conferencing platform. Text messages were also sent to the parties as reminders;

(v) Cause lists were made available online and clearly indicated which hearings will be held virtually;

(vi) Improvement of knowledge and skills to navigate the online platform and be able to exercise control over the proceedings in the event of technical disruptions and immediate technical assistance was not available. While adjudicating the case, the judicial officers or registrars were also required to simultaneously perform the following functions:

(a) acting as the Zoom "host" and control functions of the courtroom, such as to admit or exclude participants, where appropriate and muting participants;

(b) moving quickly and efficiently from one proceeding (and one set of participants) to another;

(c) if the proceedings was open to public observation, monitoring the time, issuing method of observing proceedings early and, where needed, allowing public access to recordings after the proceedings has ended;

(d) disabling any facility for the recording of the proceedings by other participants;

(e) managing the breakout room feature for certain participants to communicate without the presence of other participants, e.g. allowing a panel of judges at the appellate court to deliberate privately in a breakout room; and

(f) ensuring that records are kept of documentary evidence, and visual aids where appropriate, used during the proceedings;

(vii) Generating a useable official record of the recordings, then storing and uploading it as part of the court's e-filing system;

(viii) Designating a member of staff responsible for coordinating remote proceedings and providing technical assistance during live-streaming sessions, e.g. providing information to users about the procedures to follow and how the technology works;

(ix) Conducting preliminary testing or dry run sessions with all parties before remote hearing proper, to test parties' technological capacity, connectivity, ability to share documents, use of digital aid, etc.;

(x) Several tasks have to be done related to hosting the video conferencing platform:

(a) before a hearing starts, test the connection, and check the visibility of participants, including their dress code, virtual background, and lighting, etc.;

(b) enable the "waiting room" function to allow individuals into the "virtual courtroom" and placing disruptive participants into the waiting room, if necessary;

(c) remind participants to display their name, ensure audio and video clarity and adhere to the prescribed protocols specific to video conferences, as well as the rules and etiquette common to all courtroom procedures;

(d) putt on record that parties have given consent to the proceedings being conducted via video conferencing technology;

(e) inform parties what to do if their connection drops, if any technical issues arise, and how the hearing will proceed thereafter;

(f) produce a clear recording of the proceedings, advising parties to speak slowly and clearly and speak only when prompted. Parties should identify themselves each time they speak and avoid overlap in the recording between speakers;

(g) when the hearing concludes or if it is adjourned, confirm with the parties the next steps to be taken, and, where possible, provide a date for subsequent proceedings;

(xi) For cases scheduled for public access via the court's website, live-stream or YouTube channel –

(a) provide notice on the court's website, identifying the proceedings, scheduled times, and, if permitted, the manner of joining the proceedings;

(b) take steps to avoid "Zoombombing", indecency or disruption by the public. The IT staff will ensure that the proceedings are conducted with the highest security setting (make private or require password);

(c) manage screensharing options so that only the court acts as the "Host" and is allowed to screen share;

(d) for cases which allow public access (real time) via live-streaming:
- restrict full participation only to the parties and court staff;
- e-mail the Zoom link to the relevant parties in the proceedings only and providing simultaneous access to the public by giving notice of the information necessary to view the proceedings on the YouTube channel;
- enable YouTube live-streaming from the Zoom meeting, which is to be initiated by the court;
- adding a "Do Not Record" watermark to the live-stream;
- disable the live chat feature during live-streaming;

(e) if public access is to be given after a hearing, record the proceedings and post the recordings in the court file and inform the public that the recordings are available and how to access them.

A screenshot of the first online hearing before the Court of Appeal on April 23, 2020 chaired by Justice Kamardin Hashim (3rd from left). Justice Lee Swee Seng (5th from left) and Justice Azizah Nawawi (6th from left) were also on the panel

A panel comprising nine Judges of the Federal Court hearing a public interest appeal via video conference at the banquet hall, Palace of Justice on December 16, 2020

A Registrar hosting a remote hearing

These activities mentioned are only some of the additional tasks undertaken by the judicial officers, interpreters, and staff to make the best possible use of technology to conduct online hearings while at the same time working at reduced capacity and with limited resources.

For hearings via video conferencing platforms, the Judiciary will bear the costs of subscription fees and no charges are directly passed on to the court user. Additional budget was allocated for the purchase of audio-video tools such as PolyCom to connect the video conferencing platform to the court technology equipment in the appellate courts.

Online hearings – Stakeholders' response

On the part of the stakeholders, the initial response towards the change to digital justice was rather slow and inadequate. At the beginning of the MCO, some lawyers insisted on opting for online hearings only when all parties to the case have consented. Others supported the move but requested for time to equip themselves with the necessary equipment and internet connectivity to work remotely from home, as legal firms were not allowed to operate at their business premises.

Eventually, as the MCO went on, court users came to terms with the inevitable change looming over them. When the Judiciary requested feedback for proposed guidelines and amendments to certain written laws, we received a positive response from the stakeholders. Regular meetings were then held to update the guidelines to respond to the issues raised by all parties.

Under normal circumstances, most of the changes would involve frequent consultation, extensive testing, training, and a gradual roll-out. However, during this COVID-19 pandemic, the Judiciary has proactively led the way and acted progressively to implement all necessary measures to ensure access to justice. However, this was not a solo effort by the Judiciary. On the contrary, the swift transition to digital justice as the new normal in 2020, was made possible through the crucial and unconditional support, cooperation and collective efforts of all parties and stakeholders.

Conclusion

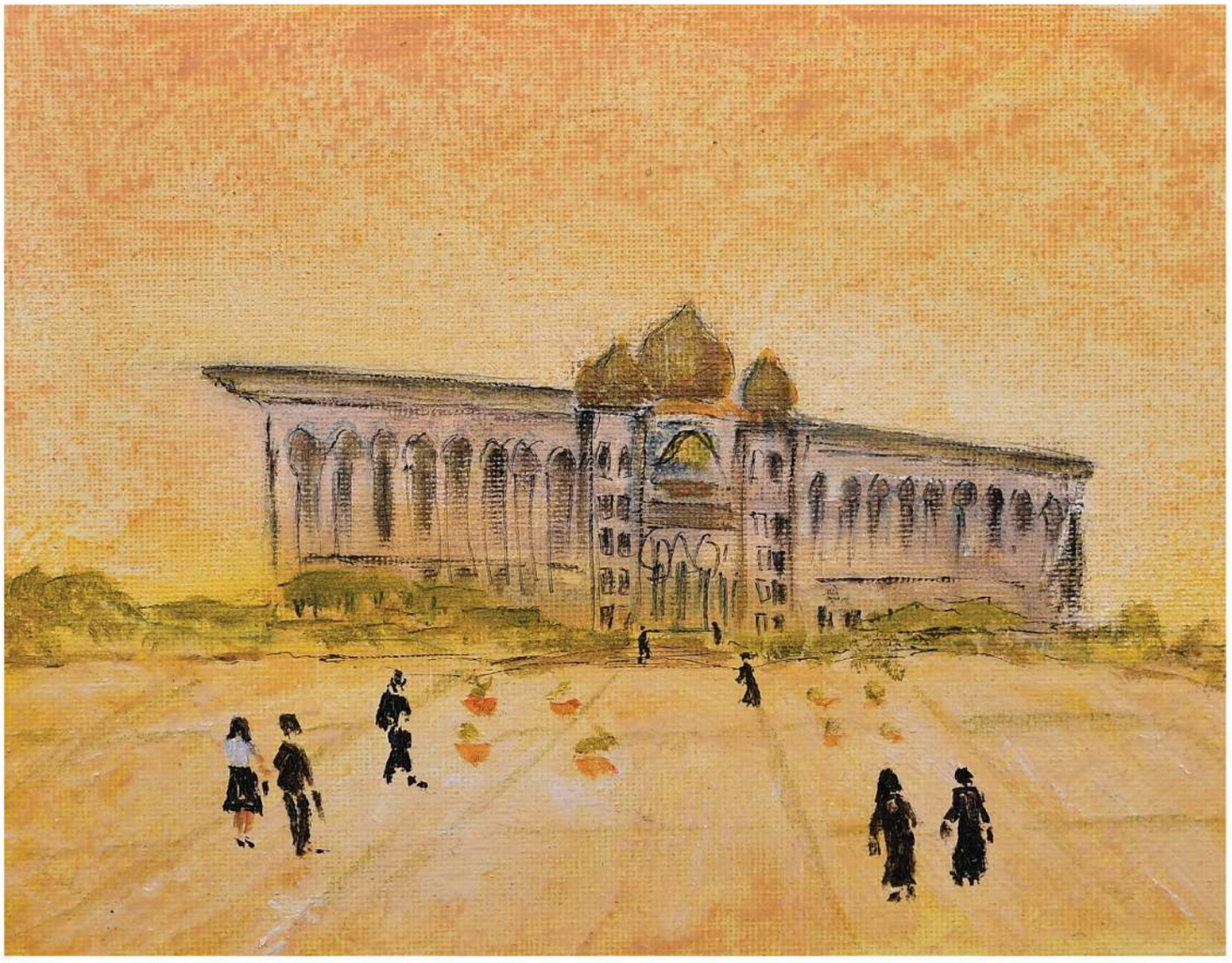
From the beginning of the MCO, the Malaysian Judiciary has made the best possible use of the existing technology to ensure the justice system kept working despite the fact that judicial and legal services and legal firms were not considered as an essential service. The pace at which technology was adopted, and the progress towards

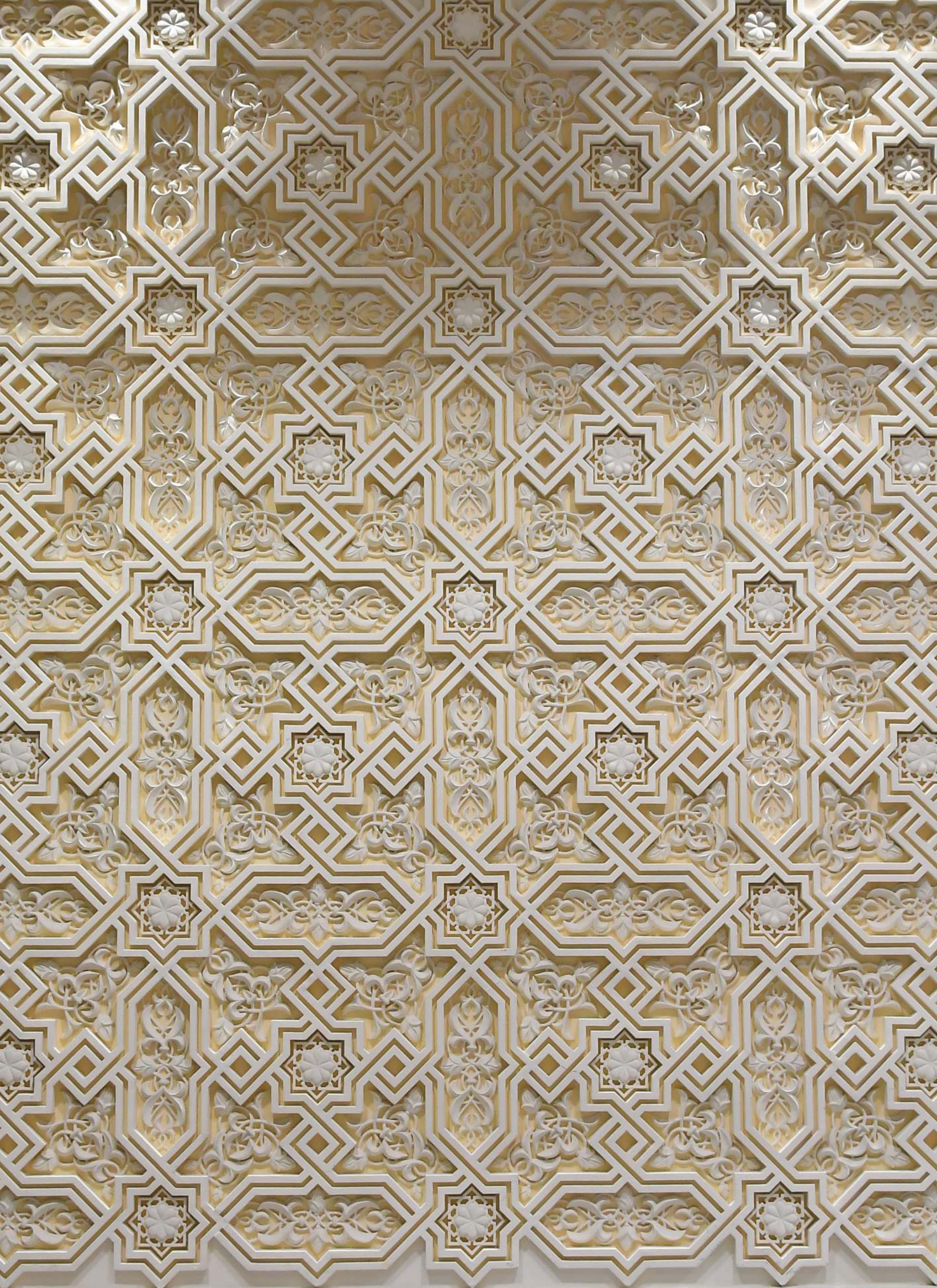
online hearings was relatively slow, until compelling circumstances made it urgent and imperative in 2020. More progress was made in just a few months in 2020 as compared to the progress made in the last 10 years.

Undoubtedly this crisis has caused many difficulties to everyone, but it also created opportunities for creativity and innovation in the Judiciary. Despite the technical problems and challenges faced, it was indeed remarkable that the courts and stakeholders managed to make a swift and successful transition to online hearings via remote technology as the "new normal".

By the end of 2020, judges, lawyers and other stakeholders continued to work remotely from their homes, and the effective and efficient use of remote technology meant that the wheels of justice continued to be in perpetual motion.

Hamidah Mohamed Deril,
Sessions Court Judge, Kuala Lumpur.





THE WORKINGS OF THE JUDICIARY DURING THE COVID-19 PANDEMIC

March 18, 2020 was another historic day on our Malaysian calendar as it marked the commencement of the Movement Control Order ("MCO") imposed by the government to curb the spread of COVID-19. The Malaysian Judiciary was not spared the effects of the imposition of the MCO. At the outset of the MCO, the courts were not listed as an "essential service" and this led to much confusion and countless questions amongst judges, officers of the court, legal practitioners, the Prison Department, the Royal Malaysian Police and many others.

It was a rollercoaster ride as the COVID-19 cases kept increasing on a daily basis from a single digit count to a staggering five digits. Such a critical situation required a proactive response as all risks of COVID-19 must be avoided at all costs.

The Malaysian Judiciary took measures in formulating and incorporating new court administration circulars and directions to adapt to the new norm. As physical presence was not recommended, the Judiciary took steps to implement the usage of modern digital technology to conduct proceedings online. It was indeed a bold and iconic move of the present Chief Justice to ensure that the dispensing of justice continued. During the early days of the MCO (March till May 2020), only urgent and critical applications in criminal matters were allowed in the courts.

The Sabah courts were amongst the earliest courts in the country to embrace and adapt to this new norm. Even before virtual hearings were implemented during the MCO, the Sabah courts had been proactively using virtual means in civil cases. Admission of advocates to the Sabah Bar was also conducted virtually by the Sabah courts in 2020. Presently, the Sabah courts continue to emphasise the use of virtual hearings whenever possible, subject however to the consent of all parties involved. Zoom accounts were added to enable judges and officers to conduct virtual hearings simultaneously. The virtual hearings and the continuing practice of filing documents via e-filing led to justice being delivered more speedily and at lower cost.

During the first MCO, Puan Elsie Primus, a Session Court judge of the Kota Kinabalu court, had the

opportunity of conducting a full trial hearing in a civil matter online via Zoom. It was a personal injury claim where the last witness was an expert witness based in Kuala Lumpur. Using Zoom with the consent of both parties including the expert witness, the proceedings proceeded for three hours. Apart from the expert witness who took oath and testified through Zoom from her clinic, both solicitors, the transcriber and Puan Elsie herself were at their respective homes during the hearing. Throughout the proceedings, the expert witness was able to refer to documents from virtual files of the case in the case management system ("CMS"). Virtual files comprise all the cause papers filed electronically and uploaded into the CMS which allow parties access to the cause papers anytime and anywhere upon logging in.

The Senior Assistant Registrar of High Court of Kota Kinabalu, Puan Nuruhuda binti Mohd Yusof experienced the case management of civil cases. When the first lockdown was announced by the government, she was then in Shah Alam. The airline industry was in chaos and, to some extent, paralysed and she was unable to return to Kota Kinabalu as planned. According to her, everything was initially uncertain as there were no hard and fast rules or specific instructions laid down in handling this situation. Judges and judicial officers were left to their own discretion on how to manage their cases. Fortunately, several directives were later issued to the judges, officers and other stakeholders of the Judiciary on how to handle cases smoothly during the pandemic. It was a first-hand experience for everyone. Puan Nuruhuda was fortunate as most, if not all, lawyers in Kota Kinabalu were familiar with using e-Review. She was able to give directions as she had sufficient information before her.

To further facilitate the disposal of cases during the pandemic, Puan Nuruhuda instructed the court interpreter to download all relevant cause papers on interlocutory applications that were fixed for ruling and hearing. The same were emailed to the judge for ease of reference. On the day of the hearing itself, she would receive further instructions from the judge to deliver the verdict of the court to all parties. Broad grounds of decision were attached to all cases for ruling. Unfortunately, trials had to be postponed. These practices were continued until early July 2020 when the court began to preside normally under strict standard operating procedures.

During the second phase of the MCO (May till June 2020) court officers returned to their offices on a rotational basis, subject to strict guidelines imposed. Puan Elsie conducted another case during the second phase of the MCO where some witnesses gave evidence via Zoom due to the inter-state and inter-district travel ban imposed by the government whilst some witnesses gave evidence in open court. Lawyers and litigants seem to have accepted and embraced this new norm.

It can be said that during the MCO, what seemed impossible was made possible – virtual hearings were accepted nationwide. Increased usage of technology was the only logical way to overcome the restrictions imposed by the MCO. Online hearings or virtual trials became the most common mode of case management during this time. It cannot be denied that while most of the officers court and lawyers feel that face-to-face hearings/trials (traditional method of advocacy) is the best mode of trial, they are now resigned to the fact that virtual hearings are the new norm for the courts.

Puan Cindy Mc Juce Balitus, a Deputy Registrar of High Court of Kota Kinabalu, had her own experience as a first-time user of Zoom. She was both excited and worried at the same time in trying to figure out how to operate the application. There were some embarrassing and humorous moments while conducting cases online from home. Despite all that, with all the experience gained right up to the third phase of the MCO, she is proud to affirm that there are many senior counsel who are eager to use Zoom as they are able to easily share documents during the hearing. Lawyers had to subscribe for higher internet speeds and install high-tech equipment to conduct Zoom hearings and some even added interesting and innovative virtual backgrounds during the Zoom hearings. A few legal firms converted their meeting room into a video conferencing room to enable their lawyers to conduct cases comfortably from their offices.

The Malaysian Judiciary has introduced several new circulars and it is still in the midst of drafting new laws for the courts to function virtually, especially with regard to online trials for criminal cases. Although online hearings can be conducted virtually, Puan Jessica Ombou Kakayun, a magistrate at the Kota Kinabalu court faced the issue of prison authorities being unable to accommodate a safe virtual hearing due to lack of facilities, poor internet connection and lack of dedicated rooms for virtual hearings at its premises. These shortcomings have caused a backlog of cases for mention or trial due to adjournments resulting in detainees being detained for longer periods.

However, the Malaysian Judiciary has continued its effort to fully digitalise the courts across the nation. For the Sabah and Sarawak courts, the current integrated court system is being enhanced under the e-Kehakiman Sabah and Sarawak ("e-KSS") project that was awarded to SAINS on August 15, 2020.

The three-year project which ends on August 14, 2023 will cover re-development and enhancement of the entire e-KSS application, and upgrading the court's technology, i.e. the court recording transcription and video conferencing system ("VCS").

Under this project, VCS has been rebranded as Video Conferencing Courts Sabah Sarawak ("V-COSS"). One of its most distinctive feature is the integrated video conferencing system between courtrooms and prisons to allow more stable, conducive and efficient online hearings to be conducted especially during the pandemic. V-COSS facilities have been placed at 10 prison locations, namely Kota Kinabalu, Sandakan, Tawau, Labuan, Kuching, Sri Aman, Sibu, Bintulu, Miri and Limbang – virtually connecting more than 30 court locations throughout Sabah and Sarawak.

V-COSS is a new platform for criminal hearings conducted online between courtrooms and prisons for case managements, appeals, remand applications and extension of remand proceedings under section 259 of the Criminal Procedure Code. The accused/prisoners are brought into a designated room with V-COSS facilities to get connected during hearings whilst judges, deputy public prosecutors and lawyers conveniently appear online from their respective offices or the courtroom. Other than criminal cases, V-COSS is also widely used for civil cases and this new system permits interstate connections.

Notwithstanding the disruption caused by the COVID-19 pandemic, adapting, innovating and adjusting to the circumstances are the most crucial values all of us must learn. COVID-19 should never be a reason for the courts to delay justice. Justice must always be served to the public no matter the circumstances, and the Malaysian Judiciary must continue its efforts to improve the administration of justice in "the new normal" era.

Elsie Primus,
Sessions Court Judge, Kota Kinabalu

CHAPTER 07
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)

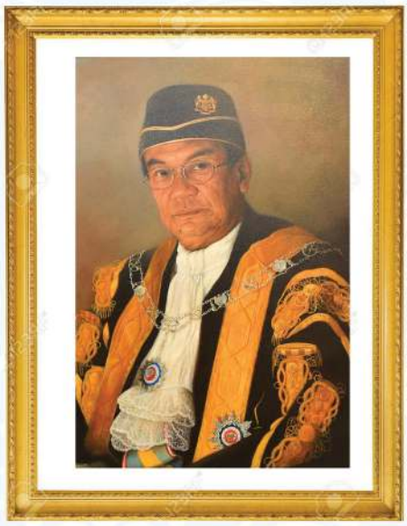
THE RT. HON. TUN DATO' SERI ABDUL HAMID OMAR
9 AUGUST 1988 – 9 NOVEMBER 1988
(ACTING LORD PRESIDENT)
10 November 1988 – 24 September 1994
(THE 7TH LORD PRESIDENT / THE 1ST CHIEF JUSTICE)

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)

Malaysia's Seventh Lord President and First Chief Justice: The Late Tun Dato' Seri Abdul Hamid Omar

Tun Abdul Hamid bin Omar, Malaysia's seventh and last Lord President, will be indelibly associated with the events surrounding the suspension of six sitting Supreme Court judges and the eventual removal from office of Tun Salleh Abas, Tun Hamid's immediate predecessor as Lord President. The suspension of the six judges and the dismissal of Tun Salleh Abas could fairly be said to be the result of a perception within the Executive of overreaching by the Judiciary, which eventually led to amendments to the Federal Constitution intended to circumscribe the powers and jurisdiction of the courts. The far-reaching consequence of these events are still felt today, more than 40 years later.

To remember Tun Abdul Hamid bin Omar merely from the context of his role in what is commonly referred to as the 1988 constitutional crisis would, however, be a mistake, for it would be a less than complete depiction of the man. Tun Hamid was, according to accounts by contemporaries, a judge of uncommon intelligence, and was possessed of charisma and not inconsiderable skill as a judicial administrator.

Tun Abdul Hamid bin Omar was born on March 25, 1929 in Kampung Nelayan, Perlis. After primary education in Perlis, he obtained a scholarship to pursue his secondary education in Sultan Abdul Hamid College in Alor Setar, Kedah. During the interregnum of the Second World War, Tun Hamid continued his studies in a Japanese school, after which he worked as an interpreter with the Japanese Police in Kedah. After a few months, Tun Hamid returned to Perlis and worked as an orderly with the State Administration under the Kingdom of Thailand. (At the time, Perlis, along with Kelantan and Kedah, were under the administration of the Thais.) He resumed his studies after the end of the war, and went on to read law in the United Kingdom

with financial support from his father, who had sold seven acres of land for this purpose.

Tun Hamid was called to the Bar by the Honourable Society of Lincoln's Inn in September 1955.

Upon his return to Malaysia, Tun Hamid served as a magistrate in Kuala Lumpur and later in Taiping. He then went on to hold various posts in the legal service, including President of the Sessions Court, Senior Federal Counsel, legal advisor to the states of Terengganu, Penang and Perak, Chief Registrar of the Federal Court and Parliamentary Draftsman, which was his final post before he was elevated to the Bench. The esteem in which Tun Hamid was held was evident from the speeches delivered during his elevation ceremony. Tan Sri Azmi Mohamed, then the Chief Justice of Malaya, said:

> I also remember an occasion when I sat as a third member of the then Court of Appeal hearing a criminal appeal. Dato' Abdul Hamid appeared for the Public Prosecutor and we were so impressed with the way he handled the case that the Chief Justice considered it appropriate that he express compliments; this he did.
>
> Another thing perhaps many of you have noticed is that Dato' Abdul Hamid is one of those lucky men who are not easily ruffled. To my mind this is one of the essential qualities of a good judge.

At the time of his elevation to the Bench, Tun Hamid was just 39 years old which is fairly young for someone to become a judge. Nevertheless, the then Attorney General of Malaysia, Tan Sri Abdul Kadir, did not see this as a problem. The Attorney General said in his speech:

> A friend of mine, My Lord, remarked to me that quite a number of our judges are fairly young in age and naturally this includes Your Lordship, who is only 39 … My personal view, My Lord, is that age is not the only important factor but the calibre of the person, his character, his varied legal experience and the dignity that he can bring to the bench which really counts. Further, it has been said that a judge should be learned in the law, patient, sympathetic, just and understanding.
>
> Knowing Your Lordship since our student days in London and having worked together in the same service for the past twelve years, I know Your Lordship has all these qualities … Your vast and varied experience in the service, your keen interest in social and sports activities, your deep understanding of human nature and human behaviour, which you have acquired in the course of your varied activities, easily make up, if I may say, what you seem to lack: a ripe age for the Bench.

If these speeches placed the weight of expectation upon Tun Abdul Hamid bin Omar, he did not disappoint during his time as a High Court judge. Former Court of Appeal judge Dato' Mahadev Shankar recalls:

> Inside the courtroom, he was to change forever the ethos of litigation by converting it from an adversarial system to a joint search for justice. I was to witness this myself in the case of *Federal Flour Mills Ltd v "Ta Tung" Owners & Ors* [1971] 2 MLJ 201.
>
> Tun Hamid was not only a good listener but produced reasoned and timely judgments. Many of these stood the test of time because even though reversed in the Court of Appeal, they were restored to immortality in the Privy Council.[1] In addition to all this he was also a sound administrator who initiated a number of reforms.

In *TW Wu & Co (M) Sdn Bhd v Sanko Line Ltd and Port Swettenham Authority* [1975] 1 MLJ 15, Tun Hamid held that the Port Swettenham Authority were under a duty, as bailees for reward, to perform their responsibilities with due care and diligence as regards the goods that were entrusted to them. His Lordship also held that the burden of proof rested on the bailee to establish that it had exercised due diligence. This decision was affirmed by both the Federal Court and the Judicial Committee of the Privy Council. Senior lawyer Tan Sri Cecil Abraham remarked:

> *TW Wu* is an important decision in so far as the relationship between bailor and bailee is concerned and the decision has found its way into *Chitty on Contracts* Volume 2 Specific Reliefs 32nd Edition, namely, paragraphs 33-032, 33-035 and 33-050 where it reiterates that the burden of proof in respect of a bailee for reward, is on the bailee.

1 See, for example, the case of *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b and the case of *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd* [1978] 2 MLJ 137.

Judges of the Federal Court of Malaysia in 1982 with the Lord President Tun Mohamed Suffian Mohamed Hashim (seated centre)
Seated: Raja Tan Sri Azlan Shah, Chief Justice of Malaya (left); and Tan Sri Datuk Lee Hun Hoe, Chief Justice of Borneo (right)
Standing L-R: Justice George Edward Seah Kim Seng; Justice Mohamed Salleh Abas; Justice Wan Suleiman Pawan Teh; Justice Abdul Hamid Omar and Justice Mohamed Azmi Kamaruddin

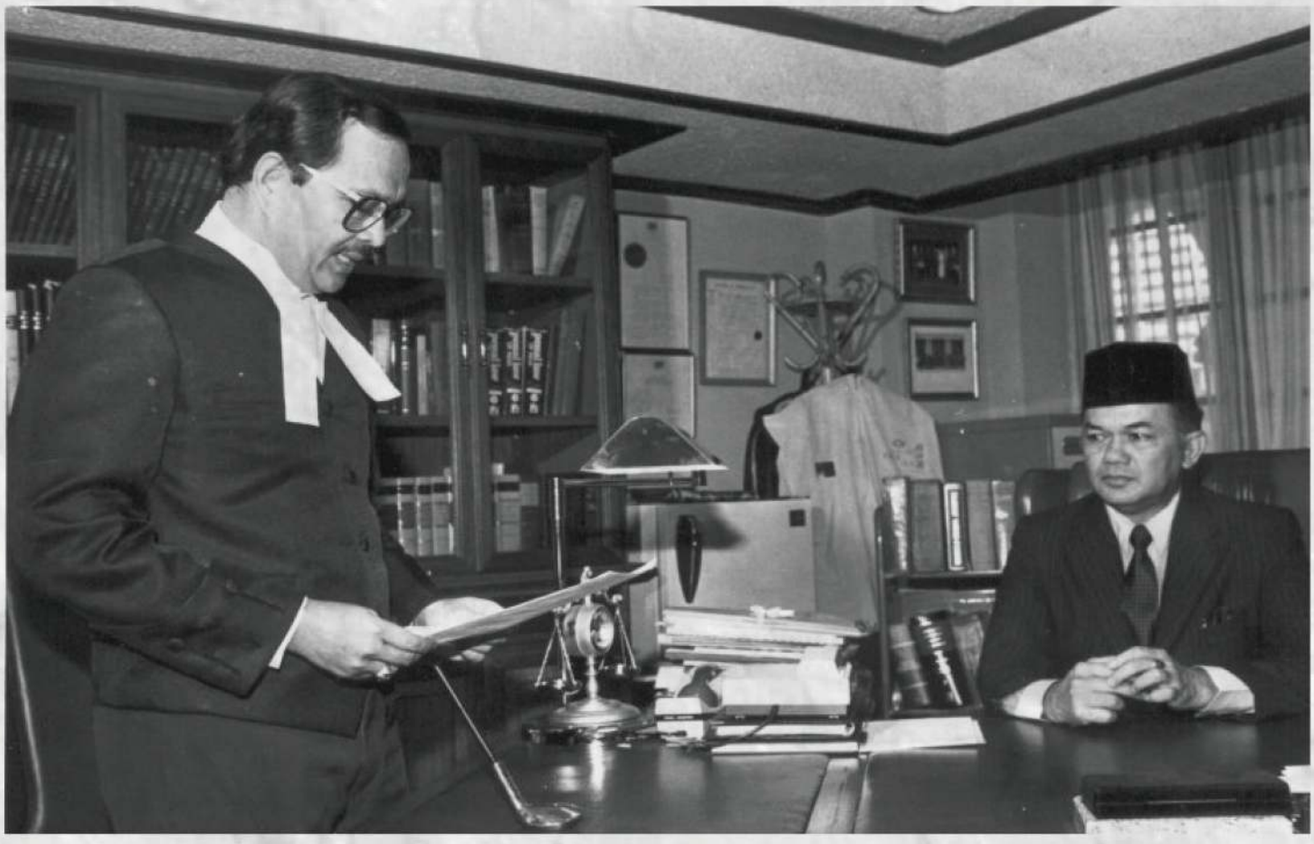
After serving 12 years at the High Court Bench, Tun Hamid was elevated as a Judge of the Federal Court of Malaysia on March 1, 1980. On February 3, 1984, he was appointed as the Chief Justice of Malaya. Tun Hamid was then appointed the Lord President of Malaysia on November 10, 1988.

During his Lordship's time at the Federal Court, significant strides were made in the development of Malaysian law. His Lordship was a part of the coram in the case of *Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12. In this case, the issue of locus standi formed the root of a claim and his Lordship had structured a clear emphasis that the relevant test to determine the question of standing is to establish infringement of a private right or the suffering of private damage as a stringent requirement to be imposed on the applicant in acquiring locus standi. In his judgment, forming part of the majority decision allowing the appeals, he articulated:

> Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.

For public interest matters, his Lordship chaired the case of *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300, SC. Faced with the question on whether or not a non-Muslim child or a minor could convert into Islam without the consent of the parent, his Lordship showcased his impartiality when deciding in the negative. In deciding so, his Lordship gave thorough considerations to the relevant constitutional provisions, the provisions of the Guardianship of

Judges of the superior court with Tun Mohamed Suffian, Lord President of Malaysia
(Justice Abdul Hamid Omar - seated second from left)



Justice Mohamed Dzaiddin Abdullah (left) with Justice Abdul Hamid Omar (right)

Chief Justice Tun Abdul Hamid Omar (right) and Dato' Sri Syed Hamid Albar (left) accompanying the Yang di-Pertuan Agong, Al-Marhum Tuanku Ja'afar Ibni Al- Marhum Tuanku Abdul Rahman (centre) during the official ceremony of the Court of Appeal on September 17, 1994 at the Sultan Abdul Samad building. (Photo courtesy of the National Archives of Malaysia)

Infants Act 1961 and the circumstances behind the promulgation of the Federal Constitution. The panel held:

> In all the circumstances, we are of the view that in wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent guardian.

His Lordship was also the chairman for the panel in the constitutional case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697. His Lordship had devoted himself to set a fair precedent in which a provision in a state constitution providing that a member of Parliament shall cease from his office if he resigns or for any other reasons ceases to be a member of such political party, is unconstitutional. The basis for the unconstitutionality is due to its inconsistency with Article 10(1)(c) of the Federal Constitution which guarantees a person's fundamental right to the freedom of association. In dismissing the appeal and holding Article XXXIA of Part I of the Constitution of the State of Kelantan unconstitutional, the court held that:

> It is, in our view, inconceivable that a member of the legislature can be penalized by any ordinary legislation for exercising a fundamental right which the Constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds.

His Lordship's tenure as the head of the Malaysian Judiciary brought many substantial changes to the structure of the Malaysian court system. Perhaps the most significant change was the abolition of appeals to the Privy Council and the establishment of the Court of Appeal on June 24, 1994. The establishment of the Court of Appeal restored the two-tier appeal process in our legal institution. This provided litigants with a further right of appeal and also served to filter the number of appeals from the High Court going up to the Federal Court, which ultimately led to even faster disposals of appeals.

The abolition of appeals to the Privy Council and the establishment of the Court of Appeal came with the renaming of the Supreme Court as the Federal Court. This also led to the change of the head of Judiciary's title from Lord President to the Chief Justice of Malaysia, which made Tun Abdul Hamid bin Omar the first Chief Justice of Malaysia.

Former Federal Court judge, Tan Sri James Foong, recalls Tun Hamid's considerable skills as an administrator when he came up with a solution to address a surge in drug trafficking cases in the early 1990s:

> Tun Hamid with the assistance of Tan Sri Hashim Yeop Sani, against convention on seniority appointed Dato' Mohtar Abdullah (as he then was) to lead a team of newly appointed Judicial Commissioners to hear and dispose drug trafficking cases throughout Peninsular Malaysia. Apparently, both these top judges were of the opinion that Dato' Mohtar Abdullah had impressive administrative skills.
>
> Dato' Mohtar Abdullah acted like the managing judge who arranged, assigned and audited the cases handled by the four JCs.

According to Tan Sri James, this model provided the inspiration for the system of managing judges to deal with the backlog of cases under the subsequent stewardship of Tun Zaki Azmi.

Tun Hamid was passionate in enhancing the usage of the Malay language in all courts in Peninsular Malaysia. During his tenure as the Chief Justice of Malaysia, his Lordship established a committee to translate and publish relevant laws frequently used in courts into the Malay language such as the Rules of High Court 1980, the Subordinate Courts Rules 1980, the Criminal Procedure Code and the Penal Code.

Having dedicated his life to the development of the Malaysian legal field, his Lordship was also active in community and social activities. During his time on the Bench, his Lordship had served as National Vice Chairman of the Red Crescent Society, Chairman of the Federal Territories Branch of the Malaysian Red Crescent Society, and Honorary President of the Spastic Children Association of Selangor and the Federal Territory. He also served as the President of the Royal Selangor Golf Club ("RSGC") from 1975–1978 and the President of the Malaysian Golf Association ("MGA") for 14 years. Senior lawyer, Datuk Thomas Lee who had served under Tun Abdul Hamid at the RSGC and MGA remembers him as a very able leader with a multiracial approach. He recalls:

> He was a very good delegator and knew that it was important to choose the right people no matter what race. He was very sociable, generous and a good friend. … Such was his popularity with the multiracial membership that he was returned to office every year unopposed.

After dedicating 26 years of his Lordship's life to the Malaysian Judiciary, he retired on September 24, 1994. Even after his retirement, his Lordship's dedication to the development of the law continued. He founded Yayasan Tun Abdul Hamid to support the furtherance of legal education.

On September 1, 2009, his Lordship passed away at the age of 80. He was survived by his wife Toh Puan Seri Azian Ayub Ghazali and four children, namely Azizuddin, Ainuddin, Hanizah dan Hanizan.

"In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent guardian."

Teoh Eng Huat v Kadhi, Pasir Mas & Anor
[1990] 2 MLJ 300, SC

A Glimpse into the Life of the Attorney General and Former Judge of the Federal Court, Tan Sri Idrus Harun

Sir Francis Bacon, the Attorney General of England and Wales in the 17th century described the office of the Attorney General as "the painfullest task in the realm", while Sir Patrick Hastings, the Attorney General a few centuries later said that "to be a law officer was to be in hell".[1]

Perhaps, given the multifarious roles of the Attorney General ("AG") and the wide range of tasks and functions held, combined with the reality of the nature of the office which is always under public scrutiny and is highly susceptible to criticism, the office demands the person of the AG to be the man of integrity and intellect, fortitude and strength. And that is what we found in the personality of Tan Sri Idrus Harun, currently the AG of Malaysia who was also a former Judge of the Federal Court.

As we explored his life experiences, we learnt that Tan Sri Idrus is always proud of his humble beginnings. Being labelled as a "kampung boy", Tan Sri Idrus perceived the description positively. For him, being born and raised up in Kampung Sanglang, Kedah to a village headman father and a homemaker mother was the greatest gift of life – for that is where he first understood and learnt about life and the world. He is grateful for his big family – his amazing parents, his wonderful wife, seven respectful children (one child has passed away), two adorable grandchildren and eight beloved siblings.

As with other kampung boys, Tan Sri Idrus grew up as a normal and rather mischievous boy. While he did enjoy playing with friends and the fun of his early childhood days, Tan Sri Idrus took learning and studying seriously. Both at school and at university,

1 Jones, E. (1969) 'The Office of Attorney-General' Cambridge Law Journal, 27(1), 43-53

Tan Sri Idrus always wanted to give his best and to maximise his own potential. For him "If others can do it, why can't I?". His persistence in achieving academic excellence came to fruition when he obtained outstanding examination results in the Higher School Certificate (HSC) that qualified him to be enrolled as a law student in the oldest and top Malaysian university – University of Malaya.[2]

Tan Sri Idrus remembers his university days as being very exciting. Among his batchmates who are still in the Judiciary are Tan Sri Rohana binti Yusuf, the President of the Court of Appeal and Tan Sri Dato' Sri Azahar bin Mohamed, the Chief Judge of the High Court of Malaya. The former AG, Tan Sri Datuk Seri Panglima Abdul Gani Patail and the late Sudirman bin Haji Arshad, a famous Malaysian singer and songwriter, were also his classmates. Datuk Seri Haji Mohd Zawawi bin Salleh, currently a Judge of the Federal Court, was one year his senior.

Tan Sri Idrus shared how life was then in the University of Malaya. The 1970s was the era of disco. It was the best decade for music, dance and partying, much influenced by movies and television series like Saturday Night Fever, Grease and Happy Days. The culture was to party and dance. Hence, for students on a budget like him, he and his friends would gatecrash into discos after midnight to enjoy the music without paying the entrance fees or table charges. "Who did not like partying and dancing during the 1970s? Even the law faculty used to organise annual dinner and dance those days," said Tan Sri Idrus.

When asked about his unforgettable and memorable experiences at university, Tan Sri Idrus said that he had to learn to be independent and to spend within his means as the federal scholarship ("JPA") he received was not sufficient. Tan Sri Idrus and friends had to share their pocket money to rent a house near the university in Petaling Jaya. Their rented house was bare and had only a dining table. So, they had to study on the floor or go to the library. Despite the difficulty, he cherished those student days. For Tan Sri Idrus, it was an unforgettable life experience being together with friends from all over Malaysia, including Sabah and Sarawak. Although they came from different religious and social backgrounds, they lived together happily and harmoniously in the rented house and shared their money whenever each of them needed help. And they remain friends till today.

Upon successfully completing his law degree, as a JPA scholar, Tan Sri Idrus had to execute a bond to serve in the government service for 10 years. By the time he completed serving the bond, he was already put on a permanent position in the government under a pensionable scheme. He did receive a tempting offer to join the private sector and was seriously considering it. However, at the same time, he was promoted to a

2 Currently ranked #59 in QS World University Rankings 2021.

Tan Sri Idrus (back: 2nd from left) with his housemates in their final year in 1979. Photo taken at their rented house.
(On his left is Datuk Mohd Yusuf, the former Solicitor General II)

senior position in the service. Upon deliberation, he continued working in the judicial and legal service instead of joining the private sector for what he thought as "the way of serving the nation".

A Brief Career History of Tan Sri Idrus bin Harun

YEAR	PLACE OF WORK	POSITION
1980–1983	Drafting Division, AGC	Assistant Parliamentary Draftsman
1983–1984	Kuala Lumpur High Court	Senior Assistant Registrar
1984–1990	Sessions Court, Kota Kinabalu, Sabah	President of the Sessions Court (i.e. Sessions Court judge)
1990–1993	Royal Malaysian Customs Department	Deputy Public Prosecutor
	Prosecution Unit, Kuala Lumpur	Deputy Public Prosecutor
	Prosecution Division, AGC	Deputy Public Prosecutor
1993–1995	Terengganu Legal Advisor's Office	Legal Advisor
1995–1996	Election Commission of Malaysia	Senior Federal Counsel
1996–1997	Anti-Corruption Agency, Kuala Lumpur	Deputy Public Prosecutor
1997–1998	Advisory and International Affairs Division, AGC Kuala Lumpur	Deputy Head of Division
1998–2002	Ministry of Domestic Trade and Customer Affairs	Registrar of Companies
2002–2004	Advisory and International Affairs, AGC, Putrajaya	Head of Division
2004–2006	Drafting Division, AGC, Putrajaya	Parliamentary Draftsman
2006–2014	Solicitor General, AGC, Putrajaya	Solicitor General
2014–2018	Court of Appeal, Putrajaya	Judge of the Court of Appeal
2018–2020	Federal Court of Malaysia, Putrajaya	Judge of the Federal Court
March 6, 2020–present	Attorney General's Chambers	Attorney General

Venturing into his working background, Tan Sri Idrus shared some momentous and unforgettable experiences. When he served in Sabah as the President of the Sessions Court (later known as Sessions Court judge) for six years from 1984 to 1990, there was an incident which Tan Sri Idrus remembers vividly – it was his encounter with demonstrators following the political crisis that led to the dissolution of the State Assembly and a state election in 1985. He said that after a one-hour standoff between the police and the demonstrators at Karamunsing intersection near KWASA Square, the police came to see him and requested that he go to the scene because the demonstrators defied the order to disperse. After a briefing by the OCPD, Tan Sri Idrus proceeded to give the final warning and told the demonstrators that they had committed the offence of unlawful assembly which was likely to cause a disturbance to the public. They ignored the warning and continued demonstrating, so the police had to take action by firing tear gas. In retaliation, the demonstrators started to destroy and burn vehicles, petrol stations and other premises in the area. A total of 1,700 demonstrators were arrested during the incident and he was on duty for the remand of those people.

Tan Sri Idrus in ceremonial attire

Tan Sri Idrus also shared that despite the huge workload in Sabah – as there were only three judges of the Sessions Court for the entire state – namely, the late Datuk Raymond Wong Tung Chuen, Datuk Sangau Gunting and himself, the experience was fulfilling as the judges, magistrates, prosecutors and lawyers were all a close-knit community, including his friend and classmate, Tan Sri Datuk Seri Panglima Abdul Gani Patail who served as the deputy public prosecutor and later senior federal counsel in Sabah. He said that throughout his years of service in Sabah, he treasured the company of the friendly and understanding officers and colleagues including his former bosses – Datuk Seri Panglima Charles Ho, the late Dato' Wan Mohammad, the late Dato' Haji Abu Mansor bin Ali and Dato' Wira Mohd Noor Ahmad.

Another pivotal life experience for Tan Sri Idrus was when he sat as Co-Chairman of the Malaysia-Thailand Joint Authority ("MTJA"), through which Tan Sri Idrus learnt how differences can turn into opportunities and strengths. What started as a dispute between Thailand and Malaysia, over territorial boundaries and overlapping claims over an offshore area between Thailand and Malaysia, was successfully converted into a benefit for both countries, when they agreed to jointly explore and exploit the resources of the seabed in the disputed area. This agreement resulted in the Memorandum of Understanding signed in 1979 between the then Prime Minister of Thailand, Kriangsak Chamanan, and the then Prime Minister of Malaysia, Tun Hussein Onn, and the enactment of the Malaysia-Thailand Joint Authority Act 1990. Tan Sri Idrus sat on the Board of Directors as Co-Chairman of the MTJA for eight years, which experience he says had taught him the importance of bilateral negotiations and agreement, and of maintaining good relationship and diplomacy with other countries for regional peace, order and stability.

As a deputy public prosecutor, Tan Sri Idrus experienced the procedural differences and advantages of the two regimes of prosecuting murder cases pre and post the abolition of the jury system. In the murder trial of Intan Yusniza, a Radio Television Malaysia (RTM) host in 1991, a case that drew the attention of the whole country, Tan Sri Idrus led the prosecution. He was also in the prosecution team in the gruesome murder trial of Mona Fandey.

For Tan Sri Idrus, there are moments in his career that he considered the most rewarding. First, when he became the Solicitor General on April 27, 2006, a post he held for eight years as a deputy to his friend and classmate – the former AG Tan Sri Datuk Seri Panglima Abdul Gani Patail. Secondly, when he was appointed directly as a Judge of the Court of Appeal on September 12, 2014 and later on, elevated to the Federal Court on November 26, 2018. He said that being a judge is what most legal officers, including himself, aspired to be when they reach the pinnacle of their careers in the legal service. Thirdly, he considers the most important part of his career as being his appointment as the AG of Malaysia on March 6, 2020 when he was already at the apex court.

Tan Sri Idrus never thought of being appointed as the AG. He said that once he crossed over to become a Judge of the Court of Appeal, he only had five months before he retired as a legal officer in the position of Solicitor General. Realistically, he thought that he would only be spending six years as a judge before retiring at the mandatory age of 66. It never crossed his mind to make a comeback to the Attorney General's Chambers ("AGC") when he was just 11 months away from retiring as a Judge of the Federal Court.

Sabah riots. Seen in the top-left picture, Tan Sri Idrus, standing while giving a final warning on loudhailer to the demonstrators (reported in *The Daily Express*, March 20, 1986)

Tan Sri Idrus as a young drafting officer at the AGC,
Bank Rakyat Building in 1981

Tan Sri Idrus (first on the right) on his circa-1980 Graduation Day
(2nd and 3rd from left – Justice Rohana Yusuf and Justice Azahar Mohamed)

He nevertheless accepted the appointment despite being aware of the challenges of leading the AGC because, "I am familiar with the work". His more than two decades of diversified working experience in the Legal and Judicial Service successfully prepared him for the challenging work he is currently undertaking. Tan Sri Idrus describes his role as the AG as follows:

> Being the Attorney General, I am in fact running the largest legal firm in Malaysia and in carrying out my functions as such, it is not free from difficulty. In the first place, I am wearing two hats, as the Attorney General and the Public Prosecutor. As the Attorney General, I am the principal legal advisor to the government and the Yang di-Pertuan Agong. Furthermore, there are some matters which we deal with which are exclusive to us. For example, we draft laws to be tabled in Parliament and deal with international law matters which are rarely handled by private law firms. Hence, certain expertise on subjects such as settlement of international disputes, bilateral or multilateral negotiations on trade, climate change or international treaties is only available in the Attorney General's Chambers.

Regardless, Tan Sri Idrus is thankful for the assistance provided by his officers at the AGC who assist him day and night in advising the government on the most important current issues. He says that their assistance makes it easier for him to perform his functions under the Federal Constitution. Particularly now, the COVID-19 pandemic has taken much of his time. As the AG, he is directly involved with the Special Ministerial Committee – a joint and concerted effort between the relevant ministries and agencies which meets daily to discuss the issues relating to COVID-19 since March 18, 2020 together with the Cabinet Ministers and chaired by the Prime Minister. The Committee makes prompt policy decisions and gives unwavering support to the frontliners to ensure that all public health measures and other actions are carried out lawfully. In this regard, the AGC plays an important role in drafting relevant laws and it is indeed unprecedented when the AGC has to adapt to the new norm of drafting these laws every two weeks during this challenging period.

Having been exposed to two entirely different types of work as the AG and a judge, Tan Sri Idrus confesses that both are close to his heart. He loves his work as a judge and as the AG. For him, both positions are equally challenging in their own way. As a judge, Tan Sri Idrus said, "the challenge is to do justice, to listen and give a fair hearing to both sides". He has to be patient and must peruse through all the evidence before making a decision. His goal is to ensure that justice is done and this, he says, "is not an easy task". This is especially so, when at the Court of Appeal, he, as a judge was laying down the law for cases that begin at the subordinate courts since the Court of Appeal is the ultimate appeal court for these cases; while at the Federal Court, he was a member of the court of last resort whose decisions produce finality and become precedents for all courts in Malaysia to follow. "A very big responsibility indeed," remarked Tan Sri Idrus.

When asked about the most difficult case to decide, Tan Sri Idrus said that all cases in the Court of Appeal and the Federal Court are difficult. However, there was one special case he remembers so well; which was the cases of *Tetuan Khana & Co v Saling Lau Bee Chiang and Other Appeals; Malayan Banking Bhd, Intervener* [2019] 3 CLJ 56 and *Tetuan Khana & Co v Saling Lau Bee Chiang & Other Appeals* [2019] 3 CLJ 1. The cases consisted of 10 appeals concerning the rights of the orang asli. It was a landmark decision of the Court of Appeal that was upheld by the Federal Court. Tan Sri Idrus chaired the Court of Appeal panel – the panel spent 15 days hearing the appeals, which he says was unprecedented.

As a judge, Tan Sri Idrus ensured that judgment writing was not delayed and was completed within the time limit provided. Acknowledging that judgment writing was sometimes daunting, Tan Sri Idrus, however, found the entire process fulfilling and satisfying. With a total of 82 written civil and criminal judgments produced and reported, Tan Sri Idrus was proud to share that he has no pending grounds of judgment.

For Tan Sri Idrus, because of his many responsibilities, time management is crucial and of utmost priority for him to fulfil his responsibility as the AG and as the head of his family. He says because of this, he does not have the luxury of free time for hobbies – he neither plays golf nor is he involved in other casual activities. Although Tan Sri Idrus views work as his priority, he also believes in the need for striking a balance between work and family. Hence, he ensures that his precious free time is spent with his family.

Born on February 2, 1955 and now aged 66, Tan Sri Idrus looks youthful. Being complimented for his

(L-R): Justice Zabariah Mohd Yusof; Justice Abdul Rahman Sebli; Justice Nallini Pathmanathan; Justice Abang Iskandar Abang Hashim (now CJSS); Justice David Wong Dak Wah (former CJSS); Justice Rohana Yusuf (PCA); The Rt. Hon. the Chief Justice of Malaysia Tengku Maimun Tuan Mat; Justice Azahar Mohamed (CJM); Justice Mohd Zawawi Salleh; Justice Idrus Harun (now the Attorney General of Malaysia); Justice Vernon Ong Lam Kiat; Justice Zaleha Yusof and Justice Hasnah Mohammed Hashim

"looking younger than his age", Tan Sri Idrus was flattered but says that he has no special secrets or tips. He walks regularly in the early morning and exercises – he says that he feels the environment in the early morning is serene and quiet, and the invigorating fresh morning air makes him feel strong, healthy and full of energy. Sleeping and waking up early has always been his routine, in addition to eating in moderation and avoiding sweets – which perhaps is his secret to enduring youth and good health.

In concluding the session, Tan Sri Idrus commented that what bothers the judicial and legal officers the most is the total separation of the judicial and legal service. For Tan Sri Idrus, the Judicial and Legal Service should remain as one service; just as most of the judicial and legal officers prefer it to be – based on a survey conducted among the officers. Any changes, he said, would require an amendment to the Constitution that currently provides for only one Judicial and Legal Service Commission. In concluding his interview with us, Tan Sri Idrus expressed his gratitude to the officers in the Judicial and Legal Service. He says that as the head of the AGC and a former judge, he really appreciates the hard work, devotion, and diligence of the officers in discharging their duties. He said that:

> As judicial and legal officers, I believe they must be responsible and act with integrity, independence and fairness in discharging their official duties. They must be able to conduct themselves in a manner expected of them, both as legal officers and as civil servants. I would say in my 41 years of service in the Attorney General's Chambers and the judiciary, I am very proud of all the officers whom I worked with as they have unwaveringly shown their commitment and dedication in carrying out their duties both as legal or judicial officers.

Tan Sri Idrus as the Solicitor General officiated the Arbitration Act 2005 Seminar

Tan Sri Idrus (first on the right) with his male siblings

Tan Sri Idrus in his chambers on his last day as a judge of the Federal Court

The Penang High Court (Photograph courtesy of Mdm. Hamidah Abdul Rahman)

Life Awaits a Retired Judge by Tan Sri James Foong Former Judge of the Federal Court

Inevitably, there comes a time when a Malaysian judge discharges his duty for a final time and becomes functus officio. This happened to me on 25 February 2012, the day I celebrated my 66th birthday. I recalled that it was a day of mixed feelings: happy to be finally freed from a well-defined structured life of 22 years focused on dispensing justice to suddenly a life with an abundance of leisure time. And it was the latter that I feared. How would I replace those busy active hours? Days that began with regular clocking-in for work, hours spent finding solutions to deal with an unimaginable array of complex human disputes, to deadlines required to complete cases and judgements. To replace these demands was by itself a daunting task.

Perhaps feeling a bit reluctant to leave such an accustomed lifestyle, I naturally pondered over the rationale of the mandatory retirement at 66 when I was both mentally and physically fit and capable of continuing with my judicial duties. Comparative studies have shown that judges are most productive between the ages of 60 and 70. And in most developed countries the retirement age is 70. To be relieved at such a relatively young age of 66 in Malaysia, I believed would deprive the nation of a pool of matured, experienced and insightful judges.

But then our Constitution mandates this. This document was however drafted more than 60 years ago when the average life span of a Malaysian was 65. Now that it has increased to 75, perhaps, this provision should be a re-looked at for the benefit of the Judiciary. From debates circulating, I am much in favour of judges of the superior counts retiring at 70. The benefits of a mature and experienced Judiciary outweighs the fears of prejudice towards a particular section of the Malaysian society and the impediment of career advancement of younger members of the Judiciary.

Returning to myself, some months prior to my retirement, I received a call from the Chief Justice inquiring whether I would like to remain for a further six months under Article 125 (1) of the Federal Constitution. To receive such an invitation was indeed an honour. It gave me the satisfaction of being appreciated and more importantly, for being on the list of those who are to be considered even if it was for a mere six months. Unfortunately, the timing was most inapt. The call came while I was on the golf course (on my day off) just after I had hit one of my most brilliant shots, an event that is so rare that my golfing partners acclaimed to be "by a moment of brilliance". Thinking that I could repeat this often upon retirement why should this be delayed? So, with little hesitation, I turned down the offer with the excuse that I had already made plans for my retirement.

That was not really true. Though I had a general idea of what I wanted to do nothing was fixed. I had not fixed anything permanent prior to retiring due to the never-ending workload and a timeline to finish those written judgments assigned to me before I go. Furthermore, if I intended to return to the Bar by joining a legal firm, even as a consultant, there was the fear of being accused of bias to that firm while on the Bench. Similar sentiments clouded intentions to join a commercial or statutory government-linked set-up. There was also

the need to maintain status and reputation post-retirement to ensure that one's future undertakings would not negatively affect or disparage the image of the Judiciary. I recalled an instance where, I was told, a retired judge who planned to open a small 'kedai runcit' (provision shop) at a tourist spot. It caused an uproar in the legal fraternity where a lawyer was heard to remark that: "I can't be calling him 'Judge' when paying for a bar of chocolate". So, this is not far off from what the late Lord Chancellor Hailsham of England and Wales once said about joining the Bench: it's equivalent to entering priesthood with a lifetime commitment and a single- minded devotion.

Though times have changed, these factors are still very much alive and have to be considered by any retiring judge before he embarks on his new venture after retiring from the Judiciary. In this sense, a judge particularly one from the superior courts faces certain handicaps when it comes to life after the Bench.

Not unlike most retired folks, the first thing I did was to go abroad for a holiday. This is symbolic to mark the end of a hard-earned career before moving onto the another. Of course, a holiday was also a much welcome rest. Instead of taking things lightly by enjoying new sights, experiences and food in a more relaxed and leisurely manner in a foreign country, my wife and I signed up for a seven day cycling trip in Europe from Passau in Germany along the River Danube to Vienna, Austria. Believing that even a grandmother could do it, as shown in the tour brochure, it turned out to be physically demanding, albeit an exceedingly interesting adventure. This experience was so profoundly enjoyable that it has now become our standard type of holiday both locally and abroad for as long as our limbs can handle it. Here, I am hoping to emulate our former Prime Minister who, at a more advanced age than I, is still engaged in this kind of sporting activity.

Like many of us, I desired to retire happy, healthy and comfortable. With abundance of leisure time on my side, these desires seem relatively simple to achieve. But when I pondered deeper, they are quite complex. Happiness is subjective and unless you know what you want out of your retired life, you may be influenced by what is dictated by friends and the media. As for health, much depends on your genes and make-up, with nature unfailingly reminding you of advancing years with unexpected and unexplained aches, pains and a lack of stamina. Then of course: comfort. Like it or not, it is much associated with money. And on a judge's pension (unless you also have other service pensions or income) comfort and the enjoyment of the finer things in life may be compromised. Here, I am not talking about possession of wealth to enjoy a lifestyle above that of a serving judge. A judge, I think, when he joined the Bench would have given up the desire to be hugely wealthy, otherwise he would not have taken on the job of a modest salary with limited and infrequent increments. Most of us joined or stayed on for either the satisfaction of the job, the status it brings and maybe even the security of a mediocre pension with free health care (if you do not mind joining the long queues in government clinics and hospitals for the position you once enjoyed as a judge that accords you priority but which would have waned over time). Wealth, certainly, I hope, is not a consideration.

Pending retirement, a serving judge would inevitably ponder over these issues. Regrettably, during my time, there was no official guidance like the kind of career guide one gets before entering working life. At the end of this career, you are supposed to know how it's done. Unlike, I am told, in the armed forces there are retirement courses for officers: telling them what to expect and tips on how to return to civilian life. For those in the Judiciary, one can only draw from the experiences of those who retired before us and in most instances much of this is based on gossip. One never fails to hear of 'Justice So and So' making tons of money as an arbitrator or, nearly fainting upon receiving his first arbitral fee following the delivery of an award. Or, Justice So and So returning to practice and now owning a fleet of cars and continuing minting. Probably these stories may be true but how was a novice retiree, like me, to go about having a share of the pie, or, did I, even want it at all?

I faced this dilemma when I retired in 2012. Still relatively healthy both mentally and physically and thinking that I had acquired some extra skills and experience in handling legal matters, I decided to return to the Bar. I guess we lawyers have that advantage of law as a profession. Legal skills are always in demand for those who are able and willing to offer them. Unlike non-professionals who may find themselves redundant after retirement. But for a retired judge to return to the Bar he has an edge as well as a burden over a lawyer. As he is perceived to have an insight of the workings and thinking of the Judiciary, a higher standard is expected of him. This is extended to what I once heard why a client chose a retired judge as his leading counsel: "he (the retired judge) knows all the

judges hearing the case". Presumably, under the grave mistaken impression that justice is dispensed through friendship rather than on facts and the law. Though this is absurd, undeniably a stint on the Bench helps to promote clientele.

But returning to practice after years on the Bench you may find new challenges that were not there when you left the Bar. As you are perceived to have acquired some added skills and valuable experiences not exposed to a lawyer, the demand on you to succeed in winning the case is much higher. The bar has suddenly risen. And often, you are engaged to deal with more complex and complicated cases since simple straight-forward cases may not demand your level of skill and advice. Some of my colleagues who took this path find this stimulating and rewarding.

If one were to return to practise law as counsel there is the fear of losing or being humiliated. There is also, perhaps the embarrassment of having to stand in front of ex-colleagues some of whom may not be too kind and tolerant. Crude remarks from the Bench may hurt especially delivered by a junior before you left. I often equate these sentiments to that of a top sporting champion returning to the competitive arena after retirement. He would have to start all over again with qualifying rounds to reach the top where he once ruled. However, if one still has such competitive spirit and finds this challenging there is no law in this country, unlike in some other Common Law jurisdictions, to prohibit return to practice as an advocate. The remuneration is of course attractive and with it comes all the trials and tribulations, triumphs and fulfillment at the Bar.

But over time, one starts to question whether this is more for the money or challenge especially with deteriorating stamina and increasing stress. Often this pathway starts with a great feeling of still being wanted but as time goes by, unless you find this kind of work both stimulating and challenging and you desire to be rich in the grave, a decision would have to be made on quitting since every professional has a working time span.

There is of course an alternative role if one chose to return to the Bar as a consultant to a legal firm. Such position often connotes a role of an advocate and solicitor in rendering legal advice and assistance rather than one appearing in court to argue a matter. Perhaps this is more befitting for a retired judge desiring to return to the Bar minus the negative aspects as described.

A more common route for a retired judge who still feels that he is not totally fed-up with the law is to become an arbitrator. This is a natural extension of the kind of work one used to do on the Bench. Though one is selected by mutual agreement and by consent from aggrieved parties in a dispute, the appointment normally follows from recommendation by lawyers involved in the dispute. Very seldom, you have a party proposing you directly without his lawyer's recommendation. In both situations your reputation on the Bench for honesty, judicial temperament and quality of judgement must precede you. Otherwise, such recommendations may be hard to come by.

Of course, there is another route: through the various arbitral institutions. The closest home is the Asian International Arbitration Centre (AIAC). There are also others such as the International Court of Arbitration (ICC), London International Court of Arbitration (LICA) or even the Hainan International Arbitration Court. With provisions in certain agreements and contracts for the director of such arbitral bodies to appoint an arbitrator, you may be fortunate to secure an appointment through this process provided you are one of their empaneled members. To be empaneled, in most instance, you have to apply and, in some cases, invited. For a retired judge, such approval should not be much of a problem based on previous experience.

However, there are certain things one must adjust to in an arbitration. Though the nature of work is much the same as a trial judge the primary contrast is, as expressed by a retired Singapore judge turned arbitrator, an arbitrator cannot demand and insist on strict adherence to certain directions particularly on a time schedule for the disposal of the matter. Unlike a sitting judge who can demand strict compliance with timelines, an arbitrator has to accommodate the timetable and availability of both counsel and parties. Often, one has to give way to the busy lawyer's programme to attend court and to comply with Bench directions.

The second thing he observed is that every issue or point raised in an arbitration must be addressed. As a judge you may, in certain situations, declare these as academic. Of course, there is also the need to restrain oneself from being too aggressive and demanding; judicial temperament here must be at its best or risk not securing another appointment. These adjustments are, in my view, minor and make one a better arbitrator.

Remuneration from an arbitration very much depends on the monetary value of the dispute. A set of scale fees is usually set for most institutionalised arbitrations. If you are looking at it for the first time, you may be surprised to discover the difference in fees between a domestic arbitration and one that is classified as foreign. Another pointer: fees are usually not paid until an award is delivered but in an ad hoc arbitration, staggered fee payment can be negotiated with the parties. Here some skills and thinking are required to anticipate for work done in a matter that is prematurely settled. Another reminder: arbitration fees are subject to tax including sales and service tax.

I once delivered a speech in an arbitration event that drew attention to an observation by a young lawyer attending such a conference for the first time. She remarked that everyone she met at the conference was "selling themselves". This is obvious: since such a gathering gives an opportunity for arbitrators who may in one case act as counsel and in another an arbitrator to expose themselves. There is no prohibition on such interchangeability of roles as long as it is not done in the course of the same matter. In some instances where three arbitrators are required, the Chairman is normally proposed and agreed to by the other two who were appointed by the respective parties. So, if one aspires to retire into this kind of work, one must remember to attend as many legal gatherings as possible bearing in mind, that the entrance fee, travelling expenses, hotel accommodation, food and drinks are no long at His Majesty's Service.

For one who wants no part in legal or arbitral work, an appointment to a corporation or company's board as an independent non-executive director may be an alternative. Here a little preparation is necessary, preferably after retirement to avoid the perception of partiality while on the Bench. Since you need to be invited to join, your intention must be made known to those concerned unless you are one of those who is so sought after that they just cannot wait to grab you the moment you step off the Bench.

Further, many of these appointments also depend on the timing when such a position falls vacant. But since there are a fair number of such vacancies in the market, with the advantage of experience on the Bench to add diversity to the board, the likelihood for such an appointment is bright. The only disadvantage to this is that such appointment carries a high degree of risk and responsibilities. Any decision made by

A group photo taken in 2010 with the Chief Justice Zaki Azmi (seated right) and
Chief Judge of High Court of Malaya Arifin Zakaria (seated left)
Standing (L-R): Justice James Foong Cheng Yuen, Justice Raus Sharif, Justice Zulkefli Ahmad Makinudin,
Justice Ramly Ali, Justice Suriyadi Halim Omar

the board is made collectively. And if your position is to protect the interest of the minority or a certain particular group, the demand for independence may be challenging. Then of course, there is the important aspect of corporate governance. This should not be much of a problem for a retired judge since his entire tenure on the Bench is nothing but a practice of this. Further, as a reminder, section 17A of the Malaysian Anti-Corruption Commission Act 2009 imposes a responsibility on every individual company director to prevent company's staff from corruption and bribery practices. Failure to exercise requisite due diligence to prevent such act from taking place, may result in a director being charged for a breach of this section.

Aside from this, the corporate world is a new experience for most retired judges who have not been there before. In a commercial institution the sole aim is to make profit and in other organizations it may be to advance a particular cause. Thus, instead of dispensing justice a retired judge now has to orientate himself to focus on of making profit or enhancing a particular objective. Terms like 'massaging the figures', 'interest rate', 'EBITA', 'balance sheet', 'profit and loss account, 'cash flow', and such like replace 'habeas corpus', 'interlocutory injunction' or 'interrogatories', 'security for costs', and so on. Such transformation takes time to adjust to, particularly for those not really fond of figures. And for those who wish to venture in this direction a course on how to read accounts will certainly assist.

But let me not discourage those who may wish to embark on this path. Other than the responsibilities, there is the opportunity to be exposed to current events and happenings. As part of a commercial or a statutory body, one will be in constant touch with daily events to keep up with developments and feel the pulse of the community in order to effectively participate in the decision-making process of the institution. Such work can be exciting and challenging. Of course, there is also the opportunity to interact with other people in the organisation and those it has dealings with. And the monetary reward for this is a pay cheque at the end of each financial year of the organisation not discounting meeting allowances.

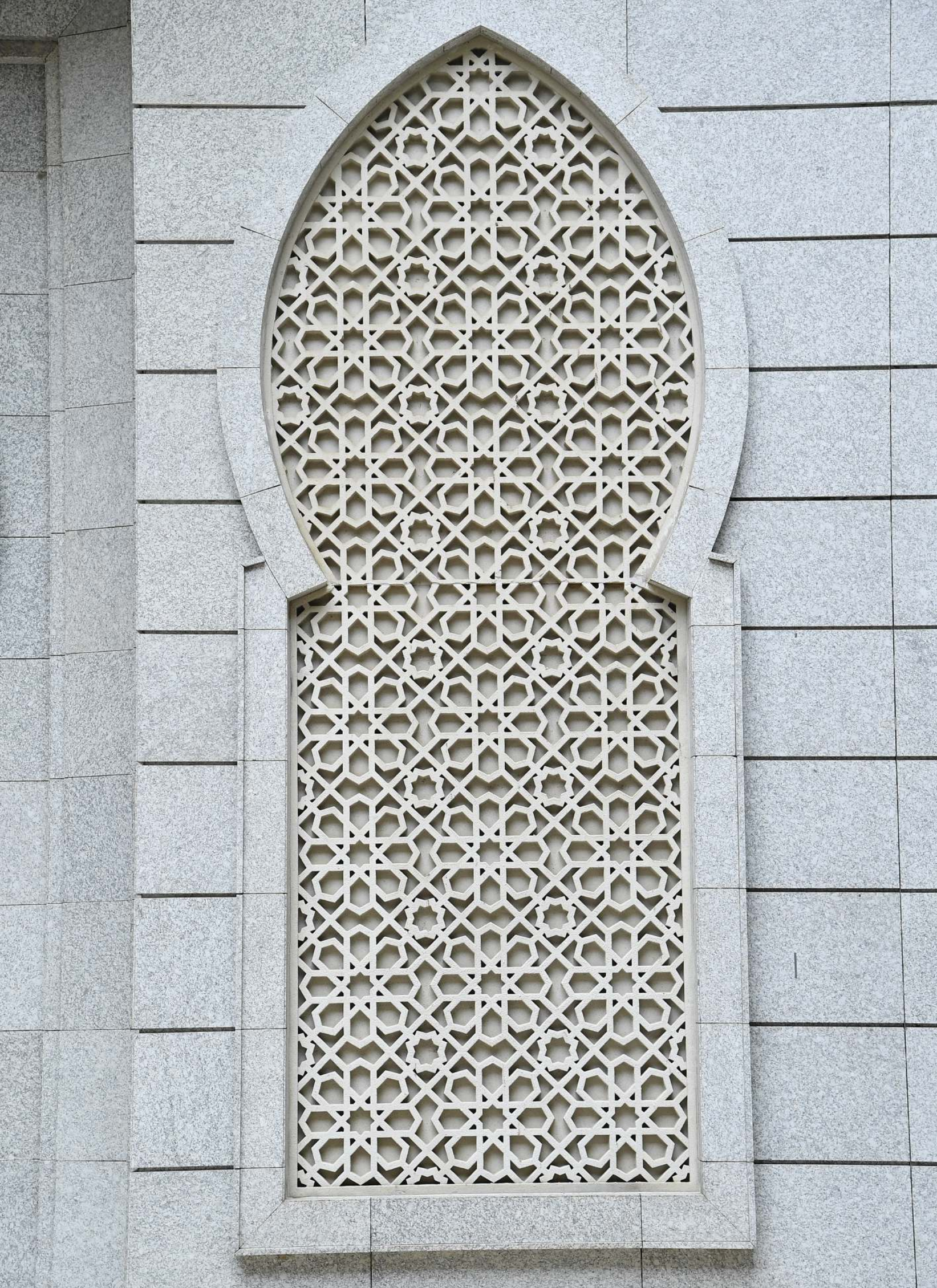
For those who prefer a less demanding environment, the academia is an alternative. Now with so many tertiary institutions that has a law faculty or department, securing a position as a member of the teaching staff is certainly not a problem. But what is demanded of a retired judge is his knowledge on court craft and advocacy skills. Lectures delivered on this subject are in great demand. These should not be too exacting for a retired judge except that one has to structure one's knowledge and deliver it eloquently. In some instances, telling war stories becomes part of the syllabus. You may not do this full time and often, if they are generous and appreciative, an "Adjunct Professorship" may be bestowed on you. Monetary return is mediocre and if one were to venture into this, it would more probably be on a pro bono basis or for a very small token. You would most probably do it either out of passion or a desire to contribute.

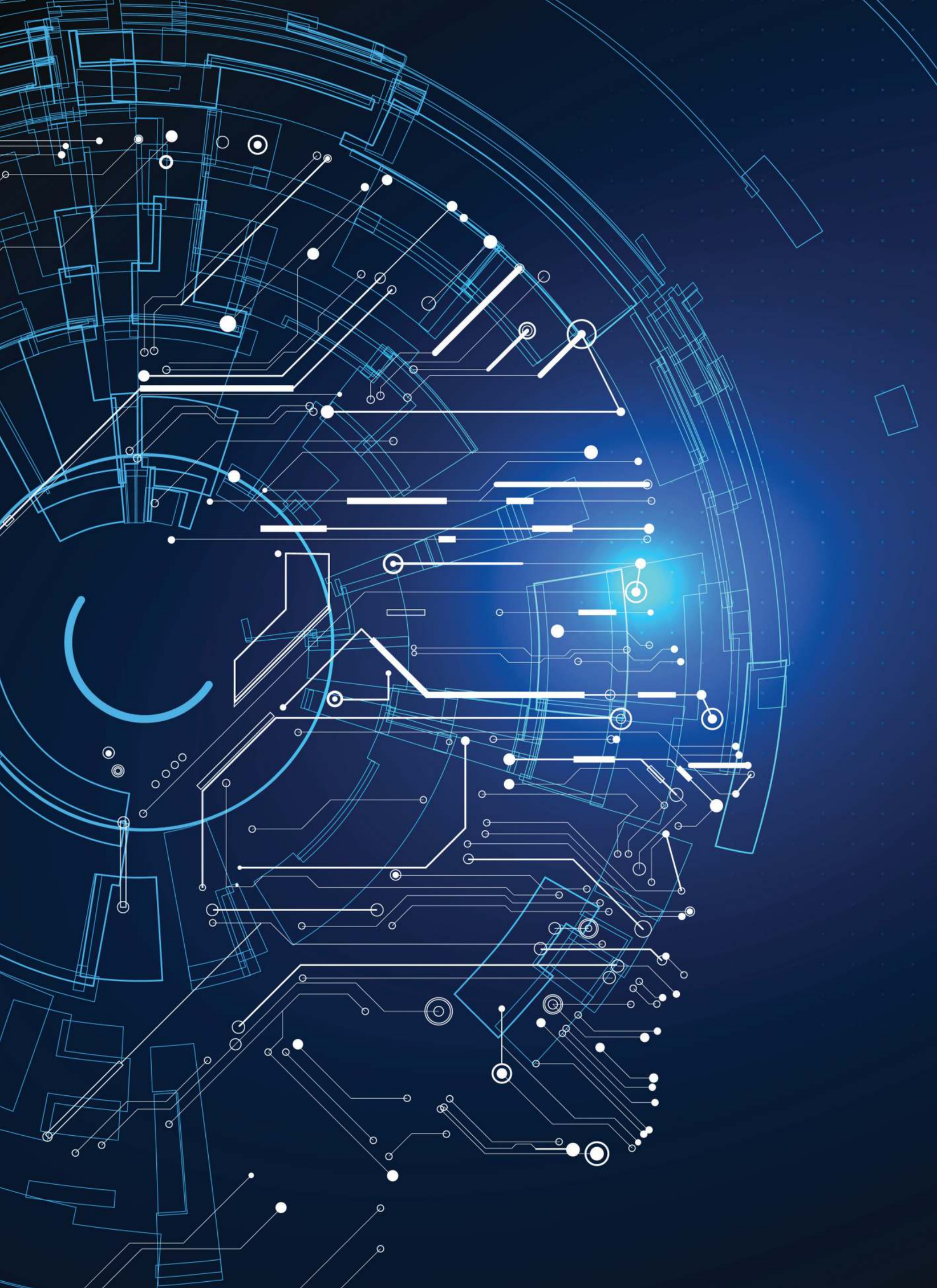
The same kind of sentiments are expressed by many retired judges who volunteer to serve in a variety of positions and capacities with numerous charitable, social and religious organisations or set ups. It is no longer for financial gain, status and position. It is for the satisfaction of serving, helping and being spiritually closer to God. If this is your calling, you may have found a fulfilling retirement life.

I have only listed out some options which someone could have told me when I retired. They are solely from my experience and views that I have formed. There is no ideal or standard way to follow in retirement for retirement means different things to different people. One can also live entirely for pleasure whether it is playing continuous rounds of golf or fishing all day or just, perhaps, watching movies or following the news and events at home and abroad or browsing the net for entertainment or gaining new knowledge. There is absolutely nothing wrong with any of these. But one thing is essential: it is to stay relevant and have a sense and purpose in life with more leisure time to spend with family and friends and to do the things you truly want and at your own pace. To enjoy this, maintaining decent health is necessary and a fair devotion of time to attain this is necessary. Each has to figure out how this is to be done.

With this, I wish all those who will be retiring the very best.

Tan Sri James Foong
Retired Judge of the Federal Court of Malaysia
February 25, 2021





CHAPTER 08

CASES OF INTEREST


MALAY

CASES OF INTEREST: CIVIL

Secret trusts enable testators to dispose of property upon death without specifying in the will, the actual beneficiary for whom the property is to be held on trust. It is not in any sense contrary to public policy as it protects the testamentary freedom of testators.

Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor [2020] 4 MLJ 581, FC

This was the first Federal Court decision on the concept of secret trusts.

This was a dispute relating to the succession to the assets of the deceased. The appellants were the deceased's lawful children from the first marriage, while the respondents were the elder brother and the nephew (the son of the former) of the deceased.

In 2013, the deceased was diagnosed with fourth stage renal cancer and underwent surgery for kidney removal. The family conflicts arose when the deceased made a will six days prior to his death, by which the deceased bequeathed all his assets and property to the respondents. The respondents then obtained the grant of probate and the appellants consequently filed a civil suit at the Pulau Pinang High Court seeking revocation of the grant of probate and to declare the will as null and void. The High Court had accordingly allowed the appellants' claim, revoked the grant of probate issued to the respondents, declared the will to be invalid, and declared that the deceased had died intestate.

Dissatisfied with the decision of the High Court, the respondents appealed to the Court of Appeal. The Court of Appeal allowed the appeal. The appellants then appealed to the Federal Court on the following questions of law:

1. Whether the concept of secret trust is applicable to Malaysia as there is no decision regarding the applicability of secret trust;
2. Whether secret trust is applicable in a case involving the issue of testamentary capacity of a testator; and
3. Whether secret trust is contradictory to the Malaysian Wills Act 1959 and/or is against public policy as it can be abused.

In dismissing the appeal and affirming the Court of Appeal's decision, the Federal Court answered Question 1 in the affirmative and Question 3 in the negative. Question 2 was held to be irrelevant as

Antique cast iron embosser seal of the High Court of Kuching, Sarawak

the court found that the elements to prove secret trusts and testamentary capacity of a testator are different one from the other and that it had been the appellants' case that the deceased either had no testamentary capacity to make the will or was put under undue influence when making the will. Despite this, the Federal Court went on to clarify the position of the law on testamentary capacity of a testator.

On the applicability of secret trusts in Malaysia, the Federal Court ruled as follows:

> [37] Therefore, it follows that the concept of secret trust, which is part of the law of trust and is governed by the rules of equity and the common law of England, is applicable in Malaysia subject to the proviso to s 3(1) of the Civil Law Act 1956 unless there is an explicit abrogation, variation, restriction or modification by written law. In the case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1, Abdul Hamid Mohamad FCJ (as he then was) stated:
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> > "Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of Peninsular Malaysia."
>
> …
> [42] The proviso to s 3(1)(a) of the Civil Law Act 1956 does not exclude the applicability of the law on trust and secret trust. This is because the court upholds secret trusts to prevent fraud on a testator and the rules of equity are applied to compel the trustee under a will to fulfill his promises to the testator.

On whether secret trusts are against public policy, the Federal Court opined as follow:

> [87] … The overriding purpose behind secret trusts is to enable property to be left in a will without explicitly naming who the property is being left to, by a bequest to a person who has previously promised to hold that property as trustee for the intended recipient. As wills are, by nature, public documents open to scrutiny, the concealment of identity that a secret trust provides is vital for those desiring a degree of privacy in the final disposal of their estate. In one sense, it would indeed not be in 'good conscience' to deny a testator the ability to distribute their estate as they see fit.
> …
>
> [93] To deny the existence of an agreement between the testator and the intended trustee would be to commit a fraud, and, providing the trust complies with the requisite conditions, it is unrealistic to uphold a strict reading of statute to allow the trust to fail. The court may intervene if there is a risk of an unconscionable result, like the denial of a testator's wishes …
> …
> [102] What can be distilled from the above discussion is that a secret trust, as a creature of common law, operates outside the formalities of Wills Act 1959. Nevertheless, a secret trust is a form of an *inter vivos* express trust in which the testator and trustee mutually agree to form a trust relationship for the lifetime of the testator. Once this is understood, one can also understand that secret trusts are enforced to promote the main policy principle behind the Wills Act 1959: to protect the testamentary freedom of testators.
>
> *per Justice Mohd Zawawi Salleh,*
> *Federal Court Judge*

Section 77 of the Strata Management Act 2013 was never intended to, and does not go further than to, ensure a fail-safe method of recovering management fees as an undisputed debt from parcel owners at the behest of a management corporation.

Dubon Bhd (in liquidation) v Wisma Cosway Management Corp [2020] 4 MLJ 288, FC

The sole legal issue for determination in the appeal was whether the right of a Joint Management Body or a Management Corporation to collect and receive payment from a proprietor, which is a company in liquidation, under sections 33 and 77 of the Strata Management Act 2013 ("SMA 2013") respectively, gives it a lawful preference as a secured creditor, over the assets of such proprietor.

The appellant, Dubon Bhd (in liquidation) is the beneficial owner of a unit in Wisma Cosway. The respondent, Wisma Cosway Management Corporation, is the management corporation of Wisma Cosway. The appellant was wound up by an order of the Johor Bahru High Court on January 18, 2000 and as part of the process of realising the company's assets, which included the unit, the liquidators required the execution of the transfer of the unit into the appellant's name. However, Stephens Properties Sdn Bhd ("Stephens Properties") that developed Wisma Cosway refused to execute such transfer unless the appellant first obtained a clearance letter from the respondent in relation to an outstanding sum of administrative and application fees. The outstanding sum comprised administrative and application fees owed to Stephens Properties and outgoings and service charges owed to the MC. The appellant through its liquidator denied the claim and argued that it was not liable to pay the sums sought by Stephens Properties and the MC because the appellant was in liquidation, and any payment of its liabilities was subject to the availability of funds for unsecured creditors. Moreover, any such payment had to adhere to the order of priority of creditors who had proven their debts, as well as the *pari passu* rule. In this context the respondent had not filed any proof of debt with the liquidator.

Subsequently, the appellant through its liquidator filed a claim before the Strata Management Tribunal, Putrajaya ("SMT proceedings") seeking reliefs *inter alia*, an order that: (a) Stephens Properties be directed to execute the memorandum of transfer without imposing any administrative and application fees; and (b) the respondent is to issue the clearance letter upon the appellant's payment of a sum of RM43,805.34. The respondent then filed a counterclaim for the sum owed and followed this up with an application in the winding up court for leave to commence or proceed with its counterclaim in the SMT proceedings under section 226(3) of the then Companies Act 1965 ("CA 1965").

The High Court refused the respondent's application to commence or proceed with any action against the appellant as the requirements for leave to proceed against the appellant (company in liquidation) had not been met. The High Court was of the view that the respondent's claim was bound to fail for two reasons: (a) any claim made by the respondent before May 31, 2011 was time-barred as at May 31, 2017 as no claim could be brought six years after the cause of action arose; and (b) the respondent is an unsecured creditor and the remaining assets of the appellant had to be distributed pari passu amongst its unsecured creditors.

When the matter was brought on appeal, the Court of Appeal, had reversed the decision of the High Court and held that leave ought to be granted to the respondent to proceed with its counterclaim. Since the appellant's debt to the respondent was a guaranteed sum under section 77 of the SMA 2013, the respondent was a secured creditor and the use of the word "shall" in section 77 imposed a mandatory obligation upon the appellant to settle the outstanding amount before the unit could be sold to third parties.

Aggrieved with the said decision, the appellant then appealed to the Federal Court. The appellant submitted that the Court of Appeal had departed from the settled principles of law on secured and unsecured debt by advocating that a new category of secured creditor exists under section 77 of the SMA 2013 which falls outside the insolvency statutory regime under the new Companies Act 2016 ("CA 2016"). In addition, the appellant averred that the outstanding sum is an unsecured debt and accordingly ought to be dealt with by a winding up court by way of lodgment of proof of debt form.

The respondent essentially supported the reasoning provided in the Court of Appeal's judgment that on a proper construction of section 77 of the SMA 2013, the outstanding sum is a secured debt. Thus, the issue could not be adequately resolved before the winding up court.

In allowing the appeal and restoring the order of the High Court, the Federal Court held that section 292 of the CA 2016 which was applicable to the case provides that after the payment of preferential debts, the liquidator acts to safeguard the interests of the unsecured creditors. That in turn is ensured by the collection and distribution of assets of the company *pari passu* amongst the unsecured creditors. The Federal Court was of the view that nothing in section 77 of the SMA 2013 purports to oust such insolvency principles. The term "guaranteed" ensures the existence of such a debt. It ensures that parcel proprietors do not evade their obligations to pay such debts. The recovery of such debts is thus assured and can simply be effected under the said section 77 of the SMA 2013.

> [34] It follows that when s 77 is construed in the context of the entirety of the SMA, and in light of the general regime of insolvency law as set out in the Companies Act, the outstanding sum payable to the MC is not a secured debt. It is a guaranteed debt vis-à-vis the company and the MC, which is a different matter [sic] altogether. It has no effect on the rights of third party creditors, such as secured creditors or other unsecured creditors.
>
> *per Justice Nallini Pathmanathan*
> *Federal Court Judge*

A bare trustee has no interest in the property to be made as a security and any charge made to a third party shall be void ab initio. In order to be eligible to seek protection under the proviso to section 340(3) of the National Land Code ("NLC"), one must first be a subsequent purchaser of the property and secondly be a bona fide purchaser for value.

He-Con Sdn Bhd v Bulyah binti Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and Another Appeal [2020] 4 MLJ 662, FC

In these two appeals before the Federal Court (Appeal Nos. 638 and 803), the court had to consider whether the vendor is a bare trustee of the landed property and whether it can subsequently be dealt with, including being charged to another party. The court also had to determine whether Ambank (M) Berhad, the fourth defendant ("Ambank") to whom the property had been charged, was an immediate or a subsequent purchaser, as this would determine whether Ambank would be entitled to protection under the proviso to section 340(3) of the NLC.

The respondents/plaintiffs are joint administrators of the estate of one deceased person, who during his lifetime had agreed to purchase a three-storey shop office pursuant to a sale and purchase agreement ("SPA") from He-Con Sdn Bhd/first defendant ("He-Con"). The respondents claimed that the purchase price had been paid in full. At the time the SPA was signed, the document of title for the property had yet to be issued. Nearly five years after the signing of the SPA, He-Con appointed the deceased through an irrevocable power of attorney ("PA1") as the attorney of the property. He-Con allowed the deceased to use PA1 to transfer the property into his name or that of his nominee and to sell, charge, rent, let or develop and manage the property without obtaining He-Con's prior consent. The deceased was also allowed through PA1 to appoint an attorney in substitution in his place. Subsequently, through a second power of attorney ("PA2"), the deceased then appointed the first respondent as his substitute attorney.

When the deceased passed away and the respondents were appointed as administrators of the estate of the deceased, the title of the said property was ready to be issued. The first respondent had requested that the title be registered in her name, but the developer

refused to consent to a direct transfer. When the first respondent obtained an order from the Kuala Lumpur High Court to administer the property, the first respondent discovered that He-Con was no longer the owner of the property as it had charged the property to Ambank as security for a financing facility without the first respondent's prior consent. Following He-Con's default in repaying the loan, Ambank obtained a court order to sell the property by way of public auction. The respondents then applied to the High Court to declare that the deceased is the true owner of the property, to set aside the transfer of the property from the developer to He-Con, and to declare the charge and the order for sale as null and void on the ground of fraud. The respondents also sought to injunct Ambank from conducting the public auction.

The High Court allowed the respondents' claim against He-Con, declaring that the deceased was the beneficial owner of the property. However, with regard to the claim against Ambank, the High Court held that Ambank was a *bona fide* party and had the right to proceed with the said public auction. Thus, Bulyah Ishak and Noraini Abdullah ("the respondents") will only be entitled to the surplus amount remaining after Ambank's public auction is settled.

Dissatisfied with the decision of the High Court, the respondents filed an appeal against He-Con while, He-Con in a separate appeal, appealed against the decision of the High Court in favour of the respondents to the Court of Appeal. The Court of Appeal was satisfied that Ambank is an immediate holder of the charge and that the terms stipulated in PA1 is clear that no evidence shall be given in proof of the terms of PA1 except the document itself. The Court of Appeal unanimously affirmed the High Court's decision which allowed the respondents' claim against He-Con with costs of RM15,000 and allowed the respondents' appeal against Ambank, i.e the fourth respondent with no order as to costs to injunct the said public auction. On October 8, 2019, a panel of five judges of the Federal Court heard the appeals of He-Con and Ambank against the decision by the Court of Appeal. The Federal Court then affirmed the Court of Appeal's decision and dismissed both appeals.

In respect of the appeal by He-Con, the Federal Court held that during the trial, the respondents had adduced all the relevant documents and testimony of witnesses to prove that the deceased had paid the purchase price of the property in full. Thus, the Federal Court opined that the deceased was the rightful owner of the property. The Federal Court opined PA1 is a document which evinced a clear intention on the part of He-Con to divest its interest in the property to the deceased as an attorney. The Federal Court was of the view that there was nothing invalid about the equitable interest of the deceased in the said property. Once that is established, He-Con is rendered a bare trustee. Once it is a bare trustee, then He-Con could not, in law, pass any interest in the said property to Ambank by way of creating a charge as security.

In regard to Ambank's appeal, the issue, in gist, is whether Ambank has an immediate or a subsequent interest over the property. In dismissing the appeal, the Federal Court was of the view that the transaction between He-Con and Ambank was caught by section 340(2)(b) of the NLC, although it was not privy to the very act which renders the instrument being void or insufficient.

> [87] … [U]nder the NLC, only a bona fide subsequent purchaser for value is protected under the express proviso to section 340(3) of the NLC. In this case, it is clear that the fourth defendant had its loan secured by registering a charge over the said loan immediately from the first defendant. At that material time, the first defendant had no longer any interest to be dealt with because it was then only a bare trustee for the deceased. In other words, no interest passed to the fourth defendant when the charge was registered. The transaction between the first defendant and the fourth defendant was a direct and immediate purchase. It was a transaction that was vitiated by s 340(2) of the NLC as it was based on an insufficient or otherwise, void instrument, as the first defendant could not pass any title or interest in respect of the said property to the fourth defendant.
>
> …
>
> [98] The result is that that the interest, albeit registered, of the fourth defendant bank, in relation to the charge is not indefeasible. The fourth defendant could not avail itself the proviso to s 340(3) of the NLC because it was not a subsequent purchaser. Being an immediate purchaser, the fact that the fourth defendant might be for all intents and purposes, a bona fide purchaser for value without notice, would not amount for much or at all. Its registered interest vide the charge is defeasible because the first defendant was a bare trustee. …
>
> *per Justice Abang Iskandar Abang Hashim, Federal Court Judge*

A management corporation may enact and pass House Rules for the purposes stipulated under section 70(2) of the Strata Management Act 2013 to prohibit the owners of service suites from using their parcels for commercial purposes by letting them out for short-term rental; as such arrangements would be mere licences not amounting to dealings within the ambit of section 70(5) of the Strata Management Act 2013.

Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp [2020] 12 MLJ 16, FC

In this case, the Federal Court had to determine whether the respondent, a Management Corporation established under the Strata Titles Act 1985 may enact and pass House Rules provisions to prohibit the owners of Verve Suites residential units from commercial usage for short-term rental which is consistent with the express land use found in the document of title, and whether such House Rules are in violation of section 70(5) of the Strata Management Act 2013 ("SMA 2013") when enforcing the said prohibition in the House Rules against the said owners.

On November 18, 2015, the Commissioner of Building Kuala Lumpur ("COBKL") issued a COBKL Circular 2015/2016 instructing all joint management bodies or management corporations to curb the prevailing issue of the use of buildings in and around Kuala Lumpur for short-term rental. Consequently, House Rule No. 3 was enacted and passed with an overwhelming majority in an extraordinary general meeting held by the respondent for the purposes of regulating, controlling, managing and administering the use and enjoyment of Verve Suites residential units and common property, and for matters relating to the safety, security and use of the individual units and to protect the common property. Suffice to say, the targeted purpose is to prohibit entirely all forms of short-term rental activities involving Verve Suites residential premises via internet platforms, booking websites and other related mediums. Any breach thereof shall attract a penalty RM200 for each day the infringement continues.

The appellants, some of whom are parcel owners in the Verve Suites, continued to engage in short-term rental activities despite two notifications issued pursuant to House Rule No. 3. As a result, two invoices were issued and the appellants were fined RM200 for every day of their failure to abide by the House Rule No. 3.

Subsequently, the respondent commenced an action in the High Court to injunct the appellants from breaching House Rule No. 3 and to enforce the same. The High Court found in favour of the respondent and held that via the short-term rental, the relationship between the houseguests and the respondent is between licensee and licensor or commonly known as "tenancies exempt from registration". The SMA 2013 is a piece of social legislation, by which the duties and powers of the management corporation set out in sections 59 and 70(2) of the SMA 2013 empower the management corporation by special resolution to make by-laws for among others, safety, and security measures. In this regard, in the interest of the community, the strata body will prevail over the individual commercial interests of the appellants. Therefore, House Rule No. 3 was held to be validly enacted and the Court of Appeal upheld this decision of the High Court.

Dissatisfied, the appellants filed an appeal to the Federal Court. The appellants obtained leave to appeal on the following questions of law: (1) Whether the Management Corporation established under relevant statutes may enact and pass the House Rules to prohibit the owners of the commercial service suites from commercial usage, in particular, for short-term rental (i.e for a day or part thereof), which is consistent with the express land use found in the document of title; and (2) whether such Management Corporation is in violation of section 70(5) of the SMA 2013 which, in subsection (a), prohibits any additional by-law from restricting dealings with any parcel of a subdivided building or land when enforcing such prohibition under the House Rules against the said owners.

The Federal Court decided in favour of the respondent and held (for Question 1) that the House Rule No. 3, created under section 70(2) of the SMA 2013 and having legal force under section 70(3) of the same, may override and supersede the express land use on the title imposed by the state authority under section 120 of the National Land Code ("NLC"). The Federal Court was of the opinion that the SMA 2013 is a social legislation which was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title, and therefore the provisions of the SMA 2013 ought to receive a liberal interpretation. Accordingly, where two different interpretations are possible, the one which favours the interest of the community over the interest of the individual is to be preferred.

[33] To resolve the apparent conflict between s 120 of the NLC and s 70 of the SMA 2013, the provisions must be read harmoniously such that they do not diametrically contradict each other. The effect of harmonious construction of these two provisions is this: the grant of powers or rights by one particular provision in a law does not mean that such rights may not at the same time be restricted by other provisions of the law. Hence, simply because the state authority has issued conditions and restrictions of use in the title of the land, that does not preclude the management corporation from promulgating further rules, regulations or by-laws for the purposes provided for by law, in particular the purposes stipulated in s 70(2) of the SMA 2013.

...

[43] The decision of this court in *Weng Lee Granite* clarifies that, generally speaking, even if a particular statute confers a certain right or interest in land, such right is not unfettered and as such, is capable of regulation for specific purposes. On the facts of that case, regulation was deemed expedient on the basis that there were certain pressing environmental and safety concerns as regards the appellant's quarrying. Extrapolating the logic of the case to the facts of the present one, we can infer, by parity of reasoning that rights and interests imposed by s 120 of the NLC are not absolute. When viewed in this context, s 70 of the SMA 2013 is no different from s 70A of the SDBA 1974 (the Street, Drainage and Building Act). While in *Weng Lee Granite* s 70A of the SDBA 1974 was interpreted to ensure that the proprietary rights of the appellant over the subject lands are exercised in a proper and responsible manner so as not to harm or endanger the environment for the good of the public, so too here. By-laws passed pursuant to s 70 of the SMA 2013 for the reasons stipulated in sub-s (2) thereof are similarly justifiable on the basis that they exist for the good of the strata community. In other words, in the present appeal, even if the state authority permits the use of the land for commercial purposes, such use is still subject to other laws in force, in particular to s 70 of the SMA 2013. Hence, the passing of House Rule No 3 is not unlawful.

per Justice Tengku Maimun Tuan Mat,
Chief Justice

As for Question 2, the court also held that the short-term rentals were lacking the element of exclusive possession and are merely licences, and therefore do not amount in law to "dealings" within the ambit of section 70(5) of the SMA 2013. There is no exclusive possession on the part of short-term renters, and the nature and quality of the occupancy was never intended to be a tenancy. In deciding so, the court opined that there is no singular test to determine whether an occupancy is a tenancy or a licence, instead it will depend on the whole facts and circumstances of the particular case.

The validity of appointments of judges shall not be challenged collaterally by virtue of the *de facto* doctrine. Judgments pronounced by a judge sitting alone in the Federal Court does not amount to coram failure. There is no breach of natural justice where the parties were not heard on certain matters not in issue in the court below as the apex court may deal with any matter which is relevant for the purpose of doing complete justice. There is no grave prejudice when the Federal Court did not consider the sole leave question posed in the case.

Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and Other Appeals [2021] 1 MLJ 478, FC

The Federal Court heard together seven review motions which were filed pursuant to rule 137 of the Rules of the Federal Court 1995 ("the RFC 1995"). All seven motions raised a common point relating to coram failure as the appointments of Tun Md Raus bin Sharif as Chief Justice ("CJ") and of Tan Sri Zulkefli bin Ahmad Makinudin as President of the Court of Appeal ("PCA") (hereinafter referred to as "the two judges") were constitutionally invalid on the basis that the advice given by the outgoing CJ, Tun Arifin bin Zakaria, to the Yang di-Pertuan Agong to appoint the two judges as additional judges of the Federal Court was invalid. It was submitted that such advice may only be given by a sitting CJ to take effect during his tenure. Hence, the two judges were not entitled to sit in these cases as they could not have occupied their respective positions as CJ and PCA as additional judges of the Federal Court under Article 122(1A) of the Federal Constitution ("the FC").

The court, in dismissing all seven review motions, unanimously held that the validity of the appointments of the two judges shall not be challenged collaterally through these review motions as the validity of the appointments of the two judges was not raised before them during the hearing of the appeals proper. Neither was the argument raised in a separate proceeding. Even if such challenge is successful, the decisions made by the two judges will continue to stand by virtue of the *de facto* doctrine that the decision of a judge or judicial arbiter can be deemed valid on the ground of public policy although his appointment may be invalid. Furthermore, the court recognised that the *de facto* doctrine exists in order to preserve the integrity of judicial decision for two reasons. It insulates the *de facto* judge's decision from collateral attack so as to prevent the integrity of the justice system being put into jeopardy and disrepute when unsuccessful private litigants raise the point of judges' lack of authority as a ground to re-litigate their case. Even if a judge's appointment is set aside *de jure*, all decisions made by the said judge, either judicially or administratively, are saved for the integrity of the judgment of the court.

> [20] The *de facto* doctrine exists to preserve the integrity of judicial decisions for at least one of two reasons. Firstly, it insulates the de facto judge's decision from collateral attack. Otherwise, unsuccessful private litigants will reserve the point as an ammunition to attack the judge's lack of authority as a ground to re-litigate their case or to have the outcome changed for the reason that the judge who heard their case was no judge at all. Doing so would be to put the prestige and integrity of justice and the justice system into jeopardy and disrepute. Secondly, even if a judge's appointment is set aside de jure, meaning that his appointment is directly and successfully assailed in proceedings against him be it in quo warranto or other proceedings, all decisions made by him either judicially or administratively are saved — not so much to save the integrity of that judge per se, but to save the integrity of the judgment of the court.
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> …
>
> [24] In any event, even if we were to accept the argument that the two judges' appointments were unlawful, their decisions remain protected by the *de facto* doctrine. The two main conditions for the doctrine to apply, as gleaned from the foregoing authorities, are that firstly, the judges whose appointments were assailed are not mere intruders or usurpers but were holding office under some colour of lawful authority. There is no doubt that the appointments of the two judges were made under the FC except that the propriety of such appointments is in issue. The two judges are therefore not usurpers in the sense of the word as there is some legal basis for their appointments. The other condition for the doctrine to apply is that the *de facto* judge cannot himself rely on it for his own protection. See: *In re Aldridge* at p 372. That is not the case here and as such the application of the doctrine is not excluded.
>
> [32] … [I]n a Malaysian context, the *de facto* doctrine has always existed in Malaysian common law and [the] constitutional and statutory

provisions are merely declaratory of the scope of its application. In that sense, we do not see why the de facto doctrine is inapplicable to constitutional appointments.

...

[34] ... The decisions of superior court judges are weightier especially those of the Court of Appeal and Federal Court (the latter being the final court of appeal). In addition, administrative decisions of the Chief Justice or President of the Court of Appeal such as recommendations on the appointments and elevation of judges or their discretions to empanel the Federal Court or the Court of Appeal, respectively carry significant ramifications. If the decisions of a superior court judge are not preserved by the de facto doctrine, the entire justice system might crumble to dust if such appointments are later deemed invalid.

per Justice Tengku Maimun Tuan Mat, Chief Justice

The application to re-amend the amended statement of claim at the High Court is non-appealable to the Court of Appeal. It renders the appeal and subsequently any order by the Court of Appeal as null and void, which ought to be set aside *ab initio*.

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1, FC

The appellant owns and operates Lincoln University College. The respondents are Majlis Perubatan Malaysia and one Prof Dato' Dr Wan Mohamed Bebakar who are involved in carrying out the accreditation survey and evaluation of the appellant's medical degree programmes that allegedly caused wrongful cancellation of the said programmes. The crux of the instant appeal lies in the order of the High Court allowing the appellant to re-amend its pleadings when the trial was already in midstream on which six witnesses out of eight had already testified at the material time. The High Court allowed the appellant's application but the said order was later reversed by the Court of Appeal. Hence, the Federal Court had to decide a preliminary issue raised by the appellant on whether an application to amend pleadings is appealable.

The appellant referred to section 67(1) of the Courts of Judicature Act 1964 ("CJA") and drew the court's attention to the words "judgments" and "order" and submitted that on plain reading of section 3 of the CJA a "decision", "judgment" or "order" excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties. The appellant's counsel argued that such "decision", "judgment" or "order", is non-appealable to the Court of Appeal when both of the said sections are read together. The respondents, on the other hand, submitted that the decision of the High Court is appealable because the High Court's decision in allowing the appellant's amendment application was given at the conclusion of the hearing of an interlocutory application on its merits.

In allowing the appeal, the majority decision opined that section 68 of the CJA imposes limitation on the jurisdiction of the Court of Appeal to hear and determine civil appeals conferred by section 67(1) of the CJA. The correct approach is to read section 68 with the definition of "decision" of section 3 of the CJA in determining matters that are non-appealable to the Court of Appeal in civil cases.

The Federal Court relied on the interpretation rendered in the recent decision in *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614 and affirmed that the intention of Parliament is clear and that the definition of "decision" is applicable to civil appeals inasmuch as it applied to criminal appeals. Although the word "decision" is not expressly used in subsection 67(1) of the CJA, the terms "judgment" or "order" appear in the definition of the word "decision" in section 3 although they are not defined specifically in the CJA.

The Federal Court also noted that an appeal does not lie against a decision in an amendment application made in the course of trial as is in the instant action. Moreover, such a decision does not finally dispose of the rights of the parties. The court found no basis in the respondents' contention, as it is a ruling made in the course of hearing of an interlocutory application.

It is trite law that the exclusion of appeals against non-final decisions is intended to prevent delays in trials occasioned by appeals of this nature. The Federal Court opined that an aggrieved party would not be prejudiced or be deprived of any right to appeal by the filtering effect of the excluding clause in the definition

of "decision" as it would still be open to the respondent, being the aggrieved party, to raise the impugned ruling in the appeal proper which is pending before the Court of Appeal. Apart from that, the court is competent to entertain and hear an appeal, if it were competently brought. However, where no jurisdiction exists or the court has no inherent jurisdiction, the appeal is not competently brought and the court therefore has no power to entertain such an appeal. Hence, a judicial decision made in want of jurisdiction or in breach of statute would be considered a nullity that is amenable for a review at any stage of the proceedings.

Justice Azahar Mohamed expressed his agreement to the majority decision by reiterating that although section 67(1) of the CJA provides that the Court of Appeal has jurisdiction to determine appeals from any "judgment" or "order" of any High Court in civil matters, it is clear from a plain reading of section 3 that a "decision", "judgment" or "order" excludes a ruling made in the course of a trial or hearing which does not finally dispose of the rights of the parties. Justice Azahar also noted that to allow an appeal from such a decision would indisputably delay the administration of justice. The Court of Appeal therefore had no jurisdiction to hear and determine the appeal and it had committed a jurisdictional error when it heard the appeal.

In delivering the dissenting judgment of the court, Justice David Wong Dak Wah, on the other hand, held that section 3 of the CJA does not apply to civil appeals through a proper reading of section 3 against sections 67 and 68 of the CJA. Justice David went on to conclude that Parliament had intended for section 3 to apply only to criminal appeals under section 50 to the exclusion of section 67 of the CJA, and hence, the amendment application was appealable.

The practice of ascribing "bin Abdullah" instead of the biological father's name to an illegitimate Muslim child has no legal basis in this country. Nonetheless, Malay Muslim illegitimate children cannot carry the personal name of his or her biological father as Malay Muslims do not have any surname and are subject to the Federal law enacted by Parliament as well as the Islamic state law enacted by the Legislature of each State.

Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener) [2020] 2 MLJ 277, FC

The Federal Court had to decide on this issue in a judicial review case on whether the Director General of National Registration ("DGNR") possesses the authority, under the Births and Deaths Registration Act 1957 ("the BDRA") to ascribe "bin Abdullah" instead of the biological father's name to the name of an illegitimate Muslim child when registering the birth of that child.

The said illegitimate child who is the first respondent was born in Johore on April 17, 2010 which was five months and 24 days (five months and 27 days according to the Islamic Qamariah calander) from the date of the marriage of MEMK (the second respondent) and NAW (the third respondent). According to Muslim law, a child is illegitimate if he or she is born less than six qamariah months from the date of his or her parents' marriage. Upon an application for the registration of the child's birth made by the second and third respondents, the DGNR issued the respondent child's birth certificate with the name of MEMK in the column on particulars of the father, and the child's full name was given as "bin Abdullah", instead of "bin MEMK". The said birth certificate also contained a notation "Permohonan Seksyen 13" as an explicit acknowledgement that such application is one for an illegitimate child. The second respondent then applied under section 27(3) of the BDRA to correct the child's name to include his name as the father of the said child. The DGNR rejected the application on the basis that the child is an illegitimate Muslim child and was to be named "bin Abdullah" in line with the *fatwa* issued on the subject.

The learned High Court judge dismissed the respondents' application and was of the opinion that the DGNR's refusal to alter the child's name from "bin Abdullah" to "bin MEMK" was in accordance with law

and that the entry "Permohonan Seksyen 13" in the child's birth certificate did not violate any of the child's fundamental constitutional liberties. Furthermore, the DGNR was correct to rely on Islamic law on legitimacy in rejecting the application to alter the child's full name to "bin MEMK".

Subsequently, the High Court's decision was overturned by the Court of Appeal on the basis that the High Court had failed to address the existence of section 13A(2) of the BDRA read together with section 27(3) of the same which enabled an illegitimate child to bear either the mother or the father's name. Therefore, the DGNR had misdirected himself by referring to the said *fatwa* when dismissing the respondents' application. The Court of Appeal went on further and held that the *fatwa* did not have any force of law and even if it had any force of law, it could not supersede the BDRA as a federal law. Therefore, the DGNR was wrong in relying on the *fatwa* issued by the National Fatwa Committee at the material time. In other words, the Court of Appeal was of the position that the BDRA did not allow the importation of substantive principles of Islamic law in the registration process.

When the matter was brought on appeal to the Federal Court, Justice Rohana Yusuf, delivering the majority decision of the Federal Court, was of the view that section 13A of the BDRA did not apply to the registration of births of Malay Muslim children, and therefore it did not enable the children to be named with the personal name of their father which is not a surname. It is an accepted view that the Malays do not have surnames and that the Malay naming convention only consists of the titles bin or binti followed by the personal name of the father.

> [43] All these observations reinforced and fortified my view that giving a plain meaning to the word surname, it is as clear as daylight that Malays do not have any surname. To name the child as "bin MEMK" on the basis that it is a surname of the father pursuant to s 13A is therefore without basis legally or factually.
>
> [44] Section 13A is clear in its language and does not call for any other rule of statutory interpretation, purposive or golden rule. In view of the above, I am clear in my mind that s 13A of the BDRA is not applicable to the Malays in Malaysia, and hence is of no application to the respondents. With respect the Court of Appeal was plainly wrong to apply s 13A(2) to the respondents.
>
> *per Justice Rohana Yusuf,*
> *President of the Court of Appeal*

However, Justice David Wong Dak Wah dissented in this matter by stating that reading the "surname" to include the personal name of the father in section 13A of the BDRA 1957 would be in accord with the object and purpose of the BDRA 1957, and therefore an illegitimate child would certainly have no issue of carrying the personal name of his father.

> [126] Further, reading "surname" to include "patronymic surnames" would be in accord with the object and purpose of the BDRA 1957. Its long title stipulates that the BDRA 1957 is an Act "relating to the registration of births and deaths". It would hardly accord with logic to read the word "surname" in the restrictive manner proposed by the appellant and the intervener and to deny a vast majority of Malaysians a surname if that phrase includes "patronymic surnames".
> ...
>
> [131] Reading ss 13 and 13A of the BDRA 1957 together, a father of an illegitimate child who wishes to have his son or daughter carry his surname is certainly not precluded from having that done by the language of the BDRA 1957. I therefore agree with the respondents' contention that "surname" in s 13A of the BDRA 1957 includes a "patronymic surname".
>
> *per Justice David Wong Dak Wah,*
> *Chief Judge of Sabah & Sarawak*

Another issue of whether in performing registration of births of Muslim children, the Registrar of Births and Death may refer to and rely on sources of Islamic law on legitimacy, the majority decision of the court held that Muslims in this country are subjected to the general laws enacted by Parliament as well as Islamic state laws enacted by each State Legislature; including matters pertaining to legitimacy of a Muslim child, as authorised by the Federal Constitution under item 4(ii) of List I (Federal List) in the Ninth Schedule to the Federal Constitution. Hence, the respondents are subjected to section 111 of the Family Law (State of Johore) Enactment 2003 ("2003 Enactment") that manifests an illegitimate child cannot be ascribed to the name of his father in Islam, and therefore the first

respondent cannot be ascribed to the personal name of his father.

Nevertheless, the majority decision opined that the decision of the DGNR to ascribe "bin Abdullah" on the application of the National Fatwa Committee was unreasonable as the *fatwa* on how to name an illegitimate child was not gazetted in Johore as required in the Administration of the Religion of Islam (State of Johor) Enactment 2003. Therefore, the DGNR was wrong in imposing the said fatwa on the respondents and had no basis in law to ascribe "bin Abdullah" to the name of the first respondent.

On the other hand, Justice David Wong Dak Wah, in dissenting, was of the opinion that the federal government has no jurisdiction to apply Islamic law to the registration of births and deaths as it falls within item 12(a) of the Federal List.

> [183] In my considered view, based on what I have stated earlier, the Federal Government, that is to say the appellants, have no jurisdiction to apply Islamic law as far as the registration of births and deaths in the context of item 12(a) of the Federal List is concerned. The registration of births and deaths is a subject-matter falling exclusively within the Federal List without any necessary correlation to the State List. This, to me, is without prejudice to the legal concept of legitimacy.
>
> [184] The legitimacy of Muslims is a subject-matter falling strictly within the jurisdiction of the State List. In this judgment, I do not make any determination on Islamic law. I am completely aware of the appellants' and the intervener's contention that legitimacy and paternity — as far as Islamic law is concerned — are inextricably linked concepts. On that observation I make no comment.
>
> *per Justice David Wong Dak Wah,*
> *Chief Judge of Sabah & Sarawak*

Justice Nallini Pathmanathan, also in a dissenting judgment, opined that the appellants acted *ultra vires* the BDRA 1957 by referring to external sources of law when exercising their powers of registration, which the Federal Constitution and the BDRA 1957 did not otherwise permit them to do.

> [275] The structure of the Federal Constitution in the present context is such that a clear divide is maintained between civil law, which is intrinsically secular in nature and applicable to all citizens on the one hand, and Muslim personal law on the other, which is confined to State legislation promulgated in accordance with the State List and applicable only to Muslims. This clear demarcation between the Federal and State Legislatures is an essential or intrinsic feature of the Federal Constitution, and ought not to be violated or transgressed. To assimilate or import state law or List 2 matters in the construction, implementation or application of Federal Law would be to violate the internal architecture of the carefully constructed and circumscribed structure of the Federal Constitution. I therefore conclude that the contents of the Johore State Enactment cannot be imported and applied in the construction of Federal Law, namely the BDRA 1957. To do so would be to conflate Federal Law and State Law. It would also conflate the concepts of paternity and legitimacy, which are differently treated under these separate "regimes".
>
> *per Justice Nallini Pathmanathan,*
> *Federal Court Judge*

On the other issue pertaining to the notation of "Permohonan Seksyen 13" on the first respondent's birth certificate, the majority was of the view that such notation is merely a true reflection of the fact surrounding the registration of birth of the first respondent. As such, it cannot be held as discriminatory against illegitimate children. As a result, the Federal Court allowed the appellant's appeal in part and set aside the order made by the Court of Appeal. The Federal Court also made a consequential order for the DGNR to remove "bin Abdullah" from the birth certificate of the first respondent in line with the application made.

per Justice Rohana Yusuf,
President of the Court of Appeal

There is no pre- and post-election qualification dichotomy under the Sarawak Constitution. An election candidate who suffers a pre-election disqualification loses the eligibility to be appointed as a member of the Dewan.

The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors and Other Appeals [2020] 4 MLJ 303, FC

In this case, the court had the occasion to hear the three appeals concerning the disqualification of a State Legislative Assembly member ("ADUN") for having dual citizenship prior to contesting in a Pujut by-election. The first respondent, a Malaysian citizen born in Sarawak, was nominated as a candidate to contest as a member of the Dewan Undangan Negeri of Sarawak ("the Dewan") for the state constituency seat of Pujut. It was undisputed that he acquired Australian citizenship and was a registered voter in Australia. Twenty-one days before being nominated as candidate, the Government of Australia approved and accepted his application to renounce his Australian citizenship. He then filed the requisite statutory declaration declaring him eligible to contest in the said election. Consequently, in the by-election he was returned as the winner with a majority of 1,759 votes.

One defeated candidate, Hii King Chiong, then filed an election petition ("EP") against the first respondent seeking a declaration that the latter was not duly elected or ought not to have been returned as an elected assemblyman for having voluntarily acquired Australian citizenship. The EP was struck out on a technical point without the merits being heard. Hii did not appeal against the striking out order pronounced. Some months thereafter, the first respondent was disqualified by a resolution passed pursuant to Article 19(1) of the Sarawak Constitution. The first respondent then filed an originating summons in the High Court of Kuching to challenge the Dewan for disqualifying him as an elected member. He succeeded in the said challenge and it was held that the disqualification was null and void as it was against the rule of natural justice and that such disqualification contravened Article 17(1)(g) of the Sarawak Constitution and/or Article 118 of the Federal Constitution.

Aggrieved by the decision of the learned High Court judge, the appellant, the second respondent and the third respondent appealed to the Court of Appeal against the entire decision of the learned High Court judge. The Court of Appeal dismissed the appeal. However, it was unanimously ruled by the Court of Appeal that the first respondent was a disqualified person by operation of Article 17(1)(g) of the Sarawak Constitution and that the disqualification was not removable, not redeemable and not forgivable. Effectively, this was carried over to his appointment as member of the Dewan.

The appellant then obtained leave to appeal to the Federal Court and posed seven questions of law to the court. The questions essentially revolved around the issues of jurisdiction and justiciability of court to entertain the Speaker of the House's decision, the privilege of the Dewan and the interpretation of Articles 16, 17, 18 and 19 of the Sarawak Constitution. The Federal Court arrived at a split decision.

In allowing the appeal, the majority held as follows:

> [145] The language of art 17(1)(g) of the Sarawak Constitution is plain and unambiguous. There is only one meaning to be ascribed to the provision, and that is, a person who is otherwise eligible for election to the Dewan but who has since become disqualified for having committed an act of disqualification under the art 17(1)(g), loses his eligibility to stand for election to the House.
>
> [146] By parity of reasoning, if such person has lost his eligibility to stand for election to the Dewan, a fortiori he must have lost his eligibility to be appointed to the Dewan as an elected member. It is palpably wrong and goes against the spirit of art 17(1)(g) to allow such disqualified person to remain in the Dewan. That will defeat the whole purpose of going through the election process, which is to appoint only qualified persons to the House as elected members. The fact that his election to the Dewan has not been voided by the Election Court does not legitimise his continued presence in the Dewan if otherwise he remains a person who is disqualified for election to the House.
>
> [147] The object behind art 17(1)(g) read with art 19(1) of the Sarawak Constitution is clear, which is to prevent a disqualified person from getting his way into the Dewan and to remain in the House as an elected member. It will be a strange working of the law if a disqualified person can legitimately sit in the House as an elected member and enjoy all the privileges accorded to a member. That

A mace at the High Court of Penang

will render art 17(1)(g) and art 19(1) completely otiose and denuded of all meaning, thus giving the wrong impression that they were enacted without any purpose in mind, contrary to an established principle of statutory interpretation that the Legislature does not legislate in vain. Article 19(1) must be read harmoniously with art 17(1)(g) and not in isolation.

per Abdul Rahman Sebli (for the majority)
Federal Court Judge

On the other hand, the minority decided as follows:

[16] ... Because the case concerned a post-election disqualification, the appropriate decision-maker was the House. And, because no decision was made, the holding of the by-election was held to be unlawful and the plaintiff's seat was declared not to be vacant. By extending the ratio decidendi, if a disqualification was a pre-election one, the appropriate body to decide the validity of the election would have to be the Election Court established under art 118 of the Federal Constitution. The House, in that regard, has no power to determine such pre-election disqualification just as the court has no power to decide on post-election disqualification.

[17] Based on my analysis of the provisions of arts 17(1) and 19(1) of the Sarawak Constitution and given that they are worded substantially the same as arts 48(1) and 53(1) of the Federal Constitution, it is my considered view that the ratio decidendi in the Fan Yew Teng No 1 case applies to the present case with equal force. Despite learned counsel for the respondent's assertion that the respondent is not disqualified, it is very obvious on the evidence that he had voluntarily acquired foreign citizenship. He is therefore clearly disqualified for election and membership by virtue of art 17(1)(g) of the Sarawak Constitution. However, the appropriate body to determine his disqualification is the Election Court and not the Dewan. In other words, because the disqualification incurred by him is a pre-election disqualification, the Dewan had no jurisdiction to make the decision to disqualify him vide the Ministerial Motion dated 12 May 2017.

per Justice Tengku Maimun Tuan Mat,
Chief Justice

[81] At this juncture, it must be understood that the list of disqualifying factors respectively in art 48(1) of the Federal Constitution and art 17(1) of the Sarawak Constitution apply to both pre-election and post-election situations. For example,

a person who has been convicted of the relevant offence is prohibited from running for elections. It may also be the case that the person, at the time of election was not convicted of any such offence and that the conviction only happened after he became a member of Parliament. The only question is who ought to make the positive pronouncement of disqualification. According to Azmi J in *Fan Yew Teng*, in the case of the former; it would have to be a court duly constituted under art 118 of the Federal Constitution; and in the case of the latter, the House itself may take the necessary action.

...

[93] Firstly, the pre- and post-election dichotomy respects the doctrine of separation of powers. If I were to sustain the submission of the appellants it would mean that if in the event that the Election Court had held that the respondent is not disqualified person in the trial of election petition, the DUN would have a power to ignore the ruling of the Election Court and in fact can override that decision by tabling a ministerial motion as was done in this case. That proposition is a blatant disregard to the doctrine of separation of powers which I am not prepared to allow. It is also in disregard art 118 of the Federal Constitution.

[94] On a proper construction of the provisions of the Federal and Sarawak Constitution, there is clear separation of powers between the High Court and the House or Dewan when it comes to the determination of disqualification. Article 118 of the Federal Constitution stipulates that no election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held. The language itself suggests that the power to determine the validity of elections (which necessarily includes pre-election disqualification), is a feature exclusive to the High Court. This accords well with use of the words "has ceased" in art 19 to suggest that once a person is already a member, the validity of his membership post-election is to be decided by the Sarawak State Legislature. In this sense, there can be no conflict as there are in fact two different decision-makers each catered to a specific situation i.e pre-election and post-election disqualification."

per Justice David Wong Dak Wah,
Chief Judge of Sabah and Sarawak.

An administrator who applied for the removal of caveat under section 177(1) of the Sarawak Land Code is considered to have a registered interest and therefore has locus standi for such application.

Tebin bin Mostapa v Hulba-Danyal bin Balia & Anor [2020] 4 MLJ 721

The Federal Court in this appeal was called upon to determine whether an administrator of the estate belonging to a deceased landowner in Sarawak who had yet to register his name as the *qua* administrator could apply to court to remove a caveat affecting the land.

The appellant was appointed as an administrator to his late father's estate. During his late father's life, his father had entered to a sale and purchase agreement to sell the lands to the respondent's father. The terms of the agreement required the appellant's father to apply for the consent to transfer. This was not done and the sale agreement was left not completed with the demise of the appellant's father. Pursuant to the sale, the respondent's father lodged a caveat on the two said parcels of lands.

About six years later, the appellant *qua* administrator sought to remove the caveats under section 177(1) of the Sarawak Land Code ("SLC"). At the High Court, the application was dismissed on the basis that the appellant had no *locus standi* to file such an application. The appellant then appealed to the Court of Appeal where the majority decision affirmed the High Court's decision. The minority decision of the court on the other hand preferred the harmonious construction of the statutes approach and opined that the appellant *qua* administrator was clothed with the necessary *locus standi* both under the SLC and other applicable statutes for an application of the removal of the caveat. The Federal Court saw the legal issue posed as a matter of statutory construction. The unanimous decision of the court in allowing the appellant's appeal and setting aside the decisions of the courts below held:

> [44] In holding that the appellant did not have a registered interest, the majority in the Court of Appeal also agreed with the view expressed in *Teng Hung Ping's* case that: (i) the appellant as the administrator of the estate holds no registered interest or estate in the land; and (ii) the appellant is not without remedy as the appellant can apply

> under s 178 of the Sarawak Land Code to be registered as the administrator of the estate so as to enable the appellant to have the locus standi to make the application. We think that this is a misnomer. We say this for two reasons. First, the appellant's application to remove the caveat was made in his capacity as the administrator of the estate of the deceased registered proprietor; for emphasis, it must be noted that as the administrator the appellant is standing in the shoes of the deceased registered proprietor.

Second, both the High Court and the majority in the Court of Appeal appeared to have taken the view that the appellant did not have any registered interest, which view failed to take into account the obvious fact that the appellant was not acting in his own personal capacity but in the capacity as the administrator of the estate of the deceased registered proprietor. In that capacity, the law recognizes that he is the representative of the estate of the deceased registered proprietor (s 2 of the Sarawak Land Code). Accordingly, we do not see how the fact that the appellant does not have a registered interest has any bearing on the matter. Further, it was also stated in *Teng Hung Ping's* case that the existence of the caveat prohibited the claimant from making an application for transmission under s 169 of the Sarawak Land Code. If so, then the administrator of an estate of a deceased registered proprietor of land is without recourse or remedy. Without being able to be entered on the register as the administrator of the estate, the administrator would not be able to discharge his statutory duties for the benefit of the estate. At any rate, it is clear that the specific provision on transmissions is s 169 of the Sarawak Land Code; we do not think that s 178 may be interpreted to override the clear and specific provision of s 169 on transmissions. As such, the fact that the appellant has no registered interest is immaterial and irrelevant to the issue in hand."

per Justice Vernon Ong Lam Kiat,
Federal Court Judge

A successive contract amounts to continuity of employment and the citizenship of an employee is not a consideration barring permanent employment.

Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 5 MLJ 58, FC

The key issue in this appeal is whether the appellant was employed on a fixed term contract or as a permanent employee of the respondent at the material time.

The appeal was brought by an expatriate appellant who was appointed as a Consultant in AIMS Date Centre 2 Sdn Bhd ("ADC") for consultancy services for a fixed one-year term and thereafter appointed as Vice-President of Product Development. His contract was renewed annually for three consecutive years and upon the merging of ADC with the respondent, he was then reclassified as the respondent's Consultant and Vice President of Product and Solutions. During the fourth year for his contract renewal, his entitlement to the bonus performance scheme was removed. Unhappy and disagreeing with the removal, he was later offered a three-months contract by the respondent which he refused. The terms of the monthly contract *inter alia* were to supersede all previous contracts and was determinable by giving two months' notice. Based on the latter clause, the respondent then gave him two months' termination notice of the contract. Feeling dejected, he complained to the Industrial Court that he had been dismissed without just cause or excuse.

The Industrial Court lifted the corporate veil and determined that the whole arrangement of the appellant's contracts was intended for a permanent employment, and the purported "fixed term contracts" were a sham. The respondent was then awarded back-wages and compensation in lieu of his reinstatement. The respondent appealed to the High Court by way of judicial review to quash the Industrial Court award.

At the High Court, the learned judge upheld the Industrial Court's decision and dismissed the respondent's application. However, at the Court of Appeal, both decisions of the Industrial Court and the High Court were set aside on several grounds *inter alia* (i) the terms of the new contract dictate that it would be a fixed term contract for the period of three months, disregarding the earlier contracts that the appellant had with his employers; (ii) there is no continuity of employment in the arrangements between ADC and

the respondent on the basis of separate legal entities; (iii) no lifting of corporate veil can be done in the absence of fraud or unconscionable conduct; and (iv) an expatriate who had to obtain a work permit can never be a permanent employee.

Aggrieved, he appealed to the Federal Court. In a unanimous decision, the Federal Court allowed the appeal, set aside the Court of Appeal decision and affirmed the decision of the Industrial Court and the High Court. It was held:

> [54] The use of fixed term contract employee had become a trend in Malaysia, particularly in the employment of expatriates and also in the construction industry where employees are commonly engaged on a project basis. A fixed term contract is a contract of employment for a specific period of time i.e with a defined end (see: *Wiltshire County Council v National Association of Teachers in Further and Higher Education and another* [1980] ICR 455). As a general rule, such contract cannot be terminated before its expiry date except for gross misconduct or by mutual agreement. However, a contract can still be for a fixed term if it contains within it a provision enabling either side to terminate it on giving notice before the term expires (see: *Dixon and another v British Broadcasting Corporation* [1979] QB 546). In this connection, the main issue that presents itself is whether there is a genuine fixed term contract or there is an employment on a permanent basis dressed up as several fixed term contracts.
>
> …
>
> [72] In our view, the proposition of law propounded above is correct in law. The citizenship of the appellant/claimant has no bearing in deciding whether the appellant/claimant was in permanent employment or in employment under a fixed term contract. We also note that the Industrial Relations Act 1967 does not make any distinction between the citizens of Malaysia and non-citizens.
>
> …
>
> [83] Based on the above reasons, we take the view that all workers should be treated with fairness, dignity, and equality without distinction whether they are local or foreigners. This is also consonant with art 8(1) of the Federal Constitution which essentially provides that all persons are equal before the law and entitled to the equal protection of the law.
>
> *per Justice Mohd Zawawi Salleh, Federal Court Judge*

In the absence of actual controversy affecting the rights of parties, the constitutional questions referred to the Federal Court are abstract and purely academic, for there is no real dispute underlying the questions to begin with. They existed in a complete factual vacuum before the apex court. Although the constitutional questions posed were undoubtedly important, this was not a proper case for the Federal Court to answer the questions in the abstract.

Dato' Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133, FC

A historic milestone was set this year when an extraordinary matter was referred to the Federal Court from the High Court pursuant to section 84 of the Courts of Judicature Act 1964 ("CJA"). The appellant filed an originating summons in the High Court seeking a declaration that: (i) the National Security Council Act 2016 ("NSCA 2016") is unconstitutional and void; (ii) section 12 of the Constitution (Amendment) Act 1983, section 2 of the Constitution (Amendment) Act 1984, and section 8 of the Constitution (Amendment) Act 1994 ("the amending provisions"), and consequently Article 66(4) and (4A) of the Federal Constitution ("FC") are unconstitutional, null and void, and of no effect for violating the basic structure of the Constitution.

The learned High Court judge accordingly referred two constitutional questions to the Federal Court pursuant to section 84 of the CJA: (a) whether the amending provisions are unconstitutional, null and void and of no effect on the ground that they violate the basic structure of the FC; and (b) whether the NSCA 2016 is unconstitutional, null and void and of no effect on the following grounds: (i) it became law pursuant to unconstitutional amendments; (ii) it was not enacted in accordance with Article 149 of the FC; and (iii) it violated the right of freedom of movement guaranteed by Article 9(2) of the FC.

Justice Nallini Pathmanathan, delivering the majority judgment, considered two main models of constitutional review of legislation, namely the European model by a specialised constitutional court, and the common law model by ordinary courts. In Malaysia, the common law model involves review that is decentralised and concrete. Two important consequences arise, i.e. constitutional questions should normally be determined by the High Court at first instance and only real and actual controversy constitutes the basis for review.

On the point of decentralised review, Justice Nallini Pathmanathan opined that the referral jurisdiction of the Federal Court is provided under Article 128(2) of the FC and this is reflected in the wordings and application of section 84 of the CJA.

> [245] Thus the drafters of the FC and CJA envisaged that the reference jurisdiction under (now) s 84 of the CJA was not to be exercised automatically or invariably in every case. The High Court should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court. Not all cases should be referred to the Federal Court for determination. It is implicit in the constitutional and statutory scheme that the "special cases" suitable to be referred to and determined by the Federal Court must necessarily be subject to certain conditions.
>
> *per Justice Nallini Pathmanathan, Federal Court Judge*

On the point of concrete review, the majority was of the view that as a general rule, the court should not answer questions which are abstract, academic, or hypothetical. This flows from the common law model of concrete review, under which the role of the court is to adjudicate matters in the context of the facts of the particular dispute before it. The test to be applied in order to determine whether a matter is abstract or academic is whether there is an actual controversy affecting the rights and interests of the parties. A violation of constitutional rights can give rise to an actual controversy to be determined by the court.

The majority also recognised that in principle, the very existence of a law can potentially constitute a violation of constitutional rights so as to give rise to an actual controversy in exceptional cases. However, such cases are few and far between. On the facts, the matter was not demonstrated to the Federal Court's satisfaction that the present case falls within the aforementioned exceptional category. It was not shown that the very existence of the NSCA 2016 interferes with the conduct of the appellant's personal life or that of any other person. The mere assertion that the statute exists and that the appellant is a citizen, is insufficient to give rise to an actual controversy.

> [287] In the absence of an actual controversy affecting the rights of parties, the constitutional questions referred to us are abstract and purely academic. The questions have not become academic due to some change in the factual substratum; they were academic for there was no real dispute underlying them to begin with. They exist in a complete factual vacuum in the case before us.
> …
> [288] Although the constitutional questions posed are undoubtedly of importance, based on the cause papers before us, we regretfully consider that this is not a proper case for the Federal Court to answer the questions in the abstract. In the circumstances, we are constrained to go no further than to express our grave reservations as to the constitutional validity of the NSCA.
>
> *per Justice Nallini Pathmanathan, Federal Court Judge*

The Right Honorable the Chief Justice Tengku Maimun Tuan Mat and Justice David Wong Dak Wah in their dissenting judgment on the reference jurisdiction of the Federal Court, on the other hand, held:

> [9] It is a settled general principle of law that the courts must construe legislation in accordance with their ordinary words and meaning in line with the intention of Parliament. As a corollary, the judicial role does not permit judges to import external words and meaning into legislation against what Parliament had intended. In this regard, s 85(1) of the CJA 1964 clearly stipulates that once a special case is transmitted to the Federal Court pursuant to s 84 of the CJA 1964, the Federal Court "shall … deal with the case and hear and determine it in the same way as an appeal to the Federal Court". Therefore, the mandatory language of s 85(1) does not allow the Federal Court to refuse to hear a special case referred to it by the High Court.
>
> [10] With respect, I therefore do not agree with the proposition that one may read into s 85(1) of the CJA the discretion of the Federal Court to refuse to hear a reference. This is because such a reading is contrary to the clear mandatory language of that section. Article 128(2) of the Federal Constitution clearly provides that the Federal Court possesses a "reference jurisdiction" subject to the "rules of court regulating that jurisdiction".
> …
> [23] In this particular case, so long as the NSC Act 2016 exists in the statute books, the Executive are free to act on it. The argument in this case is that the NSC Act 2016 was not validly enacted, or, even if validly enacted, it was enacted in disproportion to the right of freedom of movement. The passing

of the NSC Act 2016 causes it to exist and it affects all persons in Malaysia. The lis or live dispute before us is thus the validity of Parliament's act of enacting the NSC Act 2016 as against the Federal Constitution. In this context, I agree with the learned CJSS that the courts cannot take a "wait-and-see" approach because a void law remains void. The challenge to its validity is not therefore conditioned upon action by the Executive. I also agree that an examination of the drafting history of the Federal Constitution, and the permissive language of art 4 as a whole, confirms that judicial review over the validity of laws was intended to be as broad as possible. Accordingly, it is my considered opinion that this reference is not "abstract, academic or hypothetical".

per Justice Tengku Maimun Tuan Mat,
Chief Justice

[78] Even if it is accepted that declarations may create rights, and that the appellant need not establish a cause of action, it might be argued that the court ought not to determine the validity of Acts of Parliament in abstract. Tempting as it is, I must reject the argument. If one looks at it holistically, there is in fact no vacuum as the subject matter here is the NSCA 2016 and the complaint is that Parliament had breached its constitutional duty by passing an unconstitutional Act. Here the appellant is a prominent lawmaker, surely he has a constitutional duty to the people to ensure that the statutes do not contravene the highest law of the land, ie the Federal Constitutional which I may add belongs to all the people of this country, all of which have a vested interest to ensure that it is not violated.

...

[90] I therefore find no merit in the argument that this court is not properly placed to answer the constitutional questions as posed in vacuo. This is a fit and proper case for such resolution because the NSCA 2016 exists as a law passed by Parliament. Deciding its validity notwithstanding that the Executive have not used it is not a resolution of a dispute in vacuo. The act which infringes the Federal Constitution is the passing of the NSCA 2016 by Parliament. The complaint here is against the Parliament. Hence to say that we are deciding something in vacuo is factually incorrect and hence without merit.

per Justice David Wong Dak Wah,
Chief Judge of Sabah & Sarawak

On the issue pertaining to the appellant's locus standi, the dissenting judges held that this is a suitable case to relax the locus standi rule.

> [34] Therefore, I do not think the applicable test in a case such as this is for the appellant to show that he is peculiarly affected by the passing of the NSC Act 2016. He brings this action as a public-spirited citizen because the Act potentially affects him just as it affects any other person in this country. I therefore conclude that the appellant is clothed with the locus to mount this challenge.
>
> *per Justice Tengku Maimun Tuan Mat,*
> *Chief Justice*

The minority judges, after finding that the Federal Court was properly seized with the jurisdiction and has the constitutional obligation to hear this reference, went on further and considered the merits of the reference.

On the constitutionality issue on the NSCA 2016, Chief Justice Tengku Maimun agreed with Justice David Wong that NSCA 2016 is unconstitutional because it was not enacted in accordance with Article 149 of the FC.

Justice David Wong also went on and considered whether the NSCA 2016 is unconstitutional due to violation of Article 9(2) of the FC.

> [179] While I have already determined that the NSCA 2016 is unconstitutional on the ground it was not enacted pursuant to art 149 of the Federal Constitution, I will still proceed to examine whether the same is violative of art 9(2). As I have stated earlier in this judgment, if a law is passed under art 149 of the Federal Constitution, it would no longer be subject to art 9. Regardless, the question still remains whether if the NSCA 2016 could have been passed as a non-art 49 law, would it nonetheless meet the standards of art 9.
> ...
> [217] Assessing s 22 of the NSCA 2016 as a whole, and coupled by the fact that it is very reminisce of powers unique to a State of Emergency, one can hardly appreciate s 22 as being necessary or proportionate to any aim targeted to preserve "public order" much less can it be considered the least intrusive or less restrictive measure. The powers are so comprehensive that they border on being callous. I cannot therefore bring myself to agree with the respondents that there is at all any fair and objective balance in favour of the interests of the State as compared to the interests of the public.
>
> *per Justice David Wong Dak Wah, Chief Judge of Sabah & Sarawak*

The unique dual justice system relationship in Malaysia between the civil courts and the syariah courts on the issue of persons professing the religion of Islam or otherwise.

Ketua Pegawai Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors and another appeal [2021] 1 MLJ 120, CA

The Court of Appeal was called upon to review a decision of Majlis Agama Islam Malaysia ("MAIS") which issued letters of agreement and bond compelling the respondents to appear before the Syariah court to answer the charges against them. The core issue before the Court of Appeal was whether the respondents were "persons professing the religion of Islam". The court also had to determine a related issue pertaining to religious identity in MyKad.

In this appeal, the 39 respondents claimed to be members of the Ahmadiyya Muslim Jama'at religious group ("Ahmadiyya"). The premises they used for purposes of prayer and worship were raided by the officers of the Jabatan Agama Islam Selangor ("JAIS") as such use was purportedly in contravention of section 97 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("the ARIE 2003").

The respondents subsequently filed an application for judicial review in respect of the letters of agreement and bond issued against them. The issues raised were, *inter alia*, whether the Syariah courts in the State of Selangor have jurisdiction: (i) in respect of the offences under section 97(2) of the ARIE 2003, and (ii) over the members of the Ahmadiyya.

The High Court granted the reliefs sought by the respondents. The appellants appealed against the said decision and the respondents cross-appealed arguing that the Syariah courts do not have jurisdiction to try offences under section 97(2) of the ARIE 2003.

The Court of Appeal was of the view that the High Court had correctly decided that Syariah courts have jurisdiction to try offences under section 97(2) of the ARIE 2003 as it was enacted squarely within the precepts of the religion of Islam.

The High Court had examined the legal effect of two fatwas declaring Ahmadiyya to be non-Muslim, and concluded that the effect was to excommunicate Ahmadiyya from the Islamic community. As such, they

were no longer recognised as Muslims, and therefore the Syariah courts could not have jurisdiction over the respondents.

The Court of Appeal agreed with the High Court that Ahmadiyya was not, legally speaking, Muslim on the basis that the two fatwas had declared that Ahmadiyya should not be considered Muslim. Hence, as a consequence, the Syariah courts are dispossessed of jurisdiction over such persons since the reach of the jurisdiction of the Syariah courts is strictly confined to persons professing the religion of Islam, meaning to say, the Syariah courts have jurisdiction over a person only if that person professes the religion of Islam.

The Court of Appeal also held that the respondents could not be presumed to be Muslim under section 74 of the ARIE 2003 and non-Muslim pursuant to the two fatwas as these two contradictory positions were irreconcilable, on the ground that the said section 74 was intended to prevent actual Muslims from renouncing the Islamic faith to avoid Syariah prosecution.

> [114] In a generic case, it cannot be said that an Ahmadiyya may be presumed to be a Muslim by virtue of s 74(2) of the ARIE but at the same time be considered a non-Muslims [sic] under the 1998 and 2000 Fatwas. The two positions are contradictory to each other. In any event, this was not why s 74(2) was enacted. In our reading of Ahmad Fairuz FCJ's judgment in Kamariah Ali, the purpose of the provision is to prevent actual Muslims from renouncing the Islamic faith to avoid Syariah prosecution. We do not think that such a provision can extend to presume a non-Muslims [sic] like the generic Ahmadiyya is a Muslim when in actual fact the law of the State of Selangor says he is not.
>
> [115] To overcome the problem that a Muslim might no longer be Muslim in faith, the presumption in s 74(2) of the ARIE 2003 operates to presume that such a person, remains a person "professing the religion of Islam". As we said before, this is because Islam is not only a religion, but also carries legal ramifications. It also determines whether one is constitutionally a Malay or not and a fortiori whether such a person is entitled to the special position under art 153 of the Federal Constitution.
>
> [116] To clarify, if a person was born and raised as an Ahmadiyya, then his original religion is the Ahmadiyya religion. Because the two fatwas declare that his faith is not Islam, then in the State of Selangor, an Ahmadiyya is a non-Muslim just as a Christian or a Hindu is a non-Muslim. If however, a person is born and raised as a Muslim (whether he chooses to practise his beliefs or not), he is in law a person 'professing the religion of Islam'. Should he change his religion from Islam to Ahmadiyya, just as if he were to attempt to renounce Islam for any other faith, he cannot in law do so unless by order of the Syariah Court as prescribed by the relevant State law. Thus, any renunciation of the Islamic faith is within the jurisdiction of the Syariah Courts (see for example: Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 and Lina Joy). In Soon Singh, the Federal Court held that the jurisdiction of the Syariah Court to deal with conversion out of Islam, although not expressly provided for in some State Enactments, can be read into those Enactments by implication.
>
> [117] For the foregoing reasons, we find ourselves unable to agree with the appellants on their argument in respect of s 74(2) of the ARIE 2003. The respondents cannot be presumed to be Muslims under s 74 of the ARIE 2003 and be non-Muslims pursuant to the two fatwas, as these two contradictory positions are irreconcilable. We therefore find no reason to interfere with the learned judge's decision in respect of question 1 ie that the Syariah Courts have no jurisdiction to try an Ahmadiyya for a s 97(2) offence if, in the first place, the respondents have always been Ahmadiyya.
>
> *per Justice Badariah Sahamid,*
> *Judge of the Court of Appeal*

In view of the sensitivity of the subject matter and to avoid any confusion, the Court of Appeal succinctly and clearly laid down a few points, as follows:

(a) the freedom of religion is an absolute and non-derogable right save for the express limitations that the Federal Constitution itself allows. This for one is art 11(4) on the prohibition of proselytisation of any religion other than Islam to those professing the religion of Islam and the strict restriction being the one stipulated in art 11(5);

(b) the freedom of religion applicable to non-Muslims does not apply with equal force to Muslims. This is because being a Muslim confers one a legal status and changes the entire regime of personal law applicable to them. It also allows the State to enact

offences specifically catered to Muslims under Item 1 of List II of the Ninth Schedule. This is supported by the difference in language in Item 1 which is relatively more narrowly worded to include all those "professing" the religion of Islam whereas art 11(1) uses the more liberal phrase "profess and practise";

(c) therefore, the term Islam for all intents and purposes inasmuch as it is a religious belief, is also a legal label demarcating between those who can and cannot seek recourse in and be tried (as the case may be) before the Syariah Courts. Section 74(2) of the ARIE 2003 and all related legislation of other States exist to presume that a person originally a Muslim is presumed to be a Muslim until and unless he seeks an order of the Syariah Court stating otherwise;

(d) if a person is born and raised as a Muslim (whether he chooses to practise his beliefs or not), he is in law a person "professing the religion of Islam". Should he change his religion from Islam to Ahmadiyya, just as if he were to attempt to renounce Islam for any other faith, he cannot do so unless by order of the Syariah Court as prescribed by the relevant State law. Thus, any renunciation of the Islamic faith is within the jurisdiction of the Syariah Courts;

(e) the legal label of being a Muslim also has other legal effects. For one, it determines whether one is constitutionally a Malay or not and a fortiori whether such a person is entitled to the special position under art 153 of the Federal Constitution. This point is also made in the 2000 fatwa specifically in respect of the Ahmadiyya community; and

(f) the 1998 and 2000 fatwas essentially removed the legal status of the Ahmadiyya community as persons "professing the religion of Islam". Having lost that label, they cannot therefore be taken as persons or a class of persons being subject to the exclusive jurisdiction of the Syariah Courts prescribed in Item 1, List II of the Ninth Schedule of the Federal Constitution.

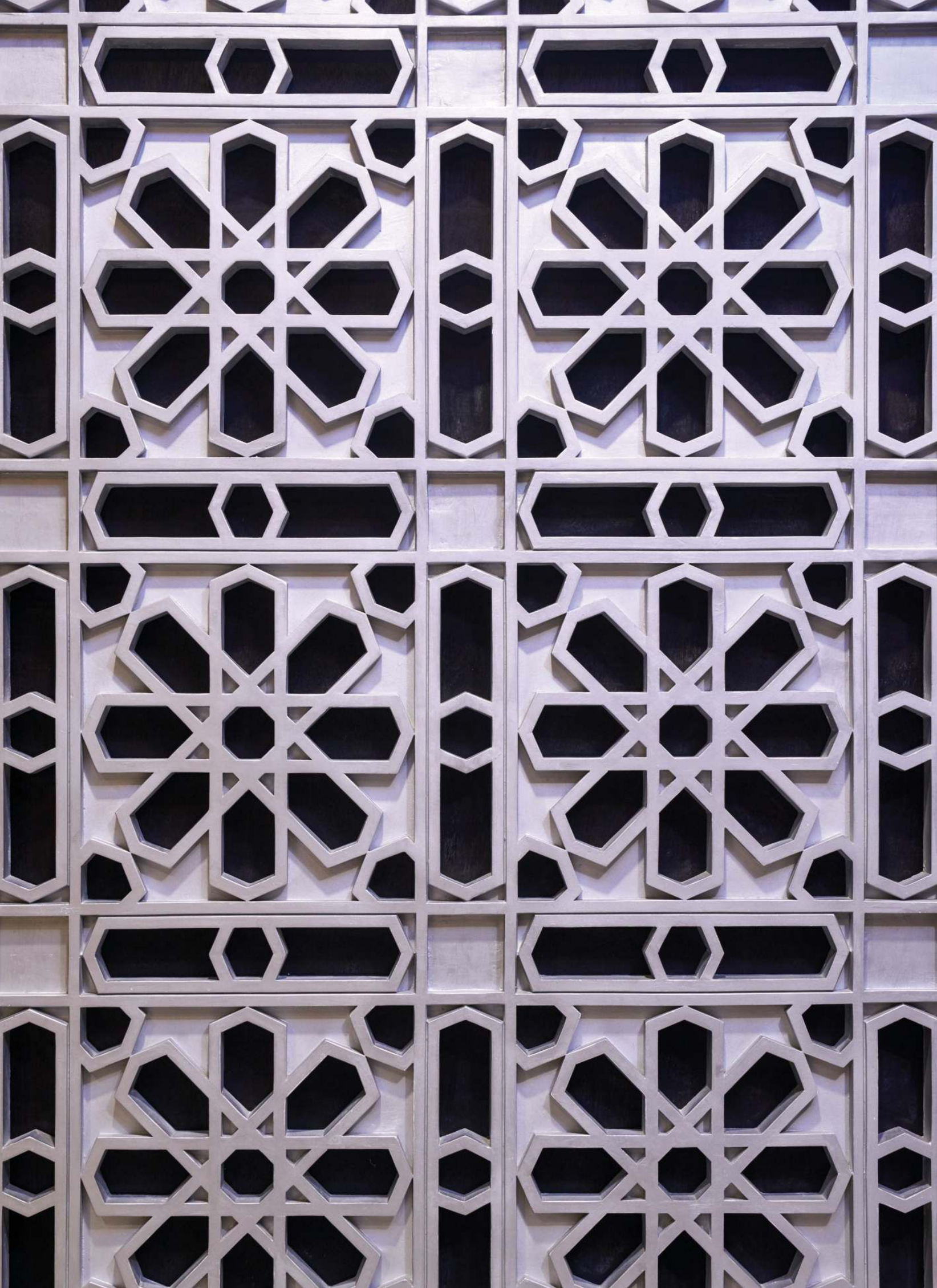
per Justice Badariah Sahamid,
Judge of the Court of Appeal

The Court of Appeal further dealt with another pertinent issue with regard to whether MyKad is deemed as conclusive evidence of a person's birth religious identity, so as to determine whether the respondents herein are indeed Ahmadiyya by original faith or were Muslims by original faith but had subsequently converted from Islam to Ahmadiyya. On this matter, the Court opined that MyKad is not conclusive evidence of a person's religious identity. As such, when MyKad states "Islam", it does not ipso facto entail that the given person is to be taken as a person professing the religion of Islam. One of the pertinent reasons is the demarcation of legislative powers between the Federal and State governments, whereby the issuance of MyKad is governed by Federal law, whereas the religious identity of a person is governed by State law.

> [146] Given the clear demarcation of legislative powers, the authority to determine whether a person professes Islam is something clearly within the powers of the State Legislature derived collectively from art 74(2) and Item 1 of List II of the Ninth Schedule respectively of the Federal Constitution. Whether or not the federal promulgated law designates someone a Muslim or otherwise therefore is not conclusive of the religious identity of the person concerned and consequently, the issue has to be determined in reference to the relevant State Enactments.
>
> *per Justice Badariah Sahamid,*
> *Judge of the Court of Appeal*

In conclusion, the court was of the opinion that the question "who is a person professing the religion of Islam" is to be determined on a case by case basis pursuant to the respective State laws, the Federal Constitution as well as relevant judicial precedents.

> [194] The inescapable conclusion from a holistic reading of the Federal Constitution is that the entire corpus of personal laws applicable to persons depends solely on whether or not they "profess the religion of Islam". In the usual cases, if the appellants or any other religious authorities suspect that a Syariah Offence has been committed, the absence of "Islam", based on Lina Joy in the MyKad should be a clear enough indication that the person is not a Muslim and thus is not subject to the jurisdiction of the Syariah Courts. This case is unique in that the Ahmadiyya personally believe they are Muslims when the State laws of Selangor have already declared them to be non-Muslims.
>
> *per Justice Badariah Sahamid,*
> *Judge of the Court of Appeal*



CASES OF INTEREST: CRIMINAL

The legislative purpose of section 180(4) of the Criminal Procedure Code ("CPC") is not to prohibit the use of presumptions in establishing a *prima facie* case. The prosecution can tender direct evidence, inferential evidence or use presumptions of law under the said provision.

Abdullah bin Atan v Public Prosecutor and Other Appeals [2020] 6 MLJ 727, FC

This case is about the proper construction of section 180(4) of the CPC. The charge in all the four appeals concerned trafficking in dangerous drugs under section 39B of the Dangerous Drugs Act 1952 ("DDA"). The common question of law in these appeals is whether the presumption of trafficking under section 37(da) of the DDA can be invoked by the prosecution to make out a *prima facie* case under section 180(4) of the CPC. The Federal Court sat in a coram of seven to hear this appeal.

Counsel for the appellants argued that that the trial judge erred in law by invoking the presumption of trafficking under section 37(da) of the DDA to find that the prosecution had established a *prima facie* case. It was further argued that section 180(4) of the CPC requires the prosecution to prove each and every ingredient of the offence by "credible evidence" and that a prima facie case can only be established on "credible evidence". It was further submitted that a statutory presumption does not amount to evidence.

In reply, the prosecution argued that the presumption of trafficking under section 37(da) of the DDA was introduced by Parliament to strengthen the law pertaining to drug offences and to assist law enforcers. The court should consider the intention of Parliament in interpreting section 37(da) of the DDA. The prosecution further argued that section 180(4) of the CPC is a general law to define a *prima facie* case whereas the DDA is a specific law for drug offences. Therefore, any conflict between the provisions in the two laws can be resolved by using the maxim *generalia specialibus non derogant*.

The Federal Court unanimously held that the presumption of trafficking under section 37(da) of the DDA may be invoked by the trial judge to establish a prima *facie case* under section 180(4) of the CPC. The purpose of section 180(4) of the CPC was not to exclude the use of presumptions, inferences, or anything other than direct evidence to establish a *prima facie* case. Rather, the purpose of section 180(4) of the CPC was to clarify Parliament's intention for the threshold to be applied at the close of the prosecution's case. The Federal Court further reasoned that section 180(4)

of the CPC must be read harmoniously with section 37(da) of the DDA. Such a construction would limit "credible evidence" to the actual finding of possession and once that is established successfully, it would automatically invoke the presumption of trafficking. Defence would then be called on a trafficking charge where the legal burden would shift to the accused to disprove trafficking.

Therefore, the Federal Court ruled that the proposed interpretation of section 180(4) of the CPC to exclude presumptions is unsustainable as such a reading is unsupported by any legislative purpose, and leads to far-reaching consequences in criminal law. In relation to the first, second, and third accused, the Federal Court ruled that their convictions are safe and their appeals were unanimously dismissed. Their convictions and sentences by the courts below were accordingly affirmed. In relation to the fourth accused on the other hand, his conviction was held to be unsafe on other grounds. The prosecution's appeal was consequently dismissed and the order of acquittal and discharge by the Court of Appeal was affirmed.

The Federal Court in its judgment held as follows:

> [60] On a proper construction, to make out a prima facie case under s 180(4) of the CPC, credible evidence is still required for a prima facie finding of actual possession. It is then that the presumption of trafficking kicks in for the accused to disprove on a balance of probabilities that he did not traffic in the dangerous drugs. Any other construction would be against the weight of settled judicial precedent. It would also render the entire presumption regime superfluous, devoid of any utility and would effectively amount to a repeal of s 37(da) of the DDA.
>
> [61] To conclude on this issue, it is our unanimous view that having found that actual or affirmative possession of the impugned drugs by the accused had been established based on credible evidence and the weight of the drugs in question exceeded the statutory limit, the learned trial judges were entitled to find that a prima facie case had been made out under s 180(4) of the CPC, by invoking the presumption of trafficking under s 37(da) of the DDA. This approach is correct in law.
>
> *per Justice Tengku Maimun Tuan Mat, Chief Justice*

It is procedurally correct for a judge in a trial for the offence of drug trafficking to revisit the element of knowledge at the defence stage although the presumption of knowledge was invoked under section 37(d) the Dangerous Drugs Act 1952 ("DDA") during the case for the prosecution.

Maria Elvira Pinto Exposto v Public Prosecutor [2020] 3 MLJ 21, FC

This case is about the defence of innocent carrier. The appellant, an Australian national, was charged at the Shah Alam High Court for the offence of trafficking in 1,142.8 grams of Methamphetamine contrary to section 39B(1)(a) of the DDA and punishable under section 39B(2) of the same statute. The learned trial judge found that the prosecution had proved a *prima facie* case. The appellant was ordered to enter defence by the High Court judge. The appellant raised the defence of innocent carrier and maintained that she had been a victim of an internet romance scam. At the conclusion of trial, the learned trial judge acquitted and discharged the appellant on the ground that the presumption of knowledge under section 37(d) of the DDA had been rebutted based on the appellant's testimony and that of the defence witnesses.

On appeal by the prosecution, the Court of Appeal reversed the decision of the learned trial judge. The central issue for determination before the Court of Appeal was whether the presumption of knowledge had been rebutted and whether the defence of innocent carrier applies in this appeal. Citing *Duis Akim & Anor v Public Prosecutor* [2014] 1 MLJ 49, the Court of Appeal ruled that once the appellant's knowledge had already been presumed under section 37(d) of the DDA at the *prima facie* stage, the learned trial judge was no longer at liberty to consider the issue of knowledge raised in the defence. Aggrieved at the said decision, the appellant appealed to the Federal Court against her conviction and sentence.

The appellant submitted that the Court of Appeal has erred in its proposition that there is no necessity to consider the element of knowledge again at the end of the trial once the presumption of knowledge had been invoked at the *prima facie* stage. The appellant relied on the decision of Augustine Paul JCA (as his Lordship then was) in the case of *Balachandran v PP* [2005] 2 MLJ 1 where his Lordship held that a case can be said to have been proven beyond reasonable doubt only at

the conclusion of the trial upon consideration of all the evidence adduced. According to the appellant, the primary issue before the Court of Appeal was in relation to the appellant's state of mind, namely whether the appellant had the requisite knowledge of the drugs. Therefore, the learned trial judge should not be faulted for evaluating the element of knowledge in the light of the appellant's evidence in rebuttal as such exercise is the bounden duty and what is expected of a trial judge under section 182A of the Criminal Procedure Code. In reply, the prosecution essentially emphasised that the appellant had ample opportunity to check the bag containing the drugs and the appellant's failure to do so attracted the doctrine of wilful blindness which was not considered by the High Court.

The Federal Court observed that the learned trial judge was right in holding that the appellant was an innocent carrier having regard to the fact that the appellant had disclosed her defence contemporaneously with the discovery of the drugs and in the light of her explanation as to how she came to be in possession of the drugs. The appellant had given good "Alcontara notice" to the prosecution through her cautioned statement and her legal representative had also done so through a letter to the investigating officer dated December 24, 2014. The Federal Court further observed that the principle enunciated in *Duis Akim* is not applicable to the instant case. Therefore, the Federal Court allowed the appeal and set aside the decision of the Court of Appeal. The appellant was acquitted and discharged.

> [64] In the instant case the learned judge merely re-evaluated the fact deemed by operation of law, namely the element of knowledge. What His Lordship did was consonant with Balachandran and s 182A of the CPC which provides that at the conclusion of the trial, the Court shall consider all the evidence adduced before it. Under the law, the learned trial judge was thus obligated to consider the defence and to determine whether it has succeeded in rebutting the statutory presumption invoked and/or has succeeded in raising a reasonable doubt on the prosecution's case.
>
> [65] This appeal turned on a question of fact i.e. whether the defence of innocent carrier has been made out. Case laws have established that the determination of whether ornot an accused person is an innocent carrier is a matter within the purview of a trial judge. As such, an appellate court must have cogent and compelling reasons to disturb the finding of fact by a trial judge. Here, the learned trial judge after hearing the witnesses and after considering the law and the evidence, concluded that the appellant had no knowledge that the bag P6 contained the impugned drugs and therefore the defence of innocent carrier has been proved.
>
> *per Justice Tengku Maimun Tuan Mat, Chief Justice*

The mandatory death penalty is not inconsistent with Articles 5, 8 and 121 of the Federal Constitution ("FC") as it is within the legislature's power to prescribe the measure and range of punishment for offences. The judiciary is not primarily in the business of articulating social or moral policy, hence any decision to change or abolish the mandatory penalty is for the legislature to make.

Letitia Bosman v Public Prosecutor and Other Appeals [2020] 5 MLJ 277, FC

This case is about the constitutionality of the mandatory death penalty under section 39B of the Dangerous Drugs Act 1952 ("DDA") for trafficking in dangerous drug and under section 302 of the Penal Code ("PC") for murder. The first, second and third appellants were separately charged, convicted and sentenced to death by the High Court for trafficking in dangerous drugs while the fourth appellant was charged, convicted and sentenced to death by the High Court for the offence of murder under section 302 of the PC. The Court of Appeal affirmed the convictions and sentences of all the appellants. Section 39B of the DDA and section 302 of the PC prescribe a mandatory death sentence. As the common ground of appeal was whether the mandatory death sentence was unconstitutional, all the appeals were heard together.

The issues raised before the nine-member panel of the Federal Court were as follows: (i) whether the power to determine the measure of punishment, namely, the mandatory death penalty is inconsistent with the judicial power enshrined in Article 121 of the FC and violates the doctrine of separation of powers; (ii) whether the mandatory death penalty violates the right to a fair trial under Article 5(1) of the FC; (iii) whether the mandatory death penalty violates the proportionality principle housed in Article 8(1) of the FC; and (iv) whether the court was under a duty to

modify section 302 of the PC to bring it into accord with the FC pursuant to Article 162(6).

The Federal Court delivered a split decision by a majority of 8:1. The majority held that the mandatory death penalty under section 39B of the DDA and section 302 of the PC is not inconsistent with Articles 5, 8, and 121 of the FC. Ultimately, it was held that the power to determine the measure of punishment or to prescribe punishment was a legislative power and not a judicial one. It was not an integral part of the core judicial function of adjudicating guilt or innocence but an integral part of the legislative function of creating offences and prescribing their punishments. Therefore, the Federal Court ruled that section 39B of the DDA and section 302 of the PC are valid and binding laws. The four appeals on the constitutionality of the mandatory death penalty were dismissed.

> [57] It can be seen from the foregoing analysis that the power to prescribe punishments is an integral part of the power to enact the offences for which the prescribed punishments are to apply. Thus the power conferred upon Parliament to create offences also enables it to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct. In the exercise of its legislative power, Parliament may lawfully prescribe a fixed punishment to be imposed by the courts upon the offender found guilty. On the other hand, the Judiciary having determined the criminal liability of an accused based on the law, has the duty to pass sentence according to law enacted by the Legislature.
> …
> [99] One essential point needs to be made here. Based on my earlier analysis at paras [70]–[74], the mandatory death penalty satisfies the test of reasonable classification, and hence is not unconstitutional vis a vis cl (1) of art 8 of the FC. The enhanced mandatory death penalty for the offences of drugs trafficking and murder is an intelligible differentia that bears a rational relation to a valid social object. There is no discrimination against the appellants as the impugned provisions apply to the class of persons who offend the provisions that relates to drugs trafficking under the DDA and murder under the Code.
> …
> [115] In the context of the present appeals, it is appropriate for the courts to give particularweight to the views and policies adopted by Parliament. Therefore, it is only right that the decision and the initiative to change or to abolish the mandatory death penalty should come from Parliament. A change, whether desirable or not, must be for Parliament to make.
>
> *per Justice Azahar Mohamed,*
> *Chief Judge of Malaya*

On the other hand, the minority view of the Federal Court had expressed that the legislature's power to determine the measure of punishment or to prescribe punishment was subject to judicial scrutiny in order to ensure that it did not transgress the FC. It was also ruled that the imposition of the mandatory death penalty was unconstitutional for infringing on the liberty of a person under Article 5(1) of the FC and violating the proportionality principle housed in Article 8(1) of the FC.

> [250] Notwithstanding these huge disparities in the circumstances of the commission of the offence, the quantity involved and the types of persons involved, they are all grouped together in one large class as "traffickers" who are all consequently subject to the sole mandatory punishment of death.
>
> [251] With the greatest of respect, it defies common sense to contend, even momentarily, that all these persons who fall within the vast definition of "trafficking" have been classified, for the purposes of punishment only, on the basis of intelligible differentia, with a rational nexus to the object of the DDA. This is because there is no intelligible criteria for classifying them together for the purposes of imposing the same punishment of mandatory death, save for the purposes of establishing culpability for the offence of trafficking. In other words, while the rationale for classification may have basis for the purposes of establishing "trafficking" so as to ensure that the wide range of activities are caught, this ought not to extend to punishment, which is a distinct and separable aspect of the crime. As such, it cannot be said that the classification is reasonable in so far as punishment or sentencing is concerned.
> …
> [295] In short, neither the enactment of s 39B DDA nor s 302 PC by the Legislature, in itself, amounts to a usurpation of judicial powers.

[296] However that does not mean, as stated earlier, that the Legislature is absolutelyfree to legislate as it deems fit. It is circumscribed, as all three arms of Government are, by the FC. As such, while a mandatory penalty may be imposed, such punishment is open to judicial scrutiny in relation to whether it is consonant with or falls within the purview of the FC, when a challenge is made to the effect that it is unconstitutional. Whether a statutory provision conforms to the provisions prescribed in the FC remains the function of the Judiciary. And nowhere is this more clearly articulated than in art 4 FC, which houses the doctrines of the separation of powers and the rule of law. It allows the Judiciary to retain a check and balance on both the Executive and the Legislature by striking down law that does not conform to the FC.

per Justice Nallini Pathmanathan,
Judge of the Federal Court

The applicable test to determine bias in a judicial recusal application is the "real danger of bias" as laid down in *Regina v Gough* [1993] AC 646. The practice of a presiding judge continuing to hear a joint trial after one of the accused had pleaded guilty was settled law in this jurisdiction based on a long line of authorities which prescribe the procedure for maintaining judicial impartiality in joint trial cases. In this respect, the case of *Yap See Teck v Public Prosecutor* [1983] 1 MLJ 410 and *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406 are still good law.

Public Prosecutor v Tengku Adnan bin Tengku Mansor [2020] 5 MLJ 220, FC

This case is about judicial recusal. The respondent was charged in the Sessions Court under section 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ("MACCA") with the offence of accepting bribery of RM1 million from one Tan Eng Boon. An alternative charge under section 165 of the Penal Code ("PC") was also preferred against him. Tan Eng Boon, the co-accused, was also charged in the Sessions Court under section 16(b)(A) of the MACCA for giving bribery and in the alternative, under section 109 of the PC. Subsequently, both cases were transferred to the High Court for a joint trial. Prior to the trial, the co-accused had applied for a plea bargain and pleaded guilty to the alternative charge. He was convicted and sentenced to a fine of RM1.5 million, and in default imprisonment of one year. The said co-accused agreed to be a prosecution witness and the prosecution indicated that they would utilise the co-accused's testimony against the respondent. By way of notice of motion, the respondent sought to recuse the learned trial judge on the grounds that the trial judge may be biased on account of the co-accused's case but the application was dismissed.

On appeal, the Court of Appeal allowed the respondent's appeal and reversed the learned trial judge's decision. The main basis of the Court of Appeal's decision was that the learned trial judge, having looked and considered the facts of the case and the documentary exhibits which were tendered in support of the co-accused's guilty plea, did not completely obliterate the same from his mind and there was a real danger that the learned trial judge might be prejudiced. According to the Court of Appeal, in dismissing the application, the learned trial judge had relied on the case of *Yap See Teck v Public Prosecutor* [1983] 1 MLJ 410 and *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406 where the "real danger of bias" test as laid down in *Regina v Gough* [1993] AC 646 and adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 was not applied. The Court of Appeal further ruled that the test was not whether there would be a real bias on the learned trial judge's part but whether there exists danger and the test was promulgated on the basis of a very low threshold of a possibility and not a probability of bias.

The Federal Court observed that both tiers of the courts below relied on the correct law in relation to bias but the application of the test to the facts and circumstances of the case had resulted in both courts arriving at diametrically opposing conclusions. The Federal Court opined that there is a difference between a "danger of real bias" and a "real danger of bias". The real danger of bias as laid down in *Regina v Gough* [1993] AC 646 does not prescribe a very low threshold of bias. What it does is to apply a lower threshold than that of an apprehension of bias or likelihood of bias. However, such threshold does not automatically translate to an extremely low threshold. The Federal Court further opined that the practice of a presiding judge continuing to hear a joint trial after one of the accused had pleaded guilty was settled law in this jurisdiction based on a

long line of authorities which prescribe the procedure for maintaining judicial impartiality in joint trial cases. Accordingly, the Federal Court reversed the decision of the Court of Appeal and ordered for the case to be fixed for mention in the original High Court for continued hearing.

> [30] … (c) the practice of a presiding judge continuing to hear a joint trial after one co-accused has pleaded guilty is settled law in this jurisdiction, based on a long line of authorities that implicitly recognised and affirmed that impartiality was maintained in such a joint trial. The reasoning in that line of case law, in both Yap See Teck and Mohd Amin bin Mohd Razali ought not to be lightly disturbed, again on relatively flimsy grounds. That is why a prescribed procedure has been advocated and followed for several decades. That procedure prescribed by case-law takes into consideration the possibility of bias and has dismissed it on cogent grounds. In short, it is implicit that the conduct of a trial in such a manner meets, and does not transgress, the fundamental requirement of impartiality in a judge. The fact that the test for bias in this country was only adopted after Sungai Gelugor cannot erode the jurisprudence that accommodated and ensured impartiality in the older criminal case-law. In view of such impartiality it cannot be said that those cases did not address the test of a real possibility of bias.
>
> *per Justice Nallini Pathmanathan, Judge of the Federal Court*

The purpose and object of the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter referred to as "Act 316") should be read into section 6(1) of Act 316 in order to give it the meaning intended by Parliament when it enacted Act 316 under the authority of Article 149 of the Federal Constitution.

Selva Vinayagam Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2020] 1 LNS 1707, FC

This case is about the proper construction of section 6(1) of Act 316. The appellant was detained for a period of two years commencing from November 22, 2018 at Pusat Pemulihan Akhlak, Simpang Renggam, Johor pursuant to a detention order issued by the first respondent under section 6(1) of Act 316. The said section 6(1) empowers the Minister of Home Affairs to make such order if he is satisfied that such person has been or is associated with any activity relating to the trafficking in dangerous drugs and that it is necessary in the interest of public order for such person to be detained. The appellant filed an application for a writ of *habeas corpus* but the application was dismissed. Before the Federal Court, the appellant raised a new point of law that the detention order and the allegations of fact thereunder were *ultra vires* Article 149 of the Federal Constitution ("FC") and the preamble to Act 316. It was further submitted that appellant was acting alone without any participation of a substantial body of persons involved in trafficking in dangerous drugs. The preamble to Act 316 states that it is an Act to stop action which is prejudicial to public order which has been taken or threatened by "a substantial body of persons". Thus, the activities of a single person cannot be deemed to be within the ambit and scope of scrutiny under Act 316.

The respondents conceded that there was nothing in the grounds or allegations of fact to say that a substantial body of persons were involved. However, the court should take judicial notice that trafficking in dangerous drugs invariably involves other persons. It was argued that the preamble to Act 316 is not relevant for the purposes of construction or considering the scope of the provisions of section 6(1) of Act 316 as there is no ambiguity whatsoever in the latter. Under the same provision, there is no requirement to show that there is a threat from a substantial body of persons involved in the activity. It was further submitted pursuant to section 11C of Act 316, the detention order may be challenged only on the ground of non-compliance with any procedural requirement.

The Federal Court observed that the fact of the appellant acting alone cannot be deemed to fall within the ambit and scope of Act 316 which is explicitly confined to action threatened by a substantial body of persons. According to the Federal Court, the power under section 6(1) Act 316 may only be exercised if the three key ingredients are set out in the grounds of the detention order and allegations of fact, namely: (i) that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs; (ii) that the detenu is a member of a substantial body of persons; and (iii) that the minister is satisfied that it is necessary in the interest of public order that the

detenu be subject to preventive detention. The omission in the setting out of all the three vital ingredients indicated that the mind of the deputy minister was not applied to the questions of the preventive detention of the appellant. There was a failure to comply strictly with the letter of the rule of law and thus the exercise of power by the deputy minister was bad in law. Therefore, the detention order was *ultra vires* Article 149 of the FC and Act 316. Accordingly, the Federal Court set aside the detention order and issued a writ of habeas corpus.

> [47] For the foregoing reasons, we think that the respondent's argument that the long title and preamble is not relevant for the purposes of interpreting sub-s. 6(1) is incongruous. It is clear that the power under sub-s. 6(1) may only be exercised if the following three key ingredients are set out in the grounds of the detention order and allegations of fact. One, that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs. Two, that the detenu is a member of a substantial body of persons. Three, that the Minister is satisfied that it is necessary in the interest of public order that the detenu be subject to preventive detention.
>
> [48] It also goes without saying that the courts must be vigilant in individual cases to ensure that the executive acts within the law and does not encroach unnecessarily into the fundamental liberties of the person. We have scrutinised the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit. We agree with counsel for the appellant that the only allegation is that the appellant is acting alone. There is no allegation that the appellant's activities were being carried out in association with or involved a substantial body of persons.
>
> *per Justice Vernon Ong Lam Kiat, Judge of the Federal Court*

In a case where the prosecution relies on the third limb of section 300 of the Penal Code ("PC"), the failure to elicit opinion evidence from the forensic pathologist in respect of whether the injuries suffered by the deceased is sufficient in the ordinary course of nature to cause death renders the conviction for murder unsafe.

Pubalan Peremal v Public Prosecutor [2020] 5 MLJ 442, FC

This case is about the importance of expert evidence in respect of the issue whether the injuries suffered by a murder victim is sufficient to cause death in the ordinary course of nature when the prosecution relies on the third limb of section 300 of the PC to prove a murder charge. The appellant was convicted of the murder of his brother-in-law whom he stabbed with a knife. The Court of Appeal dismissed his appeal. At the Federal Court, the fact that the appellant caused the death was not disputed. However, the defendant submitted that infirmities in the evidence of the pathologist cannot support a conviction under the third limb of section 300 of the PC. Although the pathologist said that the cause of death was "multiple incised wounds", his evidence was sketchy as he did not describe the "likely and natural effects" of the said injuries. The Federal Court held that the important question to be determined was whether the appellant intended to cause bodily injuries that is sufficient in the ordinary course of nature to cause death under the third limb of section 300. The question was unanswered by the pathologist.

The Federal Court, after having analysed the role of expert witness in a murder trial and the distinction between the offence of murder under section 300 and culpable homicide under section 299 of the PC, set aside the conviction for murder and substituted it with culpable homicide under section 304(a) and sentenced the appellant to 15 years' jail. The Federal Court had this to say:

> [19] In the particular circumstances of this case, the important question to be determined was whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as is sufficient in the ordinary course of nature to cause death. Unfortunately, in the present case, the critical question remains unanswered; in our view, PW4 the forensic pathologist should have

been asked to give his opinion on the nature of the injuries and its likely and natural effects, but he was not asked any questions on this crucial point. Accordingly, the evidence in this respect is wanting. As there is no evidence on the nature of the injuries and its likely and natural effects, then the offence of which the appellant should have been convicted is culpable homicide for causing such bodily injury as is likely to cause death and not murder. Accordingly, we set aside the conviction for murder, and substitute it with one under limb (a) of s. 304 of the Penal Code.

per Justice Vernon Ong Lam Kiat,
Judge of the Federal Court

APPENDIX

STATISTICS

DRUGS CASES IN MALAYSIA

Explanatory Notes:

- **The graph shows the registration and disposal of drugs cases in Malaysia from 2018 to 2020.**
- **In 2020, the registration declined by -17.0% as compared to 2018.**

CYBER (CRIMINAL) CASES IN MALAYSIA

Explanatory Notes:

- **The graph shows the registration and disposal of cyber (criminal) cases in Malaysia from 2018 to 2020.**
- **In 2020, 153 cases were registered. This is an increase of 11.7% as compared to the previous year.**

CYBER (CIVIL) CASES IN MALAYSIA

Explanatory Notes:

- **The graph shows the registration and disposal of cyber (civil) cases in Malaysia from 2018 to 2020.**
- **The year 2020 showed the highest registration of cyber (civil) cases in Malaysia (170 cases).**

CORRUPTION CASES IN MALAYSIA

Explanatory Notes:

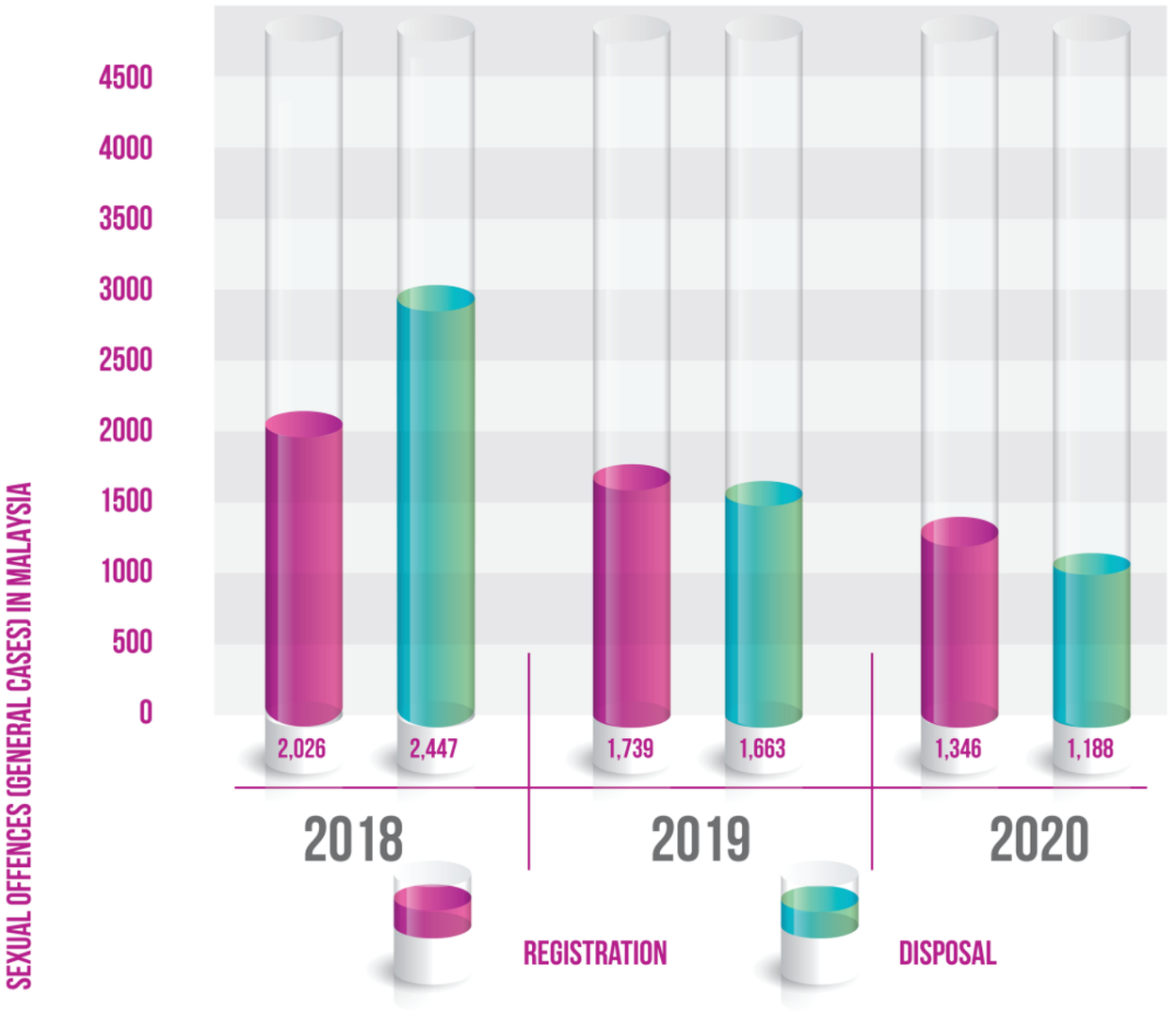
- **The graph shows the registration and disposal of corruption cases in Malaysia from 2018 to 2020.**
- **The highest disposal was recorded in 2018 (a total of 746 cases were disposed of).**

STREET CRIMES CASES IN MALAYSIA

Explanatory Notes:

- **The graph shows the registration and disposal of street crimes cases in Malaysia from 2018 to 2020.**
- **The graph shows a decrease in the number of disposals for each year.**

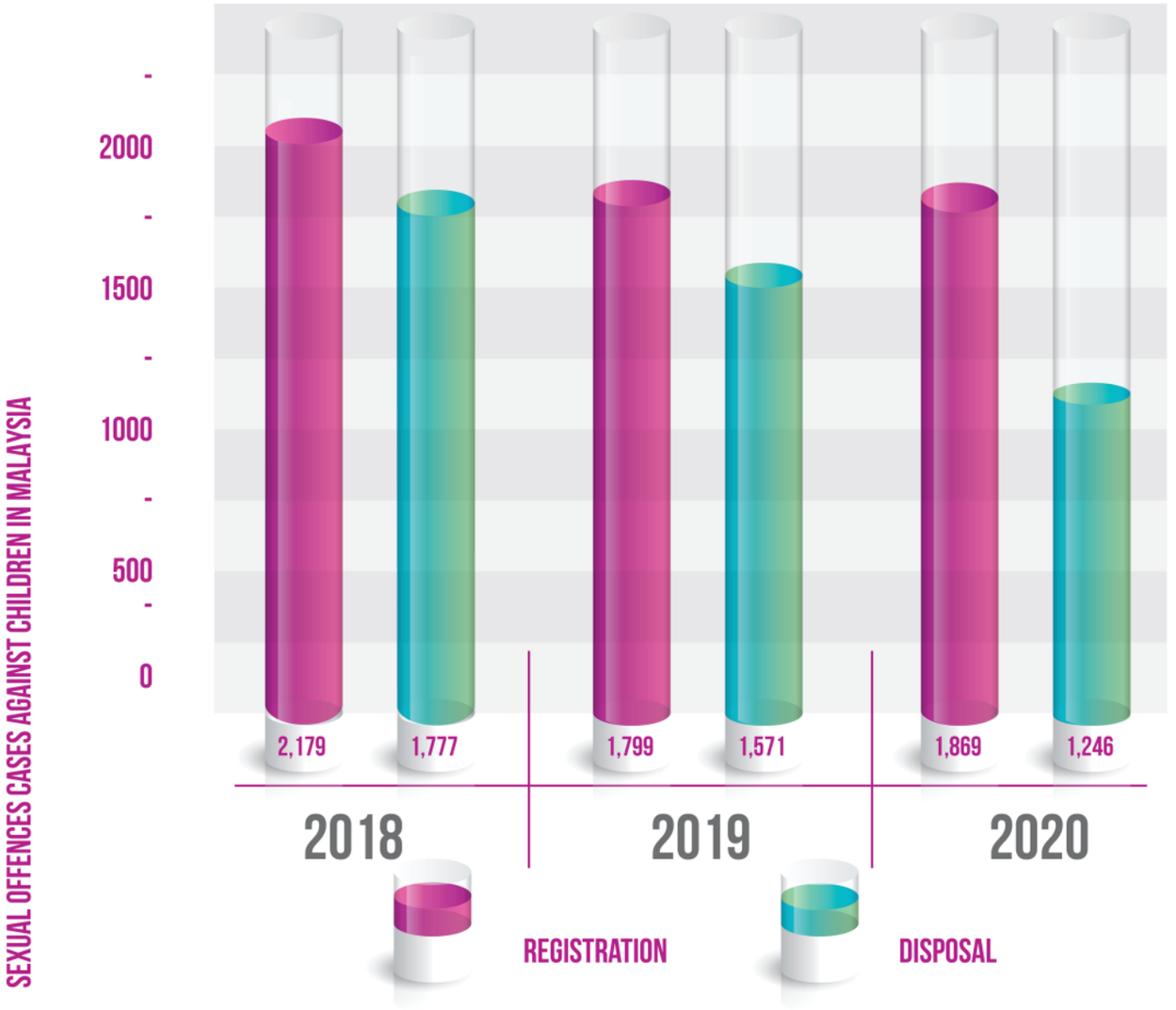
SEXUAL OFFENCES (GENERAL) CASES IN MALAYSIA



Explanatory Notes:

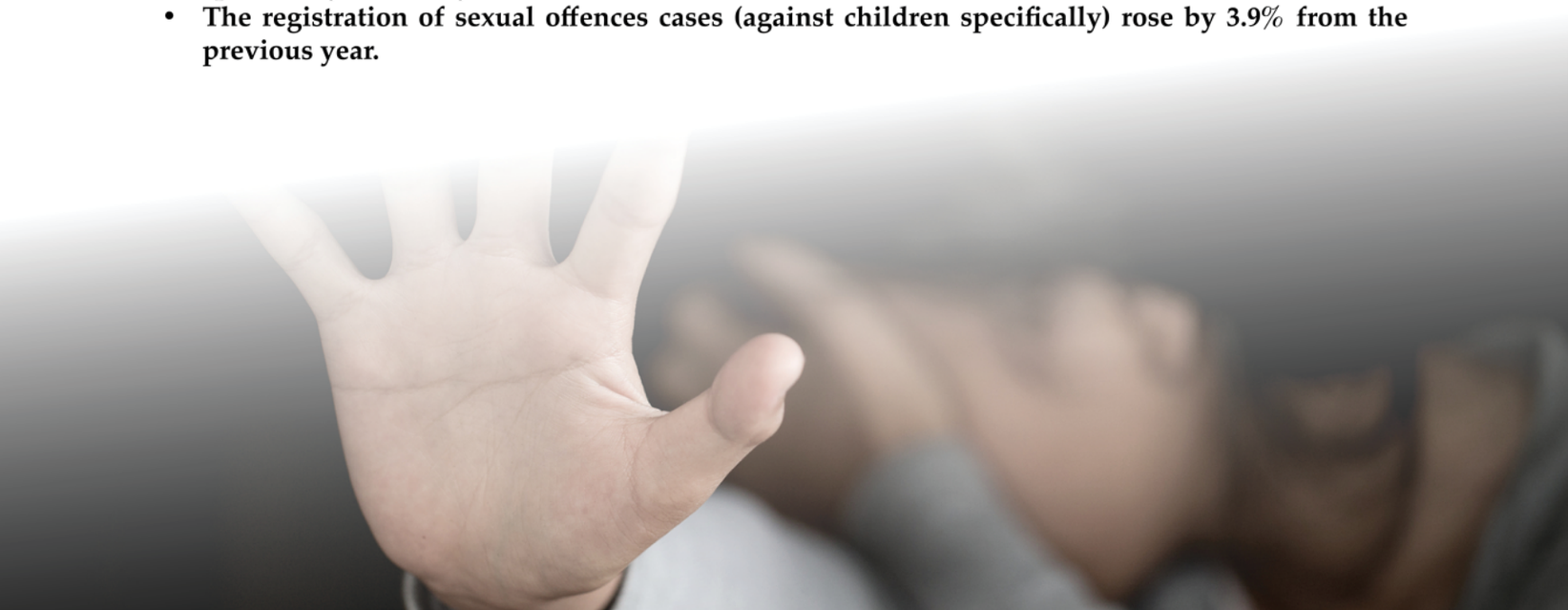
- **The graph shows the registration and disposal of sexual offences (general) cases in Malaysia from 2018 to 2020.**
- **In 2020, the registration declined by -22.6% as compared to 2019.**

SEXUAL OFFENCES (AGAINST CHILDREN) CASES IN MALAYSIA



Explanatory Notes:

- **The graph shows the registration and disposal of sexual offences cases (against children specifically) in Malaysia from 2018 to 2020.**
- **The registration of sexual offences cases (against children specifically) rose by 3.9% from the previous year.**

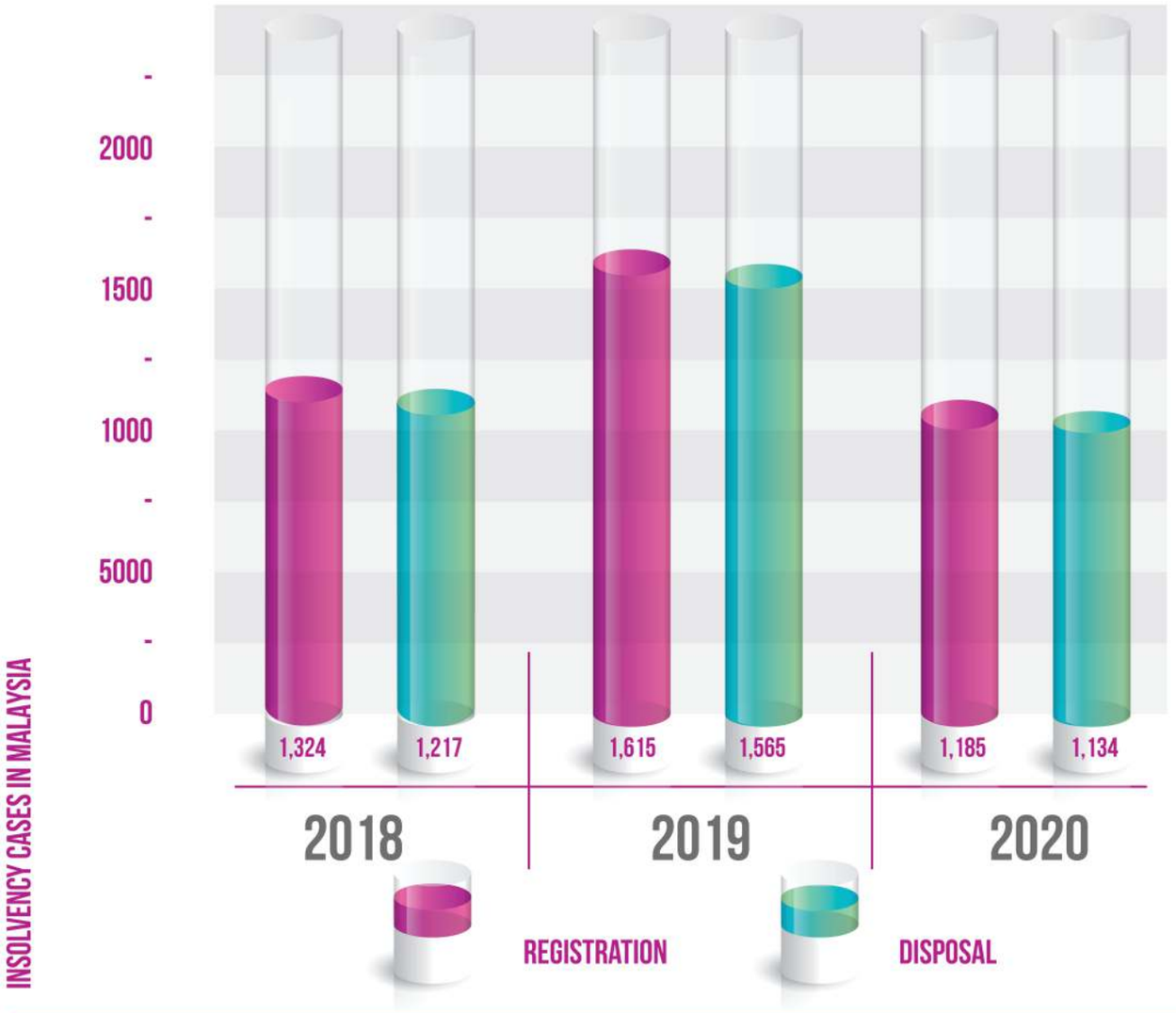


BANKRUPTCY CASES IN MALAYSIA

Explanatory Notes:

- **The graph shows the registration and disposal of bankruptcy cases in Malaysia from 2018 to 2020.**
- **In 2020, the registration declined by -28.6% as compared to 2018.**

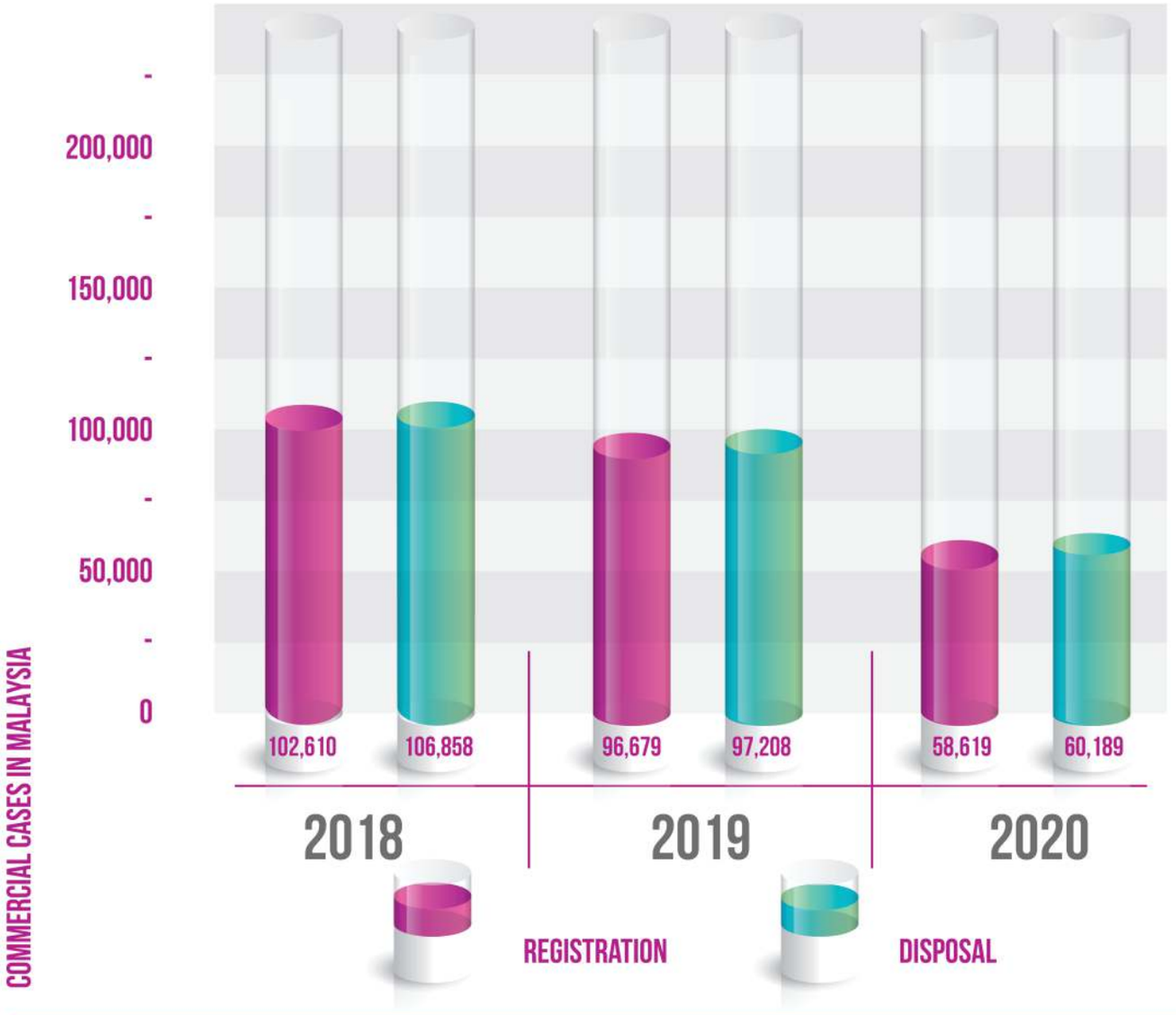
INSOLVENCY CASES IN MALAYSIA



Explanatory Notes:

- **The graph shows the registration and disposal of insolvency cases in Malaysia from 2018 to 2020.**
- **In 2020, the registration declined by -26.6% as compared to 2019.**

COMMERCIAL CASES IN MALAYSIA



Explanatory Notes:

- **The graph shows the registration and disposal of commercial cases in Malaysia from 2018 to 2020.**
- **The graph shows that the registration of commercial cases in Malaysia has been decreasing every year.**

CONSTRUCTION CASES IN MALAYSIA

Explanatory Notes:

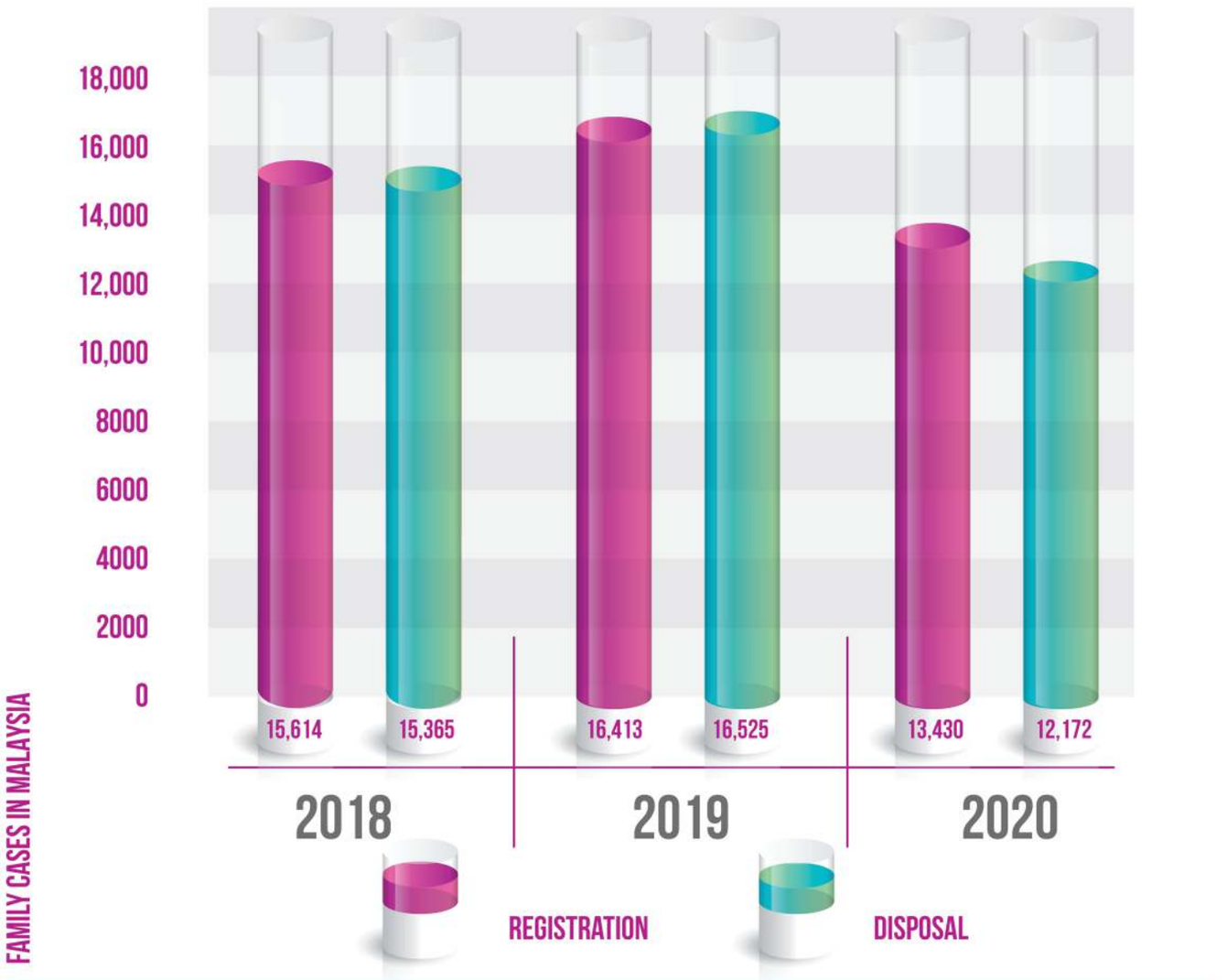
- **The graph shows the registration and disposal of construction cases in Malaysia from 2018 to 2020.**
- **The highest disposal was recorded in 2019 (a total of 1,382 cases were disposed of).**

NEW CIVIL COURT (NCVC) CASES IN MALAYSIA

Explanatory Notes:

- **The graph shows the registration and disposal of NCVC cases in Malaysia from 2018 to 2020.**
- **The graph shows an increase in the number of registrations from year to year.**

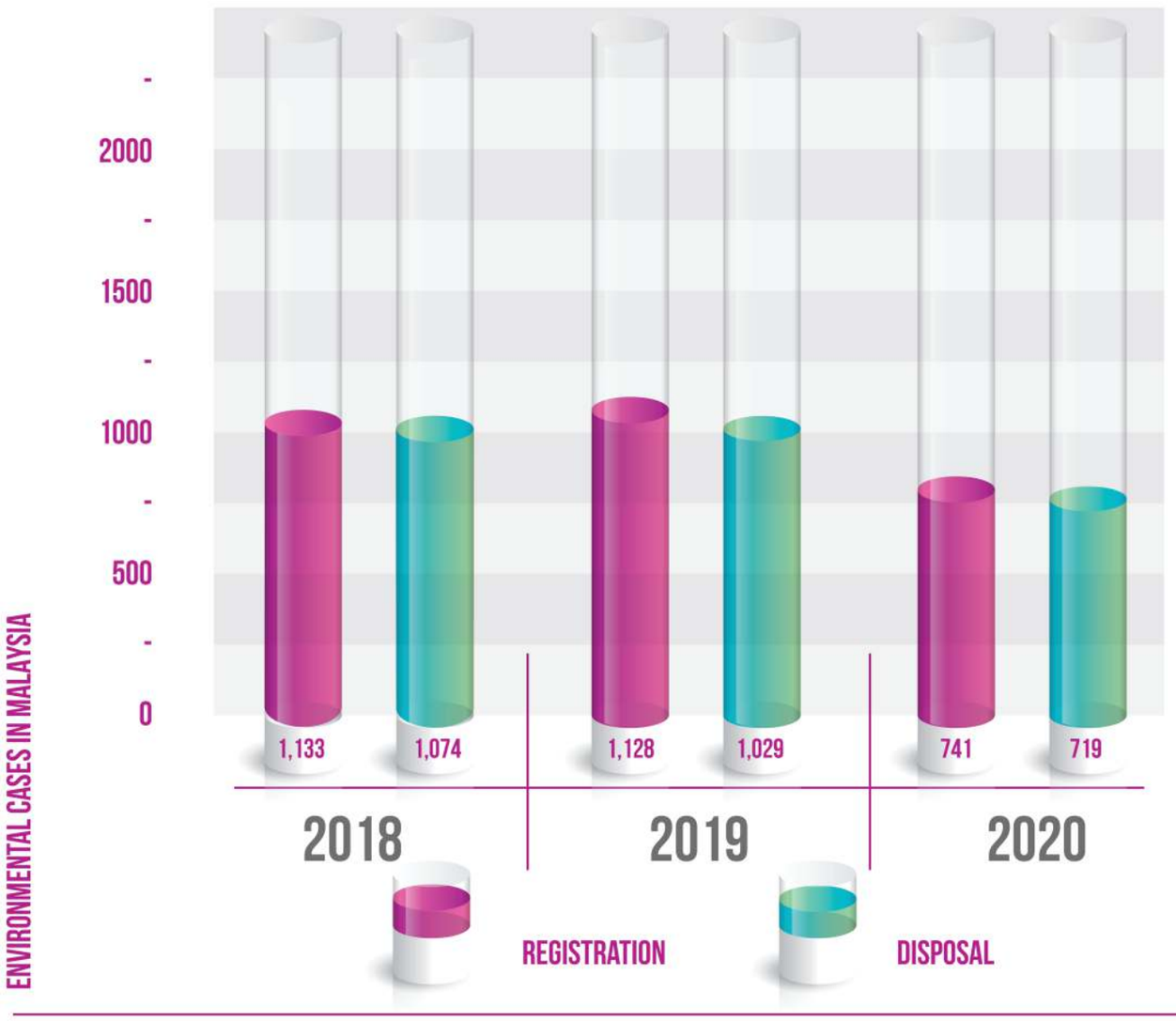
FAMILY CASES IN MALAYSIA



Explanatory Notes:

- **The graph shows the registration and disposal of family cases in Malaysia from 2018 to 2020.**
- **In 2020, the registration declined by -18.2% as compared to the previous year.**

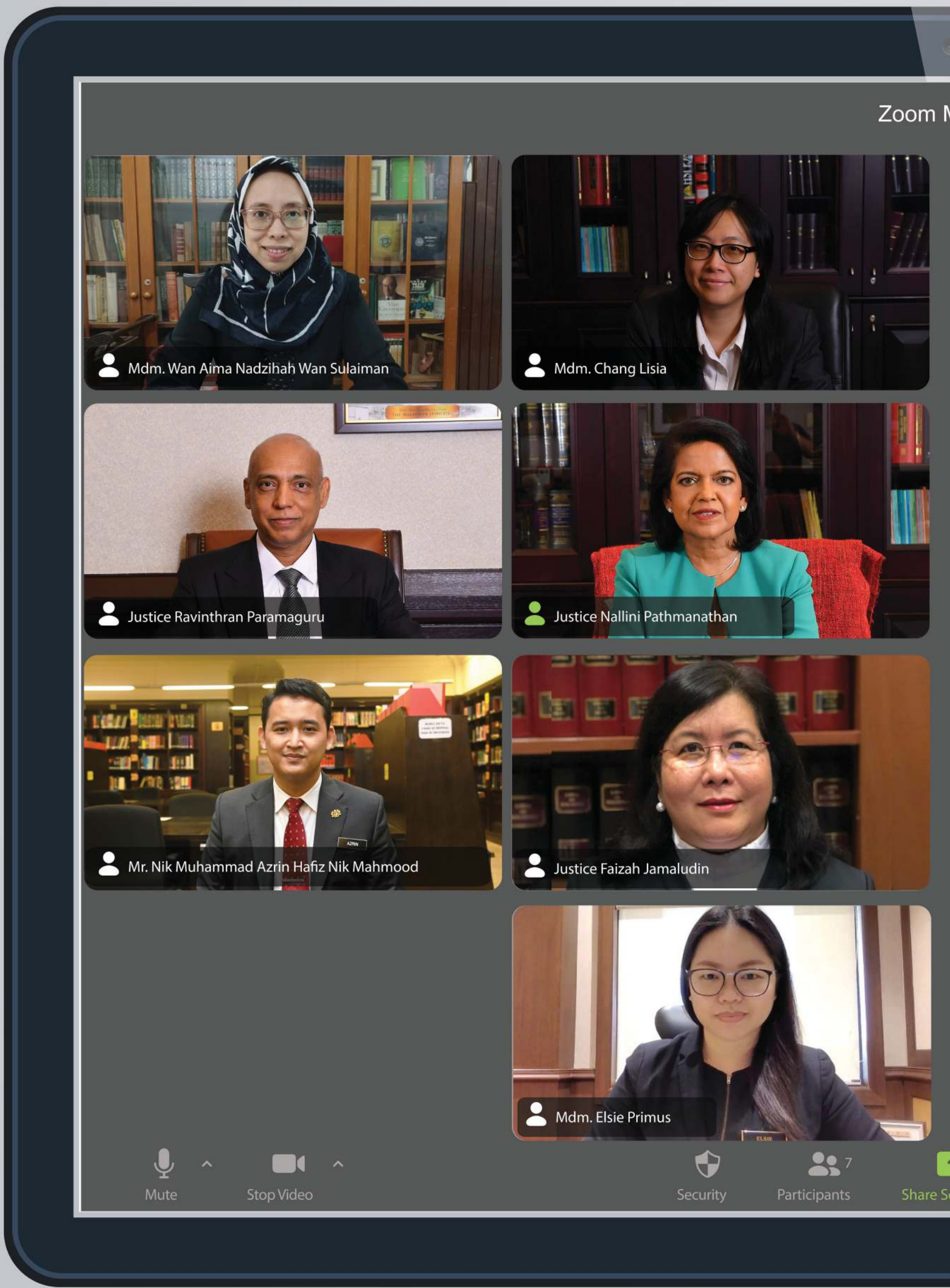
ENVIRONMENTAL CASES IN MALAYSIA



Explanatory Notes:

- **The graph shows the registration and disposal of environmental cases in Malaysia from 2018 to 2020.**
- **The graph shows a decrease in the number of registrations for each year.**
- **The lowest registrations were recorded in 2020 (741 cases).**

THE EDITORIAL COMMITTEE


Zoom M
Mdm. Wan Aima Nadzihah Wan Sulaiman
Mdm. Chang Lisia
Justice Ravinthran Paramaguru
Justice Nallini Pathmanathan
Mr. Nik Muhammad Azrin Hafiz Nik Mahmood
Justice Faizah Jamaludin
Mdm. Elsie Primus
Mute
Stop Video
Security
Participants
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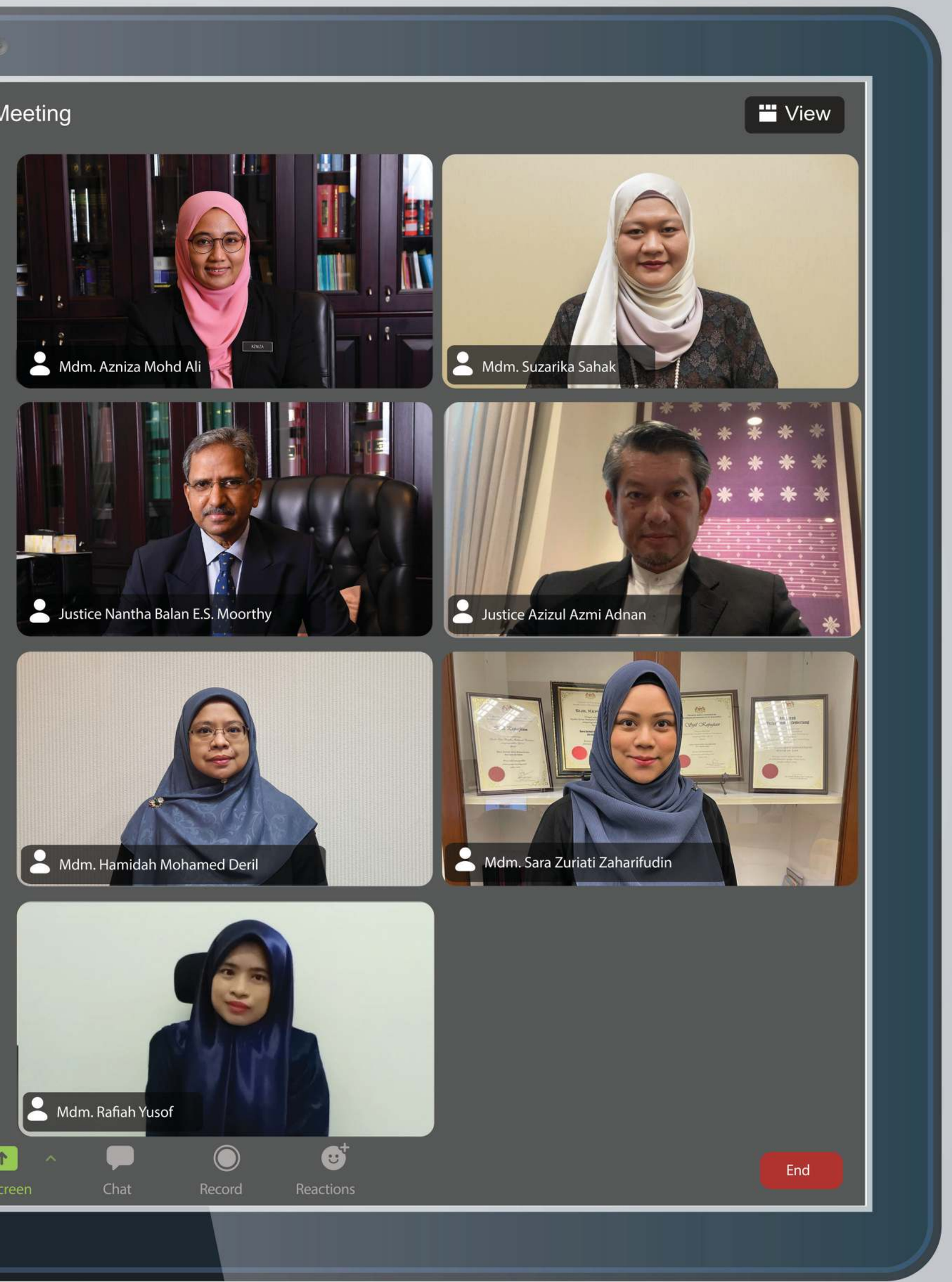
Share S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Mdm. Suzarika Sahak
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Justice Azizul Azmi Adnan
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Reactions
End

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