THE MALAYSIAN JUDICIARY

YEARBOOK 2021

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Cover

"Upholding Judicial Independence – Akin to Shielding the Malayan Tiger from Extinction"

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Foreword

By The Right Honourable Tun Tengku Maimun Tuan Mat

Chief Justice of Malaysia

Alhamdulillah, all praises be to Allah SWT as it is only by His Grace and Blessings that I am able to present to you the Malaysian Judiciary Yearbook 2021.

2021 has proven to be another challenging year for the Malaysian Judiciary as the COVID-19 pandemic continued to rage with the emergence of highly infectious and fast-spreading new variants and sub-variants. In order to ensure the availability of judicial services while keeping everyone safe and healthy, the Malaysian Judiciary constantly adapted its operations in line with the various lockdown rules imposed by the Government of Malaysia. In 2021, 12 comprehensive Practice Directions were issued, setting out the guidelines for the effective, continuous, and proper functioning of the courts.

Looking back at 2021, the COVID-19 pandemic once again accelerated the widespread adoption of technologies which are now ubiquitous and form an indelible feature of our judicial system. Since the year 2020, the Malaysian Judiciary has continued to implement new measures and enhance existing steps taken to deal with the COVID-19 pandemic, particularly in respect of the enhancement of technology across the Judiciary. The courts' heavy utilisation of technology in its daily operations has improved efficiency through the disposal of cases online and by hybrid hearings.

Based on the statistics as at the end of December 2021, I am delighted to report that the courts' performance at all levels has been progressing well.

Additionally, the Judiciary implemented several administrative improvements as part of its efforts to enhance the efficiency of disposing of cases such as:

i. increasing the number of sitting days in a week, increasing the number of panels that preside each day and the number of cases fixed each day for appellate courts;
ii. opening six new courtrooms at the High Court of Malaya which comprise two each in Kuala Lumpur and in Shah Alam, as well as one each in Sungai Petani and in Georgetown;
iii. restructuring the civil courts in Kuala Lumpur, Shah Alam, and Georgetown and dividing the cases into those filed before and after a cut-off date in order for the specific allocations of cases to be heard by designated judges; and
iv. implementing a targeted disposal of cases over a period of one year at the Kuala Lumpur Commercial Courts.

The year 2021 has also marked several momentous events. In March 2021, the first virtual hearing of a criminal case was heard at the Court of Appeal. The appeal proceeding was conducted via the Zoom platform. The accused participated from the Kajang prison, the judges from the Palace of Justice, and the defence counsel and the deputy public prosecutor from their respective offices. In April 2021, the swearing-in and oath-taking ceremony for five newly appointed Court of Appeal Judges and nine newly appointed judicial commissioners at the Palace of Justice, Putrajaya was live-streamed for public viewing via the Malaysian Judiciary's official YouTube channel. In Sabah and Sarawak, the Video Conferencing System ("V-COSS") which was introduced in 2007 was enhanced and made available in all courts and 11 prisons across Sabah and Sarawak. V-COSS was adopted for applications for extension of remand proceedings as well as hearing of the appeals at the High Court or the appellate courts. In addition, the e-Plead Guilty system ("e-PG system") was launched to enable persons summoned for certain traffic offences to plead guilty and pay the fine online. The e-Pesuruhjaya Sumpah system ("E-PJS system") was also launched as an online platform for matters pertaining to commissioners for oaths such as new applications and the taking of examinations respectively.

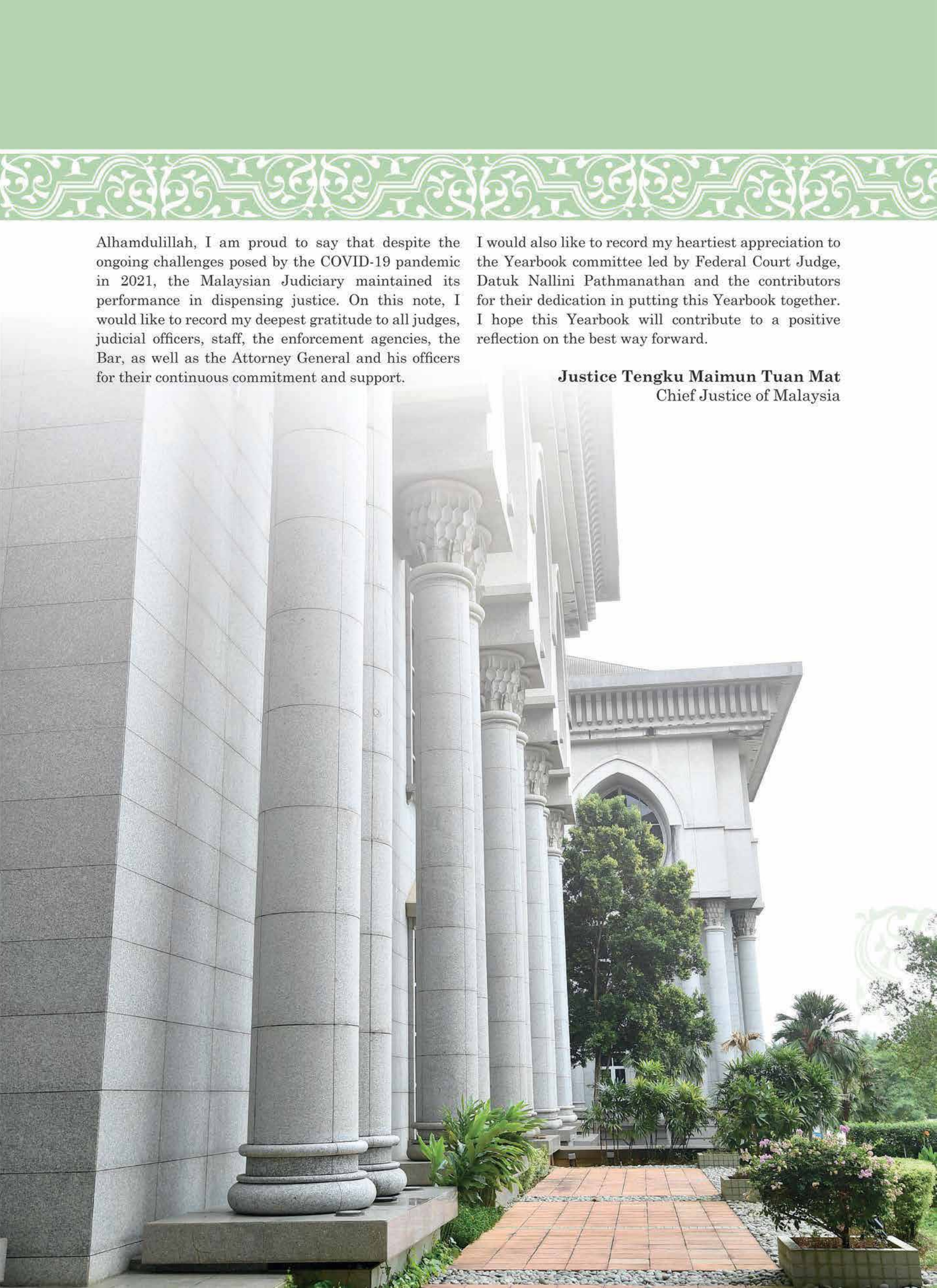
It is also significant to highlight that the Malaysian courts have decided several high-profile cases in the year 2021, among others, cases on Undi 18 and money laundering, corruption, and criminal breach of trust linked to public figures. On December 8, 2021, the Court of Appeal upheld the High Court's decision to convict the former Prime Minister of Malaysia, Dato' Seri Najib bin Tun Razak for misappropriating RM42 million in SRC International Sdn Bhd funds and he was sentenced to 12 years' imprisonment and a fine of RM210 million. On September 3, 2021, the High Court in Kuching ordered the Election Commission and the government to implement Undi 18 by December 31, 2021. The decision was made after the High Court allowed a judicial review application brought by five Malaysian youths from Sarawak aged between 18 and 20, to seek immediate enforcement of an amendment to the Federal Constitution, to lower the minimum voting age from 21 to 18.

On a different note, the Malaysian Judiciary continued to actively participate and be involved in a series of virtual meetings and events to enhance international cooperation with its counterparts in other jurisdictions. Some of the important meetings were the 6th Joint Judicial Conference ("the 6th JJC") and the 9th Council of ASEAN Chief Justices Meeting ("the 9th CACJ"). At the 6th JJC, the judiciaries of Brunei, Malaysia and Singapore engaged in panel discussions in the areas of cross-border child protection and sentencing considerations in human trafficking cases while sharing experiences on the area of judicial administration and artificial intelligence (AI). At the 9th CACJ, various wide-ranging discussions were held, among others the development of training in emerging technologies, collective engagement beyond ASEAN for judicial education and capacity building, and the possibility and means of enhancing mutual legal cooperation in various aspects of civil and family proceedings.

Alhamdulillah, I am proud to say that despite the ongoing challenges posed by the COVID-19 pandemic in 2021, the Malaysian Judiciary maintained its performance in dispensing justice. On this note, I would like to record my deepest gratitude to all judges, judicial officers, staff, the enforcement agencies, the Bar, as well as the Attorney General and his officers for their continuous commitment and support.

I would also like to record my heartiest appreciation to the Yearbook committee led by Federal Court Judge, Datuk Nallini Pathmanathan and the contributors for their dedication in putting this Yearbook together. I hope this Yearbook will contribute to a positive reflection on the best way forward.

Justice Tengku Maimun Tuan Mat
Chief Justice of Malaysia



Preface

By Justice Nallini Pathmanathan
Judge of the Federal Court,
Editor of the Malaysian Judiciary Yearbook 2021

The Annual Report 2021 accentuates the parallels between the endangered environmental rights of our future generations, and the similarly imperiled feature of judicial independence, a defining element of the constitutional landscape of Malaysia. In as much as damage to the environment is inflicted globally, with the aftermath likely to last for thousands of years, judicial independence likewise is, and has been, over the years, threatened by sudden and sustained attacks in unprecedented ways, episodically. The aftermath of these attacks too, have longstanding consequences.

Much like unmitigated industrialisation destroys the environment and the ability to provide for and protect society, unmitigated corruption places judicial independence in peril by usurping the Judiciary's power to independently provide protection in a multiplicity of ways, whether as the protector of the citizen against the power of the state, or to determine a case without fear of public opinion being against the judge.

As defined by the European Network of Councils for the Judiciary:

> Judicial independence stems from the need for impartial adjudication of all cases, whether criminal, civil or administrative law cases. The judge should not be affected by differences of power between litigating parties. Protection of the citizen against the power of the government of the state is obviously central. But the issue is broader. The judge must be incorruptible and able, in a proper

> case, to decide cases in ways that contravenes both media and public opinion. (ENCJ 2014, p. 10)

The cover of this year's Annual Report showcases the beautiful and exotic Malayan tiger whose continued survival is hard fought for, as it affords the perfect symbol for the similarly multi-faceted concept of judicial independence. Like the endangered tiger, independence is a cherished treasure that requires protection and even battle, at times, to ensure it endures for the ultimate well-being of the Judiciary and thereby the nation.

Moving on to the contents of the Annual Report, we are still left with the ravages of COVID, hence the chapter on how our magistrates coped during the pandemic, which also encompasses the accelerated shift to working digitally, which is now entrenched as an essential part of our working environment. I must accord the magistrates of the Kuala Lumpur Civil Division considerable appreciation for their candid and refreshing article, which affords us a glimpse into their struggles and triumphs during this difficult time.

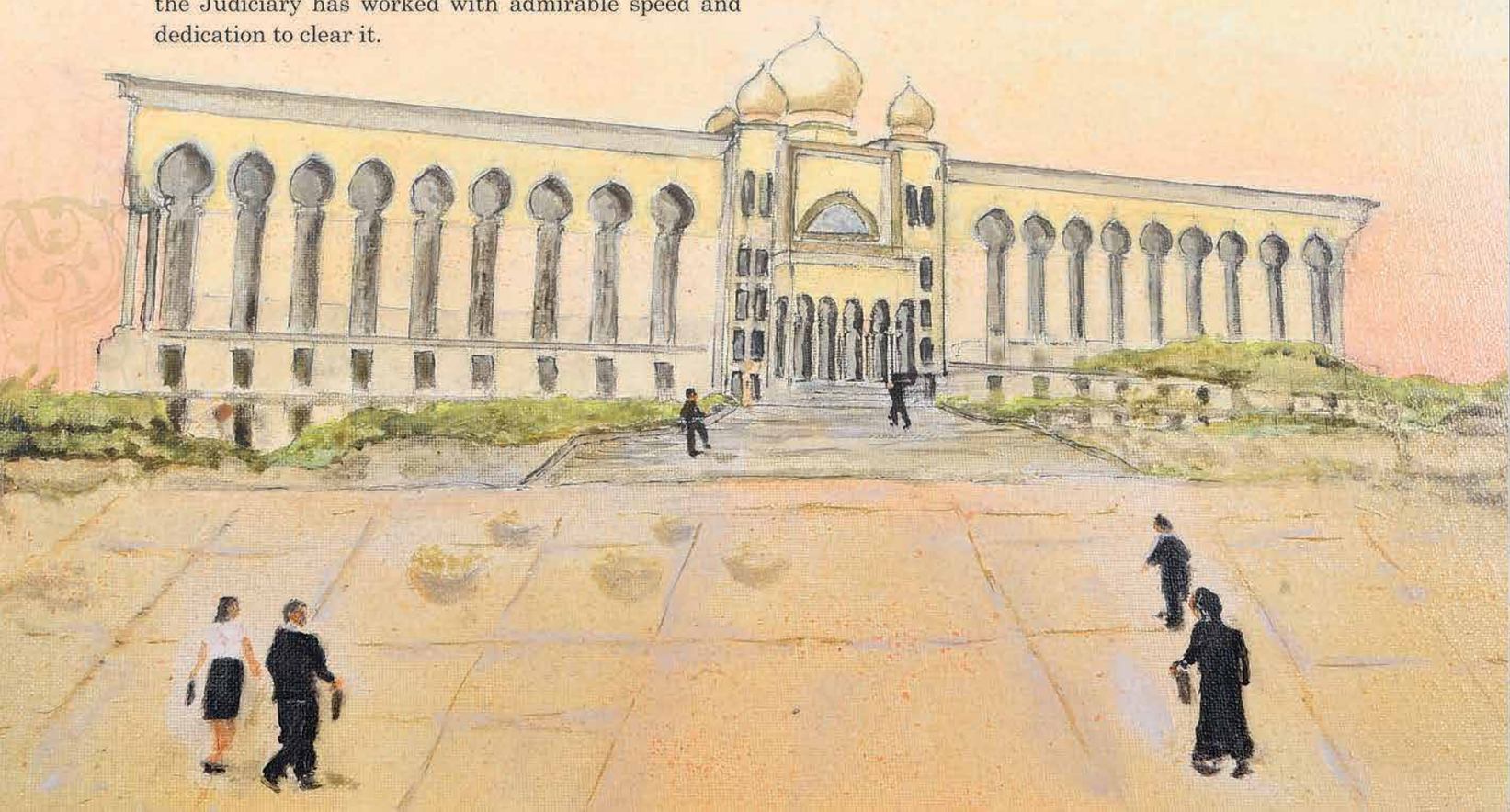
The pandemic impacted our performance resulting in a backlog, as explained in last year's edition. The backlog throughout the courts in Malaysia remains an ongoing concern, but during 2021, statistics disclose the Judiciary has worked with admirable speed and dedication to clear it.

Our traditionally covered chapters on the activities of the Malaysian Judiciary during the course of 2021 are comprehensively featured. With regard to our special features, we interviewed Tun Dato' Seri Mohd Eusoff Chin, the eighth head of the Judiciary and the second Chief Justice of Malaysia. We thank Tun Mohd Eusoff for his graciousness in sharing his life experiences, and generously giving us his time. We are also most grateful to Datuk Wira Low Hop Bing for his excellent contribution on writing judgments efficiently, a must read for most of us. Datuk Wira Low is renowned for his timely and meticulously written judgments.

I would like to take this opportunity to thank the Editorial Committee for this year, who are featured in a specially produced environmentally themed photo shoot. We braved the wind, rain and mud in the pursuit of the theme.

Particular encouragement and credit must go to Chang Lisia, who led the team. I also extend my profound gratitude to Thomson Reuters for editing this year's edition. On behalf of the Committee, I hope you enjoy this year's edition.

Justice Nallini Pathmanathan
Editor




MAHKAMAH SYARIAH
WILAYAH PERSEKUTUAN PUTRAJAYA

CHAPTER 01

THE FEDERAL COURT

STATEMENT BY THE RT. HON THE CHIEF JUSTICE OF MALAYSIA

The Chief Justice Tun Tengku Maimun Tuan Mat

The prolonged battle against the COVID-19 pandemic throughout the year 2021 did not affect the Federal Court in its constitutional functions as the highest and final appellate court in Malaysia.

In 2021, the Federal Court disposed of 1,018 cases out of 1,193 newly registered cases and 774 cases brought forward from the year 2020 which brings the percentage of disposal to 51.75%. 949 cases were then brought forward to January 1, 2022. Out of the 1,193 newly registered cases, 736 cases are applications for leave to appeal to the Federal Court ("leave applications"); 100 cases are civil appeals; 313 are criminal appeals whilst 44 cases are other cases under the original and consultative jurisdiction of the Federal Court.

As of December 31, 2021, the Federal Court disposed of 527 out of 1,046 leave applications leaving 519 pending disposal. This translates to a disposal rate of 50.38%. It is pertinent to note that more than half of the leave applications, which is 54.75%, involve general civil matters. The balance is made up of commercial, admiralty, bankruptcy, insolvency, family and constitutional matters.

As for civil appeals, 100 newly registered cases were recorded with 179 cases brought forward from the year 2020. By the end of the year, the Federal Court had disposed of 165 civil appeals with the disposal rate of 59.13%. 97 out of 165 of the civil appeals disposed of concerned commercial, insolvency and bankruptcy matters.

As for criminal appeals, excluding habeas corpus matters ("habeas corpus appeals"), there were 191 cases brought forward from the year 2020 and 104 new cases were registered, totaling 295 cases. By end of the year, 140 cases had been disposed of, leaving a balance of 155 cases carried forward to the next year. It is significant to note that 249 out of 295 cases, that is 84.4%, were drugs-related appeals. As for habeas corpus appeals, the Federal Court disposed of 158 cases from the total of 209 newly registered cases and 79 cases brought forward from the year 2020, leaving 130 cases pending disposal. This is a disposal rate of 54.86%.

Besides civil and criminal appeals, the Federal Court also hears and decides cases in its original and consultative jurisdictions. There were 59 cases on these matters; 28 cases were disposed of and 31 cases are pending disposal with a disposal rate of 47.45%.

Based on the analysis of the above statistics, I am pleased to note that the steps implemented by the Judiciary since the year 2020 in dealing with the COVID-19 pandemic have ensured that the justice system remain accessible; and indeed, these steps have improved efficiency through online and hybrid hearings. Additionally, the Federal Court implemented several administrative changes as part of its efforts to improve efficiency such as by increasing the number of sitting days in a week and the number of panels that preside each day as well as the number of cases fixed each day. In fact, since November 2020, single judge hearings were introduced especially for leave applications that arose from interlocutory appeals.

No doubt the Federal Court would not have been able to carry out its functions properly without the continuous cooperation and support as well as strong commitment from all the stakeholders of the justice system namely, the enforcement agencies, the Bar, and the AGC. My deepest gratitude and appreciation to each and every one of them. I hope we remain united and work closely together to enhance the functioning of our justice system.

Unlike the previous years, the year 2021 witnessed no new members being elevated to the Federal Court or members retiring. Thus the number of judges on the Federal Court bench remained the same as in the year 2020, working in full force in discharging their judicial duties and responsibilities.

Justice Tengku Maimun Tuan Mat
Chief Justice of Malaysia

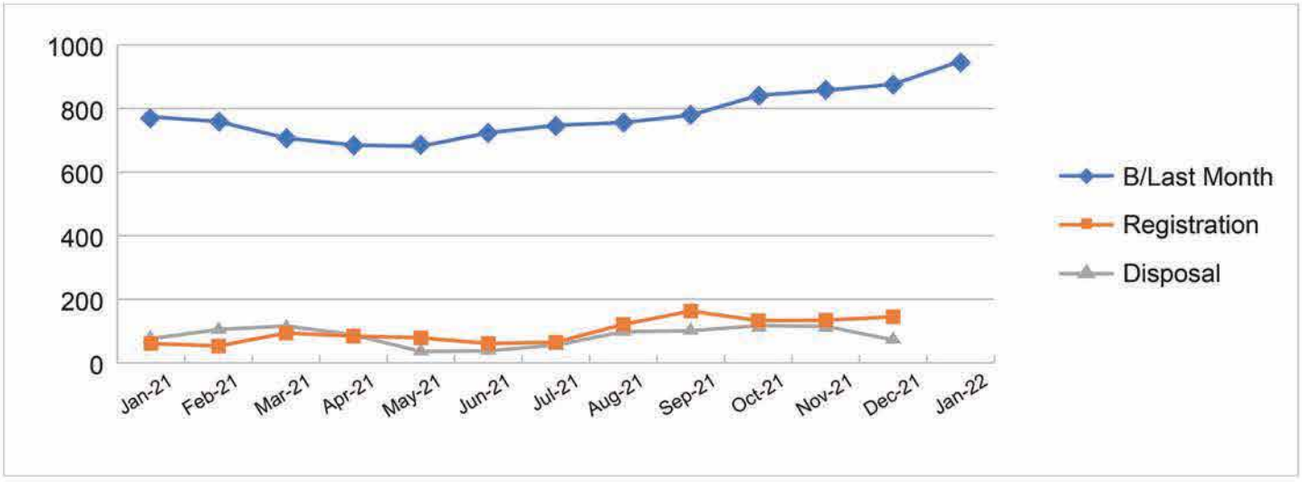
JUDGES OF THE FEDERAL COURT

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 2021

The Federal Court registered 1,193 new cases from January 1 to December 31, 2021. Of this number and the 774 cases which were brought over from 2021, 1,018 were disposed of within the year. At the disposal rate of 51.75%, 949 cases were brought forward to January 1, 2022.

NUMBER OF APPEALS REGISTERED AND DISPOSED OF IN 2021

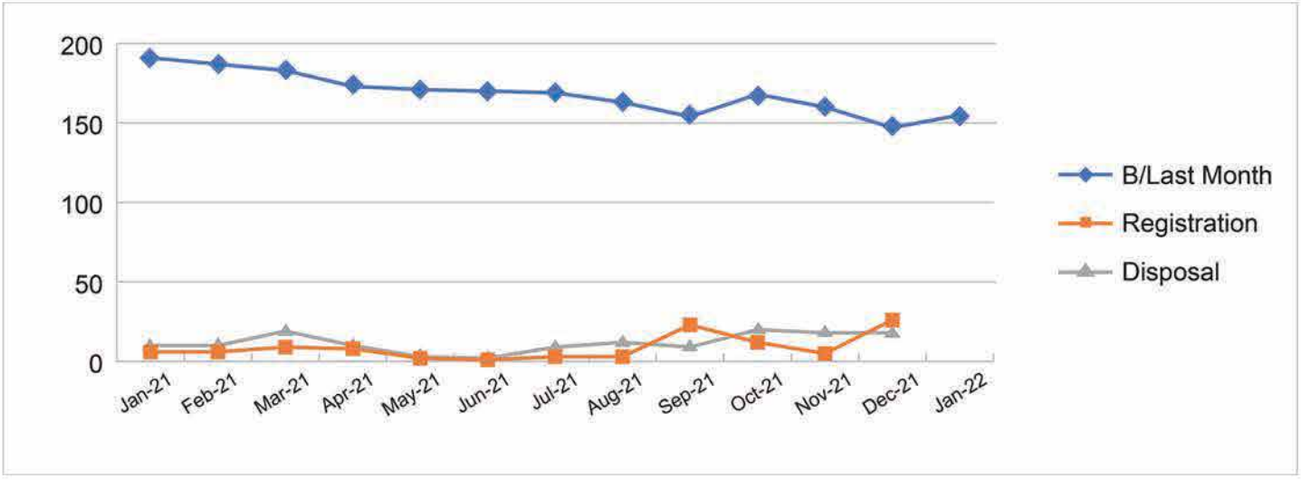


MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-22
BALANCE LAST MONTH	774	759	707	685	681	724	747	756	779	841	857	876	949
REGISTRATION	61	53	94	84	79	61	65	121	163	133	134	145	-
DISPOSAL	76	105	116	88	36	38	56	98	101	117	115	72	-

Criminal Appeals

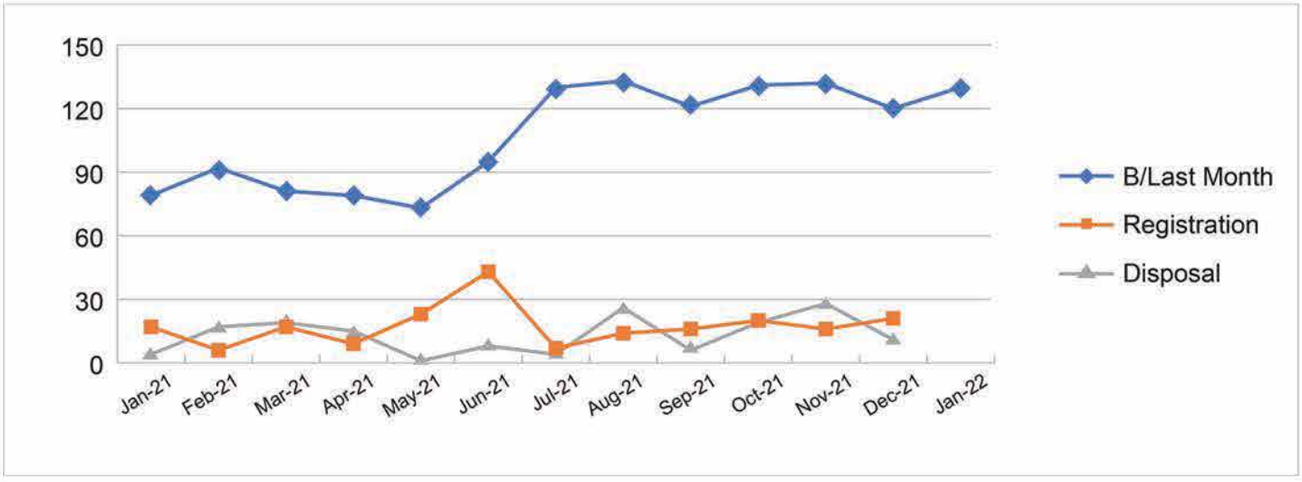
A closer analysis of the statistics discloses that 104 general criminal appeals were registered at the Federal Court in 2021. Though the court managed to dispose of 140 cases, a number that was higher than the number of cases registered, the disposal rate remained below 50% of the overall figure (47.45% to be exact). The year 2021 witnessed the registration of 209 habeas corpus appeals and disposal of 158, leaving only 130 pending at the close of year. The disposal rate of habeas corpus appeals was 45.13%. Since this court only entertains appeals against decisions of the High Court in its original jurisdiction, neither sexual nor street crimes appeals were registered at the Federal Court in 2021. Similarly, no environmental and cyber-crimes had been registered too. In total, 155 criminal appeals and 130 habeas corpus appeals have been carried forward to January 2022.

CRIMINAL APPEALS IN 2021
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-22
BALANCE LAST MONTH	191	187	183	173	171	170	169	163	154	168	160	147	155
REGISTRATION	6	6	9	8	2	1	3	3	23	12	5	26	-
DISPOSAL	10	10	19	10	3	2	9	12	9	20	18	18	-

HABEAS CORPUS APPEALS IN 2021
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-22
BALANCE LAST MONTH	79	92	81	79	73	95	130	133	121	131	132	120	130
REGISTRATION	17	6	17	9	23	43	7	14	16	20	16	21	-
DISPOSAL	4	17	19	15	1	8	4	26	6	19	28	11	-

Civil Appeals

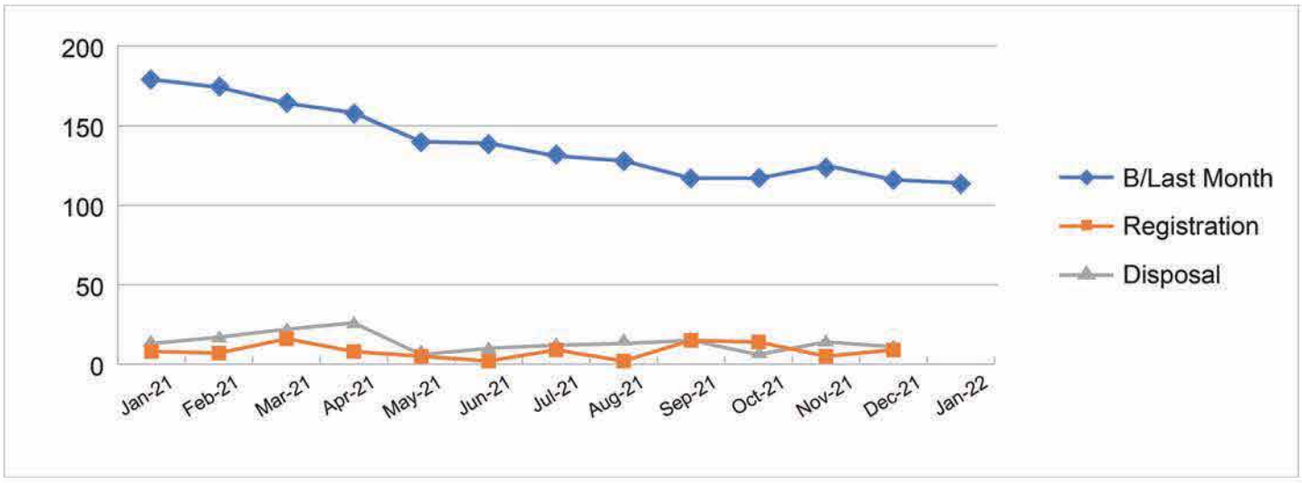
The Civil Appeals Unit started the year with a total of 179 appeals and 100 new appeals were registered throughout the same period. At a disposal rate of 59.13%, the Federal Court is proud to announce that it had disposed of 165 civil appeals in 2021 and only carried forward 114 of them to 2022.

With the dynamic progress in the development of law in Malaysia, judges of this apex court had granted leave to appeal in 48 commercial matters in 2021. The court cleared 89 commercial related appeals and 41 remained pending as at December 31, 2021. Hence, a healthy disposal percentage of 68.46% was recorded.

Insolvency appeals saw a higher disposal rate of 77.78% as the court successfully disposed of seven appeals in 2021. As for bankruptcy appeals, the court achieved a 100% disposal rate as it cleared the only matter pending since 2020. Unfortunately, none of the two constitutional related appeals registered in 2021 was disposed of in the same year. As such, the disposal rate for constitutional matters was 0%.

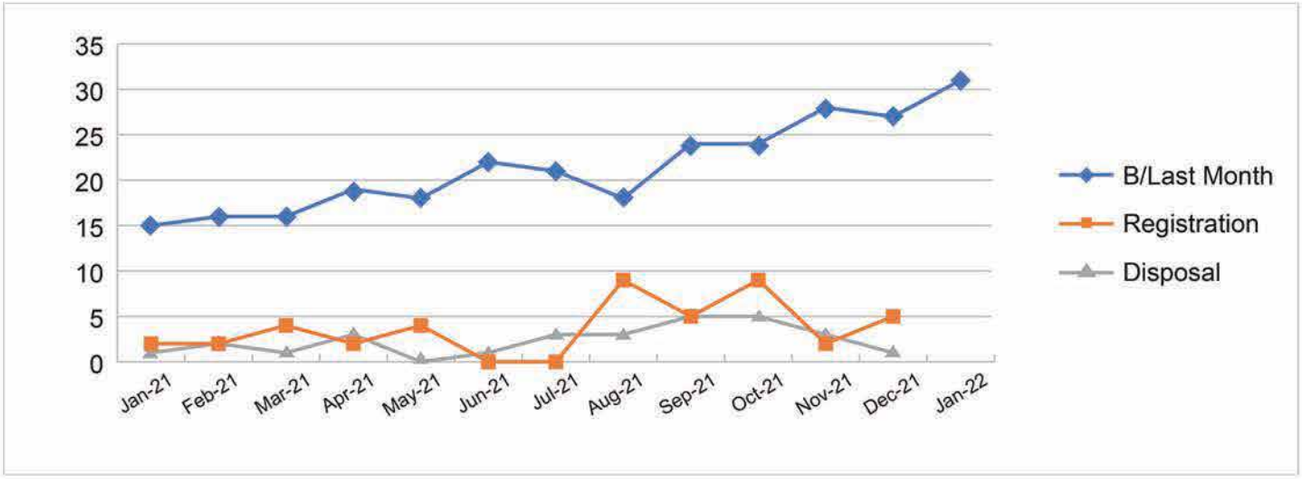
The next tracking chart presents the number of registrations and disposal of cases where this court exercised its original and consultative jurisdiction, in addition to its inherent jurisdiction to review its own decisions in civil and criminal matters. 44 cases were registered in 2021, but only 28 were disposed of during the same period. Ending the year with 31 pending cases, the Federal Court recorded a disposal rate of 47.45%.

CIVIL APPEALS IN 2021
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING



MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-22
BALANCE LAST MONTH	179	174	164	158	140	139	131	128	117	117	125	116	114
REGISTRATION	8	7	16	8	5	2	9	2	15	14	5	9	-
DISPOSAL	13	17	22	26	6	10	12	13	15	6	14	11	-

ORIGINAL JURISDICTION / CIVIL REFERENCE / CRIMINAL REFERENCE / CRIMINAL APPLICATION / CIVIL OR CRIMINAL REVIEW APPLICATION IN 2021
NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING

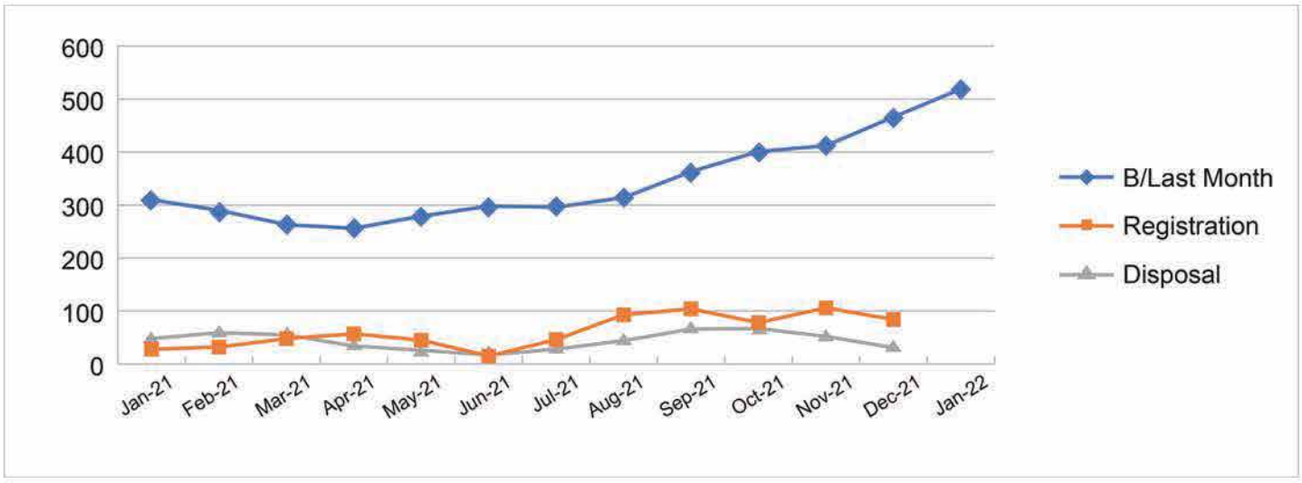


MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-22
BALANCE LAST MONTH	15	16	16	19	18	22	21	18	24	24	28	27	31
REGISTRATION	2	2	4	2	4	0	0	9	5	9	2	5	-
DISPOSAL	1	2	1	3	0	1	3	3	5	5	3	1	-

Civil Leave Applications

It is an undisputed fact that the bulk of the Federal Court's daily cases is on civil leave applications where it recorded a registration of 736 motions in 2021. The court mobilised all its assets including its senior judges, registrars and supporting staff to ensure the smooth running of the court. Out of the civil leave applications, 290 were commercial-related matters, six were admiralty, eight were bankruptcy, 15 were insolvency, another eight were family and only one was a constitutional matter. It is significant to note that more than half the civil leave applications (i.e. 54.75% equivalent to 403 motions) in the Federal Court concerned general civil matters. The court secured the disposal of 527 motions in 2021 with a disposal rate of 50.38%. Good leadership and management helped in carrying forward only 519 motions to the beginning of 2022.

LEAVE APPLICATIONS IN 2021
NUMBER OF CASES REGISTERED AND DISPOSED OF AND PENDING



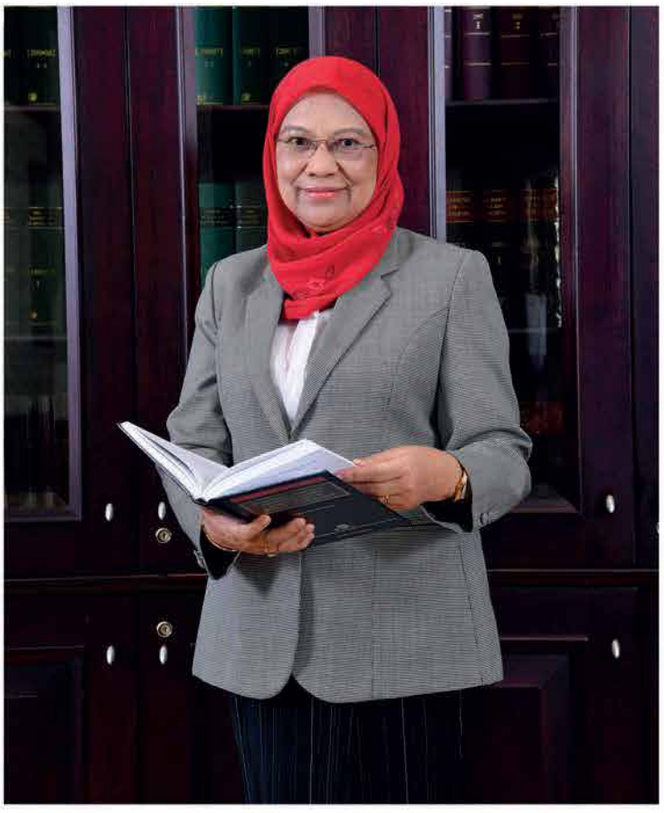
MONTHS	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-22
BALANCE LAST MONTH	310	290	263	256	279	298	296	314	363	401	412	466	519
REGISTRATION	28	32	48	57	45	15	46	93	104	78	106	84	-
DISPOSAL	48	59	55	34	26	17	28	44	66	67	52	31	-

CHAPTER

02

THE COURT OF APPEAL

STATEMENT BY THE PRESIDENT OF THE COURT OF APPEAL



The President of the Court of Appeal Rohana Yusuf

The way we worked in the year 2021 was very much the same as in the year 2020. We started the year with the continuous presence of COVID-19. As we dealt with the ebb and flow of the said pandemic and its impact, the Court of Appeal continued to manage and hear appeals.

The Court of Appeal, pursuant to Article 122A(1) of the Federal Constitution, is constituted by the President of the Court of Appeal together with a maximum of 32 judges. However, whenever the interests of justice so require, Article 122A(2) of the Federal Constitution makes provision for a judge of the High Court to be nominated by the President of the Court of Appeal as Judge of the Court of Appeal.

Notwithstanding the maximum number of Court of Appeal judges under the Federal Constitution, throughout 2019 until March 2021, the number of judges of the Court of Appeal remained between 24 to 26. This is due, amongst others, to the retirement, upwards elevation of Court of Appeal judges and logistic issues, such as insufficient chambers to accommodate the maximum numbers.

In the year 2021, three Court of Appeal judges retired. They were Justice Kamardin bin Hashim who retired on February 11, 2021, followed by Justice Lau Bee Lan on August 25, 2021 and Justice Hamid Sultan bin Abu Backer on August 28, 2021. To all the retired judges, I would like to record my immense gratitude for their services and contributions to the Court of Appeal. I wish them all the best in their pursuits, post-retirement. May happiness and good health accompany them always.

On a different note, I am delighted to welcome five new members to the Court of Appeal. They are Justice Ghazali bin Cha, Justice Ahmad Zaidi bin Ibrahim, Justice Mariana binti Yahya, Justice See Mee Chun and Justice Hashim bin Hamzah who began their terms on March 19, 2021. Their diverse backgrounds and experiences will undoubtedly help us to enhance the performance of the Court of Appeal and strengthen our justice system.

Moving on, there is a plan to fill up the maximum appointment of 32 judges at the Court of Appeal and every effort is taken to see this materialise. The existing logistic problems that we are currently facing, is being overcome by the change in workplace which has been implemented by the Judiciary beginning 2020.

While awaiting vacancies to be filled up, I have, with the cooperation of the Chief Judge of Malaya, nominated some High Court judges to assist in the disposal of appeals. I am very much grateful for the assistance and support given by the Chief Judge of Malaya in this regard.

In an effort to speed up the disposal of cases during the COVID-19 period, we continued with the internal initiatives that were already in place in 2020. Our focus was to optimise the judicial time to its utmost. To achieve this, we have increased the number of panels presiding each day and we have also increased the number of cases fixed per day to be heard by these panels. Although this may seem that Court of Appeal judges are burdened with heavy case loads and frequent number of sittings, some of which taking place with no break, the Court of Appeal judges are resilient and committed to this endeavour in order to clear the huge backlog which built up during the pandemic.

With the continuous efforts taken by the Court of Appeal, I can happily report that we made significant progress through the course of 2021. In total, during 2021, 4,993 cases were registered and added to 6,608 cases which had been brought forward from 2020. Against the said registration, 5,294 listings were cleared representing a clearance rate of 106% either through online or physical hearings. These 5,294 cases disposed of are inclusive of cases carried forward from 2020.

Online hearings have become a permanent feature in our justice system with the insertion of s 15A into the Courts of Judicature Act 1964 on October 22, 2020. I can say without hesitation that the Court of Appeal judges and lawyers appearing, adapted well to the new working practices throughout 2021. They grasped the new mode of hearing through online technologies like never before. Consequently, there were fewer postponements as compared to the number in earlier years. The Court of Appeal will no longer entertain postponements on the basis of unfamiliarity with the system. Since we are now in the endemic stage, there are also fewer postponements due to reasons related to COVID-19. The Court of Appeal will always ensure that cases are heard and disposed of in due time, without undue delay.

The statistical data shows that there were 4,901 civil matters disposed of via online hearing between January 2021 to December 2021. Sixty-two percent of the total numbers are mainly civil appeals.

Unlike civil cases, I can say that the adaptation to online hearing in criminal cases is still considerably low. Virtual criminal courtrooms started with serious resistance from criminal lawyers. Record shows that there were 166 cases disposed of through remote technology platform (hybrid or full-fledged) compared to 967 retained in-person court hearings.

In order to facilitate the use of remote communication technology in criminal appeals at the Court of Appeal, we are guided by Directive No. 6/2021 issued by the Chief Justice of Malaysia on February 26, 2021. The directive, which came into force on March 1, 2021, was designed to dispose of urgent criminal cases in a safe and speedy manner involving prison inmates whose sentences are nearing completion, child offenders and juveniles, as well as cases of public interest and other types of cases which in the opinion of the judges were necessary to be disposed of. We do recognise some hiccups in the initial stages. However, as we proceeded along, it has been a positive experience.

It must be highlighted here that the first remote criminal hearing pursuant to the directive was in fact conducted at the Court of Appeal. In those proceedings, the accused appeared on camera from the Kajang Prison, while the judges were at the Palace of Justice, and the defence counsel and the deputy public prosecutor were at their respective offices.

We, at the Court of Appeal, remain committed to continue to provide the public with access to justice despite the ongoing global pandemic. We have strived to ensure the said objective is met. In that regard, I would like to express my deepest appreciation to my fellow judges of the Court of Appeal for their continuing support and engagement. And I may say that I am very fortunate to have them on the Court of Appeal Bench. Grateful acknowledgment also goes the Registrar of the Court of Appeal, Puan Hasbi Hassan, the Deputy Registrar, Puan Kanageswari a/p Nalliah, the judicial officers and other support staff for the hard work and fortitude that they have shown throughout the reporting year.

Last but not least, I must not forget to express my gratitude to the Honourable Attorney General and his officers at the Attorney General's Chambers, members of the Malaysian Bar, the Advocates Association of Sarawak and the Sabah Law Society for their support and inputs which are always valuable to us to improve to serve the public better.

As I know this to be my last statement for the Court of Appeal in this Yearbook before I retire, I would like to say that I am privileged and honoured to be at the helm of the Court of Appeal with such great support and devotion of the judges of the Court of Appeal and the supporting staff throughout my tenure. I wish everyone the very best in 2022.

Thank you.

Justice Rohana Yusuf
President of the Court of Appeal

Judges of the Court of Appeal

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

PERFORMANCE OF THE COURT OF APPEAL IN 2021

The Court of Appeal constantly strives to dispose of more cases than the number of registered cases.

2021 recorded an increase in the registration of cases compared to the number of cases registered during the previous year. This is attributed to two identified reasons. The first being the revocation of the Movement Control Order ("MCO") and the second, the higher disposal of cases by the High Court. A total of 4,993 cases were filed in 2021 compared to 4,082 cases filed in 2020 which is a significant increase of 22%.

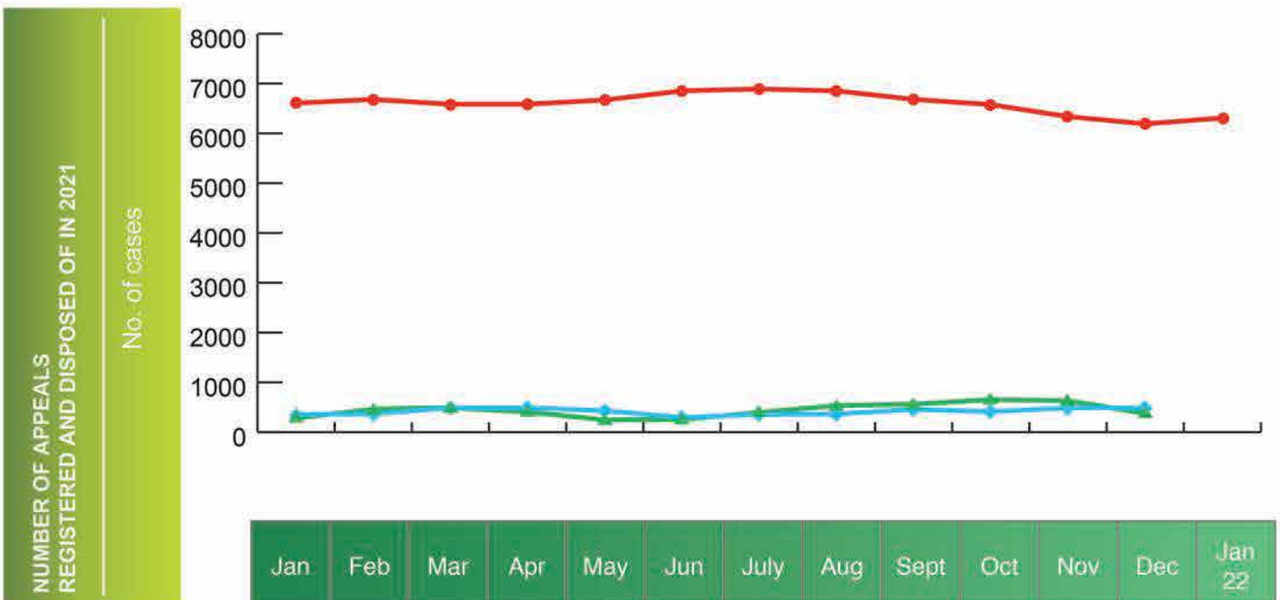
For the record, in 2021, the Court of Appeal disposed of 5,294 appeals against 4,993 appeals registered which is a 106% disposal rate against registration. This is an increase of 66% from 2020 where 3,191 appeals were disposed of. As at December 31, 2021, there were 6,307 appeals pending in the Court of Appeal, out of which 36.8% were pre-2021 appeals.

The main reason behind this improved performance is the direction of The Right Honourable President of the Court of Appeal to empanel two additional panels, i.e. FT1 and Commercial 2 to sit every week from July 2021 and to increase the number of appeals by 50% for each sitting panel. The direction was given due to the overwhelming number of appeals that were not disposed of during the MCO period. Based on our analysis, 50% of the registered appeals were adjourned since July 2021 as a result of the MCO.

The overall performance of the Court Appeal in 2021 can be seen in **Graph A.**

GRAPH A

NUMBER OF APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2021



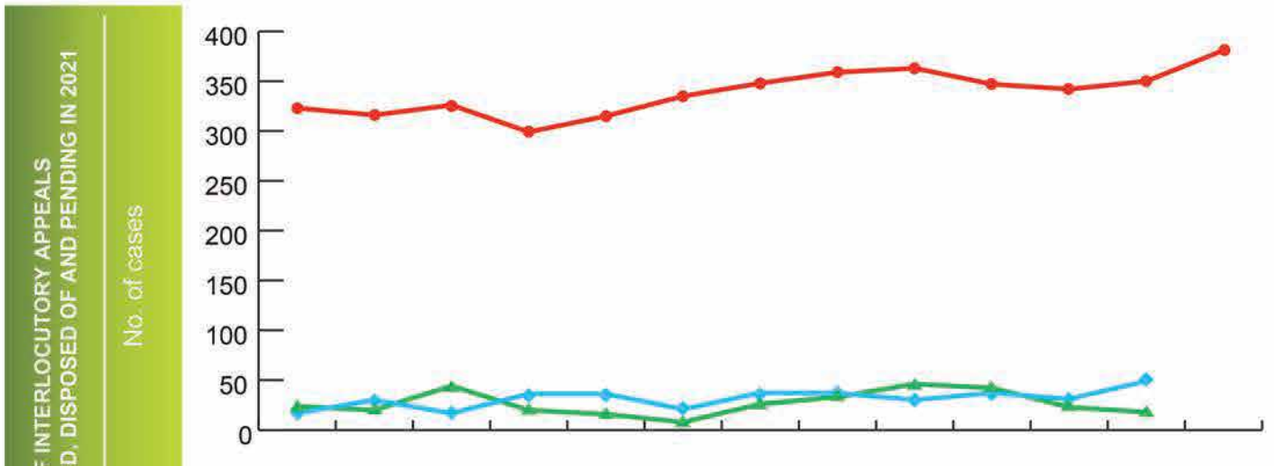
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	6608	6681	6584	6585	6670	6853	6892	6853	6682	6578	6336	6191	6307
Registration	355	366	492	490	430	294	356	364	458	412	488	488	-
Disposal	282	463	491	405	247	255	395	535	562	654	633	372	-

Interlocutory Appeals

In 2021, a total of 378 Interlocutory Appeals (IM Appeals) were registered in addition to 323 appeals which were brought forward from the previous year. By the end of 2021, 320 appeals had been disposed of leaving 381 appeals which are still pending. Out of this number, only 83 were pre-2021 appeals which are expected to be disposed of by the first quarter of 2022. The number of the IM Appeals registered, disposed of and pending for the year 2021 is shown in **Graph B**.

GRAPH B

NUMBER OF INTERLOCUTORY APPEALS REGISTERED,
DISPOSED OF AND PENDING IN 2021



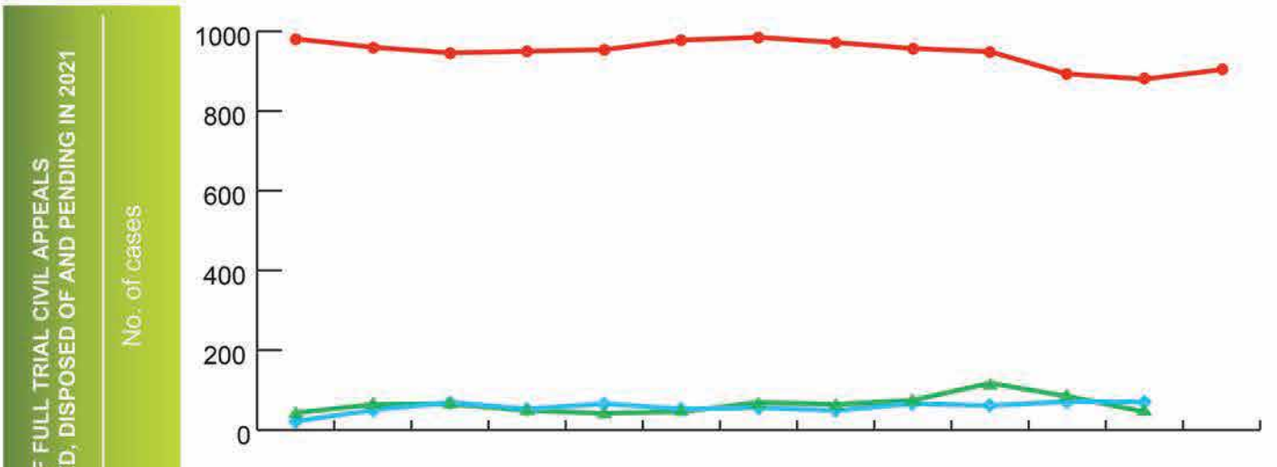
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	323	316	326	299	315	335	348	359	363	347	342	350	381
Registration	17	30	17	36	36	21	37	37	30	37	31	49	-
Disposal	24	20	44	20	16	8	26	33	46	42	23	18	-

Full Trial Civil Appeals

In 2021, a total of 686 Full Trial Civil Appeals (FT Appeals) were registered compared to 555 registered the previous year. This equates to an increase of 23%. There were 981 FT Appeals carried forward from 2020. A total of 763 appeals were disposed of, leaving 904 appeals on the list. Out of these 904 appeals, 315 were pre-2021. 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 2021



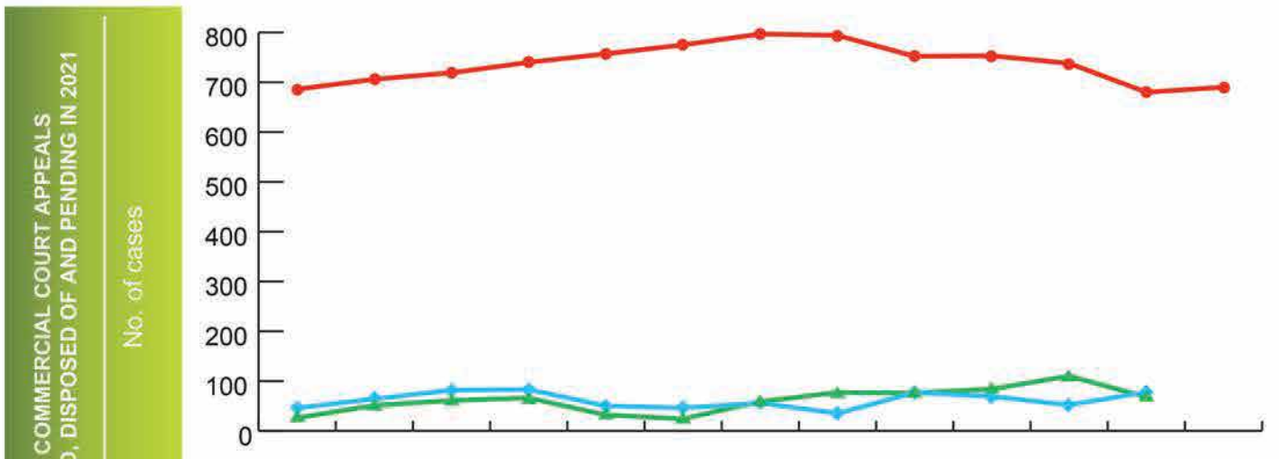
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	981	960	946	950	954	978	985	972	957	949	893	880	904
Registration	22	50	69	53	66	53	56	49	66	61	71	70	-
Disposal	43	64	65	49	42	46	69	64	74	117	84	46	-

Commercial Court Appeals

In 2021, a total of 738 Commercial Court Appeals (NCC Appeals) were registered. There has been a 28% increase compared to 2020 (576 appeals). A total of 686 appeals were carried forward from 2020. By the end of 2021, 734 appeals had been disposed of, leaving a balance of 690 cases. Out of this figure, 148 cases were pre-2021 cases. The number of NCC Appeals registered, disposed of and pending in 2021 is shown in **Graph D**.

GRAPH D

NUMBER OF COMMERCIAL COURT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2021



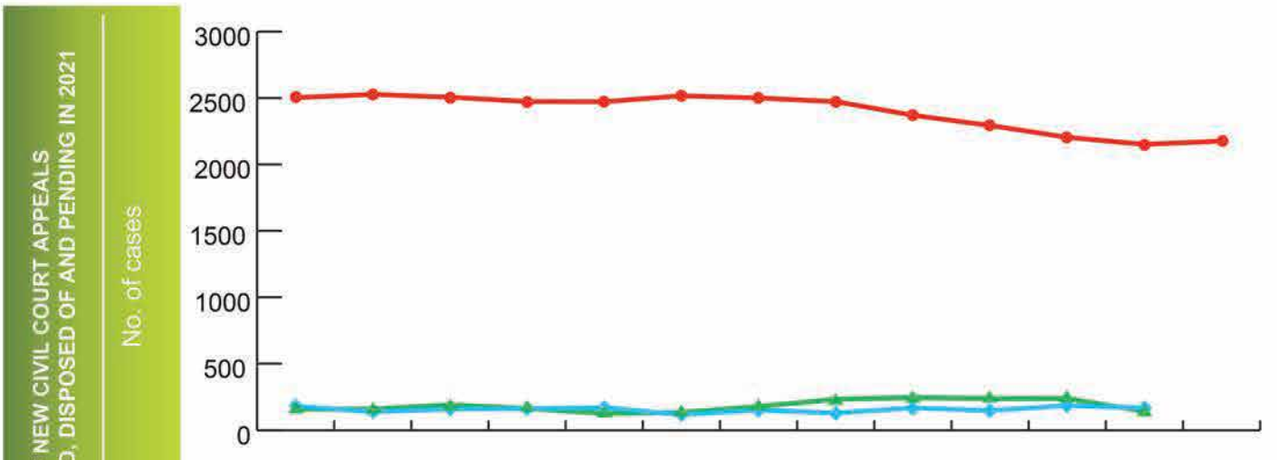
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	686	706	719	740	757	775	797	794	752	753	738	680	690
Registration	46	64	82	83	50	46	56	35	77	69	52	78	-
Disposal	26	51	61	66	32	24	59	77	76	84	110	68	-

New Civil Court Appeals

1,890 New Civil Court Appeals (NCvC Appeals) were registered in 2021. A total of 2,503 appeals were carried forward from 2020. Out of these appeals, 2,217 had been disposed of by the end of the year, leaving a balance of 2,176 cases, out of which 708 appeals were pre-2021 appeals. The number of NCvC appeals registered, disposed of and pending in 2021 can be seen in **Graph E**.

GRAPH E

NUMBER OF NEW CIVIL COURT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2021



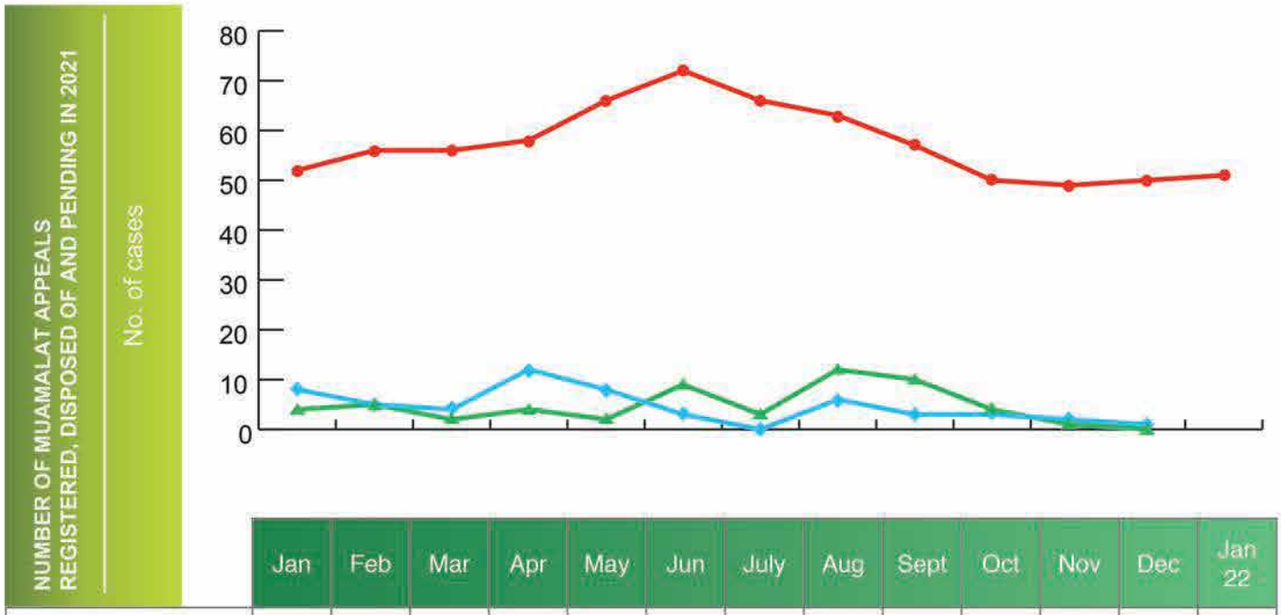
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	2503	2527	2506	2474	2472	2517	2500	2473	2370	2293	2204	2151	2176
Registration	182	140	160	163	171	118	153	130	169	149	187	168	-
Disposal	158	161	192	165	126	135	180	233	246	238	240	143	-

Muamalat Appeals

Muamalat Appeals are now current. 55 Muamalat Appeals were registered in 2021, while 52 appeals were carried forward from the previous year. A total of 56 appeals had been disposed of by the end of the year, leaving a balance of 51 appeals pending before the Court of Appeal. 15 out of the 51 appeals were pre-2021 appeals. The number of Muamalat Appeals registered, disposed of and pending in 2021 can be seen in **Graph F**.

GRAPH F

NUMBER OF MUAMALAT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2021



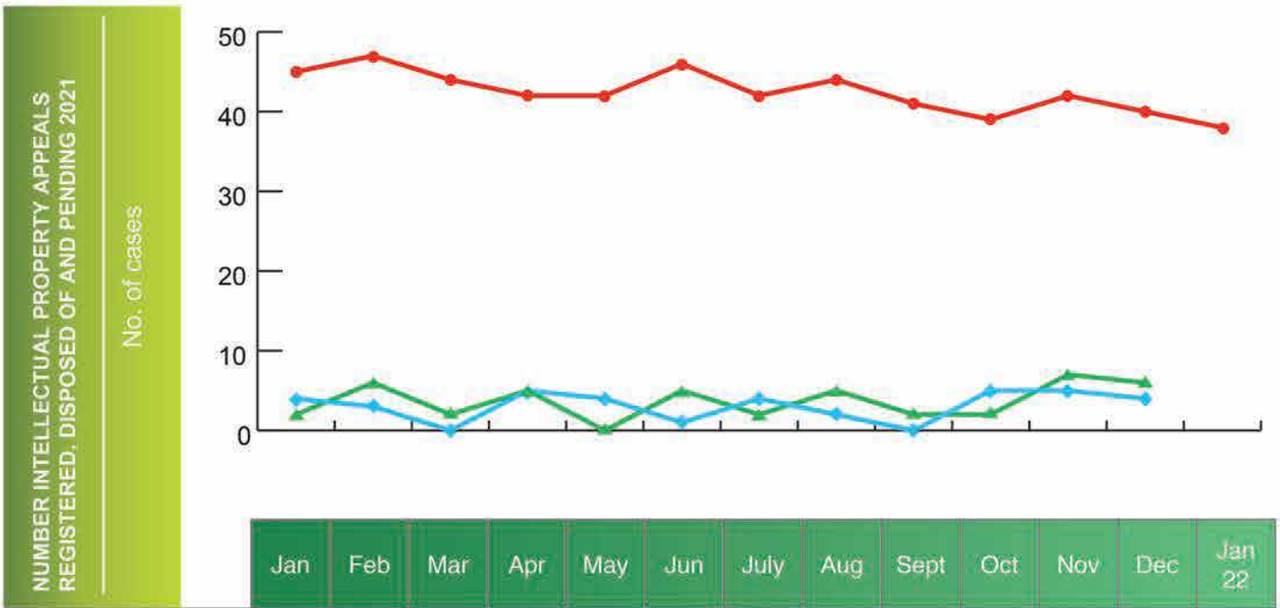
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	52	56	56	58	66	72	66	63	57	50	49	50	51
Registration	8	5	4	12	8	3	0	6	3	3	2	1	-
Disposal	4	5	2	4	2	9	3	12	10	4	1	0	-

Intellectual Property Appeals

There were 45 Intellectual Property Appeals (IP Appeals) carried forward from 2020. In addition to that, there were 37 appeals registered in 2021, an increase of 4% over the 43 appeals registered in 2020. 44 appeals were disposed of in 2021, leaving a balance of 38 appeals which are still pending. Out of this figure, only 10 appeals were pre-2021. These figures are presented in **Graph G**.

GRAPH G

NUMBER OF INTELLECTUAL PROPERTY APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2021



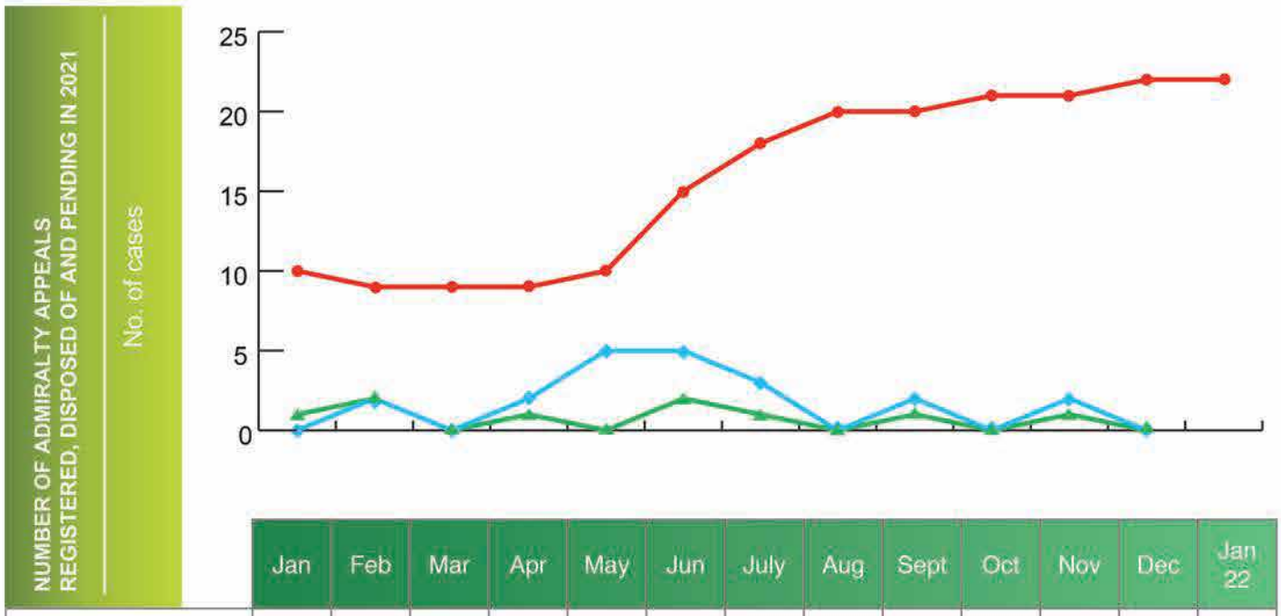
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	45	47	44	42	42	46	42	44	41	39	42	40	38
Registration	4	3	0	5	4	1	4	2	0	5	5	4	-
Disposal	2	6	2	5	0	5	2	5	2	2	7	6	-

Admiralty Appeals

Admiralty Appeals are current. In 2021, 21 appeals were registered. In addition to that, there were 10 appeals carried forward from 2020. There were 9 appeals disposed of, leaving a balance of 22 appeals pending. Of this number, 4 were pre-2021 appeals. The performance is as illustrated in **Graph H**.

GRAPH H

NUMBER OF ADMIRALTY APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2021



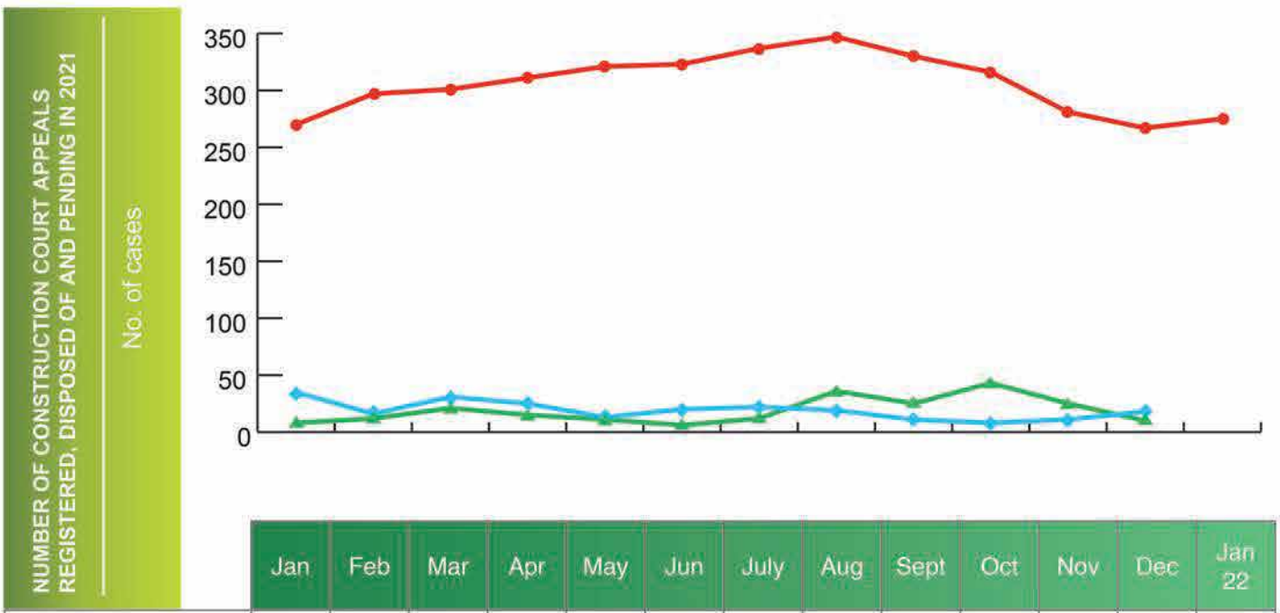
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	10	9	9	9	10	15	18	20	20	21	21	22	22
Registration	0	2	0	2	5	5	3	0	2	0	2	0	-
Disposal	1	2	0	1	0	2	1	0	1	0	1	0	-

Construction Court Appeals

In 2021, 229 Construction Court Appeals were registered and 270 appeals carried forward from 2020. There is an increase of 26% in registration over the appeals registered in 2020. A total of 224 appeals had been disposed of by the end of 2021, leaving a balance of 275 appeals. Out of these 275 appeals, 102 appeals were pre-2021. The figures are illustrated in Graph I.

GRAPH I

NUMBER OF CONSTRUCTION COURT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2021



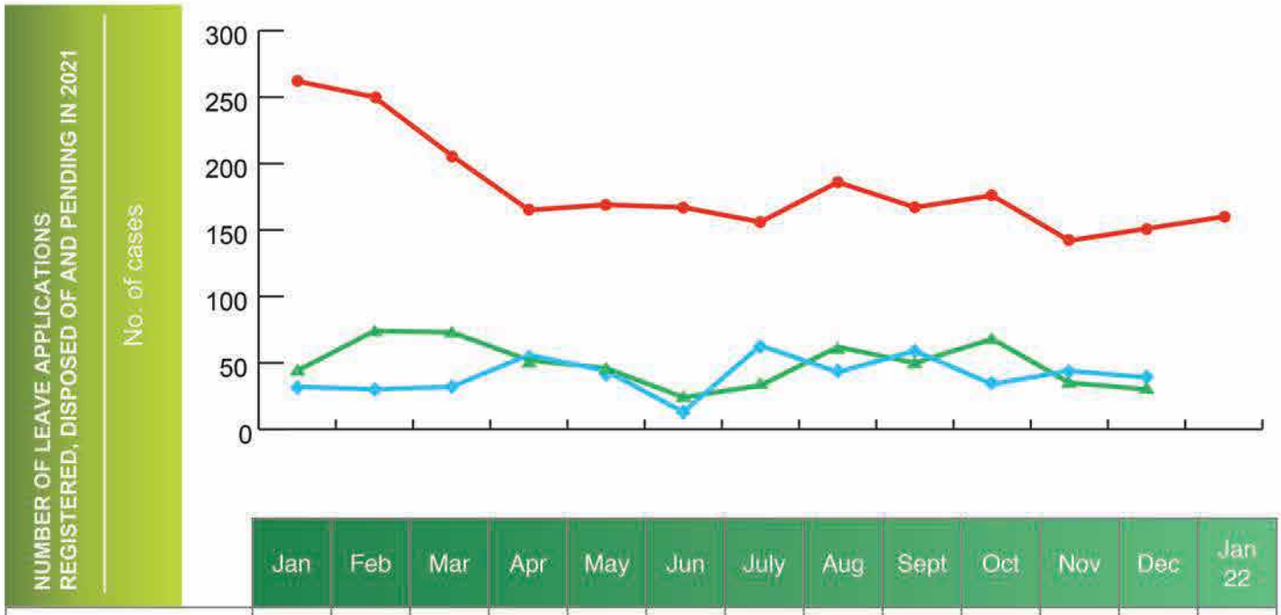
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	270	297	301	311	321	323	337	347	330	316	281	267	275
Registration	35	16	31	25	13	20	22	19	11	8	11	18	-
Disposal	8	12	21	15	11	6	12	36	25	43	25	10	-

Leave Applications

In 2021, 489 Leave Applications were registered. In addition to that, 262 Leave Applications were carried forward from the previous year. A total of 591 Leave Applications were disposed of, leaving a balance of 160 applications. The number of registered, disposed of and pending Leave Applications in 2021 can be seen in **Graph J**.

GRAPH J

NUMBER OF LEAVE APPLICATIONS REGISTERED,
DISPOSED OF AND PENDING IN 2021



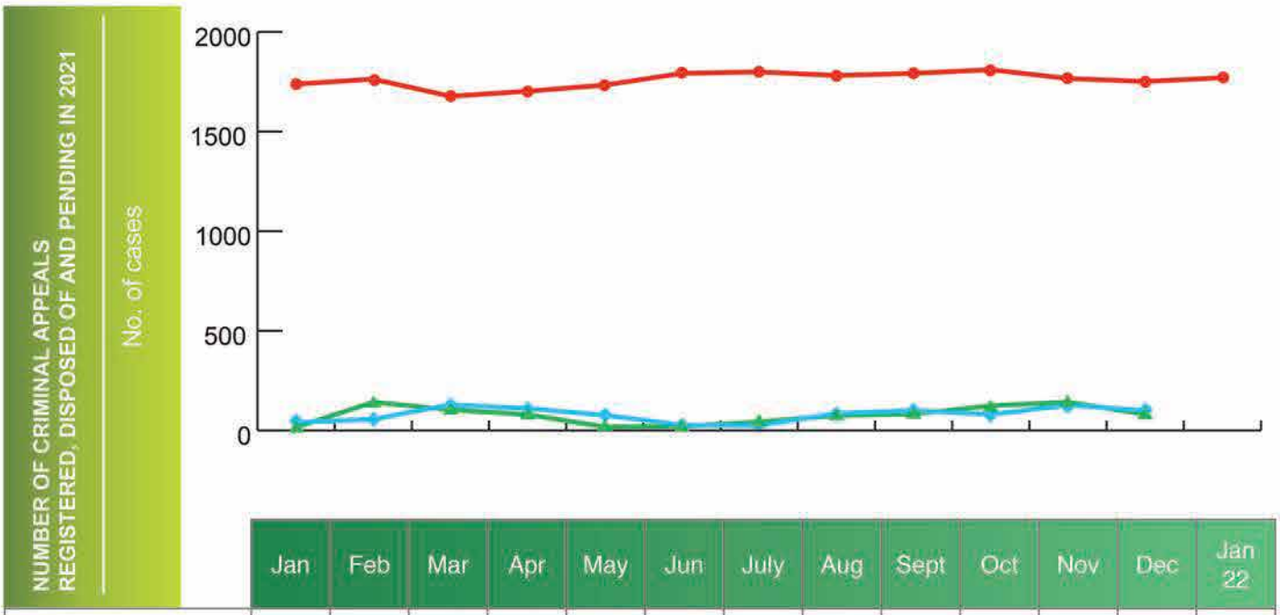
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	262	250	206	165	169	167	156	186	167	176	142	151	160
Registration	32	30	32	56	44	13	63	43	59	34	44	39	-
Disposal	44	74	73	52	46	24	33	62	50	68	35	30	-

Criminal Appeals

In 2021, 959 Criminal Appeals were registered. 1,738 Criminal Appeals were carried forward from 2020. A total of 927 appeals were disposed of, leaving 1,770 appeals pending. As shown in **Graph K**, the disposal rate as against the appeals registered is 96.6%.

GRAPH K

NUMBER OF CRIMINAL APPEALS REGISTERED,
DISPOSED OF AND PENDING IN 2021



	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	Jan 22
C/Forward	1738	1763	1677	1702	1733	1792	1799	1781	1792	1810	1766	1751	1770
Registration	41	56	129	111	77	27	25	86	100	80	127	100	-
Disposal	16	142	104	80	18	20	43	75	82	124	142	81	-

CHAPTER

03

THE HIGH COURTS

STATEMENT BY THE CHIEF JUDGE OF MALAYA

The Chief Judge of Malaya Azahar Mohamed

It cannot be doubted that these two years have been extraordinarily challenging to the world, our country and most particularly, to the Judiciary due to the ongoing impact of the Coronavirus Disease ("COVID-19") outbreak. The battle for the operation of courts and the administration of justice to remain responsive and pliant in the war against the normalcy is indeed testing.

If we recapitulate, 2020 had been tumultuous. In 2020, as a proactive response to the sudden shock of the COVID-19 outbreak, countless *cordon sanitaires* were imposed by the government to curb the pervasive spread of the virus. In line with these efforts, multiple policies were issued to regulate the operation of the courts and the administration of justice, in particular the administration of our 93 High Courts throughout Peninsular Malaysia, presided over by 43 High Court judges and 38 judicial commissioners. As for the subordinate courts, there are 143 Sessions Courts and 174 Magistrates' Courts in Peninsular Malaysia, presided over by 132 Sessions Court judges and 137 magistrates respectively.

Our High Courts and the subordinate courts are the closest bulwark of justice to the public masses. Hence, there was a vital need to ensure that these courts were kept functioning to dispense justice. As the adage goes, justice delayed is justice denied. I believe justice should not be compromised in any instance. Therefore, with the cooperation of the offices of the Chief Registrar of the Federal Court, the Registrar of the High Court of Malaya and the Registrar of the Subordinate Courts of Malaya, policies were issued to better the administration of the said courts.

Indeed, the biggest challenge in the past year was to balance the dispensing of justice with public health concerns. We had to ensure continuous delivery of our judicial services while keeping safe at the same time. The utmost priority was getting our judges, judicial officers, staff and court users back to court safely. With this priority in mind, we were compelled to be flexible and adaptable in our operations, particularly when we had to constantly adjust the operation of our State and District Courts in line with the Movement Control Orders, Conditional Movement Control Orders or Recovery Movement Control Orders announced by the government.

These challenges remain in 2021 and I believe it will still continue in the years to come. With the emergence of new variants, our fight against COVID-19 seems to be a constant battle, albeit we have stepped into the National Recovery Plan ("NRP") phase approximately half a year ago. Nonetheless, I remain positive that we the Judiciary are more than able and are sufficiently equipped to flexibly manoeuver our way forward despite all the challenges faced as is evident from our experience in 2020, where access to justice was made easier through the adoption of technology.

The efforts taken in 2020 had been crucial for this shift which has continued in 2021. There is no turning back. In the face of this crisis, we developed a new mindset that changed the way we conduct our hearings and trials including the way we function as an institution. The traditional idea of an "open court" where the judge, counsel and all parties are physically present in an open public courtroom at the same time has been gradually replaced. Virtual online hearings have now become a primary option for civil trials, mediation processes and other court administrative proceedings. This is a huge advancement in hearing matters which is here to stay. All these continuous efforts have also become the new norm for all stakeholders. I wish to thank the judges, lawyers, the court's staff and the general public who were open to adapt to this shift. Being attuned to the ever-changing demands of the court's environment is necessary. There is no better way to describe this need other than to adopt a wise man's adage – the strongest suit of men is the ability to adapt to their surroundings and to develop from adversities.

I have to note that with the countless restriction orders, lockdowns and the various NRP phases which were imposed gradually in the different states of Malaysia, the disposal of cases in each state suffered because of the closure of courts and the extension of trial dates. Backlogs of cases increased. There were unacceptable delays in the disposal of cases and longer waiting time for trials. Judges were already struggling with increasing workloads. All of these circumstances led to delayed justice and frustrated litigants. We risked the Judiciary being undermined if these predicaments were disregarded and unresolved.

To address these issues, we depended heavily on digital remote hearings to accelerate the disposal of cases. We were under tremendous pressure as a result of the COVID-19 pandemic. We had to quickly resolve these issues while we endeavoured to ensure efficiency in disposing of cases, especially pre-2019 cases. In this respect, for the period between January and December 2021 the High Court in Malaya disposed of a total of 90,744 civil cases with 42,688 cases pending disposal. This was a good disposal rate of about 68.0%. For criminal cases, a total of 5,582 cases were disposed of with 4,807 cases pending disposal, reaching a clearance rate of 53.7%. As for the Sessions Courts throughout Malaya, I am happy to report that a total of 33,338 civil cases were disposed of by the Sessions Courts in Peninsular Malaysia, achieving a clearance rate of 60.2%. As for criminal cases, a total of 29,599 cases were disposed of, reaching a clearance rate of 67.3%. With regard to our Magistrates' Courts, a total of 155,902 civil cases were disposed of, achieving a clearance rate of 81.3% and for criminal cases, 1,443,292 were disposed of, also achieving a clearance rate of 81.3%.

Whilst having to contend with old cases and clearing backlogs, the incoming registration of new cases was ever-increasing. It is the court's duty to entertain cases, monitor and promptly deal with these cases within our set timeline. However, due attention can only be given to these new cases if our backlogs are cleared. We will not be so concerned if the old cases are speedily disposed of. Hence, our immediate aim is none other than to address and eradicate these backlogs and ensure simultaneous speedy disposal of current cases within the stipulated timeline.

In facing these perennial concerns, we introduced specific measures at two levels. At the management level, we embarked on three main initiatives as follows:

(a) Opening up six new courtrooms at the High Court with a view to hearing and disposing of more cases at any given time. These new courtrooms comprise two new courtrooms in Kuala Lumpur,

two courtrooms in Shah Alam, one courtroom in Sungai Petani and one courtroom in Georgetown.

(b) Restructuring the civil courts in Kuala Lumpur, Shah Alam and Georgetown. The key adjustment is based on the division of cases into those filed before and after a cut-off date. Cases filed before the cut-off date are to be dealt with by designated judges who will hear all backlog cases until disposal by a targeted time. These judges will only focus on the old cases without being burdened with hearing or trying new cases which include interlocutory matters. For the new and current cases which are cases after the cut-off date, they are to be dealt with by a different set of designated judges. These judges will focus on the fresh cases and are relieved from hearing the old cases.

(c) In relation to the Kuala Lumpur Commercial Courts, the problem of backlog of cases can be addressed by implementing a targeted disposal over a period of one year under the current commercial court structure.

At individual judges' / judicial commissioners' level, several initiatives were undertaken as follows:

(a) Strict adherence to the timetable for the conduct of hearing. Postponements were judiciously granted. Parties attending court have a legitimate expectation for a speedy, fair and just hearing and should not be disappointed.

(b) Working at full capacity both physically and virtually to increase sitting days.

(c) Increasing the number of cases fixed per day as a form of staggered hearing.

(d) Active involvement of judges in case management. Good and strong case management contributed to more efficient running and conduct of hearings to meet the stipulated time-frame.

The above are some of the measures introduced to address the backlog in general. I hope they will support judges in clearing the backlog that we face. As a matter of certainty, in relation to the disposal of the pre-2020 cases, I will set a specific aim that they have to be disposed of by the end of 2022. It is indeed challenging and daunting, and I understand this is a huge and mammoth task to be discharged. But again, justice to the people should not be compromised due to delay and we must uphold our constitutional obligation to deliver speedy and fair justice.

Nonetheless, I stand true to the fact that in dispensing justice, the backbone of these measures must be the very judges themselves. Judges are the core individuals which run our institution. With their support and commitment, our efforts will not be in vain. On that account, it was last year that we had witnessed the elevation of Justice Ghazali Cha, Justice Ahmad Zaidi Ibrahim, Justice Mariana Yahya, Justice See Mee Chun and Justice Hashim Hamzah to the Court of Appeal. I wish to extend my congratulations to them and I recognise their unwavering efforts and expertise during their tenure in the High Court. Their elevation is a testament of their wisdom and experience as High Court judges.

On a side note, the year 2021 witnessed the retirement of three judges of the High Court in Malaya, namely Justice Zulkifli Bakar, Justice Rosilah Yop and Justice Wong Chee Lin as well as four judicial commissioners, namely Judicial Commissioner Fredrick Indran X.A. Nicholas, Judicial Commissioner Khairil Azmi Mohamad Hasbie, Judicial Commissioner George Varughese and Judicial Commissioner Wong Hok Chong. I take this opportunity to thank them for the services they rendered to the Judiciary and the country, and wish them a happy and healthy retirement.

Further, I am most delighted to welcome to the judicial fraternity the appointment of new judicial commissioners to the High Court in Malaya. These judicial commissioners appointed are those who are equipped with diverse private and public sector experience in multi areas of legal practice. With the valuable expertise under their belt, I believe they will be able to add value to the running of trials and hearings. They are Judicial Commissioner Norliza Othman, Judicial Commissioner Hasbullah Adam, Judicial Commissioner Shamsulbahri Ibrahim, Judicial Commissioner Roslan Mat Noor, Judicial Commissioner Julia Ibrahim, Judicial Commissioner Mohd Arief Emran Arifin, Judicial Commissioner John Lee Kien How @ Mohd Johan Lee, Judicial Commissioner Adlin Abdul Majid and Judicial Commissioner Mohamad Abazafree Mohd Abbas.

Before concluding, I would like to seize this opportunity to convey my sincerest appreciation to all the Managing Judges who have been constantly diligent and cooperative in lending their assistance. Despite the year being particularly challenging, they have

been very reactive to the surrounding changes. Their ideas and leadership in managing the respective courts under their care have facilitated the discharge of my administrative duties as the Chief Judge of Malaya. This appreciation too is extended to all the judges, judicial commissioners, judicial officers and the staff of the High Court of Malaya for their perseverance, patience and continuing commitment in ensuring that we deliver the highest standard of administration of justice. Their collective efforts are the foundation of the good and smooth running of our courts.

I would also wish to express my sincerest gratitude to the Chief Registrar of the Federal Court, the Registrar of the High Court of Malaya and the Registrar of the Subordinate Courts of Malaya for their dedication and hard work throughout the past year. Their swift realisation and recognition of the circumstances we faced had resulted in the issuance of various up-to-date policies, guidelines and SOPs. This synergy is none other than to guarantee the wheels of the administration of justice are kept moving.

Last but not least, I conclude my statement with this. 2022 is yet another year for us to brace through with this pandemic. We may have to accept the harsh reality that COVID-19 will always be around us for several years ahead, as it will now turn endemic. Though 2022 is another window of uncertainties, it promises good things and opportunities. We can face it with full consciousness and courage as we venture forth in the new normal. Accepting this reality faster, eases the process of moving forward in discharging our constitutional obligations. Only by moving forward, can we promise the public continuous and better access to justice. Knowing that time will rapidly pass, the future ahead of us should be welcomed with utmost optimism. I have faith in all the judges, judicial commissioners and judicial officers that they will spare no efforts in discharging their judicial duties and functions professionally.

I wish everyone the very best for 2022.

Justice Azahar Mohamed
Chief Judge of Malaya

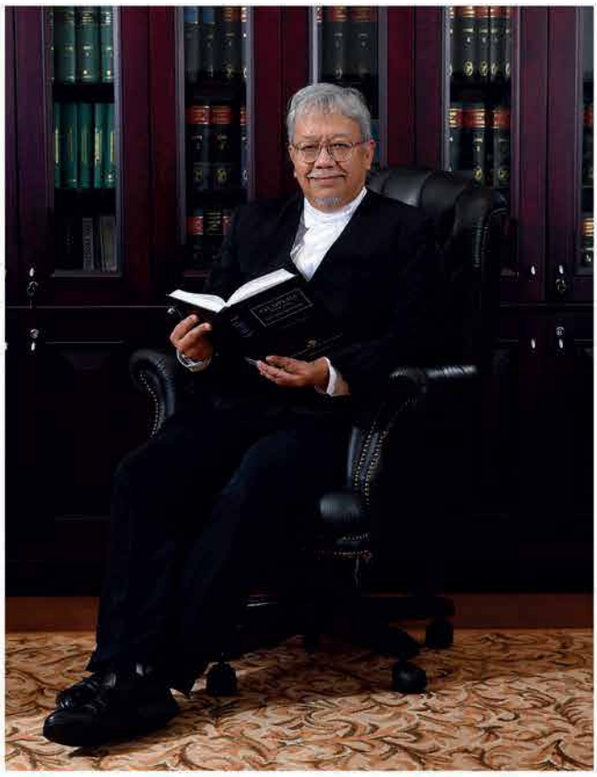
JUDGES OF THE HIGH COURT IN MALAYA 2020

1. Justice Abdul Halim Aman
2. Justice Azman Abdullah
3. Justice Mohd Yazid Mustafa
4. Justice Zainal Azman Ab Aziz
5. Justice Halijah Abbas
6. Justice Akhtar Tahir
7. Justice Nik Hasmat Nik Mohamad
8. Justice Mohd Zaki Abdul Wahab
9. Justice Azimah Omar
10. Justice Lim Chong Fong
11. Justice Azmi Ariffin
12. Justice Noorin Badaruddin
13. Justin Collin Lawrence Sequerah
14. Justice Azizul Azmi Adnan
15. Justice Mohamed Zaini Mazlan
16. Justice Mohd Nazlan Mohd Ghazali
17. Justice S.M. Komathy Suppiah
18. Justice Ab Karim Ab Rahman
19. Justice Wong Kian Kheong
20. Justice Choo Kah Sing
21. Justice Ahmad Bache
22. Justice Mohd Firuz Jaffril
23. Justice Rozana Ali Yusoff
24. Justice Abu Bakar Katar
25. Justice Hayatul Akmal Abdul Aziz
26. Justice Faizah Jamaludin
27. Justice Ahmad Kamal Md Shahid
28. Justice Roslan Abu Bakar
29. Justice Abdul Wahab Mohamed
30. Justice Hassan Abdul Ghani
31. Justice Chan Jit Li
32. Justice Muhammad Jamil Hussin
33. Justice Wan Ahmad Farid Wan Salleh
34. Justice Khadijah Idris
35. Justice Tun Abdul Majid Tun Hamzah
36. Justice Azmi Abdullah
37. Justice Rohani Ismail
38. Justice Anselm Charles Fernandis
39. Justice Ahmad Fairuz Zainol Abidin
40. Justice Mohd Radzi Harun
41. Justice Aliza Sulaiman
42. Justice Meor Hashimi Abdul Hamid
43. 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 Nadzarin Wok Nordin
14. Judicial Commissioner Quay Che Soon
15. Judicial Commissioner Atan Mustaffa Yussof Ahmad
16. Judicial Commissioner Annand Ponnudurai
17. Judicial Commissioner Rohana Abd Malek
18. Judicial Commissioner Tee Geok Hock
19. Judicial Commissioner Azhar Abdul Hamid
20. Judicial Commissioner Arik Sanusi Yeop Johari
21. Judicial Commissioner Amirudin Abd Rahman
22. Judicial Commissioner Mahazan Mat Taib
23. Judicial Commissioner Bhupindar Singh Gurcharan Singh Preet
24. Judicial Commissioner Alice Loke Yee Ching
25. Judicial Commissioner Ahmad Murad Abdul Aziz
26. Judicial Commissioner Liza Chan Sow Keng
27. Judicial Commissioner Wan Muhammad Amin Wan Yahya
28. Judicial Commissioner Nurulhuda Nur'aini Mohamad Nor
29. Judicial Commissioner Su Tiang Joo
30. Judicial Commissioner Norliza Othman
31. Judicial Commissioner Hasbullah Adam
32. Judicial Commissioner Shamsulbahri Ibrahim
33. Judicial Commissioner Roslan Mat Noor
34 Judicial Commissioner Julia Ibrahim
35 Judicial Commissioner Mohd Arief Emran Arifin
36 Judicial Commissioner John Lee Kien How @ Mohd Johan Lee
37 Judicial Commissioner Adlin Abdul Majid
38 Judicial Commissioner Mohamad Abazafree Mohd Abbas

STATEMENT BY THE CHIEF JUDGE OF SABAH AND SARAWAK



The Chief Judge of Sabah and Sarawak Abang Iskandar bin Abang Hashim

Introduction

Praise be to the Almighty for another eventful and momentous year that was 2021. It is now time for us to reflect on the year 2021 – to celebrate our achievements and to improve on any shortcomings for a better future.

To recapitulate, the year 2021 was another challenging and trying year for us and for the world as a whole. We witnessed the continuous evolution of the COVID-19 virus, with the emergence of new variants and sub-variants, highly infectious and fast spreading. Without a doubt, the pandemic has radically changed us and the way we lived our daily lives.

The judicial system was not immune from this pandemic. Fortunately, as we had invested in technology development since 2007, we were able to leverage on the use of digital technology in our court system. It gave us a bit of a head start in the manner we confronted the adverse effects of the pandemic.

Judicial performance of Sabah and Sarawak courts

The pandemic has foisted on the Judiciary the major challenge of ensuring that the administration of justice does not come to a halt as a result of lockdown measures imposed by the authorities. As much as the continued access to justice and efficient service must be given to all members of the public, the safety of the judges, court officers and staff must also be given due consideration.

Despite the challenges posed by the COVID-19 pandemic, the statistics of court performance have been progressing well.

As at end of December 2021, the High Courts in Sabah had disposed of 4,590 out of 6,961 civil cases (66%) and 603 out of 959 criminal cases (65%) whereas the High Courts in Sarawak had disposed of 2,423 out of 3,155 civil cases (77%) and 293 out of 516 criminal cases (57%).

For the Session Courts in Sabah and Sarawak, 1,516 out of 2,283 civil cases (66%) and 2,717 out of 3,651 criminal cases (75%) had been disposed of by the Sabah courts, whilst for the Sarawak courts, 1,635 out of 2,531 civil cases (65%) and 1,684 criminal cases out of 2,395 (70%) had been disposed of.

In the Magistrates' Courts in Sabah and Sarawak, 7,509 out of 10,080 civil cases (75%) and 35,770 out of 46,092 criminal cases (78%) had been disposed of by the Sabah courts and for the Sarawak courts, 4,807 out of 6,252 civil cases (77%) and 23,221 criminal cases out of 27,206 (85%) had been disposed of respectively.

Disposal of cases using online method

The method of disposal of cases at all court levels was substantially by way remote hearing.

Based on the statistic report as at end of December 2021, the disposal rate of cases in the High Courts in Sabah stood at 65%, while the rate in the High Courts in Sarawak was at 64%. For the Sessions Courts in Sabah, the disposal rate stood at 55%, while for the Sarawak courts, the rate was at 46%. The disposal rate for the Magistrates' Courts in Sabah stood at 39%, while in the Sarawak courts, the rate was at 68%.

It is also worthy of mention that the Video Conference System which was introduced in 2007 has been enhanced and now is known as Video Conferencing System for Sabah and Sarawak (V-COSS). The same facilities which are already available in all courts in Sabah and Sarawak have now been also placed at 11 prisons across Sabah and Sarawak. The facilities were mostly used for the applications of extension of remand proceedings under s 259 of the Criminal Procedure Code. Appeals either at the High Court or the appellate courts were also heard through V-COSS, especially during the movement control order ("MCO" enforceable at different periods of time).

Reports of activities of Sabah and Sarawak courts

Judicial capacity building programmes

The judicial capacity building, especially for judicial officers, continued to become our priority and focus in the year 2021. The commitment to strengthen and enhance the capacity building was evidenced by the training programmes organised either by the Chief Registrar's Office, Judicial and Legal Training Institute (ILKAP) or hosted internally by the Office of the Registrar of the High Court of Sabah and Sarawak.

One of the internal programmes hosted since 2021 has been the Judicial Community Forum – an online knowledge sharing platform by the High Court judges and judicial commissioners for the judicial officers. This monthly forum started in June 2021, covering day-to-day legal and judicial topics commonly dealt with by judicial officers, be it substantive law or procedural law.

As of December 2021, six fora had been conducted, namely:

(a) *"Impeachment Proceedings"* by Judicial Commissioner Amelati Parnell;
(b) *"How to conduct a trial using remote/online communications, including referring witnesses to documents"* by Judicial Commissioner Alexander Siew How Hai;
(c) *"Principles of Sentencing"* by Justice Celestina Stuel Galid;
(d) *"Summary Judgment"* by Judicial Commissioner Datuk Hajah Zaleha Rose binti Datuk Haji Pandin;
(e) *"Interlocutory Injunction"* by Judicial Commissioner Leonard David Shim; and
(f) *"Rules on Pleadings"* by Judicial Commissioner Wong Siong Tung.

Two webinars were organised in 2021 on Research Legal Method and Sustainable Forest Management: A Perspective from Timber Certification, a programme jointly organised with the Malaysian Timber Certification Council.

As environmental conservation and protection remains one of the Judiciary's top priorities in Sabah and Sarawak, the Sabah and Sarawak Courts Working Group on Environment (which was established in 2015) continued to organise a series of environmental-related programmes. These programmes were aimed at creating awareness and enriching knowledge amongst judges and judicial officers on the significance of sustainable development in the context of environmental protection.

Tree planting programme

The tree planting programme which was initiated by Tun Richard Malanjum in 2017 continued to be organised in collaboration with other agencies such as the Sabah Forestry Department. The year 2021 saw the Kota Kinabalu court implementing the programme where 100 Tecoma trees were planted at the Kota Kinabalu Courts Complex, followed by the courts at Kudat, Keningau, Labuan, Sandakan, Bintulu, Sibu and Sarikei.

Sentencing guideline for forestry crimes

The year 2021 witnessed the launching of the Sentencing Guideline for Forestry Crimes in Sabah in December 2021, in collaboration with WWF-Malaysia and the Sabah Forestry Department at Sandakan, Sabah. The Guideline is aimed at assisting the court in reducing disparities in sentences in cases related to forest crimes in Sabah while achieving uniformity and consistency. I am also delighted to mention that similar Guideline for Wildlife and Forest Crimes will also be published for Sarawak by 2022.

In addition, strategic collaboration and partnership programmes were initiated by WWF-Malaysia and the Sabah Wildlife Department to plan and organise more mutually beneficial programmes in the future. We are also delighted that both the local Bars, namely Sabah Law Society and Advocates Association of Sarawak also participated in these events.

Mobile court programmes

Despite the pandemic, we managed to deploy our Mobile Court last year, though the number of the Mobile Court Programme had to be reduced due to the MCO. In Sabah, only three (3) programmes were implemented at Beaufort, Tuaran and Kota Marudu. Whilst in Sarawak, two (2) programmes were organised by the National Registration Department in Pekan Beluru and Long Jekitan, Ulu Baram Miri Sarawak. At least, the wheel of justice did not completely stop during those trying times for some of our remotest stakeholders.

Conclusion

In summary, the year 2021 was a tough and challenging time, but through the period, we had all fought hard and fought well. It is a fact that the pandemic opened our eyes to the benefits of technology. It forced us to accelerate our technological enhancement so that we will be in a better position to confront future challenges with minimum adverse impact on our core business of dispensing justice.

I take this opportunity to urge all judges and judicial officers to equip themselves with relevant knowledge and skills needed to cope with the technological enhancement that is being implemented.

Lastly, I would like to express my thanks to all judges, officers and staff in the Sabah and Sarawak courts for their continuous selfless sacrifices and dedication in ensuring the fair and effective administration of justice during the COVID-19 pandemic. Indeed, no word can sufficiently express my heartfelt gratitude to all of them for their unique contributions. Let us strive to make next year a better year for all of us.

Justice Abang Iskandar bin Abang Hashim
Chief Judge of Sabah and Sarawak

JUDGES OF THE HIGH COURT IN SABAH AND SARAWAK

1. Justice Nurchaya Arshad
2. Justice Azhahari Kamal Ramli
3. Justice Dr. Alwi Abdul Wahab
4. Justice Ismail Brahim
5. Justice Dean Wayne Daly
6. Justice Celestina Stuel Galid
7. Justice Dr. 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
7. Judicial Commissioner Amelati Parnell

THE OFFICE OF THE CHIEF REGISTRAR, FEDERAL COURT OF MALAYSIA

The Chief Registrar of the Federal Court Datuk Ahmad Terrirudin bin Mohd Salleh

The year 2021 was indeed a turbulent year for the Judiciary as the spread of COVID-19 in 2020 led to the continued closure of courts throughout Malaysia as courts were categorised as non-essential services. Although it posed much adversity, the COVID-19 pandemic presented an opportunity to the Office of the Chief Registrar of the Federal Court of Malaysia to ensure access to justice was not hampered which led to several key reforms being introduced to further improve the courts' administration of justice.

Administration of justice amidst the COVID-19 outbreak

Following the COVID-19 outbreak and in striving to ensure that the administration of justice was continuously upheld, the Office of the Chief Registrar issued and circulated several Practice Directions aimed at guaranteeing the smooth, fair, timely, effective and continuous functioning of the justice system. The Practice Directions circulated in 2021 are as follows:

NO.	PRACTICE DIRECTION	TITLE
1.	Direction of the Chief Justice Number 1 of Year 2021	*Pengendalian Prosiding Kes Jenayah Di Mahkamah Semasa Tempoh Perintah Kawalan Pergerakan (PKP)* Conduct of Criminal Case Proceedings in Court During the Movement Control Order (MCO) Period

2.	Practice Direction of the Chief Justice Number 1 of Year 2021	*Pengendalian Prosiding Kes Sivil Melalui Teknologi Komunikasi Jarak Jauh Bagi Mahkamah di Seluruh Malaysia* Conduct of Civil Case Proceedings via Remote Communication Technology for Courts Throughout Malaysia
3.	Practice Direction of the Chief Justice Number 2 of Year 2021	*Penetapan Had Masa Berhujah 20 Minit Bagi Permohonan Kebenaran Merayu di Bawah Seksyen 96(a) Akta Mahkamah Kehakiman 1964 [Akta 91]* Setting of 20-Minute Time Limit for Arguments relating to Applications for Leave to Appeal under Section 96(a) of the Courts of Judicature Act 1964 [Act 91]
4.	Direction of the Chief Justice Number 3 of Year 2021	*Penyelesaian Kes Saman Trafik Melalui Teknologi Komunikasi Jarak Jauh* Settlement of Traffic Summons Cases via Remote Communication Technology
5.	Direction of the Chief Justice Number 4 of Year 2021	*Penerimaan Dokumen Pembuktian Bahawa Pempetisyen Adalah Orang Yang Berkelayakan Untuk Diterima Masuk Sebagai Peguam Bela Dan Peguam Cara* Acceptance of Documents Proving the Petitioner is a Qualified Person to be Admitted as an Advocate and Solicitor
6.	Direction of the Chief Justice Number 5 of Year 2021	*Pengendalian Prosiding Kes Sivil di Mahkamah Semasa Tempoh Perintah Kawalan Pergerakan (PKP)* Conduct of Civil Case Proceedings in Court During the Movement Control Order (MCO) Period
7.	Direction of the Chief Justice Number 6 of Year 2021	*Pengendalian Prosiding Pendengaran Rayuan Jenayah Melalui Teknologi Komunikasi Jarak Jauh Semasa Tempoh Pandemik* Conduct of Criminal Appeal Hearings Through Remote Communication Technology During the Pandemic Period
8.	Direction of the Chief Justice Number 7 of Year 2021	*Penyempurnaan Proses Jamin Melalui Teknologi Komunikasi Jarak Jauh* Completion of the Bail Process Through Remote Communication Technology
9.	Direction of the Chief Justice Number 8 of Year 2021	*Pengecualian Terhadap Pemakaian Peruntukan Undang-Undang Berhubung Dengan Urusan Mahkamah di Seluruh Malaysia* Waiver of the Application of Legal Provisions Relating to Court Matters Throughout Malaysia
10.	Direction of the Chief Justice Number 9 of Year 2021	*Urusan Dan Pengendalian Prosiding Kes Jenayah Di Mahkamah Semasa Tempoh Pelan Pemulihan Negara Fasa I Dan II* Management and Conduct of Criminal Case Proceedings in Court During the Period of the National Rehabilitation Plan Phases I and II
11.	Direction of the Chief Justice Number 10 of Year 2021	*Urusan Dan Pengendalian Prosiding Kes Sivil Dan Jenayah Di Mahkamah Semasa Tempoh Pelan Pemulihan Negara Fasa III* Management and Conduct of Civil and Criminal Case Proceedings in Court During the Period of the National Recovery Plan Phase III
12.	Practice Direction of the Chief Justice Number 11 of Year 2021	*Pengendalian Prosiding Permohonan Reman Di Bawah Seksyen 117 Kanun Tatacara Jenayah* Conduct of Remand Application Proceedings under Section 117 of the Criminal Procedure Code

Access to justice through information technology

e-Bicara proceedings for civil and criminal cases in the High Court of Malaya

The e-Bicara system is a paperless system used to hear civil and criminal appeals at the High Courts of Malaya. With the e-Bicara system, documents referred to by the parties during court proceedings are displayed on an LED television screen using a wireless presenter. The is being implemented in stages in the High Courts and the subordinate 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).

Live-streaming of elevation of judges and appointment of judicial commissioners

The swearing in and oath taking ceremony for five newly-appointed Court of Appeal judges and nine newly-appointed judicial commissioners was held on April 1, 2021 at the Palace of Justice, Putrajaya. The ceremony was live-streamed for public viewing via the Malaysian Judiciary's official YouTube channel.

Admission of advocates and solicitors to the High Court of Malaya via video conferencing

In 2021, the admission of advocates and solicitors to the High Court of Malaya continued to be carried out via video conferencing. Each ceremony was streamed live and was also broadcasted to the public via the Malaysian Judiciary's official portal and the Malaysian Judiciary's official YouTube page.

Continuous digitalisation initiatives

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 an exchange of written messages without having to attend court. From its implementation in 2020 until the end of December 2021, the e-review system has been expanded to 99% out of the 100 civil court locations in Peninsular Malaysia. The system aims to reduce in-person court appearances in case management matters before the registrars at the Court of Appeal and the Federal Court as well as save time and costs which will be incurred to attend court in person to deal with preliminary matters.

e-Lelong system

The e-Lelong system is an online public auction system that conducts public auctions of immoveable property relating to foreclosure proceedings in the High Court of Malaya. The descriptions of the properties to be auctioned off by the High Court of Malaya will be shown in the system. The e-Lelong system facilitates public auction activities, improves the quality of services provided by the court and replaces the manual public auction process. The e-Lelong system enables bidders to bid online without the need to go to court.

e-Jamin system

e-Jamin is a digital system that assists the bail payment process in courts throughout Malaysia. This system is an efficient mode of payment to facilitate guarantors as they no longer need to deposit the bail payments as such payments can be made online through the e-Jamin portal. The e-Jamin system is currently operating in 138 courts throughout Malaysia.

e-Plead Guilty system ("e-PG system")

The e-PG system was launched on February 2, 2021 at the Magistrate's Court of Shah Alam. The e-PG system provides for the person summoned or fined for certain traffic offences to plead guilty online. If a person being summoned for a traffic offence opts to plead guilty through the e-PG system, he or she is not required to be physically present in court unless the court orders otherwise.

To date, a total of four courts across Malaysia have implemented the e-PG system, namely the Shah Alam Magistrate's Court (Traffic), the Kuala Lumpur Magistrate's Court (Traffic), the Seremban Magistrate's Court and and the Putrajaya Magistrate's Court.

E-Pesuruhjaya Sumpah system ("e-PJS system")

The e-PJS system was first launched on January 25, 2021. The e-PJS system is an online platform for matters pertaining to commissioners for oaths such as new applications, exam taking requirements, records and information as well as new appointments of commissioners for oaths.

On February 23, 2021 the e-PJS system conducted its first commissioners for oaths' qualification examination which involved a total of 898 candidates comprising legal practitioners, civil servants, members of statutory bodies and civilians.

International conferences and meetings via Teleconferencing

Despite the travel ban and restrictions imposed due to the COVID-19 pandemic, the Malaysian Judiciary continued to participate in numerous international meetings and events which were conducted virtually via teleconferencing.

The 6th Joint Judicial Conference, July 22, 2021

The 6th Joint Judicial Conference hosted by the Judiciary of Brunei Darussalam was held on July 22, 2021. With the theme, "Protection of persons: The Court's role and duties in protecting economic, social and cultural rights", the biennial conference which includes the judicial institutions of Malaysia, Singapore and Brunei convened online for the first time since its inception and was attended by the Chief Justices of the three countries with a total of 70 judges and judicial officers from the respective judiciaries.

The Malaysian delegation was led by The Right Honourable Tun Tengku Maimun binti Tuan Mat (Chief Justice of Malaysia), accompanied by The Right Honourable Tan Sri Rohana binti Yusuf (President of the Court of Appeal), The Right Honourable Tan Sri Dato' Sri Azahar bin Mohamed (Chief Judge of Malaya) and The Right Honourable Tan Sri Dato' Abang Iskandar bin Abang Hashim (Chief Judge of Sabah and Sarawak). Others who were also in attendance were Justice Datuk Nallini Pathmanathan, Justice Dato' Sri Hasnah binti Dato' Mohammed Hashim, Justice Dato' Vazeer Alam bin Mydin Meera, Justice Datuk Hajah Azizah binti Haji Nawawi, Justice Dato' Lim Chong Fong, Justice Dato' Collin Lawrence Sequerah, Justice Tuan Mohamed Zaini bin Mazlan, Justice Tuan Azhahari Kamal bin Ramli, Justice Datuk Wong Kian Kheong, Justice Puan Hayatul Akmal binti Abdul Aziz, Justice Dato' Faizah binti Jamaludin, Justice Dato' Mohd Radzi bin Harun, YBhg. Datuk Ahmad Terrirudin bin Mohd Salleh (Chief Registrar of the Federal Court of Malaysia) and nine judicial officers.

HCCH-CACJ 2021 Masterclass, August 19, 2021

The Malaysian Judiciary and the Secretariat of The Council of ASEAN Chief Justices (CACJ) in collaboration with the The Permanent Bureau of the Hague Conference on Private International Law ("PB-HCCH") organised the PB_HCCH Masterclass Programe ("HCCH masterclass") which was held virtually via video conferencing on August 19, 2021.

The HCCH masterclass was attended by approximately 350 representatives from the ASEAN judiciaries, among whom were superior court judges and judicial officers. It was a half-day programme that encapsulated information on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The sessions were conducted by Mr Brody Warren, an Attaché to the Secretary-General / Senior Legal Officer to the HCCH and the Honourable Justice David Goddard, Judge of the Court of Appeal of New Zealand.

The 9th Council of ASEAN Chief Justices Meeting, October 7, 2021

The 9th Council of ASEAN Chief Justices Meeting ("9th CACJ") was held on October 7, 2021 via teleconferencing with the Supreme Court of the Republic Indonesia being the host. The 9th CACJ was attended by the Chief Justices from ASEAN countries. The Honourable Muhammad Syarifuddin, the Chief Justice of the Supreme Court of the Republic of Indonesia was elected as the Chair for the 9th CACJ.

The delegation from the Malaysian Judiciary, led by the Right Honourable Tun Tengku Maimun binti Tuan Mat, the Chief Justice of Malaysia, included The Right Honourable Tan Sri Rohana binti Yusuf, President of the Court of Appeal, The Right Honourable Tan Sri Dato' Sri Azahar bin Mohamed, Chief Judge of Malaya and The Right Honourable Tan Sri Dato' Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak. Others who were also present were Justice Dato' Sri Hasnah binti Dato' Mohammed Hashim, Judge of the Federal Court, Justice Datuk Seri Kamaludin bin Md. Said, Judge of the Court of Appeal, Justice Dato' Faizah binti Jamaludin, Judge of the High Court, Shah Alam, and Justice Puan Celestina Stuel Galid, Judge of the High Court, Sandakan.

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, the Right Honourable Tan Sri Rohana binti Yusuf, President of the Court of Appeal, the Right Honourable Tan Sri Dato' Sri Azahar bin Mohamed, Chief Judge of Malaya, the Right Honourable Tan Sri Dato' Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak and the Honourable Judges for their support and trust. I also would like to thank and congratulate the judicial officers and staff for their hard work and tremendous dedication in assisting the Judiciary.

The years 2020-2021 have shown immense digital transformation of the Judiciary with the introduction of numerous online systems that improved the delivery of justice to the public at large. It is evident that technology has long played a part in the digitalisation of the Judiciary's delivery of justice system.

The reforms undertaken by the Judiciary during the pandemic, coupled with the support from the relevant stakeholders, has ensured that access to justice did not come to a complete standstill.

Thank you.

Datuk Ahmad Terrirudin bin Mohd Salleh
Chief Registrar, Federal Court of Malaysia

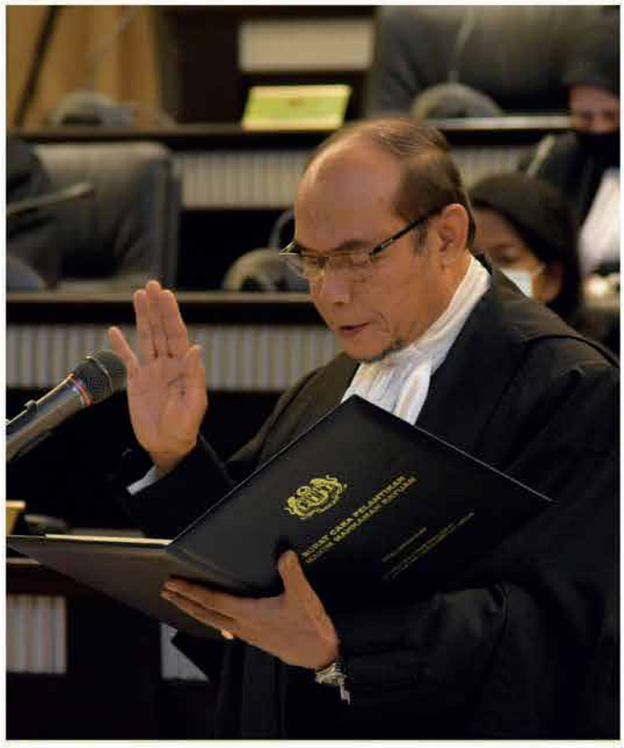
CHAPTER 04

JUDGES

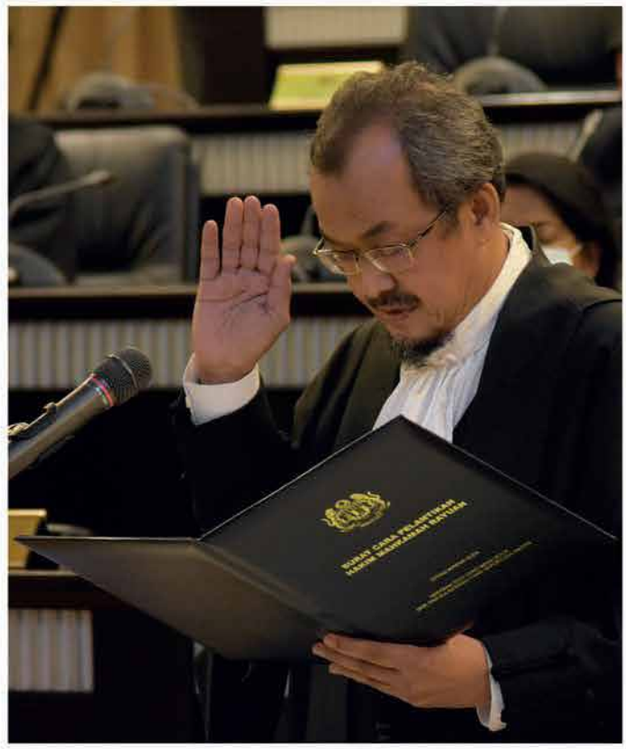
JUDGES' APPOINTMENTS AND ELEVATIONS

In 2021, five judges were elevated to the Court of Appeal and 10 judicial commissioners were appointed. The full list of appointments and elevations in 2021 is presented below:

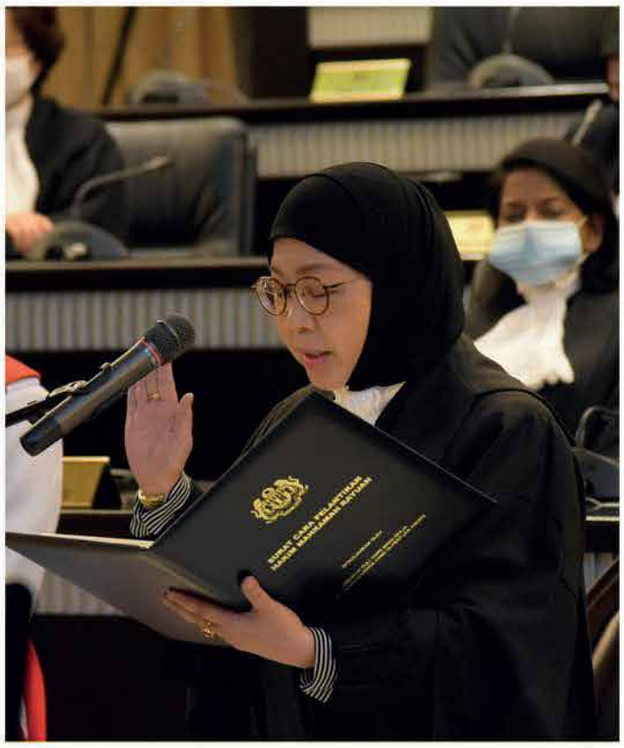
Position	Date of Appointment	Name
Judge of the Court of Appeal	March 19, 2021	Justice Haji Ghazali bin Haji Cha
		Justice Ahmad Zaidi bin Ibrahim
		Justice Dato' Sri Mariana binti Haji Yahya
		Justice Datuk See Mee Chun
		Justice Dato' Hashim bin Hamzah
Judicial Commissioner	April 1, 2021	Judicial Commissioner Amelati Anak Parnell
		Judicial Commissioner Norliza binti Othman
		Judicial Commissioner Hasbullah bin Adam
		Judicial Commissioner Dato' Sri Shamsulbahri bin Haji Ibrahim
		Judicial Commissioner Roslan bin Mat Nor
		Judicial Commissioner Julia binti Ibrahim
		Judicial Commissioner Dato' Indera Mohd Arief Emran bin Arifin
		Judicial Commissioner Dr. John Lee Kien How @ Mohd Johan Lee
		Judicial Commissioner Adlin binti Abdul Majid
	May 21, 2021	Judicial Commissioner Datuk Mohamad Abazafree bin Mohd Abbas



Justice Haji Ghazali bin Haji Cha taking the oath of office as a Court of Appeal Judge

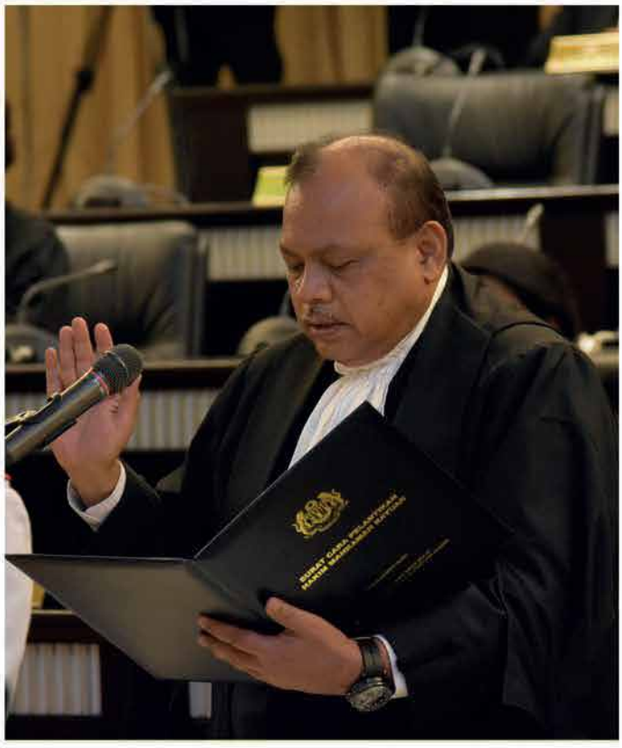


Justice Ahmad Zaidi bin Ibrahim taking the oath of office as a Court of Appeal Judge



Justice Dato' Sri Mariana binti Haji Yahya taking the oath of office as a Court of Appeal Judge

Justice Datuk See Mee Chun taking the oath of office as a Court of Appeal Judge



Justice Dato' Hashim bin Hamzah taking the oath of office as a Court of Appeal Judge

Group photo of the Judges of the Court of Appeal elevated on 19 March 2021
(Seated, L – R): Justice Azahar Mohamed, Chief Judge of Malaya; the Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat; Justice Rohana binti Yusuf, President of the Court of Appeal and Justice Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak
(Standing, L – R): Justice Datuk See Mee Chun, Justice Ahmad Zaidi bin Ibrahim, Justice Haji Ghazali bin Haji Cha, Justice Dato' Sri Mariana binti Haji Yahya and Justice Dato' Hashim bin Hamzah

Mdm. Amelati Anak Parnell taking the oath of office as a Judicial Commissioner

Mdm. Norliza binti Othman taking the oath of office as a Judicial Commissioner

Mr. Hasbullah bin Adam taking the oath of office as a Judicial Commissioner

Dato' Sri Shamsulbahri bin Haji Ibrahim taking the oath of office as a Judicial Commissioner

Mr. Roslan bin Mat Nor taking the oath of office as a Judicial Commissioner

Mdm. Julia binti Ibrahim taking the oath of office as a Judicial Commissioner

Dato' Mohd Arief Emran bin Arifin taking the oath of office as a Judicial Commissioner

Dr. John Lee Kien How @ Mohd Johan Lee taking the oath of office as a Judicial Commissioner

Mdm. Adlin binti Abdul Majid taking the oath of office as a Judicial Commissioner

Datuk Mohamad Abazafree bin Mohd Abbas taking the oath of office as a Judicial Commissioner

Photo taken on 21 May 2021 after the appointment ceremony of Datuk Mohamad Abazafree bin Mohd Abbas (far right) (L – R): Justice Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak; Justice Rohana binti Yusuf, President of the Court of Appeal; the Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat; and Justice Azahar Mohamed, Chief Judge of Malaya

Group photo of the Judicial Commissioners appointed on 1 April 2021
(L – R): Judicial Commissioner Norliza binti Othman, Judicial Commissioner Amelati Anak Parnell, Judicial Commissioner Dr. John Lee Kien How @ Mohd Johan Lee, Judicial Commissioner Roslan bin Mat Nor, Judicial Commissioner Dato' Mohd Arief Emran bin Arifin, Judicial Commissioner Julia binti Ibrahim, Judicial Commissioner Adlin binti Abdul Majid, Judicial Commissioner Hasbullah bin Adam and Judicial Commissioner Dato' Sri Shamsulbahri bin Haji Ibrahim

Group photo of the Judicial Commissioners appointed on 1 April 2021 with the top four judges.
(Seated, L – R): Justice Azahar Mohamed, Chief Judge of Malaya; the Rt. Hon. the Chief Justice Tengku Maimun Tuan Mat; Justice Rohana binti Yusuf, President of the Court of Appeal and Justice Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak
(Standing, first row, L – R): Judicial Commissioner Hasbullah bin Adam, Judicial Commissioner Amelati Anak Parnell, Judicial Commissioner Norliza binti Othman and Judicial Commissioner Dato' Sri Shamsulbahri bin Haji Ibrahim
(Standing, second row, L – R): Judicial Commissioner Dr. John Lee Kien How @ Mohd Johan Lee, Judicial Commissioner Julia binti Ibrahim, Judicial Commissioner Roslan bin Mat Nor, Judicial Commissioner Dato' Mohd Arief Emran bin Arifin, Judicial Commissioner Adlin binti Abdul Majid

RETIRED JUDGES

Datuk Dr Hamid Sultan

Datuk Dr Haji Hamid Sultan bin Abu Backer was born on August 28, 1955. In 2007 he obtained his PhD from the International Islamic University of Malaysia ("IIUM"). His doctoral thesis was on Civil Procedure and Justice. His Lordship graduated in Economics in 1983 and holds an LLB (Hons) as well as a Master's degree (LLM) in Insurance, Shipping and Syariah Law from the University of London which he completed in 1986 and in 1990 respectively. He became a Barrister-at-Law at Lincoln's Inn in 1987. His Lordship holds Postgraduate Diplomas in Islamic Banking and Finance and also in Syariah Law and Practice from IIUM. Between 1989 and 2007, he practised in Messrs Hamid Sultan Loga Chitra & Associates before joining the Judiciary.

He was appointed a Judicial Commissioner on March 1, 2007 and confirmed as a High Court judge on October 14, 2009. He was elevated to the Court of Appeal on January 8, 2013 and retired on August 28, 2021.

Datuk Dr Haji Hamid Sultan was an Honorary Fellow, Middle East Institute (MEI), National University of Singapore; an Honorary Visiting Professor at Damodaran Sanjivayya National Law University (DSNLU), Visakhapatnam, India; an Adjunct Professor at IIUM and Multimedia University (MMU); a Panel Advisor at Islamic Science University of Malaysia (USIM); and a fellow of the Chartered Institute of Arbitrators (London).

Datuk Dr Haji Hamid Sultan has spoken at various conferences worldwide including on Enforcement of Foreign Arbitral Awards in England at institutions such as the Chartered Institute of Arbitrators, London; City University of London; Attorney General Chambers, Sri Lanka; Ambedkar Law University; DSNLU Visakhapatnam; Leeds University, England; 'Maison du Barreau de Paris, Paris; EBS University Wiesbaden, Germany and Hong Kong University; and on Arbitration Clauses in Islamic Finance Facilities at Hamad Bin Khalifa University, Doha, Qatar.

Datuk Dr Haji Hamid Sultan has written approximately 1,000 judgments which cover most areas of the law. His Lordship has authored books on various subjects including Civil Procedure, Criminal Procedure, Evidence, Conveyancing, Islamic Banking, International and Domestic Arbitration and on other areas of commercial law. His books are widely used as textbooks in institutions of higher learning and by those involved in the practice and administration of law in Malaysia.

Datuk Dr Haji Hamid Sultan is a lawyer, author and judge well known to Malaysian jurists and the public. A selection of his well-known judgments includes his dissenting judgment in *Mohd Azran Rahmat v Mazlan Aliman* [2016] 7 CLJ 163. In this case, the respondent was alleged to have committed criminal trespass under s 447 of the Penal Code when he was in dialogue with the settlers of a Felda scheme. The respondent was on the alleged premises with the consent of one of the occupants of the premises, though the whole area belongs to Felda. His Lordship took judicial notice of the fact that the Felda area is wide and public access is generally not restricted. He held that:

"[28] … Essentially, … sensible judgment on the part of the police … was lacking in this case. The fact that the Felda manager lodged a report cannot give rise to reasonable suspicion that an offence has been committed without the police doing further investigation; more so when at the time of the arrest, the occupant of the premises on the Felda land said that the respondent had permission to be on the premises. *The absence of permission is the essence for trespass and consent will vitiate any investigation for criminal trespass*."

(emphasis added)

In the case of *Mohd Rafizi Ramli v Dato' Sri Dr Mohd Salleh Ismail* [2020] 1 CLJ 498, his Lordship decided that a statement of fact being made bona fide and on a matter of public interest would be a complete defence in a defamation action and such fact would so remain notwithstanding a subsequent event nullifying it. In brief, his Lordship held:

"(1) A fact which has happened will remain a fact, notwithstanding subsequent events may nullify the fact and make the fact a non-issue. Fair comment is one of the pillar defences to an action in defamation and this pillar must not be read only with the common law cases but also art. 10 of the Federal Constitution. In a defence of fair comment, if the primary facts are true, in the absence of malice and/or falsehood, the defence of fair comment should ordinarily succeed. Hence, the true test of fair comment essentially is 'whether the comment is an honest expression of a genuine opinion'. The phrases 'honest expression' and 'genuine opinion' do not relate to 'physical facts' but 'psychological facts'. Psychological facts related to the state of mind of the defendant to find liability or otherwise needs the court to take a holistic view of the case, the law and the Federal Constitution.

(2) Fair and bona fide comments or criticism upon matters of public interest cannot be scandalous or libellous or even warrant criminal defamation. The plaintiffs, who initiated an action for defamation without complying with the spirit and intent of s. 10 of the Defamation Act 1957 ('Defamation Act'), had abused the judicial process and may also have committed other torts inclusive of malicious prosecution."

In the case of *Ismail Ghulam Hussain & Ors v Nurul Shuhada Yaakub & Anor* [2020] 1 CLJ 249, in deliberating the jurisprudence regarding alteration made in a statutory form, his Lordship held that:

"The trial judge had not dealt with the alteration and/or deletion in a statutory form under s. 8(1) of the Small Estates (Distribution) Act 1955. If such alteration and/or deletion in law is not validly done, the instrument for registration will be void. The alteration, deletion or modification, if any, has to be signed or initialled by all relevant parties, or else, it will not subscribe to the jurisprudence related to *consensus ad idem*."

His Lordship also decided on the importance of the last wishes of a testator as regards a beneficiary who is potentially oppressed by declaratory reliefs sought in the case of *Lai Siew Kien v Solid Invention Sdn Bhd & Ors* [2020] 1 LNS 1092. He stated:

"[23] It must be noted that the plaintiffs' prayers are all declaratory in nature and extremely oppressive against the 6th defendant as beneficiary of the estate. In addition, declaratory prayers being discretionary in nature, the court will be slow in granting them if proper steps are not taken to seek the direction of the court based on the facts of the case. A declaratory order is not available to an individual who has committed a wrong and thereafter seeks to regularise such wrong, or one who has taken a step to assert his rights. Thus, where the cause of action is clearly related to a breach of contract, an application for a declaration is inappropriate. … It is trite that declaratory relief is a discretionary relief. If the court finds it will be unjust on the facts and circumstances to grant the declaration, it may refuse the declaration. …

[24] We find merit in the appellant's submission. In essence, the last wishes of the testator must be honoured unless it is not possible at all. This is a proper case for us to exercise appellate intervention. …"

Datuk Kamardin Hashim

Datuk Kamardin Hashim served as a Court of Appeal Judge and retired on February 11, 2021. He was born in Manong, Perak on February 11, 1955. He received his early education at Sekolah Rendah Kebangsaan Jeliang. He then continued his secondary education at Sekolah Menengah Sultan Tajul Ariffin. He completed his Sixth Form at Sekolah Menengah Alam Shah, Cheras, Kuala Lumpur. Datuk Kamardin graduated with a LLB (Hons) from University of Malaya in 1979.

Before joining the Malaysian Judiciary, Datuk Kamardin Hashim had a long and illustrious legal career, spanning almost 30 years in the Judicial and Legal Service. During his tenure in service, he held the posts of Magistrate at Penang and Kuala Lumpur, Federal Counsel at Anti Narcotic Task Force, and Senior Federal Counsel at the Pension Division, Public Services Department. He was also appointed as Sessions Court Judge of Butterworth. In 1991, he was appointed as Head of the Prosecution Unit (now Director of Public Prosecution) in Penang. In 1993, he returned to the bench as a Sessions Court Judge serving at Georgetown, Kuala Lumpur and Klang. He later became Senior Sessions Court Judge at Shah Alam (now Selangor State Court Director). He received an Excellence Service Award from the Chief Justice of Malaysia in 1998. In 2002, Datuk Kamardin was appointed as the first Chairman of the Tribunal for Home Buyers Claims under the Ministry of Housing and Local Government and later as a Chairman of the Advisory Board, Prime Minister's Department of Malaysia.

Datuk Kamardin Hashim was appointed a judicial commissioner of the High Court of Malaya on January 5, 2009 and was stationed at the Johor Bahru High Court. He was elevated as a Judge of the High Court on August 9, 2010. In 2012, he was transferred to the Criminal Division of the Kuala Lumpur High Court. He was the first High Court judge who was dedicated to the hearing of terrorism and security offences cases. To carry out his role, he attended training courses in the United States of America; the Hague, Netherlands; Manila, Republic of the Philippines; and Kuala Lumpur. On March 21, 2016, he was elevated to the Court of Appeal. He was also appointed as managing judge for the Johor (North and South) courts.

Datuk Lau Bee Lan

Datuk Lau Bee Lan was born on August 25, 1955 in Malacca. She graduated with an LLB (Hons) from University of Malaya in 1979.

Datuk Lau joined the Judicial and Legal Service in 1979 and was posted as magistrate at the Kuala Lumpur and Kuantan Magistrates' Courts until 1982. She continued to serve at the Kuantan Magistrate's Court as senior magistrate until 1987 when she was promoted to Sessions Court judge at the Muar Sessions Court.

In 1989, Datuk Lau was transferred to the Attorney General's Chambers and was posted to the Ministry of Housing and Local Government as Legal Advisor. In 1992, she was transferred to the Research Unit of the Attorney General's Chambers as a Senior Federal Counsel and in 1994 served as the Head of the Research Unit. Subsequently in 1998, she was appointed the Deputy Head (II) of the Advisory Division of the Attorney General's Chambers. Between 2002 to 2003, Datuk Lau Bee Lan served as a Chairman of the Kuala Lumpur Industrial Court before joining the Judiciary.

Datuk Lau was appointed as a judicial commissioner on May 1, 2003 and was posted to Kuching High Court. She was elevated as a High Court judge on December 21, 2004 in Kuching, Sarawak. She served from February 2007 to 2018 as a High Court judge in Muar and later in Kuala Lumpur, in the Appellate and Special Powers Division, Civil and Commercial Divisions. She was elevated to the Court of Appeal on November 26, 2018 and retired on August 25, 2021.

Datuk Lau was well regarded by the officers and staff as exemplary in her service: a kind and approachable person who fostered a pleasant working relationship, encouraging them to be productive and have a positive attitude. To fellow judges, Datuk Lau was known to show utmost respect, understanding and kindness. Her dedication to work and judicial duties set an excellent example for them to emulate values that are to be cherished for life, that in discharging their cardinal role to dispense justice, the task must be performed conscientiously, with commitment and courage.

An excerpt on his reflections of Datuk Lau as a judge, from a former member of the Bar, whose sentiments were shared by others in the Bar is as follows:

> *When one thinks of Justice Lau Bee Lan on the bench, it is exceedingly difficult to fight back a flood of sentiments of all things that are decent, good and proper. A pinnacle of rectitude, there is never a whiff of impropriety about her. It could be said, and I quote, "she has the milk of human kindness in her veins by the quart"!*
>
> *Many at the Bar would remember Justice Lau as being good natured, someone who manifests genuine care and concern in everything she does. Justice Lau was also patient to a fault. She does not allow false pride to get in her way of seeking truth. She is meticulous and exhibits an anxious desire to be completely satisfied that her decision is one arrived at after being sufficiently certain that all that is necessary has been considered, weighed, and justice served. And when she decides, one can be certain that it would be entirely upon the demands of justice according to the law and a basic sense of fairness. This, Justice Lau would do without vanity and ignoring whatever pressures to the contrary that may exist and even, if necessary, against her personal interest. No litigant can ask for more. Indeed, no independent judiciary can ask for more.*

Datuk Lau is known for her detailed and meticulous commercial and civil judgments. She was the High Court Judge in the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 CLJ 208. The Titular Roman Catholic Archbishop of Kuala Lumpur filed a judicial review application to challenge the decision of the Ketua Setiausaha Kementerian Dalam Negeri approving the publication permit for "Herald – the Catholic Weekly" subject to conditions including the prohibition of the use of the word "ALLAH". She found that the Minister of Home Affairs, in the exercise of his discretion to impose further conditions in the publication permit, had not taken into account relevant matters, hence committing an error of law warranting the court's interference. She held that when viewed on its merits, the reasons given by the Home Ministry in the various directives defy all logic and is so unreasonable by reference to the principles in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (Wednesbury unreasonableness). She therefore quashed the decision of the respondents.

Datuk Lau Bee Lan held as follows:

> [15] ... I have shown unchallenged evidence that there is a well-established practice for the use of the *"Allah"* amongst the Malay speaking community of the Catholic faith in Peninsular Malaysia, Sabah and Sarawak and the origin of the word and its translation. ...
> Considering all the factors, in my judgment, the imposition of the condition in the publication permit prohibiting the use of the word *"Allah"* in the said publication, "Herald – the Catholic Weekly" pursuant to the 1st respondent's exercise of powers under the Act contravenes the provision of arts. 3(1), 11(1) and 11(3) of the Federal Constitution and therefore is unconstitutional.

On the issue of whether the matter was justiciable, she found that it was. She held:

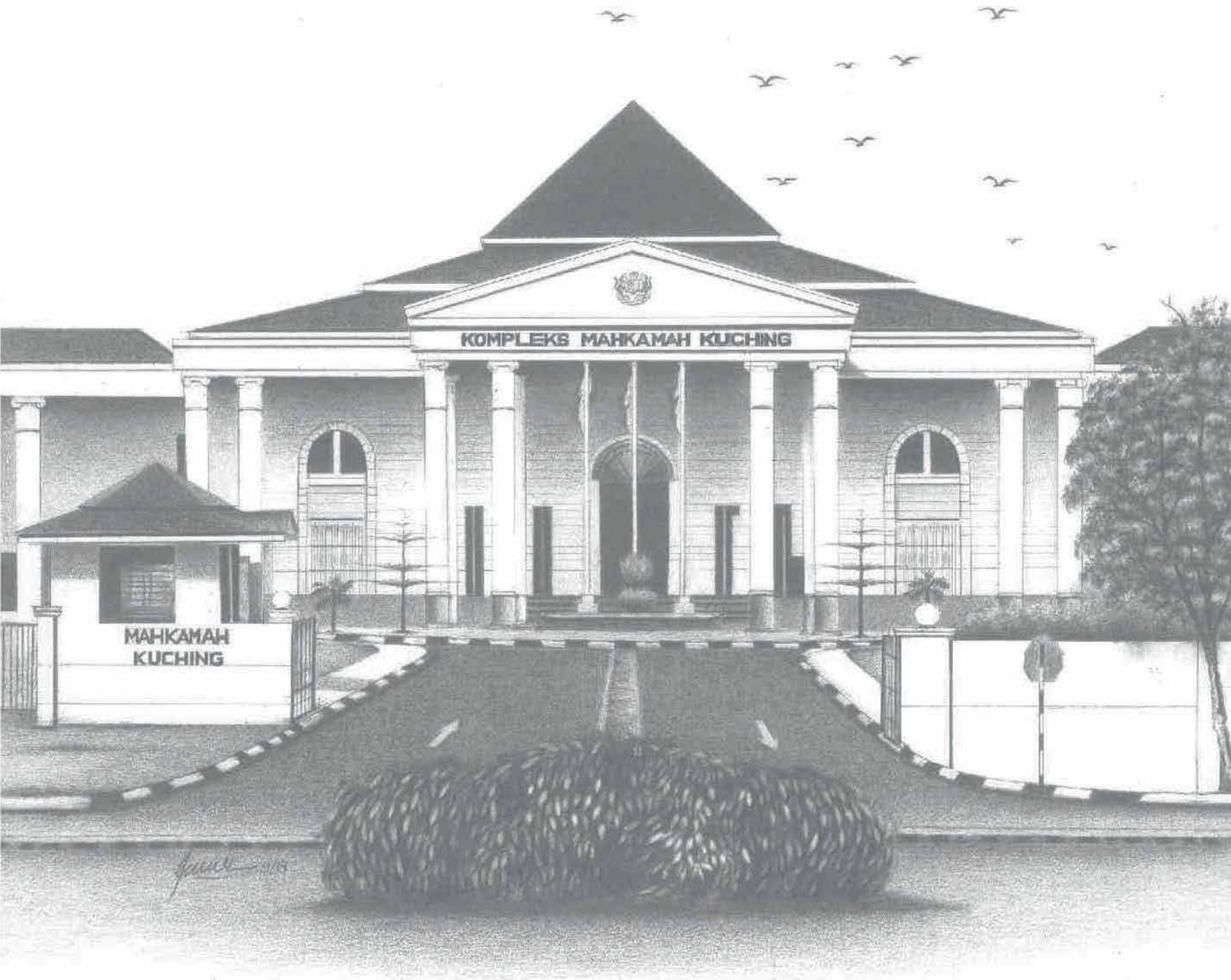
> [30] ... The court can review the constitutionality of Federal and State legislation relied on by the decision maker following the test in Nordin bin Salleh (supra).
> Issues on what is the *"polisi kerajaan"* and *"arahan kerajaan"* referred to in the affidavit of the 1st respondent and whether the word *"Allah"* is a proper name exclusive to Muslims in the context of the Malaysian society and whether there is an alternative word for "God" other than *"Allah"* for the non-Muslims are questions for determination at the merits stage of these proceedings and are clearly justiciable.

This decision was overruled by the Court of Appeal but upon the application by the Titular Roman Catholic Archbishop of Kuala Lumpur for leave to appeal to the Federal Court, the decision to refuse leave was by a 4:3 majority.

Another case of note is *Mohamad Ezam Mohd Nor & Ors v Tan Sri Norian Mai & Ors* [2013] 3 CLJ 81. The plaintiffs sued the defendants for damages for false imprisonment and defamation as their reputation was injured by the announcement of their detention under the Internal Security Act 1960 ("the ISA") to the media. Datuk Lau Bee Lan in the High Court disagreed with the plaintiffs' contention that the issue on false imprisonment was res judicata because of the Federal Court decision in *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309. She held that the principle of *res judicata* is not applicable for the issue of an arrest under section 73(1) of the ISA and went on to consider the plaintiffs' case. She found that there was mala fides in the plaintiffs' detention and that the plaintiffs had led sufficient evidence of being inhumanely treated. She then awarded general and aggravated damages, holding as follows:

> [66] The court also awards aggravated damages of RM30,000 each to Chua, Hishamudin, Saari, Badaruddin and Badrulamin considering that there is a breach of their constitutional and fundamental rights including restricted meetings with family members with accompanying threats, being handcuffed and blindfolded each time when travelling from place to place within the police detention centre, the length of period of solitary detention, prolonged interrogation with extremely limited breaks employing harsh and stressful interrogations on matters not related to national security, the harrowing experience coupled with the mental torment and emotional anguish and suffering.

The defendants only appealed on quantum of general damages for false imprisonment and against liability for the tort of defamation, thus the High Court decision on liability for false imprisonment became final. The defendants also did not appeal against the award of aggravated damages in the excerpt above. The Court of Appeal reduced the quantum of general damages but maintained the findings of liability by Datuk Lau Bee Lan.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Dato' Zulkifli Bin Bakar

Dato' Zulkifli bin Bakar was born on April 6, 1955. He was given the opportunity to study law at University of Malaya in 1974. Dato' Zulkifli started his career in the civil service in June 1979 with the Judiciary where he held the position of Senior Assistant Registrar of High Court Malaya at Kuala Lumpur and magistrate at the Kuala Selangor Magistrate's Court four months later in the same year.

In 1982, Dato' Zulkifli left the Judiciary and joined the Attorney General's Chambers ("AG's Chambers") as Deputy Public Prosecutor in the state of Kedah. He held various significant positions in the AG's Chambers throughout his legal career where among others he was appointed Assistant State Legal Advisor of Penang, State Legal Advisor of Malacca, State Prosecution Director of Perak, and Senior Federal Counsel of the Anti-Corruption Agency. He was also appointed as Deputy Head of Civil Division, State Legal Advisor of Kedah and Chairman of the Advisory Board in the Prime Minister's Department.

Dato' Zulkifli had a very remarkable career achievement in the AG's Chambers where in 1988, while holding the post of Assistant State Legal Advisor of Penang, he was appointed a member of the Royal Commission of Inquiry (RCI) to look into the Penang Jetty tragedy. The said RCI was then chaired by former Federal Court judge Tan Sri Chang Min Tat together with former Supreme Court judge Tan Sri Syed Agil Barakbah as commissioner. In 1995, while serving as Senior Federal Counsel at the Anti-Corruption Agency, Dato' Zulfikli was honoured to be a delegate representing Malaysia at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Cairo from April 28 to May 8, 1995. In 1998 he was again honoured to be among the few officers to be gazetted as Senior Deputy Public Prosecutor pursuant to section 376(ii) of the Criminal Procedure Code under Gazette PU(B) 493/1998.

Dato' Zulkifli was appointed a judicial commissioner of the High Court of Sabah and Sarawak on September 1, 2005. As a judicial commissioner, his Lordship served in Bintulu until his elevation as High Court judge on April 12, 2007. He was then transferred to the Miri, Seremban, Malacca and Shah Alam High Courts.

Dato' Zulkifli officially retired on April 6, 2021.

Dato' Rosilah Binti Yop

Dato' Rosilah binti Yop was born on October 15, 1957 in Arau, Perlis. She graduated with LLB (Hons) from University of Malaya in 1983.

Dato' Rosilah joined the Judicial and Legal Service in 1983. Her first posting was as Assistant Director of the Legal Aid Bureau between 1983 until 1985, first serving at the Kuala Lumpur branch and then the Kangar, Perlis branch.

From 1985 until 1991, Dato' Rosilah served as a magistrate in Georgetown, Penang before being promoted to the Sessions Court also in Georgetown, Penang. She then served as Deputy Registrar in the Penang High Court from 1993 until 1997 when she was once again appointed a Sessions Court judge in Georgetown, Penang. She later sat in the Sessions Courts in Kangar, Perlis (2004-2005) and Sungai Petani, Kedah (2005-2009) before returning to Georgetown, Penang as Director of the Penang courts between 2009- 2010.

Dato' Rosilah was appointed a judicial commissioner on May 11, 2010 and confirmed as a Judge of the High Court on September 12, 2014. Dato' Rosilah's last posting was at the Penang High Court before she retired on March 1, 2021.

Mdm. Wong Chee Lin

Mdm. Wong Chee Lin was born on August 1, 1960 in Sibu, Sarawak to a family of medical doctors. She received her primary education at Methodist Primary School in Sibu, Sarawak. After finishing her primary levels, she went to Methodist Secondary School up to Secondary 2 level. Thereafter, she set off to the United Kingdom to continue with her secondary education at the Kent College, Pembury.

After finishing her studies, Mdm. Wong Chee Lin chose a path different from the one taken by her parents. Instead of going to medical school, she decided to take up a degree in Politics, Philosophy and Economics (PPE) at the Hertford College, University of Oxford from 1978 to 1981. She graduated and received a Bachelor of Arts (Hons) and subsequently she was given an Honorary Master of Arts. In 1982, she received a Diploma in Law from City University. Subsequently, she was called to the Bar of England and Wales in 1984 as a member of the Honourable Society of Lincoln's Inn. In 1985, she returned to Malaysia and was admitted as an Advocate and Solicitor of the High Court of Malaya.

In the early days of her career, Mdm. Wong Chee Lin joined the practising world as a legal associate at Skrine from 1985 to 1994. In 1995, she was made a partner at Skrine. From then on, she was mainly involved in the firm's Restructuring and Insolvency practice group. She was also part of the Dispute Resolution Core Team.

During her illustrious career at Skrine, she became an expert in corporate insolvency, commercial litigation, arbitration, expert determination, receivership, liquidation, and corporate rescue matters, among others. She acted as counsel for a public-listed Malaysian oil and gas support services provider in a multi-million shareholders' dispute with a Central American specialist oil and gas service company. In the area of expert determination, she was the Malaysian counsel representing a subsidiary of a joint venture of two major oil and gas multinational companies in a dispute over a sale and purchase of carbon monoxide.

On April 1, 2018, Mdm. Wong Chee Lin was appointed as a Judicial Commissioner at the Commercial Division of the High Court of Malaya, Kuala Lumpur. Only a year later, on April 9, 2019, she was appointed as Judge of the High Court of Malaya.

During her tenure as a member of the Judiciary, she presided over many cases. The highlight of her judicial career was when her decision in Re Leadmont Development Sdn Bhd [2018] MLJU 1320; [2018] 1 LNS 1420 became the first decision on judicial management in Malaysia, making it a landmark ruling. This case is a part of the corpus of commercial case law.

In April 2021, Mdm. Wong Chee Lin returned to Skrine to resume her career in legal practice. She is a partner in the firm's Restructuring and Insolvency practice group.

Dato' Fredrick Indran XA Nicholas

Dato' Fredrick Indran XA Nicholas was born on February 15, 1960 in Selangor. He graduated with LLB (Hons) from the University of London, England in 1984 and obtained the Certificate in Legal Practice the following year.

He joined the Judicial and Legal Service in 1986 and until 1990 was magistrate of the Magistrates' Courts of Tampin, Rembau and Gemas in Negeri Sembilan. From 1990 until 1991 he was a Deputy Public Prosecutor in Kelantan, and in 1991 he was appointed as the Head of Prosecution of Malacca.

He went into private practice as an advocate and solicitor of the High Court of Malaya from 1991 until 2006. Between 2004 to 2006, he was the Chairman of the Perak State Bar Committee.

In 2006, Dato' Fredrick Indran XA Nicholas was appointed as a Chairman of the Industrial Court. He served in Kuala Lumpur until 2009 when he was transferred to Ipoh, Perak and subsequently to Penang in 2014.

He served as a judicial commissioner of the High Court of Malaya in Johor Bahru High Court from November 28, 2019 until November 27, 2021.

Mr. Khairil Azmi Haji Mohamad Hasbie

Mr. Khairil Azmi Haji Mohamad Hasbie was born in Kuching, Sarawak on February 4, 1966. He graduated with an LLB (Hons) from Leicester Polytechnic, England in 1991 and obtained the Certificate in Legal Practice in 1992.

Between 1993 until 1996 he practised at Messrs HC Lee & Co Advocates before moving to Messrs Badul Rahim, Sarkawi, Razak Tready, Fadillah & Co Advocates in 1996 until 2000.

Mr. Khairil Azmi Haji Mohamad Hasbie was the Managing Partner at Messrs Azmi & Co Advocates (Kuching) between 2000 to 2019. He was also the president of the Advocates' Association of Sarawak from 2010/11–2013/14.

He served as a judicial commissioner in the Shah Alam High Court from November 28, 2019 until November 27, 2021.

Dato' George Varughese A/L Ko Varughese

Dato' George Varughese a/l KO Varughese was born on January 31, 1963 in Selangor. Dato' George read law and graduated with LLB (Hons) from Manchester Metropolitan University in 1988 and was called to the Bar of England & Wales after having obtained the Degree of Utter Barrister from the Honourable Society of Lincoln's Inn in 1990. In 1991, he was admitted as an advocate and solicitor of the High Court of Malaya.

Dato' George commenced legal practice in 1991 at Messrs Manjeet & Associates as a legal assistant and was made a partner in 1996. In 1997 he moved to Messrs Thomas, Bala & Associates as a partner.

With several years of civil and criminal litigation experience, in 1998, Dato' George established the law firm of "George Varughese & Co" (later rebranded as "George Varughese" in 2009). He had, in 1998, also obtained his Master of Laws (LLM) from University of Malaya, and later became a Member of the Malaysian Institute of Arbitrators (MIArb), a Sports Arbitrator of the Chartered Institute of Arbitrators (CIArb), an accredited Construction Industry Adjudicator with the Asian International Arbitration Centre (AIAC) and a certified Mediator (CIArb).

Years of dedication to the legal profession and to the Bar Council saw Dato' George rise to helm the Malaysian Bar as President from 2017 until 2019. During his tenure as Bar President, he also served as a member of the Advocates & Solicitors Disciplinary Board (ASDB) and the Legal Profession Qualifying Board (LPQB).

Dato' George also served as the Chairman of the Ad-Hoc Disciplinary Committee, PIAM (2013-2019), member of the Technical Committee, Service Export Fund, MATRADE (2017-2019), member of the Taylor's Law School Legal Profession Advisory Panel (2017-2019) and member of the Editorial Advisory Board of the Sessions and Magistrate's Cases (SMC) (2017-2019).

On November 28, 2019, Dato' George was appointed as a judicial commissioner of the High Court of Malaya, and served at the High Court in Penang until November 27, 2021.

Thereafter, in 2022, Dato' George returned to practice as a Consultant in Messrs George Varughese.

Mr. Wong Hok Chong

Mr. Wong Hok Chong was born in Kota Bharu, Kelantan, on January 15, 1969. He graduated from the London School of Economics and Political Science, University of London with a LLB (Hons) in 1990 and subsequently obtained his postgraduate degree, LLM, from University of Malaya in 1997.

He was admitted to the Degree of the Utter Bar at Middle Temple in 1991, admitted as an advocate and solicitor of the High Court of Malaya in 1992 and admitted as an advocate and solicitor of the Supreme Court of Singapore in 2009.

He was in legal practice from 1992 until 2019, save for a brief stint in 2011/2012 when he was a Senior Manager (Legal) of a statutory body, Perbadanan Insurans Deposit Malaysia. Immediately preceding his appointment as judicial commissioner, he was a practising advocate and solicitor under the style of Messrs Wong Hok Chong & Co.

He served as a judicial commissioner of the High Court of Malaya at High Court Penang from November 28, 2019 until November 27, 2021.

CHAPTER

05

THE 6TH JOINT JUDICIAL CONFERENCE ON 22 JULY 2021

The 6th JOINT JUDICIAL CONFERENCE JULY 22, 2021

The 6th Joint Judicial Conference ("JJC") hosted by the Judiciary of Brunei Darussalam was held on July 22, 2021. With the theme, "Protection of persons: The Court's role and duties in protecting economic, social and cultural rights", this biennial conference involving the judicial institutions of Malaysia, Singapore and Brunei convened online for the first time since its inception and was attended by the Chief Justices of the three countries together with a total of 70 judges and judicial officers from the respective judiciaries.

A total of 26 judges and judicial officers from the Malaysian Judiciary participated in the event. The Malaysian delegates were led by The Right Honourable Tun Tengku Maimun binti Tuan Mat (Chief Justice of Malaysia), followed by The Right Honourable Tan Sri Rohana binti Yusuf (President of the Court of Appeal), The Right Honourable Tan Sri Dato' Sri Azahar bin Mohamed (Chief Judge of Malaya) and The Right Honourable Tan Sri Dato' Abang Iskandar bin Abang Hashim (Chief Judge of Sabah and Sarawak). Others who were also in attendance were The Honourable Datuk Nallini Pathmanathan, The Honourable Dato' Sri Hasnah binti Dato' Mohammed Hashim, The Honourable Dato' Vazeer Alam bin Mydin Meera, The Honourable Datuk Hajah Azizah binti Haji Nawawi, The Honourable Dato' Lim Chong Fong, The Honourable Dato' Collin Lawrence Sequerah, The Honourable Tuan Mohamed Zaini bin Mazlan, The Honourable Tuan Azhahari Kamal bin Ramli, The Honourable Datuk Wong Kian Kheong, The Honourable Puan Hayatul Akmal binti Abdul Aziz, The Honourable Dato' Faizah binti Jamaludin, The Honourable Dato' Mohd Radzi bin Harun, YBhg. Datuk Ahmad Terrirudin bin Mohd Salleh (Chief Registrar of the Federal Court of Malaysia) together with nine judicial officers.

Screen capture of the participants of the 6th Joint Judicial Conference

The three judiciaries engaged in panel discussions on the topics of child protection in cross-border issues and the rise of human trafficking cases: the reasons and sentencing considerations. They also shared their experiences on judicial administration by judges and artificial intelligence ("AI") and the extent of AI's influence on the Judiciary.

The 6th JJC concluded with the official handover to The Right Honourable Chief Justice of Malaysia on behalf of the Malaysian Judiciary as the host country for the 7th JJC which is scheduled for 2023.

Screen capture of the Chief Justices and participants of the three countries – at the centre top row is the host country Brunei Darussalam, the Rt. Hon. Chief Justice of the Supreme Court of Brunei Darussalam Steven Chong Wan Oon. On his right, The Rt. Hon. The Chief Justice of Malaysia Tengku Maimun Tuan Mat and on his left, The Rt. Hon. Chief Justice of Singapore, Sundaresh Menon.

CHAPTER

06

JUDICIAL TRAINING

JUDICIAL TRAINING: COURSES ORGANISED BY THE JUDICIAL ACADEMY

The following courses were carried out by the Training Committee of the Judicial Appointments Commission in 2021:

Induction Programme for Judicial Commissioners March 29–April 1, 2021

The "Induction Programme for Judicial Commissioners" was held on March 29–April 1, 2021 (Monday–Thursday) at the Secretary's Office, Judicial Appointments Commission, Palace of Justice, Putrajaya. This programme aimed to expose the participants to the scope and areas of work and best practices that must be adhered to when fulfilling their duties and responsibilities as judicial commissioners. This programme was the first activity organised by the Judicial Academy in 2021 during the Recovery Movement Control Order (RMCO).

A total of 10 newly appointed judicial commissioners attended this course. They are Judicial Commissioners Amelati Anak Parnell, Norliza binti Othman, Hasbullah bin Adam, Shamsulbahri bin Haji Ibrahim, Roslan bin Mat Nor, Julia binti Ibrahim, Mohamad Abazafree bin Mohd Abbas, Mohd Arief Emran bin Arifin, John Lee Kien How @ Mohd Johan Lee, and Adlin binti Abdul Majid.

The course began with a speech delivered by The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia, followed by a course briefing by the Chairman of the Training Committee, Malaysian Judicial Academy, Justice Mohd Zawawi bin Salleh, Judge of the Federal Court. This four-day course was conducted as lectures and was followed by a question-and-answer session. Ten topics were presented by senior judges entitled "Joint Session with Chief Judge of Malaya and Chief Judge of Sabah and Sarawak"; "Salient Features of the Rules of Court 2012"; "Judgment Writing Workshop"; "Case Management in Civil Cases and Court-Annexed Mediation"; "How to Conduct Criminal Trials and Appeals/Revisions in the High Court"; "Managing Procrastination and Competing Priorities"; "When to Recuse"; "Contempt Proceedings"; "How to Read Statutes"; and "Judicial Power Under the Federal Constitution". Lectures entitled "e-Court System and e-Review"; and "Salary, Allowance and Benefits for Judges" were presented by officers from the Office of the Chief Registrar of the Federal Court of Malaysia. At the end of the course, The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia, presented certificates to the participants who were appointed as Judicial Commissioner.

Photo taken during the prayer recitation before the start of the Induction Programme for Judicial Commissioners
L – R: Justice Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak; Justice Rohana binti Yusuf, President of the Court of Appeal; The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia; Justice Azahar Mohamed, Chief Judge of Malaya; and Justice Haji Mohd Zawawi bin Salleh, Judge of the Federal Court cum Chairman of the Training Committee of the Judicial Academy Malaysia

Justice Rohana binti Yusuf, President of the Court of Appeal addressing the newly appointed judicial commissioners during the Induction Programme for Judicial Commissioners

Good Faith in Contractual Performance

The "Good Faith in Contractual Performance" seminar was held on August 27, 2021 (Friday). This was the second programme conducted by the Judicial Academy in 2021 and the first to be conducted online via Zoom Meeting in collaboration with the Office of the Chief Registrar of the Federal Court of Malaysia. The training committee, the moderator and the speaker joined the zoom seminar from the Main Meeting Room, Judicial Appointments Commission, Palace of Justice, Putrajaya. The seminar aimed to provide a better understanding on the perspective and future of good faith in contractual performance in Malaysia.

A total of 159 registered participants consisting of six Federal Court judges, seven Court of Appeal judges, 27 High Court judges, 39 judicial commissioners, 41 Sessions Court judges, and 39 deputy registrars/special officers/research officers attended this programme. Meanwhile, 115 deputy registrars/special officers/research officers who were not registered also attended the programme.

The half-day programme began with the welcoming remarks by Justice Haji Mohd Zawawi bin Salleh, Judge of the Federal Court cum Chairman of the Training Committee of the Judicial Academy Malaysia. The programme then continued with an introductory session by Justice See Mee Chun, Judge of the Court of Appeal, who acted as a moderator for the talk on "Good Faith in Contractual Performance" delivered by Dr Nurhidayah binti Abdullah, a senior lecturer from the Department of Administrative Studies and Politics, Faculty of Economics and Administration, University of Malaya. The talk ended with a question-and-answer session and an online course assessment of the participants.

Justice Haji Mohd Zawawi bin Salleh during the Good Faith in Contractual Performance seminar

Justice See Mee Chun, Judge of the Court of Appeal, moderating the Good Faith in Contractual Performance seminar

Dr Nurhidayah binti Abdullah delivering her talk at the Good Faith in Contractual Performance seminar

A view of the set up for the zoom seminar at the Main Meeting Room, Judicial Appointments Commission

Section 39B of the Dangerous Drugs Act 1952

The "Section 39B of the Dangerous Drugs Act 1952" course was held on September 24–25, 2021 (Friday–Saturday) at the Banquet Hall, Palace of Justice, Putrajaya. The seminar aimed at providing judges/judicial commissioners with a comprehensive understanding of certain aspects of the law of section 39B of the Dangerous Drugs Act 1952. This was the third programme conducted by the Judicial Academy in 2021 and the second to be conducted online via Zoom Meeting.

A total of 70 participants consisting of four Federal Court judges, 31 High Court judges, 33 judicial commissioners, and two deputy registrars/special officers/research officers attended this programme.

The one and a half-day programme began on the first day with opening remarks by The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia. The programme continued with two talks in the morning session on "Duty of Trial Judge at the End of the Case for Prosecution" by Justice Abdul Rahman bin Sebli, Judge of the Federal Court and "Duty of Trial Judge after the Trial" by Justice Azahar bin Mohamed, Chief Judge of the High Court in Malaya. The talk on "Common Mistakes Made by Trial Judge in Adjudicating Section 39B Cases" was delivered in the afternoon session by Justice Haji Mohd Zawawi bin Salleh, Judge of the Federal Court cum Chairman of the Training Committee of the Judicial Academy Malaysia and Judges of the Court of Appeal, Justice Yaacob bin Haji Md Sam and Justice Abdul Karim bin Abdul Jalil.

A total of four presentations and discussions on specific topics by participants were presented on the second day with Justice Nordin bin Hassan, Judge of the Court of Appeal acting as the moderator. The topics were "The Defence of Innocent Carrier" by Justice Mohamed Zaini bin Mazlan, Judge of the High Court; "Alcontara Notice" by Justice Abd Wahab bin Mohamed, Judge of the High Court; and "Problems Faced by Trial Judges in Conducting Criminal Trial" by Judicial Commissioners Shahnaz binti Sulaiman and Nurulhuda Nur'aini binti Mohamed Nor.

Justice Azahar bin Mohamed delivering his talk titled "Duty of Trial Judge after the Trial"

The "Section 39B of the Dangerous Drugs Act 1952" course was conducted with the participants separated by plexiglass partitions in the Banquet Hall, Palace of Justice, Putrajaya in compliance with the then prevailing Standard Operating Procedures (SOP) to control the spread of the COVID-19 virus.

Talk on Ouster Clause: The UK Experience by Prof Emeritus Carol Harlow QC (Hon)

The "Talk on Ouster Clause: The UK Experience by Prof Emeritus Carol Harlow QC (Hon)" programme was held on October 29, 2021 (Friday) The programme aimed at providing a comprehensive understanding of the United Kingdom's experience on ouster clauses. This was the fourth programme conducted by the Judicial Academy in 2021, and the third conducted online via Zoom Meeting. The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia, the training committee and the moderator joined the course from the Banquet Hall, Palace of Justice, Putrajaya.

A total of 111 participants consisting of six Federal Court judges, 13 Court of Appeal judges, 30 High Court judges, 36 judicial commissioners, and 27 deputy registrars/senior assistant registrars/special officers/research officers/legal officers attended this programme.

The half-day programme began with an opening address by The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia. The programme then continued with an introductory session by Justice Hajah Azizah binti Haji Nawawi, Judge of the Court of Appeal who acted as moderator before Prof Emeritus Carol Harlow QC (Hon), a law lecturer at the London School of Economics (LSE) began her talk. The talk ended with a question-and-answer session and an online course assessment.

L – R: The moderator of the talk, Justice Hajah Azizah binti Haji Nawawi, Judge of the Court of Appeal; The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia; and Justice Haji Mohd Zawawi bin Salleh, Judge of the Federal Court cum Chairman of the Training Committee of the Judicial Academy Malaysia

A screen capture of Professor Carol Harlow giving her talk.

International Trademark Association's workshop

The "International Trademark Association's Workshop" was held on November 26, 2021 (Friday) The objective of this workshop was to provide participants with a comprehensive understanding of the issues related to trademark law. This workshop was the fifth programme conducted by the Judicial Academy in 2021 and the fourth conducted online using Zoom Meeting. Some of the judges and the training committee joined the course at the Banquet Hall, Palace of Justice, Putrajaya.

The half-day programme began with opening addresses by The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia; Iris Gunther, Director Brand Enforcement and Sustainability, International Trademark Association (INTA); and Seth Hays, Chief Representative Asia Pacific Office, International Trademark Association (INTA). The programme then continued with a workshop that was divided into three sessions.

Justice Wong Kian Kheong, Judge of the High Court conducted the first session as moderator for the session titled "An Overview Over TMA 2019 – Changes to Malaysian TM Law and The International Perspective" with two panelists, Assoc Prof Rohazar Wati binti Zuallcobley from Faculty of Law, MARA University of Technology; and Juan Rodriguez Guerra, Senior Legal Counsellor, Legal Divison of The Madrid Registry at The World Intellectual Property Organization (WIPO), Switzerland.

The second session titled "Select Changes to The TMA in Comparison with Other Jurisdictions", was presented by Maxim Hristov, Attorney at Law, PETOSEVIC Bulgaria; and Bob Kelson, Principal, BK Patent and Trademark Consultation, Australia, with Justice Mohd Radzi bin Harun, Judge of the High Court as moderator.

Justice Hanipah binti Farikullah, Judge of Court of Appeal, moderated the third session titled "Enforcement of IPR Against Online Violation", which was presented by Andrej Stec, Advisor (Referendaire), General Court European Union in Luxembourg; and Cecilia Dou, Online IP Enforcement Manager, Apple Inc China.

The Rt. Hon. Tengku Maimun Tuan Mat, Chief Justice of Malaysia delivering the opening address

A view of the set up for the zoom workshop at the Banquet Hall, Palace of Justice

9th COUNCIL OF ASEAN CHIEF JUSTICES MEETING THURSDAY, OCTOBER 7, 2021 (VIA TELECONFERENCE)

Due to the prevailing COVID-19 situation, the 9th Council of ASEAN Chief Justices Meeting ("9th CACJ") was held on October 7, 2021 via teleconference with the Supreme Court of the Republic of Indonesia being the host. The 9th CACJ was participated and attended by the Chief Justices from ASEAN. The Honourable Muhammad Syarifuddin, the Chief Justice of the Supreme Court of the Republic of Indonesia was elected as the Chair for the 9th CACJ.

The delegation from the Malaysian Judiciary was led by The Right Honourable Tun Tengku Maimun binti Tuan Mat, the Chief Justice of Malaysia, followed by The Right Honourable Tan Sri Rohana binti Yusuf (President of the Court of Appeal), The Right Honourable Tan Sri Dato' Sri Azahar bin Mohamed (Chief Judge of Malaya) and The Right Honourable Tan Sri Dato' Abang Iskandar bin Abang Hashim (Chief Judge of Sabah and Sarawak). Others who were also present were The Honourable Dato' Sri Hasnah binti Dato' Mohammed Hashim (Federal Court), Justice Datuk Seri Kamaludin bin Md Said (Court of Appeal), Justice Dato' Faizah binti Jamaludin (High Court Shah Alam), and Justice Puan Celestina Stuel Galid (High Court Sandakan).

The 9th CACJ held wide-ranging discussions on the development of training in emerging technologies, the desirability of a governance framework for the adoption of artificial intelligence in judicial processes, and collective engagement beyond ASEAN for judicial education and capacity building. The meeting also deliberated on the possibility and means of enhancing mutual legal cooperation in various aspects of civil and family proceedings. There was extensive sharing by the members on the continuing disruption to judicial processes engendered by the evolving COVID-19 situation and the measures that have been taken to successfully overcome these challenges since the 8th CACJ meeting in 2020. The meeting recognised the need for the ASEAN judiciaries to constantly review and update COVID-19 measures as the situation develops.

The Right Honourable Chief Judge of Malaya as Chair for the Working Group on Facilitating Service of Civil Processes Within ASEAN presented the Working Group's report and circulated the draft Model Rules on the Taking of Evidence for Foreign Proceedings in Civil or Commercial Matters which was prepared after considering

the respective reports on the procedures and laws relating to taking evidence in foreign proceedings submitted by ASEAN Member States. The Right Honourable Chief Judge of Malaya also expressed his gratitude towards the support and success of the Hague Conference on Private International Law Masterclass which was held virtually on August 19, 2021, organised by the Malaysian Judiciary and CACJ Secretriat in collaboration with the Permanent Bureau of The Hague Conference on Private International Law on August 19, 2021 via teleconference.

The Right Honourable Chief Judge of Sabah and Sarawak as Chair of the Working Group on "Case Management and Court Technology" also presented his report on AI Governance Framework on the Use of Artificial Intelligence for the ASEAN Judiciaries. The Framework serves as a guideline on how the Judiciary, private sector, and other agencies should work to address key ethical and governance issues in the deployment of artificial intelligence solutions.

The 9th CACJ concluded with the signing of the Jakarta Declaration by the Chief Justices from ASEAN Member States marking their consensus on the issues and matters which have been disscussed throughout the meeting.

The teleconference arrangements in the Rt. Hon. The Chief Justice's meeting room. Plexiglass cubicles were provided for the participants who attended physically to curb the spread of Covid-19 which had not yet abated at that time.

A different angle of the teleconference set up.

The Rt. Hon. the Chief Justice of Malaysia Tengku Maimun Tuan Mat

Justice Azahar Mohamed, the Chief Judge of Malaya

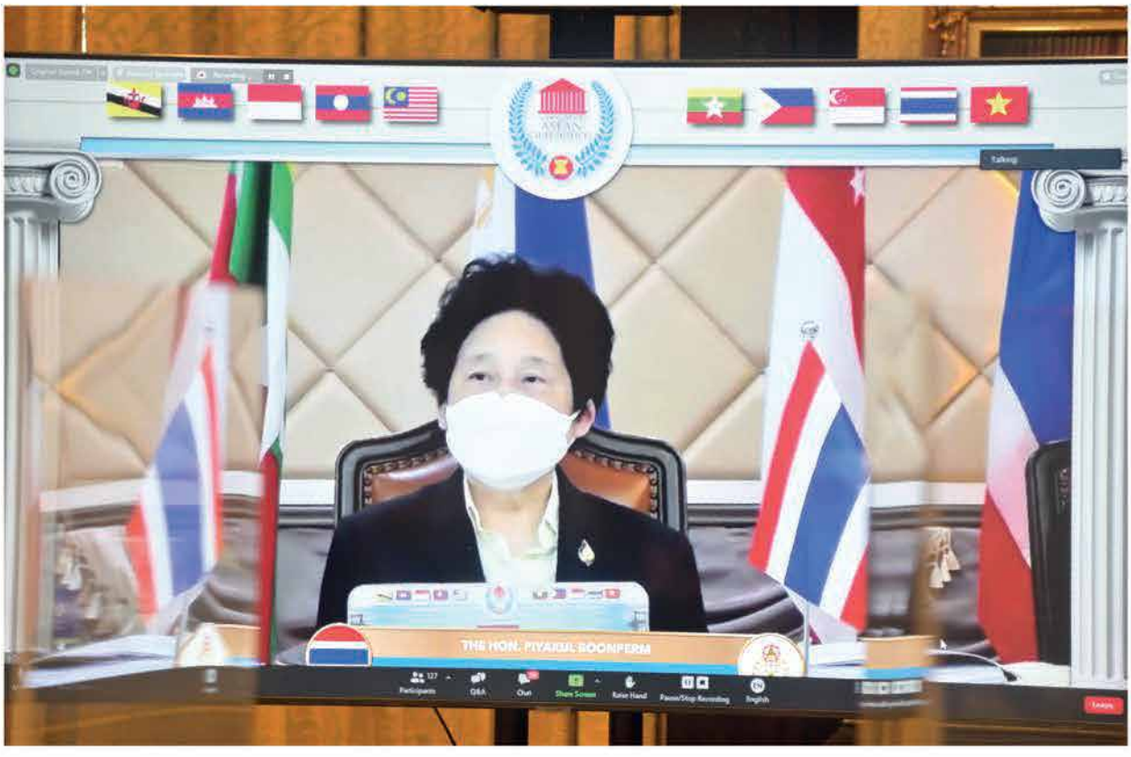
Justice Abang Iskandar Abang Hashim, the Chief Judge of Sabah and Sarawak

Justice Hasnah Dato' Mohammed Hashim, judge of the Federal Court

Justice Kamaludin Md. Said, judge of the Court of Appeal

Justice Faizah Jamaludin, judge of the High Court

The Rt. Hon. Chief Justice of Singapore, Sundaresh Menon



The President of the Supreme Court of Thailand, The Honorable Chief Justice Piyakul Boonperm

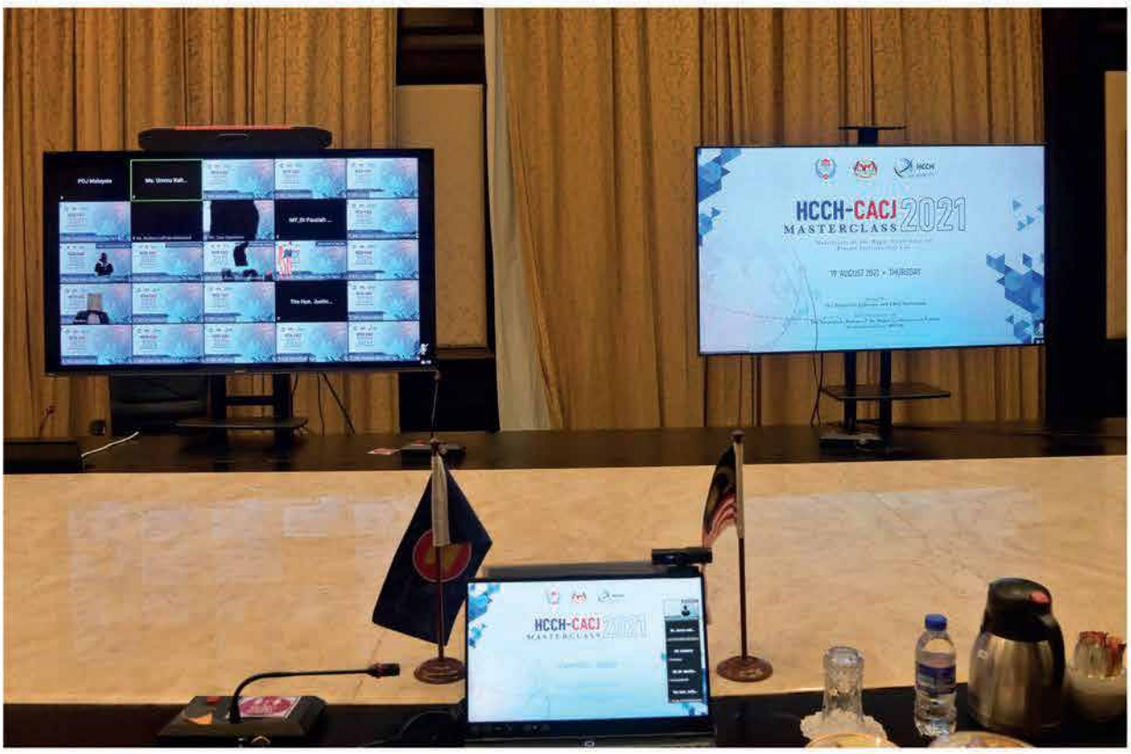
HCCH-CACJ 2021 MASTERCLASS ON:

(A)The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (HCCH 1970 Evidence Convention); and
(B) The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention)

The Malaysian Judiciary and the Secretariat of *The Council of ASEAN Chief Justices* ("CACJ") in collaboration with the *The Permanent Bureau Of The Hague Conference On Private International Law* (PB-HCCH) organised the *Permanent Bureau Of The Hague Conference On Private International Law Masterclass Programe* ("HCCH Masterclass") which was held virtually via video conferencing on August 19, 2021.

The HCCH Masterclass stems from the Bangkok Declaration signed on November 23, 2019 during the 7th CACJ Meeting held in Bangkok, Thailand. Malaysia as the chair and lead of the Working Group on Facilitating Service of Civil Process was mandated to work together with the CACJ Secretariat and explore collaboration with the Permenant Bureau of the HCCH to conduct a masterclass for ASEAN judges and judicial officers on The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Evidence Convention"), and The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("Foreign Judgments Convention").

The half-day HCCH Masterclass was attended by approximately 350 representatives from the ASEAN Judiciaries, among whom were superior court judges and judicial officers. The sessions were conducted by Mr Brody Warren, an Attaché to the Secretary-General / Senior Legal Officer to the HCCH and Hon. Justice David Goddard, Judge of the Court of Appeal of New Zealand.



The video conferencing arrangements in the Rt. Hon. The Chief Justice's meeting room

The session with Mr Brody Warren disscussed the methods of co-operation established under the Evidence Convention for the taking of evidence abroad in civil or commercial matters. The Convention provides an effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence, via letters of request, as well as diplomatic or consular agents and commissioners. The session also examined the different practices among contracting parties, bringing together the key elements of jurisprudence and the work of the Special Commission on the Practical Operation of the Evidence Convention. The discussion also addresses how the use of technology has transformed the operation of the Convention.

The Hon. Justice David Goddard led the session on the Foreign Judgments Convention. He discussed the key principles under the Convention and how it facilitates the recognition and enforcement in one Contracting State of a judgment rendered by a court of another Contracting State in a civil or commercial matter. The session demonstrated how the operation of the Convention may transform the international commercial litigation landscape, including in its relationship with the HCCH 2005 Choice of Court Convention. The session also addressed the important aspects for States to consider when joining the Foreign Judgments Convention (including possible declarations), including how to implement it in their respective legal systems.

As a whole, the Masterclass was a resounding success. It was certainly beneficial for the members of the CACJ Working Group on Facilitating Service of Civil Processes to better understand both the two Core HCCH Conventions. The HCCH Masterclass has provided a valuable platform for capacity building and equipped the CACJ Working Group members to continue potential work on developing model rules concerning matters such as the taking of evidence in foreign proceedings.

L – R: Justice Azahar Mohamed, the Chief Judge of Malaya; The Rt. Hon. The Chief Justice Tengku Maimun Tuan Mat, Justice Rohana Yusuf, the President of the Court of Appeal and Justice Abang Iskandar Abang Hashim, the Chief Judge of Sabah and Sarawak

Another angle of the video conferencing arrangements in the Rt. Hon. The Chief Justice's meeting room

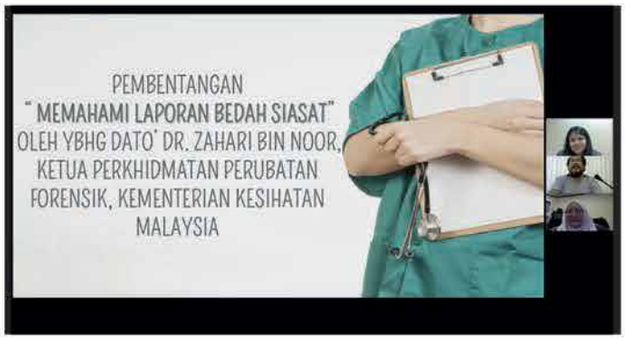
The moderator, Justice Lee Swee Seng, judge of the Court of Appeal

Courses conducted by the Strategic Development and Training Division, Office of the Chief Registrar of the Federal Court

The following courses were conducted by the Strategic Development and Training Division, Office of the Chief Registrar of the Federal Court in 2021.

1. **Webinar on medical forensics for coroners (Part 1) / *Webinar perubatan forensik untuk koroner (Siri 1)***

   This webinar was held on March 8, 2021 as part of the continuing judicial education for coroners. The objective of this webinar was to enhance knowledge in respect of medical forensics which is a vital aspect in coronial inquests. It was conducted via Zoom with 237 participants which consisted of coroners, Session Court judges and magistrates. Dato' Dr Zahari bin Noor, Head of Medical Forensics Service from the Ministry of Health was invited to share his expertise on the subject matter.



2. **Seminar on civil procedure and how to read grounds of judgment / *Seminar berkenaan prosedur sivil dan cara membaca alasan penghakiman***

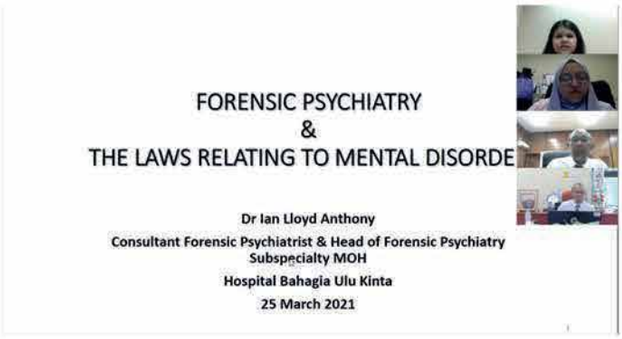
   The objective of this seminar was to give participants an overview on how to read grounds of judgment in civil proceedings. It was held on March 29, 2021 via Zoom. Judicial Commissioner Tee Geok Hock was invited as a speaker. 80 judicial officers attended the seminar.

3. **Workshop on drafting public service examination papers conducted by the Chief Registrar's Office question PKPMP / *Bengkel mendraf kertas-kertas peperiksaan perkhidmatan awam yang dijalankan oleh Pejabat Ketua Pendaftar Mahkamah Persekutuan***

   This workshop was conducted in relation to the public service examinations conducted annually by the Office of Chief Registrar of the Federal Court ("CR's Office") with a key purpose of supporting the staff of the Judiciary such as court interpreters and legal administrative assistants. This workshop was held on March 30, 2021 at the Palace of Justice, Putrajaya with the objective of highlighting the concept and guidelines in drafting examination questions. Puan Yasmin binti Abdul Razak, representative of the Chairperson of the Examination Panel of the CR's Office, delivered the welcoming address and the workshop briefing was delivered by Puan Rasyihah binti Ghazali, member of the Examination Panel of the CR's Office. 15 judicial officers who had been appointed as drafters attended this workshop.

4. Webinar on cases involving persons of unsound mind under section 342 of Criminal Procedure Code (Act 593) / *Webinar kes melibatkan orang tak sempurna akal di bawah seksyen 342 Kanun Tatacara Jenayah (Akta 593)*

This webinar was held on March 25, 2021 via Zoom with the participation of 130 judicial officers throughout Malaysia. The objective of this webinar was to enhance the knowledge of judicial officers in respect of section 342 of the Criminal Procedure Code. This webinar focused on the topic of forensic psychiatry and the laws relating to mental disorders. Dr Ian Lloyd Anthony, Head of Forensic Subspecialty Services from the Ministry of Health was invited to share his knowledge and experience on the topic.

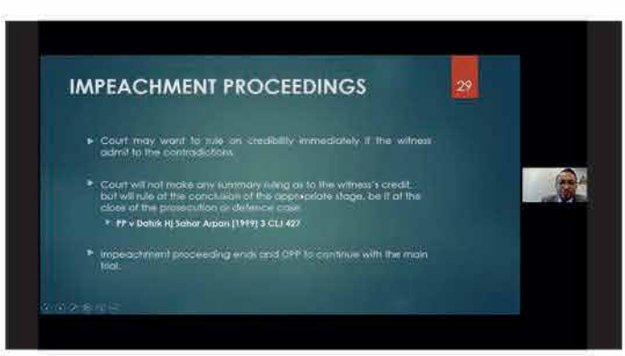


5. Webinar on impeachment proceedings (Part 1) / *Webinar prosiding pencabaran ("impeachment proceedings") (Siri 1)*

The objective of this webinar was to enhance the knowledge of judicial officers regarding impeachment proceedings for witnesses in the course of a civil or criminal trial. The focus of this webinar was to examine the approach adopted by courts in impeachment proceedings. It was conducted via Zoom on April 20, 2021 with the participation of 208 judicial officers. Justice Muhammad Jamil bin Hussin from the High Court at Kuala Lumpur was invited to impart his expertise on the topic.

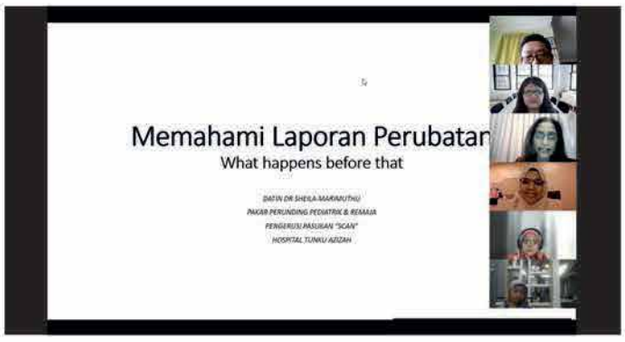
6. Webinar on Impeachment Proceedings (Part 2) / *Webinar prosiding pencabaran ("Impeachment Proceedings") (Siri 2)*

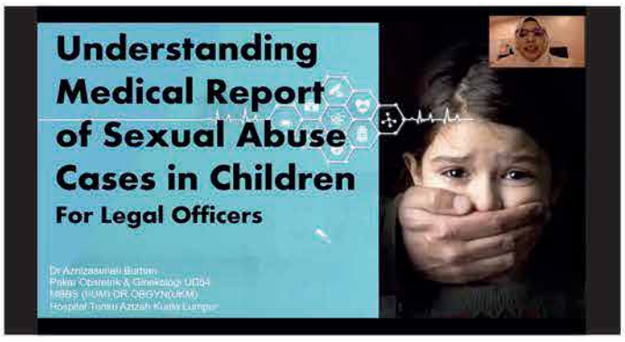
This was the second webinar on impeachment proceedings held via Zoom on May 28, 2021. Part 2 of this webinar series focused on the prosecution's perspective in conducting impeachment proceedings. Tuan Mohamad Mustaffa P Kunyalam, Deputy Public Prosecutor from the Special Litigation Unit of the Attorney General's Chambers was invited to share his knowledge and experience with the 190 participants in attendance.



7. Webinar on understanding medical reports for cases involving sexual offences against children / *Webinar memahami laporan perubatan bagi kes-kes jenayah seksual terhadap kanak-kanak*

This webinar was held as part of the Judiciary's initiative to ensure efficiency of case management and case disposal of sexual offences against children. This webinar was divided into two parts. The first part on preliminary preparation of medical reports in sexual offence cases was delivered by Datin Dr Sheila Marimuthu, Consultant Pediatrician and Adolescent Specialist from Kuala Lumpur General Hospital. The second part on understanding of medical reports was then delivered by Dr Aznizauriati binti Burhan, Obstetrics and Gynaecology Specialist from Kuala Lumpur General Hospital. This webinar was conducted via Zoom with the participation of 190 judicial officers.





8. Briefing to legal and judicial officers (L41) (new intake) on August 16, 2021 / *Taklimat kepada pegawai undang-undang (L41) (lantikan baharu) pada Ogos 16, 2021*

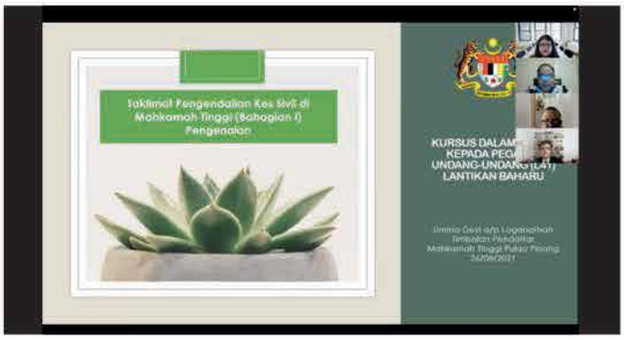
The Office of the Chief Registrar of the Federal Court ("CR's Office") had the opportunity to welcome 72 new officers in the 2021 intake. Before the new officers were to report for duty at their respective placement, induction briefings were conducted by the Strategic Development and Training Division. The briefings were conducted via Zoom on three separate occasions to cater to officer intakes respectively on August 16, 2021, September 1, 2021 and September 16, 2021. The briefings covered a variety of topics relating to the job scope of judicial officers. Among the topics covered are as follows:

1. Agency and Department Briefing by the Management Division;
2. Briefing on public service by the Human Resource Section;
3. Briefing on financial matters by the Finance Division;
4. Briefing on integrity of judicial officers by the Integrity Unit;
5. Briefing on HRMIS and MyPortfolio by the Management Division;
6. Briefing on ICT by the Information Technology Division;
7. Briefing on e-Court System by the e-Court Division;
8. Briefing on COVID-19 Standard Operating Procedure at workplace;
9. Briefing on protocol and etiquette by the Corporate Communication Division;
10. Briefing on civil case management by the e-Court Division and an experienced deputy registrar of the High Court; and
11. Briefing on criminal case management by the e-Court Division and an experienced magistrate.

9. Course on High Court case management for legal and judicial officers (L41) (new intake) on August 16, 2021 / *Kursus mengenai pengendalian kes di Mahkamah Tinggi bagi pegawai undang-undang (L41) (lantikan baharu) pada Ogos 16, 2021*

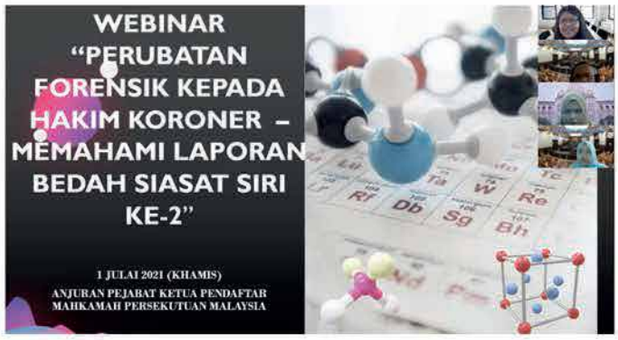
This course was conducted in view of the new norm adopted by the Judiciary particularly in conducting court proceedings using remote technology. The objective of this course was to expose the new intake of judicial officers to the method and procedure for civil and criminal case management using the Case Management System (CMS) in both civil and criminal procedure. It was held via Zoom on August 26-27, 2021 and covered the following topics:

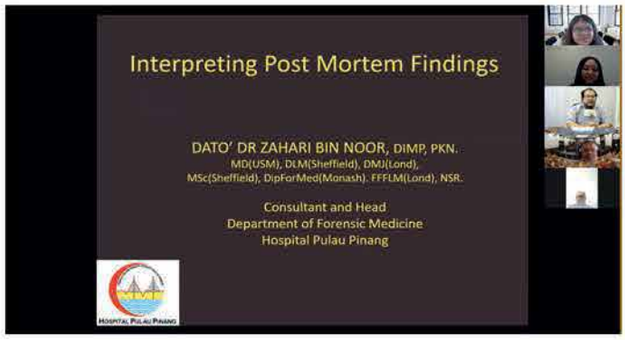
1. Briefing on Civil Case Management at High Court delivered by Puan Umma Devi a/p Loganathan (Deputy Registrar from High Court at Penang), Puan Raja Noor Adilla Raja Mahyaldin (Deputy Registrar from High Court at Shah Alam) and Tuan Amir Shah bin Amir Hassan (Deputy Registrar from High Court at Tawau);
2. Briefing on Civil Judgment Execution at High Court delivered by Puan Salamiah binti Salleh, Deputy Registrar from High Court at Kuala Lumpur;
3. Briefing on e-Lelong delivered by Tuan Lukman Hakim bin Abu Bakar Sedik, Deputy Registrar from e-Lelong Centre of High Court of Malaya; and
4. Briefing on Criminal Case Management at High Court delivered by Tuan Mahyudin bin Mohmad Som, Deputy Registrar from High Court at Kuala Lumpur.



10. Webinar on medical forensic to coroners – Understanding post mortem report (Part 2) / *Webinar perubatan forensik kepada hakim koroner – Memahami laporan bedah siasat (Siri 2)*

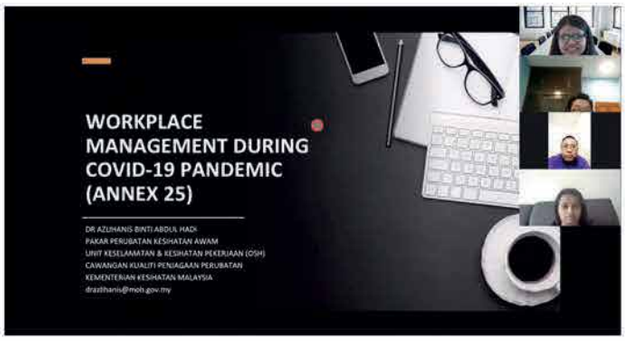
This was the second part of the webinar for coroners on the topic of medical forensic held on July 1, 2021. Dato' Dr Zahari bin Noor, Head of Medical Forensics Service from the Ministry of Health was invited again to continue sharing his knowledge focusing on the interpretation of post-mortem findings. 50 judicial officers consisting of Session Court judges, magistrates and coroners attended the webinar online via Zoom.





11. Webinar on COVID-19 preventive measures at workplace / *Webinar langkah-langkah pencegahan COVID-19 di tempat kerja*

As the country continues to fight the COVID-19 pandemic, the Judiciary is committed to ensuring a safe work environment for its judges, judicial officers and support staff and to preventing further spread of the virus. This webinar that was held on July 5, 2021 via Zoom had the objective of enlightening all members of the Judiciary regarding the vital COVID-19 preventive measures to be taken at the workplace. Dr Azlihanis binti Abdul Hadi, Public Health Specialist from the Ministry of Health was invited as the speaker to address the 457 participants in attendance.



12. Workshop on standard operating procedures (SOP) for court sheriffs and bailiffs 2021 / *Bengkel pemurnian tatacara operasi standard (SOP) sherif-sherif dan bailif-bailif mahkamah tahun 2021*

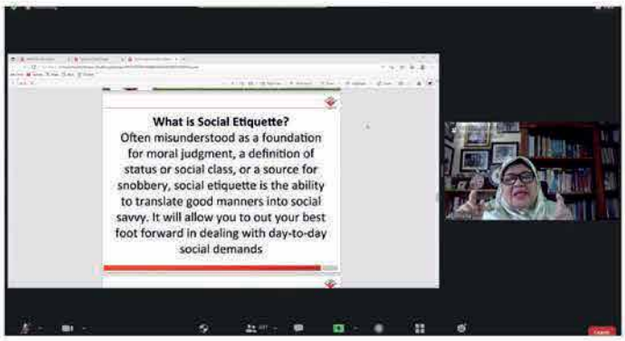
The Office of the Chief Registrar of the Federal Court realised the need to standardise the practice of court sheriffs and bailiffs in discharging their duties in respect of the execution of court orders. To this end, a comprehensive set of standard operating procedures ("SOP") was drafted. This workshop held on July 6, 2021 was conducted to further discuss and refine the SOP before the publishing of the final version. This course was attended by assistant registrars, senior assistant registrars and deputy registrars throughout Malaysia and facilitated by the Office of the Registrar of Subordinate Courts, the Office of the Registrar of the High Court of Malaya and the Policy and Legal Division.

13. English course for judicial officers in collaboration with British Council / *Kursus Bahasa Inggeris bagi pegawai kehakiman bersama dengan British Council*

The Office of the Chief Registrar of the Federal Court is committed to ensuring good proficiency of the English language among its officers in order to keep up with the demand of the ever-expanding judicial and legal service industry relating to law and development. Accordingly, this course was organised by the Strategic Development and Training Division in collaboration with the British Council with the objective of increasing the confidence and proficiency among judicial officers to communicate in English. The British Council developed a 15-hour module on business communication which was delivered by their professional trainers. 150 judicial officers registered for this course. The participants were divided into 10 groups with each group required to attend a 1.5 hour class weekly from June 2021 to August 2021. Assessments were conducted both before and after the module was delivered in order to keep track of the participants' performance. This course received good feedback from the participants.

14. Webinar on Social Etiquette / *Webinar Etiket Sosial*

This webinar was held on August 16, 2021 with the objective of familiarising judicial officers with social etiquette, particularly in discharging their duties professionally. It was conducted via Zoom with the participation of 418 judicial officers. Puan Hajah Rozita bt Hj Rahim, former Administrative and Diplomatic Officer was invited to share her expertise on this subject matter.

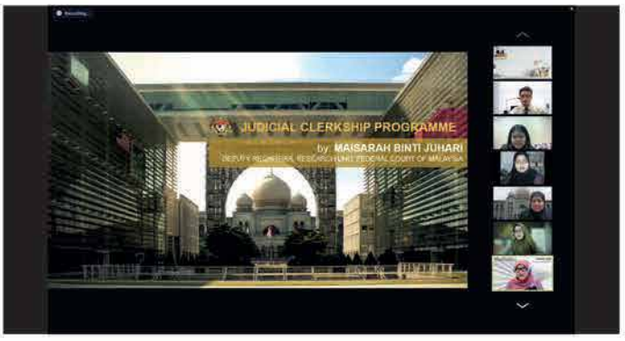


15. Sharing session by the Judiciary with final year law students from local universities / *Webinar sesi perkongsian ilmu oleh Badan Kehakiman Malaysia bersama pelajar tahun akhir undang-undang dari universiti-universiti tempatan*

This sharing session was organised as part of the Malaysian Judiciary's commitment to ensure that all stakeholders are well informed about the administration of justice system in Malaysia. To achieve that goal, the Malaysian Judiciary with the cooperation of the local universities organised a sharing session with final year law students. This sharing session was divided into two parts. Firstly, the final year law students were introduced to the e-Court system and the latest technological developments in the administration of courts throughout Malaysia after the COVID-19 pandemic. Secondly, explanation was given regarding the Judicial Clerkship Program by the Malaysian Judiciary which is open to law students/graduates in Malaysia to gain experience as Judicial Clerks under the supervision of superior court judges. Sharing sessions via Zoom had been successfully organised with the following local universities:

(1) MARA University of Technology / *Universiti Teknologi Mara* (UiTM)

Date
Speaker of 1st Session : November 12, 2021
: Tuan Mohd Faizal bin Ismail, Deputy Registrar, e-Court Division, Office of Chief Registrar of Federal Court ("CR's Office")
Speaker of 2nd Session : Puan Wan Aima Nadzihah binti Wan Sulaiman, Head of Research Unit, CR's Office



(2) Islamic Science University Malaysia / *Universiti Sains Islam Malaysia* (USIM)

Date : November 19, 2021
Speaker of 1st Session : Tuan Mohd Faizal bin Ismail, Deputy Registrar, e-Court Division, CR's Office
Speaker of 2nd Session : Puan Maisarah binti Juhari, Deputy Registrar / Research Officer, Research Unit, CR's Office

(3) Sultan Zainal Abidin University / *Universiti Sultan Zainal Abidin* (UniSZA)

Date : November 25, 2021
Speaker of 1st Session : Puan Norhanum binti Hassan, Deputy Registrar, e-Court Division, CR's Office
Speaker of 2nd Session : Puan Maisarah binti Juhari, Deputy Registrar / Research Officer, Research Unit, CR's Office

(4) Northern University of Malaysia / *Universiti Utara Malaysia* (UUM)

Date : November 25, 2021
Speaker of 1st Session : Puan Norhanum binti Hassan, Deputy Registrar, e-Court Division, CR's Office
Speaker of 2nd Session : Puan Wan Aima Nadzihah binti Wan Sulaiman, Head of Research Unit, CR's Office

(5) University of Malaya / *Universiti Malaya* (UM)

Date : December 9, 2021
Speaker of 1st Session : Puan Norhanum binti Hassan, Deputy Registrar, e-Court Division, CR's Office
Speaker of 2nd Session : Puan Maisarah binti Juhari, Deputy Registrar / Research Officer, Research Unit, CR's Office

(6) Multimedia University (MMU)

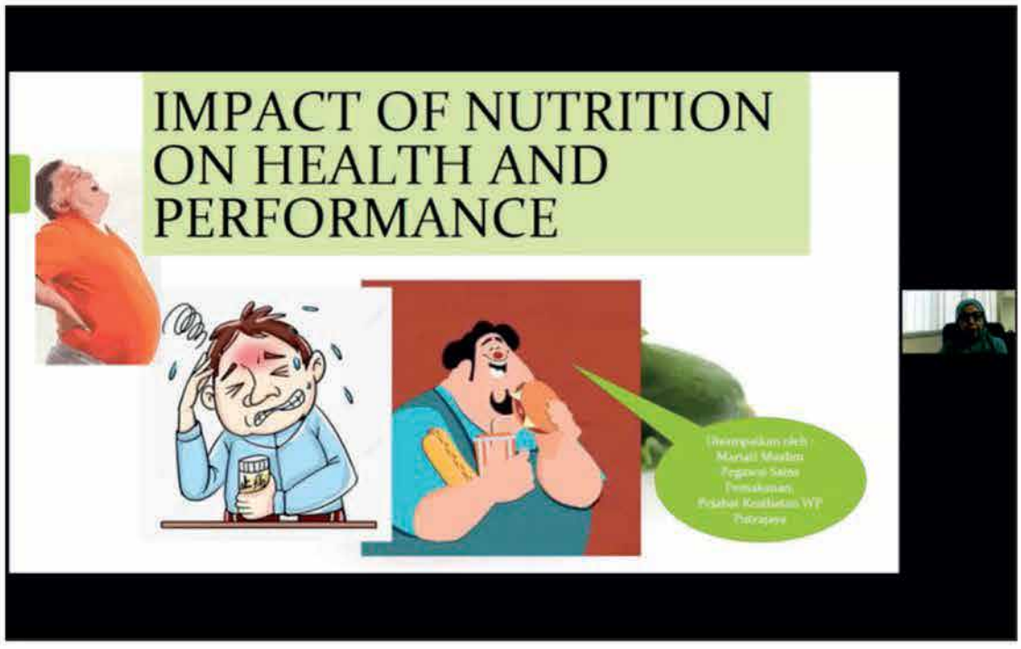
Date : December 10, 2021
Speaker of 1st Session : Tuan Mohd Faizal bin Ismail, Deputy Registrar, e-Court Division, CR's Office
Speaker of 2nd Session : Puan Wan Aima Nadzihah binti Wan Sulaiman, Head of Research Unit, CR's Office

(7) International Islamic University Malaysia (IIUM)

Date : December 16, 2021
Speaker of 1st Session : Puan Norhanum binti Hassan, Deputy Registrar, e-Court Division, CR's Office
Speaker of 2nd Session : Puan Maisarah binti Juhari, Deputy Registrar / Research Officer, Research Unit, CR's Office

16. Webinar on impact of nutrition on health and performance / *Webinar impak nutrisi terhadap kesihatan dan prestasi*

This webinar was conducted due to growing concern on the health and well-being of judicial officers indicated by the increasing cases of contracting chronic diseases relating to heart, blood pressure and sugar levels. The objective of this webinar was to create awareness among judicial officers on the importance of healthy lifestyles and balanced diets. This webinar was held on December 22, 2021 via Zoom with the participation of 190 judicial officers. Madam Mariati binti Muslim, Nutritionist Officer from Putrajaya Federal Territory Health Office was invited to share her expertise on the subject matter.



Courses organised by the Research Unit, Office of the Chief Registrar of the Federal Court

The following reports are on the courses organised by the Research Unit, Office of the Chief Registrar of the Federal Court in 2021.

SEMINAR ON CIVIL PROCEDURE AND READING JUDGMENTS

The Research Unit of the Office of the Chief Registrar organised a seminar on "Civil Procedure and Reading Judgments" which was delivered by Justice Tuan Tee Geok Hock, Judicial Commissioner from the High Court of Shah Alam on March 29, 2021. The intention behind the said course was to provide guidance on the important aspects of civil procedure and the reading of grounds of judgments in civil cases. The seminar was divided into two sessions: first, on the main policies and underlying features of the Rules of Court 2012, and second, on how to read grounds of judgments. The speaker listed down key policies embodied in the Rules of Court 2012 as guidance which covered the provisions pertaining to substantive justice, the need to save time or cost, the principles of natural justice, the importance of fair conduct of trials and interim measure of status quo, the importance of orderly and expeditious disposal of court cases and lastly, the administration of justice by the court in handling cases. In the second part of the seminar, Justice Tee elaborated that the purpose of reading judgments depends on the readers: their objectives would influence the practical steps needed to understand the judgment. In Justice Tee's observation, specifically in relation to judges and judicial officers – they read judgments to ascertain whether the statements on the principles quoted by the advocates are relevant to the material facts of the case at hand. Following that, he further explained, they also need to ascertain whether the quoted statement of principle has been overruled by a higher or apex court or whether there are any recent judgments which could change the position on the finding of the case they are currently dealing with. He stressed that it was essential to examine whether the quoted principles have been quoted correctly according to the factual context of the cited authority and if it constitutes the ratio decidendi which may bind the court deciding the present case. Justice Tee then concluded that the seminar was targeted at providing the audience a useful introduction to the art and skill of applying the rules of civil procedure and of reading court judgments. He believed that such skills cannot be gained in a matter of seconds. It is instead a life-long journey which requires consistent effort in learning and practising the skills while performing the functions and duties either as judges or judicial officers. To complete the purpose of the seminar, Justice Tee conducted legal case studies for all the participants to enhance their further understanding and application of the skill when reading judgments.

YA Tuan Tee Geok Hock, Judicial Commissioner of the High Court of Shah Alam delivering his lecture on "Civil Procedure and Reading Judgments" at Dewan Persidangan, Aras 4, Bangunan Annex, Mahkamah Syariah Putrajaya.

Some participants during the seminar on "Civil Procedure and Reading Judgments" conducted in hybrid mode.

Puan Wan Aima Nadzihah binti Wan Sulaiman, the Head of Research Unit of the Office of the Chief Registrar, Federal Court of Malaysia presenting a token of appreciation to YA Tuan Tee Geok Hock at the end of the seminar.

REMAND APPLICATIONS UNDER SECTION 4 OF THE PREVENTION OF CRIME ACT 1959

YA Datuk Vernon Ong Lam Kiat, Federal Court Judge delivering his lecture on the topic of "Remand Applications under Section 4 of the Prevention of Crime Act 1959 (POCA)" which took place from 2.30 p.m. – 4.30 p.m. on May 27, 2021 via Zoom.

The Research Unit in collaboration with the Strategic Development and Training Division of the Office of the Chief Registrar organised a webinar titled "Remand Applications under section 4 of the Prevention of Crime Act 1959" ("the webinar") on May 27, 2021, which was delivered by Justice Datuk Vernon Ong Lam Kiat, Judge of the Federal Court. The webinar was attended by judicial officers including magistrates from each court in Malaysia. The webinar was conducted in the form of "a dialogue session" between Justice Datuk Vernon Ong and all the participants on the issues relating to remand applications under section 4(1) of the Prevention of Crime Act 1959 ("POCA"). Justice Datuk Vernon Ong introduced POCA as the law passed by Parliament under Article 149 of the Federal Constitution ("FC") that may restrict the right to personal liberties guaranteed under Article 5 of the FC. Therefore, magistrates are duty-bound to exercise their discretion judicially to ensure all with before granting the remand order legal, procedural, and constitutional safeguards are strictly complied under section 4(1) of the POCA. This includes ensuring that the person produced before a magistrate for a remand under section 4(1) of the POCA is the person arrested under section 3(1) of the same Act and that such arrest was carried out in compliance with section 3 of the POCA, Article 5(3) of the FC, and section 28A of the Criminal Procedure Code.

Justice Datuk Vernon Ong referred to paragraphs 8 to 29 of his grounds of judgment in the Federal Court case of Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 CLJ 581. He then described paragraphs 23 to 29 of his grounds of judgment as the "guidelines" to grant a remand order under section 4(1) of the POCA. He subsequently invited all the magistrates to share their own experiences and challenges faced in hearing and handling remand applications under section 4(1) of the POCA. The part of the webinar was a question and answer session by the online participants with Justice Datuk Vernon Ong.

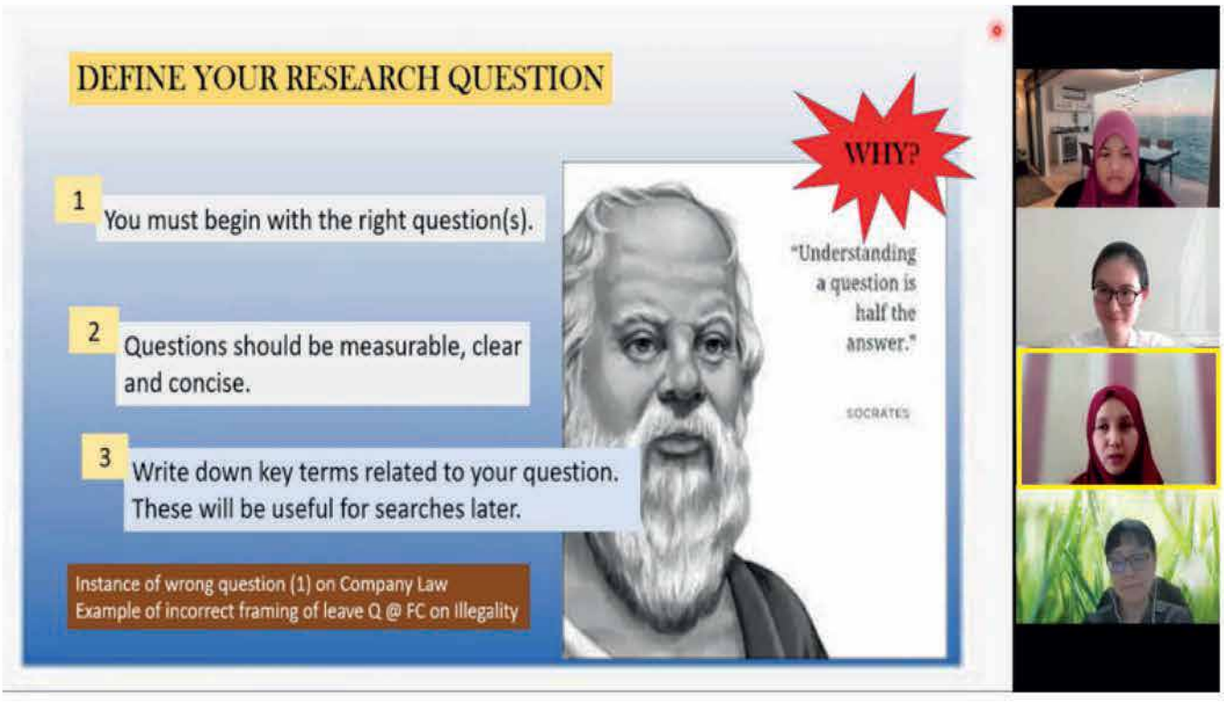
Group photo of speaker and online participants of the seminar entitled "Remand Applications under Section 4 of the Prevention of Crime Act 1959 (POCA)".

VIRTUAL BROWN BAG SESSION ON LEGAL RESEARCH (FEDERAL COURT)

The Research Unit together with the Registry of the Federal Court conducted an online seminar on legal research on June 24, 2021 which was attended by special officers and research officers to the Federal Court judges. The objective of this seminar was to share the knowledge and skills of the Research Unit officers pertaining to the processes, procedures and mechanisms applied in conducting legal research.

This seminar included two presentations by the officers of Research Unit. Firstly, Puan Joanne Tan Xin Ying presented on the topic of "The Research Process" where she explained the overall process of researching, beginning with finding the right sources or materials up to drafting write-ups. The speaker appealed to the participants to be a "READER" which is the abbreviation of Read the materials, Extract and Arrange the information, Discuss and Edit the relevant points and finally Resolve the issues or questions posted. In addition to the above, the speaker suggested tips and tricks to be applied in the research process including the usage of Google Scholar when there is lack of materials to refer to or as a "starter" and tricks in using the legal search engines and databases efficiently.

The second part of the seminar was presented by Dr Iriane Isabelo on "Reviewing and Analysing Research Materials: Descriptive vs Analytical." The speaker started by describing how to define research questions which involve coming up with the right questions as well as key terms to ease the research process. This was followed by methods of finding and reviewing research materials. According to the speaker, reviewing materials includes fast reading of the abstract to find out the theme as well as analysing literature review, the samples and variables used, the results and conclusion which will further allow the researcher to raise more questions. Apart from that, the speaker also encouraged participants to practise active reading which involves engaging, analysing, interpreting, evaluating as well as questioning the text and our own reading. At the same time, the speaker emphasised the importance of reflecting by ourselves while reading, understanding the content and interacting with the texts by taking notes, reflecting and raising objections to the ideas and evidence presented.



Slide of Dr Iriane binti Isabelo, Research Officer of the Research Unit delivering her talk on "What's Next? – Reviewing and Analysing Study Material: Descriptive v Analytical".

VIRTUAL BROWN BAG SESSION ON LEGAL RESEARCH (COURT OF APPEAL)

The Research Unit under the Chief Registrar's Office graciously hosted an online webinar titled "Virtual Brown Bag Session on Legal Research (Court of Appeal)" on June 10, 2021. The speakers for this webinar consisted of research officers and a judicial clerk from the Research Unit. The main objective of the webinar was to provide the participants an opportunity to share in the knowledge and skills required to conduct effective legal research. Puan Wan Aima Nadzihah binti Wan Sulaiman, the Head of the Research Unit, gave an eloquent talk on "Depth and breadth of legal research: fundamentals of legal research". In that brief yet purposeful talk, the speaker demonstrated the importance of having accurate legal research for the administration of justice. The speaker described the correct way to assess the problem, pose accurate questions, use precise tools and good strategies in research.

Following that, the second part of the program was presented by Puan Maisarah binti Juhari titled "Effective Legal Research Strategies in Written Submission: A Litigator's Perspective". The speaker provided plenty of food for thought about the way to construct effective legal research and strong legal writing. The speaker emphasised the importance of having accurate and powerful research strategies in drafting submissions. The third session was presented by Puan Nik Azlinda binti Nik Yusoff titled "Bailii.org – Quick Guide Summary". The speaker provided precise and enhanced guidance on accessing the free legal database to find useful sources for legal research. The fourth sharing session by Mr Ahmad Afiq bin Hasan was on "Optimization of Online Search Engine Searching Techniques – Basic Survival Skills and Systematic Outlined Response Guidance". The speaker expressed the importance of optimising the online legal databases when conducting legal research. The COVID-19 and the rapid advancement in knowledge-sharing technology requires a person to be skilful in assessing online databases or online resources when conducting legal research.The final speaker, Mr Prabakaran a/l Rajoo presented his sharing session entitled "Finding Your Case". In gist, the speaker explained the important guides in finding the relevant and/or material sources for effective legal research especially binding cases/authorities that are on point.

Group photo of some of the speakers and participants at the seminar "Virtual Brown Bag Session on Legal Research (Court of Appeal)" held virtually via Zoom.

SOME OBSERVATIONS ON THE USE OF ENGLISH CASES IN MALAYSIAN PUBLIC LAW

The Office of the Chief Justice in collaboration with the Research Unit of the Office of the Chief Registrar organised a talk on August 30, 2021 entitled "Some Observations on the Use of English Cases in Malaysian Public Law" which was delivered by Mr Shukri Shahizam, an intern to The Right Honourable The Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat. Mr Shukri is currently pursuing his PhD in Law at the London School of Economics and Political Science (LSE). The talk basically touched on the relationship and interaction between Malaysian law and the English common law in the sphere of public law. Mr Shukri further explained that his thesis was structured chronologically from Independence Day (Merdeka) till to date in order to observe the reception of English case precedents into Malaysian law, especially in judicial review matters. According to his observation, there was heavy reliance on English cases and principles in public law cases decided in Malaysia between 1976 to 1996, which he described as the middle period. However, the application of English cases in Malaysia was less prominent since 1996 onwards when Malaysian courts had developed its own interpretive method in developing constitutionalism, whilst the English law became more progressive. This occurred during the contemporary period till to date. Mr Shukri elaborated further that the reliance on English law can be fruitful since it is from a developed legal system with independent judges and is based on sources from the common law heritage. However, the courts and counsel must be cautious to ensure that there is no conflict in the underlying constitutional principles. In conclusion, he summarised that the Malaysian courts should not readily accept, but should modify or reject the English principles to reflect our own fundamental principles of the Federal Constitution.

Slide introducing the Moderator, Speaker and Master of Ceremonies of the Seminar.
(L-R): Mr Ezzamel Zarif bin Ahmed Zaharani, the Moderator (intern attached to the Right Honourable The Chief Justice of Malaysia); Mr Shukri Shahizam, the Speaker (intern attached to the Right Honourable The Chief Justice of Malaysia; and Ms Haritarshini G Selvaraj, the Master of Ceremonies (Research Officer of the Research Unit of the Federal Court).

Group photo of some of the participants, the Moderator and the Master of Ceremonies at the seminar "Some Observations on the use of English Cases in Malaysian public law" held virtually via Zoom.

CHAPTER

07

JUSTICE IN THE DIGITAL AGE

ACCESS TO JUSTICE DURING THE TIME OF COVID-19 PANDEMIC FROM THE JUDICIARY'S PERSPECTIVE

A paper delivered by Justice Nallini Pathmanathan, Judge of the Federal Court on 18 August 2021 at an online seminar on "Access to Justice during Pandemics" co-hosted by ASEAN Senior Law Officials Meeting (ASLOM) Malaysia (Attorney General's Chambers Malaysia) and the ASEAN Secretariat

Thank you very much for the kind introduction. I am grateful to the ASEAN Senior Law Officials Meeting (ASLOM) Malaysia (Attorney-General's Chambers Malaysia) and the ASEAN Secretariat for hosting this event on "Access to Justice during Pandemics" today. It is particularly gratifying to acknowledge the spirit of collaboration that is reflected by speakers and participants from the various parts of our justice system and the region of ASEAN as a whole.

In my allotted time, I propose to consider three different aspects of this topic in this jurisdiction:

(1) First, access to justice per se, and how such access is affected by this pandemic;
(2) Second, how the Judiciary dealt, and continues to deal with, access to justice up to the present;
(3) Third, how the justice system may well or should evolve, and its impact on access to justice.

1. Access to justice in the times of the COVID-19 pandemic

The starting point in Malaysia is that the courts have recognised the right of access to justice as a fundamental right under Article 5 of the Federal Constitution,[1] i.e. the right to life.

In order to comprehend how access to justice has been affected during the pandemic, it is important to first appreciate the reality of access to justice during pre-pandemic times.

Defining access to justice in its simplest terms, I understand it to mean that a person who is suffering hardship in one form or another:

(a) firstly, recognises that a legal issue is involved, or has access to someone who can identify, for his benefit, that a legal issue is involved;
(b) secondly, is able to obtain timely and affordable access to the level of legal help required, to put forward his case correctly and adequately;
(c) thirdly, gets a fair hearing before an impartial and educated adjudicator, so as to obtain a fair result and remedy to his problem;
(d) fourthly, is able to make the result and remedy a reality, which means the ability to enforce or obtain the benefit of the remedy in a timely manner.

1 *Public Prosecutor v Gan Boon Aun* [2017] 4 CLJ 41 at para [13].

With that definition, it is a harsh truth that large segments of our population, as is the case in many other countries, do not enjoy ready access to justice. As Jeremy Corbyn said: "Legal Aid is fundamental to giving everybody in this country access to justice."

Although we do have legal aid schemes in principle, the largest being the schemes funded by the government and the Bar, the bleak reality is that these schemes are simply insufficient to meet the needs of the population, as the thresholds for eligibility are at very low levels, such that persons who are just on the poverty line, and those in the lower middle class and middle class, do not qualify. And these latter groups cannot afford private legal representation.

Even if you manage to get to the courts, there is the issue of the complexity of adjudication and the length of legal proceedings, in both the civil and the criminal justice systems. The issues are even more acute in the latter. These include matters such as the role of prosecutors, how they perceive their objective and purpose, and the ability to procure adequate representation for the accused. There are also the problems of adequacy of sentencing, the need for prison reform and the rehabilitation of such persons back into society.

Now given that that is normality, you have to then extrapolate this base level to a pandemic scenario, where this level of access to justice is diminished significantly. And continues to be so.

The reality of this pandemic, as we have seen with schemes such as the White Flag campaign is, as Pablo Neruda put it so eloquently: ***"For Now, I ask no more than the Justice of Eating."***

All of us are well aware of the immediate consequences of the pandemic – the loss of lives, loss of employment, increase in suicides, mental health problems, domestic violence, child abuse, the problems faced by illegal immigrants – and it goes on. Many of these issues require access to justice.

So against this backdrop, a common scenario in many jurisdictions, how did the Judiciary deal with access to justice during the pandemic?

Essentially, we turned to technology which proved to be pivotal and crucial to enable access to justice.

2. Measures taken by the Judiciary

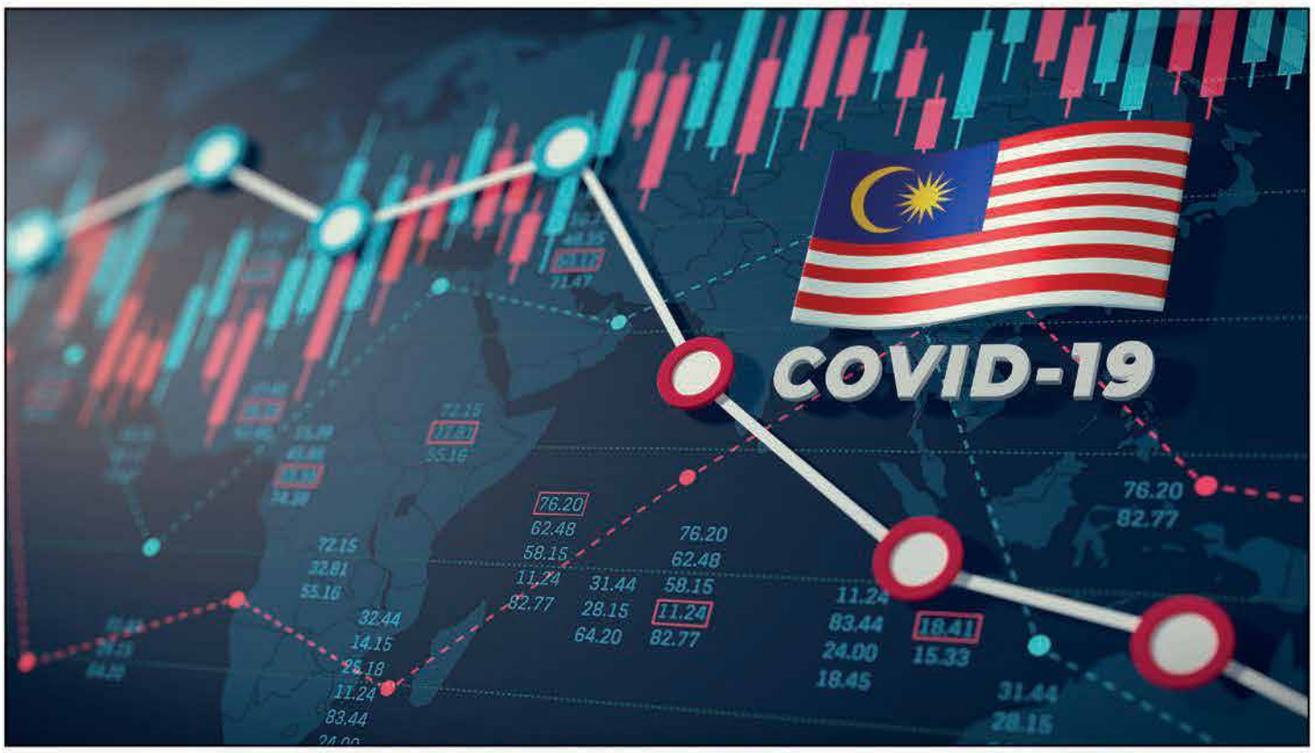
The onset of the pandemic for us commenced in March 2020 – the Government of Malaysia acted under the Prevention of Infectious Diseases Act 1988 to put in place protective measures. We were fortunate that we already had in place digitalisation of court proceedings to some extent. Technology has been introduced to the Malaysian Judiciary since 2009 onwards.

March 18, 2020 to May 3, 2020 ("the first phase")

The first phase was the Movement Control Order which took effect from March 18, 2020 to May 3, 2020. It was a complete lockdown and the courts were not at that juncture listed as an "essential service". The court buildings were closed, but the Honourable Chief Justice, being acutely aware of the need for access to justice, ensured that avenues for redress in urgent matters remained available. Comprehensive standard operating procedures for the courts were issued in the form of guidelines, which dealt with both the form and substance of the administration of justice.

On the civil front, matters of urgency such as injunctions, and warrants of arrest in admiralty matters continued to be issued. These matters were dealt with by way of remote hearings. By remote, I refer to:

(a) audio – which means telephone;
(b) visual – which means video conferencing; and
(c) paper hearings – which encompass email exchanges and entire proceedings in writing.



In criminal matters, remand applications, which comprise an "essential service" continued to be heard by magistrates. These young adjudicators physically travelled to remand centres and prisons to carry out their duties, to their great credit.

The Judiciary also recommended amendments to relevant laws to allow for direct legislative sanction for online hearings without having to base it on the consent of parties to facilitate. Such legislation however, only came into effect in October 2020. So in the interval, and even now, we had to contend with considerable reluctance, unwillingness and averseness to this different mode of conducting proceedings from the other stakeholders.

Notwithstanding this, April 23, 2020 was historic, as it was the date the Court of Appeal held its first online appeal which was live-streamed and viewed nationwide. This marked the beginning of appellate hearings online.

May 4, 2020 to June 9, 2020 ("the second phase")

The Conditional Movement Control Order phase took effect from May 4, 2020 to June 9, 2020, marking the second phase. Restrictions were relaxed, the courts re-opened partially and resumed operations throughout the country in several stages. The requisite safeguards of social distancing, temperature measures, sanitising, staggered time for physical hearings and a reduction in the number of cases per day, etc. were all put in force. However, those not physically in court continued to rely on technology and worked from home, online.

June 10, 2020 to March 31, 2021 ("the third phase")

The third phase, the Recovery Movement Control Order phase, began on June 10, 2020, with the anticipation that we would achieve normality in due course. During this phase the Chief Justice announced that all courts resume full operations with effect from July 1, 2020 but again, subject to strict standard operating procedures.

January 11, 2021 to May 31, 2021 ("the fourth phase")

Unfortunately, the Recovery Movement Control Order had to be suspended and we reverted to the Phase Two Conditional Movement Control Order from January 2021, due to the surge in COVID-19 cases in Selangor, Sabah and the Federal Territories. This surge later extended to the rest of the country. The courts continued with their restricted physical operations and emphasis was placed on online hearings.

June 1, 2021 to June 28, 2021 and the National Recovery Plan until December 31, 2021 ("the fifth phase")

In view of the exponential rise in cases, we had been moving spasmodically between phases. We were at this stage at peak levels.

This meant that we were almost wholly reliant on technology for most areas of work, save for criminal matters. All of us, including judges at all levels work from home, save for judges on the criminal circuit who operated from the courts.

The greatest advance made during this difficult time has been the ability to transition from physical court trials to online trials. You will recall that interlocutory matters and appellate matters were not a problem even from the onset by reason of the limited number of persons involved in the process. Trials are completely different. The need to incorporate witnesses, interpreters and a series of other actors multiplies the need to plan and strategise the logistics for a trial. However, we are succeeding to a considerable extent and although it is not an answer to all trials, some of which may still need to be conducted physically, we have come very far indeed in implementing online trials. I can speak in particular of the commercial courts in Kuala Lumpur where most of the judges carry out their work almost completely online.

Statistics

To give you an idea of how we have fared during this difficult period, it would be instructive to look at two sets of figures:

(i) First, a comparison between our performance prior to the pandemic and our performance now; and
(ii) Second, a rough assessment of the degree to which we have moved from physical to online disposal based on the number of matters disposed of online during the pandemic.

(i) Disposals During the Pandemic

Between 2019 and 2020

In terms of disposals between 2019 and 2020 – the appellate courts saw no discernible effects from the pandemic as the Federal Court improved its performance and the Court of Appeal saw only a 2% difference in disposals in both civil and criminal cases.

The High Court saw a slightly more appreciable difference of 5% reduction in civil matters and 10% in criminal matters. The subordinate courts which deal with the bulk of the matters in the country however saw a distinct reduction in disposal rates as figures fell by about 50%.

Between 2020 to date in 2021

The number of cases disposed of this year are still being computed. But given the length of the very restrictive movement orders we experienced in view of the huge increase in the spread of the disease, our disposal rates did decrease rather substantially. As we transition into more online disposals, it remains to be seen if the backlog, particularly in relation to criminal matters, will indeed decrease.

(ii) Approximate percentage of cases disposed of online

Between March 2021 to June 2021 when we were far more in lockdown the performance of the Federal Court moved further into an online mode – 29% of the civil matters were heard physically while 38% or more were dealt with online. At present we are completely online for all civil cases. Only criminal matters are heard physically. Our backlog lies there.

The Court of Appeal shows a similar move although civil matters are evenly balanced, while many more criminal matters have moved onto an online mode of hearing.

The High Court throughout the country has not shown such a great transition percentage wise, but this can be attributed to the fact that it is only recently that the courts have begun to conduct online trials. That has required a great deal more work than appellate work as one has to deal with numerous third parties, particularly witnesses. We were particularly challenged by the movement control orders which at the early stages precluded even lawyers from operating from their offices. That has now changed and we hope to see a transition there too. However, the bulk of cases there have been physically disposed of.

Perhaps the exception is in Kuala Lumpur, particularly the Commercial Division which traditionally leads the way. As of this year, virtually all hearings have been conducted online entirely, both interlocutory hearings, appeals and now even trials. This establishes that the use of digital technology and virtual courts has been essential for access to justice.

In *Peninsular Malaysia* the percentage of civil disposals dealt with online between 2020 and 2021 etc was 16.7%. Surprisingly, the percentage of criminal disposals was higher, 37.9%.

In *Sabah and Sarawak* the percentage of civil disposals during 2021 when all cases were dealt with online, amounted to 48% and 22% respectively. It is clear that Sabah is well on its way to transitioning to virtual hearings and courts. The figures are considerably lower for criminal matters – 28% in Sabah and 9.4% in Sarawak as physical presence is preferred for these matters.

The subordinate courts have seen a greater transition, the sessions court numbers indicating an even spread between physical and online hearings while the number of online hearings is increasing. The magistrate's court also shows a clear transition towards online hearings. So the trend is clear.

Now is that a good thing or not?

3. Delivering justice during the pandemic and the future use of technology – Its impact on access to justice

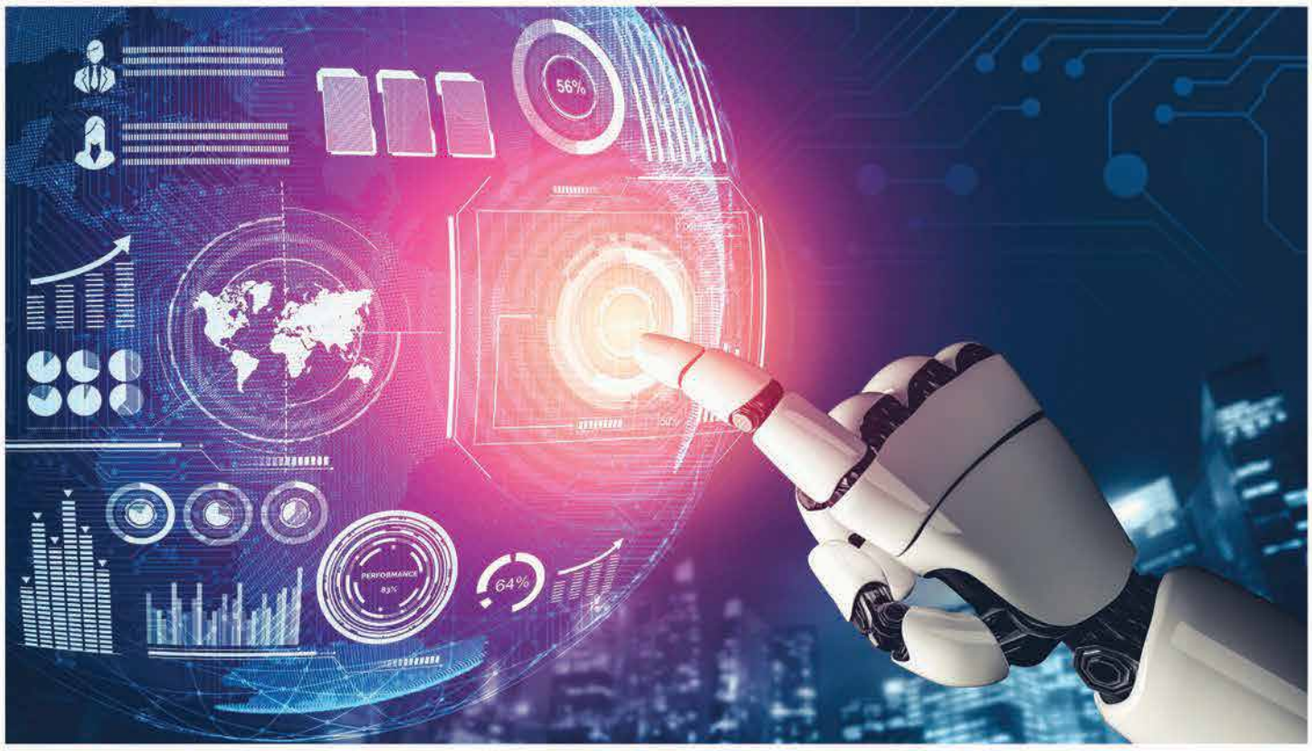
The speed at which the COVID-19 virus mutates and adapts itself to survive, notwithstanding vaccines designed to defeat it, provides a foretaste of the manner and speed at which the courts and judicial systems need to adapt in order to remain relevant in a fast digitalising and pandemic-driven world. As we go in and out of phases of being in lockdown and then released, we have shuttled between digital and physical hearings at the behest of the virus. Surely it is now time, even as the pandemic rages and wanes spasmodically, to reflect on and perhaps accept that this medium of court hearings, namely remote or virtual hearings, is here to stay.

As Albert Einstein famously said – *"The measure of intelligence is the ability to change"*.

However, the manner in which most courts across jurisdictions have approached the need for technology during the pandemic has been to adapt such technology to meet the traditional manner in which we conduct litigation in our courts. What we have not done is to adapt the adjectival or procedural aspects of the judicial process as they currently exist (and have existed since time immemorial), to meet the needs of the digitalised world as it has evolved and now subsists.

We should recognise that we are on the cusp of an evolution in terms of how justice is administered, and how access to justice is maintained and enhanced.

The first hurdle (which has been amply pointed out by renowned writers such as Susskind) is the need for the actors in the field of law, i.e. lawyers and judges, to be open to changes in the concepts, as well as the manner of providing a system of justice that affords true access to the litigants. In short, a change in mindset.



The way in which the legal system works formally, has over the centuries, been literally engraved into our legal and judicial ethos and culture to the point that if litigation is not conducted in the manner we are used to, we feel that it amounts to a derogation of substantive justice. But is that true? Or are we deceived by our own need to adhere to a familiar and comfortable system of adjudication that has survived over centuries?

We look to phrases like the majesty of the law, we look to our courtrooms, our robes, where we sit, to rue and disparage the new paradigm shift to the virtual courtroom. The question however is whether these matters constitute the essential elements of justice, the administration of justice or access to justice.

Are the requirements of a physical building, the physical presence of the actors, namely the judges sitting at their elevated Benches, lawyers submitting below from the Bar, witnesses being physically present in the witness box and litigants physically observing the proceedings, so essential to the administration of justice, that justice is somehow endangered without these physical elements? In other words, is the traditional mode of conduct of dispute resolution the only acceptable means of achieving justice?

The rule of law and virtual courts

Surely not. To my mind, *the test to be adopted in ascertaining whether justice is jeopardised is analysing whether such changes would endanger the core elements of justice and its administration*, as envisaged under the rule of law.

The *rule of law* necessarily means different things to different people globally. But for the purposes of the digitalisation of the courts, virtual courts and remote hearings, the issue of whether the "thin" version of the rule of law is jeopardised, suffices. (The "thick" version encompasses complex principles such as democracy and human rights which deviate from country to country.)

The thin version focuses on procedural fairness and ensuring that court processes adhere to a minimum standard, meaning for example, that the rules of natural justice are complied with and the essentials of a fair trial are complied with. This is guaranteed under our Federal Constitution and is sufficient to instil public confidence in the legal system.

While there is no definitive set of rules, the following aspects are indicia of *compliance with the rule of law in the context of a virtual medium*:

(a) *Open justice* may be ensured in the form of livestreaming or giving access to persons who wish to observe proceedings, apart from the litigants themselves;
(b) *Equal access by all parties*, equal treatment of and respect for participants – which means all participants enjoy an equal level of accessibility, security without undue inconvenience or cost;
(c) *Compliance with the rules of natural justice*, meaning that parties have, for example, access to legal advice and evidence, records and documents utilised throughout the court process;
(d) *An independent legal profession* that is equipped to cope with the new medium and able to provide advice to ordinary citizens at a level which is sufficient to be useful to a technologically advanced society at a cost that is not unduly prohibitive;
(e) *An independent judiciary* which is also conversant with functioning in a paperless virtual medium.

Given these indicia, it follows that the use of remote technology does accord the opportunity to litigants and their counsel to procure the attendance and examination as well as cross-examination of witnesses in conditions that are equivalent for all the parties to the dispute. And it is that which comprises the heart of procedural fairness and thereby the *rule of law*.

Early reports and even critics today object to, and criticise the use of remote hearings, and its impact on fairness. Such criticism ranges from matters like the difficulty in engaging in the proceedings, assessing demeanour, feelings of alienation, distorted gestures, and a generally weaker standard of communication, which affects the assessment of evidence, etc. Difficulties in taking instructions remotely, difficulty of rapport building between counsel and the Bench or counsel and their clients resulted in reports that virtual hearings amounted to an effectively second-rate experience. These matters constitute a summary of common initial reactions. The reality however is that there is little empirical or scientific data to support these grievances.

Nevertheless, with the increased use of remote hearings what has become apparent is that:

(a) The use of technology actually increases access to justice – the reality is that many citizens do have access to technology and are relatively well versed and comfortable with it and therefore prefer some distance from the courtroom and the judge. The courtroom is often far more daunting than a remote hearing;
(b) The use of good quality technology eases a great many of the initial complaints – there is in actuality a better opportunity to assess a witness's demeanour and credibility as the camera is able to focus more closely on a witness than in a traditional courtroom where the judge is farther away, as are counsel;
(c) "Tricks" such as breakdowns disrupting an important point in cross-examination are recognised as attempts to avoid a question;
(d) The use of audiovisual links is a great levelling tool. It enhances confidence and reduces anxiety and tension for counsel and litigants, particularly litigants in person. As for the majesty of the law, that lies in the ability of a litigant to have his grievance heard and effective redress given within a reasonable time. Less so in the formality of procedure and form.

Having said that, it must be accepted that remote hearings may not be ideal for litigants who are vulnerable or have disabilities who may need to be heard physically. Certainly immigration, criminal and family matters come to mind in this context.

But the inevitable conclusion that follows rationally through is that the transition to remote hearings does not of itself, presage jeopardy or risk to the rule of law which is the fundamental basis on which the provision of justice rests.

The need to use technology to increase access to justice for the general population

Once it is accepted that the use of remote hearings does not jeopardise the *rule of law*, the need for innovation and adaptation to the new medium becomes inevitable. When one speaks of innovation, i.e. creation and adaptation, one has to envisage and consider new methods of working so as to resolve perennial problems, like access to justice.

Allow me to project on an idealistic basis to the future of a technologically driven environment which facilitates access to justice: Today, more people have access to a smart phone than ever before – be it in remote or urban areas. If a person with a grievance is able to communicate his problem by use of technology, i.e. a smartphone, to a central body in his village, district, etc. which has been set up as the first stage of government-assisted legal aid (whether by the use of artificial intelligence ("AI") or otherwise) and can have his problem navigated to the correct channels, then he will be heard and will be told if it is indeed a problem that requires resolution legally. Adequate legal aid centres placed strategically to deal with such problems should be provided to enable and facilitate the lodging or filing of cases at the correct tribunals to enable the aggrieved person to take his complaint to the correct adjudicator.

In a simple case, eventually AI may even assist the aggrieved person as to what his legal complaint is, where it is to be taken, the prospects of success and assistance to effect such a claim. Alternatively, mediation may be suggested and that avenue pursued. This is for the future, but perhaps not as far away as we think.

We should recognise that the single most important feature of technology in jurisdictions such as ours is that it affords a basis to support those large segments of the population who have no access to justice presently, with an opportunity to be heard and to procure a remedy for their particular grievance, simply by using technology available to them.

Conclusion

In conclusion, coming back to the present, it appears to be inevitable that remote or virtual hearings have been reasonably successful in coping with the pandemic. The pandemic however does not seem to be going away for good and it cannot confidently be assumed that normality as we knew it in 2019 will be restored.

There is no reason why the optimal aspects of technology should not continue beyond the pandemic. While there are serious concerns with regard to the potential for unfairness to prevail in certain types of cases, these concerns can be addressed for the larger range of complaints and claims within the community. As such the best approach at this juncture, would be to learn, innovate and evolve on a daily basis, while monitoring virtual proceedings to ensure that the fundamentals of the rule of law are maintained.

What is needed from all stakeholders in their quest for an ideal system of access to justice is for them to comprehend and accept that technology provides us a new and exciting way in which to facilitate access to justice. This will require us to adopt a case specific approach and practice which draws on judicial wisdom and discretion to innovate practical solutions which are not readily found in a textbook, and which provides that all-important fundamental, access to justice.

After all, as stakeholders in the justice system, in one form or another, we have a duty, both professional and honourable (a most unfashionable word these days) to serve the needs of all segments of our society – the poor, the rich, the under-represented, the popular, the unpopular, the wronged and those who wrong – without discrimination but in accordance with our code of ethics, to ensure that all of society enjoys equal access to justice, not just a favoured few.

CHALLENGES FACED BY JUDICIAL OFFICERS DURING THE PANDEMIC

A. INTRODUCTION

The novel Coronavirus ("COVID-19") epidemic first broke out in Wuhan, China in December 2019 and had since then, rapidly spread to the rest of the world. By March of 2020, countries all over the world were already in lockdowns, including Malaysia.

On the March 16, 2020, Malaysia's 8th Prime Minister announced the Movement Control Order ("MCO") which commenced on March 18, 2020, where everyone was told to "stay at home" in order to prevent further spread of the virus. When we packed our bags and locked our offices on March 17, 2020 and were instructed to "work from home", it was a totally new concept that we got used to in no time.

The COVID-19 pandemic has undeniably necessitated many unprecedented events and changes to the Judiciary and the operation of the courts specifically. The impact of the outbreak on court operations and the whole justice system was indeed huge at the outset; from the closing of some courts, suspending trials and the sudden shift to remote hearings.

Given the evolving situation which moved at lightning speed, there was an urgent need for the Judiciary to adapt without discriminating the interests of justice and rights of the people. Maintaining access to justice and enabling the people to exercise their rights and have effective participation in the legal system had never been more important.

The Judiciary as well as the judicial officers had the same aim; which was to maintain service to the public as well as to ensure hearings could proceed as normal with appropriate precautions being taken.

Every effort was made to maintain a continuing functioning court system. However, in the process of delivering justice in these unprecedented times, judicial officers were also affected by the shifts and necessary adjustments to face the new norms. Be that as it may, like most aspects of life, the Judiciary and the judicial officers adjusted and came up with solutions.

In response to these unforeseeable circumstances, the Judiciary proposed amendments to three main legislation, namely the Courts of Judicature Act 1964 [Act 91], the Subordinate Courts Act 1948 [Act 92] and the Subordinate Courts Rules Act 1955 [Act 55], to allow civil and criminal proceedings to be heard through remote hearings.

Amendments were also made to the Rules of Court 2012, the Rules of the Federal Court 1995 and the Rules of the Court of Appeal 1994 in relation to the conduct of cases through online hearings. Practice Directions and guidelines were also issued with effect from January 2021 to better assist court officers, legal practitioners as well as the public.

B. CHALLENGES

Judicial officers faced some major challenges in the early stages of the pandemic. Due to the MCO that was imposed, most of our cases had to be postponed and that led to a backlog of cases. Initially, there were no real guidelines to direct court officers as to how to conduct cases through remote hearings. Furthermore, there was no standard form or system of communication to inform the public and lawyers of the status of their cases. This was especially prevalent in district courts where the online system of case management (i.e. the e-Review) had not been implemented. As a result of this, the courts received numerous emails and calls from the public, asking about their cases.

However, the judicial officers in the Kuala Lumpur courts were grateful because the Judiciary had implemented the online system way before the pandemic kicked in, especially the e-Review and the e-filing system for both civil and criminal cases. At the very least, new cases could be conducted remotely from home. Official emails for each court were also introduced to assist lawyers and public in queries regarding their cases. In this regard, the Judiciary had taken a proactive approach rather than a reactive one to cater to the unexpected situation to ensure the administration of justice was uncompromised.

With the implementation of remote hearings, the courts could at least move forward to hear cases. However, as with any new approach, it came with its own set of problems.

i. Allegations of witness coaching

Firstly, the concerns over allegations of witness coaching. The main feature of online hearings and trials was that parties did not need to be physically present in court for the case to proceed. As such, parties would either choose to situate themselves in their firm's office or any other premises they deemed suitable. As the judge was not present with counsel and witnesses, counsel had this general mistrust towards their opponents as they believed that counsel may assist their witnesses whilst giving evidence because there was no one monitoring the witnesses physically. Considering the constraints that prevented the courts from holding a physical trial in the first place, counsel were advised to assign a representative to be present at the opponent's firm (or whichever location that had been designated) to act as an observer on behalf of the court.

ii. Uncertainties regarding the mode and conduct of part-heard cases via hybrid trials

Secondly, the confusions arising from how to conduct hybrid trials. The issue here was how to address part-heard cases that had earlier been heard in open court but were going to proceed online. Prior to the pandemic, the concept of hybrid trials was unheard of and as such, the concept seemed completely impossible to be carried out. However, once the relevant Practice Directions were issued and all the teething issues were addressed, we could see that the transition from physical to online trials could be done seamlessly.

iii. Uncertainty regarding the procedures to tender part C documents

Thirdly, the procedures on tendering part C documents. With regard to this issue, there is still no clear solution to address the problem as to how original documents can be produced via the Zoom platform. As of now, one of the methods adopted is by fixing physical attendance in court either before or after a trial for both parties to produce the original documents for verification. If parties are not agreeable to this approach, the last resort would be to have a physical trial in open court.

iv. Reluctance of parties to adopt the new normal of online hearings and trials

Fourthly, the reluctance of parties to shift to online hearings and trials. In the beginning, as there was no framework or legal provision that allowed cases to be heard online or through remote hearing, judicial officers faced strong objections from legal practitioners to proceed with their cases by remote hearing. Continuous consultations and persuasions were needed to convince counsel to proceed with remote hearing rather than repeatedly postponing their cases. It was only after the necessary amendments were made to the law to provide for remote hearings that the legal practitioners slowly started accepting the fact that remote hearing is the new normal and they need to take proactive steps to keep up with the courts. The Rt. Hon. Tengku Maimun in her speech at the Opening of the Legal Year 2022 succinctly stated as follows:

Speaking of "zooming in", virtual courts have now become an indelible aspect of our system of advocacy. I say indelible because some have queried when and whether the judiciary will be reverting to physical hearings as the norm. I wish to make it clear that the judiciary has always embarked on technological advancements and online or virtual hearings mark our progress in this direction. The advent of online hearings is not merely a means to cope with the pandemic but a permanent feature of our justice system. There is, therefore, no questions of reverting.

v. Lack of facilities

Another challenge faced by judicial officers was the lack of facilities to conduct online cases from home. In the early stages of the lockdown, judicial officers could not really proceed with cases as most thought that the lockdown would only last two weeks and therefore case files for matters set beyond that two-week period were not brought home. There were also situations where judicial officers had to share their devices with their children as the children had to attend their school via online learning as well.

As time passed, several restrictions were lifted and although the judicial officers thought they were allowed to go to the office to take the necessary files to proceed with their cases, other problems arose such as not being able to cross inter-district from one red zone to another. Permission letters had to be issued and lengthy explanations had to be provided to the police at roadblocks in order to gain passage to the office. This process was very tedious and in the end most just opted to make do with what they had, while others continually postponed cases in the hope that the situation would improve.

Despite the amendments and all efforts taken to get used to remote hearings and trials, the judicial officers also faced numerous postponement requests, this time on the basis of justice and in the interests of their clients. Judicial officers had to stand firm and persuade parties to at least try to use remote hearing as the alternative to postponing cases indefinitely as this was also a hindrance to the administration of justice. Justice delayed is indeed justice denied.

In time, we could see that everyone was more open to the idea of conducting hearings online as they appreciated the ease of not having to travel for their court matters. Although there was still a certain level of reluctance to use online trials, it was definitely an improvement as compared to how it was in the beginning.

When the civil courts were physically opened in mid-2020, judicial officers had no choice but to go on with remote hearings and trials. However, numerous letters asking for postponements were still sent by lawyers, quoting the same excuse of "lack of facilities" as their main reason for not opting for online hearings and trials; also saying that they would still prefer physical attendance in court. This reason was acceptable in the early stages of the pandemic and lockdowns where everyone was told to stay at home and all offices were closed. However, after law firms were given the permission to operate, judicial officers had to put their foot down and not allow the postponements sought.

vi. Lack of knowledge on how to conduct online hearings or trials

Besides the lack of facilities, the lack of knowledge on conducting online hearings was also an obstacle. Court officers and the lawyers were learning on the go on how to use applications such as Zoom and Google Meet for purposes of remote hearings and trials.

Even with the Practice Directions issued by the courts, it was only when the actual cases were conducted online did the directions or practices to be adopted to ensure the proceedings would run smoothly recognised. A token of appreciation is due to the Chief Register's Office for always taking in feedback from the court officers on the issues faced when conducting remote/online hearings. New directions were issued almost every other week to address the various questions or situations raised by all parties.

We also saw the challenges faced by the legal practitioners in shifting to remote hearing. Most of the time, the judicial officer or staff had to invest their time to assist counsel on how to access the remote hearings. In the beginning, the courts had even taken the extra initiative to conduct mock sessions before the actual trial/hearing date in which the judicial officer or staff would teach the lawyers the features of the Zoom application. Credit is definitely due to all the senior assistant registrars, assistant registrars and interpreters for taking the time in this endeavour as it greatly assisted the court in ensuring that hearings/trials proceeded smoothly on the actual court dates. Once the lawyers had learnt the new mode, they could be seen to be even more proficient and efficient in conducting their cases online.

vii. Difficulty to maintain work-life balance

Other than the challenges faced in carrying out daily work commitments, challenges also arose in the judicial officers' personal lives during this pandemic. As everyone was confined to their residences, they had no choice but to convert their living space into working space too. This made it difficult to relax and switch off at the end of the day, and maintaining a healthy work-life balance became a challenge. When your office is in your home, the lines between work and personal life becomes blurred, and it's easy to over-work yourself. The boundaries between work and life are crucial for mental health and overall happiness, so a successful work-life balance should be a priority to help court officers thrive.

Having a separate workspace in your home (ideally with its own door) helps each person to focus during office hours and then mentally disconnect from work at the end of the day. Superiors should also set an example of a healthy work-life balance by respecting the set working hours, as long as subordinates are able to deliver their work according to deadlines. Take time off to recharge when you need it, and empower junior officers to do the same. Discuss strategies to establish balance at work, including prioritising, time management and calendar blocking.

Superiors should monitor how much time officers are actually spending at work. While overtime can play an important role in finishing a daily work routine, it needs to be balanced against ensuring a proper work-life balance is maintained. Where possible, access to a physical workplace (court) should be offered as this would allow officers to escape home-based distractions.

C. CONCLUSION

To sum it all up, the extended regulations on lockdown or stay-at-home orders imposed during the pandemic were dramatic and severe. Even with the extensive restrictions and measures in place, this public health crisis does not look like it will end at any time soon.

This extraordinary situation poses special threats and challenges to the justice systems as a whole around the world including to judges, judicial officers and lawyers. All parties have to play their part to ensure the effectiveness and independence of the court system is maintained while sustaining access to justice without any delay. This is most crucial, as the right to a fair trial is applicable to both civil and criminal proceedings.

Overall, we could see that the Judiciary has made advancements in leaps and bounds to modernise the system of administering justice while navigating the challenges faced during this pandemic. By taking the steps stated above, not only has the Judiciary managed to counter the problem of disposal of cases but it has also opened a huge possibility of conducting cases in a new way in which parties do not necessarily need to be in the same physical location in order for a case to be heard. This can support situations where parties may have to fork out a huge amount of money to bring in expert witnesses from abroad where we do not have the experts here locally. By opting for remote trials or remote hybrid trials, parties are now able to mitigate their costs as the foreign experts can give their statements in court while in actuality, the expert witnesses are in the comforts of their own home/office in their home country.

Judicial officers now can also handle more cases and matters in a day as they do not need to allocate extra time for counsel to travel from one court to another. Court documents now are all available online, so work can still continue even if the country were ordered to go under another lockdown or if an officer is required to be under home quarantine.

Summarising broadly, e-judiciary is a step towards modernisation of the Malaysian legal system. Despite many challenges faced from various aspects, it is undeniably the most effective way or tool to reduce dependency on cases being conducted physically and also to reduce unnecessary delay. A lot of effort has been put in by all parties, and if we all continue to work together we can achieve so much more.

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Civil Magistrates' Court Kuala Lumpur

CHAPTER 08

SPECIAL FEATURES

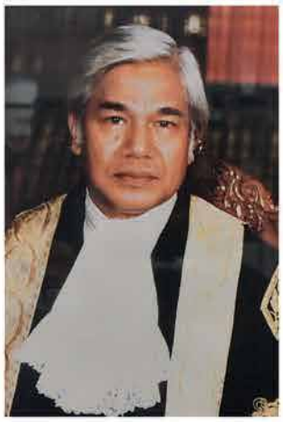
FORMER LORD PRESIDENTS/ CHIEF JUSTICES OF MALAYSIA (1963 – PRESENT)

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)

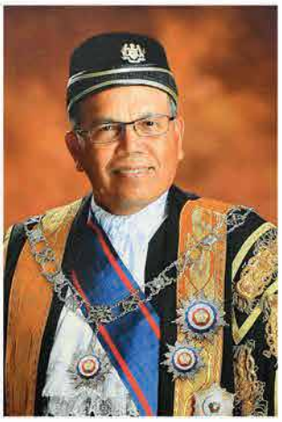
THE RT. HON. TUN DATO' SERI MOHAMED DZAIDDIN ABDULLAH
20 December 2000 – 14 March 2003
(THE 3RD CHIEF JUSTICE)

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)

TUN DATO' SERI HJ MOHD EUSOFF BIN CHIN

By Azizul A Adnan J

Tun Hj Mohd Eusoff bin Chin was the second Chief Justice of Malaysia (the eighth head of the Malaysian Judiciary). He was appointed as Chief Justice on September 25, 1994 following the retirement of Tun Abdul Hamid bin Omar. He has the distinction of being the longest serving Chief Justice, holding office for a period of six years and 86 days. (The longest serving head of the Malaysian Judiciary nevertheless remains Tun Mohamed Suffian bin Haji Mohamed Hashim, who served eight years and 195 days as Lord President.)

During his tenure as Chief Justice, Tun Mohd Eusoff oversaw a period in the history of the Judiciary that may fairly be described as tumultuous, when the relationship between the Bar and the Bench was at its lowest ebb. He will be inescapably associated with the events that culminated in the Royal Commission of Inquiry into the videotape involving the lawyer VK Lingam, which in turn had led to the first steps being taken in the long road to reforming the institution of the Judiciary.

This article has been prepared based on, among others, an interview conducted with Tun Mohd Eusoff on September 13, 2022. At the time of the interview, Tun Mohd Eusoff was 87 years old.

Tun Mohd Eusoff was born in Baru Gajah on June 20, 1935. He attended Malay School in Kampar until Standard Five. His academic inclination flourished at an early age, which led him firstly to being admitted into a special English class and thereafter into the Anglo Chinese School in Kampar.

A familiar question that Tun Mohd Eusoff has had to contend with is whether his father was ethnic Chinese—given that his name was "Chin". It turns out that his father's name was actually Hussin. In the kampongs, this would be contracted to "Chin", as would "Hassan" to "Chan". His birth at the local police station was reported by his grandfather, who evidently was not a stickler for details. It turns out, however, that Tun Mohd Eusoff is indeed half-Chinese, as his mother had been adopted by a Malay family as a child.

He attained four As in the Senior Cambridge exam in 1954. While waiting for the results of the exams, Tun Mohd Eusoff was taken by the headmaster of the school to be a temporary teacher. After the results were released, he applied for a scholarship but was unsuccessful. This mystifies him to this day, as other candidates with less stellar results had succeeded to obtain scholarships. I suggested to Tun Mohd Eusoff the possibility that the headmaster may have had other plans for him, which had caused the scholarship application to be waylaid.

After school, Tun Mohd Eusoff taught English at Sultan Ismail College, Kota Bharu from September 1955. On April 7, 1956, he joined the civil service as a labour officer in Sungai Petani.

Tun Mohd Eusoff, the then Chief Justice of Malaysia speaking at the opening of the Batu Gajah Court in Perak on May 4, 1995 which was officiated by the Sultan of Perak, DYMM Paduka Seri Sultan Azlan Muhibbuddin Shah ibni Almarhum Sultan Yussuff Izzuddin Shah accompanied by the then Crown Prince of Perak, Sultan Nazrin Muizzuddin Shah ibni Almarhum Sultan Azlan Muhibbuddin Shah now the current Sultan of Perak

Tun Mohd Eusoff, the then Chief Justice of Malaysia being greeted by Dato' Haji Anuar bin Dato' Haji Zainal Abidin, the then Chief Judge of Malaya

Tun Mohd Eusoff, the then Chief Justice of Malaysia being greeted by Madam Zainun binti Ali, the then Chief Registrar of the Federal Court of Malaysia, subsequently judge of the Federal Court. Also in the photo were Dato' Haji Anuar bin Dato Haji Zainal Abidin, the then Chief Justice of Malaya and Datuk PS Gill, judge of the High Court and subsequently judge of the Federal Court

Photographs taken on January 11, 1996 when Tun Mohd Eusoff, the then Chief Justice of Malaysia and YB Dato' Abang Abu Bakar bin Datu Bandar Abang Hj Mustapha, Minister in the Prime Minister's Department visited the Batu Gajah Court in Perak

Photographs taken on August 11, 1997 when Tun Mohd Eusoff, the then Chief Justice of Malaysia, and YB Dato' Mohamed Nazri bin Tan Sri Abdul Aziz, Deputy Minister in the Prime Minister's Department visited the Ipoh High Court and Ipoh Sessions Court

Tun Mohd Eusoff then served as an assistant district officer in Kelantan, first in Pasir Mas, then in Kota Bharu. While serving as an assistant district officer, he sat for and passed the civil service departmental laws exam, which allowed him to sit as a lay magistrate in Kota Bharu. While there, he caught the eye of the registrar of the Supreme Court (Sarwan Singh Gill, who subsequently went on to become a judge and retired as Chief Justice of Malaya), who took him to see the then Chief Justice Thomson when the Court of Appeal came to sit in Kota Bharu. He was seconded into the Judiciary, and appointed as a magistrate in Penang in November 1959.

Within the year, Tun Mohd Eusoff was awarded a scholarship to attend Lincoln's Inn. He left for the United Kingdom in February 1961 and was called to the English Bar in 1963. He had passed his Bar exams early, but had to remain in London in order to complete the dining requirements. He was given a two-term exemption from dining, and returned to Malaysia in July 1963 to resume his career in the judicial and legal service.

Photographs taken between May 27-29, 1996 on the occasion of the Federal Court sitting in Malacca and the visit by Tun Mohd Eusoff, the then Chief Justice of Malaysia to the Malacca Court Complex

When he was a deputy public prosecutor in Ipoh, he was invited by Tun Razak to join politics. Later, he was again approached by Tun Hussein Onn when he was the state legal advisor of Johor. Both times he declined. The impression he gave was that he considered himself unsuited to the vagaries of politics, preferring and perhaps taking comfort in, the substance offered by a career in the law.

His prior experience as an assistant district officer and as a labour officer placed him in good stead, as he was already familiar with land law and employment law. He quickly accumulated broad experience in the judicial and legal service, becoming a President of the Sessions Court in Kuala Lumpur in 1968, a deputy registrar of the High Court in January 1969 and was seconded to Perbandaran Ibu Kota as head of its litigation section.

Tun Mohd Eusoff was appointed the state legal advisor of Johor on February 1, 1972, and thereafter as the state legal advisor of Perak on January 1, 1975. He was a senior federal counsel in the Revenue Department from January 1, 1977 and was appointed the head legal advisor of the International Division of the Attorney General's Chambers ("AGC") in 1978. From July 15, 1980, he was the Parliamentary Draftsman.

It is fair to say that Tun Mohd Eusoff's intelligence shone through. This combined with a conscientious attitude saw him rising quickly through the ranks in the AGC. He also acquired a reputation for being fierce, earning him the nickname the "Malayan Tiger".

Tun Mohd Eusoff was elevated as a High Court judge on October 1, 1982, spending his first two years on the Bench in Kota Bharu. In 1984, he was posted to Kuala Lumpur, and then to Muar the following year.

In 1988, he was appointed by the Yang di-Pertuan Agong to be a member of the tribunal to hear the charges laid against five Supreme Court judges who had granted an interim stay of the earlier tribunal convened to hear charges against Tun Mohamed Salleh Abas.

In 1989, Tun Mohd Eusoff was posted back to the High Court at Kuala Lumpur. He was made a judge of the Supreme Court in October 1992, and was appointed as the Chief Justice of Malaysia on September 25, 1994.

In the course of my interview with him, Tun Mohd Eusoff recalled with a chuckle that he had made the decision to introduce a clocking-in system for judges. He had received complaints that little progress was made on cases because of poor time-keeping, and resolved that something needed to be done. He convened a meeting of the judges of the Federal Court and the Court of Appeal, and asked them for their views on his proposal. They agreed, but one suspects that they had little choice. The move even prompted former Lord President Tun Suffian to remark to him that he was treating judges like children!

Photographs taken on October 15, 1999 when the old Federal Court building (the Sultan Abdul Samad building) was graced by a visit from Sultan Salahuddin Abdul Aziz Shah Al-Haj ibni Almarhum Sultan Hisamuddin Alam Shah Al-Haj

The new system had an immediate impact on the courts in Kuala Lumpur, but word got to Tun Mohd Eusoff that it was less enthusiastically implemented in courts in certain other locations. Tun Mohd Eusoff then took the bold step of calling the judges' quarters early in the morning, informing the housekeeper in attendance that the judge's good friend, Eusoff Chin, was on the line. One imagines that word quickly spread, and timekeeping improved markedly henceforth!

I asked Tun Mohd Eusoff who had made the most impact on him in the course of his professional life. He answered without hesitation that it was Tun Mohamed Salleh Abas, who he described as fierce, but kind and helpful. It must therefore have been an unenviable task for Tun Mohd Eusoff to sit as a member of the tribunal determining the fate of the five Supreme Court judges during the 1988 constitutional events. However he did so as a matter of undertaking his duty when directed to do so. It was this sense of duty too, one suspects, that had led the government of

Photograph taken on October 15, 1999 when the old Federal Court building (the Sultan Abdul Samad building) was graced by a visit from Sultan Salahuddin Abdul Aziz Shah Al-Haj ibni Almarhum Sultan Hisamuddin Alam Shah Al-Haj

R – L: Tun Mohd Eusoff Chin, Toh Puan Datin Seri Hajah Rosaini Mustaffa, Justice Azizul Azmi and Madam Noradura Hamzah sharing a light moment during the interview

the day to view Tun Mohd Eusoff as a safe pair of hands, as a judge who would not unduly interfere with the already difficult task of governing the country. His pastimes were table tennis and angling (his fishing buddy was Tun Abdul Hamid Mohamad, the fifth Chief Justice). Both these pursuits coincided perfectly with his studious personality. It was apparent to me that he had many of the qualities that make a good judge: diligence, intelligence, firmness and a rapier wit to boot.

At the end of my interview with Tun Mohd Eusoff, I asked him how he would like to be most remembered by as a Chief Justice. He confided that he would like to be remembered as a fair man and judge, and for his kind treatment of his staff. Whether this is how history will judge him, however, remains to be seen. It is apposite to recall the advice of Tun Mohd Eusoff's great fishing buddy, the then Encik Abdul Hamid Mohamad, the state legal advisor of Kelantan, which was delivered when Tun Mohd Eusoff was first elevated to the Bench:

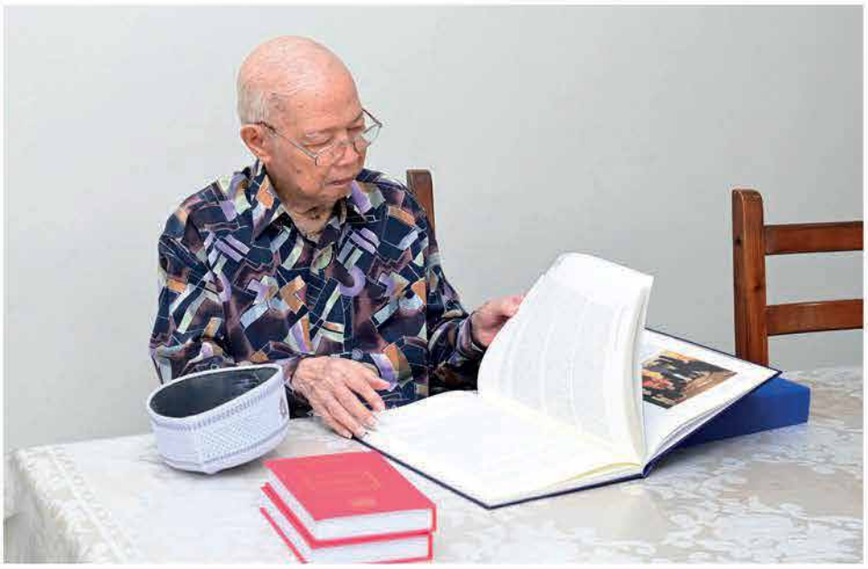
> *Dengan perlantikan ini, Datuk telah dibebankan dengan tanggungjawab yang amat berat — tanggungjawab untuk menentukan untung-ruginya seseorang, bebas tidaknya seseorang, malah hidup-matinya seseorang. Datuk juga dipertanggungjawabkan oleh Negara dan masyarakat untuk memainkan peranan penting dalam melaksanakan keadilan, mengekalkan keamanan, dan mempertahankan Perlembagaan dan kedaulatan undang-undang di Negara kita.*
>
> (English translation:
> With this appointment, Datuk is burdened with a very heavy responsibility – a responsbility to determine a person's gain or loss, a person's freedom or otherwise, even the life or death of a person. Datuk is also entrusted by the Nation and the society to play an important role in dispensing justice, maintaining peace, and defending the Constitution and the rule of law in our Nation.)

We would all do well to heed these words.

Justice Azizul Azmi Adnan, judge of the High Court (left) interviewed the second Chief Justice of Malaysia, Tun Mohd Eusoff Chin (second from left) at his residence. Tun Mohd Eusoff's wife, Toh Puan Datin Seri Hajah Rosaini Mustaffa (second from right) was also present. Justice Azizul Azmi was accompanied by Madam Noradura Hamzah, Director of the Policy and Legislation Division of the Office of the Chief Registrar, Federal Court of Malaysia (right)

For his services, Tun Mohd Eusoff was awarded the following federal and state awards:

Date	Award
16.11.1972	Darjah Setia Mahkota Johor (SMJ)
28.10.1974	Dato' Paduka Mahkota Johor (DPMJ) which carries the title "Dato'"
7.06.1978	Johan Setia Mahkota (JSM)
30.03.1984	Dato' Paduka Mahkota Kelantan (DPMK) which carries the title "Dato'"
5.06.1993	Darjah Panglima Setia Mahkota (DPSM) which carries the title "Tan Sri"
19.04.1995	Seri Paduka Cura Si-Manja Kini, Perak (SPCM) which carries the title "Dato' Seri"
20.04.1997	Seri Setia Mahkota Trengganu (SSMT.) which carries the title "Dato' Seri"
7.09.1997	Seri Setia Mahkota Malaysia (SSM) which carries the title "Tun"
16.10.1999	Darjah Gemilang Seri Melaka (DGSM) which carries the title "Dato' Seri"



Tun Mohd Eusoff Chin was presented with souvenirs, including copies of the Federal Constitution and a previous edition of The Malaysian Judiciary Yearbook

Tun Mohd Eusoff Chin posing with the photographs highlighting his career as a judge

TIME-EFFECTIVE GROUNDS OF JUDGMENT

A paper delivered by Datuk Wira Low Hop Bing, then Judge of the Court of Appeal on 7 September 2011 at the Judges' Conference.

I. Introduction

Judgment writing is an item of high priority in our judicial functions. Naturally, as judges of the superior courts, we feel inspired by our iconic quality in this important task.

In this presentation, I shall give an overview of my experience in trying to write time-effective grounds of judgment. My views are merely suggested solutions. There are no hard and fast rules. There is always room for intellectual dissent. We shine in sharing objectivity. Subjective sentiment is excluded.

My analysis and discussion consist of two component parts. They are:

(1) Effective time management; and
(2) Reader-friendly grounds of judgment.

II. Effective time management

Without a doubt, time is our most precious resource. In almost all modern contracts, parties and their legal advisers have never failed to expressly agree that "time shall be of the essence of the contract".

There are many special and unique ways of expressing the immense importance of time. These expressions include:

(1) A stitch in time saves nine;
(2) Procrastination is the thief of time;
(3) Time and tide wait for no man (woman also included);
(4) An inch of time cannot be bought with an inch of gold;
(5) When time is wasted, it can never be recycled; and
(6) Yesterday is history, tomorrow is a mystery, today is a gift; that is why we call it "the present".

In the real world, time past is gone forever; it is neither replaceable nor reversible.

It may be a source of consolation to note that good judgments may survive the savages of time. How can we make that happen? Kita boleh (we can). The answer may be found in a reader-friendly passage. It goes this way:

> *"Identify with excellence, put your name on your work, and both your name and your work will stand the test of time."*
>
> (see p 15, The Star 2, Wednesday, August 17, 2011, Lucille Dass, quoting Dr Denis Waitley).

Time management is therefore singularly significant. The art of time management may be acquired and developed as a way of life. A well-organised individual can do so. There are always essential items in our priority

list. Procrastination will prevent us from accomplishing our work. The ability to act timeously is an invaluable personal asset. The most effective time management begins with the best utilisation of our efforts. Well-arranged time is the hallmark of a well-arranged mind.

Matters of timely concern

(1) Priority for more urgent judgments

(a) Some judgments call for more urgent attention. They appear regularly on our own radar screen. They then become our "must-do" list of judgments.
(b) It is a salutary practice to give priority and put pen to paper without any delay. Once we get started, we have already eased the situation. It has taken priority. The judgment would then be given the due attention it deserves. Further delay is eliminated.
The chances are that the judgment would be completed more speedily.
(c) The completion of the first draft is certainly a source of great comfort. The process of writing consists of numerous small steps in our overall timeline for the whole judgment. We have our own gentle reminder of the urgency to continue and complete the judgment. That will assist us in going ahead with an on-going task.

(2) Intellectual quality

In the discharge of our judicial duties, we have to peruse authorities and extract the principle or ratio from them. This is a skill which is generally manifested in our respective experience. Our established intellectual quality will expedite positive comprehension of the tenor of the authorities and accurate application of the ratio. Such quality motivates us to write with comfort and confidence. It is an obvious time-saving device.

(3) Inspiration

Inspiration is an important catalyst in managing time, for the purpose of writing judgments. Generally, we know our own best time to write. It is when we feel we are inspired. We are our own judges in this regard. This is a very special individual lifestyle and habit. Only we can monitor our own best time. It is a process of individual discovery. It is a work programme personal to the planner. We can use our best time to give our competent best.

(4) Courage to be slow

(a) This is a pleasant surprise. We need some courage to be slow, but the delay must be within the bounds of reasonableness. The courage to be reasonably slow does not mean dragging our feet. Delay is a non-starter.
(b) When the task of writing a particular judgment involves facts and issues of exceptional complexity, reasonable slowing down may prove justifiable.
(c) A judge who is a good time manager may cautiously respond to certain facts and issues less speedily than a hasty colleague would. Remember "more haste, less speed". A hastily ill-prepared judgment is a wasted judgment.
(d) Quite often, it is necessary for us to put aside the draft for a while. Let our mind rest, so that our judgment is not rash.
(e) While this may appear to run counter to time constraints and multiplying matters at hand, a cautious slowing down for a couple of days may prove useful. Subsequently, we may be able to discover points not previously spotted. We may gain new insights and accumulate new ideas. Most importantly, the completion of the judgment has become a reality.

III. Reader-friendly grounds of judgment

With a view to preparing time-effective grounds of judgment, it may be worthwhile to take stock of the following:

(1) Practice Direction dated February 14, 2011

(a) Full grounds

(i) The Rt Hon the Chief Justice Tun Zaki Tun Azmi has vide Practice Direction dated February 14, 2011 thrown some light on the necessity for Court of Appeal judges to write full grounds. The Practice Direction also explains that judges are not discouraged from writing full grounds.

(ii) Full grounds are usually written upon request by the Federal Court e.g.:

- When a party applies for leave to appeal; and the Federal Court considers it necessary to peruse the grounds;
- When leave to appeal has been granted and notice of appeal has been filed;
- In the event of a dissenting judgment, the "majority" judges and "minority" judge would provide their respective grounds;
- Where the Court of Appeal reverses a decision of the High Court; or
- When a Judge enjoys writing for posterity.

(iii) The contents of full grounds would generally include a fair, clear and accurate statement of the factual background, an application of the relevant rules or ratio and an analysis of the findings.

(iv) Full grounds are useful in the analysis of the complexity of the facts and the importance or novelty of the issues raised.

(b) Broad grounds

(i) Broad grounds are given, normally ex tempore, in order to explain to the parties and their lawyers the brief reasons and rationale leading to a particular decision.

(ii) Broad grounds writen in point form are encouraged. This is to inform the parties or the Federal Court of the issues and the principles on which the decision is made. Only the relevant parts of any authority, e.g. page and paragraph, need be mentioned. The broad grounds would become the grounds of judgment and no further or additional grounds need be given: *Dato' Seri Anwar Ibrahim v PP* [2010] 9 CLJ 625, FC.

(c) Short summary of finding

It is also quite common for the Court of Appeal to provide a short summary of the court's finding at the conclusion of the hearing of an appeal. This serves to announce to the parties and their lawyers the brief decision of the court.

(d) Full grounds, broad grounds and a short summary of finding given by the Court of Appeal serve to reflect the judicial thinking of the Court of Appeal judges.

(e) Although the Practice Direction refers specifically to the Court of Appeal, I am of the view that it may be applied and adopted, mutatis mutandis, by the High Court.

(2) Avoiding non-essential quotations

(a) Where the governing principles of law are trite, a mere citation of the latest decision of the apex court would suffice. Citation of strings of authorities and an elaborate dissertation may not add anything new. On the contrary, it would be time-consuming, and unlikely to be reader-friendly. Quotations from the plethora of authorities would become non- essential, and may safely be dispensed with. Similarly, only the essence of counsel's submissions need be included.

(b) The time-demanding inclusion of non-essential quotations and submissions would not stop there. It has a chain reaction. It leads to the demand on the time of our busy readers. This ripple continues to

multiply. The readers may simply plod on and make a perfunctory attempt to read. Alternatively, they may proceed with their own preferences for other more resourceful pursuits.

(3) Language: Literature and law

(a) Literature and law are two positive contributors towards superb writing, by means of language. For people who are trained in the law, language is our single most important tool.
(b) The importance of language in literature and law is plain and obvious.
(c) Language provides the bridge for literature and law. The development of literature and law would grind to a halt if language were never in existence. There is a symbiosis between literature and law.
(d) Although literature and law share identical features, they also reveal opposing attributes. Opposites attract, in the same way as unlike poles in magnets. A love for literature opens the gateway to an understanding of the law.
(e) Literature extols the virtue of originality. The authority of a literary author gains an elevated status if his/her works had never been previously explored or written.
(f) In law, the reverse is true. By reason of the doctrine of stare decisis, originality has taken a back seat. An accurate application of the legal principles taken from judicial precedents, especially of the apex court, would give greater authority and weightage to a subsequent judgment. Relevant and essential excerpts from precedents are reproduced. Recognition is given by way of specific citation of the source(s).
(g) In terms of identical features, literature consists of literary works which are expressed in narratives. Law (whether in the form of statutes or judgments) consists of literary works, also in the form of narratives. These narratives are produced and narrated by means of language which in turn is expressed in words and phrases.
(h) These narratives provide the pith and substance or the shape and meaning to literature and law. Literature is therefore supplementary and complementary to law. A mastery of the language in literature would certainly multiply the understanding of the law. This can bring about reader-friendly judgments. Our grounds of judgment are essentially the products of the raw materials which we have gathered in our experience, knowledge and skill, acquired from these two (or even more) sources.

(4) Process of writing

(a) Organising thoughts

(i) Organising our thoughts would normally precede the process of writing. This is our mind-map. As a guide, it consists of introduction, factual background, submissions, questions for determination, individual issues for deliberation, governing principles, the judge's thinking and conclusion.

(ii) Where available, deputy or senior assistant registrars, research or special officers would lighten the onerous duties of judges.

(iii) While these officers are relatively senior in service, and generally useful, they are certainly not substitutes for judges. They have only a fraction of the judges' practical experience. Their limitations are apparent.

(iv) The ultimate responsibility in producing quality and reader-friendly judgments rests on the judges' shoulders. Hence, judges play more important roles and are not merely editors. Judges are indeed the authors of their own masterpieces in the form of published judgments.

(b) Introduction

(i) The introductory part of a judgment opens the reader's door to the contents of the judgment, such as:

- The subject-matter of the case;
- The parties, using the same identity throughout so as to avoid confusion;
- Procedural, jurisdictional and substantive issue(s) if any; and
- A summary of the decision. This is a matter of personal preference; some judges prefer to include it at the end of the judgment.

(c) Formulating issues

(i) This is dictated by the factual background and counsel's submissions on the law.

(ii) While the issues are frequently formulated according to submissions from the Bar, judges are not necessarily bound to do so. There may be occasions when submissions are out of focus, and therefore not in tandem with the issues under consideration. In such instances, an experienced judge will have to realign so as to bring it within focus and back on course.

(iii) Not all issues raised would require the decision of the judge. It is an established practice to give a summary of parties' elaborate contentions, and to avoid unnecessary regurgitations. It would be a safe guide to tackle the core or crucial issues, especially when they effectively bring about a disposal of the case.

(iv) To avoid the criticism that the unattended issues were not dealt with or were dealt with inadequately, it is prudent to add a brief catch-all statement that those issues had been taken into account and found to be either irrelevant or unhelpful. A few words of commendation to counsel would be in good order.

(d) Factual background

(i) A narrative of the factual background puts the entire case in its proper perspective. There is a time-honoured saying that when the facts are clearly and accurately established, the law will take care of itself.

(ii) The facts may vary from case to case and hence are readily distinguishable. However, the governing principles of law may well be settled or trite. A correct application of the law to the factual background becomes a natural progression.

(iii) Irrelevant facts can be distracting to the reader and would adversely affect readability. They can be dispensed with. Readers should not be led to think that a judgment is based on irrelevant facts.

(e) Application of principles

(i) An accurate discussion and application of the governing legal principles would sit at the core of a sound judgment. A well-considered judgment has its roots in strong foundation and solid grounds. The reader will be able to form an opinion on the quality and substance of a judgment.

(ii) Quite often, a judgment may contain "alternative holdings". While this method may sometimes be necessary, it may unwittingly water down the weight of a judgment. The expressions such as "even if the facts were otherwise" or "assuming arguendo that we had not concluded thus and so …" may, in the eyes of the reader, indirectly dilute the tenacity of a judgment. Judicial opinions arrived at by way of "alternative holdings" are likely to be treated as obiter dictum and not ratio decidendi.

Datuk Wira Low Hop Bing (right) accompanied the 4th Chief Justice of Malaysia Tun Ahmad Fairuz bin Sheikh Abdul Halim (left) on an official visit to the People's Republic of China. They were welcomed by the then Chief Justice Xiao Yang of the People's Supreme Court in Beijing (centre).

(iii) Novel principles of laws would warrant an in-depth analysis to support the reasoning for the new rule.

(f) Closure of case

This leads to the conclusion of a case under consideration. This must be clearly and authoritatively set out. It must not be overshadowed in riddles. The conclusion must follow the preceding analysis and discussion.

(5) Other features

Features of reader-friendly grounds of judgment are never closed. In addition to the above discussion, other features include:

(i) Exclusion of unnecessary words so that every word is essential, concise and succinct;
(ii) Avoidance of lengthy discussions in uncontroversial propositions;
(iii) Ability to identify the relevant from the irrelevant;
(iv) Capacity for precision and clarity;
(v) Accurate and careful proof-reading to ensure correct spelling, grammar, etc.;
(vi) Display of commendable quality of authorship;
(vii) Logical process of reasoning and analysis;
(viii) Expressing complex concepts in comprehensible language;
(ix) Using interesting, elegant, plain and popular words, so that the reader's reference to a dictionary is kept to the barest minimum;
(x) Pruning convoluted sentences; and
(xi) Eliminating ambiguities.

IV. Conclusion: Poem on "Judgments"

Capacity building in order to excel in effective time management is possible. Our passion for quality judgment writing is always there; it is to be found in our own garden of experience, knowledge and skill.

By way of conclusion, I find it fitting and fascinating to share a "JUDGMENT" poem with you. It reads:

JUDGMENTS

Judgments with readable grounds are products of intellectual exercise,
Using powerful expressions acknowledged as inherently apt and concise,
Decision-making process requires evaluation which is fair and precise;
Great writing is readily identifiable as being refined and reader-friendly,
Mastery of language and communication skills are applied accurately,
Excerpts, where relevant and essential, are reproduced judiciously;
Novel principles of law deserve detailed exposition after due deliberation,
Time-effective measures are ably adopted with boundless satisfaction,
Soundness of rationale and wisdom is to be determined by future generations.

THE INTERNATIONAL ENVIRONMENTAL RULE OF LAW: THE NORTH-SOUTH DIVIDE

SUSTAINABLE DEVELOPMENT: THE MALAYSIAN EXPERIENCE

A paper delivered by Justice Nallini Pathmanathan, Judge of the Federal Court on 7 May 2022 at the International Conference on Environmental Diversity and Environmental Jurisprudence: National and International Perspective organised by the University of Chandigarh, India

[1] It is a great privilege to participate in this illustrious conference. In my short presentation I highlight two aspects of environmental law, namely:

(i) how the North-South divide has affected international environmental law; and secondly,
(ii) the Malaysian experience in relation to environmental jurisprudence, development and the role of its Judiciary.

[2] I speak of the North-South conflict because the framework of international environmental law has been formulated primarily based on the perspectives of the Global North, for historical and economic reasons. The perspective of the Global South has been accorded far less acknowledgement. The goal of international environmental law cannot be successfully met if this is not addressed.

International environmental law and the North-South divide

[3] The North-South dimension has and continues to play a pivotal role in international environmental law. Historically, the divide compromised the efficacy of international environmental law, and the future requires that this divide be bridged.

[4] The root cause of this divide is founded on economic colonisation – the inequality in economic power between the Global North and the Global South.[1] Economic justice encompasses environmental justice, as the latter comprises a core component of the tussle for the resources of Mother Earth, as well as the allocation of responsibility for present and historic environmental harm. The conflict presents itself as a struggle between economic development and environmental protection between the Global North and South, although such conflicts play out within these regions as well.

[5] The North-South divide can be traced to the creation, features and orientation of international law from its genesis to its present day form.[2] The pre-Westphalian concept of the law of nations or international law comprised communities, tribes, and peoples who enjoyed sovereignty, rights, and duties without the dominance of any one region, culture or peoples. With the Treaty of Westphalia of 1648 and subsequent treaties, coupled with the conquest of the Americas, Asia and Africa and the onset of colonisation, there was a shift in the framework of international legal concepts and principles, devised by the conquerors who were largely European, to entrench their dominance and need for local land and resources in the colonised world.

[6] This was done, inter alia, by the imposition of the idea that European values and laws were the only viable and universal basis for civilisation. The indigenous or homegrown approaches of the colonised states to treaty-making and claims over their lands and assets were abrogated. The result was, and remains to this day a Eurocentric and Global North-based value system, which gives an illusion of fairness and equity across the nations, while the reality is different.

[7] Northern states conquered and exploited resources of the colonised regions for industrialisation and development for decades, with little concern for environmental degradation.[3] Today the South needs to exploit its natural resources for development and poverty alleviation, which is a paramount priority for subsistence. They therefore demand that this must be the first step towards addressing environmental protection. The North says otherwise. The conflict reflects the huge economic disparities between the North and the South, and there lies the nub of the conflict. There is therefore a crying need for the perspectives and needs of the South to be genuinely acknowledged and to comprise the basic structure for further North- South negotiations.

Development – Sustainable or unsustainable?

[8] This divide has also had detrimental effects on the evolution of "sustainable" development in the South. As the Report of the World Commission on Environment and Development: Our Common Future[4] states:

> *Humanity has to make development sustainable to ensure that it meets the needs of the present, but without compromising the ability of future generations to meet their own needs.*

[9] The Industrial Revolution saw economic development in the Global North flourishing, while the environment sustained considerable environmental degradation. International environmentalism became a serious concern with the advent of the United Nations Environment Programme and the adoption of the Stockholm Declaration which held the promise of a solution to the numerous environmental problems that subsisted across international borders.[5]

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1 Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and Jona Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015), p xxxiii, foreword by judge Christopher Weeramantry.

2 Ibid, at p 23, Ch 1 "History of the North-South Divide in International Law: Colonial Discourses, Sovereignty and Self-Determination" by M Rafiqul Islam.

3 Ibid, at p 48.

4 (New York: Oxford University Press, 1987), p 8.

5 See International Environmental Law and the Global South, supra n 1, at p 50, Ch 3 by Ruth Gordon.

[10] In reality however, the economically-weaker states of the South had not achieved the benefits (nor burdens) of the industrialisation age, and were focused on pursuing economic development rather than environmentalism. Environmentalism slowed the process of development which was therefore an unviable option.

[11] The solution was sought to be accomplished by the concept of "sustainable development", the brainchild of the Brundtland Commission which was asked to devise strategies for "sustainable" development. This difficult task required the reconciliation of two antagonistic elements, namely, economic growth and environmental protection. However this solution suffers from a two-fold conundrum. Firstly, it fails to hold the Global North accountable for its environmental degradation as it underwent and benefited from its development paradigm; secondly it fails to take into account the unsustainability of the industrialisation and modernisation model prevailing in the Global North. This is because development in the Global North saw the environment as an external factor that was to be "conquered" or dealt with, and which is a secondary concern compared to economic growth. Such a philosophy or ethos cannot afford a suitable model for sustainable development. But as the Global South pursues this "model" of unsustainable rather than sustainable development, environmental disaster threatens, leaving it to future generations to deal with the fall-out.

[12] Perhaps the answer lies in identifying and accepting the huge differences between the "needs" of the Global North and the South. The South requires human needs to be met, while consumer wants and consumption remain at the core of the needs of the Global North. The vastly greater appropriation of the earth's resources by the North is an inherent inequity, which requires serious consideration and redress. Therefore any realistic resolution must be imbued with the goals and aspirations of the Global South in a real sense. There must be acceptance that the current development paradigm which places economic growth well above environmental concerns should be seriously recalibrated. Perhaps the answer lies in accepting that for our future generations, the solution lies in finding a middle path between the high consumption and sometimes wasteful lifestyle of the Global North and the poverty of the Global South. This would address the need for genuine sustainability, and contribute towards a dialogue that seriously addresses the issue of sustainable development within a framework of global justice and fairness.[6]

Middle ground

[13] It would be unfair to portray the divide as being entirely negative. There has been progress, for example, in the formation and application of the principle of common but differentiated responsibilities. This imposes common responsibilities on both the North and the South to protect the environment, but the Northern states bear more burdens than their Southern counterparts. Here the rationale is that the Northern states are largely responsible for past environmental degradation, for a far larger consumption of the planet's resources, and possess superior financial and technological abilities to protect the environment.[7] While responsibility for the past remains elusive in the application of this principle, there is acceptance of the future responsibilities by the Global North.

[14] In conclusion on this part, as I said at the outset, it is necessary to address the North-South divide more substantively. It is necessary to provide redress for the historic legacy of the past, as well as unacceptable levels of consumption of the earth's resources. Global consensus must include a more universal embracing of values from the South in order to balance the dominance of the Eurocentric approach to global governance in this field.

6 Ibid, at p 52.

7 Ibid, at p 49, Ch 1.

The Malaysian experience

[15] In Malaysia, we have a written constitution, the Federal Constitution. The environmental governance framework allows for a shared jurisdiction between the federal and state authorities. This can give rise to conflict although federal law generally prevails.

[16] Parliament has promulgated a vast array of statutes to combat environmental degradation, so to that extent there can be no complaint of a lack of sufficient legislation. However, effective enforcement remains a serious concern.

[17] From the adjudicative aspect, a long-standing obstacle to environmental justice has been the relatively narrow definition accorded to the issue of legal standing. Potential litigants have to surmount hurdles in order to establish locus standi. The stringent test enumerated in the early '80s was softened somewhat by subsequent case law, to allow persons who are "adversely affected" to move the courts.[8] However, the scope of the phrase remains very much in dispute, particularly in relation to environmental matters.

[18] This is in contrast to the position in India where public interest litigation is part and parcel of participative justice. This is borne out by the simplicity with which an aggrieved member of the public, may write a letter to the judiciary, which is equivalent to a writ, marking the commencement of a suit.

8 See QSR Brands v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air and Komunikasi & Anor [2014] 3 MLJ 145.

[19] Our case law on environmental justice has been chequered. Early cases allowed development to prevail over the rights of Indigenous peoples, giving clear preference to development.[9] Subsequently, however, the pendulum swung the other way, with the courts holding that the state owed the Indigenous people of West Malaysia, the Orang Asli, a fiduciary duty.[10] Again, a more stringent approach was adopted in a recent decision, in relation to native customary rights in East Malaysia, cutting down the rights of Indigenous peoples. However, the effects of this decision have been diluted by statutory amendments to legislation recognising these rights.

[20] However, the Judiciary has been sensitive to environmental problems. Article 5 of our Federal Constitution (similar to Article 21 of India's Constitution) guarantees the right to life and personal liberty. In the case of Tan Tek Seng,[11] the judgment of one of our foremost jurists, former judge of the Court of Appeal, Gopal Sri Ram, held that the right to life and liberty includes a right to a healthy and pollution- free environment. It is noteworthy that Malaysia co-sponsored the resolution passed last year by the United Nations Human Rights Council that access to a clean, healthy and sustainable environment is a fundamental human right.

[21] Our goals are:

(i) achievement of 31% of renewable energy capacity for power generation in 2025 and 40% in 2035 in national power grid through Malaysia's Energy Transition Plan 2021–2040;
(ii) maintaining at least 50% forest cover as pledged during the Rio Earth Summit 1982;
(iii) implementing natural-based solutions to reduce long-term impacts of development through the planting of a 100 million trees;
(iv) moving towards zero waste directed to landfill through the waste- to-energy concept and to increase the recycling rate target to 40% by 2025; and
(v) the implementation of several national plans and policies geared towards ensuring a low carbon pathway and resilience towards climate change.

[22] In this context, two of the largest energy companies in Malaysia have rolled out their plans to achieve net-zero emissions by 2050.

Conclusion

[23] As a judge, I believe that judges have an instrumental role to play in the preservation of the environment. Firstly, courts are where litigants go, when their rights need vindication. Secondly, our decisions ensure that governments comply with their legal obligations. Thirdly, when scientific evidence relating to the environment is admitted in courtrooms and judicial findings of fact made, this helps raise the visibility of such scientific material, and contributes to discourse on the matter.

[24] I can do no better than to conclude with a quote by Vandana Shiva, "We share this planet our home with millions of species. Justice and sustainability both demand that we do not use more resources than we need".

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9 Bakun Dam.

10 Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors [2005] 4 CLJ 169.

11 Tan Tek Seng v Suruhanjaya perkhidmatan Pendidikan Malaysia & Anor [1996] 1 MLJ 261 at 288.

CHAPTER

09

CASES OF INTEREST

CASES OF INTEREST: CIVIL

FEDERAL COURT

A lawyer barred from practice is not allowed to offer legal advice. The mere reason that he is doing it pro bono is not acceptable.

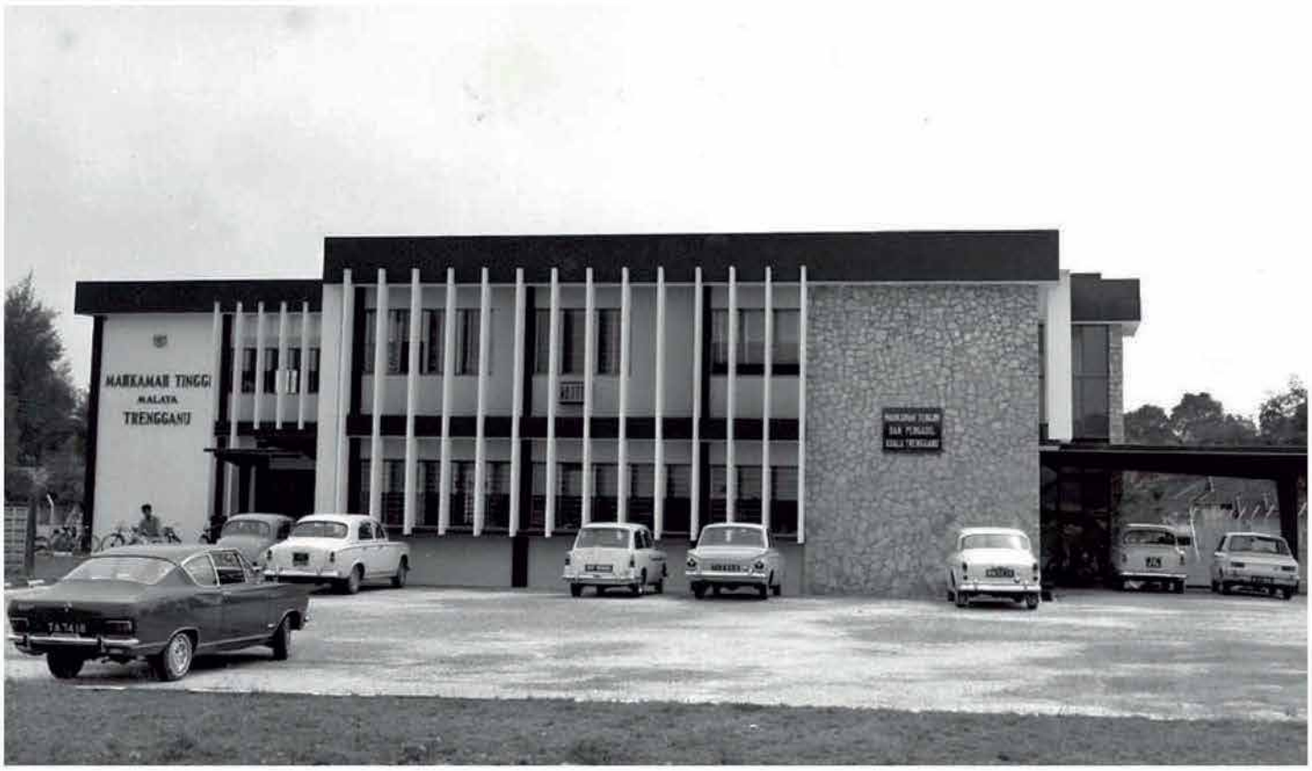
Darshan Singh Khaira v Majlis Peguam Malaysia [2021] 10 CLJ 497, Federal Court

In this case, the appellant was struck off from the Roll of Advocates and Solicitors by the respondent for practising law while being an undischarged bankrupt. At all material times, he did not have a valid practising certificate, but was giving legal advice to the complainant concerning the procedures of appeal to the High Court. The appellant contended that the mere act of giving advice does not amount to practising law as envisaged under the Legal Profession Act 1976 ("LPA"). In addition, the appellant argued that the advice given was not coupled with any remuneration to him. Nonetheless, the respondent and its Disciplinary Board took action against the appellant. Dissatisfied with the decision of both the respondent as well as its Disciplinary Board, the appellant appealed to the High Court.

At the High Court, the learned trial judge dismissed the appeal and held that the appellant indeed contravened section 29(2) of the LPA, i.e. an undischarged bankrupt cannot practise law without the consent of the Bar Council. The act of giving advice is closely associated with the concept of "practising law". The decision of the High Court was subsequently affirmed by the Court of Appeal. Thus, the appellant appealed to the Federal Court and leave was granted. The question of law raised by the appellant was whether the giving of advice to a client of a law firm amounts to practising law.

The Federal Court dismissed the appeal and upheld the sentence imposed on the appellant. The apex court declined to answer the question, but viewed that the appellant was guilty of serious misconduct because he continued to practise law despite knowing he was disqualified from doing so. Harmindar Singh Dhaliwal FCJ who delivered the judgment of the apex court explained that the LPA does not provide a definition on what amounts to "practising law". However, one of the guides in determining whether the impugned act is "practice of law" is whether it is what a lawyer usually does in carrying out his duties as an advocate and solicitor. On the facts, the appellant had indeed conducted himself in a manner as a solicitor. He undertook works usually done by a solicitor, and drafted and prepared the documents for the complainant's appeal at the High Court. This service is something which goes beyond a clerical task, and it is reasonable to infer that the appellant is a solicitor. His conduct throughout the case shows that he was involved in the practice of law. The Federal Court rejected the argument that the work done by the appellant was on a pro bono basis and cannot be equated to practising law. It was held that any payment or fees is not a prerequisite to determine "practising law". Although the appellant did not collect any fees for the services rendered by him, payment was made by the complainant to Messrs. Darshan Singh & Co.

> [17] Although the LPA 1976 is instructive as to the types of conduct which are within the exclusive domain of advocates and solicitors, the statute does not provide any determinative test as to what amounts to practising as an advocate and solicitor in all other cases. We should also add, lest it is carried too far, that although the LPA 1976 itself describes these functions as the privilege of advocates and solicitors, implicit within the provisions is the need to protect the public against persons who, although being without the necessary qualifications and competence of an advocate and solicitor, may purport to provide such services which may clearly be outside their competence to the detriment of unsuspecting members of the public. The penalties that will be visited upon such "unauthorised persons" is testament of the policy reasons behind such protection. After all, an advocate and solicitor has the necessary educational qualifications and training and is required, as a prerequisite, to be of good character. Importantly as well, an advocate



Kuala Terengganu High Court

and solicitor will be subject to discipline if he/she falls short of the prescribed standards under the law.

...

[20] With respect, we do not agree. In our view, even a single or isolated act can amount to acting as an advocate and solicitor. It is not so much a single or isolated piece of advice but rather whether the impugned act or acts is what a lawyer usually does in carrying out his functions and duties as an advocate and solicitor.

...

[29] In the circumstances, we did not think, as the appellant had asserted, that he was merely giving legal advice and assisting the litigant as any lay person would. By actively advising the complainant on his appeal and preparing the necessary documents, the appellant was plainly doing something which is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor. The legal advice and the documents to be prepared required the expertise of a legally trained mind. Although legal clerks also prepare such documents, they do so with the supervision and approval of the solicitor.

[30] Put simply, the appellant was doing, as the evidence disclosed, what a lawyer does when a client comes for advice and it was intended for the complainant to act on the legal advice provided. In our view, there existed quite plainly a relationship of confidence and trust between the appellant and the complainant which is an essential of legal practice (see *New York County Lawyers Association v Dacey*, 28 A.D. 2d 161 (1967)). It was not a case where some legal advice was given casually or informally and importantly, lacking the necessary setting and status of a solicitor dealing with a client.

per Justice Harmindar Singh Dhaliwal,
Judge of the Federal Court

The particulars in the birth register must contain the most accurate information. Hence, where there are errors/omissions and such mistakes are subsequently discovered, the National Registration Department ("NRD") must correct and update such records. This is so especially when there is convincing proof of paternity via DNA tests that shows inaccurate information recorded in the birth register.

Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara Malaysia & Anor [2021] MLJU 2362, Federal Court

This case deals with matters concerning the duty of the Registrar of Births and Deaths to amend inaccurate data contained in the birth register. Generally, it touches on these four provisions under the Births and Deaths Registration Act 1957 ("the Act"):

> Particulars of births to be registered
> 7. (1) Subject to the provisions of this Part, the birth of every child born in Malaysia shall be registered by the Registrar in any registration area by entering in a register such particulars concerning the birth as may be prescribed; and different registers shall be used and different particulars may be prescribed for live-births and still-births respectively:
>
> Provided that, where a living child is found exposed and no information as to the place of birth is available, the birth shall be registered by the Registrar for the registration area in which the child is found.
>
> Provisions as to father of illegitimate child
> 13. Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.
>
> Correction of errors and alteration in register
> 27. (1) No alteration in any register shall be made except as authorized by this Act.
>
> (2) Any clerical error which may from time to time be discovered in any register may be corrected by the Superintendent-Registrar, in such manner as the Registrar-General shall direct.
>
> (3) Any error of fact or substance in any register may be corrected by entry (without any alteration of the original entry) by the Registrar-General upon payment of the prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, stillbirth or death with reference to which the error has been made, or in default of such persons then by two credible persons having knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto.
>
> Duty of Superintendent Registrar to procure Registration
> 28. (1) Notwithstanding any omission to report or to furnish information as to any birth, still-birth or death within the time required by the preceding provisions of this Act, it shall be the duty of the Superintendent-Registrar and the Registrar to procure by all means in their power the best and most accurate information respecting any birth, still-birth or death which may have occurred within their registration areas and to cause particulars of the same to be recorded (so far as is practicable) in the manner prescribed.
>
> (2) It shall be the duty of every police officer, penghulu and headman to obtain information of every birth, still-birth and death within his respective area and also information respecting the lawful father and the mother of every child born in his area and respecting the occupier of any house in his area in which any birth, still-birth or death may have taken place and to give notice thereof to the Registrar.

> (3) Any police officer, penghulu or headman who has in his possession any such information and wilfully neglects or omits to disclose the same to the Registrar shall be guilty of an offence and be liable on conviction to a fine not exceeding fifty ringgit.

The appellant previously obtained a declaratory relief via an originating summons ("OS") at the High Court that he is the biological father of a child born on July 16, 2015 at Sunway Medical Centre ("the child"). A DNA test was conducted on the appellant, the second respondent (mother of the child) as well as on the child, and the results confirmed the biological relationship between the appellant and the child. As such, the appellant filed the present proceedings.

As against the second respondent, the appellant argued that the child was conceived out of their relationship. However, the second respondent knowingly omitted to include the particulars of the child's father during the registration of the birth. As a result, "*maklumat tidak diperolehi*" or information unavailable is recorded in the birth register with regard to the child. The appellant claimed that had he known of the birth registration, he would have attended the same and ensured his details were entered into the registry. As against the first respondent, the appellant contended that the birth register recorded inaccurate information. Thus, such error should be corrected to reflect the High Court's declaratory order.

At the High Court, apart from granting the declaratory relief, the learned judge further held that the first respondent has a statutory duty to maintain accurate, true and correct particulars in the registers. This is in line with section 28 of the Act. However, this order was reversed by the Court of Appeal. The appellate court viewed that allowing such alteration in the birth register is "in conflict with public policy", "culture of the people" and "religious values". Section 28 of the Act does not supersede section 13. Dissatisfied with the decision of Court of Appeal, the appellant appealed to the Federal Court.

The Federal Court, with a coram of three judges, allowed the appeal. Mary Lim FCJ who delivered the judgment of the Federal Court held that the particulars in the registers must contain true, accurate and correct information. Hence, if there are any errors which are discovered subsequently, these mistakes may be corrected by the Registrar-General. This is because section 28 of the Act mandates the registrars to "procure by all means in their power the best and most accurate information respecting any birth, stillbirth or death which may have occurred within their registration areas and to cause particulars of the same to be recorded (so far as is practicable) in the manner prescribed". This means that all information entered into the registers must be the best and most accurate, and must include situations such as updating the re-registration of legitimated persons whose parents have overlooked the re-registration of their births. In other words, the registers shall only contain reliable and current records of its people and population. This appears to be the intention behind section 28 of the Act.

With regard to the child, who appears to be an illegitimate child, section 13 of the Act expressly states that the name of the father of the child cannot be entered unless there is a joint request by the mother and the person who acknowledges himself to be the father of the child. Nonetheless, this was not the scenario in the present appeal as the second respondent was not agreeable to the joint request. As such, the record showing *"maklumat tidak diperolehi"* may be correct at the outset. However, taking into consideration of the circumstances of the present appeal, the entry *"maklumat tidak diperolehi"* can no longer be true. This is because the DNA test clearly indicates the appellant is the biological father of the child. This information has since been made available via the order of the High Court, and the identity of the father of the child is now undisputedly available. Thus, *"maklumat tidak diperolehi"* as recorded in the registers is inaccurate and untrue. The registrar cannot refuse this new information and omit from correcting the error in the registers. Instead, the registrar should facilitate in eliminating the error which he is indeed empowered to do so pursuant to section 27 of the Act. In fact, this declaratory order was issued by the High Court, and the failure of the registrar to comply with the order would mean he is failing in his statutory duties.

> [47] Clearly, the intent behind s. 28 is to require the Registrar-General and his officers to take proactive steps towards ensuring that all births (and deaths) are registered, and that only the "best and most accurate information" are entered into the registers. The Registrar-General even has a power to update the re-registration of legitimated persons whose parents have overlooked the re-

registration of their births after the marriage of the parents concerned by requiring the parents to attend personally and give such information as are necessary for the re-registration (see s. 17).

...

[49] In our view, all these duties coupled with the power to correct and alter any entry in the registers, whilst maintaining the original entries, serve only to ensure that the registers are current and reliable records. In this regard, the particulars entered in the registers must necessarily be true, accurate and correct. After all, these records serve to form evidence of any birth or death as the case may be (see s. 33); and in the larger sense, the source and indices of the population of this country.

[50] In the case of illegitimate births, s. 13 provides that whilst the registration of such births may still be by any of the qualified informants mentioned in s. 7, the name of the father of the child may not be entered except at the joint request of the mother and the person acknowledging himself to be the father of the child. Even then, these two persons must attend the office of the Registrar-General and sign the register together.
...

[52] In the present appeal, the registration of the birth of the child was in accordance with the terms of ss. 7, 13 and 13A. At the material time of registration, there was no joint request and agreement from the appellant to have his name entered as the father of the child. Even if the appellant says he was agreeable had he been asked, it would still not meet the requirements of s. 13 as we understand the second respondent was not agreeable to making a joint request. For the purposes in this appeal, the reasons for the lack of a joint request and agreement are really irrelevant. We find however that, given the circumstances in this appeal, the entry in the register, though rightly recorded as *"maklumat tidak diperolehi"* no longer holds true.

[53] Following the DNA results and more particularly, the order of court declaring the appellant as the biological father of the child, it cannot be now said that the information pertaining to the father of the child is or remains, unavailable or "*tidak diperolehi*". The information is since known and made available through the order of court. Quite rightly and in keeping with the duties and obligations of maintaining a public record of births which is reliable and can be relied on, the Registrar-General cannot refuse the new information. It would make no sense for the Registrar-General to maintain a record or register where the information on the father of the child is now inaccurate or untrue. On the contrary, in the face of the declaratory order, the Registrar-General would be failing in his statutory duties in not correcting the records in relation to the child's father.

per Justice Mary Lim,
Judge of the Federal Court

Muar Court Complex

A child abandoned at birth is entitled to citizenship by operation of law. The word "found exposed" in section 19B, Part III of the Second Schedule to the Federal Constitution includes a child abandoned at the place of birth by the birth mother whose identity is unknow.

CCH & Anor v Pendaftar Besar Bagi Kelahiran dan Kematian, Malaysia [2021] MLJU 2321, Federal Court

This case deals with the issue of the citizenship of a child who was abandoned at birth. The abandoned infant ("child") was born at Hospital Universiti Kebangsaan Malaysia ("HUKM"), and the identity of the birth mother was unknown. Nonetheless, the child was adopted by the appellants. The appellants then represented themselves as the biological parents of the child, and as a result, a birth certificate was issued ("first birth certificate"). When the child turned 12 years old, the National Registration Department ("NRD") declined to issue a MyKad for the child. It was believed that the NRD found certain discrepancies concerning the child and thus the appellants were asked to surrender the first birth certificate. Upon complying with the order, a second birth certificate was issued. Notably, this second birth certificate stated that the information of the child's natural parents as "not available", and the status of citizenship as "yet to be determined".

Dissatisfied with this second birth certificate, the appellants filed an application for adoption at the High Court. The application was granted, and the adoption order actually directed the respondent to issue a new birth certificate without entering the words "adopted child". Subsequently, a third birth certificate was issued. However, this third birth certificate stated that the child is a non-citizen and the status of the appellants were recorded as "information not obtained". The appellants then filed an application for judicial review at the High Court and prayed for declaratory reliefs for the following matters:

(i) The child was born in Malaysia and is a Malaysian citizen by operation of law. Article 14(1)(b), Part II, section 1(e) and section 2(3) of the Second Schedule to the Federal Constitution ("FC") were the basis of this argument.

(ii) Since the child was an abandoned child, there was no proof that he was a citizen of any other country. Thus, the child is entitled to be regarded as a citizen under section 1(e) of the Second Schedule to the FC.

(iii) The word "parents" as envisaged under section 1(a) of the Second Schedule to the FC should be construed liberally and include "adoptive parents".

This application was dismissed by the High Court which was affirmed by the Court of Appeal. Hence, the present appeal.

Contrary to both the High Court and Court of Appeal, the Federal Court allowed the application and set aside the judgments of the courts below. The apex court viewed that the provisions pertaining to fundamental liberties must be construed as broadly as possible. Hence, in the broadest sense, the phrase "any newborn child found exposed in any place" envisaged under section 19B of Part III of the Second Schedule to the FC includes newborn children who were left abandoned and discovered at a place without any trace of their biological parents. The word "exposed" is capable of including newborn children abandoned at the place of birth. Such interpretation will then prevent abandoned newborn children from statelessness. In addition, it is an accepted fact that the child was born in HUKM. As such, in light of the phrase "until the contrary is shown" in the aforesaid section 19B, it means that any party (such as the respondent) claiming that the child was not "found exposed" bears the burden to prove this assertion. Unfortunately, the respondent seems to have failed in discharging this burden.

The Federal Court then went on and explained that once a newborn child is shown to be one being "found exposed" or abandoned, the child is presumed to be born to a mother who was permanently resident at the place where the finding was made. This means that if the place of finding is within the Federation, that would satisfy the jus soli requirement as envisaged under section 1(a) Part II of the Second Schedule to the FC. The date of birth shall be the date of finding the child. Similarly, the party who asserts otherwise bears the burden to prove against the aforesaid presumptions. Therefore, upon the reading of both section 1(a) of Part II and section 19B of Part III of the Second Schedule to the FC, Chief Justice Tengku Maimun, who delivered the judgment of the court, held that the child was entitled to citizenship by operation

of law. Accordingly, the respondent was ordered to re-issue the birth certificate to register the child as a citizen of Malaysia.

> [53] The operative words in s. 19B are "any newborn child found exposed in any place". The purpose of this section, when read in context, must be to cover newborn children who are left and discovered in a place without any trace of their biological parents. We take judicial notice of the harsh realities of life: this includes newborn children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of "exposed" suggests a newborn child who was "discovered" exposed at any of these locations.
>
> [54] As such, the broadest possible interpretation of the word "found exposed" is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. The operative word "exposed" in s. 19B must therefore encompass the plight of abandoned newborn children, otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory.
>
> ...
>
> [59] This leads us now to the final portions of s. 19B. Once it is shown or averred that a newborn child is "found exposed" (or abandoned), two things are presumed, that is:
>
> (i) that the child is born to a mother who is permanently resident at the place where the finding was made (the jus sanguinis presumption); and
> (ii) the date of the finding is taken as the date of the birth.
>
> [60] Once s. 19B is invoked, any party challenging any of these presumptions must either show that (i) the child was not born of a mother permanently resident at the place where the newborn child was found, or (ii) the date of the finding is not the date of the birth. It is really only a contest on the earlier which determines citizenship because of the wording of s. 1(a) which requires that a child born within the Federation to be born of at least either one parent who is either a citizen or, more important to this case, of a parent permanently resident in the Federation.
>
> ...
>
> [62] Hence, what remains at this stage is a simple application of the law to the facts of the case. Since the child was found abandoned in the location aforementioned, it is presumed that he was born to a mother permanently resident there. It follows that he is taken to fulfil the requirements of s. 1(a) of Part II read with s. 19B of Part III as he, having been born at Hospital Universiti Kebangsaan Malaysia, was born within the Federation and his mother is presumed to be permanently resident in the Federation.
>
> *per Justice Tengku Maimun,*
> *Chief Justice*

Kuala Kangsar Court

The relief for oppression under section 346 of the Companies Act 2016 is not merely confined to relief against the oppressor shareholder. Liability can be imposed against directors/third parties if it is proved that there is a sufficiently close nexus between the oppressive conduct and the party in question. In light of this, there are seven legal tests required to be satisfied.

Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors [2021] 3 MLJ 549, Federal Court

In this appeal, the appellant who is a minority shareholder seeks to obtain reliefs against directors as well as third parties (who had collaborated with the directors) for their oppressive, discriminatory or prejudicial conduct.

The second respondent ("HL"), who is a Singapore-registered entity, entered into a joint venture with the appellant ("AJ"). The joint venture company is known as "ER", i.e. the first respondent, where HL is the majority shareholder, holding 80% of the shares. Thus, in proportion to their shareholding, both AJ and HL respectively contributed 20% and 80% as payment for the share acquisition price. Two of the three directors in ER were also directors of HL, i.e. the third and fourth respondents ("the Kuah Brothers"). The purpose of this newly-formed vehicle was to acquire 49% of the shares of another company known as Semua International Sdn Bhd ("SI"). SI is the wholly-owned subsidiary of Sumatec Resources Sdn Bhd ("Sumatec") and is in the oil-tanker chartering business. Thus, the exercise of acquiring the shares of Sumatec will enable ER to gain a significant foothold in SI. Accordingly, ER executed an agreement to purchase Sumatec's 49% shares in SI, and the proportion of shareholding in SI subsequent to the acquisition is 49:51 in favour of ER and Sumatec respectively. At the same time, another agreement "OFRA" was agreed by both parties. This OFRA provides that Sumatec will unconditionally and irrevocably guarantee ER that it will make good any shortfall if the audited profit of SI after taxation falls short of the financial representations that Sumatec had made. If Sumatec fails to make good the shortfall, ER will be given the call option to require Sumatec to sell not less than 2% of its shares in SI to ER, while AJ will be given the call option to require Sumatec to sell not less than 49% of its shares in SI to AJ.

However, the business of both Sumatec and SI suffered badly. Sumatec was not able to perform its obligations as promised under the OFRA on the aspect of call options. Be that as it may, AJ was very surprised to discover that HL did enter into a conditional sale and purchase agreement ("conditional SPA") with ER, Sumatec as well as another company known as Setinggi (the fifth respondent). Although this conditional SPA did not materialise, it essentially provides that the balance of 51% shareholding of Sumatec in SI was to be acquired by both HL and Setinggi at the proportion of 2% and 49% respectively. This means that if this conditional SPA did materialise, HL would have acquired total control of Sumatec as Setinggi was its nominee. In addition, AJ found out that pursuant to the conditional SPA, ER had waived its rights under the OFRA.

Accordingly, AJ filed a petition contending that HL had exercised its majority power in ER through Kuah Brothers in an oppressive, discriminatory and prejudicial manner. It has caused ER to enter a conditional SPA solely for the benefit of HL, disregarding the interest of AJ. It was argued that the conduct of HL executing the conditional SPA is detrimental to AJ since it waived the rights of AJ under the OFRA. However, HL argued that the conditional SPA was for the purpose of saving their joint venture. HL contended that AJ refused to invest further and wanted to opt out of the joint venture especially when Sumatec and SI suffered financial distress. Thus, AJ's claim is to extricate itself from a bad bargain.

At the High Court, it was held that HL as the majority shareholder in ER had indeed acted in an oppressive manner against AJ. Nonetheless, the Kuah Brothers, Setinggi and Setinggi's sole director ("Teh" – the sixth respondent) were not personally liable for its conduct. They were mere agents of the company, and at all material times, the obligations under the conditional SPA were not carried out. The High Court further viewed that the winding up of ER was the most appropriate remedy since the joint venture seemed to have become an unsalvageable relationship and its purpose become no longer achievable. The High Court did not order a buy-out of AJ's shares in ER by HL because it would have resulted in ER contravening the Merchant Shipping Ordinance 1952 ("MSO"). The MSO requires any company involved in the oil-tanker industry to have Malaysians as the majority composition. These findings were reaffirmed by the Court of Appeal, and thus, the appeal arose. At the

Federal Court, the sole issue for determination was whether the courts below were right in refusing to hold the Kuah Brothers personally liable under section 181 of the Companies Act 1965 ("CA 1965") (section 346 of the Companies Act 2016 ("CA 2016")).

The Federal Court unanimously dismissed the appeal and highlighted several points. First, the refusal of the courts below to order the buy-out of AJ's shares in ER was correct. The MSO is very clear on this point, and it prohibits the business of oil-tanker chartering to be wholly foreign-owned. Second, the order of winding up which was viewed as the most appropriate remedy by the courts below for the joint venture was reaffirmed. The business relationship between AJ and HL seemed to be one which was at a point of no return. As such, winding up seemed to be the last resort for AJ, HL and ER. Third, the courts below were found to have correctly concluded in deciding not to attach liability on the Kuah Brothers or to Teh. Having said that, the Federal Court viewed that both the courts below had actually erred in holding the legal principle that liability could not be imposed on the directors as they were mere agents of the company. The apex court found that while independent corporate legal personality is the general proposition of law, the legislature did provide specific statutory reliefs for cases of oppression, which thus prevail over the general rule.

Nallini Pathmanathan FCJ, who delivered the judgment of the court, explained that the language of section 181 of the CA 1965 (section 346 of the CA 2016) is wide enough to impose liability on directors as well as third parties in oppression cases. It would largely depend on the facts and circumstances of the case. The compensatory relief is so wide that it enables the court to grant reliefs not sought by the petitioner. Presently, the apex court reaffirmed the findings that HL and the Kuah Brothers were indeed attempting to salvage ER. Even though the arrangements appeared to be determinantal to AJ, AJ was neither interested in exercising its call option nor injecting further monies into the joint venture. On the other hand, HL had injected a sum of not less than RM38 million to keep ER afloat. As such, by taking these factors into consideration, the courts below were right in not holding the Kuah Brothers and Teh personally liable for their oppressive conduct. The apex court then went on and explained the legal test in determining whether it is "fair and just" to impose personal liability against the director and/or third party.

[126] From the liberal construction accorded to s 181 of the CA 1965 (now s 346 of the CA 2016), and a detailed consideration of the jurisprudence from other jurisdictions, all of which seek to achieve the same underlying purpose of achieving fairness for minority shareholders where there has been abuse by the majority vide directors or third parties, it may be concluded that it is open to the courts in this jurisdiction to impose liability against directors or third parties provided there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It requires something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It requires deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties.

[127] I would respectfully accept and adopt the reasoning as enunciated by the Canadian Supreme Court in Wilson as epitomising how an assessment is to be made as to whether in any given complaint of oppression, liability has been established against a director and/or third party.

[128] To that extent I restate the legal test applicable as follows:

(a) firstly, there should be evidence of deliberate involvement or participation in, or a sufficiently close nexus to the oppressive or detrimental or prejudicial conduct that the minority complains of, to warrant the attribution of liability to a director or third party;
(b) the imposition of liability should be fair or just in all the circumstances of the particular case;
(c) in assessing whether the imposition of such liability is fair or just, the court should be satisfied that the remedy results in fairness to the parties concerned as a whole. In this context, liability may well be more easily assessed and imposed where a director has breached his duties, acquired personal benefit or where his acts or omission will result in prejudice to other shareholders.

However, the foregoing examples do not comprise conditions without which liability will not be imposed. Ultimately the facts and factual matrix of each particular case will determine whether or not the imposition of liability on directors and/or third parties is justified. Such an assessment is undertaken on an objective basis;

(d) the attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct;

(e) such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question;

(f) in exercising its powers under s 181 of the CA 1965 (now s 346 of the CA 2016) the court should bear in mind general corporate law principles, such that director liability does not become a substitute for other statutory relief or under the common law; and

(g) in summary, the question for the court is whether in the context of s 181 of the CA 1965 the defendant was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.

[129] The courts below declined to allow liability to be made out against the Kuah brothers in their capacity as directors of Ebony Ritz or the third parties Setinggi and Teh. In so declining the courts below relied on the proposition that as directors are agents of the company no liability can devolve on them.

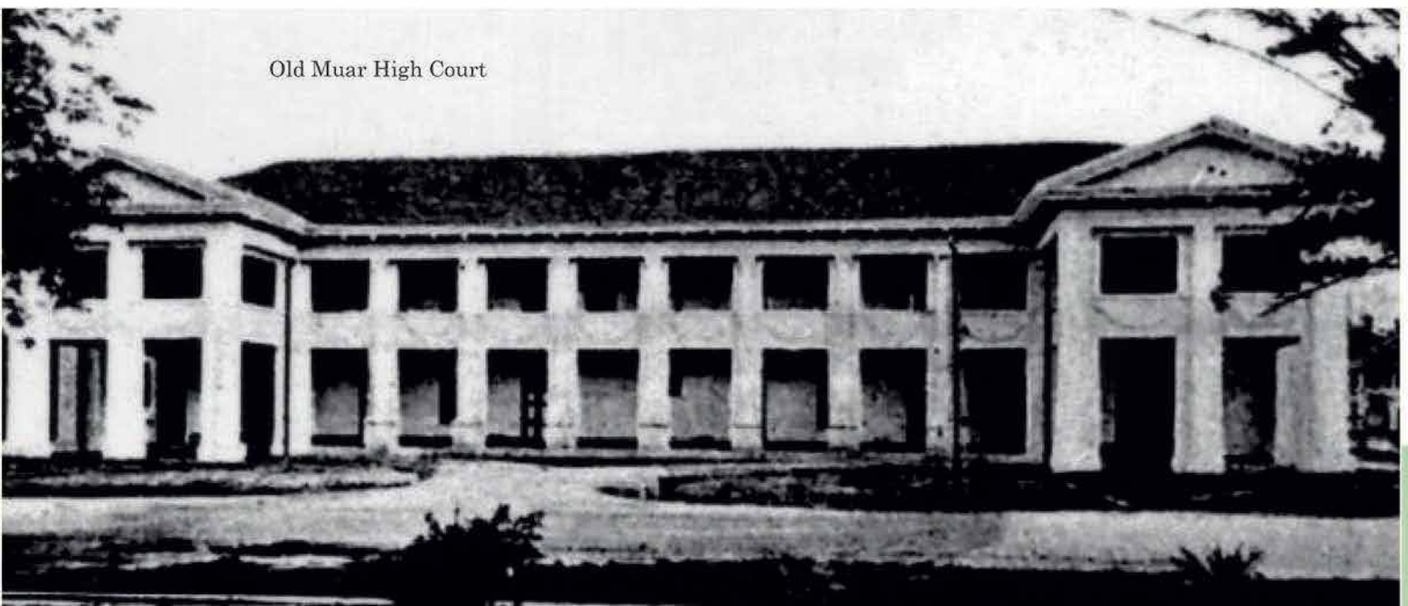
[130] To my mind, the courts below erred in law in adopting such a position, given the jurisprudence we have set out in detail above. In so determining the lower courts relied on a series of cases espousing the general corporate law position that directors stand in the place of an agent in relation to a company and to that extent are not liable for the acts of the company. The independent corporate legal personality prevails to preclude liability from devolving directly on the directors. While this may well be the general position, in the case of oppression, the legislature has provided specific statutory relief, and that must necessarily prevail over the general corporate law position in relation to relief from oppression for shareholders.

...

[161] In summary, on the primary legal issue before this court, namely whether liability can devolve upon directors and third parties in an oppression action under s 181 of the CA 1965 (now s 346 of the CA 2016) we concur with the appellant that such liability can, in an appropriate case, be imposed on directors and third parties. However, on the facts of the instant appeal, for the reasons we have stated, liability is not visited on the directors, the Kuah brothers.

[162] To that extent, both the trial court and the Court of Appeal erred in law in concluding that no such liability could be imposed under the statutory oppression regime as provided under the previous CA 1965 and the present CA 2016. However, it was concluded that this was not a just and fit case on its specific factual matrix to justify the extension of liability to the directors or third parties.

per Justice Nallini Pathmanathan,
Judge of the Federal Court



Old Muar High Court

Following a 4:3 verdict at the apex court, an illegitimate child is not entitled to citizenship. The provision on citizenship under the Federal Constitution received different degrees of interpretation by the judges.

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236, Federal Court

In this appeal, the main issue for determination is whether a child who was born illegitimate, but was legitimised due to the subsequent marriage of his parents, is entitled to be a Malaysian citizen. The provisions concerning citizenship in the Federal Constitution ("FC") became the center of attention, and in the end, this question was answered in the negative. The relevant provisions in this appeal are as follows:

> Article 14 Federal Constitution ("Article 14(1)(b)")
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> ...
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.
>
> Section 1, Part II, Second Schedule to the Federal Constitution ("section 1(b)")
> Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
>
> ...
>
> (b) every person born outside the Federation whose father is at the time of birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State;
>
> Section 17, Part III, Second Schedule to the Federal Constitution ("section 17")
> For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person.
>
> Article 31 ("Article 31")
> Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.

The background facts of the present appeal are largely undisputed. The first appellant ("CTEB") is a minor male and was born in the Philippines in 2010. The second appellant ("CWB") is CTEB's biological father, while CTEB's mother is a Philippine citizen. At all material times, the three of them are non-Muslims. However, at the time of CTEB's birth, his parents were not married. It was only five months later that both his parents registered their marriage in Malaysia.

Subsequently, in 2016, the appellants sought a declaration from the High Court that CTEB is a Malaysian citizen by operation of law under Article 14. The application was dismissed. The High Court viewed that CTEB did not meet the stipulated criteria when Article 14(1)(b), section 1(b) as well as section 17 are read together. Since CTEB was illegitimate at the time of his birth, CTEB cannot automatically acquire his biological father's citizenship. This is because section 17 construes the word "father" in section 1(b) as a "mother" for an illegitimate child. The mere fact that CTEB was legitimised due to the subsequent marriage of his parents did not provide him the right to citizenship. The Legitimacy Act 1961 ("Legitimacy Act") is irrelevant as the laws governing citizenship are already well provided for in the FC. As such, there is no requirement to refer to other laws such as the Legitimacy Act to determine the citizenship of a person. Accordingly, it was the High Court's view that legitimacy had to be assessed at the time of birth and if CTEB was legitimate at the time of his birth, he would automatically qualify for citizenship under Article 14(1)(b).

Dissatisfied with the findings of the High Court, the appellants appealed. Nonetheless, the decision was affirmed by the Court of Appeal. The Court of Appeal further cited Article 24 of the FC and opined that Article 24 precluded CTEB from acquiring Malaysian citizenship because CTEB held a Philippine passport. The appellant thus appealed to the Federal Court and

argued that it is incorrect to stipulate legitimacy as a precondition to citizenship under the FC. Section 1(b) only requires the father to be a citizen of Malaysia for the child to be entitled to Malaysian citizenship, and since the word "father" in section 1(b) was not qualified, thus, it must include "biological father". In addition, section 1(b) should not be read discriminatorily, treating legitimate and illegitimate children and their fathers and mothers differently. Otherwise, that would contravene Article 8(1) of the FC which provides that all persons are equal before the law and entitled to the equal protection of the law.

The Federal Court, with a coram of seven judges, delivered a narrow 4:3 verdict in favour of the respondents. Rohana Yusuf PCA, who delivered the majority judgment, held that the status of birth for a child will determine whether he or she is qualified for citizenship. This means that a child is not entitled to citizenship if he or she is born illegitimate. Her Ladyship explained that when both Article 14(1)(b) and section 1(b) are read together with the interpretive provision section 17, it lays down the rules and requirements that are necessary for a person to acquire citizenship. The majority view was that section 17 cannot be read disjunctively with Article 14 and section 1. This is because Article 31 of the FC provides that section 17 must be read together with provisions pertaining to citizenship, and as such, it is a total misapprehension to sever the reading of section 17 from Article 14 and section 1. Hence, when section 17 mentions that the word "father" of an illegitimate child carries the meaning of "mother", it indicates that the citizenship of the child follows that of his mother. Besides, the subsequent marriage of CTEB's parents did not change the fact that he was an illegitimate child at the time of his birth. The marriage only conferred CTEB with the rights as envisaged under the Legitimacy Act, and the Act does not in any way provide the right of citizenship to CTEB. In addition, her Ladyship highlighted that Article 14 is another instance which contains a discriminatory character, but this was expressly authorised by the FC itself. Thus, the argument that the interpretation of Article 14 contravenes Article 8 and the reasonable classification concept cannot stand. This is because Article 8 of the FC does not offer protection to those discriminatory provisions which the FC itself expressly allows.

> [154] Furthermore, this is substantiated by the fact that s 17 applies by virtue of art 31. Article 31 mandates the application of the supplementary provisions contained in Part III of the Second Schedule to the construction of the citizenship provisions. It is in that Part III that s 17 resides.
>
> [155] Section 1(b) Part II of the Second Schedule, ipso facto calls into operation of the provisions pertaining to citizenship under Part III. Section 17 opens with the words "For the purposes of Part III". Therefore, in whichever way one looks at it, s 17 cannot be detached from s 1(b). Ignoring the application of s 17 will also render art 31 of the FC as otiose.
>
> [156] Section 17 provides for reference to the "father" of an illegitimate child to refer to his "mother". The only clear meaning to be concluded therefore is that the child's citizenship follows that of his mother. There is nothing ambiguous about s 17 to permit other rules of interpretation.
>
> ...
>
> [173] I agree with the Court of Appeal's view in this appeal because the subsequent marriage of parents would not change the birth status of the child as an illegitimate child. Section 4 of the Legitimacy Act only deems a person legitimate from the prescribed date or from the date of the parents' marriage, whichever is the later. Section 9 of the same Act merely provides for the legal rights of a legitimised person to be equivalent to those of a legitimate child. The legal rights referred to are the rights to maintenance and support, claim for damages, compensation, allowance and benefit. The effect of s 9 of the Legitimacy Act must be confined to the ambit of its operability and its interpretation should not be stretched to supplement the provisions of the FC in matters relating to citizenship. There is no mention made for the rights of citizenship in the Legitimacy Act. And no corresponding provision in the FC that deems legitimisation confers the right to citizenship.
>
> ...
>
> [197] A student of Constitutional law will appreciate that not all forms of discrimination are protected by art 8. Article 8 opens with "Except as expressly authorised by this Constitution". In short, discrimination authorised by the FC is not a form of discrimination that art 8 seeks to protect.

There are in fact a number of discriminatory provisions expressed in the FC which include art 14. Since the discriminatory effect of art 14 is one authorised by the FC, it would be absurd and clearly lack of understanding of art 8 for any attempt to apply the doctrine of reasonable classification, to art 14.

...

[202] There is also another dimension to the issue of discrimination which learned counsel had overlooked and failed to address. And it is this. We know that the Legitimacy Act, as well as the Adoption Act, do not apply to Muslims. Applying these laws to construe art 14 would necessarily lead to discriminating against a Muslim child who cannot be legitimized or legally adopted. An illegitimate or adopted Muslim child cannot acquire citizenship by operation of law if these laws are to be resorted to. If the framers of the FC intend such religious discrimination it would have worded clearly in the FC in a similar tone as discriminating an illegitimate child. Whilst it authorises discrimination on legitimacy and gender, it does not authorise discrimination on religion on the issue of citizenship. Is the court in holding the supremacy of the Constitution to indulge in amending clear words to uphold and prohibit discrimination which the FC authorises.

[203] Hence, accepting counsel's argument and following Madhuvita will lead to unauthorised discrimination of the application of the laws between Muslims and non-Muslims. This form of discrimination offends the very protection envisaged by art 8 and the court must not construe art 14 to create discrimination that the FC prohibits.

per Justice Rohana Yusuf,
President of Court of Appeal

However, Chief Justice Tengku Maimun dissented and found in favour of the appellants. Her Ladyship opined that there is no such policy of law that denies a person citizenship simply because his parents were not married at the time of his birth. So long as there is sufficient proof indicating the biological relationship between him and his parents, he must be afforded citizenship. In fact, the provisions pertaining to citizenship in our FC were crafted in a very wide manner. It seeks to ensure every person be conferred with citizenship and to prevent statelessness. Section 17 was inserted to cater for cases where the illegitimate child was born outside of the Federation to an unknown father but to a known Malaysian mother. As such, section 17 is supplementary in nature and not overriding in character. This means that section 17 cannot be read as qualifying the application of section 1. Otherwise, if section 17 is allowed to override section 1(b), it would go against the reasonable classification test as envisaged under Article 8. In addition, the word "father" in section 1(b) should ordinarily include "biological father". Accordingly, when CWB was proven to be the biological father of CTEB, CTEB had then satisfied all the requirements under the law and he must be conferred with Malaysian citizenship. On a side note, her Ladyship explained that Article 24 which was cited by the Court of Appeal is inapplicable in the present facts because Article 24 concerns depriving a person who was already a Malaysian citizen of his citizenship.

[84] There is a further point that must be made in respect of cll (1) and (2) of art 8 that has not perhaps been explained in other judgments. "Law" is defined in art 160 of the FC to include "written law". The term "written law" is further defined in that article to include "this Constitution". Upon reading these definitions into the word "law" in both art 8(1) and (2) it is abundantly clear that the intention of the drafters of the FC was that the tests on unlawful discrimination applicable to ordinary laws passed by Legislature or any executive act applies with equal force to the provisions of the FC itself. There is therefore a strong constitutional basis for this court's observations in Alma Nudo that art 8(1) and perhaps the whole of art 8 is "all pervading" such that the other provisions of the FC must be construed having regard to it.

[85] Based on the submissions of the appellants, I conclude that at least three instances of discrimination will arise if one were to read s 17 of Part III as qualifying the application of s 1(b) of Part II of the said Schedule.

[86] The first form of discrimination is against the parents. In a case where the parental status of child is known but the child is born out of wedlock, interpreting s 17 of Part III in the manner advanced by the respondents has the effect of discriminating the father of the person claiming

to be entitled to citizenship by operation of law. The fathers are essentially deemed non-existent and the fact of paternity is ignored.

[87] The second instance relates to the jus sanguinis principle which s 1(b) of Part II partly encapsulate. By this biological criterion, the only element that needs to be proved, apart from the other requirements of that section, is that the father is a Malaysian citizen. It matters not that the child is legitimate or illegitimate. However, if one were to accede to the interpretation accorded by the respondents, the jus sanguinis principle is effectively rendered otiose for illegitimate child.

[88] The third instance of discrimination though not expressly submitted but which must no less be inferred for coherence of the law is the discriminatory effect the respondents' reading of s 17 of Part III has on Muslims. The FC does not define "legitimacy" and its cognate expressions. Bearing in mind the principle that in construing the constitutional provisions in issue no reference should be made to other statutes but the FC itself, s 17 of Part III as read by the respondents will create two different instances of applications on Muslims.

[89] This is because under almost all of the State Enactments, a Muslim child is considered legitimate only if he is born more than six Qamariah months after the marriage of his parents. Reading "illegitimate" the same way to Muslims in spite of the Islamic law interpretation will result in different applications to Muslims in terms of personal law and citizenship.

[90] Additionally, it would cause discrimination between Muslims and non-Muslims. A non-Muslim child who was born illegitimate but who was subsequently legitimated would not be considered as legitimate for purposes of citizenship, but a Muslim child who is otherwise born illegitimate would for purposes of the citizenship be considered legitimate. Surely that could not be the construct intended by the framers of the FC nor could they have intended for art 8(5)(a) of the FC to apply as the question here turns on the qualifications by operation of law and not personal law. As also accepted by the majority judgment, federal or State-promulgated laws are irrelevant to the question of legitimacy and as such, in the context of citizenship by operation of law, "legitimacy" must mean the same thing whether the applicant is a Muslim or a non-Muslim.

[91] Further, the discrimination between the father and mother as presented in the first example of discrimination (see para 86 herein) is expressly in violation of art 8(2) of the FC which provides that there shall be no prohibition against any citizen on grounds of gender in any law. And as I have alluded to earlier, "law" includes the FC. The word "citizen" in this case refers to the father of the person through whom he seeks to base his claim to citizenship.

[92] I am mindful of the fact that the word "gender" was only inserted into art 8(2) in the year 2001 vide Constitutional (Amendment) (No 2) Act 2001 (Act A1130) and that the constitutional provisions in Parts II and III predate the said amendment to art 8. Regardless, it is a trite principle that Parliament is taken to know the law before it made such amendments (see generally *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151). Parliament however made no attempt to amend the provisions on citizenship. In any event, the FC is a living document and I believe my reading of art 14, s 1 of Part II to the Second Schedule and s 17 of Part III is correct. I am therefore of the view that the respondents' reading of s 17 of Part III as qualifying s 1(b) of Part II is unsustainable in light of this clear prohibition against discrimination on grounds of gender in any law as inserted into art 8(2) by Parliament in 2001.

[93] In my judgment, none of the three instances of discrimination which arise out of the interpretation advanced by the respondents pass muster under the reasonable classification test implied in art 8(1) of the FC. While there may be an apparent differentia between legitimate children and illegitimate children or between their biological fathers on the one side or mothers on the other, in my opinion, it is not an intelligible differentia in that the differentiation has no nexus or connection to any policy or object sought to be achieved by the statute, in this appeal, the FC itself.

per Justice Tengku Maimun,
Chief Justice

Similarly, Justice Nallini Pathmanathan allowed the appeal and viewed that CTEB is entitled to citizenship of Malaysia. Her Ladyship relied on the doctrine of jus sanguinis and explained that citizenship by operation of law merely requires the existence of blood relationship between father and child. Presently, it was undisputed that CWB is the father of CTEB, and with the subsistence of such blood relation, the latter must not be deprived of citizenship. The mere fact that he was born illegitimate does not mean the absence of blood-tie. Our Malaysian law does not expressly provide that citizenship cannot be granted due to the absence of legitimacy or a legally recognised marriage. Her Ladyship further opined that section 17 is not relevant in the present case because it is merely a saving provision for situations such as a child born without a known father. Section 17 is not a governing provision but mere supplementary in nature. The phrase "subject to" in section 1 does not mean section 1(b) is to operate in condition upon the satisfaction of section 17. Thus, it is incorrect to construe section 17 in such a manner to impose legitimacy as a precondition before a child can be conferred with citizenship. In addition, her Ladyship explained that if an illegitimate child born to a Malaysian mother is allowed to acquire citizenship but to deny the same in cases of a Malaysian father, this is a clear case of gender discrimination. This is against Article 8 of the FC as it does not have sufficient justification. There is no rational nexus between reasonable classification vis-à-vis citizenship provisions.

> [248] Section 17 Part III falls under art 31 which provides that until Parliament provides otherwise the provisions in Part II of the Second Schedule will have effect for the purposes of Part III of the Constitution. It is supplementary in nature and not a governing section. It is also clear that Part III of the Second Schedule is interpretive in nature as evidenced by the opening words. By its very nature it explains how specific variations from the general rule are to be dealt with.
>
> [249] Therefore, such interpretive provisions which detail the legal construction to be adopted in specific instances cannot be utilised to override, derogate from or abrogate from the general rule which is set out in s 1(b) Part II. Far less to nullify the express provisions of the FC which provide for the conferment of citizenship by operation of law as a consequence of descent or a blood tie from father to child.
>
> **The meaning of "Subject to" in s 1(b) Part II of the Second Schedule**
>
> ...
>
> [252] It cannot be argued that s 17 Part III provides such express wording derogating from s 1(b) because the former is primarily interpretive in its function. An interpretive section rarely if ever, imposes a condition to, or a condition modifying or altering the primary basis for citizenship.
>
> [253] More importantly it refers to a different fact situation, namely one where there is no known or legally acknowledged father. The child has only one parent, namely the mother, and therefore is not to be left stateless because s 1(b) refers to the father. It is a saving provision for those children who have no known father. It is not a provision seeking to detract from or reduce the entitlement of those children who have a Malaysian father capable of conferring citizenship by virtue of the blood-tie.
>
> [254] It would be incorrect to construe s 17 Part III as imposing a condition of legitimacy on s 1(b) Part II, in order for a child to enjoy citizenship by descent. That is the net effect of construing s 17 Part III as a condition to the right of citizenship by operation of law premised on jus sanguinis. It would deplete and further restrict the right to citizenship by operation of law. The imposition of a legitimacy requirement as a pre-condition to citizenship under s 1(b) Part II would need express provision as it effectively removes entrenched rights conferred under the FC.
>
> *per Justice Nallini Pathmanathan,*
> *Judge of the Federal Court*

Likewise, Justice Mary Lim agreed with the findings of both Chief Justice Tengku Maimun and Justice Nallini Pathmanathan. Justice Mary Lim found that the FC is a living piece of legislation and should be read in an expansive approach. This means that the interpretation of Article 14 must be read harmoniously with other FC provisions such as Articles 5 and 8. Section 17 should not be read against the FC as it was not "expressly authorised by this constitution". Therefore, the mere fact CTEB's parents were not married at the time of his birth cannot deprive his right of citizenship under Article 14(1)(b).

[284] In my view too, the fact that the first appellant's father was not married to his mother at the time of his birth in the Philippines does not diminish his right to acquire citizenship by operation of law under art 14(1)(b). The second appellant remains the father of the first appellant, and the legal relationship between the father and mother of the first appellant does not alter the status of the first appellant. Children similarly circumstanced as the first appellant should never be required to apply for their citizenship under say arts 15 or 15A, the latter was in fact unsuccessfully explored by the appellants. The first appellant's relationship with this country is amply proven and he must be accorded citizenship by the operation of art 14(1)(b). The discrimination that arises from the respondents' reliance on s 17 of Part III, whether it be on grounds of legitimacy or illegitimacy or between father and mother are not at all 'expressly authorised by this constitution' as allowed under art 8(2) and as clearly illustrated in art 8(5). Such discrimination is caused by the effect in reading s 17 of Part III in a manner which is countenanced in law. The reading, interpretation and application of the Federal Constitution in the manner as conducted by the learned Chief Justice renders art 14 harmonious with the other provisions of the Federal Constitution, in particular arts 5 and 8; that a child of a citizen enjoys no less rights and liberties; and more fundamentally, is equally protected by the law, just as his father or mother is. This effectively gives meaning to the oft-quoted reference to our Federal Constitution as a 'living piece of legislation' — see *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 and serve to provide an inclusive yet expansive approach in the construction of our beloved Federal Constitution. Any discrimination even if authorised under the Federal Constitution and unless expressly and clearly authorised must be strictly and narrowly construed, and must never be unwittingly condoned or encouraged.

per Justice Mary Lim,
Judge of the Federal Court

In an estate claim, section 8(2) of the Civil Law Act 1956 expressly prohibits the award of exemplary damages. To be entitled to the award of such damages, the plaintiff himself must be the victim of the punishable behaviour.

Korperal Zainal Mohd Ali & Ors v Selvi Narayan (Pentadbir bersama Estet dan Tanggungan Chandran Perumal, si mati) & Anor [2021] 6 CLJ 157, Federal Court

In this appeal, the apex court was tasked with determining whether section 8(2) of the Civil Law Act 1956 ("the Act") allows exemplary damages to be granted in an estate claim. Section 8(2) provides:

> Effect of death on certain causes of action
> 8. (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:
>
> (a) shall not include any exemplary damages, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;

The deceased, Chandran Perumal died of hypertensive heart disease while he was in police custody. The inquest showed that it was the deliberate deprivation of essential medication by the police authorities which resulted in his death. Thus, the respondents, who are the joint administrators of the estate of the deceased, filed an action against the appellants. The action was premised on sections 7 and 8 of the Act as there was a breach of the deceased's constitutional right to life.

The High Court found in favour of the respondents, and that the appellants were liable for the death of the deceased. Specifically, a relief of RM200,000.00 was awarded as exemplary damages against the appellants. The appellants were dissatisfied with this aspect but their appeal was dismissed by the Court of Appeal. Hence, this matter was brought before the Federal Court to determine whether section 8(2) of the

Act actually imposes absolute prohibition on awarding exemplary damages in an estate claim. The appellants contended that the wordings envisaged in section 8(2) must be given their ordinary meaning. On the other hand, the respondents argued that section 8(2) cannot be read in a manner prohibiting exemplary damages as contended by the appellants as doing so will render it being incongruous with Article 5 of the Federal Constitution ("FC"). This case was concerned with breach of constitutional rights and public misfeasance causing death. If the respondents were not entitled to exemplary damages, it sends out a bizarre message that it is better to kill than to just injure since exemplary damages will be awarded for the latter but not for the former.

The Federal Court, with a majority of 6:1, found in favour of the appellants. Justice Rhodzariah Bujang explained that the wordings of section 8(2) are clear, and for the plaintiff to be entitled to the award of exemplary damages, he must be the victim of the punishable behaviour. However, in the present case, it was the estate of the deceased that was suing the appellants. The condition for exemplary damages was not met and as such, exemplary damages could not be awarded to the respondents. The FC also does not expressly or impliedly provide the right to the deceased's estate to such damages. Having said that, the majority substituted the exemplary damages with RM200,000.00 aggravated damages. It was opined that the estate of the deceased was entitled to aggravated damages as compensation and for the suffering of the deceased. Aggravated damages should be awarded to the respondents due to the unacceptable conduct of the appellants.

> [27] Thus, in view of art. 162(6) and the aforesaid settled principles on statutory interpretation, the question which we posed to ourselves in order to answer the legal poser granted in the leave to appeal is this: Is s. 8(2) of the CLA incongruous with art. 5 of the Federal Constitution? My answer to that is a definite no, for as laid out in Rookes's case (supra) in order to be entitled to exemplary damages, the plaintiff himself must be the victim of the punishable behaviour for its object is not to compensate him but to punish the defendant and to deter him and others in the same shoes or similar position from committing such wrongs. In the words of Lord Devlin in *Broome v. Cassell & Co* [1972] AC 1027 at p. 1126:
>
> ***The plaintiff must himself have been the victim of the conduct of the defendant which merits punishment:*** *he can only profit from the windfall if the wind was blowing his way.*
>
> *(emphasis added)*

Given that the deceased victim is not suing but his estate is, that condition for exemplary damages is not met in this case.

…

[29] Saying this does not mean that the appellants are allowed to walk away scot free for the wrong that had been done to the deceased. Without resorting to or giving a violent interpretation to the clear provision of s. 8(2) of the CLA, on the facts of this case, punishment can and ought to be meted out under aggravated damages, which the respondents had also specifically prayed for in their statement of claim. I say this because firstly, from its very nature, aggravated damages is to compensate the victim or as in this case, his estate for the unacceptable behaviour of the appellants. As stated by the learned author in McGregor on Damages, 19th edn at p. 1653:

> *Aggravated damages come into the picture where the injury to the claimant's feelings is increased by the flagrancy,* ***malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour.***
>
> *(emphasis added)*

[32] Therefore, based on the authorities cited above whilst at the same time giving due deference to the express prohibition in s. 8(2) of the CLA, the respondents in this case should be entitled to be compensated with aggravated damages which amount must reflect the sufferings of the deceased and at the same time the sheer abhorrence of the court against the negligent conduct of the appellants, even though the degree of its seriousness is not on the same footing as other reported cases where the deaths of the detainees were the result of physical abuse by their custodians. Factoring such feeling of the court is permissible as held by Lord Hailsham in *Broome*'s case (supra) at p. 1073:

> *In awarding "aggravated" damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.*
>
> *per Justice Rhodzariah Bujang,*
> *Judge of the Federal Court*

However, Justice Nallini Pathmanathan opined otherwise. Her Ladyship concurred with the findings of the learned High Court judge and affirmed the granting of RM200,000 exemplary damages to the respondents. Her Ladyship viewed that the court has the jurisdiction to mould the relief and the appropriate remedy to meet the needs of a particular infringement. The relief for the infringement of fundamental rights under Article 5(1) of the FC was expressly spelt out under paragraph 25 of Schedule 1 to the Courts of Judicature Act 1964 ("the CJA"). The CJA explains that the High Court, as such the Federal Court, has additional powers to enforce fundamental rights. This is because the rationale for awarding aggravated damages and exemplary damages are the same. It cannot be said that the former can be awarded to the victim for the wrongful conduct, but not the latter merely because the victim is dead.

> [103] The majority decision in Nurasmira, to my mind, with the greatest respect, does not represent the position in law under the FC. I am constrained to depart from the majority decision in Nurasmira because there is, in point of fact, a remedy available to be exercised by the Judiciary under para. 1 of the Schedule to s. 25 of the CJA. It provides as follows:
>
> > *Powers to issue to any person or authority direction, orders or writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others* ***for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.***
> >
> > *(emphasis added)*
>
> [104] The remedy for the enforcement of chartered or fundamental liberties may be provided for in the written Constitution itself or in the ordinary law. In Malaysia, the remedy is expressly provided for in the CJA, as set out above. Given the existence of a clear remedy it is incumbent on the courts of the country to avail themselves of these remedies and afford redress to individuals or groups who establish an infringement of such fundamental rights such as the right to life.
>
> [105] Part II of the FC refers to the fundamental liberties of which the right to life under art. 5(1) of the FC, is arguably the most important human right, comprising not only the right to live, but also the right to liberty and a non-exhaustive list of rights, all related to the right to live with human dignity.
>
> [106] To my mind therefore, it is not accurate to conclude without more, that there is no manner of redress available for the inheritors of the estate of Chandran in respect of his death as a consequence of the deliberate and wrongful neglect by the servants of the State, namely the appellants.
>
> ...
>
> [121] It is equally evident that the duty of enforcing the fundamental rights in Part II of the FC fall upon the Judiciary. This is apparent from the doctrine of the separation of powers, as an incursion by the Legislature or the Executive can only be regulated by the Judiciary for the purposes of ensuring that the provisions of the FC are not contravened. The jurisdiction and power to do so is not in issue as that is a fundamental tenet of a Constitutional supremacy to which we subscribe. It is in keeping with the rule of law.
>
> [122] The mode of redressing such incursions, and the form in which such redress can be given, is set out in federal law, more specifically para. 1 of the Schedule to s. 25 of the CJA setting out the "additional powers" of the High Court for the purpose of enforcing fundamental rights. Therefore it cannot be clearer that the High Court, and as such, this apex court has the jurisdiction and the power to afford such remedies as it deems fit to afford redress in the face of the infringement of a fundamental right.

[123] Therefore, contrary to the reasoning in Nurasmira, with respect, the lack of a constitutional remedy within the FC did not reduce or abrogate the powers of the courts to provide redress for infringements of constitutional rights.

[124] Certainly the absence of express stipulations did not result in an inability to enforce the fundamental rights in Part II of the FC. On the contrary, it allowed the courts to give any relief or order it considered appropriate in the circumstances of a case, by reason of the broad range of remedies available in para. 1 of the Schedule to s. 25 of the CJA. That would include damages or compensation, a declaration or no order at all. It all lay in the hands of the Judiciary enforcing such infringement.

per Justice Nallini Pathmanathan,
Judge of the Federal Court

The conduct of unnatural sex is already a criminal offence provided for under the Penal Code. Hence, section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 which also criminalises this conduct contravenes the State List in the Ninth Schedule to the Federal Constitution.

Iki Putra Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 465, Federal Court

In this appeal, the apex court was tasked with determining whether section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ("1995 Enactment") is inconsistent with the Federal Constitution ("FC").

The petitioner was charged under section 28 of the 1995 Enactment at the Selangor Syariah High Court for attempting to commit sexual intercourse against the order of nature with other males. However, the petitioner challenged the competency of the Selangor State Legislature ("SSL") to enact this section 28. According to the petitioner, section 28 is inconsistent with the FC because sections 377 and 377A of the Penal Code which is Federal law already govern such offences. Accordingly, the SSL is not competent to enact section 28 and the said section is thus void.

Chief Justice Tengku Maimun and the other learned justices allowed the petition. Generally, State Legislatures possess the power to enact laws for offences which are against the precepts of Islam. The concept of "precepts of Islam" is very wide and it is not merely the five pillars of Islam. Nonetheless, such power does not mean that the State Legislatures have unlimited power to make laws. The phrase "except in regard to matters included in the Federal List" contained in item 1, List II of the Ninth Schedule to the FC is clearly a preclusion clause to the power of State Legislatures. This indicates the State Legislatures only have the power to make laws which Parliament has not enacted, and in general, the States actually do not have an overriding power of legislation on the subject of criminal law. Her Ladyship further explained that the civil superior courts do have the inherent supervisory jurisdiction under Articles 4(1) and 121(1) of the FC. In terms of section 28 of the 1995 Enactment, it has indeed fallen within the preclusion clause. The provisions pertaining to "unnatural offences" are already provided under the Penal Code, and as such, this section 28 was enacted in contravention of item 1 of the State List.

[51] With respect, we are unable to agree with His Lordship's observations as regards his categorisation of which Legislature (Federal or State) is empowered to make law within the context of item 1 of the State List. The words employed by item 1 since Merdeka Day have always been "except in regard to matters included in the Federal List". The words are not: "except in regard to matters included in the Federal law". There is a critical distinction between the two categorisations and His Lordship appears to favour the latter approach over the former. Analysing the constitutional validity of State-legislated law on the basis of whether the same subject matter has already been included in the Federal law, again would render the words "Federal List" in the preclusion clause to item 1 nugatory.

[52] Hence, we are of the view that it is untenable to take the position that the power of the State Legislature to make laws by virtue of the preclusion clause is limited to the Federal laws that Parliament has not already enacted. It remains to be tested in every given case where the validity of a State law is questioned, for the courts to first ascertain whether a law in question is

within the jurisdiction of Parliament to enact and not necessarily whether there is already a Federal law in existence such that the State-promulgated law is displaced. Ultimately, as cautioned by this court in Sulaiman Takrib, the distinction would have to be drawn on a case by case basis.

[53] In this regard, we note that none of the parties before us have challenged the competency of Parliament to enact the Federal counterparts of s. 28 of the 1995 Enactment as contained in the Penal Code. Absent any challenge by any party as to Parliament's power to enact them, we must assume that the relevant Penal Code provisions were competently enacted by Parliament within the meaning of items 3 and 4 of the Federal List and any other related legislative entries (see generally *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116).

...

[74] It is quite clear from the wordings of arts. 74(3), 75 and 77 that the primary power of legislation in criminal law resides in Parliament. This is further borne out by the State List in terms of the powers of the State Legislatures to enact criminal laws, namely that the powers are subjected to the preclusion clause in item 1 of the State List and item 9 of the State List. For clarity, these provisions are reproduced as follows:

> Item 1
> Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam ... creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List
>
> Item 9
> Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proof of State law and of things done thereunder, and proof of any matter for purposes of State law.

[75] In terms of item 1, the power to legislate on offences is wide insofar as the "precepts of Islam" are concerned but limited by the preclusion clause. Item 9 in turn allows the State Legislatures to enact offences but strictly within the confines of what the State List and State law may allow. Conspicuously absent from the entirety of the State List is any entry of the likes of items 3 and 4 of the Federal List. The natural conclusion, reading all these entries harmoniously and in context suggests that primacy in terms of the enactment of offences is reposed by the FC in Parliament.

[76] The only clear limitation on Parliament to make laws apart from the general modus operandi of the FC is in respect of Islamic personal law. This is clear from item 1 of the State List which only allows Parliament the full breadth of its powers on Islamic personal law in respect of the Federal Territories. This power is also expressly limited in art. 76(2) read together with art. 76(1)(a) which provides:

> 76(1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:
>
> (a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member ...
>
> ...
>
> (2) No law shall be made in pursuance of paragraph (a) of Clause (1) with respect to any matters of Islamic law or the custom of the Malays or to any matters of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted.

...

[80] Overall, the entire tenor of all the foregoing articles read as whole and harmoniously suggests that the States do not have an overriding power of legislation on the subject of criminal law. Their power is strictly designated to matters which Parliament does not otherwise have power to make laws on.

per Justice Tengku Maimun,
Chief Justice

Justice Azahar Mohamed concurred with the Chief Justice. His Lordship expressed that although the phrase "criminal law" is not defined in the FC or any other statute, the offence of sexual intercourse against the order of nature is clearly a matter that falls within the ambit of criminal law. It falls within the Federal List which means Parliament has the power to enact laws on this subject. Clearly, section 28 of the 1995 Enactment was already provided for under sections 377 and 377A of the PC. His Lordship also opined that Article 8 of the FC which provides equal protection of law militates against the co-existence of separate laws on the same subject matter, i.e. section 28 of the 1995 Enactment and section 377, etc. of the PC. In the former, the conviction attracts imprisonment of not more than three years, fine not exceeding RM5,000 or whipping not exceeding six strokes or any combination thereof for the petitioner. However, in the latter, upon conviction of the three non-Muslims, their punishment is imprisonment of up to 20 years and also whipping. As such, it is difficult to deny the existence of discrimination between Muslim and non-Muslim offenders, with less severe punishment meted out for the former. As such, section 28 of 1995 Enactment is invalid and ultra vires.

> [126] The essential difficulty that I have with this line of argument is that the equal protection of the law under art. 8 of the FC, as pointed out quite rightly by learned counsel for the petitioner, militates against the co-existence of the impugned provision and s. 377 etc of the Penal Code on the same subject matter.
>
> [127] The reason is this. Take now the very factual matrix of the present case as an example. The petitioner is a Muslim man. He was charged in Selangor Syariah High Court under s. 52(1)(a) of the Enactment, which is punishable under s. 28 read together with s. 52(2) of the Enactment. Primarily, it was alleged that the petitioner had on 9 November 2018, between 9pm to 10.30pm in a house in Bandar Baru Bangi, attempted to commit sexual intercourse against the order of nature with certain other male persons. In the charge sheet, the other male persons included three non-Muslims.
>
> [128] If the Syariah Court were to decide that the petitioner is guilty as charged, the maximum sentence that can be imposed under the Syariah Court (Criminal Jurisdiction) Act 1965 is imprisonment not exceeding three years, a fine not exceeding RM5,000 or whipping not exceeding six strokes or any combination thereof.
>
> ...
>
> [130] It is hard to deny that a non-Muslim would be discriminated against by virtue of a Muslim having the benefit of a lesser sentence for a substantially similar offence under the impugned provision. Clause (1) of art. 8 of the FC provides that all persons are equal before the law and entitled to equal protection. Generally, cl. (2) of art. 8 provides that there shall be no discrimination against citizens on the ground only, among others, of religion. Once acquitted or convicted by the Syariah Court, that Muslim person would have the protection against repeated trials under cl. (2) of art. 7 of the FC.
>
> *per Justice Azahar Mohamed,*
> *Chief Judge of Malaya*

However, although Justice Zabariah Mohd Yusof concurred with allowing the petition, her Ladyship expressed some reservations on one particular aspect: the civil courts retain supervisory jurisdiction which is inherent in their function under Articles 4 and 121(1) of the FC. Her Ladyship opined that the powers of the court is derived from Article 121(1) and not Article 4(1) of the FC. Article 121(1) deals with the judicial powers of the courts including supervisory jurisdiction, whereas Article 4(1) is merely declaratory in nature pronouncing the supremacy of the FC as the supreme law of the Federation.

> [136] The application of arts. 4(1) and 121(1) of the Federal Constitution (FC) was addressed in the majority judgment of *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Anor* [2021] 1 LNS 46 (Criminal Appeals No: 05(HC) (303, 304, 305, 307, 308-12-2019(B) and 05(HC)-7-01-2020(W)) which was delivered on 19 February 2021, where it was held that powers of the courts (be it original jurisdiction or supervisory jurisdiction), are derived from art. 121(1), not art. 4(1) as stated in the said sentence. The application of art. 4(1) was also addressed in the majority judgment of *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579. Article 4(1) is a declaratory provision on the

supremacy of the FC as the law of the Federation and the rest of art. 4 deals with the manner of challenging any law which is inconsistent with the FC or the incompetency of the relevant Legislature in enacting any particular law. Article 121(1) is the provision that deals with judicial power of the courts which includes supervisory jurisdiction. Article 121(1) expressly provides that the jurisdiction and powers of the courts are conferred by Federal law.

...

[138] In respect to the last sentence of para. 64 in the said judgment [i.e. CJ's majority judgment in this same case], which implies that if the jurisdiction is not excluded in the law, then the jurisdiction is there, by the words "Thus, unless their jurisdiction is clearly excluded by virtue of subject matter under art. 121(1A) the question that the civil superior courts have no jurisdiction does not arise." Jurisdiction of the courts must be provided by the law/statutes. If it is not provided, then the jurisdiction is not there. Caution must be exercised here in interpreting the issue of jurisdiction in relation to art. 121(1A) as such. What was held in Indira Ghandi Mutho, is that art. 121(1A) did not prevent civil courts from continuing to exercise jurisdiction in determining matters under Federal law, notwithstanding the conversion of a party to Islam. In Indira Ghandi Mutho, it involves a couple where the husband has converted to Islam whereas the wife did not, which means that she had no locus to appear before the Syariah Courts and that Syariah Court did not have jurisdiction over her. Hence, it was held that art. 121(1A) does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. One needs to understand what was held in the context of the facts of the case.

per Justice Zabariah Mohd Yusof,
Judge of the Federal Court

When can a Syariah court exercise its jurisdiction over a person? Distinction is made between one who "no longer professes the religion of Islam" and one who "never professed the religion of Islam".

Rosliza Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 301, Federal Court

In this appeal, the Federal Court had to deal with the situations as to when a Syariah court may exercise its jurisdiction over a person.

It was undisputed that the plaintiff was born in 1981 to a Muslim father ("Ibrahim") and a Buddhist mother Yap Ah Mooi ("YAM"). The birth certificate of the plaintiff states "maklumat tidak diperoleh" in relation to her religion, while the religious status of YAM was unclear. However, in 1994, when applying for the plaintiff's identity card, Ibrahim stated the plaintiff as "Muslim" and YAM as "Malay". A year later, when applying for their new identity cards, both Ibrahim and YAM affirmed their status as "married". YAM recorded her religion as "Buddha" and her race as "Chinese". However, in 2008, YAM attested a statutory declaration ("SD") stating that she and Ibrahim were not married at the time of the plaintiff's birth, and that the plaintiff was not raised as a Muslim. Hence, the plaintiff sought declarations from the court that:

(i) she was an illegitimate child born to a Buddhist mother;
(ii) even if her putative father was a Muslim, his religious faith cannot be ascribed to her under section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("ARIE") and section 111 of the Islamic Family Law (State of Selangor) Enactment 2003 ("IFLE"); and
(iii) she was not a Muslim or person "professing the religion of Islam" as per item 1, List II of the Ninth Schedule to the Federal Constitution ("FC") and as such, is not subjected to the jurisdiction of the Syariah courts or "Muslim law".

The plaintiff attested a SD stating that she was a Buddhist and had never practised the precepts of Islam. Her averment was further supported by letters

from the religious authorities of the Federal Territory as well as the nine other States confirming they had no record of any marriage between Ibrahim and YAM. Briefly, section 111 of the IFLE reads as follows:

> Where a child is born to a woman who is married to a man more than six qamariah months from the date of the marriage or within four qamariah years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the nasab or paternity of the child is established in the man, but the man may, by way of li'an or imprecation, disavow or disclaim the child before the Court.

Whereas section 2 of the ARIE states:

"Muslim" means:

(a) a person who professes the religion of Islam;
(b) a person either or both of whose parents were at the time of the person's birth, a Muslim;
(c) a person whose upbringing was conducted on the basis that he was a Muslim;
(d) a person who is commonly reputed to be a Muslim;
(e) a person who has converted to the religion of Islam in accordance with s. 108; or
(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be oral or written.

Nonetheless, both the High Court and the Court of Appeal dismissed her application and opined that the plaintiff was legitimate and is a Muslim as a marriage did subsist at the time of the plaintiff's birth. The respective letters from the religious authorities did not mean that no marriage had taken place. As such, since the plaintiff was born legitimate, the religious faith of her father Ibrahim can be ascribed to her by virtue of section 2(b) of the ARIE and section 111 of the IFLE. The courts further held that pursuant to Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan Yang Lain ("Lina Joy"), the application by the plaintiff is an attempt to renounce the religion of Islam. It is an offence against the precepts of Islam and thus, it fell within the jurisdiction of Syariah courts under Article 121(1A) of the FC. The plaintiff appealed against the decision of both the High Court and Court of Appeal in dismissing her application for declaratory reliefs. The plaintiff posed two questions for the apex court:

(i) when the issue for determination is "whether a person is or isn't a Muslim" and not "whether a person is no longer a Muslim", whether the High Court has the jurisdiction to hear this matter upon the interpretation of Article 121 of the FC ("question 1"); and
(ii) in light of regulation 24(1) of the National Registration Regulations 1990 ("NRR") and where the truth of the contents of any written application for registration of an identity card or the contents of an identity card is not proven by affidavit or at trial, whether the said contents can be considered facts proved for a declaration of status under section 41 of the Specific Relief Act 1950 ("question 2").

The Federal Court, chaired by a panel of nine judges, unanimously found in favour of the plaintiff. Question 1 was answered in the affirmative and question 2 in the negative. However, although both Justice Azahar Mohamed and Justice Hasnah Mohammed Hashim agreed with the answers to the leave questions, both departed on the orders/reliefs granted to the plaintiff.

With regard to question 2, it was unanimously agreed by the judges that any person who is seeking to prove a fact cannot rely on his identity card or the contents of his written application as evidence of truth especially when the facts are disputed. Hence, both the courts below had erred in accepting Ibrahim's written application for identity card as evidence of his marriage to YAM. It was against regulation 24 of the NRR and was not sufficient proof of their marriage. Regulation 24 of the NRR is as follows:

> (1) The burden of proving the truth of the contents of any written application for registration under these Regulations, or the contents of an identity card, shall be on the applicant, or on the person to whom such identity has been issued, or on any other person alleging the truth of such contents.
> (2) Where any person claims that he is an exempted person the burden of proving such fact shall lie upon him.

Accordingly, this finding was unsustainable and was set aside. The apex court viewed that the plaintiff had indeed successfully proved that she was the illegitimate child of Ibrahim and YAM. The letters from the religious authorities had successfully cast doubts on the existence of the marriage between

Ibrahim and YAM, and as such, it was illogical to find that a marriage existed at all material times. In light of this, the plaintiff cannot be regarded as a legitimate child at the time of her birth and cannot be deemed as a Muslim simply by virtue of section 2(1)(b) of the ARIE and section 111 of the IFLE.

> [64] Under s. 111, which relates to the ascription of paternity, a child may only be ascribed the paternity of the father if he or she is born to a woman who is married to the man for a period of more than six qamariah months. And the father may only disavow or disclaim paternity under the provisions of that section. It follows that a child born less than six qamariah months or born to a woman not married to the man who fathered the child is illegitimate and the nasab or paternity of the child could not be established in the father. A simple application of the section to the facts of the instant case results in the conclusion that the plaintiff is an illegitimate child and while her status as a Muslim is disputed, it remains undisputed that Ibrahim is a Muslim. And as a Muslim, the said s. 111 applies to Ibrahim to remove him, in law, of any ascription of paternity to the plaintiff.
>
> [65] The necessary implication upon a holistic construction of IFLE 2003 against s. 2 of the ARIE 2003 therefore suggests that "parents", in s. 2 of the ARIE 2003, refers only to the parents of legitimate children. Reason being, if s. 111 of the IFLE 2003 not only renders a child illegitimate but also bars the ascription of paternity to the said child, then it stands to reason that the putative father cannot, in law, be considered the child's father. This is the first reason why the plaintiff cannot be considered a Muslim simply by virtue of s. 2(1)(b) of the ARIE 2003.
>
> [66] For completeness, the other question warranting an answer is this. Even if under Islamic law or the IFLE 2003 Ibrahim cannot ascribe paternity to the plaintiff, could he nonetheless, under secular law, have the right to decide his then-infant daughter's religion as he did for her in 1994 in her written application for an identity card? The short answer is no. The authority for this is the judgment of this court in Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145; [2018] 1 MLJ 545 ("Indira Gandhi").
>
> ...
>
> [70] In conclusion, the following issues in respect of question 2 are clear. Firstly, the plaintiff is an illegitimate child. There is no proof of marriage of her parents at the time she was born. The plaintiff cannot be deemed a Muslim simply by virtue of s. 2(1)(b) of the ARIE 2003 on the premise that "either" or "both" of her parents are Muslim. For the reasons aforementioned, although Ibrahim had stated certain particulars in his application for an identity card on behalf of the plaintiff or even in his own application for a new identity card, those particulars are not proof. Even if they are, they appear to materially conflict with the evidence on record.
>
> *per Justice Tengku Maimun,*
> *Chief Justice*

With regard to question 1, the Federal Court held that Syariah courts can only exercise its jurisdiction over a person on two conditions:

(i) the person professes the religion of Islam (jurisdiction personae); and
(ii) the subject matter for determination is expressly enumerated in item 1 State List of the Ninth Schedule to the FC (jurisdiction ratione materiae).

Hence, in the absence of these, Syariah courts are not empowered to exercise its jurisdiction over such person. Article 11(1) of the FC uses the phrase "profess and practise". Item 1 of the State List, only provides the word "profess", and this is a notable difference when it concerns the jurisdiction of the courts. When the matter concerns the issue of "profess", it must be justiciable before the civil courts, and if it concerns the issue of "profess and practise", it falls within the jurisdiction of the Syariah courts. In addition, a distinction must be made between "one who no longer professes the religion of Islam" and "one who never professed the religion of Islam". In the former, it is also known as renunciation cases which only the Syariah courts have jurisdiction to hear. In the latter, it is not about the faith of a person but rather on ascertaining the identity of a person under the FC. The civil courts would have jurisdiction over such cases. This case concerns the issue of constitutional identity of the plaintiff, and the issue is whether the plaintiff is at all

material times professing the religion of Islam. Thus, only the civil courts have the right to address this issue. The evidence shows that the plaintiff is not a Muslim, and accordingly, is not a person "professing the religion of Islam". Hence, the findings of both the courts below that the plaintiff is actually seeking to renounce her faith cannot stand. The plaintiff's applications were granted order in terms.

> [83] Article 11(1) of the FC guarantees the right to profess and practice one's religion. The conjunction "and" in art. 11(1) suggests that it governs more than mere professing. It extends to how one identifies oneself or how one may be identified with a specific religion and the right to also determine one's own level of devotion to his or her belief. However, item 1 of the State List singularly uses the word "professing". Contrasting art. 11(1) with item 1 of the State List, it is plain that the latter was deliberately more narrowly worded to exclude the requirement of "practice". Thus, so long as one is a Muslim by identification whether he practises or not, or whether he continues to believe in the faith or not, he is no less legally identified as a "person professing the religion of Islam".
>
> [84] Taken in this context, there is a notable difference between "profess" on the one side and "profess and practice" on the other. The former is a constitutional term and is justiciable before the civil courts. The latter phrase is a question of faith and dogma and therefore falls within the jurisdiction of the Syariah Courts by virtue of art. 121(1A) of the FC.
>
> [85] The dispute before us relates to the question of one's constitutional identity. It therefore necessitates constitutional interpretation of something which only the superior courts of this country have the right to address. It is only when one's faith is the main subject matter of the dispute does such dispute fall within the jurisdiction of the Syariah Courts. In this regard, there is a significant distinction between "one who no longer professes the religion of Islam" on the one side, and "one who never professes the religion of Islam", on the other. This will be further elaborated later.
>
> ...
>
> [103] All judicial power vests solely in the civil superior courts as per the basic structure of our FC ingrained in art. 121. However, art. 121(1A) dispossess the civil courts of jurisdiction ratione materiae once it is established that the subject matter of the suit is one which falls within the jurisdiction of the Syariah Courts. Having said that, in *ab initio* cases, the issue before the court is not one of faith. It is a question of one's identity under the FC. In contrast, renunciation cases concern persons who despite being Muslims, no longer have faith or believe in the religion.
>
> [104] The phrase "professing the religion of Islam" is a provision of the FC. Ascertaining the meaning of any provision of the FC is a judicial power classified broadly under the umbrella of judicial review and accordingly, it is a power vested strictly and only in the civil superior courts. That this is the position of our constitutional jurisprudence is settled in the words of Salleh Abas LP in *Lim Kit Siang v. Dato' Seri Dr Mahathir Mohamad* [1987] 1 CLJ 40; [1987] CLJ (Rep) 168; [1987] 1 MLJ 383, at p. 169 (CLJ); pp. 386-387 (MLJ):
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> > "The courts have a constitutional function to perform and they are the guardians of the constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review – a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action."
>
> ...
>
> [123] Accordingly, the concurrent decisions of the High Court and the Court of Appeal cannot stand as they were made on the erroneous premise that the plaintiff was originally a Muslim seeking to renounce her faith. This is an ab initio case and not a renunciation case.
>
> *per Justice Tengku Maimun,*
> *Chief Justice*

Justice Azahar Mohamed and Justice Hasnah Mohammed Hashim concurred with the answers on the leave questions, but departed on the aspect of reliefs. Firstly, prayer (i), i.e. the plaintiff was illegitimate at birth and that YAM was a Buddhist, was granted. However, for prayers (ii) and (iii), these two issues actually encompass legal as well as religious matters. Therefore, the civil courts are deciding on issues concerning Islamic law, specifically on section 111 of the IFLE which concerns the religious status of the plaintiff at the time of her birth. This issue has indeed transgressed into the realm of Islamic law and hence, the opinions of qualified Islamic scholars should be sought. Justice Azahar and Justice Hasnah viewed that it is inappropriate for the civil courts to decide on the applicability of this provision without having an in-depth understanding on the concept of Islamic jurisprudence. The civil courts actually lack the ordinary competency to determine this issue and in the absence of opinions of the Fatwa Committee of the State of Selangor, prayers (ii) and (iii) cannot be granted in favour of the plaintiff.

> [154] I do not think we can extract a principle of Islamic law from the provisions of s. 111 of the IFLE 2003 with certainty that the religious status of the illegitimate child born out of wedlock follows the religion of the natural mother at the time of birth and not the religion of the putative father who incidentally is a Muslim. In a matter that has a far-reaching ramification, it is imperative that there must be a degree of certainty in our decision. Granted that s. 111 of the IFLE 2003 applies to the appellant's putative father (it remains undisputed that he's a Muslim) to strip him of nasab from the appellant, still I do not think that it is appropriate for a civil court dealing with the religious status of the appellant at the time of birth to merely decide on the terms of the provision without having an appreciation and understanding of the rules of Islamic jurisprudence.
>
> [155] The question pertaining to the religious status of the appellant at the time of birth transgresses into the realm of Islamic law, which needs serious consideration, proper scrutiny and proper interpretation of such law. Unquestionably, when the legal question of religious status is concerned, it bears spiritual and theological undertones. In my opinion, the civil court on its own is not qualified to determine this issue. It bears emphasising that Islamic law is derived from the primary sources ie, the Holy Quran and the Hadith. In addition, there are other secondary sources of Islamic law, for example the consensus of the religious scholars (*ijma*) and the authoritative rulings (*fatwa*) (for a discussion on the sources of Islamic law, see the judgment of Mohd Zawawi Salleh FCJ in *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd*; *President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 5 CLJ 569 at pp. 626 to 627 and *The Administration of Islamic Law in Malaysia* by Professor Ahmad Mohamed Ibrahim, Institute of Islamic Understanding Malaysia at p. 37). Moreover, due to difficult theological doctrinal differences, there are diverse interpretations of Islamic law (see the judgment of Rohana Yusuf PCA in the case of *Jabatan Pendaftaran Negara & 2 Ors v. A Child & 2 Ors*). Hence, this specific question on Islamic law is outside the ordinary competency of a civil court. In my opinion, unless it is an established principle of Islamic law and there is certainty on the matter, judges in the civil court should not take upon themselves to decide on this matter without expert opinion, as we are not sufficiently equipped to decide on it.
>
> [156] In a matter so fundamental and important as to the religious status of a person, for this apex court to decisively and conclusively determine the issue which is without precedent. I am of the opinion that to remove any doubt it is advisable the civil court obtains the opinion of qualified and eminent Islamic scholars who are properly qualified in the field of Islamic jurisprudence to provide opinion in accordance with religious tenets and principles, to assist the court in determining the issue. Above all else, this is to ensure that our decision is not contrary to Islamic law and it is in conformity with the Islamic law jurisprudence. The point I want to make is this: while we are competent to adjudicate the matter and to rule on this foundational issue, it must not be without the assistance of Islamic jurists after consideration of Islamic law. With this in perspective, in my opinion, the expert opinion given by a Fatwa Committee is relevant evidence to be considered in deciding with certainty the issue before us. In this regard, learned counsel for the appellant Datuk Seri Gopal Sri Ram in his written submission has brought to our attention the 2003 Enactment that provided an exclusive provision for the civil court to avail itself to seek the opinion of the Syariah

Committee if any question on Hukum Syarak or Islamic law calls for a decision. Section 53 of the 2003 Enactment reads:

Request for opinion of Fatwa Committee
53. If, in any Court other than a Syariah Court any question on Hukum Syarak calls for a decision, the Court may request for the opinion of the Fatwa Committee on the question, and the Mufti may certify the opinion of the Fatwa Committee to the requesting Court.

per Justice Azahar Mohamed, Chief Judge of Malaya; (concurring) Justice Hasnah Mohammed Hashim, Judge of the Federal Court

A public officer when suing as an individual is allowed to commence an action for defamation, regardless of whether the action is in his official capacity or personal capacity.

Lim Guan Eng v Ruslan Kassim & Another Appeal [2021] 4 CLJ 155, Federal Court

In this action, the plaintiff sued the defendants for defamation. This matter arose at the High Court due to the press statement and the published articles which were said to be defamatory in nature. The background of this action actually stemmed from the plaintiff's official visit to Singapore. The plaintiff, who was the Chief Minister of Penang, attended a dinner with his officers, amongst them one Datuk Seri Kalimullah Hassan ("Kalimullah"') where they met the Chief Executive of Temasek Holdings. Thereafter, Ruslan Kassim ("D1") and the Chief Information Officer of Perkasa ("D3") issued a press statement:

(i) Suggesting that the plaintiff, together with Kalimullah and one Datuk Muhammad Azman Yahya ("Azman"), attended a secret meeting between DAP and the Singapore political party People's Action Party (PAP);
(ii) Seeking the agenda of the meeting to be disclosed;
(iii) Questioning whether Kalimullah and Azman had previously organised such meeting; and
(iv) Claiming that Malaysians were entitled to question the loyalty of the plaintiff, Kalimullah and Azman.

These press statements were then sent to D4 and D6, the Chief Editors of the New Straits Times ("'NST") ("D5") and Utusan Melayu (Malaysia) Bhd ("Utusan") ("D7"), respectively. Subsequently, pursuant to the press statements, D5 and D7 respectively published an article "Three Queried Over Dinner with Singapore Politicians" and "Kalimullah, Azman Perlu Perjelaskan Isu Jumpa PAP". The plaintiff thus commenced an action in the High Court claiming for damages for defamation, contending that the press statements and the articles were defamatory of him.

The action was allowed by the High Court. The learned trial judge found that the press statements were defamatory of the plaintiff as they questioned the loyalty of the plaintiff as a Chief Minister and citizen of Malaysia. In addition, D5 and D7 had acknowledged that the published articles were baseless. Apologies were also tendered by D5 and D7 towards Kalimullah, and also by D1 towards Azman. The High Court further held that malice was inferred based on the conduct of the defendants as they had acted without caring for the truth of those statements. As such, an award of RM550,000.00 was granted to the plaintiff as general and aggravated damages. D1 and D3 then filed an appeal against the findings of the High Court. At the same time, the plaintiff filed a cross-appeal on the quantum of damages.

On appeal, the Court of Appeal allowed the appeals and the plaintiff's claim was dismissed. The Court of Appeal found that the plaintiff had no locus standi to bring an action for defamation in his official capacity. The case of *Utusan Melayu (Malaysia) Bhd v Dato' Sri DiRaja Hj Adnan Hj Yaakob* ("Adnan Yaakob") which relied heavily on *Derbyshire County Council v Times Newspaper Ltd & Ors* ("Derbyshire") was held applicable in the present case. This meant that an elected government and the holders of public office should be open to criticism from the public regarding public administration and affairs. Otherwise, that would curtail the freedom of free speech. Nonetheless, a public office holder could still sue in his personal capacity when his individual reputation had been injured. Presently, the plaintiff was suing for defamation in his official capacity as Chief Minister. As such, the personal capacity exception in Derbyshire was not applicable. The plaintiff appealed.

At the Federal Court, the plaintiff posed a question: whether an individual, who holds political office or is a government official, is disentitled from bringing an action in defamation in his official capacity. The plaintiff argued that the decision of Court of Appeal was erroneous because in *Chong Chieng Jen v The State Government of Sarawak* ("Chong Chieng Jen"), it was held that a government authority is not prohibited from commencing a defamation suit. Since the plaintiff was a government official, even if he was suing in his official capacity (which he was not), he was permitted to do so under Malaysian law. An individual is similar to a public official and an ordinary citizen, and is just as capable of being defamed. All share the equal amount of right to dignity as well as reputation. Hence, the plaintiff contended that the Defamation Act 1957 ("the Act") does not impose any prohibitions on the species of protagonist able to commence actions for defamation. In fact, the provisions in section 3 of the Government Proceedings Act 1956 ("GPA") and section 3 of the Civil Law Act 1956 do not restrict the rights of the plaintiff to sue in his personal/official capacity. On the other hand, D2 and D3 argued that government officials can only bring an action for defamation in their personal capacity and not their official capacity. The case *Chong Chieng Jen* is not applicable on the present facts because it dealt with a state government and not a public officer. Nevertheless, government officials can still sue in their official capacity if the requirements in the GPA are satisfied, which the plaintiff failed to do. As such, the entire action must be dismissed.

By a majority of 2:1, the Federal Court found in favour of the plaintiff. The findings of the High Court were restored, and Justice Harmindar Singh Dhaliwal held that the action was commenced by the plaintiff in his personal capacity and as a private citizen. The pleadings indicated that the suit was neither initiated in the official capacity as Chief Minister, nor as the State Government of Penang. Instead, the press statements were actually criticisms made against the plaintiff that he was being disloyal to the country both as Chief Minister and as a citizen. As such, the plaintiff could not be prohibited from suing in his official capacity and the provisions of the GPA did not affect him. Although there is no express provision in the GPA as to whether a government official can sue for defamation if the defamatory materials concern his official functions, a public official must be said to have the similar rights as other citizens and can sue for defamation. Government officials must have the rights to commence defamation suits whether it concerns personal or official matters, and need not avail themselves to the GPA provisions. Otherwise, they will be powerless against attacks from, for instance, the media, and it is actually unjustified to give inequitable treatment to public officials if they are prevented from commencing defamation suits. The decision in the case of Chong Chieng Jen is irrelevant and inapplicable since it concerns the right of the state government to bring a defamation suit. Presently, albeit it deals with a public official, it still concerns with the rights of an individual to sue for defamation. Accordingly, the decision of Court of Appeal was set aside, and the amount of damages awarded by the High Court was reaffirmed.

> [32] It was therefore unfortunate for the Court of Appeal to make the assumption that it was the plaintiff's administration that was criticised and not the plaintiff personally. The court found that the plaintiff's suit was made in his capacity as Chief Minister of Penang and that therefore the claim was made in his official capacity and not by him personally. The court held that since the exception to the Derbyshire principle did not apply to the facts and circumstances of the case, the plaintiff's claim must be dismissed (at para [48] of the judgment).
>
> [33] With respect, I do not think this was a correct assessment of the facts. The pleadings indicated that the action was brought by the plaintiff personally and not in his official capacity as Chief Minister. It was the plaintiff suing as a private citizen and not by the office of the Chief Minister or the Government of the State of Penang. In other words, the suit was brought as an individual and not by an organisation in the form of the Government or a Government body. The impugned statements had named the plaintiff and specifically referred to his disloyalty to the country both as Chief Minister and as a citizen.
>
> [34] The sting of the statements was more a criticism of the plaintiff rather than his office or the Penang State Government. He was the one who had the capacity to divulge the secrets. I do not think, therefore, that the plaintiff was disentitled from bringing the action as an individual to protect his reputation (see *Knupffer v London Express Newspaper Limited* [1944] AC 116; *Goldsmith and Another v Bhoyrul and Others* [1998] QB 459; *Lee Hsien Loong v Singapore Democratic Party and Others* [2006] SGHC 220 ("Lee Hsien Loong v SOP")).

...

[49] This brings me neatly to the larger question of whether a Government official can bring a defamation action if the defamatory material relates to the exercise of his official functions as opposed to only matters concerning his private life. This is somewhat related to the earlier issue of whether a claim is brought in his official or personal capacity but the question is now framed by a consideration of the contents of the claim rather than the manner in which the claim is brought.

...

[106] As I had indicated earlier, although in a different context, it is discriminatory that the reputation of public officials in matters affecting their official functions is singled out for adverse treatment. There are far more influential persons in the community who affect public life. As all persons are guaranteed equal rights under the Federal Constitution, there is insufficient basis and justification for the inequitable treatment. Being singled out as such may also seriously deter capable and deserving persons from seeking public office. The reason is obvious. Without the protection, public officials will be powerless to defend against attacks by the media and others who will no doubt be in a powerful position as the necessary checks, which the law of defamation normally provides, will be limited.

...

[111] As it turned out, the Court of Appeal in the instant case, found similarly that the plaintiff/appellant was suing in his official capacity as Chief Minister of the State of Penang and not in his personal capacity. The court took the position that they ought to follow their own decision in Adnan Yaakob as the principle of law applied equally to the facts and circumstances in the case before them. Not having the benefit of hindsight in that the *Adnan Yaakob* [decision] was later set aside by the Federal Court, the Court of Appeal was certainly obliged to follow their earlier decision. For the same reasons as indicated earlier, this decision cannot also be sustained.

per Justice Harmindar Singh Dhaliwal,
Judge of the Federal Court

However, Justice Abdul Rahman Sebli held otherwise. His Lordship viewed that the Court of Appeal had rightly found in favour of the defendants, and that the action brought by the plaintiff was indeed not in his personal capacity. The accusations made against him concerned the plaintiff being the holder of the office. In fact, the official visit to Singapore was in his official capacity as the Chief Minister of Penang, and was not in his personal capacity as a citizen going on a holiday. The pleadings further mentioned that the plaintiff was the Chief Minister of Penang. This clearly indicates that the plaintiff was concerned with his reputation as the Chief Minister of Penang as well as the reputation of its state government. As such, his action was premised on his official capacity. This particular finding by the Court of Appeal was not appealed against by the plaintiff. This would then mean that the plaintiff had accepted that he had no *locus standi* to bring an action for defamation as the Chief Minister of Penang and is thus estopped from claiming otherwise. Besides, section 24(3) of the GPA expressly states that the plaintiff can be represented by a private legal practitioner of his choice. In light of this, he must first obtain a fiat from the State Legal Advisor ("SLA"), which the plaintiff failed to do. The position of "Chief Minister of Penang" indeed falls within the definition of "State Officer" as envisaged under section 24(3) of the GPA, and that would mean that if the plaintiff failed to comply with the statutory requirements, his writ and statement of claim are illegal and ought to be disregarded.

> [144] In any event, by pleading and making the point in para. 1 of his statement of claim that he was the Chief Minister of Penang at the material time, it is obvious that the appellant's primary concern was to protect his reputation as the Chief Minister of Penang and the reputation of the State Government of Penang that he was heading, and not so much his personal reputation as a private citizen.
>
> [145] The clear representation that he made was that he was suing as the Chief Minister of Penang and not in his personal capacity as a private citizen. This can be seen first of all from para. 20 under the heading "Particulars of Malice" of his statement of claim...
>
> [146] In his witness statement dated 17 February 2014, the appellant gave his address as "Chief Minister's Office, Level 28, KOMTAR, 10502

Penang." Obviously that was his official address as the Chief Minister of Penang and not his personal address.

[147] Paragraph 1 of the statement of agreed facts is further proof that the appellant had sued in his official capacity as the Chief Minister of Penang

...

[170] It is also important to remember that the appellant's action was triggered by the respondents' accusation that he had disclosed official Government secrets while on official visit to Singapore in his official capacity as the Chief Minister of Penang and not in his personal capacity as a private citizen on a holiday in the Republic.

[171] To accuse a Chief Minister of disclosing official Government secrets while he is on official duty is not accusation of a personal and private nature. It concerns not only the holder of the office but also the office itself. On the facts, it is futile to separate the two entities.

per Justice Abdul Rahman Sebli,
Judge of the Federal Court

Although comments posted on the Internet are made by third party online subscribers, the online intermediary is presumed as the publisher of these comments under section 114A of the Evidence Act 1950. The burden of proof now rests on the online intermediary to rebut such statutory presumption on the balance of probability. The knowledge of the online intermediary of the existence or content of the comments can be inferred from the surrounding circumstances. Therefore, the defence of denial of knowledge of the existence or content of the comments is insufficient to rebut such presumption.

Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor [2021] 3 CLJ 603, Federal Court

The Honourable Attorney General of Malaysia ("AG") obtained leave of the Federal Court to commence committal proceedings against the first and second respondents pursuant to Order 52 rule 3(1) of the Rules of Court 2012. The first respondent ("Malaysiakini") was the local online news portal while the second respondent (Gan Diong Keng, also known as "Steven Gan"), is the editor-in-chief at that material time, were jointly named as respondents in the present suit.

The basis of this committal proceedings was closely related with two articles published by the first respondent. The first article concerned the acquittal of former Sabah Chief Minister, Musa Aman on 46 charges of corruption and money laundering. Coincidentally, on the same day, the first respondent republished a press statement from the Office of Chief Registrar entitled "CJ orders all courts to be fully operational from July 1". Pursuant to the publications, several comments ("impugned comments") were made by third party online subscribers on Malaysiakini's website on June 9, 2020. These impugned comments were predominantly directed at the impartiality of the Judiciary as well as the Chief Justice. Consequently, a week after the publication of these impugned comments, the AG instituted an ex parte notice of motion to obtain leave to commence committal proceedings against both the respondents, as the alleged publishers of these impugned comments. Upon hearing the application, the Federal Court ruled that a prima facie case had been made out and granted

leave for the commencement of committal proceedings against both respondents.

During submissions, the AG invoked the presumption under section 114A of the Evidence Act 1950 ("the Act") against both respondents. According to the AG, the respondents facilitated the publication of the impugned comments by third party online subscribers. By virtue of section 114A(1), the first and second respondents were presumed to be the publishers of the impugned comments. Taking into consideration the contemptuous nature of the impugned comments and the application of the statutory presumption, the AG submitted that a prima facie case of committal had been made out against both respondents.

The respondents however maintained that they were not involved in the publication of the impugned comments. Although the impugned comments were published on the first respondent's cyber platform, these comments were wholly authored by third party online subscribers. Neither the first respondent nor the second responded had any knowledge of the existence or content of the impugned comments until they were alerted by the police on June 12, 2020. Since they were neither the maker nor involved in the publication of the impugned comments, the respondents contended that it was unjust to hold them liable for contempt of court.

The Federal Court, by a majority of 6:1, dismissed the contention of the respondents. The court acknowledged that the impugned comments were made by third party online subscribers, and were not authored by the first respondent. However, when it concerns online publications, the extent of liability of the Internet content provider or online intermediary, such as the first respondent, remains debatable. The court made references to the underlying legislative intention in enacting section 114A of the Act. Through reference to the Hansard of the Dewan Rakyat, section 114A was introduced to ease the burden of identifying and proving the identity of anonymous persons involved in publications via the Internet. In short, it alleviated the challenges to ascertain and verify the real identity of the commentators. From the holistic point of view on the legislative intent of the provision, the majority ruled that the presumption in section 114A can be invoked against any person whose name appears on the publication as either the owner, host, administrator, editor or sub-editor. Likewise, the impugned comments here, though made by third party subscribers, were published on the first respondent's website. Thus, the first respondent, as the host of the website, was presumed under section 114A to have published the impugned comments. Nonetheless, the court emphasised that section 114A remained a rebuttable presumption. Hence, the burden now lay on the first respondent to rebut such presumption on the balance of probability.

Having said that, the majority dismissed the rebuttals raised by the first respondent. The first respondent attempted to rely on the defence of no knowledge of either the existence or content of the impugned comments through the affidavit of its director, Premesh Chandaran s/o Jeyachandran. The first respondent, once again, emphasised that the impugned comments were made by third party online subscribers on its website. In other words, the first respondent did not, in any way, author, be involved in, moderate, or know of the impugned comments published. In fact, the first respondent was only aware of such comments after being alerted by the police three days later. The first respondent further contended that there were three safeguards implemented against the comments by third party online subscribers. Among others, these safeguards involved terms and conditions which warned against abusive postings, filter programmes and peer reporting systems. With these mechanisms in place, the respondent contended that the general practices of major online publishers had been strictly complied with. Considering the high volume of comments posted by third party online subscribers daily, the first respondent submitted that it was impractical to monitor all these comments.

With regard to the first respondent's knowledge of the impugned comments, Rohana Yusuf PCA, who delivered the majority judgment, viewed that such knowledge was purely a matter of fact which could be inferred from the surrounding circumstances. Thus, proof of knowledge was always a matter of inference. Reiterating the judgment of *Augustine Paul J in PP v Kenneth Fook Mun Lee (No 2)* [2003] 1 LNS 721, her Ladyship affirmed that "it can be presumed that a person had knowledge of the danger of his act and every person is presumed to have some knowledge of the nature of his act." As in the present scenario, the majority opined that the first respondent's knowledge stemmed from the objective of its website. The website was designed to facilitate discussions and commentaries among the third party online subscribers. Therefore, the first respondent must bear the risk which flowed

from the way its platform operated. It was wholly insufficient for the first respondent to rely on the three safeguards adopted to prevent offensive statements, such as the impugned comments, from being published. Furthermore, considering the well-structured editorial team of the first respondent, it was inconceivable that the first respondent did not have knowledge of the existence of such impugned comments. Therefore, the majority concurred that the first respondent had failed, on the balance of probability, to rebut the statutory presumption of publication.

As for contempt of court, the burden was on the AG to prove the allegation of contempt based on the criminal standard of proof of beyond reasonable doubt. On the facts, the court was satisfied that a case of contempt beyond reasonable doubt was proved against the first respondent. The failure of the first respondent to substantiate its rebuttals connotes that no reasonable doubt was cast on the AG's case. As for the second respondent, the majority ruled that the AG failed to adduce any fact or evidence which implicated the second respondent as the publisher of the impugned comments. Thus, the presumption under section 114A could not be extended to the second respondent. As such, the apex court found the first respondent liable for contempt of court and dismissed the claim against the second respondent. Having regard to the scurrilous and contemptuous nature of the impugned comments, a deterrent sentence, viz a fine of RM500,000.00 to be paid within three days, was meted out against the first respondent.

> [49] From the above speech, it is apparent that the challenges in identifying cybercriminals trickle down to tracing the offenders who naturally can hide behind the cloak of Internet anonymity. Although the email address, IP address, location, owner of the computer can be traced, the verification of the identity of the sender or commentator remains difficult. This warranted a provision on presumption based on the "owner honest principal" to ease the burden of proof in respect of certain facts. At the first blush, the principal actor such as the Internet owner etc should be the first target to be imputed with liability.
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> …
>
> [75] The three safeguards adopted by the first respondent have proved to have failed and do not efficiently control or prevent offensive comments from being published. The first respondent's responsibility cannot end by putting in place a T&C with such self-preserving caveat for its own self-protection without regard to injury to others. The surrounding circumstances of the present case strongly suggest that the impugned comments were published without reservation and were only taken down upon being made aware of by the police.
>
> [76] To accept such measures as a complete defence will be to allow it to unjustifiably and irresponsibly shift the entire blame on its third party online subscribers, while exonerating itself of all liabilities. The truth is the postings were made possible only because it provides the platform for the subscribers to post the impugned comments. There being no two ways about it. In short, as stated in the application by the AG, the first respondent facilitates the publication of the contemptuous comments by the third party subscribers. The first respondent cannot be allowed to turn their news portal into a runaway train, destroying anything and everything in its path, only because their riders are the ones creating such havoc albeit made possible by their train.
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> …
>
> [84] The irresistible inference is that at least one of them had notice and knowledge of these impugned comments. Therefore, it is our finding that the first respondent cannot deny notice or knowledge of the existence of the postings. On the facts before us, the first respondent cannot rely on mere denial to avail itself of the defence of ignorance.
>
> …
>
> [86] It would be expected for the respondents to foresee the kind of comments attracted by the publication of the article on the acquittal of Musa Aman by the court following the withdrawal of charges, coinciding with the unfortunate timing of the press release by the Chief Justice. Members of the editorial team, in particular, must have been aware of the kind of materials published and would be able to foresee the sort of comments that it would attract given their experience in running Malaysiakini for over 20 years.
>
> *per Justice Rohana Yusuf,*
> *President of the Court of Appeal*

Nallini Pathmanathan FCJ delivered a dissenting view on the liability of the first respondent. Her Ladyship concurred with the majority that the application of the presumption in section 114A established a prima facie case that the first respondent did, as a matter of fact, publish the impugned comments. Having said that, her Ladyship drew attention to the fact that section 114A does not impute any guilt or liability on the publisher. The presumption merely altered the normal course of proof in such manner that the publisher now played an incumbent role to rebut the presumption. In the present suit, the first respondent sought to rebut the presumption by relying on the affidavits. All the evidence tendered indicated that the first respondent was not aware of the existence or content of the impugned comments on June 9, 2020 until being alerted by the police on June 12, 2020.

Her Ladyship viewed that knowledge or awareness of the first respondent (online intermediary) is necessary to be proved before he can be held liable as the publisher of the impugned comments. When the first respondent operates an online news portal which invites comments from the third party online subscribers, generally, the former is not liable for the comments posted in its website. However, the first respondent only becomes liable as a publisher when it has knowledge of both the existence and content of the unlawful content and fails to remove it within reasonable time. In short, actual knowledge is the rule of thumb in determining whether the first respondent is a publisher of the impugned comments. In light of this, her Ladyship strongly rejected the application of the "ought to know" or "constructive knowledge" test in affixing the liability on the publisher. The application of constructive knowledge test would bring about considerable uncertainties as it may result in excessive surveillance and removal of comments on online websites. Impliedly, such test dilutes the protection for freedom of expression under Article 10 of the Federal Constitution. The "ought to know" test appears to be harsh on the online intermediary as liability will be affixed upon the existence of comments by third party online subscribers.

In an action for contempt, her Ladyship emphasised that actual intention to publish is pivotal. It is wholly insufficient for the AG to merely establish the intention of the respondent to publish by way of constructive knowledge. Actual awareness as well as the knowledge of the existence and content of impugned comments on the part of first respondent must be proven. Presently, the respondents were not the publisher and had no cognizance of the existence or content of the impugned comments until June 12, 2020. Thus, neither of the elements for "scandalising the court" contempt was proven beyond reasonable doubt against the respondents.

> [204] It must be borne in mind that here the first respondent is an online intermediary which merely supplied the means for the publication of the impugned statements and is not the author of the comments. This distinction warrants an examination of the exact degree of knowledge required to attract liability on the part of an online intermediary.
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> ...
>
> [253] Having reviewed the case-law in other jurisdictions, I am of the considered view that an online content service provider like the first respondent that operates an online news portal and provide content in various forms including the invitation of comments from the third-party users becomes liable as a publisher when it has knowledge or becomes aware of both the existence and the content of the subject material that is unlawful or defamatory, and fails to take down said material within a reasonable time...
>
> ...
>
> [257] Under the "ought to know" test, an online news portal is affixed with liability as a publisher as soon as the third party impugned comments appears on the portal and will be untenable to avoid that consequence, even if it removes the impugned comment, because it will be caught by the test that it ought to have known and anticipated that comment before it could be posted. This means that as soon as a comment is posted, an online intermediary cannot do anything to avoid being treated as a publisher.
>
> [258] Conversely, the application of the "actual knowledge" test would not leave unlawful comments unchecked. It simply means that an online intermediary will only become a publisher from the time it had knowledge of the impugned speech. It is only from that point in time that there arises a duty on the part of the online intermediary to remove all unlawful content from its site within

a reasonable time. If it fails to do so, it is likely to be liable for a variety of offences. Thus, an online news portal becomes a "publisher" upon becoming aware of the existence and content of an impugned comment. Until then it is not a "publisher". This is consonant with the CMA which regulates the communications and multimedia industries.

...

[262] Parliament has stipulated that an online news portal becomes a "publisher" with clear duties upon becoming cognisant of any unlawful comment which needs to be taken down. It is only upon failure to do so that it can be said that the publisher has committed a wrongdoing. Therefore, the imposition of a "ought to have known" test run awry of the current legislation and the Code.

...

[278] I am of the view that actual knowledge meaning actual awareness of the existence and content of the impugned statements is necessary and that constructive knowledge inferred from the surrounding circumstances is insufficient to establish intent to publish on the part of the respondents, for the purposes of liability under "scandalising the court" contempt.

per Justice Nallini Pathmanathan,
Judge of the Federal Court

"Service charge" does not fall within the meaning of "basic wages" as defined in the minimum wage legislation. Thus, service charge cannot be incorporated and computed as part of the salaries in meeting the statutory minimum wage requirement.

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] 4 CLJ 775; [2021] 2 ILR 177, FC

In this appeal, the apex court was tasked to determine whether "service charge" is part of "basic wages" as envisaged under the National Wages Consultative Council Act 2011 ("NWCCA) and Minimum Wages Order(s) 2012 to 2020 ("MWO").

The appellant ("the hotel") has been in the hotel business since January 1995. Its employees signed individual contract of employment in which their remunerations comprised basic salary plus service charges. A dispute arose when the National Union of Hotel, Bar and Restaurant Workers ("the union") in October 2011 invited the hotel to commence collective bargaining in respect of the terms and conditions of employment to be included in the parties' first collective agreement. The hotel was not willing to do so. Thus, in February 2012, the dispute was referred to the Industrial Court pursuant to section 26(2) of the Industrial Relations Act 1967 ("the IRA"). The main issue to be decided was with regard to the terms to be incorporated into the first collective agreement. Both the union and the hotel were unable to agree on the salary structure and the service charge as contained in their first collective agreement. The union proposed retaining the "service charge system" together with a salary adjustment of 10%. The hotel however proposed to introduce a "clean wage system" to substitute the "service charge system", or as an alternative, to retain the "service charge system" but introduce a "top-up structure". This "top-up structure" as proposed by the hotel was to operate in a manner where the service charge would be utilised towards the payment of minimum wages. It is important to note that the MWO was enacted as a subsidiary legislation under the NWCCA. This meant that the coming into force of the MWO had an effect on the dispute concerning the salary structure.

On July 18, 2014, the Industrial Court via Award No. 874 of 2015 ordered that the minimum salaries of the employees be increased from RM900 to RM1,300. The Industrial Court also ordered retaining the "service charge system" for employees covered under the scope of first collective agreement. The Industrial Court explained that both salary as well as service charge are fundamental terms in an employment contract. As such, these two terms cannot be varied unilaterally such as by the hotel in the present case. Thus, the hotel must pay its employees the minimum statutory wage and the contracted share of service charge. Dissatisfied with this ruling, the hotel applied by way of judicial review to quash the award. Both the High Court and the Court of Appeal dismissed the application, and agreed with the findings of the Industrial Court. It was held by both the High Court and the Court of Appeal

that service charge cannot be utilised to pay minimum wages, regardless of whether it is under the "clean wage system" or the "top-up structure". This is because under the NWCCA, the phrase "minimum wages" is defined as "basic wages", and it does not contain the element of service charge. Hence, the hotel appealed.

At the Federal Court, the main issue for consideration was whether the hotel is allowed to utilise the service charge and to incorporate it as part of the salaries in meeting the statutory minimum wage requirement. The hotel raised two questions of law:

(i) whether under the NWCCA, hoteliers are entitled to utilise part or all of the employees' service charge to satisfy their statutory obligations to pay the minimum wage; and
(ii) whether having regard to the NWCCA and its subsidiary legislation, service charge can be incorporated into a clean wage or utilised to top up the minimum wage.

The hotel argued that as "service charge" was a contractual term, the Industrial Court ought to have utilised section 26(2) of the IRA to resolve the dispute so as to strike a balance by adjusting the content of the wages. In light of the greater requirement to meet the statutory minimum wages, the Industrial Court could have incorporated part or all of the service charge as wages, thereby eliminating the apparent inequity to the hotel. The Malaysian Employers Federation and four other hotel associations ("amicus parties"), which were granted permission to appear and submit an amicus brief vide amicus curiae at the Federal Court, took the similar stance. Specifically, section 30(4) of the IRA was referred to and the phrase "shall have regard to" indicates that it is mandatory for the chairman of the Industrial Court to take into account the financial impact of his award on the entire hotel industry.

The Federal Court, comprising a panel of three judges, unanimously dismissed the appeal. Both questions were answered in the negative. Justice Nallini Pathmanathan, who delivered the judgment of the court, held that the hotel is not permitted to utilise part or all of the service charge for the purpose of satisfying the statutory obligations to pay the minimum wage. Neither should this service charge be used as a top-up to the minimum wage, nor should it be incorporated into the clean wage salary structure. In other words, the element of service charge cannot be included in computing the minimum wage.

First, her Ladyship explained that both the NWCCA and the MWO aimed to protect and alleviate the plight of workmen and the working poor. Essentially, both these legislation are social legislation as well as an anti-poverty device. They seek to address the problem of the exploitation of labour through the payment of unduly low wages, and they apply to all employees regardless of the sector they are working in. They further strive to alleviate the plight of the working poor by enhancing their purchasing power and raising their living standards. As such, both the NWCCA and the MWO should be construed harmoniously. Sections 26(2) and 30(4) of the IRA cannot be read in such a manner so as to modify, vary or supplement the statutory effect of the NWCCA and the MWO. The contentions by the hotel and the amicus parties amounted to asking the court to interpret the IRA in a manner allowing the abrogation of the purpose, object and effect of the minimum wage legislation. Such approach is inappropriate as it is equivalent to undermining and stultifying the clear purpose and object prescribed by Parliament. Instead, in construing the NWCCA as well as the MWO vis-à-vis the IRA, the interpretation must be one which affords the maximum protection for the class which the social legislation favours. On the facts, these two pieces of legislation were enacted in favour of labour or workmen. Nonetheless, this does not mean the rights and interests of employers and employers' unions are disregarded in toto. It only signifies that in the event where these two interests are in conflict with one another, the court is bound to consider the purpose of the social legislation and to give effect to such purpose. This signifies that the minimum wage prescribed under the NWCCA and the MWO must be achieved without derogating from other entitlements or benefits enjoyed by the employee. Otherwise, the minimum wage would be achieved only at the cost of an entrenched benefit. This certainly is not the purpose of the minimum wage legislation.

The Federal Court also held that it is not open for the hotel to complain that costs have increased several-fold and hence the contractual benefit in the form of service charge be appropriated and utilised to meet the mandatory minimum wage obligations. The object of the NWCCA and the MWO as prescribed by Parliament was to assist workmen, and thus, sections 26(2) and 30(4) of the IRA cannot be read in a manner placing the Industrial Court above Parliament and trampling the purpose of both legislation. Regrettably, the modes of statutory construction put forward by the hotel and the amicus parties actually attempt to abrogate the benefits created for workmen.

On the aspect of service charge, the apex court explained that "service charge" does not fall within the meaning of "basic wages" as defined in the minimum wage legislation. Under the Employment Act, basic wages refer to the contractual sum negotiated between the employer and the employee under a contract of service. Under the minimum wage legislation, basic wages refer to a sum of money which Parliament determines under section 23 of the NWCCA to be the bare minimum sum payable for work done under a contract of service for all employees in Malaysia. Service charge, on the other hand, is a benefit or cash emolument peculiar to the hotel industry. The purpose of service charge is to supplement the low monthly salaries in this industry. Thus, basic wages cannot, in any way, include the element of service charge.

The Federal Court further held that service charge is not a form of tax or other form of payment which customers are obliged to pay under any statute but is a sum collected by the hotel for and on behalf of its employees. Out of the 10% collected, 1% is kept as administrative charges, and the remaining 9% is distributed to the employees. Hence, when the contract of employment includes the element of service charge, it must be paid to the employees. The hotel is not permitted to vary or unilaterally remove this term in the contract of employment or collective agreement without the consent of its employees. In other words, this 9% service charge is actually held on trust by the hotel for the benefit of its employees. It must be paid to the employee when it is due, and the eligible employees are those who enjoy a contract of service granting them service charge pursuant to their individual contracts or collective agreement. Accordingly, regardless of whether it is a "clean wage" structure or the "top-up" structure, it is not permissible for the hotel to utilise the service charge monies for the purpose of meeting the statutory obligation created by the NWCCA and the MWO. Thus, the Industrial Court, the High Court and the Court of Appeal did not err in refusing to incorporate "service charge" as part of the definition of "basic wages".

> [50] It follows that in construing the provisions of the NWCCA 2011 and MWO 2012 in conjunction with ss. 26(2) and 30(4), (5) and (6) IRA, the interpretation which affords the maximum protection of the class in whose favour the social legislation was enacted must be given effect. The social legislation here refers to both NWCCA 2011 and the IRA. And it is beyond dispute that both pieces of legislation were enacted in favour of labour or workmen. This does not mean that capital or employers and employers' unions rights are to be trampled trodden upon, or that their interests are to be ignored or diminished. What it does mean is that when the two interests collide, the court is bound to consider the purpose for which the social legislation was enacted, and give such object and purpose due effect.
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> [52] Put another way, s. 26(2) and s. 30 IRA should be construed so as to ensure that the minimum wage prescribed under NWCCA 2011 and MWO 2012 is achieved without derogation from other entitlements or benefits enjoyed by the workman. Otherwise, the minimum wage would be achieved at the cost of an entrenched benefit, which in monetary terms means the workman is deprived of some monies. To that end, the purpose and object of the minimum wage legislation is not achieved.
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> ...
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> [54] It is therefore not tenable to construe or apply ss. 26(2) and 30(4) IRA otherwise than to ensure that the purport and object of the NWCCA 2011 and MWO 2012 are met. Put another way, it is not open to the Hotel to complain that its costs have increased several-fold and then go on to insist that a contractual benefit in the form of service charge be appropriated and utilised to assist it, in meeting its mandatory statutory payment obligations. That would run awry of both the NWCCA 2011 and MWO 2012, as well as the IRA. It needs to be pointed out that to utilise ss. 26(2) and 30(4) IRA to abrogate NWCCA 2011 and MWO 2012 would effectively be placing the Industrial Court above Parliament because the Industrial Court would then be displacing the specific provision of law as promulgated by Parliament. This is inconceivable.
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> [55] In this context, it is relevant that the IRA aims at maintaining a peaceful and harmonious environment in, inter alia, the hotel industry. Such a liberal interpretation requires that the workman or labour benefits as it is the vulnerable group, albeit not to the complete detriment of the employers. Here, what the employers view as the seeming "detriment" is imposed statutorily

by Parliament itself. It follows therefore that Parliament, when determining that minimum legislation was required to, and did take into account the needs and capacity of all industries, including the hotel industry. Ultimately, the point is that the construction to be afforded to the NWCCA 2011 and MWO 2012, as social legislation, must meet the object prescribed by Parliament, which is to assist the workman. The IRA in no way detracts from that object and accordingly its provisions should be construed liberally and purposively to achieve that same object. And not so as to detract from, or seek to abrogate the benefit created for what is ultimately the welfare of the weaker working class.3 [Shashni, Akriti, "Beneficial Interpretation in Welfare Legislation: Study of Judicial Decisions in India" (July 26, 2013). Available at SSRN: https://ssrn.com/abstract=2298771 or http://dx.doi.org/10.2139/ssrn.2298771.] The modes of statutory construction put forward by the Hotel and the amicus parties do precisely that.

...

[96] Service charge, being monies collected from third parties, does not belong to the Hotel. When it is paid by a customer as part of the bill, ownership in those monies does not vest in, or transfer to the Hotel. Ownership of the monies is immediately transferred and lies with the employees who are eligible to receive those monies. And the employees eligible are those who enjoy a contract of service granting them service charge points under their individual contracts or under their collective agreement.

[97] The Hotel collects the monies and does not mix or intermingle it with its own funds. These funds are kept separately, effectively in trust for the eligible employees to be distributed on a specific date as provided for in their contracts. This is further evidence of a lack of transfer of ownership of these funds. The Hotel in point of fact, acts as a fiduciary or trustee who holds the monies until distribution to the beneficiaries who are the eligible employees.

[98] Therefore, the correct analysis in law of the payment and receipt of service charge, is that it reflects a trust situation whereby the customer pays, and the eligible employees receive the monies they are entitled to, through the trustee or fiduciary namely the Hotel.

[99] It follows that as the monies did not, at any point in time, belong to the Hotel, there is no entitlement in law for the Hotel to appropriate and utilise those monies to meet the statutory obligation created by the NWCCA 2011 and the MWO 2012. Those monies at all times belonged to the eligible employees. It is in that context that the Court of Appeal likened the top-up structure or the clean wage system as amounting to asking the employees to pay themselves from their own monies. Wages, by their very definition, envisage monies belonging to the employer being paid to the employee under a contract of service. It does not envisage monies that are collected for the benefit of the employees being utilised by the employer to offset its own liabilities. The NWCCA 2011 and MWO 2012 certainly did not statutorily provide so.

per Justice Nallini Pathmanathan,
Judge of the Federal Court

Section 20 of the Industrial Relations Act 1967 ("the Act") is a social legislation. When representations are made against the employer for dismissal, only the reasons, factors or events which occurred in the mind of employer when deciding to dismiss a workman will be considered by the Industrial Court. Only pre-dismissal and not post-dismissal reasons will form the basis of assessment and adjudication before the Industrial Court. Section 20 of the Act does not allow the employer to rethink and add on to the original reasons to justify the termination.

Maritime Intelligence Sdn Bhd v Tan Ah Gek [2021] 10 CLJ 663; [2021] 4 ILR 417, FC

In this case, the appellant ("the company") owned an education institution known as Netherlands Maritime Institute of Technology ("the Institute"). The respondent, Tan Ah Gek ("Jenny") was employed as the Vice President – Services & Registrar ("VPSR") of the Institute. At her pre-employment interview, Jenny made available all her certificates and qualifications, including the qualification from Newport University. She was not queried on this qualification nor its accreditation during the interview as well as throughout the course of her employment at the Institute. However, Jenny was subsequently dismissed by the Institute due to the complaints lodged against her by more than half of the employees of the company who had signed a petition. It was alleged that Jenny had abused her power and conducted herself unethically and unprofessionally. The petition was submitted to one Dr Mohd Farhan, a director and shareholder of the company. Dr Mohd Farhan then requested Professor Malek, the President and CEO of the Institute, to investigate the allegations and report on the matter. In fact, Professor Malek who was a personal friend of the workman who had recommended Jenny to the position at the Institute did not conduct an investigation. Instead, he recommended taking action against four employees who were believed to have initiated the petition on the basis of their purported poor performance.

The company then appointed an independent person, i.e. a retired director from the Labour Department, Mr. Haji Arip to investigate the petition. The result of investigation showed that Jenny had committed misconduct and hence, a show cause letter was issued. The explanations offered by Jenny were unsatisfactory and the matter proceeded with a domestic inquiry. The charges against Jenny were, among others, as follows:

(i) unethical behaviour that could tarnish the image of the Institute; and
(ii) acting unprofessionally and using derogatory language about the academic staff with the intention of creating a negative perception among other staff members.

The domestic inquiry panel found that the allegations against Jenny were proved with cogent evidence. Thus, Jenny was dismissed with immediate effect. Jenny however appealed against the decision, but the company responded that findings of improper conduct against her were established with convincing evidence and therefore, it was untenable for her to continue her employment with the company.

Dissatisfied with the decision, Jenny filed a representation under section 20(1) of the Act seeking reinstatement. The Industrial Court decided in favour of Jenny, and found that the dismissal was without just cause or excuse. Although reinstatement was rejected, the Industrial Court awarded Jenny a sum of RM288,000.00 as compensation. The Industrial Court opined that the domestic inquiry panel was neither neutral nor impartial, and as such, the domestic inquiry was invalid. The Industrial Court heard the matter afresh, and allowed the company to restate the reasons as well as its basis for dismissing Jenny. The Industrial Court found that the company had actually failed to substantiate its allegations against Jenny. It is important to note that for the first time in the Industrial Court, the company via its pleadings raised a new point. This new point concerned Jenny's qualification that she was never qualified for her position from the outset. Her Masters degree was from an unaccredited university in Malaysia and accordingly, her dismissal was justified. In other words, the company was actually raising a new post-dismissal allegation against Jenny at the Industrial Court. This new allegation was made long after the decision to dismiss Jenny which formed the subject matter of the instant appeal.

The company sought to quash the Industrial Court's decision by applying for judicial review. The application

was dismissed by the High Court which held that the Industrial Court should not have considered the point on Jenny's lack of qualifications as it was not one of the reasons for Jenny's dismissal. An appeal was lodged to the Court of Appeal by the company which contended that the Industrial Court failed to consider the evidence on Jenny's lack of qualifications, and wrongly rejected the evidence. The appeal was similarly dismissed but on different grounds. The Industrial Court and the High Court relied on the case of Goon Kwee Phoy v J & P Coats (M) Sdn Bhd ("Goon Kwee Phoy"), whereas the Court of Appeal held that the Industrial Court has the discretion to consider new grounds. The Court of Appeal distinguished the following situations:

(i) where the company gave no reasons at all for dismissing the workman; and
(ii) where the company gave some reasons for dismissing the workman but only raised new grounds before the Industrial Court.

The Court of Appeal held that in the former situation, it could be concluded that the company elected to justify its dismissal of the workman at the Industrial Court. However, in the latter situation, the Industrial Court ought to be entitled to satisfy itself as to why the new ground of misconduct was not communicated to the workman earlier. The company sought leave to appeal to the Federal Court which was granted. The following questions were posed to the Federal Court:

(i) whether the Industrial Court has the right to enquire into reasons subsequently put up by the employer via pleading to justify the dismissal, even if such reasons were not given at the time of the dismissal; and
(ii) whether the Federal Court decision in Goon Kwee Phoy is authority for the proposition that the employer is bound only by the reasons of dismissal stated in the letter of termination.

The Federal Court unanimously dismissed the appeal. The first question was answered in the negative and the apex court declined to answer the second question. Justice Nallini Pathmanathan held that section 20 of the Act is a social legislation to ensure that the right of a workman is not truncated arbitrarily at the will of the employer. When a workman is dismissed "without just cause and excuse" by his employer, he is entitled under the law to make representations seeking remedy of reinstatement. Hence, in construing such statutory provisions, the court should interpret them in a manner reflecting the purpose of the Act.

Section 20 of the Act offers such protection to the workman. When the termination of employment is not well-grounded, impartial and reasonable, representations may be made to the Industrial Court. This representation will be against the reasons, factors or events which occurred in the mind of employer when the decision to dismiss was made ("pre-dismissal reasons"). As such, the Industrial Court will determine whether the dismissal was indeed one "without just cause or excuse" as alleged based on those pre-dismissal reasons. The law does not allow the Industrial Court to survey post-dismissal reasons to ascertain whether the workman's dismissal was justified as those reasons were actually not operative in the employer's mind when the decision to dismiss was made. Subsequent and fresh evidence cannot be used retrospectively to justify a dismissal. Section 20 of the Act cannot be read in a manner allowing the employer to rethink and add on to the original reasons to shore up its case.

With regard to the case of Goon Kwee Phoy, the apex court found that it is well-settled law that in adjudicating the workman's representations, it should be confined to reasons relating to and immediately prior to the dismissal. This however does not mean that post-dismissal reasons cannot be considered by the court at all. If there are compelling new facts such as breach of trust or theft which was discovered post-dismissal, the employer may adduce these reasons to counter a claim against reinstatement or compensation. This means that the new facts will go towards the issue of the remedy to be awarded, and not to the basis or reason for the dismissal. Thus, the Court of Appeal had erred on this point as it did not adequately consider the words of Goon Kwee Phoy as well as the interpretation of section 20 of the Act.

> [46] By virtue of the clear statutory content of s. 20(3), the function of the Industrial Court is tied inextricably to the representations of the workman of a dismissal without just cause or excuse. Those representations are made by the workman at the time of his dismissal, for reasons which he feels are without any reasoned basis or for reasons that are insufficient to warrant a dismissal. The focus of the enquiry of the Industrial Court under s. 20(3) of the Act, is therefore premised on matters and events as they occurred at the time of the dismissal. The reasons operating in the mind

of the employer, which preceded the decision to terminate, and resulted in the decision to terminate, comprise the matters to be considered and adjudicated upon by the Industrial Court under s. 20(3).

[47] By way of elaboration of this point, specific factors, events or reasons would have operated on the employer's mind, prior to the employer deciding to terminate the workman's services. It is those reasons, factors or events which comprise the basis for the dismissal. And the workman makes his representation or complaint of dismissal without just cause or excuse based on those reasons, factors or events only under s. 20(1). It therefore follows that the representations based on those limited reasons, factors or events only, can comprise the basis for assessment and adjudication by the Industrial Court under s. 20(3).

[48] The term "representations" therefore ties the jurisdiction of the Industrial Court down to the reasons, factors or events operating in the mind of the employer at the time of dismissal resulting in the representation.

...

[50] There is no provision for the Industrial Court to consider matters outside of the representation by the workman, under s. 20(3). Matters outside of the representation would include matters which were not operative in the employer's mind when the decision to dismiss was taken, but which the employer chooses to put forward post-dismissal at a subsequent stage in the Industrial Court, to justify the decision to dismiss the workman, ex post facto. The very specific wording of s. 20 does not prescribe or allow an overarching survey by the Industrial Court of any and all matters both pre and post dismissal, in an effort to ascertain whether the workman's representations are made out.

...

[110] It is here that a distinction must be made between the basis for the dismissal and the appropriate remedy to be afforded to a workman. It is well settled from Goon Kwee Phoy (above) onwards that the workman's claim of a dismissal without just cause or excuse under s. 20 should be tried on the cause of action, or circumstances apprehending at the time of the dismissal when the representations were made. However, that does not mean that events after institution of the representations cannot be considered at all.

[111] In a case where there are compelling new facts of for example breach of trust or theft, discovered post-dismissal, it is open to the employer to adduce such evidence in relation to the remedy to be afforded to the workman. It would be a formidable basis to counter a claim for reinstatement, and may well be sufficient for the Industrial Court to conclude that no compensation in lieu of reinstatement ought to be allowed either. In point of fact, it is the duty of the Industrial Court under s. 30 to consider the subsequent facts and circumstances and mould the relief accordingly. It might conclude that the relief has become inappropriate and determine the correct relief to achieve complete justice between the parties.

[112] While it therefore may go towards the issue of the remedy to be awarded, it does not go to the basis or reason for the dismissal, simply because it was not known at that particular time and could not have operated on the employer's mind. As such, the workman was not dismissed for such misconduct, but for some other reason. That other reason comprises the basis for the workman's representation and it is the representation, as we have explained earlier that circumscribes the Industrial Court's function and obligation under s. 20(3).

per Justice Nallini Pathmanathan,
Judge of the Federal Court

The Housing Development (Control and Licensing) Act 1966 and its subsidiary legislation are social legislation. Such laws were passed with the intention of reducing the inequality of bargaining power between parties. This means that the court will give effect to the intention of Parliament in interpreting such legislation. Hence, when the developer fails to deliver vacant possession in accordance with the time stipulated in the statutory sale and purchase agreement, liquidated ascertained damages ("LAD") shall be calculated from the date of payment of booking fee and not from the date of the statutory agreement.

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals [2021] 2 CLJ 441, FC

The seven appeals (comprising three different sets of cases) which were heard together were against the application for judicial review at the High Court. All the appeals raised the same point of law, i.e. when there is a delay in delivery of vacant possession by a developer to the purchaser in respect of Schedule G and/or Schedule H-type contracts under regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 ("HDR") enacted pursuant to section 24 of the Housing Development (Control and Licensing) Act 1966 ("HDA"), whether the date for calculation of LAD begins from:

(i) the date of payment of deposit / booking fee / initial fee / expression by purchaser of his written intention to purchase; or
(ii) the date of the sale and purchase agreement.

The dispute was on the interpretation of the phrase "from the date of this agreement" stated in clause 24(1) of Schedule G and clause 25 of Schedule H to the HDR (both are statutory contracts and shall be referred to collectively as "scheduled contracts").

The background of the disputes is as follows: Appeals 29 and 30 were filed by PJD Regency Sdn Bhd, the developer for a project named "You Vista". The first respondent in both appeals was the housing tribunal constituted under section 16B of the HDA, whereas the second respondent was the purchaser of certain units in the "You Vista" project ("PJD Regency cases"). In Appeals 40, 41 and 42, the purchasers of "Taman Paya Rumput Perdana Fasa 2" were the appellants, whereas GJH Avenue Sdn Bhd was the respondent ("GJH Avenue cases"). The other two appeals, namely Appeals 4 and 31 were filed by the developer named Sri Damansara Sdn Bhd. The respondents were the purchasers of the project "Foresta Damansara" ("Sri Damansara cases"). For ease of comprehension, the parties were referred to by their general designations namely "the developers", "the purchasers" and "the housing tribunal".

With regard to the PJD Regency cases, it was contended by the purchasers that the calculation of LAD should be from the date of issuance of the certificate of completion and compliance ("CCC"), and not from the date of issuance of certificate of practical completion ("CPC") as argued by the developer. The sale and purchase agreements between them only indicated one type of certification, i.e. CCC. Thus, the purchasers were awarded LAD by the housing tribunal for late delivery of vacant possession and the late completion of common facilities by the developer. This finding was affirmed by both the High Court and Court of Appeal.

In the GJH Avenue appeals, the purchasers were similarly awarded with LAD by the housing tribunal. The LAD was calculated from the date of payment of booking fees, and it was affirmed by the High Court. However, the Court of Appeal viewed that "the date of this agreement" as provided for in the sale and purchase agreement was the actual date the sale and purchase agreement was entered into.

In the Sri Damansara appeals, the purchasers were awarded LAD by the housing tribunal for the failure by the developer to comply with the statutorily prescribed timeline. LAD was calculated from the date of payment of booking fees, and this finding was affirmed by the High Court and the Court of Appeal. The main issue in contention was whether the purchasers were unjustly enriched with the LAD awarded as the developer had provided the purchasers a 10% rebate on the purchase price of the property.

The Federal Court dismissed the developers' appeals, while the appeals by the purchasers were allowed. Chief Justice Tengku Maimun held that in light of the decisions of Supreme Court in both *Hoo*

See Sen & Anor v Public Bank Bhd & Anor ("Hoo See Sen") and *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* ("Faber Union"), the legal issue in the present appeals were actually well-settled. The law is very clear on this particular point: when the developer failed to deliver vacant possession in accordance with the time stipulated in the statutory sale and purchase agreement, the LAD shall be calculated from the date of payment of booking fee, not from the date of statutory agreement. Her Ladyship explained that the HDA and its subsidiary legislation such as the HDR are social legislation. It aims to regulate the relationship between the stronger and the weaker parties in a contract. Due to the inequality of bargaining power, laws such as the HDA and the HDR were passed to protect the interests of purchasers. Such laws strive to balance the bargaining power by providing certain statutory safeguards for the weaker party. Therefore, when the wordings of the social legislation or statutory contracts are unambiguous, the court shall interpret them in a manner offering the maximum protection to the class of people which the law seeks to protect. The court will not adopt a literal reading of the provision but will interpret it in accordance with the statutory protections afforded by Parliament. This means that in the present appeal, the court will not arrive at a conclusion that the date of calculation of the LAD ran from the date printed in the scheduled contract.

With regard to the collection of booking fees, the apex court viewed that regulation 11(2) was unambiguous on this point. The law strictly prohibits the collection of booking fees regardless of the nomenclature used. Nonetheless, in the present appeal, the scheduled contracts actually required a 10% booking fee to be paid upon the signing of sale and purchase agreement. Hence, the 10% deposit and the signing of the sale and purchase agreement would have been done simultaneously. However, despite the express prohibition, the present scheduled contracts embodied such a booking fee provision which signified that the developer had bypassed the statutory prohibition. As both the HDA and the HDR are social legislation, it follows that the scheduled contracts in these appeals would not be read literally, and the date of the contract could not be taken to mean the date printed in the scheduled contracts. In construing the illegality against the developers, if the collection of booking fees, albeit illegal, was their attempt to secure an early bargain, it is sufficient to constitute an intention to enter into a contract. Therefore, the developers would have to bear the full extent of the LAD payable by them to the purchasers for any late delivery of vacant possession. A delay in delivery of vacant possession under regulation 11(1) of the HDR would mean that LAD is calculated from the date the booking fee was paid by the purchaser, and not from the date of the sale and purchase agreement.

With regard to the PJD Regency appeals, the findings of the housing tribunal, the High Court and the Court of Appeal were affirmed. The Federal Court agreed with the findings that a developer was only entitled to deliver vacant possession to the purchasers upon the issuance of the CCC. The CCC, which is a legal requirement, is issued only after the developer complies with laws such as the Street, Drainage and Building Act 1974. This is to ensure the premises and the construction have passed the architect's certification. The CPC or any other document are not the same as the CCC.

As for the GJH Avenue appeals, the apex court opined that the Court of Appeal had erred in its interpretation of social legislation. The interpretation adopted by the Court of Appeal would mean that the developers were allowed to benefit from the illegal booking fees and were allowed to manipulate the date of the contract for the purposes of LAD. With regard to the Sri Damansara appeals, the findings of the housing tribunal, the High Court as well as the Court of Appeal were affirmed. The Federal Court viewed that the rebate was essentially an ex post facto discount, i.e. a refund of monies paid by the purchasers. There is no question of unjust enrichment since the present appeals concerned the right of innocent parties (the purchasers) to enforce their statutory remedy against the party in breach, i.e. the developer. The developer is thus prohibited from mitigating its losses incurred by the LAD by offsetting it against the purchaser's own money.

> [31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is "social legislation". A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and

analogous example is how this court interpreted the Industrial Relations Act 1967 in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369 ("Hoh Kiang Ngan").

...

[33] With the greatest of respect, it is our view that the submission is untenable. When it comes to interpreting social legislation, the State having statutorily intervened, the courts must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the Legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory.

[34] We find considerable support for this assertion in the judgment of this court in *Hoh Kiang Ngan* (supra), at p. 707 (CLJ); p. 387 (MLJ):

> *Now, it is well-settled that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with well-settled canons of construction, such legislation must receive a liberal and not a restricted or rigid interpretation.*
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> *(emphasis added)*

...

[46] Regulation 11(2), as emphasised, very clearly stipulates and expressly provides for an absolute prohibition against the collection of booking fees howsoever they are called or described. Instead, the scheduled contracts now require that 10% of the purchase price be paid upon the signing of the sale and purchase agreement. Thus, speaking in ideal terms, if the law is strictly complied with, there is no question as to whether the date of calculation of the LAD runs from the date of payment of the booking fee or from the formal date of the agreement. This is because, the 10% deposit and the signing of the sale and purchase agreement would have been done simultaneously. Indeed, the statutory contracts for sale prescribe a specific payment schedule that must be complied with.

[47] The recent amendment to the HDR 1989 vide PU(A) 106/2015, to our minds, further cements the notion that the legislative framework has been further tightened to abrogate this practice of booking fees. Regulation 11(2) was amended to even stricter terms: everyone, not just developers, is prohibited from collecting booking fees. The new reg. 11(2) of the HDR 1989 reads:

> (2) No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale.

[48] In our view, the intention of Parliament is unequivocal. From the Hansard in 1966, to the change in the subsidiary legislation up to the amendment to the HDR 1989 in 2015, the written law in force has made it crystal clear that the collection of booking fees is to be absolutely prohibited.

[49] Given the clear legislative intent, it follows that we are unable to read the scheduled contracts in these appeals literally. The legislative aim here is that any payment collected must be in accordance with the terms of the statutory contract of sale. Accordingly, to give effect to this legislative intent and in light of the collective status of the HDA 1966 and HDR 1989 as social legislation, it follows that where this illegal practice of booking fee is afoot, the date of the contract cannot be taken to mean the date printed in the scheduled contracts. Otherwise, this court would be condoning the developers' attempt in this case to bypass the statutory protections afforded to the purchaser by the legislative scheme put in place.

...

[76] Thus, it can be said that the general principle of law flowing from this discussion is as follows. When it concerns social legislation and the stronger side to the transaction has committed an illegal act, the existence of a penal provision does not automatically render the contract void. If that were so, then the legislation would, if it were taken to destroy the contract or to erase the weaker side's right to a remedy, be to defeat the very protective purpose for which it was enacted. Accordingly, in such cases, the weaker party to the transaction will not be deemed to be

in pari delicto and shall accordingly be entitled to the appropriate remedy. The natural result of this is that the stronger party will have that illegality construed against them. The result of that exercise depends very much on the facts of a particular case.

[77] In these appeals, the prime idea behind the legislative framework is that the developers should be confined to a set timeline. Booking fees are prohibited yet the developers have continued to brazenly flout the law by calling it standard practice. At the same time, they very boldly demand that the statute be construed in their favour by strictly limiting the commencement period to the dates printed in those contracts.

[78] In construing the illegality against the developers, if it is their attempt to have secured an early bargain through the illegal collection of booking fees, then the protective veil cast by the Legislature over the purchasers should operate in a way so as to bind the developers to the booking fees. In this way, the developers will have to bear the full extent of the LAD payable by them to the purchasers consistent with the overall intent of the written law in respect of late delivery of vacant possession.

per Justice Tengku Maimun,
Chief Justice

The Federal Court emphasised that the doctrine of law cannot prevail over supremacy of our Constitution. Post-Merdeka laws can only be declared void under Article 4(1) of the Federal Constitution ("FC") if it is inconsistent with any provision encapsulated in the FC. The apex court reiterated that Article 121(1) of the FC serves as the governing provision of judicial power in the federation. Section 59A of the Immigration Act 1959/63 ("IA 1959/63"), as a federal law, merely confines the jurisdiction of courts to review any procedural non-compliance in immigration matters. Although section 59A precludes the court's power from reviewing substantive matters, such provision does not remove the judicial power in absolute. Hence, section 59A of the IA 1959/63 is consistent with Article 121(1) of the FC and such provision must not be struck down merely for infringing the doctrine of separation of powers.

Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579, FC

On May 15, 2016, the appellant was stopped by the immigration authorities at Kuala Lumpur International Airport after she collected her boarding pass to South Korea. She was told that a travel ban was imposed on her. As a result, she was blacklisted and not allowed to leave the country ("the impugned decision"). At that material time, no reason was given to the appellant for the imposition of such ban. The respondent relied on section 59 of the IA 1959/63 that no statutory obligation is reposed on him to provide or to inform the appellant of the reasons for such travel ban. However, the reasons were only disclosed by the respondent in the affidavit in response to the present judicial review application.

The affidavit indicated that the appellant was blacklisted from leaving the country for a period up to three years commencing January 6, 2016. The primary reason given by the respondent was that the appellant has disparaged the Government of Malaysia *("memburukkan Kerajaan Malaysia")* at different forums and illegal assemblies. Therefore, the travel ban was imposed pursuant to a circular entitled *"Pekeliling Imigresen Malaysia Berhad Bil. 3 Tahun*

2015". However, the travel ban was lifted two days later, i.e. on May 17, 2016.

At the High Court, the appellant contended that the facts raised in the respondent's affidavit have yet to take place. Since the facts relied upon by the respondent have not occur, they could not possibly constitute valid reasons to justify the imposition of the travel ban. The appellant further submitted that the travel ban has infringed her freedom of speech, which is a fundamental right guaranteed under Article 10(1) of the FC. The travel ban imposed on the appellant actually restrained her from attending a human rights conference in South Korea and receiving an internationally recognised award on behalf of a local non-governmental organisation. Additionally, she contended that there was procedural non-compliance as the respondent failed to disclose reasons in response to her reasonable queries. Nevertheless, the High Court ruled in favour of the respondent and dismissed the appellant's application for judicial review. The trial judge emphasised that the law is settled that travelling abroad is not a constitutional right for a citizen. As for the appellant's right to be heard, the court was of the opinion that such right was expressly excluded by virtue section 59A of the IA 1959/63. The said provision also dispensed with any statutory obligation for the respondent to disclose the grounds for such travel ban. At the Court of Appeal, the appellant's appeal was dismissed on the basis that it was rendered academic as the travel ban had been lifted. The Court of Appeal pointed out that section 59A of the IA 1959/63 conferred wide discretionary powers on the respondent and any decision made pursuant to the said provision is not amenable to judicial review. Thus, the application for judicial review sought by the appellant was without merit.

At the apex court, the respondent raised a preliminary objection against the application filed. The respondent contended that the impugned decision sought to be judicially reviewed was academic as the travel ban had been lifted even before the application before the High Court commenced. In other words, the appellant no longer suffered from any real grievance to substantiate her application for judicial review. On the contrary, the appellant argued that the present suit must not be rendered academic. Taking into account the overwhelming public interest, the appellant invited the court to adjudicate on the validity of the impugned decision made by the respondent. In light of the preliminary objection, the apex court acknowledged the disinclination of the Judiciary to exercise its discretion to hear hypothetical or academic issues. Nevertheless, the Federal Court ruled that the present application must be heard on merits and the respondent's objection was dismissed. With the leave granted by the Federal Court, three issues were raised for the court's determination:

(1) whether section 3(2) of the IA 1959/63 empowers the Director General ("DG") the unfettered discretion to impose a travel ban. In particular, can the DG impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticising the government?
(2) whether section 59 of the IA 1959/63 is valid and constitutional?
(3) whether section 59A of the IA 1959/63 is valid and constitutional in light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and Another Case* [2017] 3 MLJ 561 ("Semenyih Jaya") and *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 1 MLJ 545 ("Indira Gandhi")?

Considering that the outcomes to question 1 and 2 are dependent on the answer of question 3, the apex court began with the determination of question 3.

With regard to question 3, the constitutionally of section 59A was challenged in light of the precedents laid down in both *Semenyih Jaya* and *Indira Gandhi*. Section 59A is produced in verbatim as follows:

> 59A. (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing the act or decision.

On the issue of constitutionality, the court emphasised that section 59A is presumed to be constitutional and the appellant has the burden to prove otherwise. The appellant contended that section 59A confined the power of the court to conduct judicial review only on matters relating to procedural non-compliance. It means no judicial review could be made on substantive matters, particularly on the decision of the respondent. Since section 59A denied the court of its inherent powers of judicial review, the appellant submitted that

Parliament has breached the doctrine of separation of powers, which constitutes the basic structure of the Constitution. In relation to this doctrine, the appellant substantiated her argument with strong reliance on Semenyih Jaya and Indira Gandhi. Both these cases affirmed the doctrine of separation of powers in which judicial power rests solely with the Judiciary. More importantly, the Federal Court in both the above cases ruled that such power cannot be abrogated or even removed by constitutional amendments. Nonetheless, the present apex court pointed out that these decisions could be misconstrued, which the appellant did, in such manner that the FC must bow to the doctrine of separation of powers. The present Federal Court explained that the doctrine of separation of powers merely indicates that the three branches namely, the Legislature, the Executive and the Judiciary are to act within their respective spheres of power. This means that the Legislature makes the law, the Executive enforces the law, and the Judiciary interprets the law. Although the doctrine of separation of powers constitutes the basic structure of our Constitution, such doctrine cannot prevail over the Constitution.

In light of this, the apex court drew attention to the real issue to be determined viz., whether section 59A of the IA 1959/63 was void for being inconsistent with Article 121(1) of the FC. This is wholly different from what was contended by the appellant viz, whether section 59A was unconstitutional for contravening the doctrine of separation of powers. Thus, it is pertinent to understand the constitutional framework of Article 121(1) of the FC. The expression in Article 121(1) is that "the High Courts and inferior courts shall have such jurisdictions and powers as may be conferred by or under Federal law". The appellant contended that Article 121(1) empowers Parliament to enact laws which circumscribe judicial power. Hence, this violates the doctrine of separation of powers. Likewise, the appellant argued that section 59A of the IA 1959/63 was passed to restrict the exercise of judicial power to review substantive matters. Nonetheless, upon scrutiny, the Federal Court viewed that Article 121(1) is irresistibly clear and unambiguous that it is the governing provision on judicial power for the federation. From the provision, it is evident that the power and jurisdiction of courts are conferred by federal law. In the present case, section 59A is federal law. Such provision has allocated the powers and jurisdictions of court to adjudicate only on procedural non-compliance in immigration matters. It means both the High Court of Malaya and High Court of Sabah and Sarawak are bound to exercise their powers within the jurisdictions conferred by section 59A. The court emphasised that section 59A only limits and does not wholly remove the judicial power in immigration matters. On the contention that Article 121(1) infringed the doctrine of separation of powers, the Federal Court ruled that any doctrine of law cannot prevail over the FC. As such, post-Merdeka laws can only be declared void under Article 4(1) if it is inconsistent with any provision encapsulated in the FC. Since section 59A of the Immigration Act is a federal law enacted and passed by Parliament, it is erroneous to regard such provision as inconsistent with Article 121(1). Therefore, section 59A of the IA 1959/63 is constitutional and valid. Hence, question 3 is answered in the affirmative.

Since section 59A of the IA 1959/63 is valid, the apex court proceeded to consider whether the respondent failed to comply with the procedural rules when imposing the travel ban. The appellant in question 1 challenged the "unfettered" discretion of the DG under section 3(2) of the IA 1959/63. Section 3(2) states:

> The Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.

The Federal Court ruled that it is unambiguous from section 3(2) that the DG has the discretion to impose such travel ban on the appellant. The provision is clear as it confers the DG with broad powers in "all matters relating to immigration". However, such discretion must not be exercised arbitrarily. In short, the DG's discretion to impose a travel ban is not unfettered. After examining the peculiar facts and circumstances, the court viewed that the reasons given for the imposition of the travel ban on the appellant were inappropriate. Therefore, question 1 is answered in the negative. With regard to question 2, the appellant disputed the constitutionality of section 59 of the IA 1959/63. The Federal Court, in its majority, affirmed the validity of section 59 which was decided by the earlier apex court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72. Thus, the present court concluded that it is wholly untenable to overrule the earlier decision and strike down section 59 as unconstitutional.

To conclude, the Federal Court ruled that both sections 59 and 59A of the IA 1959/63 are valid and constitutional. Thus, questions 2 and 3 were answered

in the affirmative. As for question 1, it was answered in the negative as the court viewed that the discretion of DG is not unfettered. Therefore, based on question 1, the present appeal was allowed. Pursuant to prayer 4 of the appellant's judicial review application, the Federal Court declared that the respondent did not have unfettered discretion in making the impugned decision.

> [31] To be inconsistent with "this Constitution" means to be inconsistent with any article of the Federal Constitution that relates to the legislative scheme of the impugned law. In the present case, the legislative scheme of s. 59A of the Immigration Act is to limit the judicial review power of the High Courts to procedural non-compliance by the decision-maker. Clearly, that is within the competence of Parliament to legislate pursuant to the power conferred on it by art. 121(1) of the Federal Constitution. This section is therefore not void under art. 4(1) for being inconsistent with art. 121(1).
>
> [32] The purport of s.59A of the Immigration Act is merely to limit judicial power and is not a finality clause. This court in *Indira Gandhi* had this to say on finality clauses:
>
> > "Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party."
>
> ...
>
> [72] It is a principle of great antiquity that the decision in each case must be confined to its own peculiar facts and circumstances. It is not every pronouncement by the court that counts as the ratio decidendi of the case. While obiter dicta are entitled to due respect, they cannot be placed on par with ratio decidendi. Care must be taken to separate the wheat from the chaff so to speak.
>
> ...
>
> [79] The way art. 4(1) of the Federal Constitution works in relation to s.59A of the Immigration Act is to render the provision void if and only if it is inconsistent with any constitutional provision that confers it with the legitimacy and force of law. It is only art. 121(1) of the Federal Constitution that confers such legitimacy and force of law on s.59A of the Immigration Act and no other article. For that reason, s.59A of the Immigration Act can only be void if it is inconsistent with art. 121(1) and not with other article of the Federal Constitution such as arts. 5(1), 8(1), and 10(1) which have nothing to do with the power of Parliament to enact Federal Law pursuant to art. 121(1) of the Federal Constitution.
>
> ...
>
> [88] Clearly, it is a term of art. 121(1) of the Federal Constitution that the jurisdiction and powers of the courts are "as may be conferred by or under Federal law". In the content of the present case, that "Federal law" is s. 59A of the Immigration Act. Thus, Federal law has determined that the jurisdiction and powers of both High Courts in immigration matters are only to adjudicate on procedural non-compliance and not on the substantive decision of the decision-maker. Both the High Court of Malaya and the High Court of Sabah and Sarawak have no jurisdiction to travel outside the confines of that power.
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> ...
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> [122] The position that the appellant takes is wholly untenable. Being a provision that governs judicial power of the Federation, art. 121(1) of the Federal Constitution cannot be suborned to any doctrine of law, including the Indian doctrine of basic structure and the common law doctrine of separation of powers. No doctrine of law can override art. 121(1) of the supreme law, which stipulates in very clear language that the jurisdiction and powers of the High Courts and inferior courts are "as may be conferred by or under Federal law". The question of this express term of the supreme law being in violation of the doctrine of separation of powers does not arise.
>
> ...
>
> [163] With all due respect, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* had been misconstrued and misapplied by the appellant. There is absolutely nothing in the judgments to

say that art. 121(1) of the Federal Constitution has no force of law to confer on Parliament the power to enact ouster clauses such as s. 59A of the Immigration Act. On the contrary, Semenyih Jaya in fact recognised the power of the Legislature to enact laws limiting appeals by declaring the finality of a High Court order because to hold otherwise would be contrary to sub-s. 68(1)(d) of the Courts of Judicature Act 1964.

...

[186] I have mentioned earlier that this provision has been held to be valid by this court in Sugumar Balakrishnan. I find no reason to depart from the decision. For this court to overrule the decision and to strike down s. 59 of the Immigration Act as unconstitutional would mean that even an illegal immigrant could challenge the Director General's decision in court. It is of course his right to do so but this goes to show how untenable the situation can be if s. 59 of the Immigration Act were to be struck down as unconstitutional.

...

[251] If were to accept the appellant's proposition that ss. 59 and 59A of the Immigration Act are void and ought to be struck down on the authority of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*, it would mean all of the following:

(i) The doctrine of separation of powers prevails over the doctrine of constitutional supremacy;
(ii) It is the judicial arm of the Government and not the Federal Constitution that is supreme as the Judiciary can override the constitutional mandate of the Federal Constitution which vests the power in Parliament through art. 121(1) to enact ss. 59 and 59A of the Immigration Act;
(iii) Article 121(1) is unconstitutional for violating the doctrine of separation of powers;
(iv) Article 121(1) is void for being inconsistent with art. 4(1) of the Federal Constitution;
(v) Article 159 of the Federal Constitution is redundant and had been formulated in vain by the framers of the Federal Constitution as Parliament is powerless to amend any "basic structure" of the Federal Constitution;
(vi) All post-Merdeka laws are void if they violate the doctrine of separation of powers, even if they are not inconsistent with art. 121(1) of the Federal Constitution;
(vii) All ouster clauses, with exception of those enacted pursuant to art. 149 are void, not for violating art. 121(1) of the Federal Constitution but for violating the doctrine of separation of powers.

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

Justice Mary Lim concurred with the majority and further addressed each issue at greater length. With regard to question 1, her Ladyship invoked the presumption of constitutionality on both sections 59 and 59A of the IA 1959/63. Similarly, the maxim *omnia praesumuntur rite et solemniter esse acta* (all things are presumed to have been done rightly) also applied to the provisions of law here. It means the legislation are presumed valid until established otherwise. Thus, it is the court's duty to give effect to the intention of Parliament as expressed in the wordings of the provision, which in the present case was the ouster clause in section 59A. Although ouster clauses are commonly incorporated into statutes, her Ladyship viewed that such clauses do not deter the court from examining decisions being referred to it. The court may only decline such intervention provided it is satisfied that the subject matter falls within the jurisdiction of the relevant authority. Likewise, in the present case, it was ruled that section 59A only confines the jurisdiction of courts to review procedural non-compliance in immigration matters. It does not remove the power of courts to judicially review any immigration matter in absolute terms. Therefore, both the provisions must not be struck down under Article 4(1) of the FC on the ground of inconsistency with the Constitution.

In light of the discussion above, her Ladyship proceeded to examine the procedural non-compliance by the DG (respondent) in imposing the travel ban on the appellant. From the respondent's affidavit, the travel ban was imposed on the appellant pursuant to the circular. The circular, in general, deals with the application for new international passports in cases where a passport was lost, damaged or suspended. Thus, her Ladyship viewed that the appellant's case did not fall within the ambit of the circular since she was not applying for a new international passport. Hence,

the circular has no application here. Furthermore, the circular was also ruled invalid on the ground that there was no indication of its source of enabling power. Neither the IA 1959/63 nor the Passports Act 1966 ("PA 1966") gives legal force to the circular. In other words, the circular could not be the source of power for the respondent to impose the travel ban on the appellant. At most, the circular could only serve for administrative purposes with no force of law. Nevertheless, the respondent contended that the circular and the travel ban were made pursuant to section 3(2) of the IA 1959/63. Her Ladyship acknowledged the supervisory power of the DG but it is only limited to immigration matters. Such power must be properly exercised and not be extended to impose travel bans on reasons unrelated to an immigration matter. In the present case, the travel ban was imposed on the appellant for allegedly scandalising and ridiculing the government. It is obvious that such matters did not fall within the purview of the DG. The respondent has no authority to determine what conduct, action or speech of any person would amount to an offence of disparaging the government. In fact, such power is within the jurisdiction of the police, as conferred under the Police Act 1963. Since there was no indication that the respondent acted on the instructions of the police, it can be concluded that the imposition of the travel ban was entirely his decision. Thus, it was concluded that the respondent had acted in excess of his jurisdictions and powers when he imposed the travel ban on the appellant.

Her Ladyship also held that the appropriate legislation to be applied here was the PA 1966. Taking into consideration that the appellant's document of travel (international passport) was blacklisted, the IA 1959/63 is inapplicable as it only deals with immigration matters. Section 2 of the PA 1966 empowers the immigration officer to make an endorsement (blacklisting) as he thinks fit. However, such discretion is not unfettered. Her Ladyship viewed that the endorsement should only be made at the time of entry or departure of the appellant. In short, the passport can only be lawfully endorsed at the time of presentation of passport. In the present case, the affidavit of the respondent indicated that the endorsement was not effected at the time of departure on May 15, 2016. Rather, it was entered on January 6, 2016, which was a clear violation of section 2. Thus, the impugned decision made was invalid. To conclude, her Ladyship found that the respondent has fatally failed to abide with the procedural rules and the applicable laws. On those grounds, question 1 was answered in the negative in which the respondent had acted far in excess of his jurisdiction.

With regard to question 2, the constitutionality of section 59 was challenged by the appellant. In essence, section 59 exempted the need to afford the right to be heard to any person when there is an order or decision made against him under the Immigration Act. Nevertheless, her Ladyship viewed that the right to be heard constituted the fabric of the administration of justice. It means the rule of law required the element of fair play in the course of attaining justice. Although the statute may dispense with the requirement to provide reasons to the person affected, the rule of natural justice still demands reasons to be provided. Likewise, the rule of natural justice also requires each person to be granted the opportunity to explain before a decision is made. Considering the extensive application of section 59 dealing with entry of a person into East Malaysia, the court ruled that it is improper to find section 59 invalid as submitted by the appellant. In the present case, her Ladyship viewed that the application of section 59 is beyond the factual matrix of the appellant's case. Therefore, question 2 must be answered in the affirmative.

In light of the constitutionality of section 59A of the IA 1959/63, as contended in question 3, her Ladyship concurred with the majority that such provision is constitutional and valid. Section 59A neither contravenes Article 4(1) nor Article 121(1) of the FC. Her Ladyship reiterated that right to travel abroad is not absolute in that such right can be curtailed on reasonable grounds. However, as discussed earlier, it was found that the grounds underpinning such travel ban on the appellant was not reasonable. Since the respondent was not empowered to impose a travel ban for a situation relating to allegedly disparaging the government, the appellant could not be barred from leaving the country. Furthermore, her Ladyship emphasised that section 59A implicitly recognises the power of the court to intervene and examine the decision made by the respondent. In fact, it is the inherent power of the court to exercise its supervisory jurisdiction. In exercising the supervisory jurisdiction, the court will examine primarily the process and procedural compliance by the relevant authority before reaching its decision. In short, such supervisory jurisdiction of the court serves to ensure better administration of justice. Therefore, section 59A is constitutional and question 3 is answered in the affirmative.

[282] Section 59A does not seek to prohibit the scrutiny of the court in absolute terms. It serves to limit that scrutiny, "except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision". Where the jurisdiction and power of court is interfered with in absolute terms as was the case in Semenyih Jaya where s. 40D of the Land Acquisition Act 1960 reduced the role of court to the "sideline and dutifully anoint the assessors' decisions", the court has no hesitation in striking down such provision as offending the doctrine of basic structure as enshrined within art. 4. …

[283] I understand ouster clauses such as that presented in s. 59A may be similarly found in no less than 100 other pieces of legislation and the effect of striking down such a clause or similar clauses will have far-reaching consequences. This is further reason why the court should be slow in striking down provisions of the law on ground of invalidity; that it should only be done in the clearest of conditions and where the presumption of validity leads to no avail and brings injustice; or in this appeal, if it is established that s. 59A is inconsistent with art. 4 and/or any other provision of the Federal Constitution

…

[304] In order to answer the question of compliance with the procedural requirements, be it of the principal Act or any Regulations made under the principal Act, the source of the power to issue the Circular must be examined. In this respect, the Circular gives no indication of its source of enabling power; whether it be pursuant to Act 155 or Act 150. Further, even if this was a drafting flaw, neither legislation empowers the respondent, in particular the first respondent from issuing such Circulars having a force of law to have the reaches that it did in the case of the appellant. At best, such Circulars are only administrative and for internal use with no force of law at all.

…

[312] The respondents attempt to argue that the Circular and thereby the ban or blacklisting of the appellant and/or passport was pursuant to the powers set out in s. 3(2) of Act 155. This provision states that the Director General of Immigration "shall have the general supervision and direction of all matters relating to immigration throughout Malaysia". In my view, this power of supervision and direction may only be properly exercised in relation to matters already prescribed by Act 155 or by the Regulations made under Act 155. It may also extend to matters under Act 150 since both pieces of legislation come under the purview of the Director General of Immigration and are necessarily related. It cannot be in relation to matters outside Act 155 or Act 150, certainly not on matters governed by other legislation unless of course there are specific powers to that effect under those laws. Such general powers of supervision and direction even of all matters relating to immigration cannot, by any stretch of imagination, extend to a power, whether implied or express, to ban travel by citizens for reasons which are unrelated to immigration or passports, as we see in this appeal, that is, purportedly for scandalising or ridiculing the Government, a matter which does not come within the purview of the original powers of the Director General of Immigration. The affidavit deposed by the Director General of Immigration does not indicate that he acted on the instruction of some other authority; rather it was entirely his decision; seeming to suggest a misconception that he has the power to regulate such behavior or conduct, which he does not.

…

[328] The respondents have no power to cast upon themselves the right or authority to determine what conduct, action or speech of any person including a citizen, would amount to an offence of disparaging the Government. That decision or determination is entrusted by Parliament to the bodies properly authorised under the relevant laws, for example Penal Code or Sedition Act 1948, to act. In this respect, this would generally be the task and responsibility of the police. The respondents are not police and they have no power or authority to determine any offence of that nature or to even investigate or act, even if for a moment there was such an offence committed.

…

[339] Although the blacklisting or endorsement had already been lifted, it is a matter of grave importance to the general citizenry and to the

respondents too, that the validity of the impugned decision is still examined. As seen, the respondents have not only made a decision which is wholly irrational and unreasonable (the offending conduct attributable to the appellant had yet to take place), they have acted far in excess of their jurisdiction.

...

[345] Although that view is expressed in the context of the obligation of decision-makers to give reasons, I see no distinction when it comes to the right to be heard, that before a decision is rendered in respect of any matter under consideration, the rules of fair play require that an accused be informed of the complaints against him, that he has an opportunity to explain, if he so wishes, before a decision is taken.

...

[352] Given that s. 59 (and for that matter s. 59A) has application to Part VII of Act 155 and Act 155 is law that deals with entry of persons into the East Malaysian States for which there are special safeguards for the constitutional position of Sabah and Sarawak as provided in art. 161E(4) of the Federal Constitution, it would be highly improper to find s. 59 invalid for the reasons articulated by the appellant; without more and certainly not without having those States heard. The East Malaysian States may well have their justifications and sound reasons for not affording an opportunity to be heard before making its decision under any of the scenarios in s. 65. But whether such justifications or reasons will withstand the scrutiny of the court is entirely an exercise which I am not prepared to embark on; that is wholly speculative and wrong.

...

[373] Now, how the court is to deal with the complaint when approached for the exercise of its supervisory jurisdiction is not a matter which is spelt out or can be dictated by the terms of s. 59A. That power, authority or jurisdiction is provided for in art. 121 read with art. 4 and more specifically, in the Courts of Judicature Act 1964 (Act 91). It is in those sources that the court takes its power and jurisdiction, including inherent power; and it is through legal reasoning and jurisprudence that the court determines whether its powers within its supervisory jurisdiction would be engaged in any particular cause. Legal principles of reasoning such as the rules of natural justice, the audi alteram partem rule; the Wednesbury principles of procedural impropriety, illegality, irrationality and unreasonableness (see Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223; and Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374), mala fides, abuse of process, are but a few such principles.

[374] In an application for judicial review, the court exercises its supervisory jurisdiction as opposed to its original and appellate jurisdiction. In the exercise of its supervisory jurisdiction, the merits of the decision are not of primary concern; it is the process or the procedure that is scrutinised. And, in determining whether those processes or procedure have been complied with, the courts use, amongst others, its powers and tools of principles and reasoning to reach its answer. As alluded to earlier when dealing with the first question, this task is not mechanical, passive or grammarian; it is a heavy responsibility carefully shouldered so that proper direction may be shown so that the same errors are not repeated; and generally, for better administration. These tools of reasoning can never be legislated; it would lead to sheer exhaustion.

Per Justice Mary Lim,
Judge of the Federal Court
(concurring)

However, although Chief Justice Tengku Maimun and Justice Nallini Pathmanathan agreed with the findings on question 1, they both did not agree with the majority on questions 2 and 3.

Chief Justice Tengku Maimun agreed that the present appeal was not academic and thus, in the interest of the public, leave to appeal should be granted. With regard to question 1, her Ladyship concurred with the majority that the DG (respondent) does not have unfettered discretion in imposing the travel ban. Presently, the appellant was holding a valid passport and the respondent acted by blacklisting the appellant's passport pursuant to the circular. There

is no provision of law in the circular which actually confers power on the respondent to blacklist a person who holds a valid passport. In other words, there is no basis for the respondent to impose a travel ban on the appellant. As such, the travel ban was invalid and in light of Article 5(1) of the FC, the right of the appellant to travel aboard had been breached. Be that as it may, her Ladyship dissented on the findings by the majority on question 2. Her Ladyship opined that the concept of constitutional natural justice (also known as procedural fairness) refers to whether the law is unfair, arbitrary or oppressive. This concept is embodied in Articles 5(1) and 8(1) of the FC, where it ensures that not only the law passed is procedurally fair, but the discretion conferred on the Executive is, although significant, exercised as fairly as possible in all cases. Section 59 of the IA 1959/63 appears to purportedly exclude the concept of procedural fairness as guaranteed by Articles 5(1) and 8(1) of the Constitution. It does not provide any room for interpretation and as such, section 59 must be struck down for being invalid and unconstitutional.

With regard to question 3, her Ladyship viewed that section 59A should be struck down as it was against Article 4(1) of the FC. Her Ladyship departed from the findings of the majority and opined that section 59A is actually attempting to exclude the power of the court. Chief Justice Tengku Maimun explained that the supremacy of the Constitution as well as judicial powers are the basic features of our Constitution. This means that regardless of how cleverly or widely an ouster clause has been crafted, the power of the court including judicial review cannot be ousted, diminished, or excluded. The court must have the power to scrutinise the conduct of the state such as the Legislature or the Executive. Otherwise, Article 4(1) would be rendered nugatory as it would appear that the courts have the power to strike down the actions of the Legislature and the Executive but are powerless to enforce any breach of fundamental rights that arise from such invalid laws. Hence, when an ouster clause such as section 59A attempts to exclude judicial review, whether in whole or in part, it must be declared unconstitutional.

> [458] Going by the principles that have been elucidated up to this point, it is clear that the supremacy of the FC in art. 4(1) and its corollary device of judicial power are basic features of the FC. Accordingly, the power of the court to scrutinise State action whether legislative, Executive or otherwise, cannot be excluded. This in itself should be a good enough answer to the respondents' second argument that s. 59A can be justified without a definitive ruling on the validity of ouster clauses because it allows for challenges "in regard to any question relating to the compliance with any procedural requirement of the Act".
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> [459] To accede to the submission of learned SFC would mean that courts can only scrutinise what Parliament allows to be scrutinised. There is no alternative but to reject the submission because it is reminiscent of parliamentary supremacy. Under art. 4(1), all laws are subject to the FC. And, as garnered from the FC's legislative history, the intendment of art. 4(1) was to cover all acts whether legislative, Executive, quasi-legislative, quasi-judicial, etc. We cannot therefore, in the presence of a written constitution declaring itself to be the highest source of law, adopt the English method of resolving the legality of ouster clauses simply on the basis of statutory construction much in the way the respondents suggest.
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> [466] As has been explained earlier in this judgment, no act of any public body is immune from the scrutiny of art. 4(1). The Judiciary is the organ which is tasked to interpret the law under art. 121(1) and is thus the medium through which art. 4(1) operates. These provisions form part of the basic structure of the FC. Reading the two provisions together, it is quite clear that ouster clauses can never oust, diminish or exclude the judicial power of the courts and its vehicle: judicial review – no matter how cleverly and widely crafted. Section 59A of Act 155 to the extent that it seeks to do that is therefore invalid and unconstitutional.
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> [566] Natural justice here is not therefore natural justice in the administrative law sense of the term. Administrative natural justice relates to situations where there is a breach of some right by the administrative branch. Constitutional natural justice refers to the validity of the law passed, that is, whether the law is not unfair, arbitrary or oppressive. On the distinction, see generally

Yong Vui Kong v. Attorney General [2011] SGCA 9. Procedural fairness, which is another way of saying constitutional natural justice, is embedded in arts. 5(1) and 8(1).

...

[573] The rule adumbrated above accords with the spirit of art. 8(1) of the FC as we have always understood it. Apart from the specific limbs of discrimination expressly sanctioned by cl. (5), art. 8(1) does not permit discrimination unless it is founded on an intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question (see *Harun Idris* (supra), at p. 117; *Mohamed Sidin v. PP* [1966] 1 LNS 107; [1967] 1 MLJ 106). The principles in respect of procedural fairness are merely a means of ensuring that not only is the legislation procedurally fair, but where the Legislature confers discretion of significant amplitude to the Executive, that such discretion, though on the face of it discriminate, may be applied as fairly as possible on the facts of each and every case.

[574] Section 59 of Act 155 leaves no room for interpretation. It unequivocally excludes natural justice and hence purports to exclude procedural fairness guaranteed by arts. 5(1) and 8(1) of the FC. It is therefore my determination that the appellant has overcome the presumption of constitutionality. For the foregoing reasons, s. 59 is invalid and unconstitutional and it is hereby struck down.

per Justice Tengku Maimun,
Chief Justice

Likewise, Justice Nallini Pathmanathan disagreed with the findings of the majority on questions 2 and 3. Her Ladyship viewed that the power of judicial review can neither be amended, abrogated nor removed by any legislation. This power of judicial review is expressly provided under Article 4(1) of the FC, and this essential feature actually enables the court to declare any law unconstitutional if it is inconsistent with the Constitution. It allows the courts to judicially review the laws to ascertain their validity in the context of the Constitution. As such, legislation is not allowed to be framed in a manner abrogating the power of the Judiciary under the Constitution. If this is permissible, it amounts to abrogating constitutional remedies. In other words, Article 121(1) of the FC must be construed harmoniously and holistically with Article 4(1), in a manner where it ensures the doctrines of constitutional supremacy and separation of powers remain as the foundational features of judicial power. In the present appeal, the ouster clause in section 59A of the IA 1959/63 is indeed seeking to exclude the power of judicial review. It seeks to abrogate the court's power of judicial review by stipulating only procedural matters are reviewable by the courts. Her Ladyship opined that such provision clearly contravenes the express constitutional jurisdiction conferred on the courts, as it prevents the courts from determining the substantive grounds or reasons that prevent the appellant from travelling. Such exclusion of the power of judicial review is against Article 4(1) of the FC, and as such, it could not subsist and must be declared as void. This means that the decisions of both Semenyih Jaya and Indira Gandhi which upheld the principle that superior courts enjoy the power of judicial review as a basic feature of the Constitution, was affirmed. Question 3 is thus answered in the negative.

With regard to question 2, her Ladyship held that section 59 of the IA 1959/63 is void for contravening Article 5(1) of the FC. Article 5(1) provides for, among others, the right to travel abroad freely, but this right can be restricted by law. The word "law" must include both substantive as well as procedural law, and such law must be fair, just, reasonable, and is neither arbitrary nor capricious. This means that any restrictions imposed by law on the right to travel should comply with the principles of natural justice. This would mean that the person restricted from travelling must be given an opportunity to be heard. In the present appeal, section 59 expressly excludes the right to be heard and hence the authorities are not required to explain the reason for prohibiting the appellant from travelling abroad. Thus, an order made pursuant to the IA 1959/63 which infringes fundamental freedom and fails to observe the principle of "audi alteram partem" must be declared void. In other words, section 59 contravenes the concept of natural justice as envisaged under Article 5(1) of the FC because it is not a law that is fair, just and reasonable. Accordingly, question 2 is answered in the negative.

With regard to question 1, Justice Nallini Pathmanathan concurred with the findings of the majority that the minister and the DG had acted

in excess of their powers when they restricted the appellant from leaving for Korea. This is because section 3(2) of the IA 1959/63 does not empower the minister or the DG to issue a circular prohibiting a citizen who is holding a valid passport from travelling abroad on the grounds of "memburukkan nama kerajaan atau negara". As such, the acts of the minister and the DG were irrational and void. As reiterated above, the right to life encompasses the right to travel abroad. Nonetheless, such right can be curtailed if it is in accordance with the law. The word "law" bears the similar meaning as explained by her Ladyship in answering question 2. Hence, in ensuring that the rights of citizens are not abrogated, the courts must strictly scrutinise the acts of the Executive and the laws passed by the Legislature. In the present appeal, it was clear from the facts that the right of the appellant to travel abroad had been curtailed. However, the exercise of curtailing this right was made pursuant to the circular, a circular which the minister and the DG are not empowered to make. This signifies that the curtailment was not "in accordance with law" as envisaged in Article 5(1) and as such, the conduct of both the minister and the DG are void. In addition, her Ladyship explained that the conduct of restricting the appellant from travel abroad has also encroached on her right to freedom of speech. This is because the purpose of travelling to South Korea was to accept an award and to participate in a related conference. This would necessarily mean that the appellant would be exercising her freedom of speech and expression.

> [769] That underlying issue relates to whether the right to travel, not only within but abroad, comprises a fundamental right of a citizen of Malaysia falling within the "right to life" guaranteed under art. 5(1) FC.
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> [770] All these cases turned on whether there was a right either to be issued a passport to travel abroad, or to simply travel abroad within art. 5(1) FC. The said article comprises a guarantee against State action subject, of course to the restrictions set out in the FC. I concur with the Chief Justice that the right to travel abroad is indeed such a fundamental right falling within the right to life. And such a fundamental right can be curtailed provided such curtailment is in accordance with "law" as provided in art. 5(1) FC.
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> [771] "Law" has been defined in Alma Nudo as encompassing the essential characteristics of being, if I may paraphrase, fair, just and proportionate or reasonable, and neither arbitrary nor capricious, both in relation to substantive and procedural law. (See also the dissenting judgment in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277.)
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> [781] On the facts of the instant appeal, it therefore follows that the decision of the Minister, executed by the Director General through his officers, in preventing Maria Chin from travelling abroad, despite having possession of a valid passport, amounts to a contravention of a fundamental right. And that fundamental right is ensconced in art. 5(1) FC namely the right to life which is construed to include the right to travel abroad save and unless such right is curtailed by law. There was no such valid curtailment "in accordance with law" as envisaged in art. 5(1). Accordingly, the restraint and restriction imposed by the Minister and thereby the Director General who executed the content of the Circular, is inconsistent with art. 5(1) and is void.
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> [790] In the instant case, the Circular and the subsequent action of the Director General and his officers effectively trammelled upon, and precluded Maria Chin from exercising her right of freedom of speech and expression, by prohibiting her from travelling abroad to attend and participate in the conference.
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> [791] More significantly, the contents of the Circular issued by the Minister and executed by the Director General, do not fall within the purview of the restrictions in art. 10(2), (3) or (4). Neither the Minister nor the Director General can rely on s. 3(2) of the Immigration Act, which is general in nature, to deprive Maria Chin of this fundamental right. To reiterate, apart from the fact that "memburukkan Kerajaan Malaysia" does not fall within the purview of s. 3(2) of the Immigration Act, it does not fall within the restrictions of the FC as set out above.
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> [793] On the contrary, the State, through the Minister and the Director General, by their

positive acts, took away any ability to exercise such a right. The overarching purpose of the Circular was to prevent the right of a citizen to discuss openly or express an opinion about the social, economic or political aspects of Government. As stated earlier, the attempt to remove the right to express, exchange and debate views or opinions in relation to the Government, interferes with a fundamental aspect of democracy, given that the liberty to speak and express one's view is given the highest order of priority in a functioning democracy. The fact that this right was to be exercised on foreign soil makes no difference. The right is inherent to the citizen, Maria Chin, and does not stop on the shores of Malaysia.

...

[803] The rights which are affected by any such acts of these authorities is fundamental in nature, as they fall within the purview of art. 5(1) FC. The power to so remove or restrict such a fundamental right, namely the right to travel freely, has been vested by Parliament in these authorities, namely the Minister, Director General and his officers under the Immigration Act.

[804] As these powers extend to the curtailment of fundamental rights, they are quasi-judicial in nature. For example, the power to impound a passport, or to prevent a person holding a valid passport from travelling abroad, is quasi-judicial in nature. Any such removal must therefore comply with the principle of natural justice.

[805] Natural justice in this sense extends to the manner of exercising the power and the need to give reasons for such curtailment. In the present context, it means that as the Minister prior to issuing the Circular, and more specifically, prior to applying it in Maria Chin's case, ought to have accorded her the opportunity to be heard. There was ample opportunity to do so, as she only sought to travel several months after the issuance of the Circular. There was ample time for the Minister to have given her notice both of the fact of the Circular and for her to explain why any such blacklisting ought not to apply to her. Having considered her representations, and if he had still come to the same conclusion, he ought to have written to her and set out the reasons why he was still impelled to preclude her from such travel.

[806] That would have been compliance with the principles of natural justice. It would have accorded Maria Chin the opportunity to challenge the decision too. However as is evident in this case, none of this was done.

per Justice Nallini Pathmanathan,
Judge of the Federal Court

Jelebu Court

When a successful bidder at a public auction has duly registered the land in his name, he is thus said to have obtained an indefeasible title to the said land. Such right prevails over any other unregistered interests, including, for instance, the purported right of the State Authority over the land based on a promise made by the previous owner to surrender the same to the State.

Bayangan Sepadu Sdn Bhd v Jabatan Pengairan Dan Saliran Negeri Selangor & Ors [2021] 1 LNS 2146, FC

In this appeal, the subject matter of dispute concerns a land located in Tempat Bukit Kemuning, Daerah Klang ("the land"). This land was previously jointly owned by Newacres Sdn Bhd and Bumi-Murni Sdn Bhd ("the previous owners"). However, when the previous owners defaulted in their loan repayment, CIMB Bank Berhad ("CIMB") who is the chargee of the land, applied to sell the land via public auction. Subsequently, on March 25, 2011, this land was purchased by the appellant via public auction held by the Klang Land Office.

Somewhere in July 2011, the appellant conducted a land survey and found that there was a retention pond on the land as well as other permanent structures built surrounding it. Thus, the appellant demanded for information and documents from the first and second respondents to justify their occupation on the land. The first respondent explained that they were in the process of collecting the relevant information and documents concerning the project and the retention pond. The first respondent further explained that a meeting would be held once the relevant information and documents were obtained. Nonetheless, the appellant conducted a further land search subsequent to the public auction, and found there was no indication that the retention pond and the structures were built on the land. Neither was there any indication that the portion of the land had been surrendered to the respondents by the previous owners. The land search conducted prior to the judicial sale produced the same result. Thereafter, the appellant conducted two further land searches and the results showed that the interests of the respondents on the land were not registered in the register document of title, and at the same time, there was no record of any surrender of the land to the State. Thus, the appellant filed an application at the Shah Alam High Court requesting for the discovery of necessary documents to justify the respondents' occupation on the land. The respondents then lodged a police report stating that the project file could not be located and they will gather the documents and plans from Majlis Bandaraya Shah Alam ("MBSA"). To support their claim that the portion of the land was surrendered to the third respondent, both the first and second respondents produced several documents. The appellant then issued a letter of demand dated March 16, 2017 to the first respondent requesting for the delivery of vacant possession of the land and the removal of the fence and structures within three days. The respondents failed to comply with the letter of demand, and the appellant filed an action at the Shah Alam High Court. The High Court held in favour of respondents which was reaffirmed by the Court of Appeal. Leave to appeal to the Federal Court was granted with the following questions posed:

(i) assuming that the land was the agreed lot to be surrendered to MBSA (which was denied), whether the right of the appellant as the registered owner under section 89 and section 340 of the National Land Code ("NLC") could be defeated by a promise to surrender the said property made by the previous owners; and

(ii) assuming that the land was the agreed lot to be surrendered to MBSA (which was denied), whether there was a valid surrender of the land under section 196(1)(c) read with section 196(2)(a) of the NLC when the consent of the chargee had not been obtained.

The Federal Court unanimously allowed the appeal and both questions were answered in the negative. Justice Mohd Zawawi Salleh, who delivered the judgment of the court, explained that every dealing concerning land must be registered in light of the principle of indefeasibility of title under the Torrens system. Hence, when there is a dealing whose interest is unregistered in the registered document of title, this unregistered interest cannot defeat the title of the registered proprietor. This concept is similarly applicable in the present appeal. When a successful bidder at a public auction such as the appellant obtains an indefeasible title to the property, any unregistered interest such as that of the respondents cannot defeat the title of the registered proprietor. Undoubtedly, the trial judge had the discretion to draw an adverse

inference against the respondents for failure to call the previous owners to testify on the alleged surrender of land. Such failure is however immaterial since the appellant already had an indefeasible title. The name of appellant was duly registered in the document of title, and any unregistered interest cannot supersede the title of the registered proprietor.

With regard to the issue of surrender, the Federal Court found that neither section 196, 200 nor 201 of the NLC was complied with. There was no consent reduced into writing from the person or body who had registered interest in the land, i.e. CIMB-chargee as required under section 196(1)(c) read together with section 196(2)(a) of the NLC. In the absence of CIMB's consent as chargee, it cannot be assumed that all mandatory statutory requirements were already complied with. The mere reliance on the documents as produced by the respondents was not sufficient to hold that there was a valid, legal surrender at all material times. Hence, when there was no valid surrender of the land to the State, a trespass of land had occurred due to the continuing presence of the respondents' structure on the land.

> [27] It is trite that land law in Malaysia is based on title and interest by registration which is derived from the Torrens system. There are two fundamental principles of the Torrens system, namely the mirror principle and the curtain principle. The mirror principle portrays a concept in which the land title mirrors all relevant and material details that a [prospective] purchaser, lessee and chargee ought to know. This means that a person can obtain all such material information of the land, based on what is endorsed on the register document of title and the issue document of title. On the other hand, the curtain principle is a concept that dispenses with the need to look beyond the register – as the land itself provides all relevant information reflecting the validity of the same. Ostensibly, the "curtain" is where the principle took its name from.
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> [30] It is pertinent to note that the principle of indefeasibility of title is one of the main features and attributes of the Torrens system of conveyance. It involves the proposition that once a person is registered as proprietor of certain land or interest in the land, he or she acquires a title that cannot be vitiated except as provided under s. 340 of the NLC. Therefore, s. 450 complements s. 89 (see *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal* [2021] 6 CLJ 650; *Mega Meisa Sdn Bhd & Ors v. Mustapah Dorani & Another Appeal* [2020] 1 LNS 1480; [2020] 6 MLJ 594).
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> [31] In the premises, we agree with the submission of learned counsel for the appellant that a successful bidder at a public auction conducted under the NLC obtains an indefeasible title to the subject property and the unregistered interest is not protected under the NLC. Every dealing or transaction of a land by a party whose interest is unregistered in the register of document cannot defeat the title of the registered proprietor.
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> [43] Our short answer to this argument is this. It is a well-established principle that the trial judge has the discretion whether or not to draw an adverse inference from the absence of a witness and this will depend on whether they were central or crucial to the issues to be decided. In *Efobi v. Royal Mail Group Ltd* [2021] UKSC 33, the United Kingdom Supreme Court referred to "a risk of making overly legal and technical what reality is or ought to be just a matter of ordinary rationality". The court observed that tribunals should be free to draw, or decline to [draw], inferences "using their common sense without the need to consult law books when doing so". Whether a failure to give evidence was significant would depend entirely on the context and particular circumstances, including for example whether the witness was available to give evidence, what other evidence there was on those points, and the significance of those points in the context of the case.
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> [44] We are of the view, in the context of the present case, irrespective of whether or not the previous owners are being called to testify, the statement to be given by them is immaterial since the appellant has an indefeasible title as the appellant's name has been duly registered in the document of title.
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> …

[51] It is clear that in order to be a valid surrender, the procedure under s. 200 of the NLC must be complied with. With respect, we are of the view that the High Court and the majority in the Court of Appeal erred in law in reaching the decision that there was a valid surrender as the previous owners did not object to the construction of the retention pond and structures on the land. On the factual matrix of the present case as alluded to earlier in the judgment, there was no evidence to show that any of the procedures in ss. 196, 200 and 201 of the NLC had been adhered to. There was no consent in writing from the person or body who has registered interest in the land (CIMB/chargee) as required by s. 196(1)(c) read together with s. 196(2)(a) of NLC.

[52] We would like to emphasise that the surrender of any private land must be made with the consent of both the registered proprietor and the State Authority and must strictly comply with the relevant statutory provisions of the NLC. We venture to say that these provisions are made for the purpose of safeguarding the interest of the registered proprietor. Where the procedures as stipulated by the provisions of the NLC are not adhered to, grave doubts are cast on the validity and/or legality of the surrender. In the absence of the consent of CIMB/chargee and by merely relying on the documents and/or letters produced by the respondents as enumerated in para. [7] of this judgment, it cannot be assumed that all mandatory requirements under the provisions of the NLC had been adhered to when the State Authority gave its consent for the transfer.

[53] In the premises and consistent with the Torrens system that registration is everything, coupled with the fact that neither the previous owners nor the MBSA attempted to legalise the surrender pursuant to the procedure and provisions under the NLC, the second leave question must be answered in the negative.

per Justice Mohd Zawawi Salleh,
Judge of the Federal Court

In a trademark infringement claim, the court needs to consider several aspects when comparing the plaintiff's registered mark with the impugned mark. Apart from ocular examination, the court needs to see the combination of the features as a whole vis-a-vis the disclaimers. The examination on the arrangement and insertion of the "essential features" in the impugned mark is crucial, and what constitutes essential features can be determined by looking at their nature and legal position in the registered trade mark. Thus, in comparing the marks, the test is whether the arrangement and insertion of the essential features in the impugned mark actually give rise to public confusion. As for disclaimed words, the court can consider them in juxtaposition or in combination with the essential features.

Ortus Expert White Sdn Bhd v Nor Yanni Adom & Anor [2021] MLJU 2747, FC

The appellant ("plaintiff") appealed against the decision of the Court of Appeal reversing the findings of the High Court and dismissing their claim on trademark infringement. At all material times, the plaintiff was a company distributing "Royal Expert" beauty products. The products carried the trademark "Royal Expert White", and was registered under the Trade Marks Act 1976 ("TMA"). Subsequently, the first defendant/respondent ("D1") entered into a dealership agreement with the plaintiff. The second defendant/respondent ("D2"), who was the sole proprietor of Rafica Resources, had distributed the plaintiff's products together with D1. D1 was then found to be selling skin whitening cream bearing the trademark "Real Expert White", with packaging allegedly similar to the plaintiff's product. Thus, the plaintiff commenced an action on the following grounds:

(i) breach of the agreement, namely clauses 7.4 and 14.4;
(ii) trademark infringement of the plaintiff's trademark under section 38(1)(a) of the TMA as the defendants were selling "Real Expert White" products; and
(iii) passing off "Real Expert White" products as the plaintiff's products.

The High Court allowed the plaintiff's claim and the defendants were held liable for their conduct. Nonetheless, this finding was reversed by the Court of Appeal as the appellate court found that the defendants did not breach the agreement. The evidence adduced was insufficient to support the claim for trademark infringement and tort of "passing off". The plaintiff thus appealed to the Federal Court, and leave was granted on the following questions:

(i) whether in a trademark infringement action, the court ought to consider the disclaimed words in juxtaposition or in combination with the essential features in the registered trademark for the purpose of deciding whether there was a likelihood of confusion and/or deception; and
(ii) in a tort of passing off case, could the goodwill of a business be destroyed completely by mere publication(s) of documents that make no specific reference to the business owner.

Justice Zabariah Mohd Yusof delivered the judgment of the court and allowed the appeal. The first question of law was answered in the affirmative. In a trademark infringement action, the court ought to consider disclaimed words in juxtaposition and/or in combination with the essential features in the registered trademark for the purpose of deciding whether there is a likelihood of confusion and/or deception. Her Ladyship relied on the imperfect recollection test and explained that the Court of Appeal had failed to consider this test. The Court of Appeal had also erred in comparing and analysing the essential features of the plaintiff's trademark when determining the likelihood of confusion and/or deception.

Thus, her Ladyship explained that in the plaintiff's registered trademark, there was a disclaimer where the plaintiff had no right to the exclusive use of the words "Royal" and "Expert White". This means that in light of sections 18, 35(1) and 40(2) of the TMA, the proprietor of a registered trademark does not have exclusive right to use the words in relation to the disclaimer. This would mean that the words can be freely used in subsequent applications for trademark registration. As such, since the disclaimed words "Royal" and "Expert White" could not be regarded as essential features, the plaintiff had dispensed with the legal and evidential burden to prove the existence of likelihood of confusion or deception based on the essential features of the plaintiff's registered trademark. When comparing the plaintiff's registered trademark "Royal Expert White" with the defendants' "Real Expert White" mark, an ordinary consumer with ordinary memory of the general impression or significant details of the plaintiff's registered trademark would be deceived or confused. This is because there were similarities of idea and concept between the plaintiff's trademark and the defendants' mark, and both labels on the packaging were positioned similarly. Both the plaintiff and the defendants were conducting business within the same market, targeting the same category of consumers, and were in direct competition with each other. Thus, consumers may think that the defendant's "Real Expert White" mark actually resembled the plaintiff's "Royal Expert White". Based on this, there was an infringement of trademark by the defendants and the findings of High Court are thereby reaffirmed.

With regard to question 2, this was answered in the negative. This signifies that in a tort of passing off, the goodwill of a business cannot be destroyed completely by mere publication of documents that make no specific reference to the business owner. First, her Ladyship explained that at all material times, the plaintiff enjoyed the goodwill of its business in light of their trademark "Royal Expert White". There was evidence from the public that they were confused as to whether "Royal Expert White" and "Real Expert White" were the same. This meant that the defendants had caused confusion/deception to the public. The tort of "passing off" was thus established as the defendants were attempting to pass their goods off as those of the plaintiff. Accordingly, damage may be proven in the present case via loss of sales, loss of gross profits or alternatively, loss of existing trade, i.e. trade had been diverted away from the plaintiff towards the defendants. The Court of Appeal however considered the press release issued by the Ministry of Health warning the sellers and distributors to stop the sale and distribution of the product "Royal Expert Whitening Cream" for containing mercury. The Court of Appeal agreed with the defendants' submission that the plaintiff had suffered losses due to this negative publicity, and not because of the defendants' misrepresentation. In light of this, her Ladyship held that the press release concerned "Royal Expert Whitening Cream", a product of another entity known as Ortus Expert Cosmetic Sdn Bhd. This had absolutely nothing to do with the plaintiff's product. Even if the plaintiff's product did contain mercury and was against the Control of Drugs and Cosmetics Regulations 1984 or any other law, it does not mean that the plaintiff's

trademark is not entitled to statutory protection under section 14(1)(a) of the TMA. Thus, the Court of Appeal had erred in holding that the plaintiff's business no longer possessed any goodwill by the alleged banning of the plaintiff's product by the Ministry of Health.

[77] Thus, discerning from the aforesaid authorities, we are of the view that:

(i) in a trademark infringement action, the court ought to consider disclaimed words in juxtaposition or in combination with the essential features in the registered trademark for the purpose of deciding whether there is a likelihood of confusion and/or deception;
(ii) the court cannot decide the issues of infringement of trademark and likelihood of confusion and/or deception solely upon the basis of the use of disclaimed words;
(iii) disclaimed words cannot be regarded as essential feature;
(iv) the court can consider disclaimed words in terms of phonetic, visual, and trade channel aspects for comparison to decide whether there is likelihood of confusion and/or deception;
(v) the court shall consider the marks as a whole and not to disregard the disclaimed words, and whether their collocation and arrangement all inserted in similar form and similar position or arrangement so as to make the whole so similar as to be calculated to confuse and/or deceive. The end purpose is whether the mark is so similar as to be calculated to cause a confusion and/or deception.

...

[104] Upon a full consideration of the principles and authorities aforementioned, the test for likelihood of confusion and/or deception would be as follows:

(i) both side-by-side comparison and the imperfect recollection test must be satisfied;
(ii) the comparison is made in terms of phonetic, visual, trade channel, and idea aspects of the marks;
(iii) the purpose of such comparison is to determine whether the defendant's mark contains essential features of the plaintiff's registered trademark, which strike the eye and fix themselves in the recollection of the users of the plaintiff's goods;
(iv) the court shall then take into account all surrounding circumstances and apply the imperfect recollection test, bearing in mind the outcome of the comparison, in order to determine whether it is likely that an ordinary consumer with ordinary memory who would be likely to buy the goods would be deceived and think that the defendant's mark is the same as the plaintiff's registered trademark. In other words, the test of whether one trademark is confusingly similar is an objective test and the test is that of an ordinary person with an appropriate level of literacy (*Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar of Trademarks (Interested Party)* [2017] 1 LNS 1006); and
(v) in determining this test, the court is entitled to give effect to their own opinions, and not confined to the evidence of witnesses.

...

[108] Upon a comparison between the plaintiff's registered trademark and the defendants' Real Expert White mark, and given that disclaimed words "Royal" and "Expert White" cannot be regarded as essential features, it is our judgment that the High Court did not err in its findings that the plaintiff has discharged the legal and evidential burden to prove the existence of likelihood of confusion/deception based on the two essential features of the plaintiff's registered trademark which strike the eye and fix themselves in the recollection of the users of the plaintiff's products which are:

(i) the crown device; and
(ii) the two rectangles.

The Court of Appeal however disregarded the disclaimed words entirely and failed to even consider what are the essential features of the

plaintiff's goods, despite referring to the case of JS Staedtler. The Court of Appeal also failed to consider the cases which we have referred to with regards to essential features in determining the likelihood of confusion/ deception (paras. 78-89).

[109] The next question to be considered is whether an ordinary consumer, with an ordinary memory of the general impression or significant details of the plaintiff's registered trademark, would be deceived/confused and think that the defendant's Real Expert White mark resembled the plaintiff's registered trademark, taking into account the disclaimed words "Royal" and "Expert White". We answer this in the affirmative, upon the following grounds, which was also the findings of the High Court Judge:

(i) the general impression or significant details of the plaintiff's registered trademark would be their essential features as stated above;
(ii) Real Expert White mark's diamond-shaped device is similarly confusing and/or deceptive as the crown device of the plaintiff's, and the diamond shaped device is placed at the top and the middle of Real Expert White mark, which is the same position as the crown-shaped device in the plaintiff's registered trademark (as per the decision of the High Court);
(iii) the defendants' Real Expert White mark has a rectangle which contains the words "Expert White", same as the plaintiff's registered trademark, and such rectangle is one of the essential features of the plaintiff's registered trademark;
(iv) both the plaintiff and defendants focus their business within the same market and target the same segment of the public. In fact, both products are of the same class, ie, cosmetics (closeness of goods) (Romer J's judgment in the English High Court case of *Re Ladislas Jellinek* [1946] 63 RPC 59 at p. 70 and Mohd Yusof Mohammad SCJ's judgment in Tohtonku Sdn Bhd at p. 347);
(v) the consumers of both the plaintiff and the defendants are of the same category, as indicated by the plaintiff's evidence that there was a drop in its gross profit and sales;
(vi) the trade channel or distributor of the plaintiff and defendants are the same, as indicated in the fact that D1 is the distributor for Royal Expert White products and Real Expert White products. Looking at the surrounding circumstances, there is overlapping of trade channels between the parties that could cause confusion and deception to the public. In this regard, we refer to the Court of Appeal case of *Bata Ltd v. Sim Ah Ba & Ors* [2006] 3 CLJ 393; [2006] 1 MLRA 762;
(vii) the evidence of similarity of idea and concept between the plaintiff's registered trademark and the defendants' Real Expert White mark as both are applied at similar position on the box package of the goods (Refer to the judgment delivered by Lord Fraser in an appeal from New Zealand, *Solavoid Trademark* [1977] RPC 1, at p. 30). The idea or concept of the plaintiff's and defendants' marks is the same which connotes exclusivity and class, as mentioned at para. [106];

...

[111] To sum up, bearing in mind the earlier discussion of the principles and authorities, in deciding the test of likelihood of confusion and/or deception, the court shall take into account:

(i) all the surrounding circumstances which include:
    (a) the closeness of the goods;
    (b) the impression given by the marks;
    (c) the possibility of imperfect recollection;
    (d) the risk that the public might believe that the goods come from the same source or economically-linked sources; and
    (e) the steps taken by the defendant to differentiate his goods from the plaintiff's is also pertinent;

(ii) the court is entitled to decide the likelihood of confusion and/or deception based on its own

opinion, and is not confined to the evidence from the parties.

[112] On the other elements of the infringement of trademark, namely:

(i) the defendant is not the registered proprietor nor the registered user;
(ii) the use was in the course of trade;
(iii) the use was in relation to goods or services within the scope of registration;
(iv) use as a trademark or as importing as a reference to the registered proprietor or registered user or to their goods or service. The use of a mark "as a trademark" in s. 38(1) means use for the purposes set out in the definition of a "trademark" in s. 3(1). The use must be to indicate the source or origin of the goods in relation to which the mark is used (refer to Irving Yeast [1934] 51 RPC 110),

we are in agreement with the learned trial judge that the aforesaid elements have been proven by the plaintiff.

[113] Given the above analysis, in a trademark infringement action, whether the court ought to consider disclaimed words in juxtaposition and/or in combination with the essential features in the registered trademark for the purpose of deciding whether there is a likelihood of confusion and/or deception, we answer in the affirmative, upon the approach of the imperfect recollection test. As such, there is infringement of the trademark. It is our judgment that the plaintiff has proven all the five ingredients to constitute an infringement of the trademark of the plaintiff. The learned High Court Judge did not err in his findings with regards to the infringement of trademark by the defendants. The Court of Appeal failed to compare and analyse the essential features of the trademark of the plaintiff which is the Crown device and the diamond-shaped device on the impugned mark but misdirected itself by focusing on the difference of the word "Royal" and "Real" which is irrelevant in determining the likelihood of confusion and/or deception in an infringement action. Case law authorities have established that where disclaimers (or referred to as "common marks") are included in the trademark to be compared, or in one of them, the proper course is to look at the marks as a whole and not to disregard the parts which are disclaimed. The Court of Appeal disregarded the disclaimers entirely when comparing the marks of the plaintiff and of the defendants. The Court of Appeal also failed to consider the imperfect recollection of customer/customers test when making purchases in determining the likelihood of confusion/deception, but premised merely on the side by side comparison test, which is erroneous.

…

[132] Contrary to the learned trial judge's judgment, the Court of Appeal had considered D1 and D2's submission at the trial, which is a press release issued by the Ministry of Health (MOH) that banned the product "Royal Expert Whitening Cream" for containing mercury. The press statement acts as a warning not only to all sellers and distributors to stop the sale and distribution of the product, but also to the public to immediately seek medical advice for any adverse reactions from using the product "Royal Expert Whitening Cream". In view of the press release, the Court of Appeal agreed with the defendants that this refers to the "Royal Expert" branding and the plaintiff's product. Hence, it was concluded that the plaintiff had suffered loss due to this negative publicity and [the loss was] not caused by the defendants' misrepresentation.

[133] Given the press release, the Court of Appeal held that fundamentally, the plaintiff had failed to prove that the defendants in selling the Real Expert White Cream were passing off a product of the plaintiff as the goodwill of the plaintiff's product had been destroyed.

[134] However, we disagree with the findings by the Court of Appeal on this point. Firstly, the press release has got nothing to do with the plaintiff's products but the products of another entity, Ortus Expert Cosmetic Sdn Bhd. There is nothing in evidence that the notification of the plaintiffs' goods pursuant to CDCR 1984 has been cancelled by the Director of Pharmaceutical Services. With the notification, the plaintiff can sell and distribute its products. Secondly, even if it is true that the plaintiffs' goods contained mercury which is contrary to CDCR 1984 or contravenes any law and that the manufacture, distribution,

supply, sale and use of the plaintiff's goods may be prohibited (which has not been proven), such a fact, in itself, does not mean that the use of Ortus Expert White's registered trademark is contrary to law under s. 14(1)(a) of the TMA. Nor does this mean that Ortus Expert White's registered trademark is not entitled to protection by the court under s. 14(1)(b) of the TMA.

[135] There is a difference between the trademark as an intangible intellectual property right and the contents of the actual goods itself.

[136] A registered trademark confers on its owner a form of intellectual property and statutory right under s. 35(1) of the TMA. The statutory rights attached to the registered trademark are distinct from the goods and services which bear the registered trademark.

...

[138] If the proposition by the Court of Appeal is accepted, namely that goodwill of the products is destroyed by the negative press release, it would lead to an absurd and untenable situation where a trademark owner would be constrained from relying on goodwill attached to its goods to prevent third party from acts of infringement and passing off in the event that there is negative publicity being made against its brand although the said brand could have been established in the market over a period of time.

[139] We do have instances of branded goods which have established goodwill in their brand being subjected to negative publicity, yet that does not mean such branded goods lose their goodwill.

[140] It is our judgment that the Court of Appeal had erred when it decided that the plaintiff's business no longer had any goodwill merely by the alleged banning of the product of the plaintiff by the Ministry of Health. In any event, there has been no criminal prosecution against the plaintiff nor any statutory penalties imposed and the fact is that the press release by the Ministry has no relation to the goods of the plaintiff.

per Justice Zabariah Mohd Yusof,
Judge of the Federal Court

A judicial sale under section 257 of the National Land Code ("NLC") does not give rise to a contract between the chargee bank and the successful bidder. If there are any shortcomings in the sale, the remedy does not lie in the Contracts Act 1950 but elsewhere.

Ambank (M) Bhd v AIM Edition Sdn Bhd [2021] 2 LNS 2082, FC

In this appeal, the apex court was tasked to determine whether a judicial sale under section 257 of the NLC gives rise to a contract between the chargee bank and a successful bidder.

The appellant who was a chargee initiated proceedings for a judicial sale of land via public auction. The bid by the respondent was accepted and the respondent was duly registered as the owner of the land. The respondent later discovered that the actual size of the land was merely 81.9945 hectares, which contradicted what was stated in the proclamation of sale, i.e. 94.76 hectares. Thus, the respondent commenced an action claiming for compensation for loss of land. At the High Court, the respondent's action was dismissed as the claim was not proved. The High Court further held that an order of sale was merely an exercise of statutory right by the appellant under the NLC. Thus, the appellant was not a vendor such as those under a sale and purchase agreement. These findings were reversed by the Court of Appeal. The appellate court found that there was a concluded contract between the appellant and the respondent. The order for sale was indeed a sale and purchase agreement. The appellant appealed against the decision of the Court of Appeal.

The Federal Court unanimously allowed the appeal and the decision of the High Court was reinstated. Justice Mary Lim explained that judicial sale was governed by the NLC. The word "judicial" means it was ordered by the court after the reasons for ordering a sale under the NLC had been met. In fact, the proclamation of sale, the memorandum and terms of sale, and Form 16F can only indicate that the land was sold by the Registrar of the High Court, executing the order for sale as granted by the High Court. It is therefore not correct nor plausible for a judicial sale which was governed by the NLC to fit into the confines of the Contracts Act 1950. As such, if there were any

shortcomings in the judicial sale, as in the present appeal, the remedy for the respondent lay elsewhere and not under the law of contract. There was no reason to use the principles of contract to describe the relationship of parties in an auction sale of land that was conducted pursuant to the court's order.

> [39] On our part, we must emphasise that the public auction is a judicial sale of the subject property, judicial as it is ordered by the court after the court is satisfied that the grounds for ordering a sale under the National Land Code have been met. If there are any shortcomings in that sale, the remedy lies elsewhere but not in contract as there is none to begin with.
>
> ...
>
> [49] This opinion is correct and is actually borne out when we examine the relevant documents in the judicial sale, namely the proclamation of sale, the memorandum and terms of sale, Borang 16F. All four documents clearly indicate that the subject lands were sold by the Registrar of the High Court, executing the order for sale as granted by the High Court, and not at all by the appellant chargee bank. There is thus no legal or factual basis for the conclusions reached by the Court of Appeal.
>
> ...
>
> [59] Given that the auction sale of the subject lands in the present appeal, and for that matter in any judicial sale is conducted pursuant to an order of court granted after the court was satisfied that the conditions for such an order had been met, we hold that there is no contract between the chargee bank and the successful bidder. There is no cause or reason to use the concept or legal fiction of contract to describe the relationship of the parties to that judicial sale. As opined by Judith Sihombing at para. [1239] at p 1274 in National Land Code – A Commentary:
>
> > [1239] The purchaser will have no relationship to the chargee which would entitle the former to pressure the latter to make such payment because there is no contract between the chargee (who is not the vendor of the land but the applicant for the order for sale) with purchaser. Further, the chargee has no control over the proceeds of the sale (as these are held by the Court).
>
> [60] We are therefore of the unanimous view that in relation to the first question, a judicial sale pursuant to s. 256 of the National Land Code clearly does not give rise to a contract between the chargee bank and the successful bidder such as the plaintiff who is the respondent in this appeal. Given the fact that the remedy for an order for sale is expressly provided by statute, there is no reason or need to deploy the legal fiction of a contract. Ultimately, this was a judicial sale governed by statute and it is neither correct nor plausible to fit such a creature of statute into the confines of the Contracts Act 1950.
>
> *per Justice Mary Lim,*
> *Judge of the Federal Court*

The defence of absolute privilege cannot be invoked automatically in cases where police reports are made. If a police report was lodged with ill intent and not for purposes of initiating a criminal investigation, this absolute privilege rule is not applicable.

Nor Aziz Mat Isa v Sun Teoh Tia (SAC) & Ors [2021] 3 CLJ 186, FC

In this appeal, the appellant was seeking the court to extend the application of the defence of absolute privilege in cases where police reports are made. At all material times, the appellant was a policeman and was charged with the offence of insulting the Inspector General of Police ("IGP") in his police report. He was found guilty by the Disciplinary Board ("second respondent") and his service was terminated. Thus, the appellant sought judicial review at the High Court to quash the decision of second respondent. The High Court dismissed the application on the grounds that the defence of absolute privilege was not applicable to disciplinary proceedings under the Public Officers (Conduct and Discipline) Regulations 1993. The Court of Appeal affirmed the findings of High Court.

Hence, the appellant appealed to the Federal Court and argued that in light of the consideration of

public policy, the defence of absolute privilege should be available to protect the statements made in the police report. In addition, the police report cannot be used as a basis of initiating disciplinary action and as such, his dismissal was unlawful. The appellant also contended that the defamatory statements in the police report were privileged in nature and the person making such police report should not be deterred by threat of civil liability.

The Federal Court, chaired by a panel of three judges, unanimously dismissed the appeal. Justice Mohd Zawawi Salleh held that the defence of absolute privilege can be invoked in cases of police reports only if it is the first step of criminal investigation. This is important so as to ensure every person will have unfettered access to lodge police reports, that is an "open channel of communication" between citizens and the police, and to encourage the public to assist in criminal investigations. However, if there is an attempt to extend the application of this absolute privilege rule, it must be one which facilitates criminal investigations as well as bringing the perpetrator to justice. This means that if the police report was lodged, but it was not done for the purposes of initiating a criminal investigation, there was no compelling basis to extend the application of this absolute privilege rule. In the present case, it was clear from the police report that it meant the IGP was incompetent and stupid. Such conduct could not be said to be one which was for the purpose of discharging one's public duty in investigating a suspected crime. Instead, this appeared to be one which was not a genuine complaint. The statement in the police report seemed to be one which was made with ill-will and improper motives, and not for the purpose of reporting a crime or to enforce obedience to law. Rather, it was aimed to tarnish the image of the IGP. As such, the defence of absolute privilege could not be applicable in the present case. In fact, there is no such policy that the defence of absolute privilege will be invoked automatically when a police report is lodged. In addition, there is no rule that prohibits the maker of such statements to be subjected to disciplinary proceedings. Thus, the conduct of the appellant in the present case actually contravened paragraph 8.1.3 (now paragraph 33.1.4) of the Perintah-perintah Tetap Ketua Polis Negara (PTKPN A110). This would mean the appellant could be subjected to disciplinary proceedings, and his dismissal pursuant to the disciplinary action was perfectly justified.

[19] It can be seen from the decisions of the cases referred to above, absolute privilege is founded on policy consideration. A police report lodged would be absolutely privileged if it is the first step in the process of criminal investigation by the police and therefore not actionable for the purpose of the law of defamation. With such a report, the crime will be investigated and the perpetrator be brought to justice. In our opinion, the grounds of public policy which explain the basis for the absolute privilege rule is to encourage honest and well-meaning persons to assist in the process of investigating a crime with a view to prosecution by relieving the persons who lodged the police report from the fear of being sued for something they say in the reports (see *Noor Azman* (supra)).

...

[21] With respect, we disagree. In our judgment, any expansion in the ambit of the defence of absolute privilege must relate to this underlying aim of facilitating the effective discharge of the shared public duty in judicial proceedings or events leading to judicial proceedings. As we have alluded to earlier, a police report lodged would be absolutely privileged if it is the first step in the process of criminal investigation by the police and therefore not actionable for the purpose of the law of defamation. The public policy would dictate that citizens must have unfettered access to make police reports. It recognises the importance of ensuring an "open channel of communication" between citizens and the police.

[22] As we examine the policy consideration, however, we see no compelling justification for extending an absolute privilege to a police report for the purpose of disciplinary proceedings against the maker who lodged the report for the purposes other than for the police to kick start the investigation on the course of the commission of a crime. In the instant case, there can be no doubt that the contents of the statement in the police report lodged by the appellant in their literal and ordinary meaning were understood to mean that IGP was incompetent and stupid. It was not a genuine complaint to the authorities. The appellant was venting his frustration publicly. His conduct of lodging the said police report could not be said to be discharging his public duty to report crimes or provide information to his colleagues

in investigating a suspected crime. That is the crucial difference between the present case and the case of *Lee Yoke Yam* (supra).

[23] In our judgment, the suggested extension of the scope of absolute privilege would be wholly disproportionate and unnecessary for the aim of encouraging members of the public to report suspected wrongdoings. The defence of absolute privilege is afforded for sound reasons of policy, but it must not be extended further than is necessary. Thus, in *Darker v. Chief Constable of the West Midlands Police* [2001] 1 AC 435, Lord Cooke said at p. 453:

> "Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being McCarthy P's proposition in *Rees v. Sinclair* [1974] 1 NZLR 180 at 187: The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ..."

...

[25] In our considered opinion, there is no public policy consideration to recognise that the defence of absolute privilege is automatically invoked when a police report is lodged and there could be no action whatsoever taken against the maker, like a disciplinary proceedings in the instant case. Furthermore, it has not been demonstrated in the present case of the necessity for the appellant to make the impugned statements in the said police report. The impugned statement was made from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the IGP. In fact, the police [report] lodged by the appellant is not for the purpose of actually reporting crime, or to enforce obedience to the law, or to see that guilty people are punished but for the purpose of tarnishing the image another individual.

per Justice Mohd Zawawi Salleh,
Judge of the Federal Court

Tapah Court

COURT OF APPEAL

In respect of underaged children, the consent of both parents is required before a Certificate of Conversion to Islam can be issued. This principle has been decided in the latest Federal Court decision of Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals [2018] 3 CLJ 145; [2018] 1 MLJ 545.

Pendaftar Muallaf Wilayah Persekutuan v Lee Chang Yong & 3 Ors [2021] 1 LNS 2079, CA

In this case, the first respondent and Teng Wai Yee (Aleena binti Abdullah) ("Aleena"), were married under the Law Reform (Marriage and Divorce) Act 1976. Out of the marriage, they have two children, AB(1) and AB(2). On December 29, 2015, Aleena converted to Islam and had the children registered as Muslims about five months later. At the material time, AB(1) was 8 years 1 month old, whilst AB(2) was only 3 years and 7 months old. Subsequently, the first respondent filed a divorce petition at the Shah Alam High Court and on April 27, 2018, the High Court made the following orders:

(i) that the first respondent be allowed visitation rights to the children;
(ii) that Aleena be given the sole custody, care and control of both the children.

However, on appeal, the Court of Appeal on September 13, 2018 set aside the order of the High Court and made an order that the first respondent be given the sole guardianship, custody, care and control of both the children.

Thereafter, the first respondent filed an application for judicial review under Order 53 of the Rules of Court 2012 ("the ROC 2012") seeking the following reliefs:

(i) An order of certiorari pursuant to Order 53 r 8(2) of the ROC 2012 to quash the conversion of religion of AB(1) and AB(2), the children of the first respondent and Aleena and the decision by the appellant in issuing the Certificate of Conversion to Islam ("Kad Akuan Agama Islam") both dated May 11, 2016;
(ii) An order of prohibition pursuant to Order 53 r 1 of the ROC 2012 to prohibit the appellant, its officer or agent from registering the children as muallaf (Muslim) under the relevant enactments;
(iii) An order of mandamus to compel the appellant and the Ketua Pengarah Jabatan Agama Islam to cancel the registration of the children as converts to Islam in the Register of Converts;
(iv) Alternatively, a declaration that the Certificates of Conversion to Islam are null and void.

The learned High Court judge granted an order of certiorari to quash the children's conversion to Islam, the issuance of the Certificates of Conversion and an order of mandamus to cancel the registration of the children as converts to Islam premised on the fact that the issue before the court had already been decided by the Federal Court in the case of I*ndira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 ("Indira Ghandi"). In the circumstances, her Ladyship decided that she was bound by the said decision based on the doctrine of stare decisis.

Therefore, an appeal was filed against the decision of the High Court. The main issue raised in the appeal is whether the consent of both parents are required, before the Certificate of Conversion to Islam in respect of underaged children can be issued.

Learned counsel for the appellants submitted that the decision in *Indira Gandhi* is distinguishable on its facts as in that case, section 96 of the Administration of the Religion of Islam (Perak) Enactment 2004 was not complied with. Section 96(1) of the Enactment requires the children to be present before the Registrar and utter the two clauses of the affirmation of faith before the Certificate of Conversion can be issued. These requirements were not fulfilled in Indira Gandhi. In contrast, in the present case, all the requirements under the relevant provision of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), in particular section 85, had been complied with.

The appellant also argued that the Federal Court decision on the same issue in the case of *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 CLJ 1; [2008] 2 MLJ 147, should be followed. In the circumstances, it was the appellants'

contention that the decision in *Indira Gandhi* is per incuriam and as such is not binding.

In *Subashini*, the Federal Court held that either husband or wife has the right to convert a child of the marriage to Islam. Nik Hashim FCJ explained this decision in the following manner:

> [25] The wife complained that the husband had no right to convert either child of the marriage to Islam without the consent of the wife. She said the choice of religion is a right vested in both parents by virtues of arts. 12(4) and 8 of the FC and s. 5 of the Guardianship of Infants Act 1961.
>
> [26] After a careful study of the authorities, I am of the opinion that the complaint is misconceived. **Either husband or wife has the right to convert a child of the marriage to Islam.** The word "parent" in art. 12(4) of the FC, which states that the religion of a person under the age of 18 years shall be decided by his parent or *guardian, means a single parent. In Teoh Eng Huat v. The Kadhi of Pasir Mas, Kelantan & Anor* [1990] 2 CLJ 11; ([1990] 1 CLJ (Rep) 277), Abdul Hamid Omar LP, delivering the judgment of the Supreme Court, said at p 14 (p. 280):
>
> > "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 instructions relating to any other religion than his own without the permission of the **parent** or guardian."
>
> Further down, His Lordship continued:
>
> > *We would observe that the appellant (**the father**) would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant.*
>
> *(emphasis added)*
>
> Therefore, art. 12(4) must not be read as entrenching the right to choice of religion in both parents. That being so, art. 8 is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in Nedunchelian, supra, and as such, the argument that both parents are vested with the equal right to choose is misplaced. Hence the conversion of the elder son to Islam by the husband albeit under the Selangor Enactment did not violate the FC. Also reliance cannot be placed on s. 5 of the Guardianship of Infants Act 1961 which provides for equality of parental rights since s. 1(3) of the same Act has prohibited the application of the Act to such person like the husband who is now a Muslim. (See *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 CLJ 416).
>
> *(emphasis added)*

In the same case, Abdul Aziz Mohamad FCJ expressed his view as follows:

> "[157] Construing Teoh Eng Huat to mean that by virtue of the said cl. (4) the conversion of a non-Muslim person under eighteen requires the consent of his "parent or guardian", the wife argues that, by virtue of the rule of construction that the singular includes the plural, "parent" **in cl. (4) must be read in the plural to mean both parents. In my opinion, in the case of the word "parent" in cl. (4) and in the said ss. 95 and 117, it is improper to begin construing it by applying the said rule of construction and thereby reading it as "parents". One has to begin by construing what is the meaning of "parent". The ordinary meaning is "a father or mother". See, for example, the Concise Oxford Dictionary. So is the legal meaning. Black's Law Dictionary, 7th edn, gives the meaning as "the lawful father or mother of someone". The relevant phrase in cl. (4) has, therefore, to be read as "by his father or mother or guardian". The same applies to the two sections. The relevant words have to be read as "if ... his father or mother or guardian consents". Either the father or mother will do, not both.** With that, the question of applying the rule about the singular including the plural no longer arises because "mothers or fathers" would be out of the question. The Bahasa Malaysia text of the Administration Act, which is the authoritative text, in fact says in s. 117 "jika ... ibu atau bapa atau penjaganya mengizinkan".
>
> *(emphasis added)*

The Court of Appeal opined that the contention by the appellant's counsel that the facts in Indira Gandhi is distinguishable from the present case are untenable as the main facts in both cases involve the unilateral conversion of the children which is the main question for the determination of the courts. In *Indira Gandhi*, a specific question of law on the same issue discussed above was posed before the court which reads:

> 3. Whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam can be issued in respect of that child.

After having considered the relevant laws and authorities including the decision in *Subashini*, Zainun Ali FCJ held as follows:

> *[175] Based on a purposive interpretation of art. 12(4) read with the Eleventh Schedule of the Federal Constitution, and on an application of ss. 5 and 11 of the GIA,* ***it is concluded that the consent of both the appellant and her husband are required before a Certificate of Conversion to Islam can be issued in respect of the children. The third question is thus answered in the affirmative.***
>
> *(emphasis added)*

Clearly, the latest Federal Court decision in *Indira Gandhi* has decided that if both parents are still surviving, the consents of both of them are required before a Certificate of Conversion to Islam can be issued. In the circumstances and based on the principles of stare decisis, the Court of Appeal decided that it was bound by the decision in *Indira Gandhi*.

Secondly, the appellant also submitted that the conversion and the appellant's decision to register the conversion was made on May 11, 2016 whereas *Indira Gandhi* was decided on January 29, 2018. Thus, it was submitted that the law at the material time was as decided in *Subashini* and not the decision in Indira Ghandi.

The Court of Appeal was of the view that this proposition is misconceived as it is trite law that the latest decision of the Federal Court supersedes its earlier decision as explained in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ("Dalip Bhagwan Singh") as follows:

> *If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication,* ***its decision represents the present state of the law.*** *When two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.*
>
> *(emphasis added)*

On the issue of whether the decision in *Indira Gandhi* is the *ratio decidendi* of the case or mere per incuriam (sic), the Court of Appeal referred to the principle of law in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 CLJ 577, where this principle was explained in the following manner:

> *[51] It has been said in certain textbooks that the decision or judgment of a judge may fall into two parts, i.e., the ratio decidendi (reason for the decision) and obiter dictum (something said by the way).* ***The ratio decidendi of a case is the principle of law on which a decision is based. When a judge delivers judgment in a case he outlines the facts which he finds have been proved on the evidence. Then he applies the law to those facts and arrives at a decision, for which he gives the reason (ratio decidendi).*** *The judge may also go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an obiter dictum.* ***The binding part of a judicial decision is the ratio decidendi.*** *An obiter dictum is not binding in later cases because it was not strictly relevant to the matter in issue in the original case. However, an obiter dictum may be of persuasive (as opposed to binding) authority in later cases.*
>
> *(emphasis added)*

On the other hand, the words per incuriam has been interpreted by the Federal Court in *Dalip Bhagwan Singh* as follows:

> *A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above.* ***The words "per incuriam" are to be interpreted narrowly to mean as per Sir Raymond Evershed, MR in Morelle v. Wakeling [1955] 2 QB 379, 406 as a "decision***

given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong".

(emphasis added)

The Federal Court in *Indira Gandhi* in answering a specific question of law, had considered the relevant facts and applied the law as can be seen from paragraphs [142] until [181] of the grounds of judgment. All relevant statutory provisions and previous Federal Court decisions on the same issue including Subashini had been analysed and considered before the decision on the issue was made.

As such, the Court of Appeal was of the view that, the decision in *Indira Gandhi* that the consents of both parents were required before the Certificate of Conversion to Islam could be issued, was the ratio decidendi of the case. Therefore, the Court of Appeal was bound by the decision of the Federal Court in *Indira Gandhi*'s case. Hence, the appeal was accordingly dismissed.

> "[35] In the present case, it is undisputed fact that the children's conversion to Islam was without the consent of the 1st respondent, the father of the children and as such, the High Court judge was correct in granting an order of certiorari to quash the said conversion, the issuance of Certificate of Conversion and an order of mandamus to compel Pendaftar Muallaf Wilayah Persekutuan and Ketua Pengarah Jabatan Agama Islam to cancel the registration of the children as converts to Islam.
>
> [36] Again we reiterate that the High Court and this court are bound by the decision of the Federal Court in Indira Gandhi's case by the doctrine of stare decisis."
>
> *per Justice Nordin Hassan,*
> *Judge of the Court of Appeal*

It is in the interest of the public as well as the accused for a trial to proceed without delay. This is also the intention of Parliament in enacting section 172B of the Criminal Procedure Code. That a proceeding may be rendered a nullity and the applicant will be put to the expense of a trial are not special circumstances for the court to grant a stay of proceedings.

Datin Sri Rosmah binti Mansor v PP [2021] MLJU 2394, CA

The applicant was charged with two corruption offences under the Malaysian Anti-Corruption Commission Act 2009 in the High Court at Kuala Lumpur.

The applicant filed a notice of motion for an order that the criminal proceedings Nos. WA-45-9-03/2019 and WA-45-19-07/2019 be stayed pending the disposal of the applicant's appeals against the ruling of the learned High Court judge in dismissing the applicant's applications to nullify the applicant's trial and to disqualify the lead prosecutor, Datuk Gopal Sri Ram ("DGSR"), from conducting and leading the prosecution.

In the notice of motion, the applicant's grounds for stay of proceedings are as follows:

(i) if stay is not granted and if the applicant's appeal is allowed by the Court of Appeal, it would render the appeal nugatory. As such, it is a waste of time and efforts by all parties for the continuation of the trial;
(ii) the decision of the High Court judge is appealable to the Court of Appeal without having to wait for the court's decision at the end of the defence case;
(iii) there is a novel question of law in the said appeal which concerns the legality of the proceedings against the appellant;
(iv) the legality of the appointment of DGSR as senior deputy public prosecutor by fiat should be determined first by the Court of Appeal and/or the Federal Court before the prosecution against the appellant;
(v) the appellant's rights for fair and impartial trial will be prejudiced if stay of proceedings is not granted;

(vi) there are special circumstances for granting the stay of proceedings.

The court dismissed the stay application after finding that the applicant had failed to show any special or exceptional circumstances for a stay. The court made reference to the statement below by Raja Azlan Shah J (as His Majesty then was) in *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 8:

> *Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances.* ***It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.***
>
> *(emphasis added)*

Applying it to the facts of the case before it, the court dismissed the stay application on the basis that no exceptional or unusual circumstances had been shown to justify the application:

> "[11] Reverting to the present application, the main contention by counsel for the Applicant was that the proceedings at the High Court may be rendered a nullity if their appeal to the Court of Appeal is successful. This is due to the fact that the legality of the proceedings and the legality of the appointment of DGSR as the lead prosecutor were the subject matter of the Applicant's appeal. In relation to this, as decided by the Federal Court in *Dato Sri Najib*'s case alluded to earlier, that the proceedings may be rendered a nullity is not a special circumstance and as such it does not support the Applicant's application for the stay of proceedings.
>
> [12] We have also considered public interest which dictates that the trial of serious offence especially by a public figure should be resolved expeditiously without interruption or fragmentation by interlocutory appeal. Moreover, the hearing of the Applicant's proceedings has already commenced and needs to be completed without delay. Besides, it is alsoin the best interest of the Applicant if the trial is resolved as soon as possible where the Applicant has the opportunity to put her defence and clear her name if she is innocent.
>
> [13] In addition, we find expeditious completion of a criminal trial is in tandem with the intention of the Parliament when section 172B of the Criminal Procedure Code (CPC) was enacted and came into effect on 1.6.2012. Section 172B(4) requires a trial to commence no later than three months after an accused was charged. Clearly, a long delay including granting stay of proceedings without exceptional or unusual circumstances will defeat the Parliament's intention.
>
> ...
>
> [15] Further, we are also of the view that the Applicant's rights over the High Court Judge rulings are best vindicated by an appeal after a full trial and if convicted, with the benefit of all relevant facts which were placed before the trial judge. We do not see any miscarriage of justice in the circumstances.
>
> [16] On the issue that the Applicant's appeal would be rendered nugatory, we find this contention is bereft of any merit. As mentioned earlier, that a proceeding may be rendered a nullity and the Applicant will be put to the expense of a trial are not special circumstances for the granting of stay proceedings. Therefore, the issue of nugatory of the Applicant's appeal does not arise. In any event, the Applicant would not be deprived the result of her appeal if successful.
>
> [17] Having weighed all the grounds advanced by the Applicant in the present application, we find, there is no compelling justification for this court to grant the stay of proceedings. The Applicant has not shown any exceptional or unusual circumstances to justify the stay application."
>
> *per Justice Nordin Hassan,*
> *Judge of the Court of Appeal*

HIGH COURT

A Spartacus order is a self-identification order requiring unknown persons to reveal their identity and to provide an address for service. Such order would then enable the plaintiff to enforce the remedies against these unknown persons.

Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor [2021] 3 CLJ 587, HC

In this case, the High Court granted the first ever order in our local jurisdiction known as "Spartacus" or "I am Spartacus" order. It is a self-identification order, and it compels unknown persons to identify himself or herself and to provide an address for service.

At all material times, the plaintiff was a victim of push payment fraud. According to the plaintiff, the first defendant was an unknown person who had infiltrated its email communications with its South Korean business counterpart. As a result, the plaintiff executed a payment transaction amounting to €123,014.65 (equivalent to approximately RM600,000) and perceived that this payment was genuinely made to its South Korean counterpart. Nonetheless, the monies were credited into a CIMB bank account under the name of Premier Outlook Services ("POS account"). This POS account was under the control of the second defendant, and when an order of discovery was granted in favour of the plaintiff, the documents showed that the second defendant had caused the monies to be paid out into different bank accounts, including his own and the accounts of the proposed third and fourth defendants. The High Court had previously granted proprietary as well as Mareva injunctions against the first and second defendants. Thus, the plaintiff sought to trace and recover its monies and applied for, among others, a self-identification order, also known as a "Spartacus" or "I am Spartacus" order against the first defendant who is an unknown person(s).

Justice Ong Chee Kwan granted this application. Referring to the English case of *PML v Person(s) Unknown* [2018] EWHC 838, his Lordship explained that this Spartacus order is an order mandating the unknown persons to identify himself or herself and provide an address for service. This order is relevant and applicable in the present case as the plaintiff's monies appeared to remain within Malaysian bank accounts and Malaysian jurisdiction. Hence, when this "self-identification" notice is made via advertisement in the local newspaper, it should be effective in alerting the unknown persons to reveal themselves. If this unknown person fails to identify himself or herself even after being alerted by the advertisement, he/she is thereby at risk of being subjected to committal proceedings. Such order is necessary so that if the plaintiff succeeds in obtaining the reliefs sought in this suit, it would be able to enforce the remedies against these unknown persons.

> [57] Enclosure 57 is the plaintiff's application for a self-identification order, also known as a "Spartacus" or "I am Spartacus" order, against the first defendant – being persons unknown. A self-identification order is an order requiring the persons unknown to identify himself/herself and to provide an address for service.
>
> [58] In the English High Court case of *PML v. Person(s) Unknown* [2018] EWHC 838 (QB) ('PML'), the purpose of the self-identification order is so that if the plaintiff were to succeed in its claim, such an order is necessary to ensure that the plaintiff's remedies are to be effective. In PML, unknown hackers had hacked and stolen a large amount of data. The unknown hackers then blackmailed the plaintiff to pay money in order for the data to be returned. The court granted a self-identification order against the unknown hacker defendants and Justice Nicklin explained at [17]:
>
> > 17. ... Such an order is necessary if, in the event of success in the claim, the remedies to which the claimant would be entitled are to be effective. Of course, a defendant may disobey and not comply with a self-identification order as well as the non-disclosure order. But it cannot be assumed that all defendants will choose defiance. Few defendants can remain confident that they will ultimately manage to evade identification. If they fail, punishment for contempt of court would then loom large.
>
> [59] The court also went on to explain that in another case of *NPV v. QEL & Another* [2018] EWHC 703 (QB) also involving an anonymous blackmail case, the self-identification order was made against the anonymous second defendant.

The second defendant complied with the order and provided his name and address for service.

...

[61] In this case, the self-identification order would require placement of an advertisement in Berita Harian of a notice against the first defendant (being the persons unknown). The notice would alert the persons unknown of the order for them to self-identify within seven days of the advertisement and failing which, they risk committal proceedings.

[62] In this case, the web of potential defendants is growing wider. Originally, the second defendant was the recipient of the plaintiff's monies. Next, the money trail has led to the proposed third and fourth defendants. The self-identification order is necessary so that if the plaintiff is successful in its current suit, the plaintiff's proprietary remedies are to be effective against these other persons unknown. The plaintiff's monies also appear to remain within Malaysian bank accounts and Malaysian jurisdiction. Hence, the self-identification advertisement in Malaysia can be effective in alerting the persons unknown to reveal themselves.

[63] Although the cases granting a self-identification order cited involved blackmailing and threat of publication of confidential or sensitive information, I find the principles equally applicable in the present circumstances which involved fraud and persons hiding behind the fraud.

per Justice Ong Chee Kwan,
Judicial Commissioner of the High Court

Tampin Magistrates' Court

When an application is made by a solicitor to discharge himself from representing his client, the trial judge must hear this application before continuing with the trial. Failure to do so would mean the client is denied a fair representation, and this would amount to a miscarriage of justice. Thus, the findings under such circumstances must be set aside.

Dragger Engineering (M) Sdn Bhd v Exora Trading & Construction Sdn Bhd [2021] 6 CLJ 286, HC

In this appeal, the main issue in contention was whether a miscarriage of justice had occurred when the learned trial judge decided to proceed with the trial and not hear the solicitor's application to discharge himself from representing one of the parties in the suit. When this case arose at the Sessions Court, the respondent was claiming against the appellant for an alleged breach of a sub-contract amounting to RM437,729.32. The trial was fixed for November 28, 2017. However, on the said date, the solicitor for the appellant filed an application to discharge himself from representing the appellant. This application was later extracted on the same day, and the hearing of this application was scheduled for December 12, 2017. In spite of fixing December 12, 2017 as the hearing date for the application to discharge, the learned trial judge proceeded with trial. The trial was conducted without the participation of the appellant's counsel, whereby witnesses were called and submissions were filed in the mere presence of the appellant's director. Subsequently, on January 3, 2018, the respondent's action was allowed. The appellant thus filed an appeal on June 24, 2020 at the High Court challenging the findings of the Sessions Court judge. This appeal was filed after the appellant obtained leave and extension of time from the Court of Appeal on June 23, 2020.

The High Court allowed the appeal and set aside the decision of the Sessions Court. Justice Mohd Arief Emran Arifin held that the Sessions Court judge had failed to appreciate Order 5 rule 6 of the Rules of Court 2012. This provision actually stipulates that the appellant, being a company, is required to be represented by a solicitor. This means that the appellant must be represented throughout the

trial which, regrettably, the learned trial judge did not comply with and did not hear the application to discharge. In other words, the act of allowing the trial to continue under such circumstances and not allowing the appellant to appoint new solicitors to represent them amounted to a miscarriage of justice. The mere attendance of the director of appellant on the date of trial did not offer substantial significance as the appellant could not put its case through its counsel to the respondent's witnesses.

> [14] I am guided by the principles of law as laid down in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665, *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58 and by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1.
>
> [15] It is sufficient that I reproduce the judgment of Nallini Pathmanathan JCA (as Her Ladyship then was) in *MMC Oil & Gas Engineering Sdn Bhd* (supra):
>
> > [15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.
> >
> > ...
> >
> > [18] Judicial decisions are required to be handed down expeditiously and with minimum delay. However, this ought not to compromise the fundamental requirement that trial judges undertake a comprehensive and holistic approach to the evaluation of evidence in reaching their findings at first instance. A failure to consider the entirety of the evidence and material issues, a failure to make findings of fact or the making of bare findings of fact, all allow for appellate intervention. Apart from the real possibility of a miscarriage of justice, such omissions by a trial judge require the appellate courts to take on the role of first instance judges and review the evidence in its entirety afresh. This in turn amounts to a strain on judicial resources. The importance of a comprehensive consideration of the matter at first instance cannot be sufficiently emphasised. Equally when there has been just such a holistic approach adopted, there should be considerable appellate restraint exercised when reviewing a first instance judgment on appeal.
>
> ...
>
> [18] The facts as disclosed in the record of appeal and the grounds of the learned judge indicate that the learned Sessions Court Judge did commit such an error that justifies appellate intervention. I find that no reasonable judge facing the same facts would have continued with the trial without determining the application to discharge and without having the opportunity for the appellant to be informed of the said application to discharge and to appoint new lawyers or solicitors to represent itself at trial. As it stood on the date of the trial, the appellant would be entitled to assume that it was represented by its previous counsel and should have had the opportunity to canvass its defence through witnesses as well as through cross-examination of the respondent's witnesses. The appellant being a company, is required to represent its case through a solicitor of its choice in accordance to O. 5 r. 6 of the Rules of Court 2012 and *Kotabato Corporation (M) Sdn Bhd & Anor v. Wisma Central Management Corporation* [2003] 4 CLJ 520; [2003] 4 MLJ 473.
>
> ...
>
> [20] Although the appellant did appear in court on 12 December 2017, at that time it would have been too late. The court had gone ahead with the trial and it would have left the appellant

at a substantial disadvantage. The appellant could not put any further evidence and had not been afforded the opportunity to put its case through its counsel to the respondent's witnesses. Therefore, even if the director had attended court on 12 December 2017 and filed its submission, to allow the proceedings to continue under such circumstances would have been unfair and would have caused a miscarriage of justice. The Sessions Court Judge should have not proceeded with the trial if the application of discharge was not heard. The appellant would have therefore been entitled to assume that it was represented by counsel on the date of the trial and would have been afforded adequate opportunity to put its case forward for consideration.

[21] It is therefore my finding that the learned Sessions Court Judge had not provided adequate opportunity for the appellant to take the appropriate steps necessary to defend itself at trial. The learned Sessions Court Judge should have at least dismissed the application and under those circumstances could have legitimately proceeded with the hearing of the trial on its merits. Thus, I am of the opinion that the facts disclose a serious miscarriage of justice justifying appellate intervention. I am empowered under those circumstances to set aside the order of the Sessions Court and order that a new trial be fixed before the Sessions Court.

per Justice Mohd Arief Emran Arifin,
Judicial Commissioner of the High Court

Segamat Sessions and Magistrates' Court

A directive must be reflective of the policy decision of the Cabinet. When the directive is without any statutory backing, any decision made thereunder will have no legal effect.

Jill Ireland Lawrence Bill v Menteri Bagi Kementerian Dalam Negeri Malaysia & Anor [2021] 4 CLJ 231, HC

This is a judicial review application filed by the applicant who is a native Bumiputera Christian from Sarawak.

At all material times, the applicant was detained when she landed at Sepang Low Cost Carrier Terminal in 2008. Her belongings consisting of, among others, eight Christian educational audio compact discs ("CDs") belonging to her which carried the word *"Allah"* in each of the titles were confiscated. The respondent, i.e. the Ministry of Home Affairs ("Ministry") relied on a 1986 Directive as a basis for the detention and confiscation. This 1986 Directive entailed several rules, which prohibited the use of four words, including the word *"Allah"*, and permitted the use of some other 12 words with conditions ("Directive"). In response, the applicant contended that she and her family were using Bahasa Malaysia as their faith language at all times, and that the materials used in worship, such as the *AlKitab*, were in Bahasa Indonesia (*AlKitab* was the Indonesian translation of the Bible where the word *"Allah"* appeared). Hence, the applicant filed an application for judicial review at the High Court against the Minister of Home Affairs ("minister") and the Government of Malaysia ("government") seeking:

(a) A certiorari order quashing the decision of the minister;
(b) A mandamus order to direct the return of the CDs;
(c) A declaration, pursuant to Article 11 of the Federal Constitution ("FC"), that the applicant has the constitutional right to import the CDs in light of the right to practise religion and the right to education; and
(d) A declaration, pursuant to Article 8 of the FC, that the applicant was guaranteed equality of all persons before the law and was protected from discrimination against citizens, inter alia, on the grounds of religion in the administration of the law, in particular the Customs Act 1967 and the Printing Presses and Publications Act 1984 ("the Acts").

The High Court which heard the application at first instance granted prayers (a) and (b). Thus, the respondent filed an appeal against the findings of the High Court and the applicant filed a cross-appeal. The former was dismissed by the Court of Appeal, whereas the latter was allowed. Accordingly, the judicial review matter was remitted back to the present High Court to hear prayers (c) and (d). However, the applicant amended prayer (d) and instead sought a declaration that the Directive was unlawful and unconstitutional ("prayer (d)(B)"). Hence, the present High Court was tasked to deal with constitutional issues, and the respondent argued that the Directive was a Cabinet decision relating to the government's policy at that time. In fact, the Directive was issued to preserve public order, and to avoid any confusion among Muslim and Christian communities as well as to avoid religious sensitivity among Malaysians. The Acts actually confer powers on the minister to exercise his/her discretion when the matter concerned publication vis-à-vis public order. The argument that there was a violation of religious freedom cannot be sustained as this right is still subject to Article 11(5) of the FC, which allows laws to be enacted to preserve public order.

Justice Nor Bee Ariffin allowed the declarations sought in prayers (c), (d) and (d)(B), and held that the Directive cannot stand. Her Ladyship made references to the Prime Minister's letter dated May 19, 1986 ("PM's letter") and the Deputy Prime Minister's notes ("DPM's notes") issued at that particular time. The DPM's notes were expressly clear on the matter concerning "*Istilah/Perkataan Islam di dalam 'AlKitab' yang tidak boleh digunakan*". Thus, when the DPM's notes were endorsed with the word "*keputusan*", that would mean the DPM's notes were the Cabinet's policy decision and they spelt out words that were permissible to be used in the Christian religion. Putting it in another way, the 1986 Directive must reflect the Cabinet's policy decision. This was however not the case as there were inconsistencies between the Cabinet's policy decision and the Directive. It appeared that the Directive imposed a total ban on several words which the DPM's notes did not provide for. As such, the minister was prohibited from alleging that the Directive was made in accordance with the Cabinet's policy decision; rather, it was a stand-alone directive issued by the Publication and Quranic Texts Control Division of the Ministry. Her Ladyship also viewed the Directive itself actually did not specify the Act pursuant to which it was made. Having said that, her Ladyship went on and drew inferences that the respondent may have treated the Directive as a subsidiary legislation of the Printing Presses and Publications Act 1984 ("Act 301") having the force of law, and thereby relied on it as a basis of confiscating the CDs. However, upon perusing section 26 of Act 301, i.e. the rule-making provision, it only allows the minister to make rules on procedural-related matters. This means that the minister was prohibited from issuing the Directive as well as imposing prohibition on the use of certain words in Christian publications as occurred in the present case. Accordingly, even if this Directive was made pursuant to Act 301, the Directive was invalid as it went beyond the ambit of section 26 of Act 301. The end result was this Directive was a nullity, having no legal effect as it was not backed by any statute. In other words, the prohibition imposed by the Directive which was used against the applicant was illegal and could not be sustained. With regard to the argument that the Directive was issued to preserve public order, her Ladyship found this argument was neither supported with cogent reasons nor reinforced with any reliable evidence. In fact, the minister failed to explain as to how, where and when such confusion and misunderstanding had perversed the peace and tranquility in our society. Her Ladyship then went on and held that the conduct of the respondents prohibiting the importation of the CDs pursuant to the Directive had contravened Article 11 of the FC.

> [72] This was confirmed by the Minister in his affidavit in encl. 15. Marked as exh. SHA1 was a letter dated 19 May 1986 from the Prime Minister (PM) to the Secretary General, the Ministry of Home Affairs, which showed that the Cabinet had discussed and the Deputy Prime Minister (DPM) was assigned to determine on the words permitted to be used and prohibited from use in the Christian religion, with the note from the DPM dated 16 May 1986 appended thereto (DPM's note). The DPM's note also appeared as exh. "SHM4" in encl. 6).
>
> ...
>
> [74] It is apparent that the PM's letter endorsed the '*Keputusan*' contained in the DPM' note. Thus, it is reasonable to infer that the "*Keputusan*" in the DPM's note became the Cabinet's policy decision

on the words that can and cannot be used by the Christian religion (the Cabinet's policy decision).

...

[79] In the circumstances, the impugned Directive then must mirror the Cabinet's policy decision. The question is whether it did? Upon painstakingly perusing through all evidence adduced in this proceedings, I entertained serious doubt whether the Cabinet's policy decision was incorporated in the impugned Directive as there appears to be marked discrepancies between the Cabinet's policy decision and the impugned Directive. My reasons are as follows.

...

[82] The DPM's note relates to the subject "*Istilah / Perkataan Islam Di Dalam "AlKitab" Yang Tidak Boleh Digunakan*". The *AlKitab* is an Indonesian translation of the Bible where the word "*Allah*" appears therein. The DPM's note was couched in unambiguous terms. The plain and clear language in DPM's note in my view simply means that the 12 words can be used unconditionally while the four words cannot be used but the four words can be used subject to the condition stated immediately below the four words. It is crucial to bear in mind that the words "*Dengan syarat di luar kulit (muka depan) buku-buku itu ditulis perkataan "UNTUK AGAMA KRISTIAN*" appeared only in para. 2 and not para. 1 of the DPM's note.

[83] However, there is a marked departure in the impugned Directive from the Cabinet's policy decision as contained in the DPM's note.

[84] Firstly, with regard to the 12 words. There is now attached in para. 2 of the impugned Directive these words "*Sekiranya penerbitan tersebut berbentuk buku atau risalah yang hendak disebarkan atau dijual perkataan "UNTUK AGAMA KRISTIAN*", *disyaratkan ditulis di kulit luar (muka depan) buku atau risalah tersebut.*" These words do not appear in para. 1 of the DPM's note.

...

[105] The inconsistency issue aside, indisputably, the Minister referred to the impugned Directive as the law. Learned SFC maintained the stance that there was nothing illegal about the impugned Directive and unless and until it is withdrawn, it continues to be in force and commands compliance. Thus, the inference to be drawn is that the respondents have treated the impugned Directive issued by the Ministry as a subsidiary legislation having the force of law and was legitimately used as the basis to exercise the power under s. 9(1) of Act 301 to confiscate the eight CDs.

...

[110] Thus, the impugned Directive can be regarded as a subsidiary legislation (formatting aside) provided that it is made under Act 301 and it has legislative effect. Learned author M.P Jain explained the effect of the definition of "subsidiary legislation" in these words at p. 57:

> This means that an order, notification, etc. can be regarded as subsidiary legislation only if it has a 'legislative effect.' Some of the terms mentioned here are also used indiscriminately for 'administrative' acts as well. The definition in the Interpretation Act emphasises two aspects of subsidiary legislation: (i) it is made under an Act of the Legislature (or Ordinance): and (ii) it has legislative effect. It means that every order, notification etc. is not subsidiary legislation: it is so only if it has 'legislative' effect; if it is not 'legislative' in nature, it is not subsidiary legislation; it may then be regarded as 'administrative' in nature ...

...

[116] The impugned Directive did not state the provision of Act 301 pursuant to which it is was made. If the respondent claimed that the impugned Directive is law, the provision of Act 301 would have been spelt out. When it did not, then it is incumbent on this court to find out whether Act 301 empowers the Minister to issue the impugned Directive.

...

[119] From its long title and the other provisions of Act 301 read and taken as a whole, it is plain and clear that Act 301 is not a general law on public

order but a specific law directed at regulating the licensing of printing presses, issuance of permits to publish newspapers and the control of undesirable publications which are enforced by penal sanctions.

...

[122] Looking at the two provisions above, the Minister is empowered to impose prohibition on and refuse importation of any publication if the Minister is satisfied that the elements prescribed in the said provisions are present in the said publication. Even if one is to assume that Act 301 is a general law on public order as maintained by learned SFC (to which I disagree), there is nowhere in the said provisions and in any other provisions and the rule making provision in s. 26 which I shall advert to later, that provide the Minister with the power to issue a subsidiary legislation which imposed prohibition on the use of the four words in all Christian publications – "*Perkataan yang tidak boleh dipakai atau digunakan dalam penerbitan Kristian di negara ini ...*" The publishers were reminded "*... supaya mematuhi arahan Kerajaan dalam semua bentuk penerbitan agama Kristian yang diterbitkan*".

[123] The Minister's rule-making power in s. 26 deals substantively with procedural related matters. It is apparent that the Minister is not given the power under s. 26 to make rules pertaining to the impugned Directive.

[124] I am mindful of the Printing Presses and Publications (Licences and Permits) Rules 1984 made pursuant to s. 26(2)(d) of Act 301, published as P.U. (A) 305/1984. I do not see any relevance of this subsidiary legislation, which came under consideration in Titular Roman Catholic Archbishop of Kuala Lumpur in the High Court and the Court of Appeal, to the issuance of the impugned Directive. The impugned Directive made no reference whatsoever to P.U. (A) 305/1984 and matters pertaining to conditions attached to licences and permits of the publishers were never an issue. In any event, as the respondents have treated the impugned Directive as law, there is no subsidiary legislation made under s. 26 in respect of the impugned Directive in the same manner P.U. (A) 305/1984 was made.

[125] The issuance of the impugned Directive is undoubtedly outside the ambit of s. 26.

[126] There is a clear lack of statutory power to make and issue the impugned Directive under Act 301.

[127] Therefore, the impugned Directive cannot be a subsidiary legislation that has legislative effect made in the purported exercise of the powers under Act 301.

[128] The Minister must understand the law that regulates his decision-making power and he must give effect to it. If the Minister does not follow the law that regulates the exercise of his powers, then he had acted illegally because his action had gone beyond the limits of the power prescribed by the law. In this present case, the Minister has not acted according to the law by wrongly giving himself the jurisdiction to act by misconstruing the provisions of Act 301. Consequently, there is occasioned what is described as a substantive ultra vires. MP Jain explained at p. 347:

> In substantive *ultra vires*, the main concern of the courts is to see that the authority exercises its discretionary power according to, and within the limits set by, the statute. The first principle of the rule of law is that the authority exercising discretionary power has to act according to law; it should confine itself within the ambit and scope of, and not exceed, the powers conferred on it by law; and if the authority steps out of the limits set by the controlling statute, then its act is invalid. The court review is based on the hypothesis that in conferring discretion, the legislature could not have intended that the concerned authority should be the sole judge of the extent of its powers. If it were so, the authority will come to enjoy a completely uncanalised power which would be the negation of the rule of law. The courts are thus obligated to ensure that no authority exceeds its powers or go contrary to law.

...

[130] In the premises, I hold that the applicant is entitled to the declaration sought that the impugned Directive is invalid. In this case, an

error in law had occurred when the respondents had treated the impugned Directive as being validly made under Act 301 when it was not justified or authorised by any provision of the said Act, and in allowing its enforcement under s. 9(1) of the same Act.

...

[132] The impugned Directive stands without any statutory backing and certainly cannot prevail over P.U. (A) 134/1982. In the case of *C.L. Verna v. State of Madhya Pradesh*, AIR 1990 SC 463, a Government notification was struck down as *ultra vires* a statutory rule. The Supreme Court held that an administrative instruction can supplement a statute but it cannot compete with a statutory rule and if there be contrary provisions in the rule, the administrative instructions must give way and the rule shall prevail.

[133] Thus, the end result is that the impugned Directive is illegal, unlawful and is a nullity for want of jurisdiction.

...

[135] Applying the principle enunciated in the case above, the impugned Directive is devoid of any legal effect whatsoever from its inception. It follows that the prohibition on the use of the four words imposed by the impugned Directive cannot be legally sustained.

...

[137] The statement above is self-explanatory on the legal impact of the impugned Directive found to be void and a nullity.

[138] The decision in making and issuing the impugned Directive is also irrational and perverse when there was a total disregard to the fact that the impugned Directive would be in direct conflict with P.U. (A) 134/1982. A matter which the Minister ought to have taken into account and which he did not.

...

[160] It is obvious that from the evidence filed in the affidavits of the respondents, there is no adequate, reliable and authoritative evidentiary basis for the impugned Directive. It is to be noted that although the Minister indicated that the basis for the making of the impugned Directive was on the ground of public order, he did not provide any supporting reasons. There was no affidavit evidence of any disruption or any potential to disrupt the public order before and at the material time when the impugned Directive was made or even when the Cabinet made its policy decision. The respondents did not cite any particular case of public disorder.

...

[166] If the ground of public order failed, the only other ground that the Minister relied on in the making and issuance of the impugned Directive was to avoid confusion and misunderstanding that could arise if the common word "*Allah*" is used by both the Muslim and Christian communities. This, he claimed may affect peace and harmony. It was so asserted but the Minister did not say how, where and when such confusion and the misunderstanding has broken our peace and tranquility.

...

[201] In light of the judgment in *Jamaluddin bin Othman*, supra, in my view, the act of the respondents' officer to prohibit the importation of the eight CDs on the ground of the impugned Directive would be inconsistent with the provision of art. 11 of the FC and would not be valid unless the applicant's action was shown to go well beyond what can normally be regarded as professing and practising her religion.

[202] There was no dispute that the eight CDs were for her personal religious edification. There was no evidence whatsoever to indicate that her importation of the eight CDs went well beyond what can normally be regarded as professing and practising her religion. Right to profess and practise one's religion should include right to the religious materials. In *Jones v. Opelika* [1941] 316 US 584, it was held that the right to profess and practise one's religion encompasses the right to have access to religious materials.

[203] It is my judgment that the prohibition in the impugned Directive offends the provision of art. 11(1) of the Federal Constitution. Thus, the applicant is entitled to the declaration sought in the amended para. (c).

[204] It is also my finding that the applicant is entitled to the declaration sought in para. (d). The discrimination by the first respondent was apparent from the outset. The Cabinet's policy decision that had allowed the use of the four words subject to the specific conditions, was converted into an absolute prohibition for reasons best known to the Minister. Learned SFC's submission that the intention of the impugned Directive was to avoid conflict between the Christian and Muslim community and the confusion among the Muslims, taking into account the Muslim population in West Malaysia, and not meant to target the applicant because Christians in Sabah and Sarawak are not restricted to use the word "*Allah*", is of no consequence. The confiscation of her eight CDs would not have taken place if that was the intention of the impugned Directive.

per Justice Nor Bee Ariffin,
Judge of the High Court

Old Klang Court

CASES OF INTEREST: CRIMINAL

FEDERAL COURT

Criminal appeals from Magistrates' Courts subsequently appealed to the Court of Appeal shall be confined to only questions of law. Section 50(2) of the Courts of Judicature Act 1964 ("CJA") provides that prior leave is required from the Court of Appeal, and that the appeal is only confined to questions of law. The word "notwithstanding" in section 50(3) of the CJA only means the Public Prosecutor ("PP") is not required to obtain prior leave from the Court of Appeal. It however does not mean that the appeal by the PP can go beyond questions of law.

Public Prosecutor v Rahmat Ghazali and Another Appeal [2021] 2 CLJ 207, CA

The present appeal deals with the interpretation of section 50(2) and 50(3) of the CJA. These two provisions are as follows:

> 50. (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
>
> (3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorized by the Public Prosecutor; and notwithstanding subsection (2) no leave of the Court of Appeal is required.

Briefly, there were two unrelated appeals originating from the Magistrates' Courts which were being dealt with by the Court of Appeal. One of it concerned the accused who was acquitted for the alleged offence under section 41(1) of the Road Transport Act 1987. The appeal by the PP was dismissed by the High Court, and thus, a further appeal was lodged. However, the accused filed a notice of motion to strike out the appeal. The accused relied on section 50(2) of the CJA and argued that the petition of appeal filed by the prosecution team contravened this provision as it only disclosed issues of facts or issues of mixed facts and law. Conversely, section 50(2) of the CJA only allows appeals on issues of law. Thus, the issue before the Court of Appeal, among others, was whether appeals by the PP shall be only confined to questions of law.

The Court of Appeal delivered a split decision by a majority of 2:1. The majority explained that appeals by the PP which originated from the Magistrates' Courts shall be confined purely to questions of law. The plain reading of section 50(2) of the CJA, states two rules. First, prior leave must be obtained regardless of whether the appeal was filed by the PP or by the accused; and second, the appeal must only be confined to questions of law. The word "notwithstanding" in section 50(3) however merely refers to the matter concerning the requirement of leave. It simply means no leave is required if the appeal is lodged by the PP. It does not state that subsection (2) does not apply to the PP.

> [9] In answering this question, I should think that it is important to read holistically all the sub-sections of s. 50. Section 50 gives jurisdiction to the Court of Appeal to hear appeals from criminal matters decided in the High Court and it includes appeals from Sessions Court and Magistrate's Court. However, s. 50(2) provides a limitation to the manner that appeals that emanate from Magistrate's Court are brought to the Court of Appeal. It must be noted that s. 50(2) provides generally and without qualification that "an appeal shall lie to the Court of Appeal, with leave of the Court of Appeal". It also enacts that "such appeal" shall only be confined to questions of law. Therefore, on a plain reading of s. 50(2), two prerequisites apply to all appellants regardless of their status as the Public Prosecutor or as the aggrieved accused person. The first prerequisite is that prior leave must be obtained from the Court of Appeal and the second prerequisite is that the appeal must be confined to questions of law. However, s. 50(3) states that "notwithstanding" s.

50(2), no leave is required in the case of an appeal by the Public Prosecutor. Section 50(3) uses the word "notwithstanding" when referring to the prerequisite of obtaining prior leave. It does not say that s. 50(2) has no application at all to the appeal of the Public Prosecutor. If words to that effect appear in s. 50(3), it is possible to argue that the Public Prosecutor is not only exempted from obtaining leave but is also exempted from limiting his appeal to questions of law. Therefore, on this point, I would respectfully agree with the reasoning of Mohd Hishamudin JCA but without the need to consider the equality provision of art. 8 of the Federal Constitution. For the same reason, with the greatest of respect, I would disagree with the reasoning of Lamin Mohd Yunus PCA who opined that the Public Prosecutor's appeal is not confined to questions of law as he is the custodian of public interest. To my mind, such an argument is tenable only if the clear provision of the law exempted the Public Prosecutor from the restriction that had been placed generally on all appellants by s. 50(2). Otherwise, one can also argue that the Public Prosecutor, by virtue of being the custodian of public interest, is exempted from other written provisions of the law as well which are of general application. In fact, as noted earlier, Parliament in enacting s. 50(3) specifically exempted the Public Prosecutor from applying for leave but did not go further than that and exempt him from confining his appeal to questions of law only. In the premises, I am of the view that appeals of the Public Prosecutor from decisions of the Magistrate's Court in criminal matters that come before this court are confined to issues of law only. As I said earlier, my learned brother Dato' Nordin bin Hassan JCA has a different opinion on this issue alone.

per Justice Ravinthran Paramaguru,
Judge of the Court of Appeal

Parit Court

However, Nordin Hassan JCA held otherwise. His Lordship was of the view that these two provisions did not stipulate the appeal by the PP must only be confined to questions of law. The word "notwithstanding" in section 50(3) of the CJA has a clear literal meaning, i.e. "in spite of". Thus, it means that no leave is required from the Court of Appeal for the PP to appeal against the decision of the High Court in cases originating from the Magistrates' Courts. The phrase "such appeal" is very important when reading section 50(3) and 50(2) of the CJA. His Lordship explained:

> [20] Further, sub-s. 50(3) must be read together with sub-s. 50(2) and one of the keywords in sub-s. 50(2), is the words "such appeal" which are the following:
>
> ***An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal,*** *against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court* ***but such appeal shall be confined to only question of law*** *which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of appeal or revision.*
>
> *(emphasis added)*

> [21] In my view, the words "such appeal" in s. 50(2) refers to said appeal with the leave of the Court of Appeal which does not apply to the Public Prosecutor as the Public Prosecutor is exempted from obtaining leave pursuant to sub-s. 50(3). Hence, the appeal that confined only to the questions of law envisaged by sub-s. 50(2), is the appeal that requires leave which only applicable to an accused person who intends to appeal against the decision of the High Court in respect of criminal matter decided by the Magistrate's Court.

per Justice Nordin Hassan,
Judge of the Court of Appeal

The PP who is the guardian of public interest should not have his power limited or confined to questions of law only during an appeal. The purposive approach must be applied when interpreting the CJA to ensure the element of public interest is protected. Thus, the PP should be allowed to appeal on the questions of law, questions of fact, as well as a mixture of both questions of law and fact.

When the accused's conviction is secured due to the flagrant incompetence of his counsel, it would mean that there is a breach of the accused's right to a fair trial. The incompetence of counsel deprived the accused of a chance of acquittal.

Yahya Hussein Mohsen Abdulrab v Public Prosecutor [2021] 9 CLJ 414, FC

The present appeal by the accused concerns the issue of whether the incompetence of counsel at a criminal trial is sufficient to render the conviction unsafe. In this case, the accused, a Yemeni national, was arrested at the Tawau Airport for carrying a piece of luggage ("P2") containing 1,800.82g of methamphetamine. At the High Court, the accused was convicted and sentenced to death for the offence of drug trafficking under section 39B(1)(a) of the Dangerous Drugs Act 1952. The accused argued that he has no knowledge that P2 actually contained drugs. He claimed that P2 was packed by his wife's brother-in-law, i.e. Mickey and that he (the accused) was asked to assist in delivering P2 to Mickey's friend. Nonetheless, this defence was never put to any of the prosecution's witnesses during the trial. As such, the Judicial Commissioner ("JC") found this to be an afterthought defence and one of bare denial by the accused. It is rather illogical for Mickey, who has no special relationship with the accused, to pack P2 when it would be more reasonable for P2 to be packed by the accused's wife. Accordingly, the accused appealed.

At the Court of Appeal, the accused was represented by another counsel as the counsel who represented the accused at the trial passed away ("trial counsel"). The accused argued that the conviction against his drug trafficking offence should be quashed because his trial counsel was flagrantly incompetent. His trial counsel did not advocate his defence during the criminal proceeding, and instead chose to mount a sole challenge on the discrepancies in the weight of the drugs. In light of this, the accused applied to allow the introduction of new evidence, and this application was granted. The accused advanced his defence as follows:

(i) He gave a detailed narration on the events which led to his arrest to his trial counsel;
(ii) He briefed his trial counsel that he was under the impression the P2 was a present to be delivered to another on Mickey's behalf. He denied having the knowledge that P2 contained a dangerous drug;
(iii) This story was conveyed at the earliest opportunity to the authorities upon his arrest. His cautioned statement contained such information; and
(iv) His trial counsel promised to revert to the accused upon exhausting the accused's narration, but he never did. Their only encounter was a brief one in court before trial.

DW3, who was formerly an Economics and Consular Affairs Officer to the Yemeni Embassy in Malaysia, was called to testify. DW3 was tasked to oversee the case of the accused, and testified that the accused had informed him of his trial counsel's attitude when DW3 visited him in prison. His trial counsel also acted against the accused's request to call his wife to testify during the trial. The accused intended to have his wife testify that Mickey was indeed his brother-in-law. The records on the passport show that the accused's wife did travel to Tawau but was not called to the witness stand. No justification was put forward by the trial counsel for such omission. In fact, the trial counsel omitted or failed to submit at the close of the prosecution's case, and unfortunately had passed away and could not be present at the close of the defence case. Hence, it cannot be said that the accused was given the right to a fair trial as provided for under the Federal Constitution ("FC"). The Court of Appeal allowed the appeal and ordered a retrial. The accused was not acquitted and discharged, and as such, he further appealed to the Federal Court.

The Federal Court, with a coram of three judges, unanimously allowed the appeal. The accused was acquitted and discharged. The Federal Court agreed with the findings of the Court of Appeal that the

flagrant incompetence of the trial counsel was not a mere "technicality" but was a serious miscarriage of justice as it did not satisfy the minimum standard of fairness as envisaged in Article 5(1) of the FC. In fact, the accused was deprived of a fair opportunity of acquittal. The outcome of the trial was due to the failure of trial counsel to effectively cross-examine the prosecution's witnesses. The actual narratives of the accused which stood a good chance of exculpating his criminal liability were regrettably not put forward by his trial counsel during the trial. As a result, the JC was given the impression that the defence was an afterthought. The true events only came to light after the introduction of new evidence at the Court of Appeal. These new evidence seemed to raise a reasonable doubt on the accused's knowledge of the drugs in P2. When the element of knowledge is not proved, it follows that the second element of "possession" as well as the third element of "trafficking" cannot be sustained. Thus, the conviction is unsafe, and the accused shall be acquitted and discharged.

[48] On an objective assessment of the additional evidence, we found that the Court of Appeal was correct to hold that the appellant's counsel was flagrantly incompetent occasioning in a miscarriage of justice to the appellant based on the following.

[49] Firstly, the appellant would only be addressing the court as to his defence during the defence's case. During the defence's case, the appellant revealed for the first time the fact of Mickey and the entire transaction involving him. The JC found that the appellant's narrative was an afterthought invented to support his testimony during the defence's case as this was never put in cross-examination during the prosecution's case. At the prosecution's case, it was the duty of his counsel to effectively cross-examine the prosecution's witnesses, which his counsel failed to do. The overall impression created in the mind of the JC arose as a result of counsel's failure to cross-examine the prosecution's witnesses as he should and to lead evidence of the defence on this fact.

[50] Secondly, and following from the first, the appellant's counsel refused generally to consider the appellant's narrative and instead chose to mount another defence for him, namely, the discrepancy in the weight of the drugs. The learned JC correctly found that the discrepancy in itself is not a sufficient ground to cast reasonable doubt on the prosecution's case. The appellant's counsel avoided advancing the appellant's actual narrative which would have stood a better chance of exonerating him.

[51] Thirdly, and further on the point of exonerating evidence, the appellant was the only witness who was called. In the appellant's evidence, he denied having knowledge of the dangerous drugs and to support that assertion, he further posited the defence that Mickey packed his bag for him. The JC disbelieved this for the questionable reason that the appellant's wife should have logically packed the bag for him. The learned JC would have perhaps arrived at a different conclusion if there was evidence before him on the fact that Mickey was not just some random stranger but was known to the appellant because Mickey was the appellant's wife, DW2's brother-in-law. To this effect, DW2 made her way to the court in Tawau to testify but the appellant's counsel refused to put her on the stand.

[52] Fourthly, taking DW1's additional evidence at face value as supplemented by DW3, the trial counsel barely met with the appellant (only once in prison and once more briefly in court). The appellant's counsel made no submissions at the close of the prosecution's case and unfortunately, had passed away such that he could not be present for the decision at the end of defence's case.

per Justice Tengku Maimun,
Chief Justice

Tangkak Magistrates' Court

The Attorney General/Public Prosecutor ("AG/PP") does not have absolute or unfettered discretion under Article 145(3) of the Federal Constitution ("FC") to institute, conduct or discontinue any proceeding for a criminal offence. In appropriate, rare and exceptional cases, such discretion is amenable to judicial review.

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC

The present appeal largely concerns whether the AG/PP has unfettered discretion to institute criminal proceedings despite the statutorily-conferred legal privilege and immunity.

The appellant was the Director of the Asian International Arbitration Centre ("the Centre"). The Centre was formerly known as the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"), and was established under the auspices of Asian-African Legal Consultative Organisation ("AALCO"). It was believed that AALCO and the Government of Malaysia entered into an agreement known as "the Host Country Agreement" which then led to the establishment of the Centre. Pursuant to the Agreement, the Government of Malaysia will allocate grants to the Centre from time to time. In addition, various forms of privileges and immunities will be afforded so as to ensure the Centre and its staff are able to function as an independent arbitral institution. In light of this arrangement, regulations were made pursuant to the International Organizations (Privileges and Immunities) Act 1992 ("Act 485"). Subsequently, those regulations were amended by the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) (Amendment) Regulations 2011. As a result of Act 485 and the regulations, the appellant shall be immune from suit or "other legal process" for the acts done in the capacity as Director.

During the appellant's tenure as the Director of the Centre, he had authored a book entitled Law, Practice and Procedure of Arbitration. The Centre then purchased several copies of the book for distribution and promotional activities. AALCO was aware of this and supported it. In addition, the appellant donated all the royalties from the sale of his book to the Centre. Subsequently, the Malaysian Anti-Corruption Commission (MACC) (the third respondent) investigated this matter and decided to charge the appellant for the offence of criminal breach of trust. However, the consent from the AG/PP (the second respondent) to prosecute the appellant was required. In light of this, the Secretary General of AALCO notified the AG/PP that the appellant cannot be prosecuted due to the immunity provided by the law. The Secretary General informed that there can be no ad-hoc waiver of the appellant's immunity just to allow the AG/PP to prosecute him. This is because the waiver will similarly remove the immunity of AALCO and the Centre. This means that all the information and archival materials of the Centre which are supposed to be inviolable pursuant to the Host Country Agreement may become non-confidential. All these may be required to be produced during the appellant's trial. In spite of this, the AG/PP proceeded and signified his assent to the MACC to prosecute the appellant.

The appellant filed an application for judicial review at the High Court seeking declarations recognising his immunity from prosecution. The appellant intended to stop the prosecution by the AG/PP as well as the MACC for the criminal breach of trust charges. The High Court allowed the application and stated that the phrase "and from other legal process" includes immunity from criminal proceedings. In addition, the power of AG/PP is indeed amenable to judicial review. However, the Court of Appeal reversed the findings of the High Court. The appellate court opined that the immunity afforded to the appellant under Act 485 is not absolute. Moreover, the power of the AG/PP to prosecute is an unfettered discretion and cannot be subjected to judicial review. Dissatisfied with the decision of the Court of Appeal, the appellant further appealed to the Federal Court.

The Federal Court, with a coram of seven judges, unanimously allowed the appeal. The verdict of the High Court, particularly on the declaration that the appellant has immunity as the former Director of the Centre for acts done within his official capacity, was reinstated. The Federal Court opined that the phrase "and from other legal process" as envisaged under Act 485 and the Host Country Agreement can only be construed to include criminal proceedings. Such interpretation is essential to ensure Malaysia does not violate its international law obligations on immunities and privileges. The granting of immunities and

privileges are expressly spelt out by the Host Country Agreement and Act 485, and it is meant to protect the integrity and independence of the Centre. This purpose of this piece of legislation does not change regardless of whether it is a criminal or civil proceeding.

With regard to the question of whether the power of the AG/PP is amenable to judicial review, the Federal Court answered this matter in the affirmative. It was held that the AG/PP had acted in contravention of the law in exercising his powers under Article 145(3) of the FC. Act 485 clearly spelt out the immunity provided to the appellant, and it means no criminal or civil proceedings ought to be brought against the appellant for acts done in his official capacity. Thus, the AG/PP knew or ought to have known that the appellant was protected with immunity under Act 485. As a result, the act of prosecuting the appellant in spite of the statutorily-conferred immunity renders the charges null and void. The Federal Court then went on and explained that the AG/PP does not have unfettered discretion under Article 145(3) of the FC. The power to institute, conduct or discontinue any proceeding for a criminal offence is not absolute, and in rare, appropriate and exceptional cases, it is amenable to judicial review.

> [113] In all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP's decision within the recognized reasons for judicial review.
>
> [114] Based on the foregoing authorities, it can be surmised that any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage of any application for judicial review.
>
> [115] Firstly, the burden of proof lies on the applicant. The applicant will have to show that he has a legal basis to challenge the decision of the AG/PP. This refers to the traditional grounds of judicial review and other bases implicitly recognized by the earlier judgments on this subject, including but not limited to:
>
> (a) illegality;
> (b) procedural impropriety (eg breach of the rules of natural justice);
> (c) irrationality (considering irrelevant considerations or ignoring relevant and material considerations); and
> (d) mala fides.
>
> [116] Once the above legal grounds or any of them are clearly set out, the applicant will then have to adduce compelling and prima facie proof that the decision or omission of the AG/PP falls within those grounds or any one of them. In other words, the courts are to presume, having regard to the doctrine of separation of powers, that all or any of the grounds were not made out unless the evidence singularly leads to the inevitable conclusion that they have been made. It is only after that threshold is crossed that the AG/PP bears the burden to justify his actions or inactions to the court.
>
> …
>
> [122] The evidence on record led to no other conclusion but that the second respondent knew or ought to have known that the appellant was covered by the scope of his functional immunity. Despite this, the second respondent had obviously made up his mind to charge the appellant. One clear and direct indication of this is the second respondent's issuance of his consent to prosecute the appellant to the third respondent in spite of the letter from the Secretary General of AALCO of even date indicating that the first and second respondents had already requested independently for an ad hoc waiver of immunity which requests were vigorously denied.
>
> [124] Hence, we found that the appellant had satisfied the two-step test. He identified illegality, the correct ground for review, and adduced compelling prima facie evidence to sustain that allegation. The second respondent was unable to rebut those allegations and the presumption of legality over the second respondent's exercise of discretion under art 145(3) was successfully overcome. In those narrow circumstances, we allowed the appeal.
>
> *per Justice Tengku Maimun,*
> *Chief Justice*

Prosecutors have a duty to make available to the defence the witnesses who were not called during the prosecution's case. This is because prosecutors have a duty to present their cases in a fair and impartial manner by producing all relevant facts to assist the court in ascertaining the truth.

Rosli Yusof v Public Prosecutor [2021] 7 CLJ 681, FC

In this appeal, the appellant was convicted for the offence of drug trafficking under section 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). The question posed to the Federal Court was whether the prosecution has the duty to make available to the defence any witness whose evidence may assist the accused in his defence.

The appellant was arrested by the police while he was in a Toyota Avanza vehicle ("Toyota"). The Toyota was said to be filled with rice gunny sacks containing packed cannabis weighing 112,892g ("drugs"). Subsequent to the appellant's arrest, four other individuals were arrested by the police ("arrestees"), including one Kamarul and a Thai national. These arrestees were neither called by the prosecution during trial nor were they offered to the appellant. The High Court judge found a prima facie case had been established and ordered the appellant to enter his defence. The appellant in his defence averred that he had no knowledge of the drugs found in the Toyota. It was the appellant's case that Kamarul drove a Proton Persona ("Proton") together with him to pick up the Toyota at a house, and Kamarul was the person who drove the Toyota while the appellant drove the Proton. Thereafter, both the appellant and Kamarul met the Thai national, who Kamarul had a conversation with. The appellant argued that he was not privy to the conversation, and subsequently, Kamarul left the Toyota and joined him in the Proton. After having a meal together, the appellant explained that he dropped Kamarul off at the vicinity where the Toyota was parked. Kamarul (who was driving the Toyota) and the appellant (driving the Proton) arranged to meet again at an agreed location. The appellant arrived earlier than Kamarul, and upon Kamarul's arrival at the agreed location, Kamarul appeared anxious. Without saying much to the appellant, Kamarul grabbed the Proton keys and sped off. Thereafter, the appellant was arrested by the police. The learned trial judge was of the view that his defence was insufficient to cast a reasonable doubt on the prosecution's case. The appellant was convicted and the Court of Appeal affirmed this finding. Hence, the appellant's appeal to the Federal Court.

The Federal Court unanimously allowed the appeal and the conviction under section 39B(1)(a) of the DDA was set aside. The charge against the appellant was reduced to one of possession under section 39A(2) of the DDA and he was sentenced to 18 years' imprisonment. Justice Mohd Zawawi Salleh held that the prosecution has the duty to make available to the accused any witnesses investigated by the police and from whom the statements were recorded. This means that the accused not only has the right to defend himself against the charges, but also has the right to obtain other evidence to support his defence. In this appeal, it was clear that the evidence from the arrestees were important to the appellant's case. This meant that the prosecution should have called the arrestees such as Kamarul or the Thai national to testify, or the very least, make them available to the defence. It cannot be said that the prosecution did not know what evidence will be adduced by both Kamarul or the Thai national since their statements had been recorded by the police. Investigations were carried out against both Kamarul and the Thai national, and it was clear that Kamarul was the person who had full control of the Toyota in which the drugs were found and he was the person who engaged in a conversation with the Thai national. Furthermore, it was confirmed by the investigating officer that the drugs originated from Thailand. Presently, the prosecution did not charge any of the arrestees, did not call any of them as witnesess, and did not offer any explanation for not calling them to testify as witnesses at the trial. As such, the prosecution should have made the arrestees available to the appellant where their evidence would probably assist the appellant.

> [38] In our view, it is settled law based on the authorities cited to us by learned counsel for the appellant in his submission that the prosecution has discretion whether to call any particular witness, but such discretion is subject to two limitations, viz (i) the discretion must be exercised with due regard to considerations of fairness and good faith; and (ii) the witnesses who had been investigated by the police and from whom the

statements have been recorded must be offered to the defence.

[39] On the factual matrix of the present appeal, the importance of these witnesses to the defence is clearly demonstrated from the evidence of the appellant, who averred that the said Kamarul Hisham was the actual person who has full control of the car in which the impugned drugs were found. The appellant testified that it was Kamarul Hisham who engaged in a discussion with the Thai national, Yeap Tak San. The investigating officer (SP8) herself confirmed that the impugned drugs originated from Thailand as can be seen from the rice gunny sacks in which the impugned drugs were found…

[40] In our view, the objective of a fair trial requires the prosecutor to call the arrestees or at the very least Kamarul Hisham and the Thai national as witnesses unless there is some good reason not to do so. The prosecution did not proffer any explanation for the non-calling of these witnesses. These witnesses are persons who had been arrested contemporaneous or in proximity to the arrest of the appellant and pursuant to the same investigation.

…

[43] The investigating officer (SP8) had investigated all these witnesses and submitted the single set of investigation papers to the Deputy Public Prosecutor who then decided not to charge them. In the circumstances, the prosecution cannot be heard to say that it did not know what evidence these witnesses would give because statements had been recorded from them. Necessary arrangements should have been made by the prosecution to make them available to the defence during the proceedings in the High Court.
[44] We agree with the submission of learned counsel for the appellant that the learned trial judge and the Court of Appeal had committed serious misdirection in placing the burden on the appellant to call these witnesses to establish his defence that Kamarul Hisham was the actual trafficker and the failure to do so was a decisive factor in the assessment of the defence case.

…

[46] Before parting, we consider it apposite to emphasise that a person's right to defend himself or herself against a criminal charge includes the right to obtain and adduce other evidence in support of his or her defence. It is desirable in the interest of justice for the defence to obtain the fullest possible access to the facts relevant to the issue in the case. In this regard, the prosecution has a duty to make available to the defence witnesses who had been investigated by the police and from whom the statements have been recorded. This is, as we alluded to earlier, an important or vital corollary or element of an accused's right to a fair trial.

per Justice Mohd Zawawi Salleh,
Judge of the Federal Court

Seri Manjung Magistrates' Court

COURT OF APPEAL

In general, the court is not bound to state its reasons when delivering its ruling at the end of the prosecution's case. However, in a drug-related cases, a trial judge is required to make certain definitive findings on the elements of possession and trafficking, i.e. whether those elements were proven by the prosecution through direct evidence or by invoking the statutory presumption.

Additional findings stated in the written grounds of judgment which were not pronounced by the presiding judge in the oral ruling at the close of the prosecution's case, are not prejudicial to the accused, provided that the accused is made aware of the case he has to answer.

Dato' Sri Mohd Najib Hj Abd Razak v Public Prosecutor [2021] 1 LNS 2080, CA

The appellant was the Prime Minister ("PM") and the Minister of Finance ("FM") of Malaysia. As the FM of Malaysia, he was said to be the personification of the Minister of Finance Incorporated ("MOF Inc") which, inter alia, wholly owned all MOF Inc companies on behalf of the Government of Malaysia.

SRC is a private limited company. It was incorporated under the Companies Act 1965 on January 7, 2011. One of its two subscriber shareholders was one Nik Faisal Ariff Kamil ("Nik Faisal"), who would later become its first chief executive officer ("CEO'), the other being Vincent Beng Huat Koh. SRC was incorporated to identify and invest in projects associated with the exploration, extraction, processing and trading of conventional and renewable energy resources, natural resources and minerals.

Apart from being a subscriber shareholder of SRC, Nik Faisal was the chief investment officer of 1Malaysia Development Bhd ("1MDB"). 1MDB was originally incorporated in 2008 as Terengganu Investment Authority, but subsequently on July 31, 2009 became wholly owned by MOF Inc. It was established to drive strategic initiatives for the economic development of the country, particularly in the areas of energy and real estate.

In a letter dated August 24, 2010 addressed to the appellant in his capacity as the PM and FM, the CEO of 1MDB, Shahrol Azral Helmi proposed a RM3 billion grant to be provided to set up SRC, stating therein that it was to serve as a strategic resource vehicle to maintain strategic stakes in key resources such as coal, alumina, uranium and iron as well as oil and gas. The primary object for the establishment of SRC was to carry out and invest in projects associated with conventional and renewable energy resources, natural resources and minerals.

The appellant as the PM then wrote a minute on this 1MDB letter to Tan Sri Nor Mohamed Yakcop, who was the minister in charge of the Economic Planning Unit ("EPU") in the Prime Minister Department to study the proposal. The accused's exact words, as written, were "Untuk dikaji dan dibuat ulasan". Tan Sri Nor Mohamed Yakcop in turn instructed the Director General ("DG") of the EPU to evaluate the request by 1MDB.

The DG of the EPU in a memo dated October 12, 2010 addressed to the appellant through the Minister in the Prime Minister's Department stated that whilst the setting up of SRC was supported, its proposed focus ought to be confined only to coal and uranium. The EPU's stance was that the strategic energy resources in respect of the extraction and importation of oil and gas ought to be continued to be pursued by Petronas, whilst the iron and alumina sectors, which were deemed less strategic to the requirements of the country, should be driven by the private sector as was the position at that time. The EPU suggested that that funding for SRC should be sourced from financial institutions and concluded that an award of a grant of RM3 billion would be declined but a launching grant of RM20m be given to set up SRC. The position and recommendation of the EPU were agreed and accepted by both the appellant and the Minister in the Prime Minister's Department.

In a letter dated June 3, 2011, signed by Nik Faisal, by then a director of SRC, which was addressed to the appellant in his capacity as PM and FM, it was suggested by Nik Faisal that to further pursue the strategic plans of SRC, its funding should be in the form of a loan of RM3.95 billion to be obtained from *Kumpulan Wang Persaraan* (*Diperbadankan*) ("KWAP").

The appellant on June 5, 2011 wrote a minute on the said letter, to Datuk Azian Mohd Noh, the CEO of KWAP, that the former agreed with the proposal by SRC. The appellant wrote in the Malay language — "*YBhg Datuk Azian, setuju dengan cadangan ini*".

That particular SRC letter addressed to the appellant, and subsequently minuted by the appellant to the CEO of KWAP, was then hand delivered by Datuk Azlin Alias (since deceased), who was the principal private secretary of the PM to the CEO of KWAP. The CEO of KWAP was contacted by Datuk Azlin to meet at a hotel in KL Sentral after office hours in order to personally hand over the said letter to her.

This then led KWAP to start processing the application in the said SRC letter. The task to prepare the paper work was assigned to its Fixed Income Department. The paper work was later approved by the management team of KWAP for the purpose of tabling it to the investment panel. The investment panel is the only party having the authority under the Retirement Fund Act 2007, to approve loans taken from KWAP. Eventually, the investment panel approved a financing of RM2 billion in 2011, and an additional RM2 billion in 2012.

These approvals were principally granted on the strength of the two government guarantees that the Cabinet approved to guarantee the repayment of the aggregate principal loan amount of RM4 billion by SRC to KWAP. The applications by SRC for the guarantees were made to and processed by the Ministry of Finance. The appellant's participation at the two relevant meetings of the Cabinet to approve the government guarantees of RM2 billion was the basis of the charge of the use of position for gratification against the accused under s 23 of the Malaysian Anti-Corruption Commission ("MACC") Act 2009.

On December 24, 2014 Am-Islamic Bank, via an email, received a written instruction signed by Nik Faisal and Dato' Suboh Yassin, who were directors and signatories of SRC to transfer an amount of RM40m from SRC's current account No. 2112022010650 to the current account of Gandingan Mentari Sdn Bhd ("GMSB") No. 888100380694 which was maintained at the same bank.

On the same date, GMSB issued a transfer instruction to Am-Islamic Bank signed by the same two signatories as in SRC (as the two were also directors and signatories of GMSB) to effect the transfer of the same amount of RM40m into the current account No. 106810001108 at Affin Bank under the name of Ihsan Perdana Sdn Bhd ("IPSB").

Two days later, on December 26, 2014, of the RM40m received from GMSB, a sum of RM27m was transferred out of IPSB's account and credited into a personal Am-Islamic Bank current account No. 2112022011880 ("account 880") which was also known and coded as the "AmPrivate-1MY" account in AmBank.

Also on December 26, 2014, IPSB made another transfer of RM5m out of its Affin Bank account, which sum was credited into another current account of the appellant, also maintained at Am-Islamic Bank bearing the account No. 2112022011906 ("account 906") and was also known and coded as the "Am-Private-MY" account. In short, at the close of business on December 26, 2014, RM32m was credited into accounts 880 and 906 belonging to the appellant.

Soon after, on December 29, 2014, from the amount received from IPSB, on the instructions of the appellant to Am-Islamic Bank dated December 24, 2014, Am-Islamic Bank transferred RM27m from account 880 to the account of Permai Binaraya Sdn Bhd ("PBSB") and also a further transfer of RM5m from account 906 to the account of Putra Perdana Construction Sdn Bhd ("PPC").

On February 5 and 6, 2015, two instruction letters signed by the same two signatories of SRC were issued to Am-Islamic Bank to effect the transfer of a sum of RM10m in two tranches of RM5m each to GMSB. The monies were then transferred by GMSB into IPSB's account. On February 10, 2015, IPSB effected a transfer of the RM10m into the appellant's account 880. On the same day, Nik Faisal issued an instruction letter to Am-Islamic Bank for the RM10m received from IPSB to be transferred from account 880 to the accused's account 906.

Nik Faisal, in addition to being the CEO and director as well as the authorised signatory of SRC had also been appointed by the appellant as the latter's "Authorised Personnel" or agent to operate the personal accounts of the appellant at AmBank on the terms and conditions which were confined to instructing transfers of funds amongst the accounts of the appellant. As the mandate holder, Nik Faisal could

not withdraw funds from or issue personal cheques of the appellant out of the said personal accounts of the accused.

At the same time, during the period of between December 2014 and February 2015, a total of 15 cheques were issued by the appellant; with one cheque from the Am-Islamic Bank account No. 2112022011898 ("account 898") or also known and coded as the '"AmPrivate-Y1MY" account. 14 other cheques were issued from the appellant's account 906.

The inward transfers of the aggregate of RM42m from SRC into accounts 880 and 906 of the appellant, which were effected on December 26, 2014 and February 10, 2015 were the crux of all the seven charges against the appellant. As the PM, the appellant was during the material period vested with the authority to appoint and dismiss directors of SRC and to approve any amendments to the company's memorandum and articles of association ("M&A"), was its advisor emeritus under the company's M&A, and as the FM was in the capacity as MOF Inc the sole shareholder of SRC.

The appellant, at the end of the trial, was convicted by the High Court on one count of abuse of position for gratification under section 23(1) of the MACC Act 2009, three counts of criminal breach of trust under section 409 of the Penal Code and three counts of money laundering under section 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. He was sentenced to 12 years' jail and a fine of RM210 million in default five years' jail for abusing his position and 10 years' jail for each of the other offences, with the custodial sentences ordered to run concurrently.

[85] The principle is very clear, there is no statutory requirement on the part of the trial judge to give reasons for his finding on prima facie case at the close of the prosecution case. The trial judge can simply say that he has found a prima facie case proved and call the accused to enter his defence. What is important is that the accused knows what he has to answer, and that would be from the charge and the evidence of the prosecution establishing the ingredients of the offence. However, there are some limited circumstances where the trial judge would be required to make certain definitive findings at the close of prosecution case, for instance in a charge of drug trafficking, the trial judge would have to make definitive findings on the element of possession and trafficking, whether prosecution's case is established by direct evidence or by invoking the statutory presumption. This is important as the accused has different burden to discharge if the statutory presumption is applied. *See Ho Yee Onn v. PP* [2020] 2 CLJ 491; [2019] MLJU 1518, CA; *Mohamad Hanafi Mohamad Hashim lwn. PP* [2016] 6 CLJ 378; [2016] 3 MLJ 723, CA.

[86] The fact of the matter is that, by the oral ruling the appellant was not prejudiced. The appellant knew very well what the case against him was, he was not prejudiced for not being able to put up his defence properly. There was concerted and focused attack on every aspect of the prosecution's case, and on each and every element of the seven offences, and the prosecution's evidence in respect of that was vigorously challenged.

per Justice Vazeer Alam Mydin Meera,
Judge of the Court of Appeal

Port Dickson Court

Based on the wordings of section 56 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the Act"), it is clear that an order for forfeiture under section 56(2) of the Act, can only be made by the High Court judge if he is satisfied that the monies in the respondents' bank account were the subject matter or evidence in relation to the commission of an offence under section 4(1) of the Act, or proceeds of an unlawful activity under section 23 of the Malaysian Anti-Corruption Commission Act 2009; and there is no purchaser in good faith for valuable consideration in respect of the monies in the appellant's and the respondents' bank account.

Badan Perhubungan Umno Negeri Pahang V Public Prosecutor& Other Appeals [2021] 1 LNS 2182, CA

There were nine appeals that arose from the prosecution's nine notices of motion for an order of forfeiture under section 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the Act"). In all nine cases, the property sought to be forfeited was monies in the respondents' bank accounts.

The monies in the respondents' bank account were frozen on June 25, 2018 and seized on September 21, 2018. It was the prosecution's allegations that:

(a) The seized monies were the subject matter or evidence relating to the commission of an offence under section 4(1) of the Act or the proceeds of an unlawful activity. The unlawful activity refers to the unlawful activity committed by Dato' Seri Mohamad Najib bin Tun Abdul Razak ("DSN") under section 4(1) of the Act and also section 23 of the Malaysian Anti-Corruption Commission Act 2009;
(b) DSN had abused his position as the Chairman of the Board of Advisors of 1 Malaysia Development Berhad ("1MDB") and as the Finance Minister had caused a huge sum of monies to be transferred from 1MDB's funds to his personal bank account for his own use. DSN then transferred out the monies to various third parties including the respondents herein;
(c) From 2011 to 2014, DSN has transferred or paid out monies from his personal account and deposited them into the respondents' bank account. The prosecution alleges these monies were proceeds of unlawful activity alleged against DSN; and
(d) The remaining monies in the respondents' bank account which were sought to be forfeited is part of the monies transferred or paid out by DSN to the respondents' bank account and thus were proceeds of the unlawful activity.

In essence, those motions arose from the investigations into the involvement of the former Prime Minister, DSN in relation to the affairs of government-owned corporate entity – 1MDB. The prosecution claimed that there were many transactions of transfer into the personal bank account of DSN of funds suspected to have been diverted from 1MDB, and the subsequent payments out of this account in favour of various parties.

> [80] In these cases, it is not in dispute that the respondents herein did not participate or abet the commission of the unlawful activity. They are mere recipients of monies given by DSN. In the circumstances, we are of the view that in a forfeiture proceedings under s 56, the owner of the account, the appellant or the respondents herein, can challenge the applications by showing among others that they are bona fide purchasers, have a legitimate legal interest in the property, did not in any way participate, collude or involve in the commission of the concerned offence or offences, lacked knowledge and did not in any way assist to avoid forfeiture of the property. To a certain extent, they can be treated as third parties and the defences provided under s 61 of the Act may be relied upon to defeat the forfeiture proceedings.
>
> *per Justice Hadhariah Syed Ismail,*
> *Judge of the Court of Appeal*

HIGH COURT

The power of the Coroner to order the disclosure of documents in an inquest proceeding is embodied in section 51 of the Criminal Procedure Code ("CPC"). Section 51A of the CPC, on the other hand, is a provision that applies only in criminal trials and is therefore not applicable in death inquiry proceedings. Accordingly, section 51A cannot be read together with or as an extension of section 51, but as a provision independent of and separate from one another.

Zaidi Mohd Zain & Anor v Public Prosecutor [2021] 6 CLJ 905, HC

This case concerns the criminal revision of a Coroner's decision. The main issue in contention was whether section 51A of the CPC is applicable in a death inquest.

At all material times, it was agreed that the applicant's son died whilst in police custody. A death inquest was held to identify the cause of his death. The applicant is thus an "interested persons" pursuant to Arahan Amalan Bil. 2 Tahun 2014 ("the Practice Direction"). The applicant applied to the Coroner under section 51A of the CPC for the disclosure of documents such as police reports, post mortem reports, etc. concerning the death of his son. The application was dismissed by the Coroner who held that section 51A of the CPC was not applicable in death inquiries as the said section is meant for pre-trial disclosure associated with criminal trials and as such, it is not applicable in inquests. The applicant then applied to the High Court for a review the Coroner's decision relying on the case of *Retnarasa Annarasa v PP* [2008] 4 CLJ 90 ("Retnarasa") which held that section 51A of the CPC read with section 51 actually allows the discovery of documents in both criminal trials and inquest proceedings.

Justice Mohd Radzi Abdul Hamid allowed the application and ordered the delivery of the relevant documents to the applicant. His Lordship explained that the Coroner was indeed correct in holding that section 51A of the CPC is not applicable in death inquiries. Section 51A was incorporated into our criminal jurisprudence with the aim of assisting the accused to prepare for his defence in a criminal trial. Thus, section 51A cannot be said to be applicable in an inquest proceeding. Furthermore, in light of the decision of Dato' Seri Anwar Ibrahim v PP [2010] 4 CLJ 265, the Federal Court held that section 51A of the CPC must be read separately and independently from section 51. This means that the decision in Retnarasa holding section 51A may be read together with section 51 of the CPC is no longer a good law. Hence, while the Coroner was correct in refusing section 51A as the basis of disclosure, the Coroner had actually failed to consider section 51 of the CPC, a provision that may be read together with the Practice Direction and thereby empowering him to order the disclosure of documents. Accordingly, in light of this section 51, an application for discovery of documents can be made at any stage of an inquiry, investigation or trial. The applicant, being an interested person, is thus allowed to apply under this provision for the documents to be disclosed.

> [15] After careful consideration of the provision of s. 51A of the CPC and the decisions of the High Court in *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; [2009] 7 MLJ 741, the Court of Appeal in *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331; [2010] 2 MLJ 353, the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312, on the purpose and interpretation of s. 51A it is clear that s. 51A only applies in a criminal trial where an accused is prosecuted for an offence. The Court of Appeal in *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* (supra) stated thus:
>
> > [41] Section 51A of the Code came into force on 6 March 2006. It provides for automatic discovery of certain documents by the accused before the commencement of the trial. Section 51A(1)(b) provides for the delivery to the accused of a copy of any document which would be tendered as part of the evidence for the prosecution. Section 51A(1)(c) requires the public prosecutor to deliver to the accused a written statement of facts favourable to the defence of the accused.
> >
> > [42] We agree with the submission of the learned Solicitor General that the wording of s. 51A is very clear in that what the prosecution is required to supply are those documents/statements of fact expressly stipulated therein.

[16] Therefore, since an inquest is not a trial that involves the prosecution of an accused, s. 51A which provides for the automatic disclosure of documents to an accused for the benefit of him in preparing his defence cannot apply to an inquest. As stated by Mah Kweng Wai JCA (sic) in *Teoh Meng Kee v. PP* [2014] 7 CLJ 1034:

> [117] An inquiry of death is not like a criminal trial. There is no complainant, no prosecutor and there is no accused person on trial. It is only an inquiry by a Magistrate as to the cause of death and the Deputy Public Prosecutor is there not to prosecute anyone but only to assist the court with the examination of witnesses for the purpose of receiving the evidence. Hence the officer "conducting" the inquiry is known as an assisting officer and not as a prosecuting officer. Counsel present is there not to defend anyone but only to look after the interest of those who have appointed him. The procedure and rules of evidence which are suitable for the accusatorial process are unsuitable for an inquiry of death which essentially is an inquisitorial process. At the close of an inquiry there is no finding of guilt, conviction or punishment of anyone. The threshold for the standard of proof in an inquiry of death must thus be lower than that for a criminal trial."

[17] Premised on the above, this court holds that s. 51A of the CPC cannot be the statutory provision that gives the Coroner the power to exercise a discretion to order the disclosure of documents in an inquest and corollary to that an application for disclosure for documents cannot be made under that provision. To that extent, the Coroner's decision that s. 51A of the CPC does not apply to an inquest is correct.

[18] Following from the above, in this court's view the decision of the High Court in Retnarasa Annarasa v. PP [2008] 4 CLJ 90; [2008] 8 MLJ 608 referred to by learned counsel for the applicants cannot longer be taken as good authority for the proposition that s. 51A of the CPC can be read together with s. 51 of the same Act to give the Coroner the power to order the disclosure of documents in an inquest. Both the Court of Appeal and Federal Court in PP v. Dato' Seri Anwar Ibrahim & Another Appeal (supra) had clearly held that s. 51A cannot be read as an extension to s. 51 of the CPC and that they must be read separately. Abdull Hamid Embong FCJ speaking for the Federal Court held:

> [31] The learned judge relied on a High Court decision in Retnarasa Annarasa v. PP [2008] 4 CLJ 90 where it was opined that s. 51 should not be read in isolation but in tandem with s. 51A CPC. It was also held in that case that with the new s. 51A in place, previous cases decided on the issue of disclosure of information and documents would no longer be applicable.

[32] The Court of Appeal hearing this instant appeal rejected this approach as disclosed in these passages:

> It is obvious from the judgment of the learned Judge in the instant case that he was in agreement with the decision of the High Court in Retnarasa case. The learned Judge disregarded the decisions of the apex court on the interpretation of section 51 of the Code. In fact this was the main complaint by the Public Prosecutor. With due respect, we were unable to agree with the decision of the learned Judge. In our view the decision of the apex court in the Raymond Chia's case and the Husdi's case are relevant and applicable in respect of the application for documents not specifically mentioned in section 51A of the Code. In this connection we agree with the submission of the learned Solicitor General that the law on the application of section 51 had not changed notwithstanding the inclusion of the new section 51A of the Code.

...

[37] In our view the learned judge was also wrong to say that earlier cases decided on s. 51 are no longer applicable. Having considered both sections, we agree with the Court of Appeal that s. 51 and s. 51A are two separate and distinct provisions. Section 51A is a provision which imposes an obligation upon the prosecution to supply certain documents and materials. It has no connection to s. 51 which gives the court a discretion to allow for discovery in specific instances. Hence, s. 51A

should not be used in interpreting s. 51. Section 51 should thus be interpreted as it stands and taken to mean according to its plain and ordinary meaning and not be differently read. Thus, s. 51 cannot now be modified with the aid of the so called philosophy underlying the new s. 51A, even if such a philosophy did exist. It is thus wrong for the learned judge to conclude that s. 51A, had changed the mode of prosecution in a criminal trial, and in the process ignoring past precedents on its interpretation."

...

[20] ... It is clear that by the words in ss. 334 and 337 of the CPC, an inquest is an inquiry and an inquiry comes within the scope of s. 51 of the CPC. Section 51(1) states:

> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

[21] Therefore, in an inquest any application for disclosure of documents must be made pursuant to s. 51 of the CPC. How that power shall be exercised by the Coroner must then be guided by the Arahan.

...

[26] Referring to the Federal Court decision in *PP v. Raymond Chia Kim Chwee & Anor And Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436, an application for documents under s. 51 of the CPC can be made at any stage of an inquiry, investigation or trial. Hashim Yeop A Sani FJ in delivering the decision of the court stated:

> Section 51 is a general provision to be invoked at any stage of an inquiry, investigation or trial or other proceeding under the Code. From the language it is plain that section enables the Court or police officer, as the case may be, if it or he considers that the production of any document or material is necessary or desirable to issue, a summons (in case of the Court) or a written order (in the case of the police officer) to the person in whose possession or power the material or document is believed to be requiring such person to attend and produce the material or document at the time and place as stated in the summons or written order.

[27] In the context of an inquest, it is this court's view that the application can be made at any stage of the inquiry. It can be made before the commencement of the inquest and it can be made during the course of the inquest. Therefore, a Coroner should not decline to hear an application and exercise the discretion to disclose documents when an application is made before commencement of the inquest proceedings.

per Justice Mohd Radzi Abdul Hamid,
Judicial Commissioner of the High Court

Although the Security Offences (Special Measures) Act 2012 ("SOSMA") is constitutional, this does not mean that it can contravene every aspect of fundamental liberties provided for in the Federal Constitution ("FC"). Article 149 of the FC only allows laws such as SOSMA to be inconsistent with Article 5, 9, 10 or 13, but not Article 8. In other words, section 13(2)(b) of SOSMA is not allowed to discriminate between men and women in bail applications.

Entiran Durasamy & Other Applications v PP [2021] 10 CLJ 902, HC

This case dealt with an application for bail, where eight men were denied bail for an alleged offence under section 130V(1) of the Penal Code ("PC"). Reading section 130V(1) together with the SOSMA and the Criminal Procedure Code ("CPC"), these eight men were in fact charged with security offences. Previously, all accused except for one applied in vain for bail at

another High Court. The grounds of refusing the bail was because section 13(2)(b) of the SOSMA only allowed the court to consider bail applications for women, not men. Thus, the applicants argued that section 13(2)(b) of the SOSMA is unconstitutional and discriminatory in nature. Although the provision was worded in such a manner, men should equally be considered in bail applications. This point was however not addressed by the previous High Court when the bail applications first arose. As such, the applicants now raise this argument again for determination by the present court.

Justice Su Tiang Joo allowed every applicant bail, setting RM30,000 for each applicant with additional conditions. Essentially, his Lordship explained that there could not be an issue of functus officio as the previous High Court did not deal with this particular point, i.e. section 13(2)(b) of the SOSMA vis-à-vis Article 8 of the FC. In fact, this point was heard afresh in the present court, which means the present court was allowed to make findings on this matter. With regard to the issue of section 13(2)(b) of the SOSMA, his Lordship opined that Article 149 of the FC actually allows laws such as the SOSMA to exist and to remain constitutional. It allows the SOSMA to contravene certain aspects of fundamental liberties such as Article 5, 9, 10 or 13. However, Article 149 does not, in any manner, allow the SOSMA to contravene Article 8. It does not provide that laws such as the SOSMA can offend or be inconsistent with Article 8 of the FC. This signifies that when section 13(2)(b) allows women and not men to be considered for bail, this rule discrimates against men. There is no intelligible differentia as to why women may be allowed bail, but not men, for similar security offences under section 13(2)(b) of the SOSMA. The words of his Lordship, "... such a blanket exception in favour of women is discriminatory against men. Women are as equally capable of committing security offences under the SOSMA as men. Such discrimination, to my mind, would not qualify as a rational or reasonable classification or differentiation..." summed up the justification why the applicants herein must be entitled to be considered for bail. Putting it in another way, the word "women" in section 13(2)(b) must include men as well.

> [8] Instead, this court agrees with the principle enunciated by His Lordship, Collin Lawrence Sequerah J in the High Court case of Suresh Kumar Velayuthan v. PP [2020] 4 CLJ 270 (HC) that art. 149(1)(f) of the Federal Constitution validates laws passed notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13 and that the SOSMA and in particular s. 13 thereof is valid and lawful.
>
> [9] However, with respect, where I differ is when men are discriminated from being granted bail when such a right is given to women under s. 13(2)(b) of the SOSMA. Such discrimination goes against the non-gender discrimination provision housed within the fundamental liberty of equality which is expressly provided in art. 8(1) and (2) of the Federal Constitution as reproduced below:
>
> *8(1) All persons are equal before the law and entitled to the equal protection of the law.*
>
> *(2)* ***Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only*** *of religion, race, descent, place of birth* ***or gender in any law*** *or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*
>
> *(emphasis added)*

Ipoh High Court

[10] By reason thereto, so as to provide an interpretation that is in harmony with the supreme law housed within the Federal Constitution, in my view, the word "women" in s. 13(2)(b) of the SOSMA includes "men". Applying such a construction, the applicants who are all men should similarly be entitled to be considered for bail. See the Federal Court decision of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701, where Augustine Paul JCA (who retired as FCJ) in delivering the judgment of the Federal Court said:

> *If art. 160(2) is not interpreted together with s. 3(1) it would render the section otiose in so far as its power to modify the common law in the future is concerned. This will militate against* ***one of the recognised canons of construction of a Constitution which is that if two constructions are possible the Court must adopt the one which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory*** *(see State of Punjab v. Ajaib Singh AIR [1953] SC 10).*
>
> *(emphasis added)*

[11] In opposing the applications for bail, the respondent relied upon the case of *PP v. Khong Teng Khen & Anor* [1976] 1 LNS 100; [1976] 2 MLJ 166, where the Federal Court held that the law may classify persons into children, juveniles and adults and provide different criteria for determining liability or the mode of trying them or punishing them if found guilty. And, that the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class. The case of *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 (FC) was also cited where it was held that discriminatory law is good law if it is based upon reasonable or permissible classification or founded on intelligible differentia.

[12] However, with respect, in my view there is no intelligible differentia as to why men should not be allowed bail when women are allowed bail under s. 13(2)(b) of the SOSMA when charged for a security offence, the security offence in this case being an offence under s. 130(V)(1) of the Penal Code. Such a blanket exception in favour of women is discriminatory against men. Women are as equally capable of committing security offences under the SOSMA as men. Such discrimination, to my mind, would not qualify as a rational or reasonable classification or differentiation. Indeed, to drive home the point, there is no provision at all in the SOSMA that women cannot be charged for any security offences under this Act. The very fact that there is a provision for bail for women under s. 13(2)(b) of the SOSMA would logically drive anyone to conclude that women are capable of committing security offences and are equally liable to be charged for the same.

[13] I am aware that this would result in there being no distinction to be drawn between women and men when granting bail and the answer lies in art. 8 of the Federal Constitution.

…

[19] It is pertinent to observe that the SOSMA is a law enacted pursuant to art. 149 of the Federal Constitution and where such law is valid notwithstanding that it may be inconsistent with any of the provisions of the fundamental liberties enshrined in arts. 5, 9, 10 or 13 of the Federal Constitution (hereinafter referred to as the class of "excluded fundamental liberties") but significantly, the fundamental liberty of equality under art. 8 of the Federal Constitution is not included in the class of excluded fundamental liberties. This intentional omission drives me to hold that the laws made under art. 149 cannot be inconsistent with the fundamental right of equality enshrined in art. 8. Such an omission clearly does not make it fall within the qualifying provision of art. 8, which provides "Except as expressly authorised by the Constitution". And, seeing that art. 8 is housed within Part II on Fundamental Liberties of the Federal Constitution together with arts. 5, 9, 10 and 13, it would be apt to also apply the maxim expressio unius est exclusio alterius (when one or more things of a class are expressly mentioned, others, of the same class are excluded) (see para. [26] of the Federal Court decision of Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347) and this court ought to construe the law enacted under

art. 149 to be in harmony with the fundamental liberty provisions of equality under art. 8.

...

[22] However, in s. 13(2)(b) of the SOSMA there is a relaxation on bail for a security offence where it allows women who may be charged under s. 130V(1) of the Penal Code to be amenable to bail despite it being a security offence under the SOSMA. On this ground, I find that men should not be discriminated against and should similarly be entitled to be considered for bail depending on the circumstances of the case, ie, on a case-by-case basis, for example, whether the applicant is a flight risk.

...

[27] ... Notably, the issue of whether the applicant who is a man should similarly be entitled to bail like women under s. 13(2)(b) of the SOSMA and should not be discriminated against in breach of the fundamental liberty provision encapsulated in art. 8 was not (emphasis added) discussed and decided upon. Instead, on the premise that the applicant does not come within the three categories of persons under s. 13(2)(b) of the SOSMA, bail was denied with reference made to Raman Shunmugham lwn. PP [2020] 2 CLJ 818 (CA). This, to my mind, with the greatest of respect, amounts to a jurisdictional omission which would be an exception to the functus officio rule enabling this court to consider the fresh applications before this court. In other words, from the facts of this case, the exception to the functus officio rule applies and this court is at liberty to hear these fresh applications for bail.

per Justice Su Tiang Joo,
Judicial Commissioner of the High Court

Section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM") is not unconstitutional as it does not take away the power of the court. This provision does not abrogate the concept of right to fair trial, and it still provides an avenue for appeal against decisions made thereunder. When there is a specific rule governing a specific matter such as the ATIPSOM, it prevails over the general law such as the Evidence Act 1950 and the Criminal Procedure Code. This is in line with the concept of generalibus specialia derogant.

Ketheeswaran Kanagaratnam & Anor v PP [2021] 9 CLJ 749, HC

In this case, the court was tasked to determine whether section 61A of the ATIPSOM is unconstitutional. This provision essentially provides that the deposition of trafficked persons can be accepted as prima facie evidence without the need to undergo cross-examination especially when the trafficked persons cannot be found.

At all material times, the applicants were charged under section 12 of the ATIPSOM. During the trial, the prosecution delivered to the applicants the depositions made by three victims of their crime under section 51A of the Criminal Procedure Code ("CPC"). The applicants challenged the constitutionality of section 61A of the ATIPSOM via notice of motion. It was contended that section 61A contravened Articles 121(1), 8(1) and 5(1) of the Federal Constitution ("FC"), arguing that this provision had excluded the power of the court to decide whether the evidence was prima facie. The applicants further contended that section 61A deprived them of their rights under Article 5(1) of the FC as the former disallowed the applicants from cross-examining the deponents. Article 8(1) of the FC was also said to be transgressed because all persons are equal before the law. As such, the applicants ought to enjoy equal protection of the law, with fair treatment and procedure throughout the criminal trial. When they were not afforded the right to challenge the depositions and cross-examine the deponents, Article 8(1) of the FC was thus violated. In addition, the applicants argued that section 61A of the ATIPSOM was contrary to the Evidence Act 1950 ("EA") as well as the CPC.

Justice Azmi Abdullah dismissed the motion and held that section 61A of the ATIPSOM is constitutional and valid. His Lordship viewed that section 61A did not usurp the judicial power to rule and decide. This provision only says prima facie evidence and the consideration of the deposition itself does not provide a prima facie case. After all, the court would still be required to evaluate all the evidence in toto in deciding whether a prima facie case has been established. Hence, despite the challenged provision not allowing cross-examination, the deposition would still be subject to analysis on its contents. In other words, the judicial power of the court was not derogated by section 61A and thus, Article 121(1) of the FC was not infringed.

With regard to the issue of whether section 61A contravened Article 5(1) of the FC, this was answered in the negative. His Lordship held that the right under Article 5(1) had never been an absolute one. The phrase "save in accordance with the law" in Article 5(1) clearly allowed provisions like section 61A of the ATIPSOM to fall within this exception. Thus, disallowing cross-examination on the depositions does not mean that there was a denial of a fair trial. It does not mean the deposition automatically establishes a prima facie case. After all, the court would still be required to exercise its judicial mind and determine whether a prima facie case has been established. Likewise, section 61A did not contravene Article 8(1) of the FC. In fact, the ATIPSOM did provide an avenue for an appeal to be made against decisions made thereunder. Thus, when the law contains provisions for appeal, it cannot be said that Article 8(1) is infringed. On the question of whether the ATIPSOM contravened the EA as well as the CPC, his Lordship reiterated the principle of generalibus specialia derogant. When there is a specific law such as the ATIPSOM, it prevails over the general law such as the EA. That would mean section 61A of the ATIPSOM would prevail over section 134 of the EA. Hence, section 61A of ATIPSOM did not contravene Articles 121(1), 8(1) and 5(1) of the FC.

> [14] Section 61A of ATIPSOM by its wording still retains the court's judicial power to rule and decide with the court's powers not being transgressed as the arbiter to make a finding and to arrive at a decision.
>
> …
>
> [19] In PP v. Sumon Khan & Anor [2018] 1 LNS 1506; [2019] 2 MLJ 215, the Court of Appeal concurred with the High Court that the depositions made would still be subject to an analysis of its contents irrespective of the non-allowance for cross-examination and thus in the final decision made, the totality of evidence would form the basis for the decision and not a total reliance on the deposition alone…
>
> …
>
> [22] From the decided cases, this court is of the opinion that s. 61A is concerned only with prima facie evidence and the consideration of the deposition in itself does not provide a prima facie case whereby in order to establish a prima facie case the courts still have to view the evidence in totality in arriving at a decision. This goes to show that the court's function as the final arbiter is not encroached upon and thus the section does not usurp the powers of the court hence s. 61A of ATIPSOM does not infringe art. 121(1) of FC.
>
> …
>
> [29] It has always been the position of the law that the right is not absolute. Given the fact that s. 61A of ATIPSOM is a specific and explicit law which has been provided for as being the exclusion stated in art. 5(1) of FC, hence the application of s. 61A of ATIPSOM cannot be deemed to be in contravention of art. 5(1) of FC.
> [30] It does not deny a fair trial since the deposition is only a single aspect of the evidence to be produced at trial and even then it is still subject to be examined by the trial judge as decided in PP v. Sumon Khan. This evidence by deposition is not the be all and end all as regards evidence to prove a prima facie case. Thus, this court views that the impugned provision does not infringe upon art. 5(1) of the FC.
>
> …
>
> [33] In *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 it was held that the equality provision is not absolute and it does not mean that all laws must apply uniformly to all persons in all circumstances everywhere. Lord President Suffian has laid down the principle involved by stating:
>
> > Doing the best we can, we are of the opinion that the principles relevant to this appeal that

may be deduced from the Indian decisions and from consideration of our constitution are these:

...

8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the laws. (Minority judgment in NI Caterers AIR 1967 SC 1581 and judgment in M Chhagganal AIR 1974 SC 2009.) We think that we should follow the same principle.

...

[34] In item 8 of the above-cited case it was held, where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to, but it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. This court views that s. 61A does not fall foul of this condition as to infringe upon art. 8 of the FC given the provision for appeal therein contained in ATIPSOM 2007.

...

[37] From the reading of s. 5 of ATIPSOM it is clear that the provisions contained in the Act ie in this situation, s. 61A would override the requirement as found in s. 145 of Evidence Act 1950 due to the use of the maxim generalibus specialia derogant.

[38] Section 5 of ATIPSOM itself provides for the application of ATIPSOM 2007 to prevail in the event that it conflicts with provisions of other written laws and supersedes the other written laws and this is the situation of the maxim generalibus specialia derogant being applicable which is that a general Act is made subject to a specific Act. There are apparent that certain specific provisions in the legislation are designed to prevail over the more general provisions of the law and these must be given its full effect which is the foundation of this maxim.

per Justice Azmi Abdullah,
Judge of the High Court

Tapah Court

In deciding whether to offer bail for non-bailable offences such as murder, the health condition of the accused should be taken into consideration. The seriousness of the offence should not be the sole, paramount and dominant determining factor for non-bailable offences.

Hobalan N Vello v Public Prosecutor [2021] 1 LNS 1762, HC

In this case, the accused was charged with the offence of murder under section 302 of the Penal Code ("PC"). The accused then applied for bail pending the disposal of trial with conditions stipulated by the court. However, by virtue of the First Schedule to the Criminal Procedure Code ("CPC"), the offence of murder is non-bailable in nature. Hence, the exercise of granting or refusing the bail application is at the discretion of the court.

In light of this, the accused argued that bail should be granted in his favour because he, among others, is sick and infirm with limited mobility, is unable to walk and wheelchair-bound, needs to undergo urgent medical treatment and spinal surgery, has been on frequent visits to the Orthopaedic Clinic Ward, and does not pose any risk of absconding. On the other hand, the prosecution argued that the reasons put forward by the accused did not constitute exceptional and special circumstances. Instead, the bail will merely serve as a convenience for the accused. Thus, the reason of "convenient circumstances" should not be considered by the court when exercising its discretionary power for such an application.

The High Court allowed the application and held that bail should be granted to the accused in this case. Amelati Parnell JC explained that the main objective of bail is to ensure the accused will attend the trial and will not interfere with the administration of justice. While a section 302 of the PC offence is indeed a non-bailable offence pursuant to section 388(1) of the CPC, bail should be granted if there is no reasonable ground to believe that the accused is guilty of such an offence. In the present case, the court viewed that the prosecution had actually failed to produce prima facie evidence in support of the charge against the accused. In fact, this case could very well fall under section 148 instead of section 302 of the PC as per the charge.
The High Court then went on to consider the medical report of the accused in light of the proviso to section 388(1) of the CPC. This proviso states that an accused who is suffering from such medical conditions is allowed to be released on bail, and the learned judge found the accused was indeed a sick and infirm person which fell under the ambit of this section. As such, the accused was entitled to be released on bail and was not affected by the restriction under section 388(1) of the CPC. Moreover, there was no evidence to suggest that there was a risk of the accused absconding or tampering with witnesses if bail is granted.

> [11] In this present case, the main grounds submitted by the accused are that he is sick and infirm and as such requires constant medical attention and surgical intervention. Due to his past medical history, aggravated by the incidents in this present case, he was in constant pain, unable to walk and suffering from urinary and bowel incontinence.
>
> …
>
> [19] … Nonetheless, there are no findings to suggest that the accused was feigning pain. In fact, he has been taking medications to manage his pain. The medical specialist also noted that the accused "needs regular medication for pain control and limited physiotherapy and rehabilitation due to the pain and disability."
>
> …
>
> [27] Hence, as per Dr Norisyam bin Yusoff's affidavit in reply (encl. no. 3), the accused is suffering from severe back problems and surgical intervention is vital. I am satisfied that the accused is a sick and infirm person within the meaning of the proviso to s. 388(1) of the [Criminal Procedure Code]. Following the case of PP v. Dato' Balwant Singh (supra), the accused herein is not affected by the restriction placed on s. 388(1) and is entitled to be enlarged on bail at the discretion of the court.
>
> *per Amelati Parnell,*
> *Judicial Commissioner of the*
> *High Court Sabah & Sarawak*


ISTANA KEHAKIMAN

APPENDIX

STATISTICS

GLOBAL PERFORMANCE OF CIVIL CASES IN 2021

COURTS	2021					
	CIVIL					
	BALANCE BROUGHT FORWARD FROM PRE-2021	REGISTRATIONS	DISPOSALS	BALANCE CARRIED FORWARD	RATE OF DISPOSALS %	BACKLOG %
FEDERAL COURT	494	856	701	649	51.9%	48.1%
COURT OF APPEAL	4,870	4,034	4,367	4,537	49.0%	51.0%
HIGH COURT	53,995	91,334	99,649	45,680	68.6%	31.4%
SESSIONS COURT	20,319	39,933	36,662	23,590	60.8%	39.2%
MAGISTRATES' COURT	41,844	167,178	168,959	40,063	80.8%	19.2%
TOTAL	121,522	303,335	310,338	114,519	73.0%	27.0%

Explanatory Notes:

- **The Federal Court disposed of 701 civil cases, leaving 649 cases pending disposal. This translates to a disposal rate of 51.9%.**
- **The Court of Appeal cleared a total of 4,367 civil cases, leaving a total of 4,537 cases pending disposal. This is a disposal rate of 49.0%.**
- **The two High Courts globally disposed of a total of 99,649 civil cases and 45,680 cases remain pending disposal. This is a disposal rate of 68.6%.**
- **The Sessions Courts disposed of a total of 36,662 civil cases. A total of 23,590 cases remain pending disposal. That is a disposal rate of 60.8%.**
- **As for the Magistrates' Courts, a total number of 168,959 civil cases were disposed of and 40,996 cases remain pending disposal. The disposal rate is a very healthy 80.8%.**

GLOBAL PERFORMANCE OF CRIMINAL CASES IN 2021

COURTS	2021					
	CRIMINAL					
	BALANCE BROUGHT FORWARD FROM PRE-2021	REGISTRATIONS	DISPOSALS	BALANCE CARRIED FORWARD	RATE OF DISPOSALS %	BACKLOG %
FEDERAL COURT	280	336	316	300	51.3%	48.7%
COURT OF APPEAL	1,738	959	927	1,770	34.4%	65.6%
HIGH COURT	5,153	6,787	6,529	5,411	54.7%	45.3%
SESSIONS COURT	14,139	37,512	35,506	16,145	68.7%	31.3%
MAGISTRATES' COURT	389,622	1,476,411	1,518,851	347,182	81.4%	18.6%
TOTAL	410,932	1,522,005	1,562,129	370,808	80.8%	19.2%

Explanatory Notes:

- **The Federal Court disposed of 316 criminal cases, leaving 300 cases pending disposal. This translates to a disposal rate of 51.3%.**
- **The Court of Appeal cleared a total of 927 criminal cases, leaving a total of 1,770 cases pending disposal. This is a disposal rate of 34.4%. This rate is particularly acute in view of the pandemic as the presence of the accused is necessary especially for capital offences.**
- **The two High Courts globally disposed of a total of 6,529 criminal cases and 5,411 cases remain pending disposal. This is a disposal rate of 54.7%.**
- **The Sessions Courts, disposed of a total of 36,662 criminal cases. A total of 23,590 cases remain pending disposal. This is a disposal rate of 60.8%.**
- **As for the Magistrates' Courts, a total number of 1,518,851 criminal cases were disposed of and a staggering 347,182 cases remain pending disposal. The disposal rate is a very healthy 80.8%.**

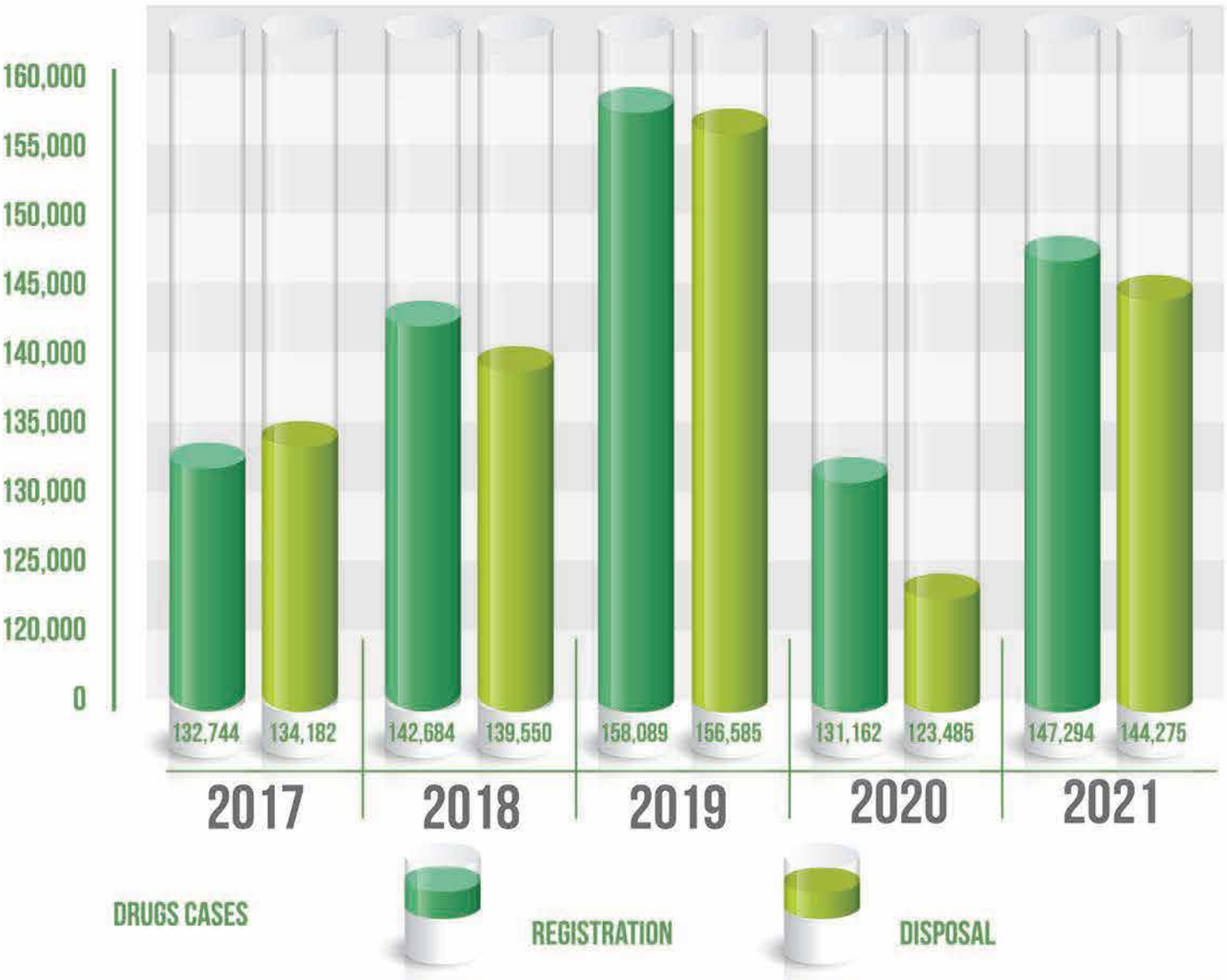
GLOBAL PERFORMANCE TRAFFIC CASES IN 2021

COURTS	2021					
	TRAFFIC CASES					
	BALANCE BROUGHT FORWARD FROM PRE-2021	REGISTRATIONS	DISPOSALS	BALANCE CARRIED FORWARD	RATE OF DISPOSALS %	BACKLOG %
MAGISTRATES' COURT	289,377	1,072,677	1,101,006	261,048	80.8%	19.2%
TOTAL	289,377	1,072,677	1,101,006	261,048	80.8%	19.2%

Explanatory Notes:

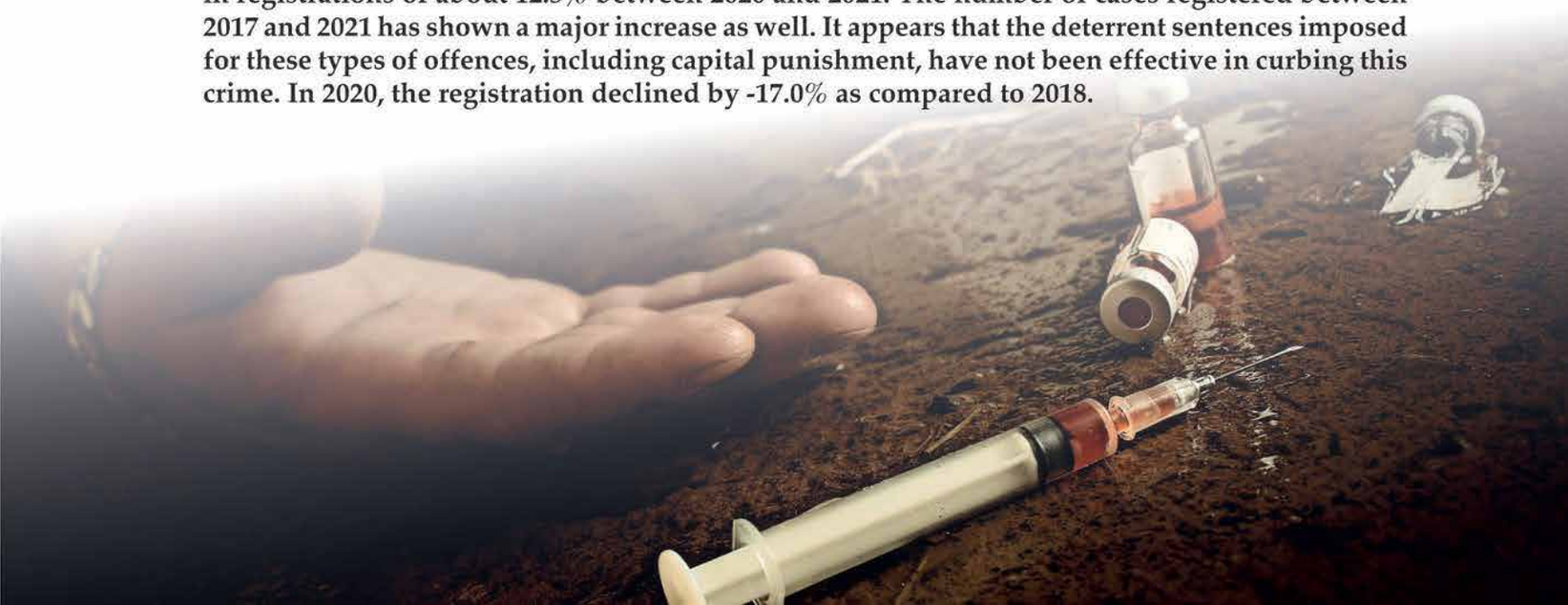
- **The large number of criminal cases registered in the Magistrates' Courts in 2021, i.e. 1,476,411 cases, is largely attributable to the sizeable number of traffic summonses cases in those courts comprising about 1,072,677 (72.7%) of the total number of criminal cases registered.**
- **Not all of the traffic offences registered can be resolved via the ePG system but the number of cases that can be resolved by fully digitalising the conviction and sentencing aspect of traffic summonses should greatly alleviate the load on such courts, as well as provide the public better access to justice.**

DRUGS CASES

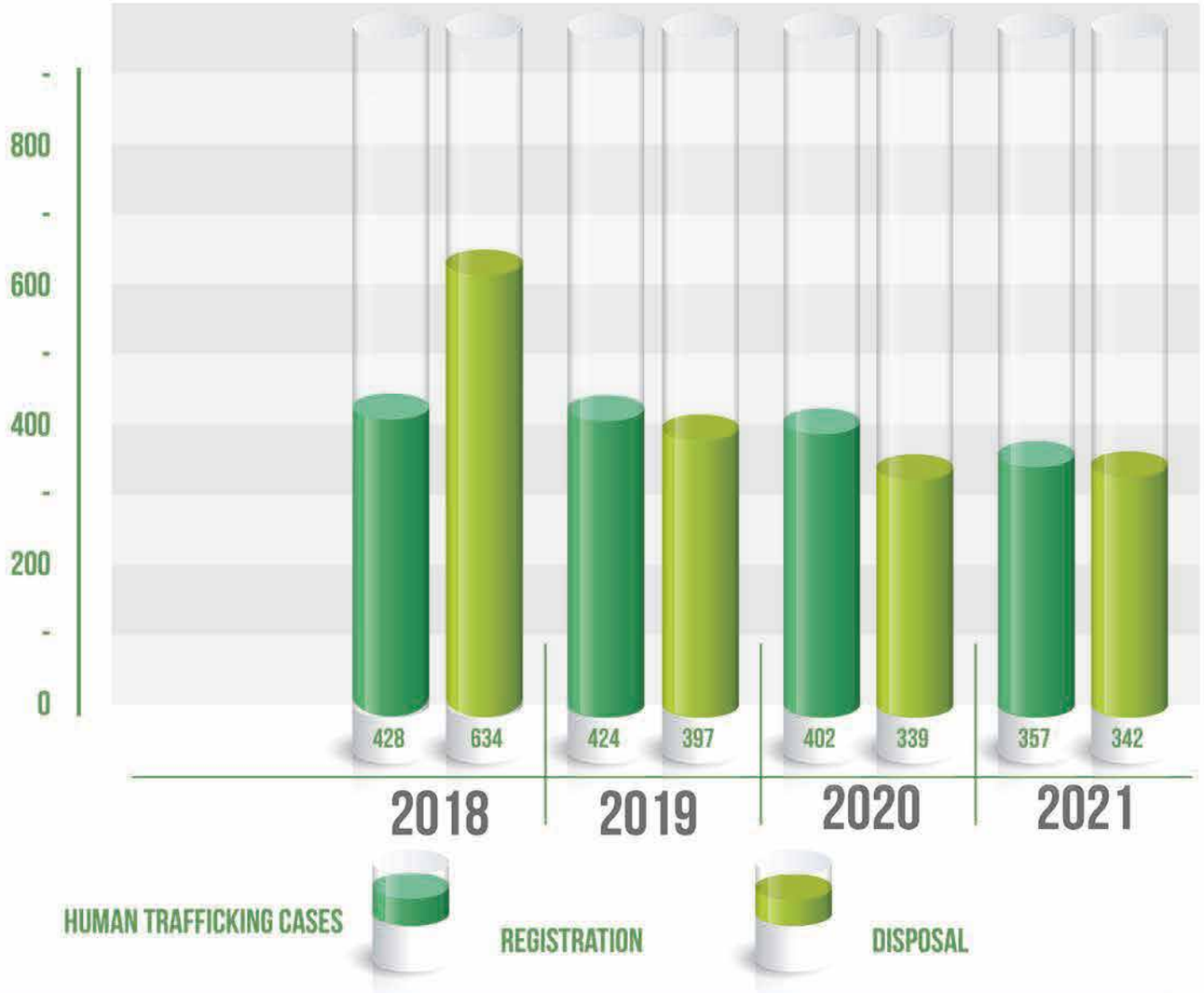


Explanatory Notes:

- The graph shows the registration and disposal of drugs cases from 2017 to 2021.
- There has been a major change in the number of drugs cases recorded. There was a large increase in registrations of about 12.3% between 2020 and 2021. The number of cases registered between 2017 and 2021 has shown a major increase as well. It appears that the deterrent sentences imposed for these types of offences, including capital punishment, have not been effective in curbing this crime. In 2020, the registration declined by -17.0% as compared to 2018.

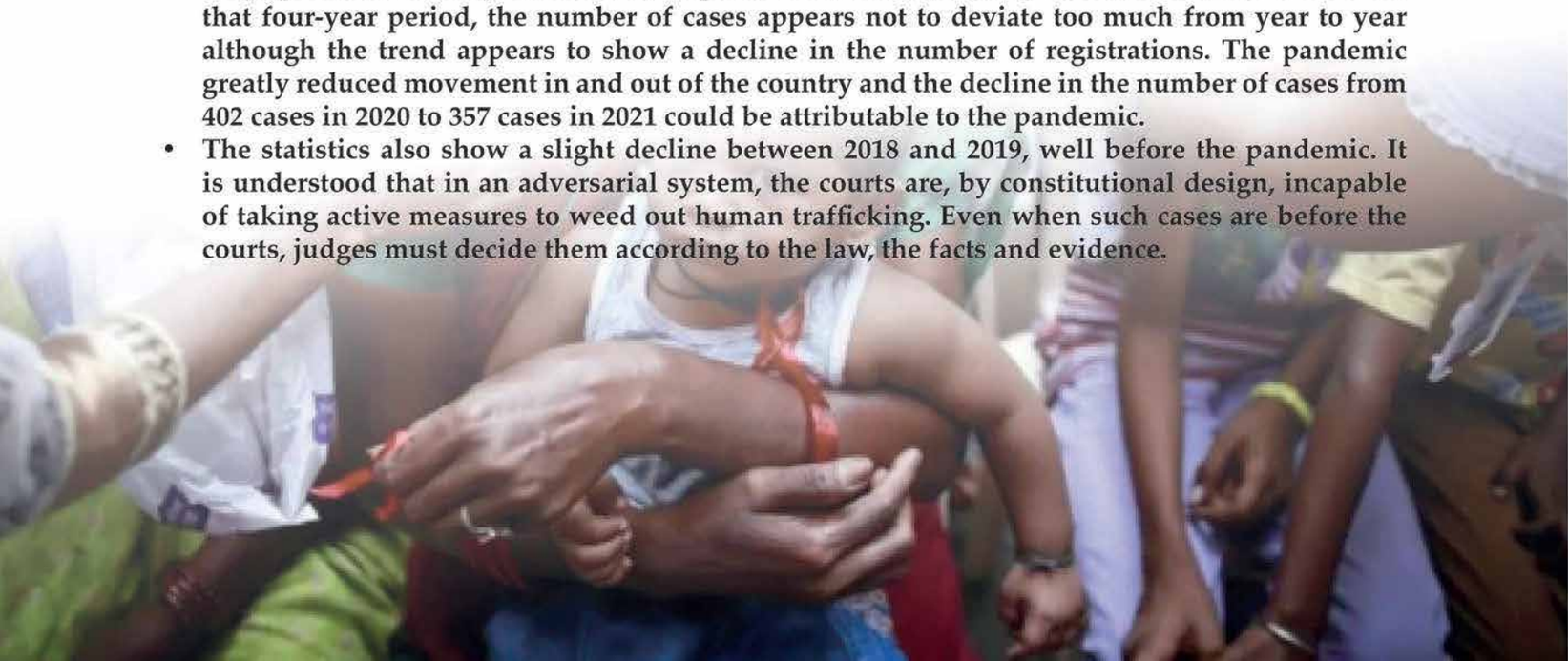


HUMAN TRAFFICKING CASES

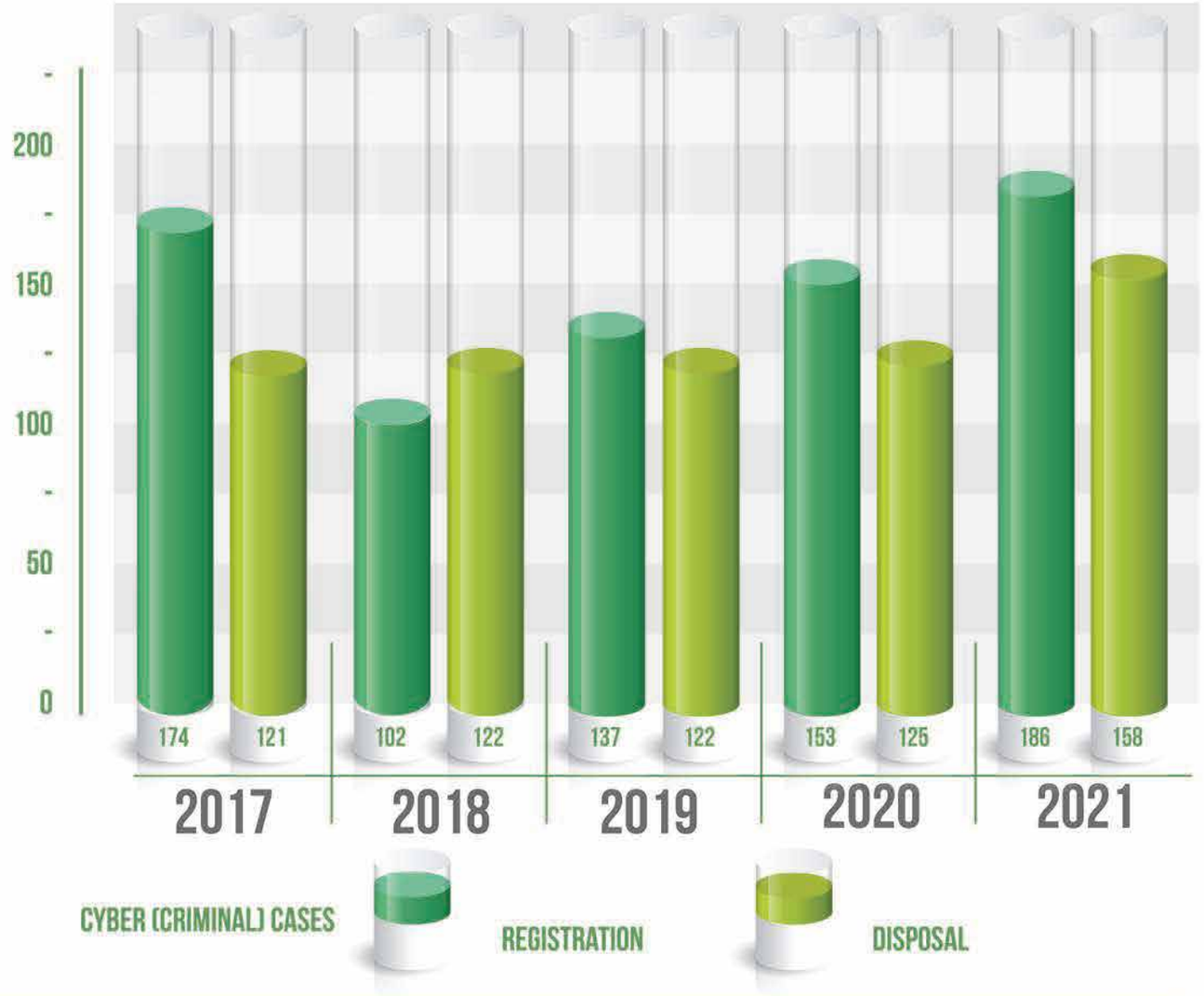


Explanatory Notes:

- he graph shows the registration and disposal of human trafficking cases from 2018 to 2021. Over that four-year period, the number of cases appears not to deviate too much from year to year although the trend appears to show a decline in the number of registrations. The pandemic greatly reduced movement in and out of the country and the decline in the number of cases from 402 cases in 2020 to 357 cases in 2021 could be attributable to the pandemic.
- The statistics also show a slight decline between 2018 and 2019, well before the pandemic. It is understood that in an adversarial system, the courts are, by constitutional design, incapable of taking active measures to weed out human trafficking. Even when such cases are before the courts, judges must decide them according to the law, the facts and evidence.



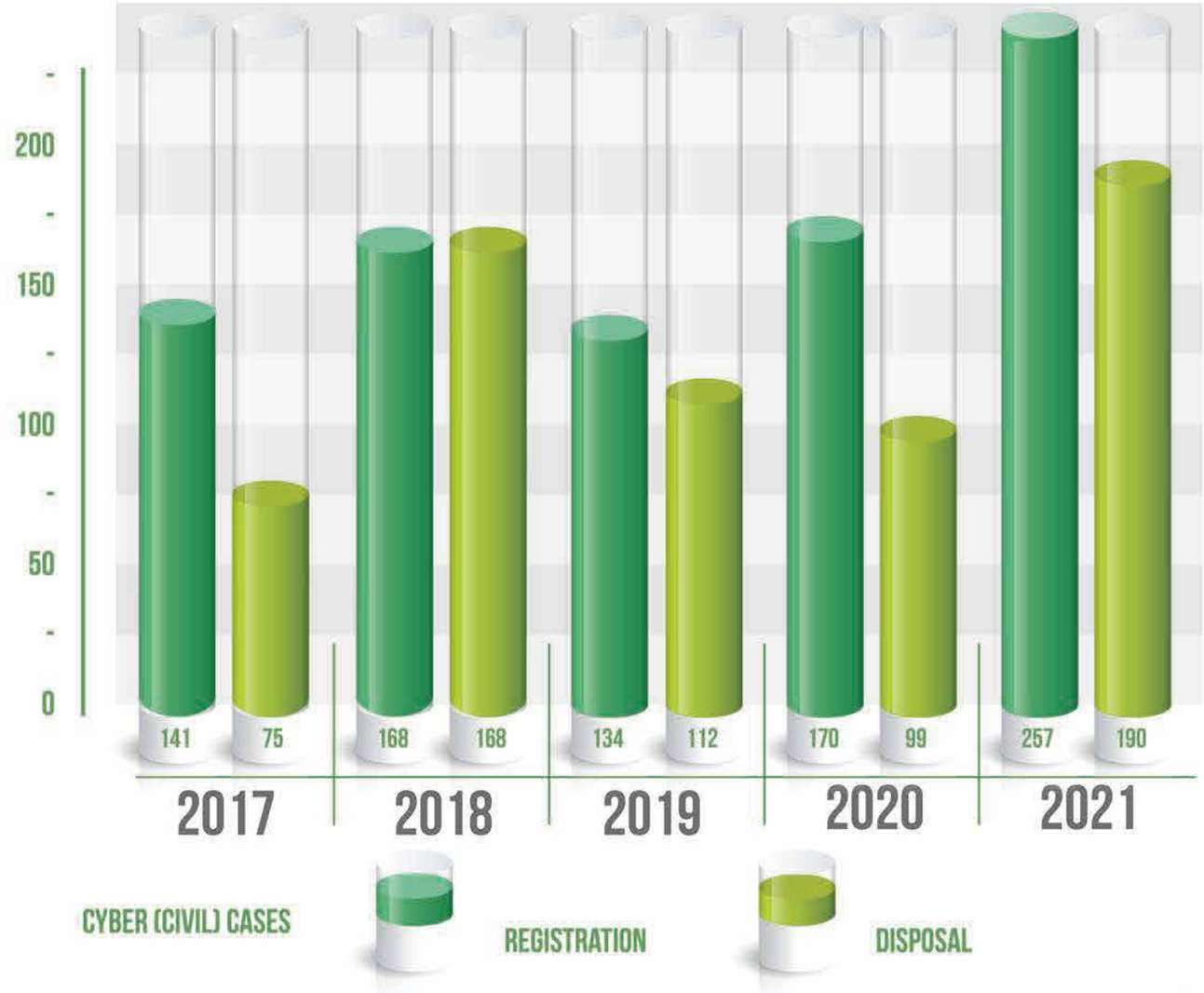
CYBER (CRIMINAL) CASES



Explanatory Notes:

- **The graph shows the registration and disposal of criminal cyber cases from 2017 to 2021. Criminal cyber cases have been consistently increasing with 2021 marking a 21.6% increase from 2020.**
- **The steady rise of such cases reflects the greater use of social media and perhaps the greater tendency to misuse it.**

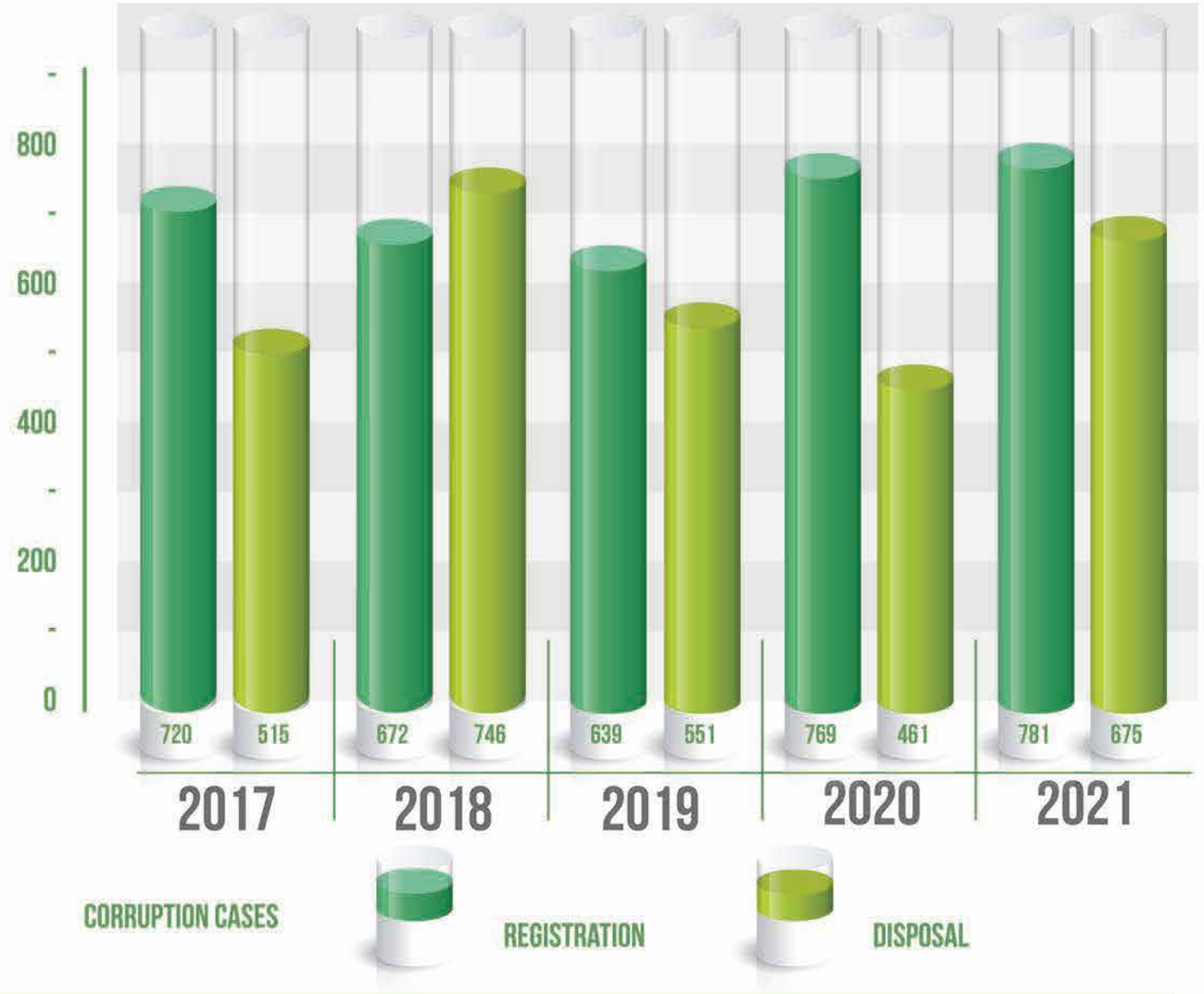
CYBER (CIVIL) CASES



Explanatory Notes:

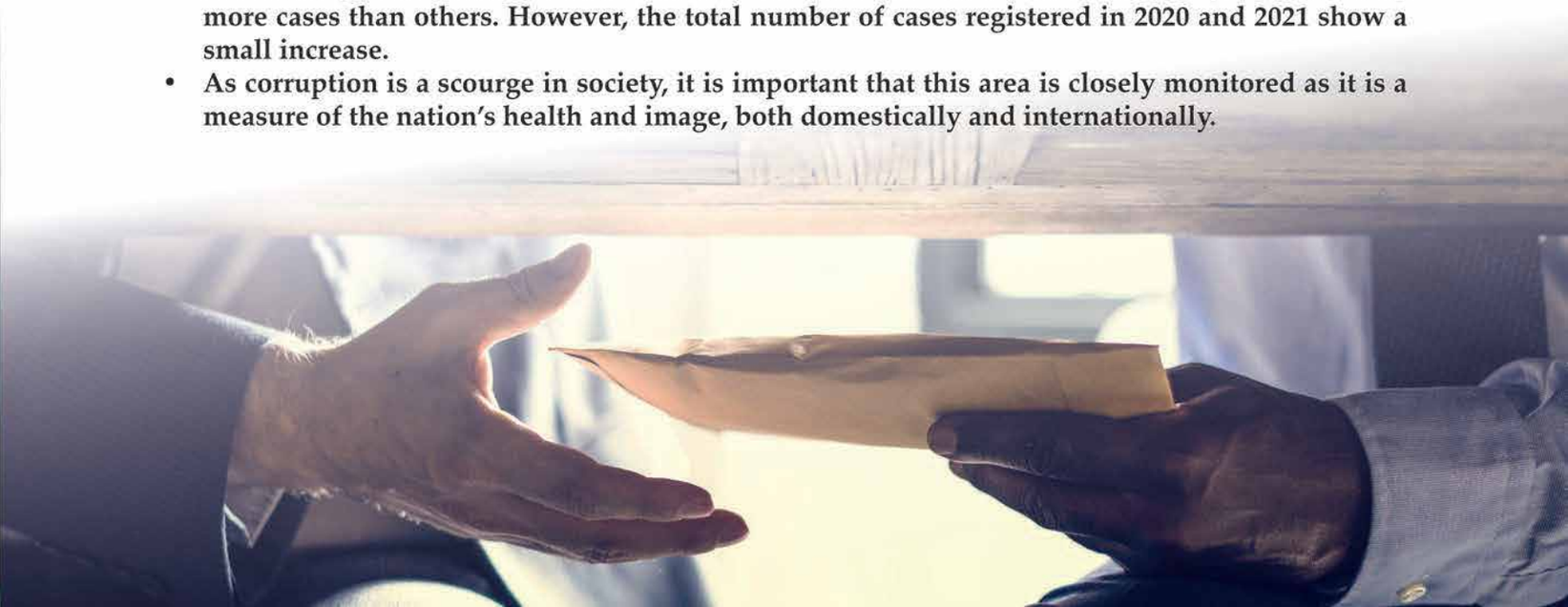
- **The graph shows the registration and disposal of civil cyber cases from 2017 to 2021. These cases refer mostly to cyber defamation cases. There was a large increase of 51.2% in civil cyber cases between 2020 and 2021.**

CORRUPTION CASES

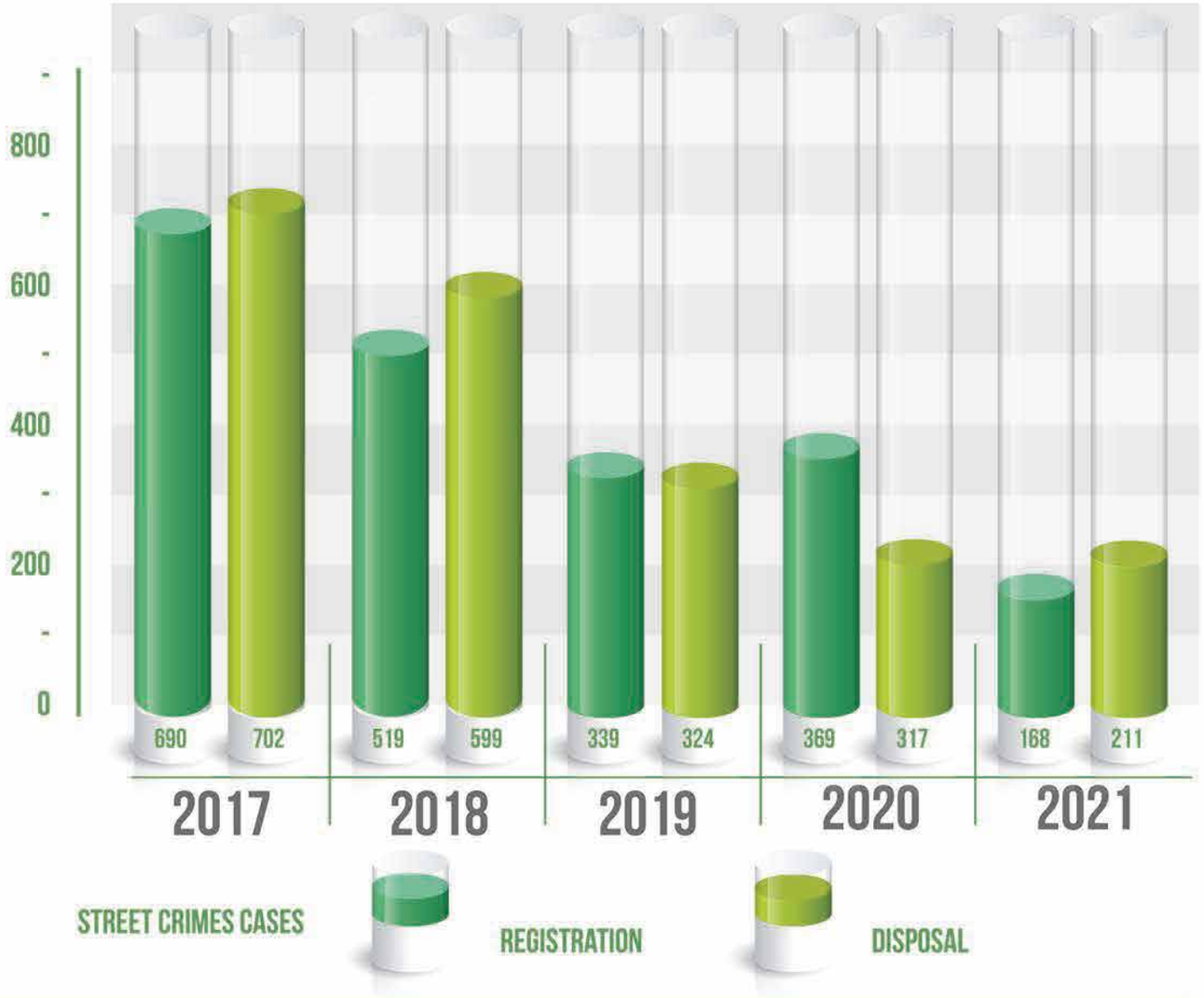


Explanatory Notes:

- The graph shows the registration and disposal of corruption cases from 2017 to 2021. The number of cases registered between 2017 and 2021 has not been consistent, with some years recording more cases than others. However, the total number of cases registered in 2020 and 2021 show a small increase.
- As corruption is a scourge in society, it is important that this area is closely monitored as it is a measure of the nation's health and image, both domestically and internationally.

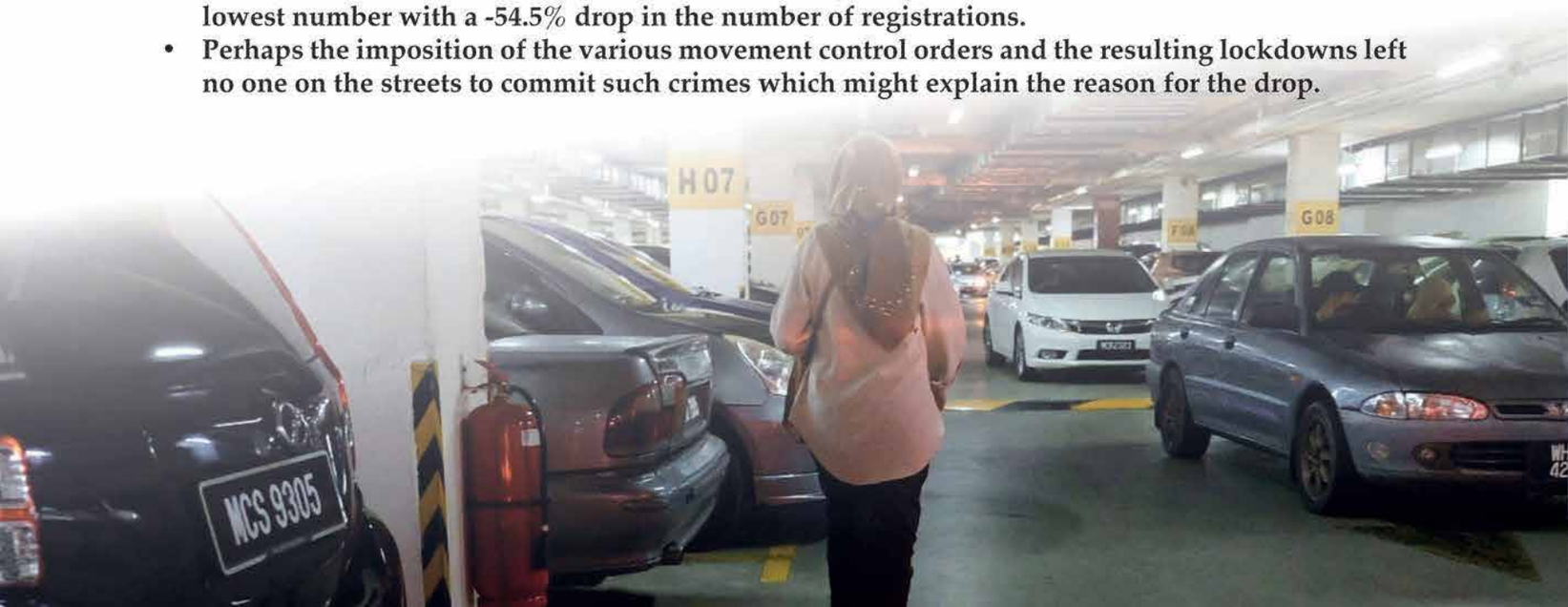


STREET CRIMES CASES

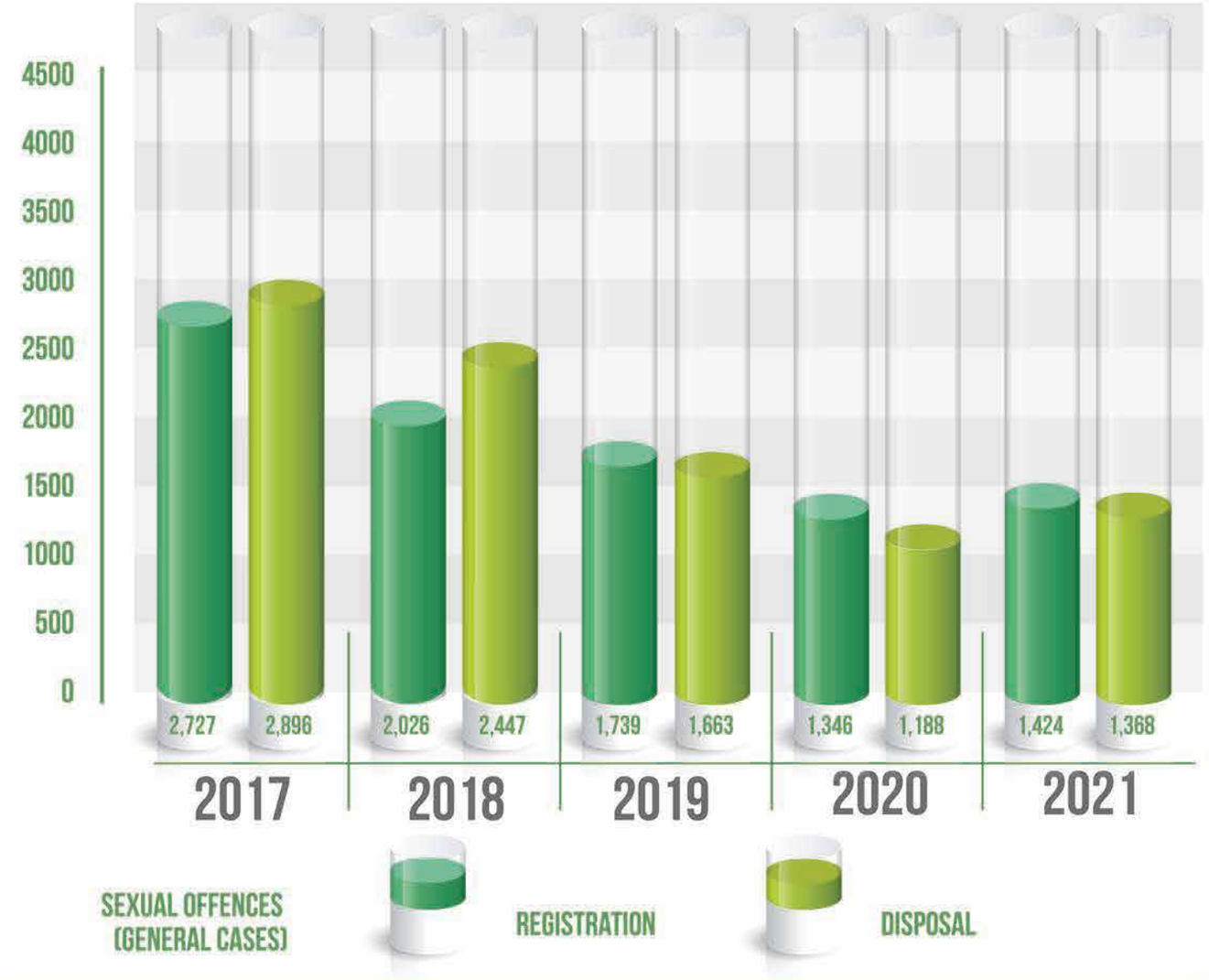


Explanatory Notes:

- The graph shows the registration and disposal of street crime cases from 2017 to 2021. Street crime cases have been on the steady decline during the period of 2017 to 2021. 2021 recorded the lowest number with a -54.5% drop in the number of registrations.
- Perhaps the imposition of the various movement control orders and the resulting lockdowns left no one on the streets to commit such crimes which might explain the reason for the drop.



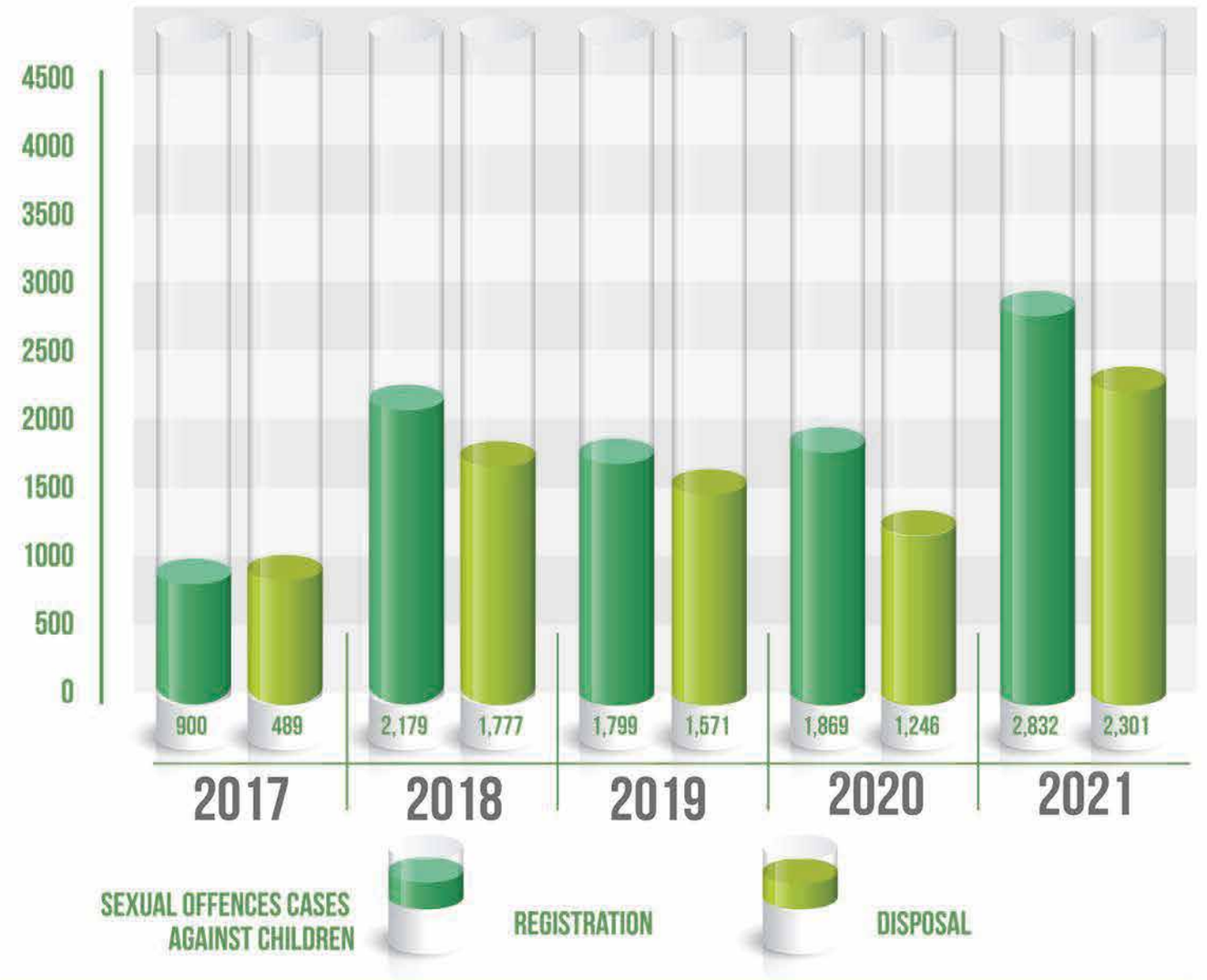
SEXUAL OFFENCES (GENERAL) CASES



Explanatory Notes:

- **The graph shows the registration and disposal of general sexual offences cases from 2017 to 2021. There appears to be a decreasing trend in the number of registrations for the period between 2017 to 2020. Specifically, the increase between 2020 and 2021 was 5.8%.**

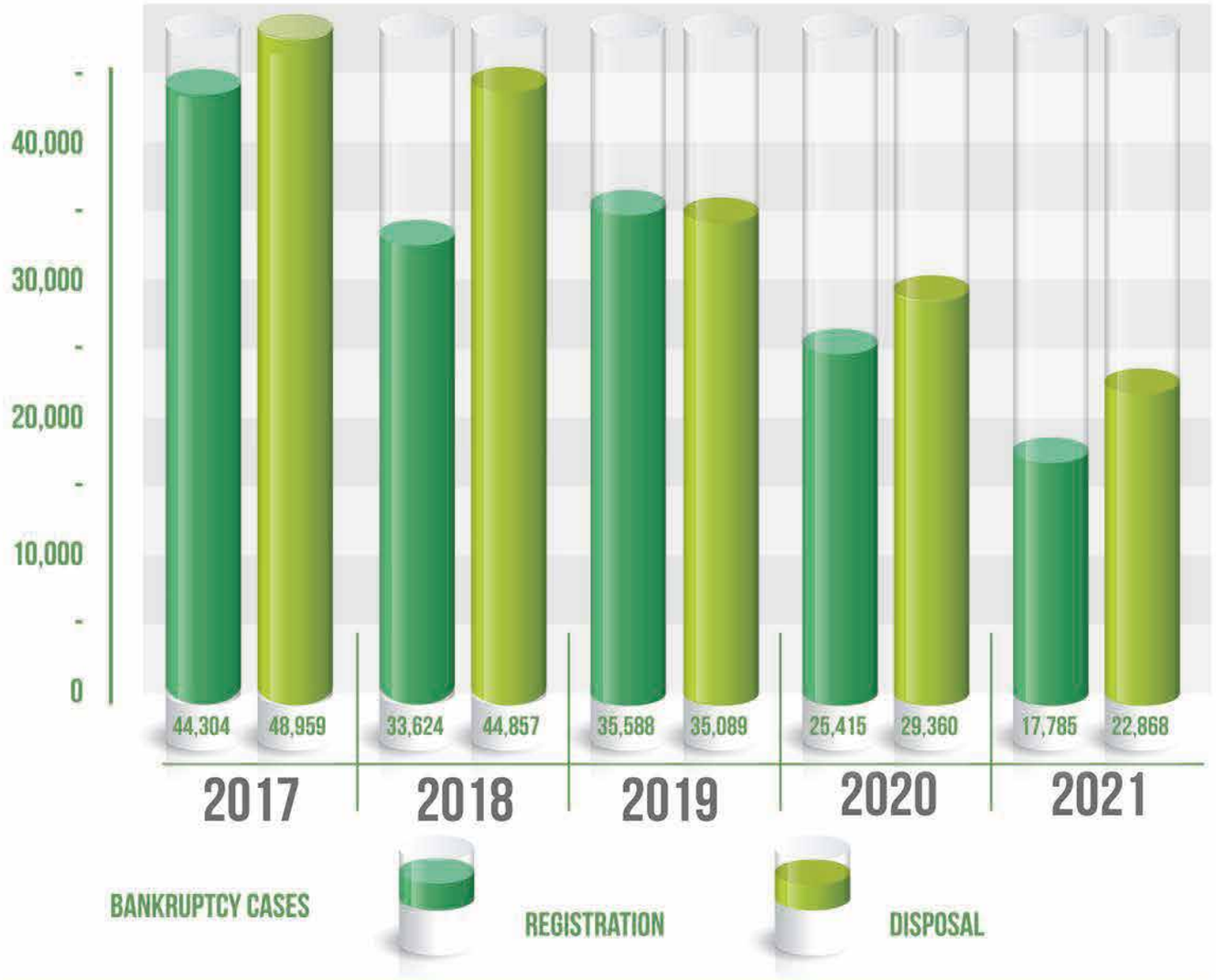
SEXUAL OFFENCES (AGAINST CHILDREN) CASES



Explanatory Notes:

- **The graph shows the registration and disposal of sexual offences cases against children from 2017 to 2021. By and large, there was a steep increase in the number of registrations by almost 51.5% between 2020 and 2021.**

BANKRUPTCY CASES



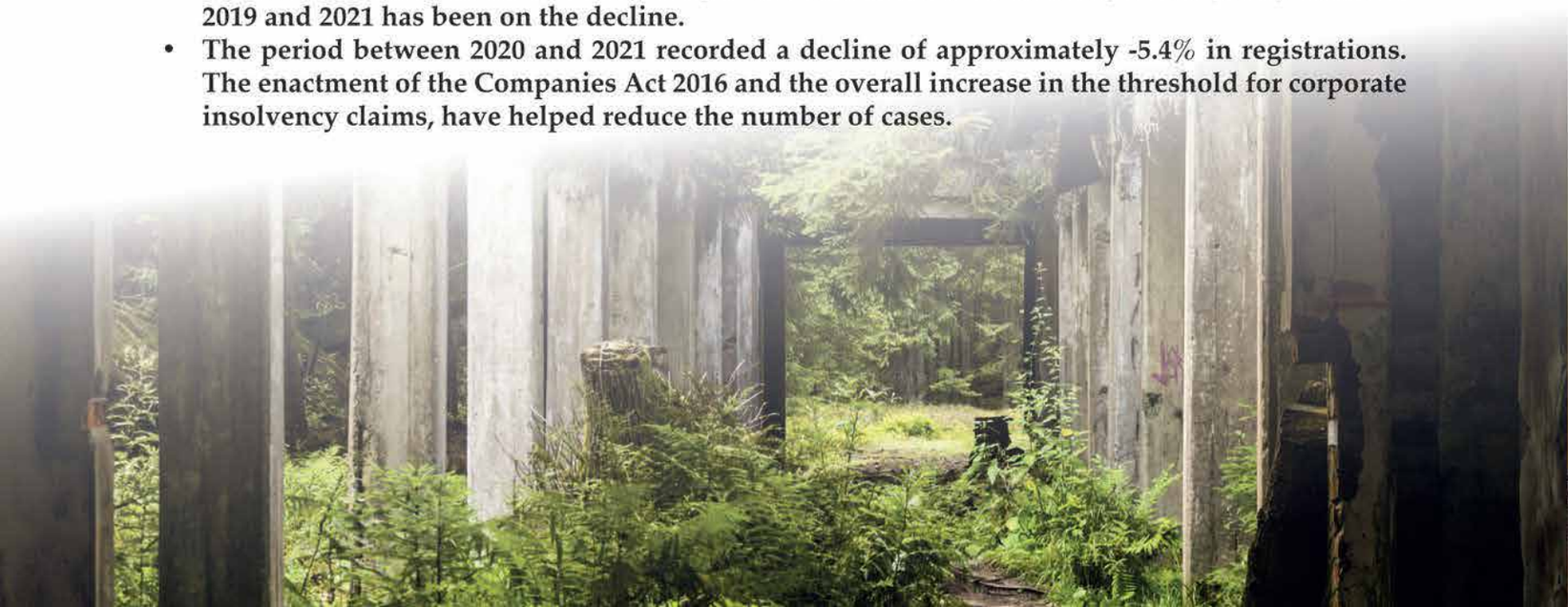
Explanatory Notes:

- The graph shows the registration and disposal of bankruptcy cases from 2017 to 2021. There is an overall drop in bankruptcy cases over this period, specifically between 2020 and 2021 which recorded a -30.0% decline in registrations.
- The amendments to bankruptcy laws that increased the threshold for bankruptcy claims along with other amendments have naturally reduced the number of such cases filed.

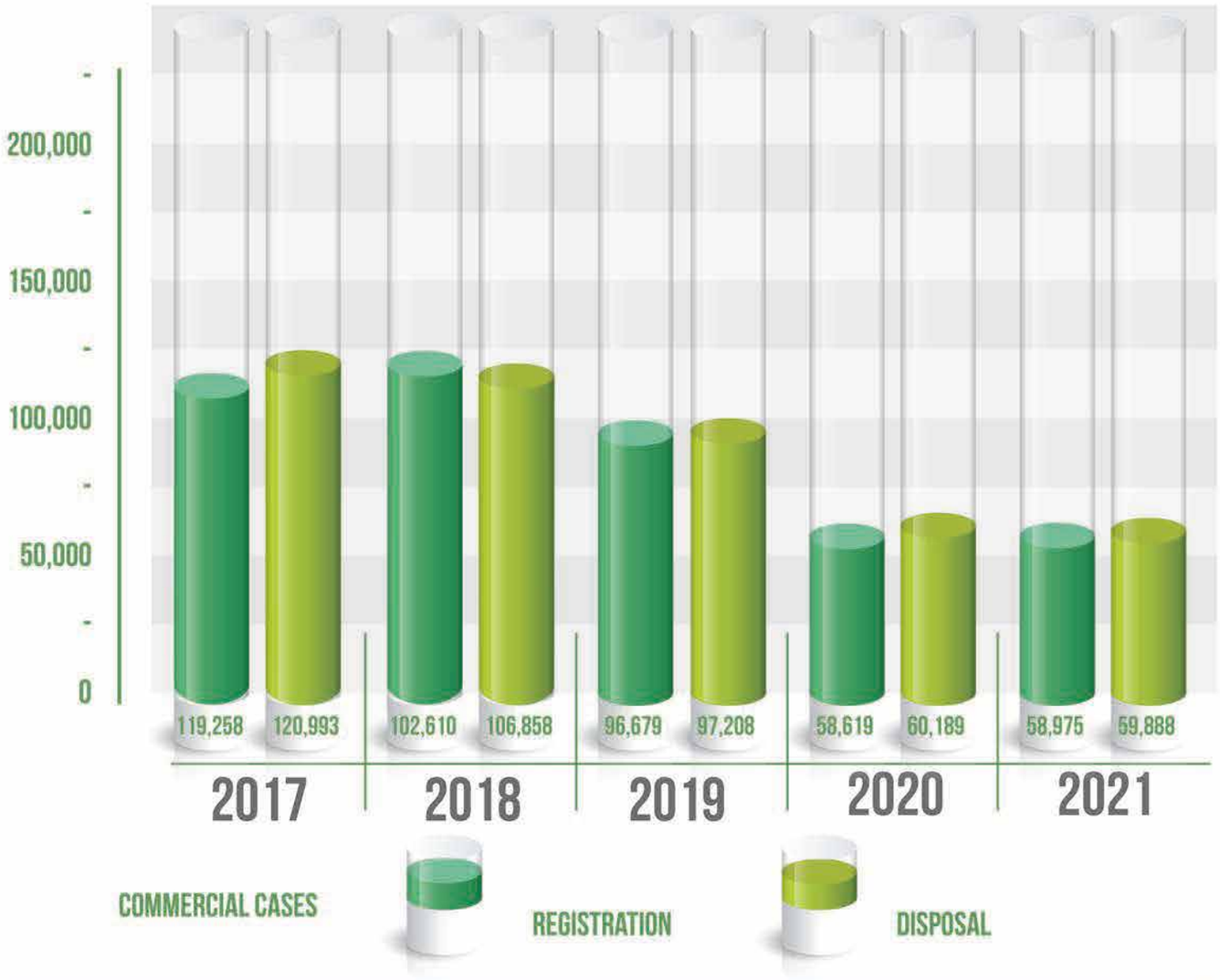
CORPORATE INSOLVENCY CASES

Explanatory Notes:

- **The graph shows the registration and disposal of corporate insolvency cases from 2017 to 2021.**
- **From 2017-2019, there was an increasing trend. The number of cases registered yearly between 2019 and 2021 has been on the decline.**
- **The period between 2020 and 2021 recorded a decline of approximately -5.4% in registrations. The enactment of the Companies Act 2016 and the overall increase in the threshold for corporate insolvency claims, have helped reduce the number of cases.**



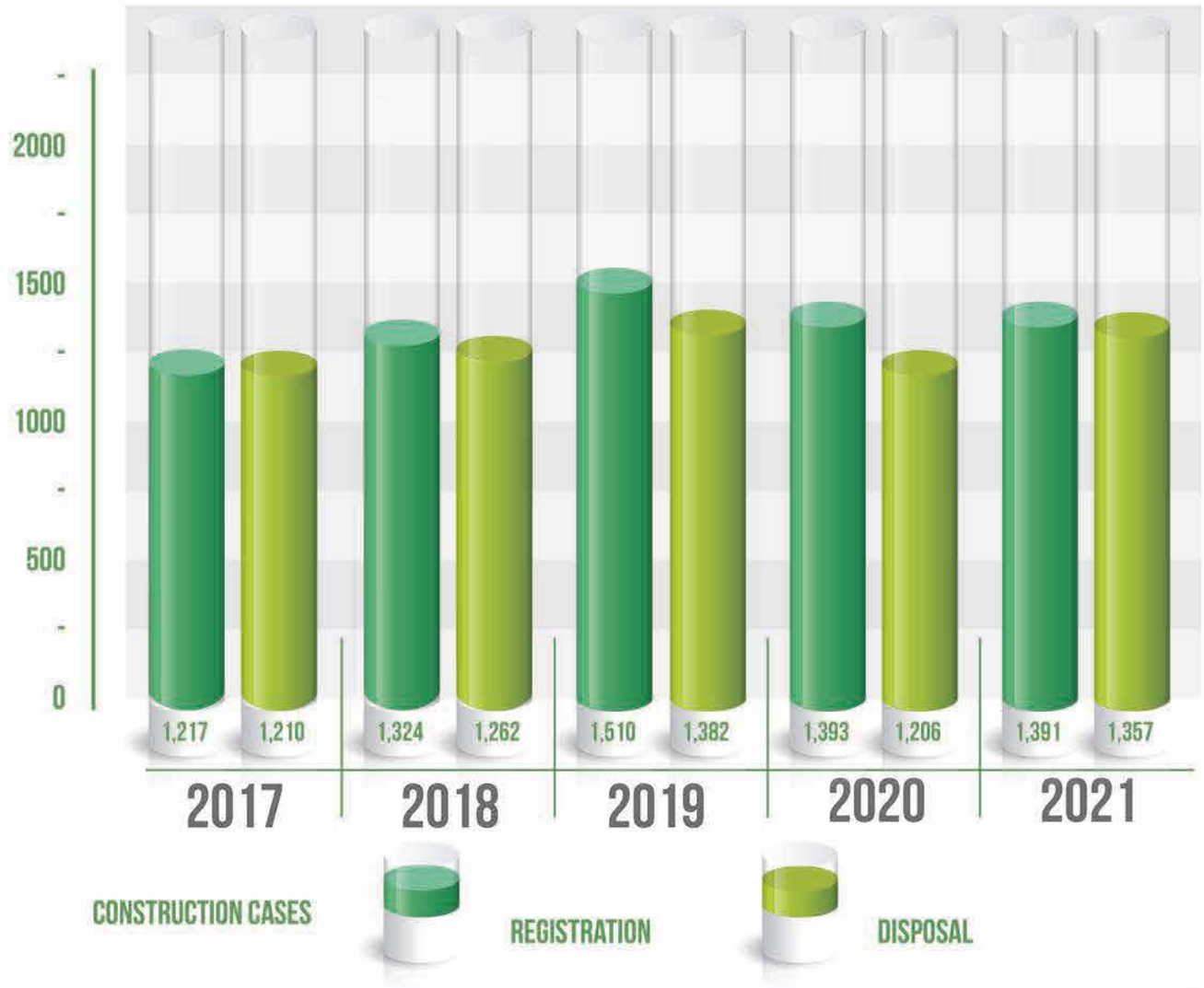
COMMERCIAL CASES



Explanatory Notes:

- **The graph shows the registration and disposal of commercial cases from 2017 to 2021. Commercial cases are of significance, as they are, to some extent, an indicator of the country's economic pulse as disputes show some measure of active business and trade. The number of commercial cases has been on the decline between 2017 and 2021. The drop from 2020 to 2021 was about -0.6%.**
- **However, only 58,975 cases were recorded in 2021 as compared to 119,258 in 2017. This is an alarming drop of about 50.0% over a short period of 5 years.**

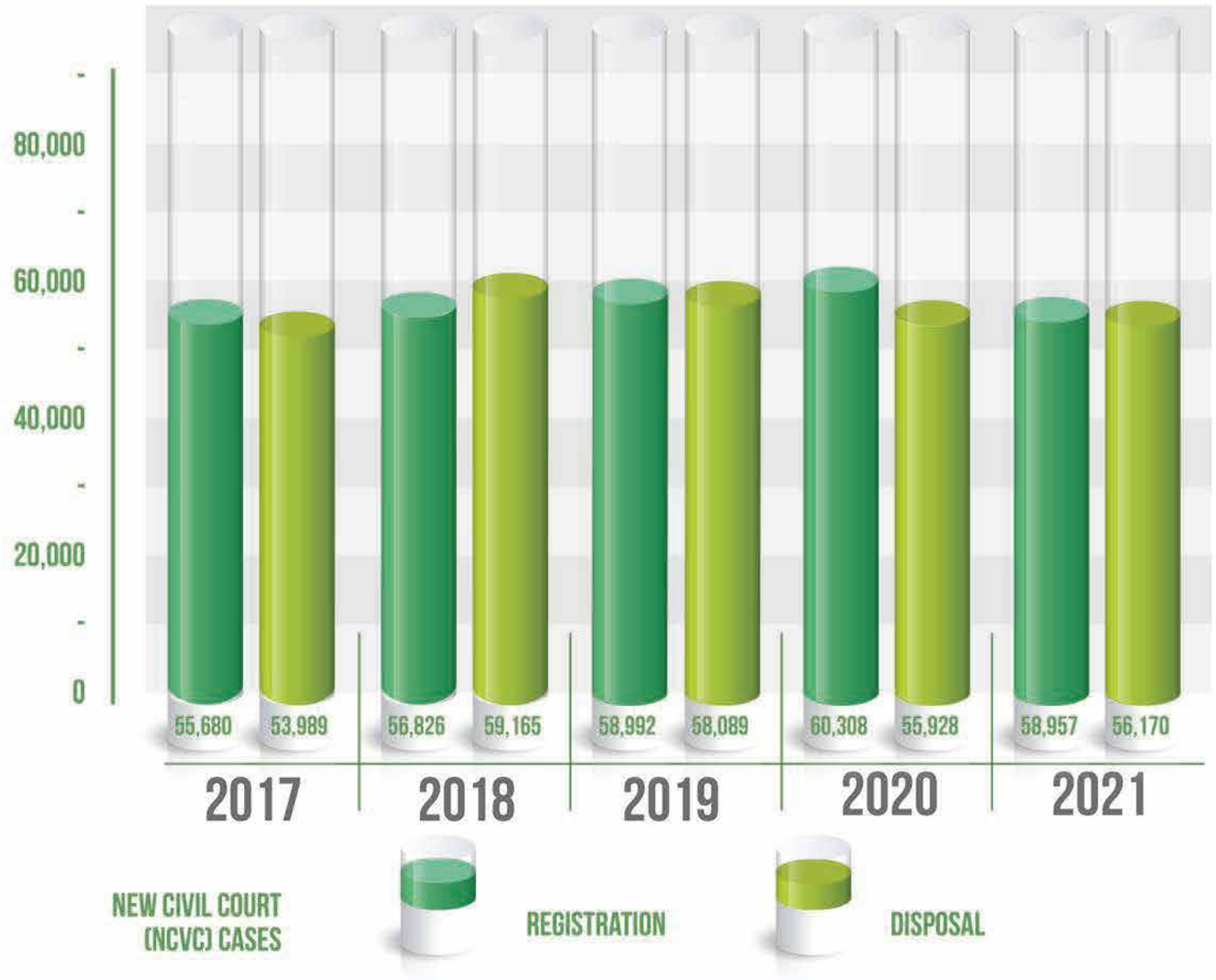
CONSTRUCTION CASES



Explanatory Notes:

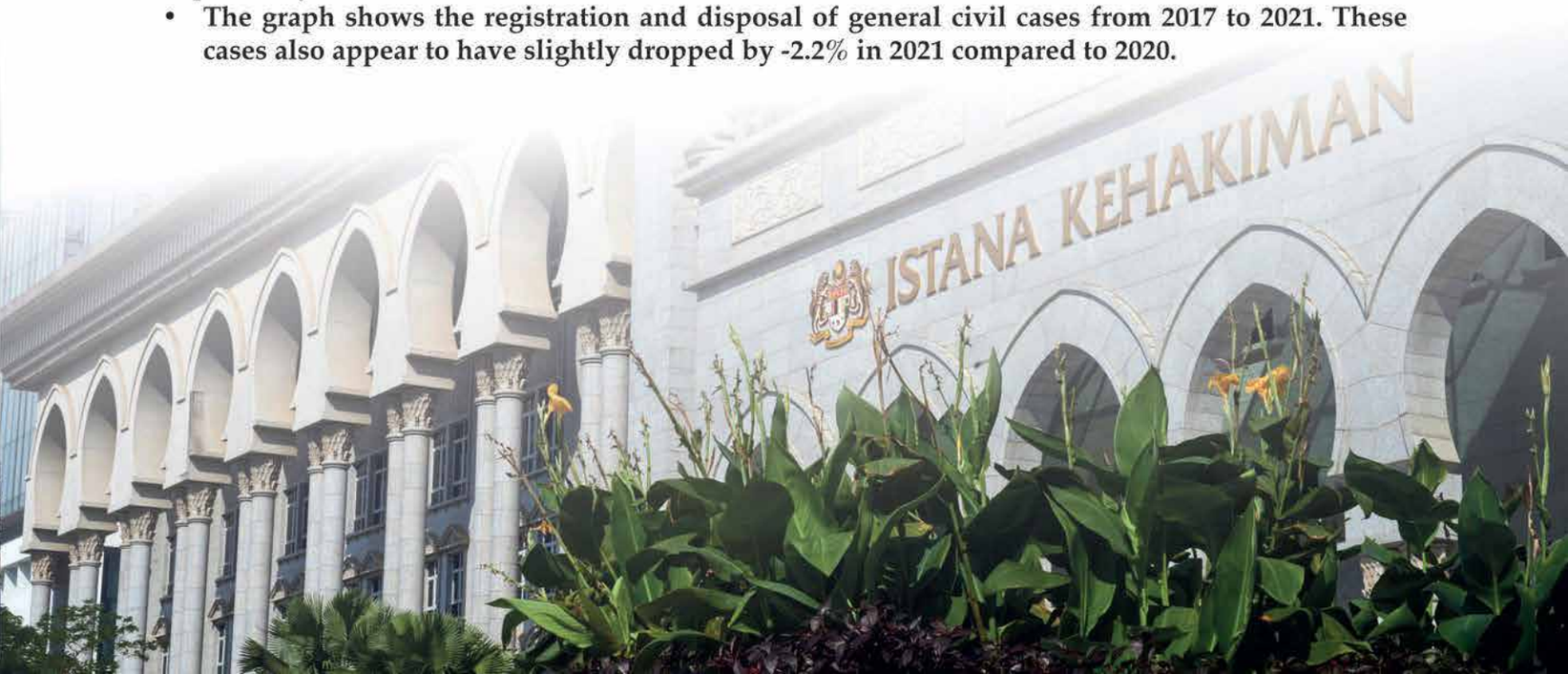
- **The graph shows the registration and disposal of construction cases from 2017 to 2021. The number of construction cases shows a minimal drop with registrations averaging about 1,200 cases a year.**
- **This may well be attributable to the pandemic and the construction industry payment and adjudication mechanism as well as other alternative dispute resolution mechanisms in place.**

NEW CIVIL COURT (NCVC) CASES



Explanatory Notes:

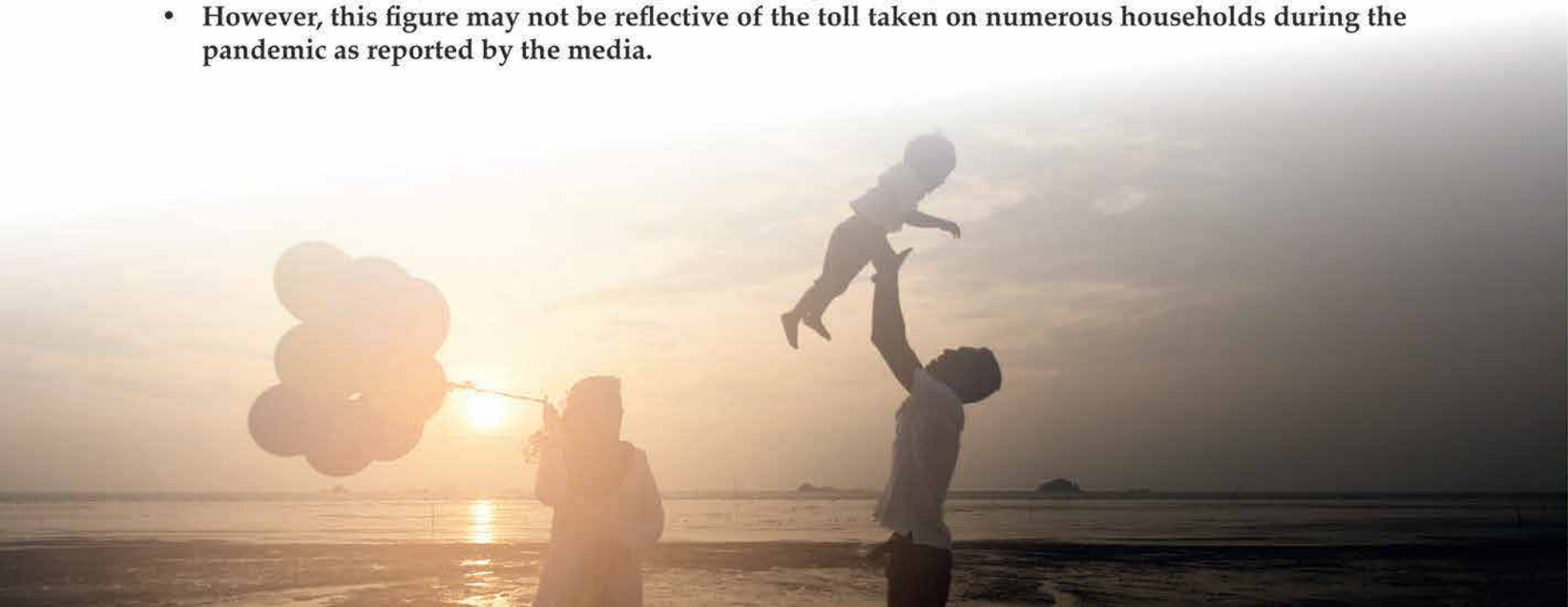
- **The graph shows the registration and disposal of general civil cases from 2017 to 2021. These cases also appear to have slightly dropped by -2.2% in 2021 compared to 2020.**



FAMILY CASES

Explanatory Notes:

- **The graph shows the registration and disposal of family cases from 2017 to 2021. The number cases increased by 6.1% in 2021 compared to the previous year.**
- **However, this figure may not be reflective of the toll taken on numerous households during the pandemic as reported by the media.**



ENVIRONMENTAL CASES

Explanatory Notes:

- **The graph shows the registration and disposal of environmental cases from 2017 to 2021. The registration of these cases has also seen a decline for the period between 2017 and 2020. In year 2020 to 2021 there was an increase. 2017 recorded 1,565 cases whereas 2021 recorded 857 cases or a 15.7% increase from 2020.**

THE EDITORIAL COMMITTEE

L - R. Mdm. Chang Lisia, Justice Faizah Jamaludin, Justice Nallini Pathmanathan, Dr Noradura Hamzah, Justice Azizul Azmi Adnan, Mr. Nik Muhammad Azrin Hafiz Nik Mahmood, Mr. Kho Feng Ming, Mdm. Chan Jia Kay and Justice Liza Chan Sow Keng

[Justice Ravinthran Paramaguru, Mdm. Suzarika Sahak and Mdm. Rafiah Yusof were unable to attend.]

(First row, L - R): Justice Faizah Jamaludin, Justice Nallini Pathmanathan, Justice Azizul Azmi Adnan and Justice Liza Chan Sow Keng.
(Second row, L - R): Mdm. Chang Lisia, Dr Noradura Hamzah, Mr. Nik Muhammad Azrin Hafiz Nik Mahmood, Mr. Kho Feng Ming and Mdm. Chan Jia Kay.

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