

THE MALAYSIAN JUDICIARY



YEARBOOK 2022



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Cover

"The Kangar Court Complex, located at Bukit Lagi, Seriab, Kangar "



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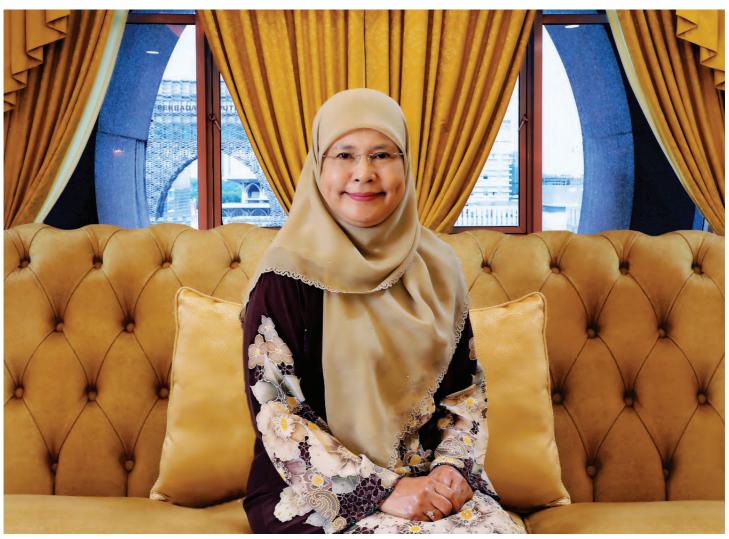
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Foreword

By The Right Honourable Tun Tengku Maimun Tuan Mat

Chief Justice of Malaysia



Alhamdulillah, I am delighted to present to you the Malaysian Judiciary Yearbook 2022 which features a comprehensive record of the significant events and performances of the Courts during 2022, as well as valuable insights from the present members of the Bench on various topics.

As the Country transitioned into the endemic phase of COVID-19 in 2022, the Malaysian Judiciary continued to provide judicial services, maintaining all safety and health precautions, and remaining committed to the constitutional mandate of dispensing justice fairly and impartially. During this period, the Malaysian Judiciary is still heavily reliant on technological

advancements such as e-review and virtual hearings, which have now become permanent features of our judicial system.

In reviewing the year 2022, several monumental events deserve recognition. In July, the newly constructed Kangar Court Complex was officially opened. The complex was constructed at a cost of RM39 million and is equipped with state-of-the-art technology and facilities. It consists of a three-storey building that houses a High Court, two Sessions Courts, two Magistrate's Courts, and administrative offices and facilities. The courtrooms are fully equipped with Recording Voice to Text (RVT) and Case Management



Systems (CMS). I am confident that these facilities will enhance the efficiency and productivity of Court officers and staff in handling cases, as well as improve the delivery system of judicial services provided to all users in Perlis.

There were two significant international events hosted by the Malaysian Judiciary in 2022, namely the 10th Council of ASEAN Chief Justices' Meeting ("CACJ") and the Inaugural ASEAN plus 3 meeting. The 10th CACJ serves as a platform for discussion and cooperation among ASEAN judiciaries, focusing on a wide range of core issues pertaining to judicial cooperation and collaboration. The meeting was attended by the Chief Justices and the heads of delegations of member countries, as well as their judges and other senior judicial officials who are members of the CACJ Working Groups. In the meeting, Justice Mohamad Zabidin Mohd Diah, who replaced Tan Sri Dato' Sri Azahar Mohamed, and Justice Abang Iskandar Abang Hashim respectively, led working groups that successfully presented and produced two core CACJ documents. These are the Model Rule for Evidence in Civil and Commercial Matters in Foreign Proceedings and a Governance Framework for Artificial Intelligence in ASEAN Courts.

In addition, I was honoured to be elected Chairman of the CACJ from 2022 to 2024 for a two-year term. I hope to fulfill this trust and responsibility to the best of my ability, to foster understanding and close cooperation among ASEAN judiciaries.

The Inaugural ASEAN plus 3 meeting was held in November 2022 to exchange information and discuss technological developments and the use of technology to facilitate access to justice. It was a hybrid meeting of the ASEAN Chief Justices and the representatives of the People's Republic of China, Japan, and the Republic of Korea.

The year 2022 also marked the beginning of the Malaysian Judiciary's Judicial Tour Program, or "Jelajah Kehakiman", which is a nationwide roadshow that promotes the legal services provided by the Malaysian Judiciary. It is part of our corporate social responsibility initiative to increase access to justice and legal literacy among the general public. A number of stakeholders were involved in the firstever program, such as the Royal Malaysian Police, the Ministry of Health, the Insolvency Department, the National Registration Department, the Road Transport Department and the Malaysian Bar / State Bars. As of 2022, the program has been implemented in Kota Bharu, Kelantan, and Kuching, Sarawak, and will be expanded to other states in the future.

As a whole, the Judiciary has performed well in 2022, and I am proud of its achievements. Over the coming years, I am confident that the Judiciary will continue to provide justice to the highest standards and improve its accessibility and delivery.

I would like to take this opportunity to thank all the judges, judicial officers, staff, enforcement agencies, the Bar and the Attorney General and his officers for the outstanding work carried out by them throughout the year, and without whom the many achievements of 2022 would not have been possible. I would also like to thank the Yearbook Committee, led by the Court of Appeal Judge, Justice Azizul Azmi Adnan, and all contributors for their commitment and effort in producing this publication.

I hope that this yearbook will be a valuable resource for all those who are interested in the work of the Malaysian Judiciary.

> Tun Tengku Maimun Tuan Mat Chief Justice of Malaysia



Preface

By Justice Azizul Azmi Adnan

Judge of the Court of Appeal, Editor of the Malaysian Judiciary Yearbook 2022



It is a great honour for me to welcome you to the yearbook of the Malaysian Judiciary for 2022.

The yearbook is intended to form a record of the events of the year, as well as a repository of the notable stories in the annals of the judiciary; stories that are hoped to inspire, educate and perhaps amuse.

However the yearbook is necessarily only an incomplete record of the events of the past year, which has seen the convictions of a former prime minister affirmed by the apex court, and the astonishing and unprecedented attack on a member of the judiciary.

These events and the stories behind them will in the fullness of time be someday told, but for the moment they will remain quite beyond the scope of this year's yearbook.

I wish to record my thanks and appreciation to all the contributors to this year's edition, and to my colleagues in the editorial committee. Despite the ever-present demands of time on your busy schedules, you have still done your part to ensure the timely publication of the yearbook, for which I am grateful. My appreciation also goes to Tan Sri Nallini Pathmanathan and the previous chief editors—Tan Sri Idrus Harun and Tan Sri Zainun Ali—for your guidance and leadership. The heights we scale are only possible because we stand on the shoulders of giants.

Justice Azizul Azmi Adnan Editor



OLD SUPREME COURT



THE OPENING OF THE LEGAL YEAR 2022



Opening of the Legal Year 2022

After a year's hiatus due to the movement restriction orders caused by the COVID-19 pandemic, the Opening of the Legal Year ceremony for Peninsular Malaysia resumed in 2022. The Opening of the Legal Year 2022 ("OLY 2022") was held at the Palace of Justice, Putrajaya on January 14, 2022 with the theme "Access to Justice and the New Normal".

The hybrid ceremony (physical and virtual attendance) was attended by the Judges of the Federal Court, the Court of Appeal and the High Courts, and Judicial Commissioners. Invited guests who attended the ceremony included the former Chief Justices of Malaysia, Tun Arifin Zakaria and Tun Md Raus Sharif, the then Minister in the Prime Minister's Department (Parliament and Law), YB Dato' Sri Dr. Hj Wan Junaidi Tuanku Jaafar, the then Deputy Minister in the Prime Minister's Department (Parliament and Law), YB Datuk Wira Hajjah Mas Ermieyati Samsudin, the Attorney General of Malaysia, Tan Sri Idrus Harun, and the then President of the Malaysian Bar, Mr. AG Kalidas.

The Judiciary was honoured with the presence of the Chief Justice of the Supreme Court of the Republic of Indonesia, the Right Honourable Professor Dr. Muhammad Syarifuddin, SH, MH, the Chief Justice of the Supreme Court of the Philippines, the Right Honourable Mr. Justice Alexander G Gesmundo, the Chief Justice of the Supreme Court of the Republic of Singapore, the Right Honourable Justice Sundaresh Menon, and the then Deputy Chief Justice of the Constitutional Court of Indonesia, the Honourable Mr. Justice Aswanto, at the OLY 2022.

The OLY 2022 commenced with a ceremonial procession at 9.00 a.m., followed by a speech by the then President of the Malaysian Bar, Mr. AG Kalidas. Mr. Kalidas began his speech by addressing the challenges to public health and the rule of law brought about by the COVID-19 pandemic. He went on to highlight the initiatives between the Bar, the Judiciary, the government and the Attorney General's Chambers in 2021 by touching first on the Bar's support of the Judiciary's role in implementing remote





Speech by Mr. AG Kalidas, President, Malaysian Bar

hearings during the pandemic and affirming the Bar's commitment in protecting and upholding the independence of the Judiciary.

Mr. Kalidas went on to mention the initiatives by the Bar with the support of the government during the pandemic including the establishment of the COVID-19 Mediation Centre (PMC-19), continued access to legal services during the lockdown period in mid-2021 and the call to increase funding for the National Legal Aid Foundation. He also highlighted the Bar's support of the government's effort in the defence of universal human rights as well as the Bar's stand and concerns on freedom of speech and assembly, occurrence of death in custody, the plight of migrant workers and also on sustainable development and climate change.

Mr. Kalidas expressed his gratitude to the Attorney General's Chambers ("AGC") for its role on matters concerning the legal profession notably the amendment to the Legal Profession Act 1976 as well as its related rules and hoped that the AGC would provide reasons to the public when it decides

to discontinue to prosecute a public interest case at any stage, in order to preserve the people's trust and confidence.

Mr. Kalidas concluded his speech by mentioning several initiatives by the Bar for its members in 2021 including reducing or waiving its members' annual subscription and levies as well as subsidising the professional indemnity premium, offering up to five free counselling sessions, establishing a "peer support network" for sexual harassment survivors, approving a new ruling to include sexual harassment in a professional setting as a misconduct under section 94(3) of the Legal Profession Act 1976, and approving the concept of virtual offices.

The next speech was by the Attorney General of Malaysia, Tan Sri Idrus Harun. In his speech Tan Sri Idrus highlighted the role played by the AGC in providing legal support to the government in its effort to curb the spread of COVID-19. He mentioned that the AGC worked closely with the policymakers to identify the most appropriate mechanism to enforce the Standard Operating Procedures ("SOPs") so as to





Speech by Tan Sri Idrus Harun, The Attorney General of Malaysia

strike a balance between public health and continued livelihood of the people.

He further reiterated that, through the hard work of his officers, seven Emergency Ordinances under clause 2B of Article 150 of the Federal Constitution, two new Acts namely the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 and the Temporary Measures for Government Financing (Coronavirus Disease 2019 (COVID-19)) Act 2020 as well as 73 subsidiary legislation under section 11 of the Prevention and Control of Infectious Diseases Act 1988 were enacted.

Tan Sri Idrus also spoke of the AGC's role in the passing of the Syariah laws pertinent to matters affecting Muslims including congregational prayers, vaccination and management of death of COVID-19 patients. He also expressed his gratitude to his officers for keeping the legal machinery working during the pandemic by utilising various technological platforms to conduct remote hearings, appeals, meetings as well as international conferences. He also praised the Judiciary for the digitalisation of

the justice system and is pleased with the robust, long-standing partnership between the AGC, the Judiciary and the Bar.

Tan Sri Idrus also cited the AGC's own advancement in information technology and the accolades it had received in that regard. He concluded his speech by pledging his commmitment towards ensuring a fair, transparent and efficient delivery of the justice system in Malaysia.

The final speech at the OLY 2022 was that of the Chief Justice of Malaysia. The Right Honourable Tun Tengku Maimun Tuan Mat began her speech by welcoming and thanking all guests who were in attendance, both physically and virtually. Her Ladyship said that the ceremony was a special one as it marked the tremendous efforts and lengths that everybody had gone through since the onslaught of the COVID-19 pandemic.

The Chief Justice emphasised that the Judiciary alone does not hold the key to "access to justice" and acknowledged that the Executive and the Legislature, as well as the Bar and the AGC played a pivotal role in



The Right Honourable Tun Tengku Maimun Tuan Mat delivering the final speech

enabling the people to gain access to the courts during the pandemic. Her Ladyship went on to emphasise the role played by the various reforms introduced by the Judiciary since 2009 in facilitating the technological advancements to enable it to cope with the pandemic.

The Chief Justice continued by highlighting the recent developments the Judiciary had initiated throughout the course of the pandemic. Her Ladyship first touched on the virtual courts and online hearings which were made possible with the introduction of section 15A of the Courts of Judicature Act 1964 that allows criminal and civil proceedings to be conducted remotely using remote communication technology. The Chief Justice also announced that the Judiciary was in the midst of formulating a practice direction on hybrid criminal trials at the superior and subordinate courts to allow parties to be present physically in the open court or remotely from any suitable location.

Her Ladyship announced the improvements the Judiciary had implemented to enhance the court processes including the expansion of the e-Court platform in all court locations throughout the

peninsular, the expansion of the recording and voice to text (RVT) system in three hundred and twenty (320) court locations, the enhancements to the e-Jamin system as well as the cashless payment of fines and summonses, the introduction of the e-Plead Guilty or ePG system for specific traffic offences, the introduction of artificial intelligence (AI) to assist in sentencing and the revision of getting-up fees and the selection criteria for assigned counsel in capital crime cases.

The Chief Justice also touched on the proposal to amend certain laws to enhance the Judiciary's efficiency including the proposed amendments to limit interlocutory appeals, the amendment to section 137 of the Criminal Procedure Code to allow magistrates to accept online pleas of guilty and the amendment to the provisions of the Criminal Procedure Code relating to notices and records of appeal to allow service of those document via electronic means.

Her Ladyship continued by announcing the opening of six new courtrooms of the High Court in Malaya to enable the hearing and disposal of more cases, the relocation of the Kangar Court Complex as well





From L-R:

The Right Honourable Justice Azahar Mohamed, CJM, The Right Honourable Chief Justice Tun Tengku Maimun Tuan Mat, The Right Honourable Justice Rohana Yusuf, PCA and The Right Honourable Justice Abang Iskandar Abang Hashim, CJSS

as certain other courts in Sabah and Sarawak, the construction of a new Ampang court and also the plan to relocate the Shah Alam Court Complex. The Chief Justice went on to announce the government's approval for the use of 25 acres of land in Negeri Sembilan for the construction of the Judicial Academy, a proposed new Nilai court and also the Chief Registrar's Office proposed Data Centre.

International judicial cooperation was another area that was highlighted by the Chief Justice in her Ladyship's speech. Her Ladyship was pleased to announce the collaboration between the Federal Court of Malaysia

and the Supreme Court of the Republic of Singapore on Court-to-Court Communication and Cooperation in proceedings concerning admiralty and shipping law as well as cross-border corporate insolvency matters. The Chief Justice also mentioned the Judiciary's regular engagements with international organisations to enhance judicial best practices including the bi-annual Joint Judicial Conference with Brunei and Singapore, the Council of ASEAN Chief Justices (CACJ), the Standing International Forum of Commercial Courts (SIFoCC) and the Association of Asian Constitutional Courts & Equivalent Institutions (AACC). This concluded the event.





Physical and virtual attendance of guests and judges



Judges of the Federal Court and the Court of Appeal





The Right Honourable Chief Justice Tun Tengku Maimun Tuan Mat with Solicitor General Ahmad Terrirudin Mohd Salleh at the red carpet for the Opening of the Legal Year 2022



 $OLY\ 2022\ committee\ members$



THE OPENING OF THE LEGAL YEAR 2022 SABAH AND SARAWAK



Opening of The Legal Year 2022 in Sabah and Sarawak

The Opening of the Sabah and Sarawak Legal Year 2022 was held on January 21, 2022 at the Kota Kinabalu Court Complex, Kota Kinabalu, Sabah. Dispensed with in 2021 due to the pandemic, this much anticipated annual tradition finally returned with the theme "Access to Justice and the New Normal".

In strict compliance with the pandemic restrictions, the ceremony began at approximately 7.30 a.m. with the arrival of the Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun Tuan Mat at the venue who was greeted by the traditional instrumental music performance, the *Kulingtangan*. Immediately after her Ladyship's arrival, group photography sessions were held as she was joined by the Right Honourable President of the Court of Appeal, Justice Rohana Yusuf, the Right Honourable Chief Judge of Malaya, Justice

Azahar Mohamed, the Honourable Attorney General of Malaysia, Tan Sri Idrus Harun, the Honourable State Attorney General of Sabah, Datuk Nor Asiah Mohd Yusof and other honourable and distinguished guests who are all warmly welcomed by the host, the Right Honourable Chief Judge of Sabah and Sarawak, Justice Abang Iskandar Abang Hashim. A short ceremonial procession then ensued from the point of arrival to the entrance of the court complex where the flag-raising ceremony was held. The flag-raising ceremony began with the singing the national and the Sabah and Sarawak state anthems, followed by recitations of doa and Rukun Negara. The delegates then proceeded to the courtrooms for the open court proceedings. As they entered the court complex, they were welcomed by cultural dance performers who then ushered them to the respective courtrooms.



Judges of the Federal Court, stakeholders and delegates at the Opening of the Legal Year 2022

At 9.00 a.m., the open court proceedings commenced with the remarks by the President of the Sabah Law Society, Mr. Roger Chin Ken Fong who illustrated how the pandemic has in fact highlighted the significance of the Judiciary. In his words,

This has altered our perception of court simply as a building. It is not just a physical space. It is a public service.

Embracing fully the measures adopted by the court in responding to the debilitating impacts of the pandemic, he stressed that:

Virtual courts and online services must be viewed as core components of the justice system. They should sit alongside and complement in-person hearings.

He applauded the Judiciary, the legal professionals and all who work and are involved in the legal system for ensuring the wheels of justice continued to turn despite the global health crisis.

Mr. Roger Chin also commented on the Executive's action in suspending Parliament during the state of

emergency and its advice against challenging the State-enacted Syariah laws. Moments like these demand that judges remain true to their oath, to rise above personal sentiments and views, be it communal, religious or political, and to discharge their duty to protect and defend the Constitution. He extolled the Judiciary for its willingness to uphold the Constitution at all times, undaunted by the risks of misunderstanding or politicisation by those who may not appreciate the context of judicial decisions. Ultimately the rule of law and the provisions of the Federal Constitution must always prevail and any concerns as to perception can be managed with tact and diplomacy.

Mr. Roger Chin welcomed the recent constitutional amendment to Article 1(2) and Article 160(2). Only time will disclose the profound implications of these amendments, but he was confident that we were up to a good start. On that note, Mr Roger Chin also called for a more autonomous administration of the courts in Sabah and Sarawak, particularly on the appointment, removal and suspension of judges, judicial officers and supporting staffs as well as on financial management.

To quote:

Insofar as Sabah and Sarawak Courts are concerned, administrative power should not be centralized with Palace of Justice (POJ) and should instead be exercised by the Chief Judge of Sabah and Sarawak (CJSS).

By decentralisation, accurate and well-informed decisions could be made faster as the needs and actual scenario on the ground would be better reflected.

To conclude, Mr. Roger Chin reassured the Chief Justice that the Judiciary has the unwavering support of the Sabah Law Society and that the Sabah Law Society will continue its commitment to sustain efficient and effective administration of justice.

The President of the Advocates Association of Sarawak, Mr. Antonio Sim Peak Khiong was then invited to address the court. He started his speech by recording his pleasure on the passing of the amendments to Article 1(2) and Article 160(2) of the Federal Constitution, deeming such amendments as the first positive step in restoring the special position of Sabah

and Sarawak in Malaysia, and will be looking forward to more constitutional reforms and recognitions in the future particularly on having Sabah and Sarawak's own Judicial Commission and the reinstatement of all the special constitutional rights spelt out in the 18 points memorandum.

Mr Antonio Sim also stressed on the importance of having at least one Bornean judge with Borneo judicial experience presiding over matters involving rights of Sabah and Sarawak in the appellate courts. As much as the Sarawak advocates appreciate and are grateful that this was the current practice in the empanelling of the appellate courts, it was only fitting that the same was reflected in the Courts of Judicature Act 1964.

Further, Mr. Antonio Sim also commended the Judiciary for its innovative approach in overcoming the disabling challenges caused by the COVID-19 restrictions. By utilising fully the digital platform that has been in use since 2007, enhanced and upgraded over time to accommodate remote hearings, the delivery of justice could continue unhindered despite the pandemic. The Judiciary's approach in maintaining constant engagement with all the stakeholders including the



(L-R) The Right Honourable Justice Abang Iskandar Abang Hashim, CJSS, The Right Honourable Chief Justice Tun Tengku Maimun Tuan Mat,
The Right Honourable Justice Rohana Yusuf, PCA and The Right Honourable Justice Azahar Mohamed, CJM

Advocates Association of Sarawak throughout this process was also greatly appreciated and in return, the Advocates Association of Sarawak has always provide positive and unwavering support to the Judiciary's effort in improving access to justice. The Advocates Association of Sarawak was eagerly anticipating a further enhanced system with the implementation of the e-Kehakiman Sabah and Sarawak (e-KSS) project under the newly appointed Chief Judge of Sabah and Sarawak.

The Advocates Association of Sarawak noted an encouraging surge in the number of advocates taking up Yayasan Bantuan Guaman Kebangsaan ("YBGK") cases throughout Sarawak. Now that they have also been actively conducting YBGK training sessions to equip advocates with the necessary skills required, they foresaw more advocates taking up trials and appeals under the legal aid scheme in the near future. The collaborative effort of all four branches of the Advocates Association of Sarawak in setting up a list



Judges and stakeholders at the Opening of the Legal year 2022- Sabah and Sarawak assembling in front of the Kota Kinabalu Court Complex

of advocates qualified to be appointed as assigned counsels also ensures no accused persons indicted with capital punishment charges are left unrepresented. The Advocates Association of Sarawak hoped the Bar's and Bench's collaborative effort in outreach and social responsibility programmes be extended for year 2022.

Moving forward, as the Judiciary is encumbered with high-profile cases involving senior government officials and politicians, the Advocates Association of Sarawak fervently hoped that the Judiciary remain independent and decide cases without fear or favour. The Advocates Association of Sarawak was also delighted to note that now online hearing will be a permanent feature of our

justice system. Parties ought to be given the option of proceedings with either virtual or physical hearing, even for document-heavy and contentious matters, and the Advocates Association of Sarawak was looking forward to engaging the Judiciary further in this regard.

Next to address the court was the Honourable Sabah State Attorney General, Datuk Nor Asiah Mohd Yusof. She opined that the pandemic has spotlighted the limitations in the service delivery of the Sabah State Government. Despite being able to continue with mostly legal advisory, drafting and litigation works credit to the remote hearing technology, the pandemic

has prompted the Sabah State Attorney-General's Chambers to embark on its *Pelan Strategik SAGC* 2022-2026 to implement a digitalised working system to improve both efficiency and standard of service of the Chambers.

For Sarawak, the State Attorney General's address was delivered by Mr. Saferi Ali, the Deputy State Attorney General of Sarawak. He began his speech by welcoming the Right Honourable Tan Sri Dato' Abang Iskandar Abang Hashim to his Lordship's first Sabah and Sarawak Opening of Legal Year presiding as the Right Honourable Chief Judge of Sabah and Sarawak. In rising up to the challenges posed by the pandemic, the Sarawak State Attorney General's Chambers drafted the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Ordinance 2020 [Chapter 78] to allow government departments, agencies, and local authorities to continue with their statutory duties despite the various Movement Control Orders imposed. Extensive use of remote technology was also introduced – after almost two years, the Chambers have managed to master its use and looked forward to its continued deployment.

Despite the pandemic and its challenges, the year 2020 and 2021 have been distinctly eventful for the Sarawak State Chambers: from the Kuching High Court's ruling on the constitutionality of the State Sales Tax (Taxable Goods and Rate of Tax) (Amendment) (No. 2) Order 2018 to the Federal Constitution amendments on Articles 1(2) and 160(2) to the recent pronouncement of the apex court ruling in Busing Anak Jali & 6 Ors v Kerajaan Negeri Sarawak & Anor [Appeal No. 01(f)-31-10/2019(Q)] that finally provided some legal certainty to the status of Pemakai Menoa and Pulau Galau under the Sarawak Land Code. Nonetheless, the items of the Chambers' agenda were far from settled. Steps were being taken to further improve the efficiency in the State legal administration including the elevation and transformation of the Native Court and the placement of Legal Officers in Resident Offices throughout Sarawak and in the State Ministries. To this end, the Chambers assured that it is committed and relentless in its due and fair administration of the law and will continue to work diligently and assiduously in meeting the expectations of the Sarawak people.

The penultimate speech was delivered by the Honourable Attorney General of Malaysia, Tan Sri Idrus Harun. In his reflections, he acknowledged how the pandemic has indeed prompted remarkable shifts in our working culture. He congratulated the entire legal community for being able to adapt swiftly to the sudden change and coping effectively with the situation. He applauded those in the justice system for embracing these challenges and learning to adapt by adopting technology to ensure continuous delivery of justice. For the new legal year 2022, the Chambers aspired that justice continues to be upheld. The Attoney General said:

... these three components of justice – the Judiciary, the Bar and the AGC echo the same aspirations, desires and vision to maintain the rule of law. It is my fervent wish that the Judiciary, the State Bar of Sabah and Sarawak, the State Attorney General's Chambers of Sabah and Sarawak and the AGC continue to collaborate to achieve a better working environment in the name of advocating justice.

The open court proceeding was concluded with the final address by the Right Honourable Justice Abang Iskandar Abang Hashim, the Chief Judge of Sabah and Sarawak who began by welcoming and thanking all who were in attendance for gracing the occasion. His Lordship took the opportunity to congratulate Justice Dr. Lim Hock Leng for his elevation as a High Court Judge on March 25, 2020, Judicial Commissioners Datuk Hajah Zaleha Rose Datuk Haji Pandin and Tuan Alexander Siew How Wai for their appointments on July 10, 2020 and Judicial Commissioner Puan Amelati Parnell for her appointment on April 1, 2021. Well wishes were also directed to Justice Datuk Mairin Idang who had retired on November 21, 2020 after seven long years as a Judicial Commissioner and subsequently High Court Judge in Sabah and Sarawak.

The Chief Judge of Sabah and Sarawak then began recounting the judicial developments in Sabah and Sarawak throughout the years 2020 and 2021, from the enhancement of both physical and digital infrastructures to judicial capacity building. His Lordship firmly believes that:

Access to justice is the most essential aspect of judicial systems worldwide. Without the ability to physically access court buildings and understand court proceedings, other efforts to reform and improve the courts matter little.



His Lordship assured all that:

the Judiciary will continue to provide comfortable, safe and secure court buildings for easy access by members of the public.

His Lordship also highlighted the continuous effort of the High Court of Sabah and Sarawak in strengthening the judicial capacity of its judicial officers, convinced that:

judicial education has become [the] principal tool to provide accountability to the judiciary.

The High Court of Sabah and Sarawak would also be renewing its commitment to environmental protection and conservation, citing them as "one of the judiciary's top priorities in Sabah and Sarawak". To put words into action, programmes involving strategic collaboration and partnership with WWF-Malaysia, Sabah Wildlife Department and the US Department of Justice were already in the pipeline for the year.

His Lordship then proceeded to present on the performance of courts in Sabah and Sarawak. It could be deduced from the statistics at hand that despite the pandemic, there was no marked decline in disposal rates, which could be attributed to the use of online platforms for hearings. His Lordship remarked:

To me, this is a testament of acceptance and cooperation from our stakeholders, particularly members of the respective Bar and the respective Chambers.

Before declaring the opening of the Legal Year for Sabah and Sarawak, His Lordship stated:

It has been a tough and challenging battle, but it was a fight well-fought and worthy [of] every sacrifice that you all made. Let us all continue to do so in our quest to dispense justice to all.

The Opening of the Sabah and Sarawak Legal Year 2022 ended with a gala dinner held at Shangri-La Tanjung Aru Resort, Kota Kinabalu.



Cultural dance performances which took place at the court complex



THE OPENING CEREMONY OF THE KANGAR COURT COMPLEX



Opening of the Kangar Court Complex officiated by The Raja of Perlis, His Royal Highness Tuanku Syed Sirajuddin Ibni Almarhum Tuanku Syed Putra Jamalullail and Raja Perempuan Perlis, Her Royal Highness Tuanku Tengku Fauziah Al Marhum Tengku Abdul Rashid, seen here with the Right Honourable Chief Justice Tun Tengku Maimun Tuan Mat

The opening of the Kangar Court Complex was officated by The Raja of Perlis, His Royal Highness Tuanku Syed Sirajuddin Ibni Almarhum Tuanku Syed Putra Jamalullail and Raja Perempuan Perlis, Her Royal Highness Tuanku Tengku Fauziah Al Marhum Tengku Abdul Rashid on July 5, 2022. Located in Bukit Lagi, Seriab, Kangar on a piece of land measuring slightly more than 9 acres, the complex was constructed at a cost of RM39 million.

The state court of Perlis had previously been operating at Jalan Hospital in Kangar, Perlis since 1962 which housed a Sessions Court and a Magistrate's Court. In 1991, a High Court was established, and the building of the High Court was inaugurated by The Raja of Perlis, His Royal Highness Tuanku Syed Putra Ibni Almarhum Syed Hassan Jamalullail, on November 9, 1991.

This new court complex was completed and handed over by the contractors, the Public Works Department, the Legal Affairs Bureau of the Prime Minister's Department and the Office of The Chief Registrar Federal Court of Malaysia to the Perlis Court on December 16, 2021. This complex houses a High Court, two (2) Sessions Courts and two (2) Magistrates' Courts, all equipped with state-of-the-art systems and facilities.

Each courtroom is equipped with Recording Voice to Text (RVT) and a Case Management System (CMS). The Kangar Court Complex also features many modern amenities and facilities including a conference hall, a library, a Children's Court, and rooms for lawyers and deputy public prosecutors. It is hoped that with these improved facilities, the administration of justice and the delivery of judicial services in the state of Perlis will improve.





Opening Ceremony of the Kangar Court Complex



The Raja of Perlis, His Royal Highness Tuanku Syed Sirajuddin Ibni Almarhum Tuanku Syed Putra Jamalullail and Raja Perempuan Perlis, Her Royal Highness Tuanku Tengku Fauziah Al Marhum Tengku Abdul Rashid in front of the Kangar Court Complex

THE REFERENCE PROCEEDING OF ALLAHYARHAM TUN DR. MOHAMED SALLEH ABAS

Reference proceeding were held for Allahyarham Tun Dato' Dr. Mohamed Salleh Abas on September 14, 2022 at the Palace of Justice, Putrajaya. The proceeding were chaired by the Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun Tuan Mat. The other presiding judges were the Right Honourable the President of the Court of Appeal, Justice Rohana Yusuf, the Right Honourable the Chief Judge of Malaya, Justice Azahar Mohamed and the Right Honourable the Chief Judge of Sabah and Sarawak, Justice Abang Iskandar Abang Hashim. Members of various segments of society were invited to attend the reference proceeding. They included former Chief Justice Tun Md. Raus Sharif, Deputy Minister in the Prime Minister's Department (Parliament and Law), YB Datuk Wira Mas Ermieyati Samsudin, family

members of Allahyarham Tun Salleh, senior members of the Bar and officers of the judicial and legal service.

The proceeding commenced with an address by the Attorney General of Malaysia, the Honourable Tan Sri Idrus Harun. The Attorney General described Allahyarham Tun Salleh's dedication to work as "only one of many attributes of Allahyarham Tun Salleh's outstanding personality as he was a man who was widely respected for his legal wisdom, scholarly bent of mind, and his affable and humble persona".

His speech was followed by that of the President of the Malaysian Bar, Madam Karen Cheah, who highlighted that Tun Salleh "was truly a man of renaissance and had the distinction of serving in the Judiciary, the



Group photo of Allahyarham Tun Salleh's family with the Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun Tuan Mat, the Right Honourable President of the Court of Appeal, Justice Rohana Yusuf, the Right Honourable the Chief Judge of Malaya, Justice Azahar Mohamed, the Right Honourable the Chief Judge of Sabah and Sarawak, Justice Abang Iskandar Abang Hashim, former Chief Justice Tun Md. Raus Sharif, Attorney General of Malaysia, the Right Honourable Tan Sri Idrus Harun and Deputy Minister in the Prime Minister's Department (Parliament and Law), YB Datuk Wira Mas Ermieyati Samsudin

Attorney General's Chambers, as well as being a member of the Malaysian Bar. Not many can claim a similar feat. His legacy is in having left an indelible mark and impact on the legal community through his pronounced actions and deeds".

The proceeding culminated with a special speech by Allahyarham Tun Salleh's granddaughter Ms. Nuralissa Norrazak. She spoke of her grandfather with great affection and respect. She described her grandfather in these words: "Although he may appear as a man of a few words, he was a loving grandfather. Always reminding and teaching all six children and 26 grandchildren about Islam and the importance of seeking knowledge. I had asked several of my cousins how they would describe our late grandfather in a few words. The common ones are: studious (we would always find him reading the day's paper or a book), a workaholic (until he was not able to) and a man of nature (we would always find him in his pagoda t-shirt and *kain pelekat* tending to his orchard)".

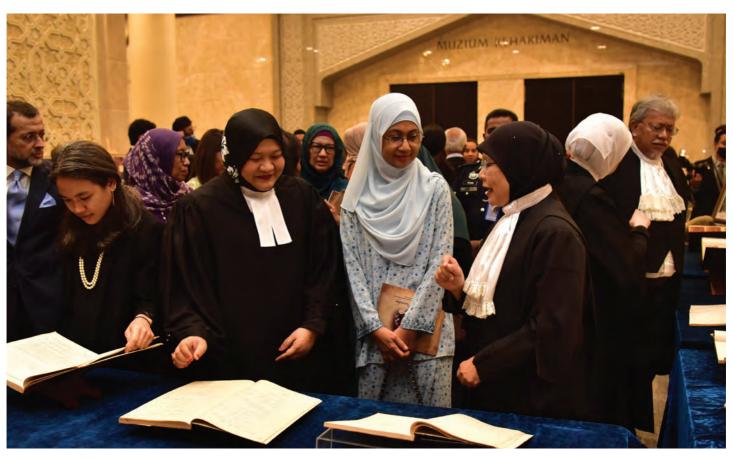
The Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun Tuan Mat then delivered her address on behalf of the Judiciary. Tengku Maimun said the former Lord President was a great and courageous legal luminary as he had staunchly defended the Federal Constitution and championed the Judiciary's independence until the very end. She noted that Tun Salleh had said that judges ought to observe and respect the concept of separation of powers, for judges should not encroach into the domain of the executive or the legislative branches of the government. Tengku Maimun further said that during Tun Salleh's tenure as Lord President, the Malaysian Judiciary had been hailed as a model for other countries in terms of the independence and credibility of the Judiciary.

The Chief Justice then concluded the proceeding with an order that the record of the reference proceedings be kept in the archives of the Judiciary and a copy extended to the family.



Allahyarham Tun Salleh's family members





Allahyarham Tun Salleh's youngest daughter Ms. Azlina Mohd Salleh with the Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun



Ms. Amelia Abdul Halim (Allahyarham Tun Salleh's granddaughter) with her husband Mr. Nazly Ibrahim by his potrait





STATEMENT BY THE RIGHT HONOURABLE CHIEF JUSTICE OF MALAYSIA



The Chief Justice Tun Tengku Maimun Tuan Mat

The Federal Court remains committed to fulfilling its constitutional role as the apex and final appellate court in Malaysia.

As the final appellate court, the Federal Court hears most civil appeals, criminal appeals, and applications for leave to appeal to the Federal Court ("leave applications"). The Federal Court also hears cases under its original and consultative jurisdiction, such as civil and criminal references, criminal applications, and civil and criminal review applications.

In 2022, there were 1,059 newly registered cases and 949 cases brought forward from 2021, totalling 2,008 cases. As of the end of 2022, the Federal Court had disposed of 1,358 cases representing 67.63%, an increase of 15.88% over the disposal rate of 51.75% in 2021. As a result, there are only 650 pending cases carried forward to 2023. Out of 1,059 newly registered cases, 624 are leave applications, 164 are civil appeals, 128 are criminal appeals, 96 are habeas corpus appeals and the remaining 47 are other cases under the original and consultative jurisdiction of the Federal Court.

For leave applications, there were 624 newly registered cases and 519 cases brought forward from 2021, totaling 1,143 cases, out of which the Federal Court disposed of 808 cases with a disposal rate of 70.69%, an increase of 20.31% over the 50.38% disposal rate in 2022. As for civil appeals, there were 164 new cases registered and 114 cases brought forward from 2021, totaling 278 cases, out of which 137 cases were disposed of, representing a disposal rate of 49.28%. The majority of leave applications and civil appeals arose from a range of general civil cases, followed by commercial, insolvency, bankruptcy, admiralty, and family cases.

With regard to criminal appeals, excluding habeas corpus cases ("habeas corpus appeals"), there was a slight increase in the number of new cases registered. There were 128 cases filed in comparison to 104 in 2021. At the end of 2022, a total of 147 cases had been disposed of out of 283 cases, comprising the 128 newly registered appeals as well as 155 appeals brought forward from 2021. Thus, the disposal rate of criminal appeals increased slightly from 47.46% in 2021 to 51.94% in 2022.

In terms of habeas corpus appeals, 96 new appeals were registered and 130 appeals were brought forward from 2021, totaling 226 appeals. A total of 203 appeals representing 89.82% of the cases were successfully disposed of. This represents a major increase of 44.69% in the disposal rate from 54.86% in 2021.

In addition, 47 cases were filed and 31 cases brought forward from 2021 under the original and consultative jurisdiction of the Federal Court, totalling 78 cases, of which 63 cases were disposed of, leaving 15 cases carried forward to 2023. This shows a notable increase of 33.32% in the disposal rate, from 47.45% in 2021 to 80.77% in 2022.

It is significant that 278 of the 539 cases registered relating to criminal appeals, criminal applications, criminal references, and habeas corpus involved drugrelated matters, and 194 of those 278 cases had been successfully disposed of by the Federal Court, for an overall disposal rate of 69.78%.

In reviewing the Federal Court statistics for 2022, I am pleased to report that the year ended on a positive note, which indicates that the Federal Court is steadfastly improving its efficiency in disposing of cases through physical, online, and hybrid proceedings.

It is important to highlight that several administrative changes implemented at the Federal Court since 2019 have substantially contributed to the better disposal rate of the cases. The Federal Court had increased the number of sitting days per week, the number of panels that preside each day, and the number of cases fixed each day. Also, single judge hearings have been introduced to hear leave applications arising from interlocutory appeals.

On this note, I would like to emphasise that the positive and encouraging performance of the Federal Court in 2022 would not have been possible without the continuous and strong cooperation and collaboration among judges, judicial officers, and staff of the Federal Court as well as all stakeholders in the justice system, including law enforcement agencies, members of the Attorney General's Chambers, the Malaysian Bar, the Sabah Law Society, and the Advocates Association of Sarawak. Accordingly, I wish to express my gratitude to each and every one of them for their unrelenting support and dedication.

The year 2022 witnessed the Federal Court bidding farewell to Justice Rohana Yusuf, the former President of the Court of Appeal, Justice Azahar Mohamed, the former Chief Judge of Malaya, and two members of the Federal Court bench, namely Justice Mohd Zawawi Salleh and Justice Zaleha Yusof. Their hard work, commitment, dedication, and outstanding service have without doubt contributed to the success and achievement of the Malaysian Judiciary.

The year 2022 also saw Justice Mohamad Zabidin Mohd Diah being promoted to the Federal Court from the Court of Appeal. I congratulate him and wish him the best of luck.

Tun Tengku Maimun Tuan Mat Chief Justice of Malaysia



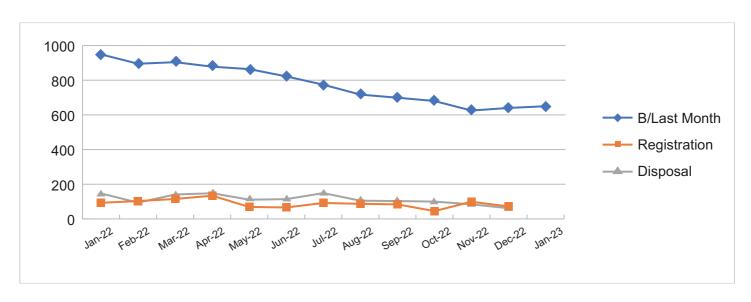
Judges of the Federal Court of Malaysia

- 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
- 15. Justice Mohamad Zabidin Mohd Diah



PERFORMANCE OF THE FEDERAL COURT

NUMBER OF CASES REGISTERED AND DISPOSED OF AND PENDING IN 2022

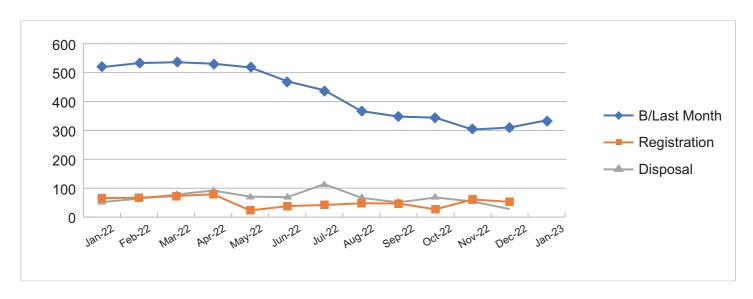


MONTH	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-23
BALANCE LAST MONTH	949	895	904	878	864	822	774	717	699	680	625	640	650
REGISTRATION	93	103	115	134	69	66	92	87	84	45	99	72	
DISPOSAL	147	94	141	148	111	114	149	105	103	100	84	62	

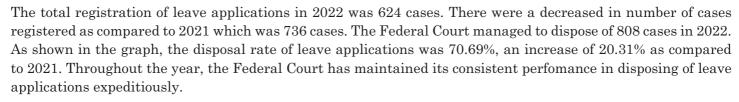
The three main categories of cases in the Federal Court were applications for leave to appeal, civil appeals and criminal appeals. From January 1 to December 31, 2022, 949 cases were brought forward from 2021 and 1,059 new cases were registered. Of these cases, 1,358 were disposed of, leaving only 650 pending at the end of the year. The percentage of disposal was 67.63%. The graph shows the overall perfomance of the Federal Court in 2022.



LEAVE APPLICATIONS IN 2022 NUMBER OF CASES REGISTERED, DISPOSED OF AND PENDING

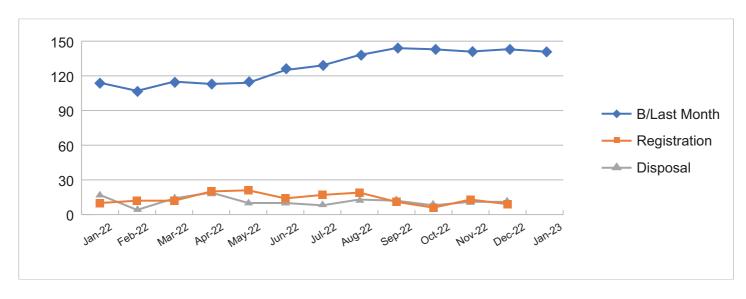


MONTH	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-23
BALANCE LAST MONTH	519	533	536	531	518	470	439	367	348	344	303	310	335
REGISTRATION	66	67	73	79	23	38	42	48	47	27	61	53	
DISPOSAL	52	64	78	92	71	69	114	67	51	68	54	28	





CIVIL APPEALS IN 2022 NUMBER OF CASES REGISTERED. DISPOSED OF AND PENDING

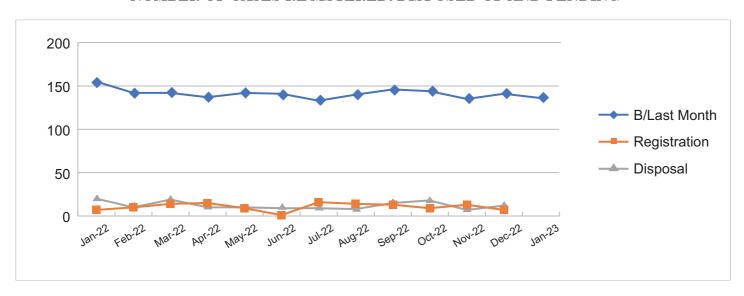


MONTH	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-23
BALANCE LAST MONTH	114	107	115	113	114	125	129	138	144	143	141	143	141
REGISTRATION	10	12	12	20	21	14	17	19	11	6	13	9	
DISPOSAL	17	4	14	19	10	10	8	13	12	8	11	11	

A total 114 cases were brought forward from the previous year and 164 civil appeals were registered. Of this number, 137 cases were disposed of within the year. As shown in the graph, the disposal rate of civil appeals against the cases registered was 49.28% with 141 cases brought forward to January 2023.



CRIMINAL APPEALS IN 2022 NUMBER OF CASES REGISTERED. DISPOSED OF AND PENDING

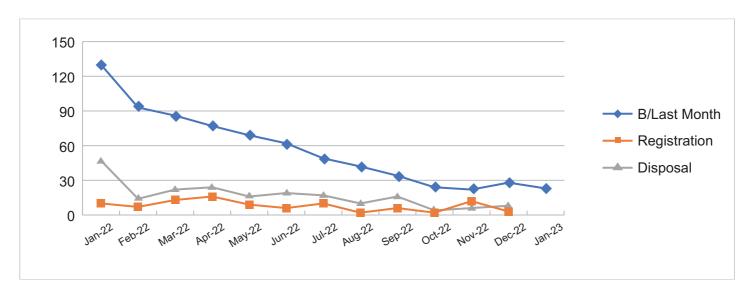


MONTH	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-23
BALANCE LAST MONTH	155	142	142	137	142	141	133	140	146	144	135	141	136
REGISTRATION	7	10	14	15	9	1	16	14	13	9	13	7	
DISPOSAL	20	10	19	10	10	9	9	8	15	18	7	12	



A total of 128 criminal appeals were registered in 2022. A total of 147 cases were disposed of, leaving a balance of 136 appeals by December 31, 2022. As shown in the graph, the disposal rate of criminal appeals was 51.94%, an increase of 4.48% as compared to 2021.

HABEAS CORPUS APPEALS IN 2022 NUMBER OF CASES REGISTERED. DISPOSED OF AND PENDING

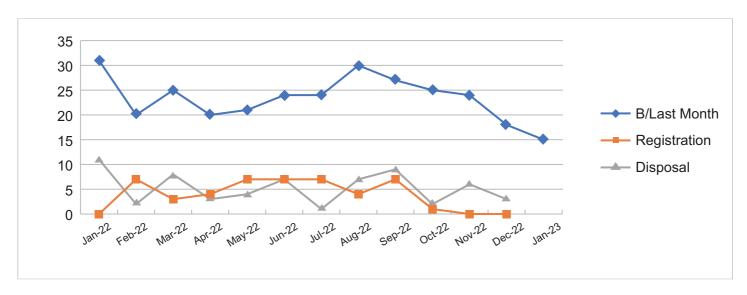


MONTH	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-23
BALANCE LAST MONTH	130	93	86	77	69	62	49	42	34	24	22	28	23
REGISTRATION	10	7	13	16	9	6	10	2	6	2	12	3	
DISPOSAL	47	14	22	24	16	19	17	10	16	4	6	8	

A total of 96 habeas corpus appeals were registered with 203 appeals disposed of in 2022, leaving only 23 cases pending at the close of year. As shown in the graph, the percentage of disposal of habeas corpus appeals was 89.82%, an increase of 44.69% as compared to 2021.



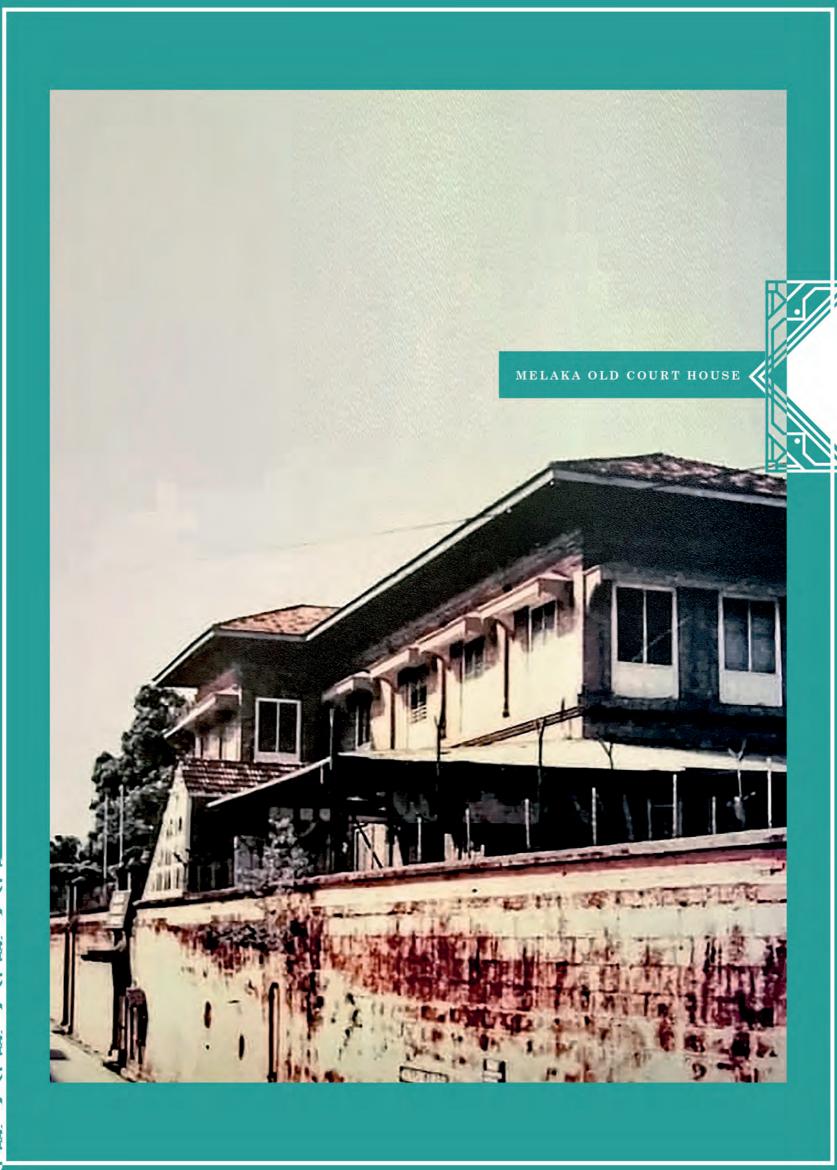
ORIGINAL JURISDICTION/CIVIL REFERENCE/CRIMINAL REFERENCE/CRIMINAL APPLICATION/CIVIL OR CRIMINAL REVIEW APPLICATION IN 2022 NUMBER OF CASES REGISTERED. DISPOSED OF AND PENDING



MONTH	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-23
BALANCE LAST MONTH	31	20	25	20	21	24	24	30	27	25	24	18	15
REGISTRATION	_	7	3	4	7	7	7	4	7	1	_	_	
DISPOSAL	11	2	8	3	4	7	1	7	9	2	6	3	

A total of 47 cases were registered for other matters comprising original jurisdiction, reference (civil dan criminal), criminal applications and review applications (civil and criminal), 63 cases were disposed of, leaving a balance of 15 cases at the end of 2022. As shown in the graph, the percentage of disposal was 80.77%.









STATEMENT BY THE RIGHT HONOURABLE PRESIDENT OF THE COURT OF APPEAL



The President of The Court of Appeal Justice Rohana Yusuf

The Court of Appeal sits as the second highest court below the Federal Court. The court has no original jurisdiction. By virtue of Article 121(1B) of the Federal Constitution, the jurisdiction of the court is to determine appeals from the decisions of the High Court in relation to civil or criminal cases and any other jurisdiction given by or under federal law. Since its inception in 1994, the Court of Appeal has followed through to fulfil the objective of its establishment, which has gradually transformed the judicial landscape.

At the Court of Appeal, the proceedings are heard and disposed of by a panel of three (3) judges or such greater uneven numbers as the President of the Court of Appeal may determine.

At the start of 2022, we had twenty-eight (28) judges on the Court of Appeal Bench. But during the year we lost four (4) of them to retirement. They were Justice Mohd Sofian Tan Sri Abd Razak who retired on January 1, 2022, followed by Justice Darryl Goon Siew Chye on June 22, 2022, Justice Nor Bee Ariffin

on August 29, 2022, and Justice Haji Ghazali Haji Cha on October 17, 2022. To all the retired judges, I would like to record my immense gratitude for their service 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 happier note, we witnessed the elevation of Justice Mohamad Zabidin Mohd Diah to the Federal Court on February 3, 2022. On the same date, Justice Mohd Nazlan Mohd Ghazali was appointed as a judge of the Court of Appeal. May I take this opportunity to congratulate both of them on their elevation and I am sure they will undoubtedly continue to contribute towards the development of the law with their diverse backgrounds and experiences.

In light of the retirements and elevations, and while awaiting the vacancies to be filled up, I am very grateful for the assistance and support rendered by my learned brother and sister judges in the High Court (who had been nominated by the Chief Judge of Malaya) whenever called upon to assist at the Court of Appeal. Their continuous cooperation and efforts are very much appreciated. And I cannot thank each of them enough. My special thanks also goes to the Chief Judge of Malaya for his invaluable support and co-operation.

The Court of Appeal was active throughout 2022. As at December 31, 2022, 6,300 appeals were pending in the Court of Appeal. Out of the 6,300 appeals pending, 33.46% were pre-2022 appeals. The remaining cases are appeals from 2022, which constitute 66.54% of the appeals pending.

In 2022, the Court of Appeal saw a registration of 5,219 new appeals. This is an increase of 226 appeals from 2021. There were 6,307 appeals brought over from 2021, making it a total of 11,526 appeals pending in Court of Appeal in 2022. The Court of Appeal disposed of a total of 5,226 appeals in 2022. The percentage of disposal is 45.34% of the total appeals pending in 2022.

The pandemic has left us with a sizeable backlog. The impact was so sudden and pervasive. The accumulation of the outstanding backlog has been addressed continuously and all the judges of the Court of Appeal have been working exceptionally hard to reduce the backlog by ensuring the speedy and effective resolution of cases. In this context, the virtual courts platform has been immensely helpful, because

it enabled us to accommodate more sittings than our physical courtrooms allow.

The shift to virtual platforms, accelerated by the pandemic, with a view of making better use of technology and enhancing access to justice, has facilitated the speedy and efficient disposal of cases. Throughout the period, civil appeals were disposed of remotely. Nevertheless, criminal appeals, due to the nature of the case, require onsite attendance.

For the year 2022, the Court of Appeal disposed of 4,032 civil appeals from the 4,105 cases registered in 2022 and 4,537 cases carried forward from 2021, leaving 4,610 appeals pending disposal. This translates to a disposal rate of 46.7%. As for criminal cases, a total of 1,114 criminal appeals were registered in 2022 and 1,770 criminal appeals were carried forward. A total of 1,194 appeals were disposed of, leaving 1,690 appeals pending. Out of these 1,690 appeals, 801 are pre-2022 appeals. This is a disposal rate of 41 %. This rate is an improvement from the disposal rate in the year 2021 which was only 34%. On this note, I am very pleased and proud to say that the Court of Appeal judges, court officers, and support staff have shown remarkable fortitude in carrying out their tasks.

Similar to the other levels of the court, sensitive cases known as public interest cases are part of the number of cases being heard. These cases concern a wide variety of issues which attract broad public concern such as violation of laws and regulations by respected figures, abuse of authority, as well as those which are a danger to public health or safety. Throughout 2022, the Court of Appeal disposed of 51 civil appeals and 4 criminal appeals of public concern. Being high profile cases, priority was given for their completion. Thus, a targeted case processing strategy was deployed aimed at their early disposal. These appeals, though frequently subjected to intense scrutiny by the media and members of the general public, were adjudicated and disposed of in accordance with normal procedures and applying the rule of law.

I was appointed as the President of the Court of Appeal on December 5, 2019. Prior to that, on November 25, 2019, I was designated by the Right Honourable the Chief Justice to exercise the powers and perform the duties of the post following the retirement of Tan Sri Dato' Sri Ahmad Hj Maarop. This year is my last year as the President of the Court as I retire on November 9, 2022.



My duties as the President of the Court of Appeal have been made easy by all my dear brother and sister judges at the Court of Appeal. Despite the heavy burdens shouldered by them, their full co-operation has always been assured. I must place on record that the *esprit de corps* amongst the Court of Appeal judges is exemplary. Each one of the judges are ever willing to stand in for their colleagues in times of need. So much so very rarely do we have to postpone appeals on account of any ill health of our members. My deepest appreciation to all of them and may I say that I am very fortunate to have them on the Court of Appeal Bench.

In achieving this, I recognise and acknowledge that the Court of Appeal would not have achieved these results without the contribution of the Registrar of the Court of Appeal beginning with Dato' Hasbi Hassan who is now the Chief Registrar of the Federal Court, followed by Puan Norliza Othman (now judge) and Puan Jumirah Marjuki who has always been ably assisted by Puan Kanageswari Nalliah and all the registrars and staff of the Court of Appeal.

Last but not least, my gratitude also goes 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 in assisting us in improving and serving the public better. Our achievements thus far would not have been possible without their continuous support.

Before I end, I sincerely apologise if there have been any errors on my part during my tenure in the Judiciary. I am happy that the Judiciary will continue to flourish in the good hands of the Chief Justice, The Right Honourable Tun Tengku Maimun Tuan Mat and her new team.

Justice Rohana Yusof

The President of the Court of Appeal

Judges of the Court of Appeal

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



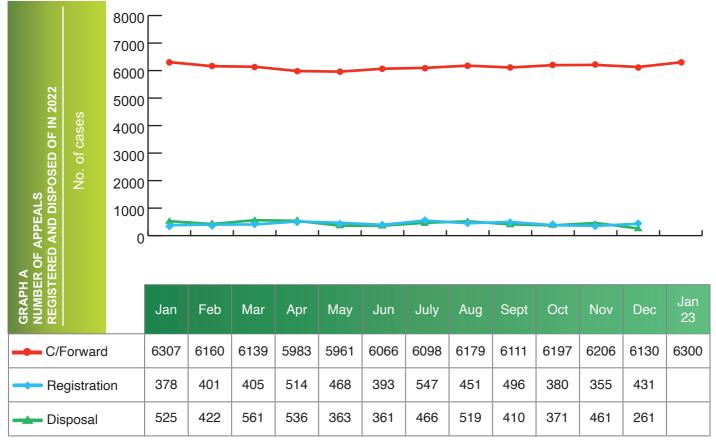
PERFORMANCE OF THE COURT OF APPEAL

As at December 31, 2022, there were 6,300 appeals pending in the Court of Appeal. Out of the 6,300 appeals pending, 33.46% are pre-2022 appeals. The rest are appeals filed in 2022, which constitute 66.54% of the appeals pending.

In 2022, the Court of Appeal saw a registration of 5,219 new appeals. This is an increase of 226 appeals from 2021. There were 6,307 appeals brought forward from 2021 making it a total of 11,526 appeals pending in the Court of Appeal in 2022. The Court of Appeal disposed of a total of 5,226 appeals in 2022, amounting to 45.34% of the total appeals pending in 2022.

The overall performance of the Court of Appeal in 2022 can be seen in Graph A.

 ${\bf GRAPH~A}$ NUMBER OF APPEALS REGISTERED AND DISPOSED OF IN 2022

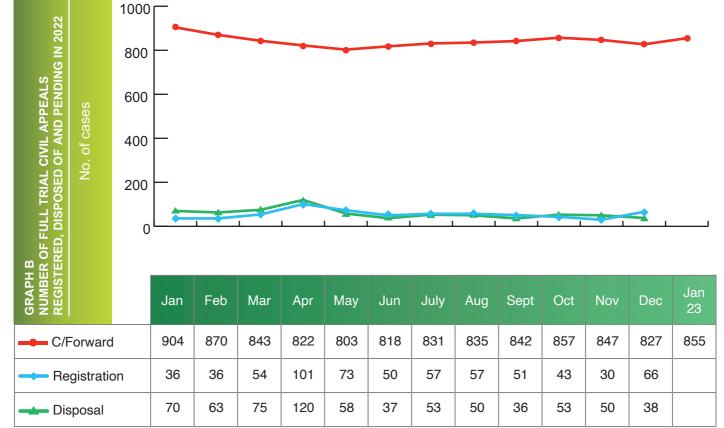


Full Trial Civil Appeals

Full Trial Civil Appeals (FT Appeals) are appeals which do not fall under the categories of New Commercial Court Appeals (NCC), New Civil Court Appeals (NCvC), Muamalat Appeals, Intellectual Property Appeals (IP), Admiralty Appeals, and Construction Court Appeals.

In 2022, a total of 654 FT Appeals were registered. There were 904 FT Appeals carried forward from 2021. A total of 703 appeals were disposed of, leaving 855 appeals on the list. Out of these 855 appeals, 298 are pre-2022 FT Appeals. The Court of Appeal's performance in relation to FT Appeals is shown in Graph B.

GRAPH B $\label{eq:continuous} \mbox{NUMBER OF FULL TRIAL CIVIL APPEALS REGISTERED,} \\ \mbox{DISPOSED OF AND PENDING IN 2022}$



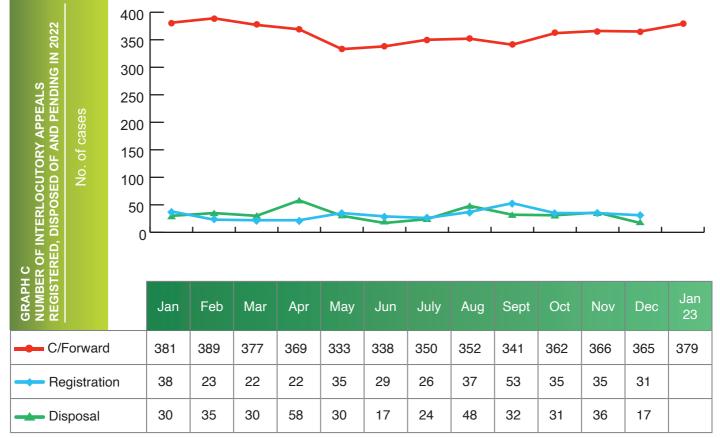


Interlocutory Appeals

Interlocutory Appeals (IM Appeals) are appeals which originate from an interlocutory application at the High Court and do not fall under the categories of NCC Appeals, NCvC Appeals, Muamalat Appeals, IP Appeals, Admiralty Appeals, and Construction Court Appeals.

In 2022, a total of 386 IM Appeals were registered. Added to that, there were 381 IM Appeals carried forward from 2021. By the end of 2022, 388 appeals had been disposed of, leaving 379 appeals which are still pending. Out of this figure, only 87 are pre-2022 appeals. The figure of the IM Appeals registered, disposed of and pending for the year 2022 are shown in Graph C.

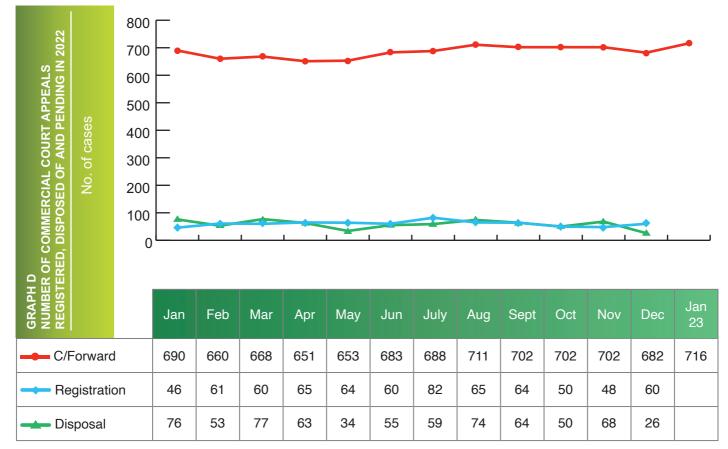
GRAPH C $\label{eq:continuous}$ NUMBER OF INTERLOCUTORY APPEALS REGISTERED, $\label{eq:continuous}$ DISPOSED OF AND PENDING IN 2022



Commercial Court Appeals

In 2022, a total of 725 Commercial Court Appeals (NCC Appeals) were registered. This number is inclusive of NCC Appeals after full trial and appeals from interlocutory applications. A total of 690 appeals were carried forward from 2021. Out of these appeals, 699 appeals were disposed of. There are 716 appeals which are still pending before the Court of Appeal. Out of this figure, 141 cases are pre-2022 cases. The number of NCC Appeals registered, disposed of and pending in 2022 is shown in Graph D below.

GRAPH D NUMBER OF COMMERCIAL COURT APPEALS REGISTERED, **DISPOSED OF AND PENDING IN 2022**



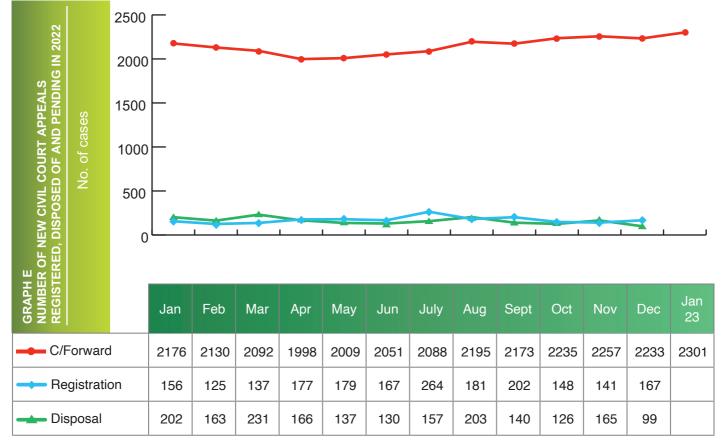


New Civil Court Appeals

There were 2,044 New Civil Court Appeals (NCvC Appeals) registered in 2022. This number is inclusive of NCvC Appeals after full trial and appeals from interlocutory applications. A total of 2,176 appeals were carried forward from 2021. Out of these appeals, 1,919 had been disposed of by the end of the year, with a balance of 2,301 cases, of which 644 appeals are pre-2022 appeals. The number of NCvC Appeals registered, disposed of and pending in 2022 can be seen in Graph E.

GRAPH E

NUMBER OF NEW CIVIL COURT APPEALS REGISTERED,
DISPOSED OF AND PENDING IN 2022

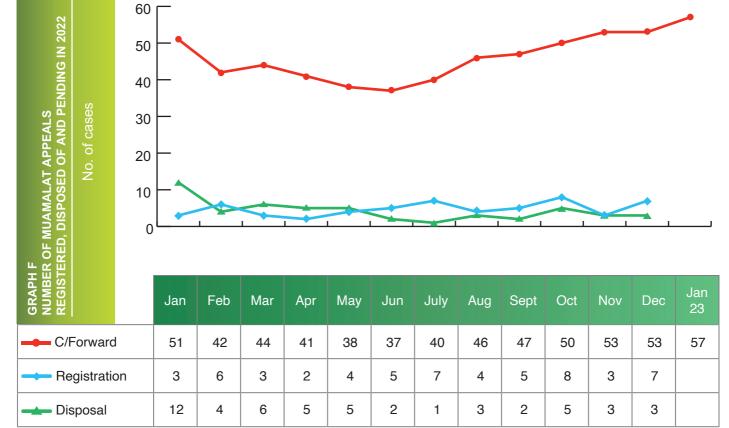




Muamalat Appeals

A total of 57 Muamalat Appeals were registered in 2022. This number is inclusive of Muamalat Appeals after full trial and appeals from interlocutory applications. In addition, there were 51 appeals carried forward from the previous year. A total of 51 appeals were disposed of in 2022, leaving a balance of 57 appeals pending before the Court of Appeal. 14 out of the 51 appeals are pre-2022 appeals. The number of Muamalat Appeals registered, disposed of and pending in 2022 can be seen in Graph F.

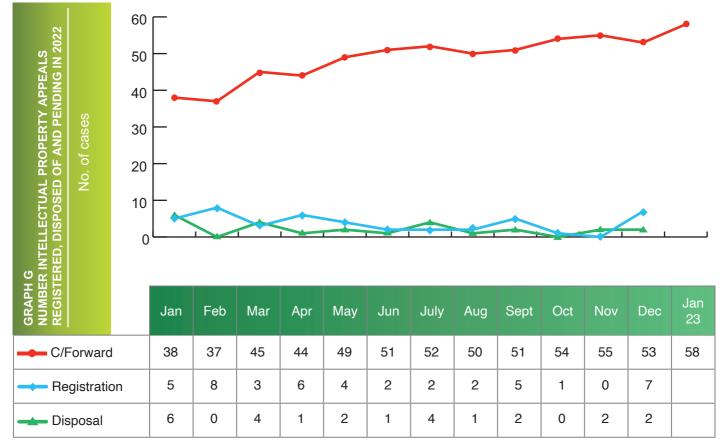
 $\label{eq:GRAPHF}$ NUMBER OF MUAMALAT APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2022



Intellectual Property Appeals

There were 38 Intellectual Property Appeals (IP Appeals) carried forward from 2021. In addition to that, there were 45 appeals registered in 2022. This number is inclusive of IP Appeals after full trial and appeals from interlocutory applications. Out of these appeals, 25 appeals were disposed of, leaving a balance of 58 appeals which are still pending. Out of this figure, only 18 appeals are pre-2022. These figures are shown in Graph G below.

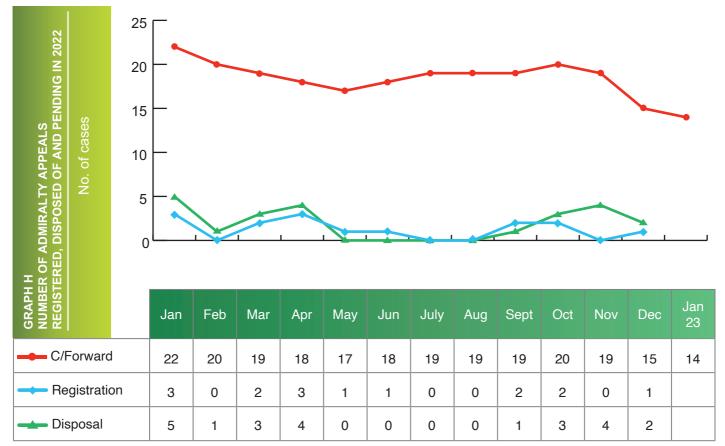
 $\label{eq:GRAPHG}$ NUMBER INTELLECTUAL PROPERTY APPEALS REGISTERED, DISPOSED OF AND PENDING IN 2022



Admiralty Appeals

In 2022, 15 appeals were registered. This number is inclusive of Admiralty Appeals after full trial and appeals from interlocutory applications. In addition to that, there were 22 appeals carried forward from 2021. There were 23 appeals disposed of, leaving a balance of 14 appeals pending of which 14 are pre-2022 appeals and 43 appeals are appeals registered in 2022. The performance is as illustrated in Graph H below.

GRAPH H $\label{eq:hydro} \mbox{NUMBER OF ADMIRALTY APPEALS REGISTERED, DISPOSED OF } \mbox{AND PENDING IN 2022}$



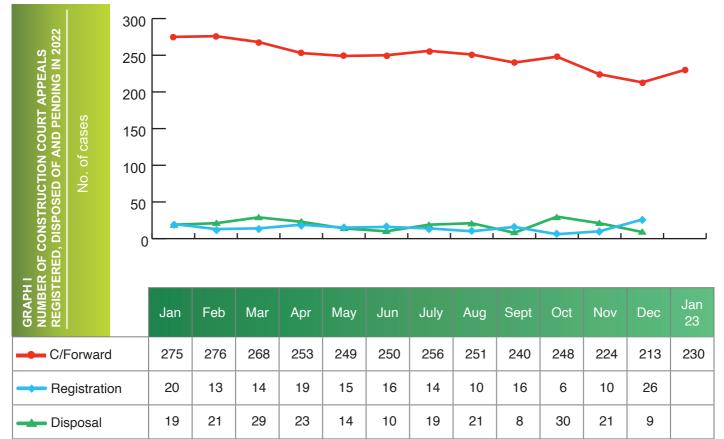


Construction Court Appeals

In 2022, 179 Construction Court Appeals were registered. This number is inclusive of Construction Court Appeals after full trial and appeals from interlocutory applications. 275 appeals were carried forward from 2021. A total of 224 appeals were disposed of, leaving a balance of 230 appeals. Out of these 275 appeals, 97 appeals are pre-2022. The performance is as presented in Graph I below.

GRAPH I

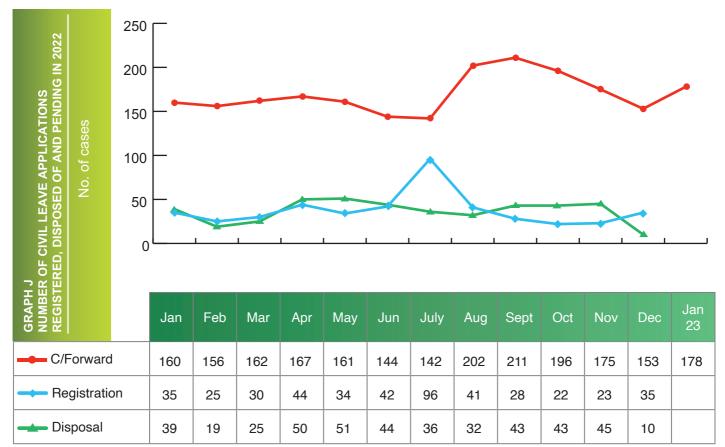
NUMBER OF CONSTRUCTION COURT APPEALS REGISTERED,
DISPOSED OF AND PENDING IN 2022



Civil Leave Applications

In 2022, 455 Civil Leave Applications were registered. In addition to that, 160 Civil Leave Applications were carried forward from the previous year. A total of 437 Civil Leave Applications were disposed of, leaving a balance of 178 applications. The number of registered, disposed of and pending Civil Leave Applications in 2022 can be seen in Graph J.

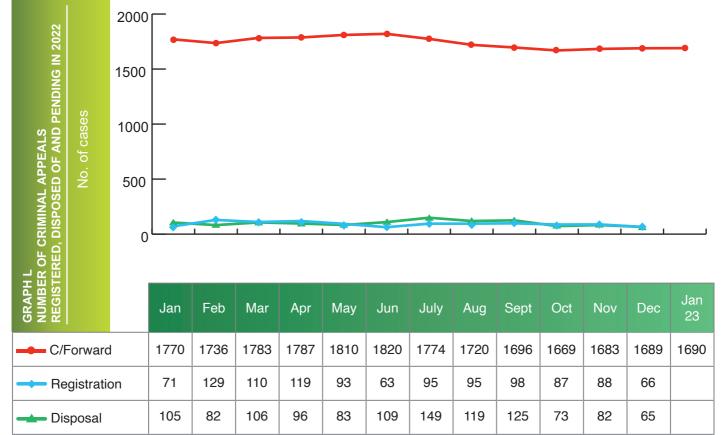
GRAPH J $\label{eq:continuous} \mbox{NUMBER OF CIVIL LEAVE APPLICATIONS REGISTERED,} \\ \mbox{DISPOSED OF AND PENDING IN 2022}$



Criminal Appeals

A total 1,114 Criminal Appeals were registered in 2022. There were 1,770 Criminal Appeals carried forward from 2021. A total of 1,194 appeals were disposed of, leaving 1,690 appeals pending. Out of these 1,690 appeals, 801 are pre-2022 appeals. The number of criminal appeals registered, disposed of and pending in 2022 is shown in Graph L below.

 $\label{eq:GRAPHL} \mbox{NUMBER OF CRIMINAL APPEALS REGISTERED, DISPOSED OF } \mbox{AND PENDING IN 2022}$



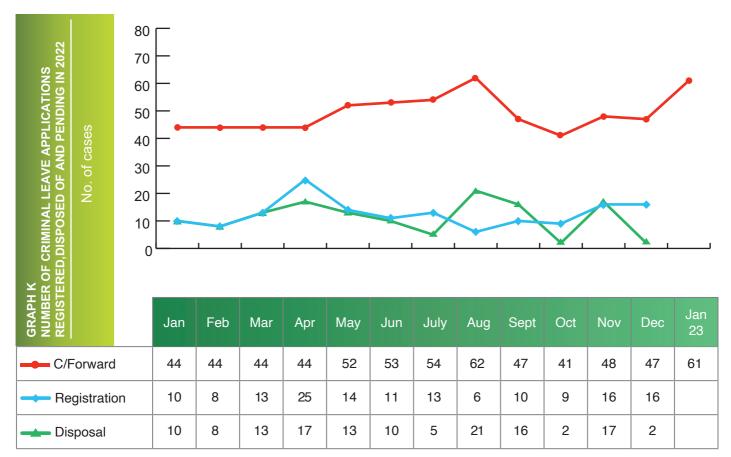


Criminal Leave Applications

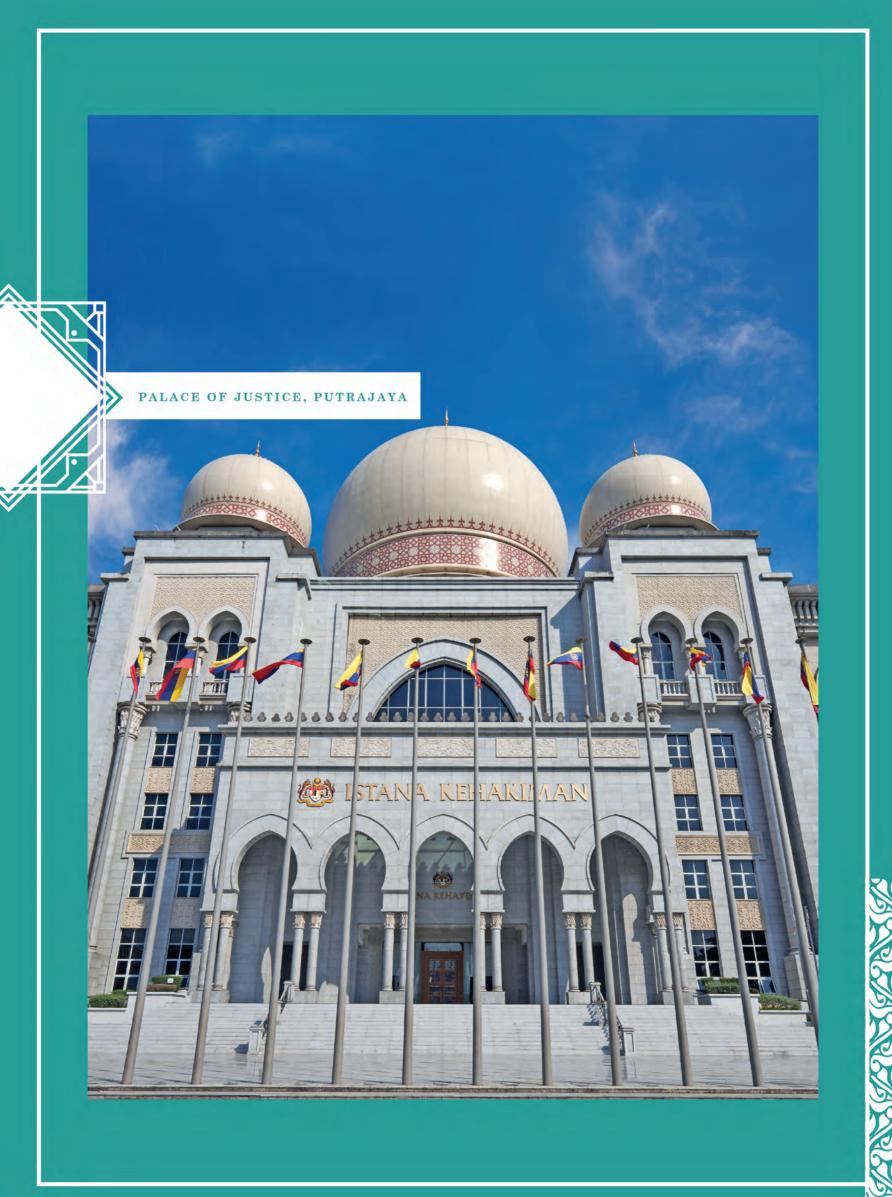
In 2022, 151 Criminal Leave Applications were registered. In addition to that, 44 Criminal Leave Applications were carried forward from the previous year. A total of 134 Criminal Leave Applications were disposed of, leaving a balance of 61 applications. The number of registered, disposed of and pending Criminal Leave Applications in 2022 can be seen in Graph K.

GRAPH K

NUMBER OF CRIMINAL LEAVE APPLICATIONS REGISTERED,
DISPOSED OF AND PENDING IN 2022









STATEMENT BY THE RIGHT HONOURABLE CHIEF JUDGE OF MALAYA



The Chief Judge of Malaya, Justice Azahar Mohamed

It is with the greatest pleasure that I present this Statement for the High Court in Malaya.

With the transition from the COVID-19 pandemic to an endemic state, and as the tumultuous force of the pandemic recedes, our main focus for the year 2022 has been to find ways to increase the rate at which cases are disposed of in order to deal with the increase of cases filed and the backlog of cases in the High Court as well as the subordinate courts as a result of the pandemic.

At the same time, after years of intermittent movement control restrictions and as life returns to normal, judges, judicial commissioners, judicial officers and staff also have an important role to play in ensuring the administration of justice continues to be delivered in a safe environment as COVID-19 is not completely behind us.

The past lockdowns and movement control restrictions have caused the volume of outstanding cases to grow. The pandemic has left us with a sizeable backlog.

Trial dates are now fixed further and further into the future. While we have to contend with the very old cases and clear the backlog, the newly-registered cases coming to us need to be monitored and dealt with promptly in line with the prescribed timelines. Failure to deal with the cases promptly and effectively leads to delayed justice and frustrated litigants It also undermines public confidence.

Our immediate aim for 2022 was to deal with the backlog of cases and to ensure the simultaneous speedy and current disposal of cases within the prescribed timelines. At the individual court levels, judges were reminded to continue with the several initiatives that were introduced in the previous year. There should be strict adherence to the timetable for the conduct of hearings and trials. On the appointed date, cases must and should proceed with minimal delay. In line with the Arahan Amalan Ketua Hakim Negara Bil. 1/2019 (Chief Justice Practice Direction No. 1/2019) judges were reminded to avoid last-minute postponements. Judges were also required to work at full capacity both physically and virtually by increasing sitting days and increasing the number of cases fixed per day.

Judges are however constantly reminded that justice cannot be compromised in the quest for greater efficiency and speed in the disposal of cases. This is addressed by emphasising, among others, on the importance of quality judgments handed down at all levels of the Judiciary. A well-reasoned judgment is the hallmark of a good judge. In order to enhance judges' judicial skills in various areas of judge-craft, judges participate in continuing legal education. Judicial training is now an integral part of the judicial life of our judges. Continuing judicial training is crucial to ensure judges acquire and develop the skill and knowledge necessary to perform their role to the highest professional standard. To this end, my office works closely with the Malaysian Judicial Academy which provides judicial training to judges to enhance productivity and inspire judges to achieve judicial competency and excellence. For the year 2022, the training programme focusesd on "writing better judgments" with the prime objective of assisting judges to develop and enhance their skills and techniques in judgment writing by using the 5Cs approach, i.e. clear, concise, comprehensive, coherent and convincing.

Good and strong case management contributes immensely to a more efficient running and conduct of hearings to meet the stipulated timeframes. It should add value to the litigation process and judges should be actively involved in case management. Judges should not be mere timekeepers and just follow the timelines set. For just and expeditious disposal of cases, the conduct of cases should not be left to the parties. Judges should provide appropriate direction.

To deal with the issue of delayed justice and frustrated litigants, we relied heavily on remote hearings to accelerate the disposal of cases. We developed a new mindset in conducting hearings and trials and the way we function as an institution. Now more than ever, digital transformation is important to prepare our courts for the future. The traditional idea of an "open court" involving the judge, counsel and all parties being physically present in an open public courtroom at the same time is being replaced with hearings conducted via video conferencing, especially in civil and commercial cases. Generally, there is now recognition that remote hearings can secure a just, expeditious and economical disposal of cases. Of course, remote hearings may not be suitable in all cases and some cases may be inherently unsuitable. Nonetheless, remote hearings are a permanent feature in our justice system, and they are here to stay. As stated by the Right Honourable Chief Justice on the occasion of the Opening of the Legal Year 2022 on January 14, 2022:

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 hearings is not merely a means to cope with the pandemic but a permanent feature of our justice system. There is, therefore, no question of "reverting".

In this regard, judges must sharpen their ICT skills and continue enhancing their knowledge on how to conduct remote hearings and trials effectively and efficiently. It is necessary for judges to adjust and adopt the available technologies in order to ensure they are conversant with the ever-changing rigour of virtual hearings as it is in the interest of justice to do so.

I am happy to state for the period between January and December 2022, a total of 5,070 criminal cases were registered in the various courts of the High Court



in Malaya and 4,861 cases were disposed of. For civil cases, a total of 111,852 cases were registered and 120,549 cases were disposed of.

The disposal rates of cases in the subordinate courts in Peninsular Malaysia for the year 2022 were equally remarkable. A total of 42,467 criminal cases were registered in all the Sessions Courts in Peninsular Malaysia and 45,066 cases were disposed of. As for civil cases, a total of 45,339 cases were registered and 44,923 cases were disposed of.

Similar success was achieved in the Magistrates' Courts throughout Peninsular Malaysia. A total of 2,036,274 criminal, departmental and traffic summons cases were registered and a total of 2,057,680 cases were disposed of. For civil cases, a total of 162,224 cases were registered and 160,764 cases were disposed of.

The high number of cases disposed of by these courts reflect the hard work and tireless efforts put in by the judges, judicial commissioners and judicial officers in discharging their judicial functions. I wish to put on record my personal appreciation to all of them for their hard work in 2022 and hope for better results in 2023.

On a different note, the year 2022 witnessed the retirement of Judges of the High Court in Malaya, namely Justice Mohd Yazid Mustafa and Justice Ab Karim Ab Rahman as well as three Judicial Commissioners, namely Judicial Commissioner Awang Armadajaya Awang Mahmud, Judicial Commissioner Maidzuara Mohammed and Judicial Commissioner Amirudin Abd Rahman. I take this opportunity to thank them for the services they have rendered to the Judiciary and the country, and wish them a happy and healthy retirement.

Last year we witnessed the elevation of a Judge of the High Court in Malaya to the Court of Appeal, namely Justice Mohd Nazlan Mohd Ghazali. I would like to congratulate him on his appointment and I am certain that his vast experience will be invaluable to the Court of Appeal.

At the same time I wish to congratulate Justice Latifah Mohd Tahar, Justice Amarjeet Singh Serjit Singh, Justice Muniandy Kannyappan, Justice Shahnaz Sulaiman, Justice Evrol Mariette Peters, Justice Ong Chee Kwan, Justice Mohd Radzi Abdul Hamid, Justice Aslam Zainuddin, Justice Julie Lack, Justice Nadzarin Wok Nordin, Justice Quay Chew Soon, Justice Atan Mustaffa Yussof Ahmad and Justice Anand Ponnudurai on their appointment as Judges of the High Court in Malaya.

I am also pleased to welcome the new Judicial Commissioners appointed to the High Court in Malaya, namely Judicial Commissioner Azizan Md. Arshad, Judicial Commissioner Narkunavathy Sundareson, Judicial Commissioner Noor Ruwena Md. Nurdin, Judicial Commissioner Jamhirah Ali, Judicial Commissioner Rozi Bainon, Judicial Commissioner Noor Hayati Mat, Judicial Commissioner Azlan Sulaiman, Judicial Commissioner Kenneth Yoong Ken Chinson St. James, Judicial Commissioner Leong Wai Hong, Judicial Commissioner Noor Hisham Ismail, Judicial Commissioner Roz Mawar Rozain, Judicial Commissioner Fathiyah Idris, Judicial Commissioner Wan Fadhilah Nor Wan Idris, Judicial Commissioner Rofiah Mohamad, Judicial Commissioner Wong Mee Ling, Judicial Commissioner Raja Ahmad Mohzanuddin Shah Raja Mohzan and Judicial Commissioner Suria Kumar Durairaj Johnson Paul.

I am privileged and honoured to be at the helm of the High Court in Malaya for more than three years. As I look back on my career, I am grateful for the opportunities that have come my way and the people who have supported me every step of the way. As this Statement by the Chief Judge of Malaya is my last, I would like to take this opportunity to thank everyone who had helped me along the way. I am extremely fortunate to benefit from the support I received. It is not possible to mention everyone I wish to thank, but they include, the Chief Registrar, the Registrar of the Court of Appeal, the Registrar of the High Court, the Registrar of the Subordinate Courts and all their respective staff and officers. All of them have worked diligently to support and assist me. I must thank all the judges, judicial commissioners, judicial officers and staff of the Office of the High Court for their continuous commitment and hard work in dispensing justice and upholding the integrity of the Judiciary. I would also like to thank all the Managing Judges who assisted me in discharging my administrative role and responsibility. They have done a great job and have helped me in more ways than I can mention.

There is so much that I shall miss about the Palace of Justice, particularly the Federal Court. I enjoyed my work there immensely. It has been my privilege and a pleasure to work with the Chief Justice, the President of the Court of Appeal, the Chief Judge of Sabah and Sarawak and all the other Federal Court judges.

I wish everyone the very best for 2023.

Azahar Mohamed

Chief Judge of Malaya

Judges of the High Court in Malaya

- 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 S.M. Komathy Suppiah
- 17. Justice Ab Karim Ab Rahman
- 18. Justice Wong Kian Kheong
- 19. Justice Choo Kah Sing
- 20. Justice Ahmad Bache
- 21. Justice Mohd Firuz Jaffril
- 22. Justice Rozana Ali Yusoff
- 23. Justice Abu Bakar Katar
- 24. Justice Hayatul Akmal Abdul Aziz
- 25. Justice Faizah Jamaludin
- 26. Justice Ahmad Kamal Md Shahid
- 27. Justice Roslan Abu Bakar
- 28. Justice Abdul Wahab Mohamed
- 29. Justice Hassan Abdul Ghani
- 30. Justice Chan Jit Li
- 31. Justice Muhammad Jamil Hussin
- 32. Justice Wan Ahmad Farid Wan Salleh
- 33. Justice Khadijah Idris
- 34. Justice Tun Abdul Majid Tun Hamzah
- 35. Justice Azmi Abdullah
- 36. Justice Rohani Ismail
- 37. Justice Anselm Charles Fernandis

- 38. Justice Ahmad Fairuz Zainol Abidin
- 39. Justice Mohd Radzi Harun
- 40. Justice Aliza Sulaiman
- 41. Justice Meor Hashimi Abdul Hamid
- 42. Justice Ahmad Shahrir Mohd Salleh
- 43. Justice Latifah Mohd Tahar
- 44. Justice Amarjeet Singh Serjit Singh
- 45. Justice Muniandy Kannyappan
- 46. Justice Shahnaz Sulaiman
- 47. Justice Evrol Mariette Peters
- 48. Justice Ong Chee Kwan
- 49. Justice Mohd Radzi Abdul Hamid
- 50. Justice Aslam Zainuddin
- 51. Justice Julie Lack
- 52. Justice Nadzarin Wok Nordin
- 53. Justice Quay Che Soon
- 54. Justice Atan Mustaffa Yussof Ahmad
- 55. Justice Anand Ponnudurai

Judicial Commissioners of the High Court in Malaya

- Judicial Commissioner Awang Armadajaya Awang Mahmud
- 2. Judicial Commissioner Maidzuara Mohammed
- 3. Judicial Commissioner Norsharidah Awang
- 4. Judicial Commissioner Rohana Abd Malek
- 5. Judicial Commissioner Tee Geok Hock
- 6. Judicial Commissioner Azhar Abdul Hamid
- 7. Judicial Commissioner Arik Sanusi Yeop Johari
- 8. Judicial Commissioner Amirudin Abd Rahman
- 9. Judicial Commissioner Mahazan Mat Taib
- Judicial Commissioner Bhupindar Singh Gurcharan Singh Preet
- 11. Judicial Commissioner Alice Loke Yee Ching
- 12. Judicial Commissioner Ahmad Murad Abdul Aziz
- 13. Judicial Commissioner Liza Chan Sow Keng
- 14. Judicial Commissioner Wan Muhammad Amin Wan Yahya
- 15. Judicial Commissioner Nurulhuda Nur'aini Mohamad Nor
- 16. Judicial Commissioner Su Tiang Joo
- 17. Judicial Commissioner Norliza Othman

THE MALAYSIAN JUDICIARY

- 18. Judicial Commissioner Hasbullah Adam
- 19. Judicial Commissioner Shamsulbahri Ibrahim
- 20. Judicial Commissioner Roslan Mat Noor
- 21. Judicial Commissioner Julia Ibrahim
- 22. Judicial Commissioner Mohd Arief Emran Arifin
- 23. Judicial Commissioner John Lee Kien How@ Mohd Johan Lee
- 24. Judicial Commissioner Adlin Abdul Majid
- 25. Judicial Commissioner Mohamad Abazafree Mohd Abbas
- 26. Judicial Commissioner Azizan Md. Arshad
- 27. Judicial Commissioner Narkunavathy Sundareson
- 28. Judicial Commissioner Noor Ruwena Md. Nurdin
- 29. Judicial Commissioner Jamhirah Ali

- 30. Judicial Commissioner Rozi Bainon
- 31. Judicial Commissioner Noor Hayati Mat
- 32. Judicial Commissioner Azlan Sulaiman
- 33. Judicial Commissioner Kenneth Yong Ken Chinson St. James
- 34. Judicial Commissioner Leong Wai Hong
- 35. Judicial Commissioner Noor Hisham Ismail
- 36. Judicial Commissioner Roz Mawar Rozain
- 37. Judicial Commissioner Fathiyah Idris
- 38. Judicial Commissioner Wan Fadhilah Nor Wan Idris
- 39. Judicial Commissioner Rofiah Mohamad
- 40. Judicial Commissioner Wong Mee Ling
- 41. Judicial Commissioner Raja Ahmad Mohzanuddin Shah Raja Mohzan
- 42. Judicial Commissioner Suria Kumar Durairaj Johnson Paul



STATEMENT BY THE RIGHT HONOURABLE CHIEF JUDGE OF SABAH AND SARAWAK



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

Writing for the Yearbook for third year since my appointment as the Chief Judge of Sabah and Sarawak in 2020, I am pleased to report positive changes in the administration of justice and the courts in both the Borneo States, pre and post the pandemic.

In 2022, when the country entered the transition to the COVID-19 endemic phase after battling the virus outbreak for two years, we managed to conduct, for the first time, the Opening of the Legal Year in a hybrid manner. Participation of the legal fraternity in Sabah and Sarawak was commendable although most guests attended the event virtually, through video conferencing.

Disposal of cases

While acknowledging that the performance of the courts in the Borneo States had been adversely impacted by the pandemic, we were fast to adapt to the changing scenario and had succeeded in being on



track on case disposal after the lifting of the COVID restrictions. In both States, the High Courts disposed of more than 50% of civil cases. As for criminal cases, the High Courts in Sabah reached the disposal percentage of more than 61% while the High Courts in Sarawak settled 289 out of the 1,259 registered cases.

The achievement of the subordinate courts was commendable for both States. More than 60% of civil cases were disposed of, while the disposal rate of criminal cases was at 76% for the Sessions Courts in Sabah and 85% for the Sessions Courts in Sarawak.

As for the Magistrates' Courts, the percentage of disposal for both civil and criminal cases in both States exceeded 80%.

In this regard, I must congratulate both judges and judicial officers for their relentless commitment in ensuring that cases were heard and disposed of at a reasonable timeframe while adjusting to the new normal post-COVID-19.

External engagements

With the lifting of the COVID-19 restrictions, the courts received visits from various organisations such as schools and higher learning institutions. In fact, through the Working Group on Environment, the courts in both States had been actively engaged with other agencies, both public and private such as the World Wildlife Fund ("WWF"), Sabah Parks, the Forestry Department, and lawyers' association in organising environmental-related activities.

To name a few, the Sarawak Court Working Group on Environment (SWGE) had, on June 16, 2022, launched the Sentencing Guidelines for Wildlife Crimes in Sarawak. Similar guidelines were first issued in Sabah in 2019. Following that, SWGE took part in a conservation programme at the Bung Bratak Heritage Centre, where the participants were exposed to the history of the Bung Bratak Heritage Centre and the planting of trees. Another programme called "Aram Ngabas Gua Kamek" was also held by SWGE where its members visited Gua Silabur in the district of Serian in an effort to foster and inspire conservational spirit within the judicial community.

In Sabah, the Kota Kinabalu Court Working Group on Environment (KKCWGE) and the WWF co-organised monthly seminars relating to environment called "1 Hour 4 Nature". The participants included judicial officers and court staff. In October, the Second Borneo Colloquium on Environmental Justice was held in collaboration with the WWF and the Sabah Law Society. The event was supported by the Ministry of Tourism, Culture and Environment Sabah and Current Law Journal Sdn Bhd. With the theme of "Locus Standi in Civil Environmental Litigation", the programme succeeded in bringing together judges, prosecutors, lawyers, academics, government officials and representatives from non-governmental organisations (NGOs).

Perhaps, one of the most memorable events in 2022 was the Mount Kinabalu climb in September 2022 – the joint event with Sabah Parks on "Environmental Conservation and Enforcement in Sabah: Protecting Natural Heritage". I was fortunate to be able to join the climb but only managed to reach up to the Layang-Layang point. Apart from YA Datuk Christopher Chin Soo Yin and my special officer Aizuddin who graciously offered to keep me company for the night at Layang-Layang, the rest of the team succeeded in conquering Low's Peak although the weather condition was not so ideal. My congratulations to them! Thank you, YA Datuk Chris Chin and Aizuddin.

Continuous enhancement of digitalisation of the

Having started digitalisation in the courts more than a decade ago, and with the lessons learned during the pandemic, the courts in both States were in a state of readiness to enhance the existing technological system in the courts' processes; from filing to processing of court documents, managing cases online, hearing cases, handling remands online, which were the core activities of the courts. Through the e-Kehakiman Sabah Sarawak (eKSS) project, the redevelopment of the integrated court system (ICS) saw most courthouses undergoing a digital makeover with the installation of new hardware and software for the court recording transcription (CRT) system.

In an effort to digitalise monetary transactions in courts, we have integrated the eCourt finance (ECF) system to improve the delivery of efficient services to members of the public and diverse stakeholders. This is as part of the nation-wide initiative on the part of the Judiciary.

The use of artificial intelligence in court sentencing (AiCOS)¹ system also continued to be fed with sentencing data for offences relating to possession in section 12(2) of the Dangerous Drugs Act 1952, and theft in dwelling house under section 380 of the Penal Code. For the year 2022, the percentage of courts in both States following the recommendation provided by AiCOS is recorded at 46.24%.

Considering the emerging and expanding use of AI in aid of court processes and in the judicial decision-making process, especially in the criminal justice system, the Council of ASEAN Chief Justices through its Working Group on Case Management and Court Technology developed a set of guidelines governing the development, deployment and use of AI in the administration of justice, judicial decision-making, court processes and case management.

Reaching the unreachable

Through mobile courts, judicial officers in Sabah would go to the interior areas of the State to expedite the extraction of birth certificates for late registration cases. The programme has been well received with the participation of other agencies such as the National Registration Department, lawyers, healthcare services and other NGOs providing free-of-charge assistance to the communities. This service has continued as it is a noble effort by the courts in Sabah towards reaching the otherwise unreachable stakeholders.

Judicial capacity development

With the belief that knowledge is power and recognising the need to equip judicial officers in both States with sufficient understanding and comprehension of the law, an online monthly community forum has been an ongoing programme. Under this initiative, judges and judicial commissioners of the High Court would present relevant topics for discussion. I personally attended the programme without fail and have found it an effective interactive session to guide judicial officers and to clarify legal issues faced by them.

An intensive short three-day workshop on contempt of court was also held both in Sabah and Sarawak with YA Dean Wayne Daly as the trainer. These activities were in addition to the existing trainings organised by the Office of the Chief Registrar and the Judicial and Legal Training Institute (ILKAP).

Day of remembrance

In August 2022, we held a Reference Proceeding, a special day of remembrance to honour the memory of three departed judicial luminaries from Sarawak, namely Tan Sri Datuk Amar Haji Mohamad Jemuri Serjan, formerly CJSS; Datuk Denis Ong Jiew Fook, formerly Judge of the Court of Appeal; and Dato' Seri Tan Chiaw Thong, formerly Judge of the High Court of Sabah and Sarawak. It was attended by their family members, judges, court officers, staff and members of the legal fraternity as well as officers of the Sarawak State Attorney General's Chambers. Suffice to say that their contribution to the Judiciary has been immense. It was a solemn yet beautifully poignant occasion, indeed.

Inter-agency cooperation

Although the Judiciary stands at the centre of the administration of justice, it cannot work in silo without the collective cooperation of the other important players in the legal fraternity — lawyers, prosecutors, as well as other departmental and enforcement agencies.

The experience of the courts in Sabah and Sarawak throughout the year 2022 has proven that with the steadfast cooperation and continued support of every stakeholder, we could discharge our role in dispensing justice to the public with unwavering commitment to the rule of law.

At this juncture, I would like to express my heartfelt gratitude to every member of the legal fraternity, and various agencies, both public and private in both Sabah and Sarawak for their support throughout my tenure as the CJSS. Together we have made 2022 a year that it has been. May we continue to walk with renewed strength, vigour and commitment to serve the public, guided by the rule of law, at all times.

Abang Iskandar Abang Hashim

The Chief Judge of Sabah and Sarawak



Fast forward, on June 15, 2023, AiCOS won the innovative award of the Prime Minister Department 2022.

Judges of the High Court in Sabah and Sarawak

- 1. Justice Norchaya Haji 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
- 8. Justice Duncan Sikodol
- 9. Justice Christopher Chin Soo Yin
- 10. Justice Wong Siong Tung
- 11. Justice Leonard David Shim

Judicial Commissioners of the High Court in Sabah and Sarawak

- 1. Justice Zaleha Rose Datuk Haji Pandin
- 2. Justice Alexander Siew How Wai
- 3. Justice Amelati Parnell



STATEMENT BY THE CHIEF REGISTRAR, FEDERAL COURT OF MALAYSIA



The Chief Registrar of the Federal Court Dato' Hasbi Hasan

The year 2022 was the third year in which we continued to recover from the devastating impact of the dreadful pandemic of the Coronavirus Disease which started in 2019 ("COVID-19"). This pandemic, with its global footprint, has altered the way Malaysian courts conduct its core business of service delivery. The Office of the Chief Registrar had to introduce new measures to augment the current status quo and contingency plans that would help provide guidance going forward.

VIRTUAL HEARINGS TO STAY AS PART OF THE NEW NORMAL

The Malaysian courts take the position that virtual or remote hearings are by their nature not in contradiction of the notions of natural justice and a fair trial. It is merely a change in venue from a physical to a virtual one. It does not alter any part of the substance and procedure in a civil appeal. The courtroom etiquettes and practices remain practically the same for virtual hearing, except that counsel now can sit down while submitting during the hearing. The principle of open



justice can be preserved in a remote hearing by way of live streaming. Parties are in no way inhibited from presenting their case, knowing the case against them or responding to their opponents' submissions. Unless a party demonstrates that real prejudice will be occasioned, there can be no objection based purely on the technical or procedural basis that the hearing is a remote one. The key here is in keeping a healthy balance. The measures the Malaysian Judiciary has taken will require that judges, officers, practitioners, litigants and the general public adapt and adjust. This is critical in ensuring that continued access to justice is not brought to a halt.

There is no question of reverting to the old ways of holding physical hearings post-COVID-19 as was affirmed by the Chief Justice, Tun Tengku Maimun Tuan Mat. The Malaysian Judiciary had always embarked on technological advancements and online or virtual hearings marked its progress in this direction. In fact, the advent of online hearing is not merely a means to cope with the pandemic but a permanent feature of our justice system.

The Office of the Chief Registrar would like to reaffirm its full dedication to support the Judiciary and will continue to protect our courts and ensure their independence, dignity, accessibility, and effectiveness in the pursuit of justice. In doing so, The Office of the Chief Registrar will keep its stakeholders informed of any developments initiated.

2022 has been a remarkable year for the Office of the Chief Registrar with the successful implementation of all targeted strategies and operational activities throughout the year.

Activities under the Office of Chief Registrar, Federal Court of Malaysia

The activities for year 2022 under the auspices of the Office of the Chief Registrar is listed below:

No.	Dates	Activities	
1.	January 14, 2022	Majlis Pembukaan Tahun Perundangan 2022	
		Opening of the Legal Year 2022	
2.	January 21, 2022	Majlis Pembukaan Tahun Perundangan Sabah dan Sarawak 2022	
		Opening of the Legal Year Sabah and Sarawak 2022	
3.	February 24-27, 2022	Mesyuarat Majlis Hakim-Hakim Malaysia kali ke-54 Tahun 2022	
		54th Malaysian Judges Conference Meeting 2022	
4.	April 8, 2022	Kunjung hormat kepada Yang Berhormat Dato' Seri Azalina Othman, Mentedi Jabatan Perdana Menteri (Undang-Undang dan Reformasi Institusi)	
		Courtesy Visit to Yang Berhormat Dato' Seri Azalina Othman, Minister in the Prime Minister's Department (Law and Institutional Reforms)	
5.	June 9-12, 2022	Kunjung hormat kepada Yang Berbahagia Dato' Sallehudin Alyubi, Timbalan Ketua Setiausaha Kanan, Jabatan Perdana Menteri	
		Courtesy Visit to Yang Berbahagia Dato' Sallehudin Alyubi, Deputy Senior Chief Secretary, Prime Minister's Department	
6.	June 23, 2022	Lawatan ke Mahkamah Majistret Dungun, Terengganu	
		Visit to Dungun Magistrate's Court, Terengganu	



7.	June 24, 2022	Lawatan Yang Amat Arif Hakim Besar Malaya ke Kompleks Mahkamah Temerloh, Pahang
		The Right Honourable Chief Judge of Malaya's Visit to Temerloh Court Complex, Pahang
8.	July 19, 2022	Pelancaran Majlis Perasmian Persidangan Keselamatan Negara 2022
		Launch of the National Security Conference 2022
9.	August 12-14, 2022	Persidangan Penolong-Penolong Pendaftar PKPMP
		Conference for Assistant Registrars of PKPMP
10.	August 21-23,2022	The Council of ASEAN Chief Justices Working Group on Facilitating Service of Civil Process and The Council of ASEAN Chief Justices Working Group on Case Management and Court Technology Meeting
11.	September 24-25, 2022	Jelajah Kehakiman Negeri Sarawak
		Judicial Tour in the State of Sarawak
12.	September 26-28, 2022	Program Lawatan Yang Amat Arif Ketua Hakim Negara dan Yang Amat Arif Hakim Besar Sabah dan Sarawak ke Mahkamah di Mukah, Kapit dan Sibu, Sarawak
		Visit Programme by The Right Honourable the Chief Justice of Malaysia and The Right Honourable Chief Judge of Sabah and Sarawak to Court in Mukah, Kapit and Sibu, Sarawak
13.	October 14-16, 2022	Mesyuarat Majlis Hakim-Hakim Malaysia kali ke-55 Tahun 2022
		The 55th Malaysian Judges Conference Meeting 2022
14.	November 3-6, 2022	The 10th Council of ASEAN Chief Justices' Meeting
15.	November 22, 2022	Kunjungan Majlis Penasihat Undang-Undang Universiti Awam kepada Yang Amat Arif Ketua Hakim Negara
		Visit by the Public University Legal Advisory Council to The Right Honourable the Chief Justice of Malaysia
16.	November 30, 2022	Sesi Meet & Greet Yang Amat Arif Ketua Hakim Negara Bersama Pihak Media
		Meet & Greet Session by The Right Honourable the Chief Justice of Malaysia with the Media

New court complex

The opening of the new court complex is as follows:

No.	Date	Particulars
1.	July 5-6, 2022	Majlis Perasmian Kompleks Mahkamah Kangar oleh DYMM Tuanku Raja Perlis
		Official Opening Ceremony of Kangar Court Complex by His Royal Highness Tuanku Raja Perlis



External and inter-department training

The list of agencies that provided training to judicial officers and staff for 2022 is as follows:

No.	Agencies	
1.	Judicial and Legal Training Institute (ILKAP)	
2.	Attorney General's Chambers (AGC)	
3.	Prime Minister's Department (JPM)	
4.	Women's Centre for Change (WCC)	
5.	Amanah Saham Nasional Berhad (ASNB)	
6.	National Strategic Office for Anti-Trafficking In Persons and Anti-Smuggling of Migrants (MAPO), Ministry of Home Affairs	

In-house Training

The list of training activities for 2022 carried out under the auspices of the Office of the Chief Registrar is as follows:

No.	Courses
1.	Kursus Pemprosesan Draf Perintah, Perintah dan Klarifikasi Perintah
	Processing of Draft Orders, Orders, and Clarification of Orders Course
2.	Bengkel Penyediaan Ringkasan Kes Sivil dan Jenayah di Mahkamah Rayuan
	Workshop on Preparation of Civil and Criminal Case Summaries at the Court of Appeal
3.	Kursus Jurubahasa di Mahkamah Rayuan
	Interpreters Course at the Court of Appeal
4.	Kursus Pengurusan Kes dan Penyediaan Ringkasan Kes (Profile)
	Case Management and Case Summary Preparation (Profile) Course
5.	Kursus Mengenai Hukuman Alternatif bagi Kes-kes Jenayah dan Dadah di Mahkamah Rendah
	Course on Alternative Sentencing for Criminal and Drug Cases in the Subordinate Courts
6.	Refresher Course Jurubahasa
	Interpreters' Refresher Course
7.	Kursus Pengurusan Aduan SISPA bagi Penyelia dan Pegawai Penyiasat
	SISPA Complaint Management Course for Supervisors and Investigating Officers
8.	RVT/ePG/eDenda (Zon Utara)
	Recording Voice to Text / e-Pleading Guilty / e-Fine (Northern Zone)
9.	RVT/ePG/eDenda (Kuala Lumpur)
	Recording Voice to Text / e-Pleading Guilty / e-Fine (Kuala Lumpur)

10.	RVT/ePG/eDenda (Selangor)
	Recording Voice to Text / e-Pleading Guilty / e-Fine (Selangor)
11.	RVT/ePG/eDenda (Zon Timur)
	Recording Voice to Text / e-Pleading Guilty / e-Fine (Eastern Zone)
12.	RVT/ePG/eDenda (Zon Selatan)
	Recording Voice to Text / e-Pleading Guilty / e-Fine (Southern Zone)
13.	Kursus Penataran Bahasa Kebangsaan Dalam Perundangan
	National Language Proficiency in Legislative Matters Course
14.	Kursus Pengurusan Kontrak
	Contract Management Course
15.	Ceramah Integriti (Zon Tengah)
	Integrity Lecture (Central Zone)
16.	Ceraman Integriti (Zon Utara)
	Integrity Lecture (Northern Zone)
17.	Ceramah Integriti (Zon Selatan)
	Integrity Lecture (Southern Zone)
18.	Ceramah Integriti (Zon Pantai Timur)
	Integrity Lecture (East Coast Zone)
19.	Ceramah Integriti (Zon Sabah)
	Integrity Lecture (Sabah Zone)
20.	Ceramah Integriti (Zon Sarawak)
	Integrity Lecture (Sarawak Zone)
21.	Bengkel Pelan Anti-Rasuah Organisasi
	Organizational Anti-Corruption Plan Workshop
22.	Latihan Pangkalan Data dan eBook Zon Utara
	Database and eBook Training for Northern Zone
23.	Latihan Pangkalan Data dan eBook Zon Selatan
	Database and eBook Training for Southern Zone
24.	Latihan Pangkalan Data dan eBook Zon Timur
	Database and eBook Training for Eastern Zone
25.	Latihan Pangkalan Data dan eBook Kepada Semua Kakitangan Perpustakaan Mahkamah Malaysia
	Database and eBook Training for All Malaysian Court Library Staff
26.	Latihan Pangkalan Data dan eBook Zon Sabah
	Database and eBook Training for Sabah Zone
27.	Latihan Pangkalan Data dan eBook Zon Sarawak
	Database and eBook Training for Sarawak Zone





POJ)

2022 Series 3 Procurement Management Strengthening Course (Terengganu, Kelantan, Pahang and

Overseas training/courses/seminars

The list of judicial officers' participations in training/courses/seminars for 2022 is as follows:

No.	Dates	Name of courses/seminars	No. of officers
1.	May 23-25, 2022	Lawatan Kerja Jawatankuasa Pilihan Khas Hal Ehwal Wanita dan Kanak-kanak dan Pembangunan Sosial, United Kingdom Working Visit of the Special Select Committee on Women and Children Affairs and Social Development, United Kingdom	2
2.	June 4-28, 2022	U.S. Government's Premier Professional Exchange Program, International Visitor Leadership Program (IVLP) "Human and Civil Rights for Marginalized Communities"	1
3.	June 6, 2022- July 7, 2022	Judicial Clerkship Training at United States District Court for the Centre District of California, United States of America	2
4.	August 6-17, 2022	International Visitor Leadership Program, United States of America	2
5.	September 6-7, 2022	Introductory Program on ASEAN Institutions and Legal Instruments and WG-JET Meeting, Jakarta, Indonesia	1
6.	September 19-21, 2022	Commonwealth Secretariat Conference on Addressing Cybercrime in Asia, Singapore	1
7.	September 21-24, 2022	The 10 th Summer School, Istanbul, Turkey	2
8.	October 2-4, 2022	The 43 rd Asean Law Association (ALA) Governing Council Meeting, Bandung, Indonesia	2
9.	October 4-7, 2022	The $5^{\rm th}$ Congress of World Conference on Constitutional Justice, Bali, Indonesia	2
10.	November 5-6, 2022	Regional Workshop on Human Rights Law and Technology-Mediated Expression in Southeast and South Asia, Bangkok, Thailand	2
11.	November 6-15, 2022	Program Lawatan Sambil Belajar dan Penanda Aras ke Amerika Syarikat berhubung Isu Pemerdagangan Orang, Washington & New York, United States of America	1
12.	December 16-17, 2022	Conference of Constitutional Jurisdiction of Member States of the Organization of Islamic Cooperation (CCJ- OIC), Istanbul, Turkey	1



Launching of the Judicial Tour Programme

For the first time, the Malaysian Judiciary, through the Office of the Chief Registrar of the Federal Court of Malaysia as the secretariat, initiated a corporate social responsibility (CSR) programme known as "Jelajah Kehakiman", or the Judicial Tour Programme. It is a roadshow by the Malaysian Judiciary in collaboration with other government and private agencies.

The program was launched on July 19, 2022, by the Chief Justice, Tun Tengku Maimun Tuan Mat. Also attending to witness the launching was the Chief Judge of Malaya, Tan Sri Dato' Sri Azahar Mohamed.

The first road tour took place on August 4-5, 2022, in Kota Bharu, Kelantan and after that, in Kuching, Sarawak (September 24-25, 2022). There were nine (9) government and private agencies that joined the road tour, including the Royal Malaysian Police, the Ministry of Health Malaysia, the Malaysian Insolvency Department, the National Registration Department, the Legal Aid Department, the Road Transport Department, the Malaysian Prisons Department, the Malaysian Bar / State Bars and DAPAT Vista (M) Sdn Bhd (for the e-Jamin system)..

The Judicial Tour Programme aims to increase public access to justice and legal literacy. Hence, it will be expanded to other states in the future.

Conclusion

Last but not least, I would like to offer my utmost gratitude to the Honourable Judges for their support and trust in me in heading this office. Special thanks to all officers and staff for their hard work and excellent performance. I would also like to thank the Attorney General and his officers, the Malaysian Bar, the Sabah Law Association, the Advocates Association of Sarawak and all other stakeholders for their commitment and sacrifice.

I am very much looking forward to the next phase of our journey. There is certainly much to do. Indeed, the realisation of our vision for the Judiciary will surely be among our most significant projects or activities in the coming years.

Dato' Hasbi Hasan

Chief Registrar The Federal Court of Malaysia









Position

JUDGES' ELEVATIONS AND APPOINTMENTS

The year 2022 witnessed a total of 36 elevations and appointments to the superior courts. There were 19 judges elevated to the Federal Court, the Court of Appeal and the High Courts in Malaya, and in Sabah and Sarawak. Apart from these elevations, there were also 17 Judicial commissioners appointed from the Judicial and Legal Service as well as the Malaysian Bar.

Name

The list of judges elevated and judicial commissioners appointed in 2022 is as follows:

Judge of the Federal Court February 4, 2022 Justice Mohamad Zabidin Mohd Diah

Date of

Appointment

Judge of the Court of Appeal	February 4, 2022	Justice Mohd Nazlan Mohd Ghazali
Judges of the High Court	April 27, 2022	Justice Latifah Haji Mohd Tahar
		Justice Amarjeet Singh Serjit Singh
		Justice Duncan Sikodol
		Justice Muniandy Kannyappan
		Justice Dr. Shahnaz Sulaiman
		Justice Evrol Mariette Felix Michael Peters
		Justice Christopher Chin Soo Yin
		Justice Ong Chee Kwan
		Justice Mohd Radzi Abdul Hamid
		Justice Haji Aslam Zainuddin
		Justice Julie Lack
		Justice Wong Siong Tung
		Justice Leonard David Shim
		Justice Nadzarin Wok Nordin
		Justice Quay Chew Soon
		Justice Atan Mustaffa Yussof Ahmad
		Justice Anand Ponnudurai
Judicial Commissioners	February 4, 2022	Judicial Commissioner Azizan Md. Arshad
		Judicial Commissioner Narkunavathy Sundareson
		Judicial Commissioner Noor Ruwena Md. Nurdin
		Judicial Commissioner Jamhirah Ali
		Judicial Commissioner Rozi Bainon
		Judicial Commissioner Noor Hayati Haji Mat
		Judicial Commissioner Azlan Sulaiman
		Judicial Commissioner Kenneth Yoong Ken Chinson St. James
		Judicial Commissioner Leong Wai Hong
		Judicial Commissioner Noor Hisham Ismail

		Judicial Commissioner Roz Mawar Rozain
	September 30,2022	Judicial Commissioner Fathiyah Idris
		Judicial Commissioner Wan Fadhilah Nor Wan Idris
		Judicial Commissioner Rofiah Mohamad
		Judicial Commissioner Wong Mee Ling
		Judicial Commissioner Raja Ahmad Mohzanuddin Shah Raja Mohzan
		Judicial Commissioner Suria Kumar Durairaj Johnson Paul

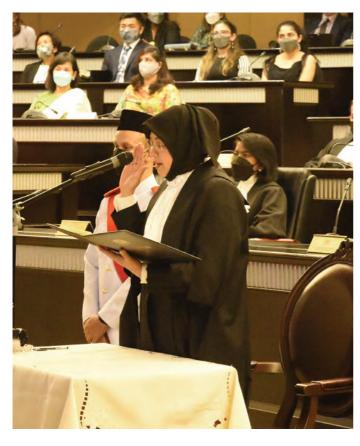


Justice Mohamad Zabidin Mohd Diah

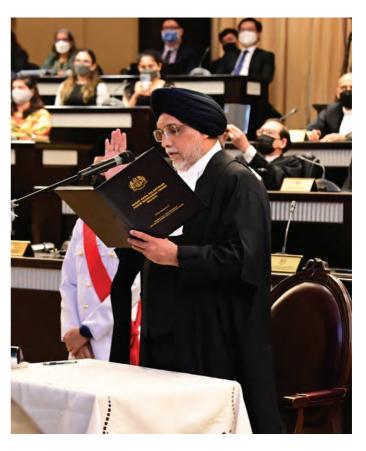


Justice Mohd Nazlan Mohd Ghazali





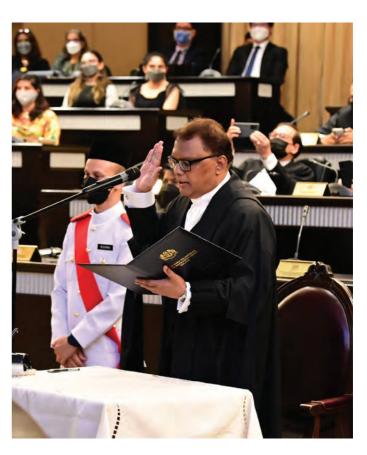
Justice Latifah Haji Mohd Tahar



Justice Amarjeet Singh Serjit Singh



Justice Duncan Sikodol



Justice Muniandy Kannyappan





Justice Dr. Shahnaz Sulaiman



Justice Evrol Mariette Felix Michael Peters



Justice Christopher Chin Soo Yin



Justice Ong Chee Kwan





Justice Mohd Radzi Abdul Hamid



Justice Haji Aslam Zainuddin



Justice Julie Lack



Justice Wong Siong Tung





Justice Leonard David Shim



Justice Nadzarin Wok Nordin



Justice Quay Chew Soon



Justice Atan Mustaffa Yussof Ahmad



Justice Anand Ponnudurai



Judicial Commissioner Azizan Md. Arshad



Judicial Commissioner Narkunavathy Sundareson



Judicial Commissioner Noor Ruwena Md. Nurdin



Judicial Commissioner Jamhirah Ali



Judicial Commissioner Rozi Bainon



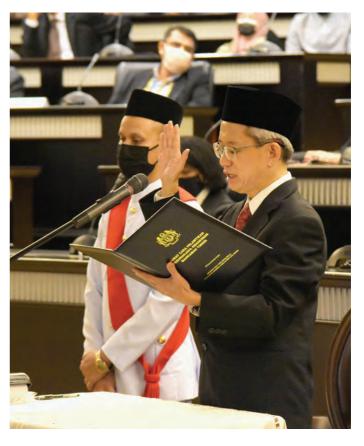
Judicial Commissioner Noor Hayati Haji Mat



Judicial Commissioner Azlan Sulaiman



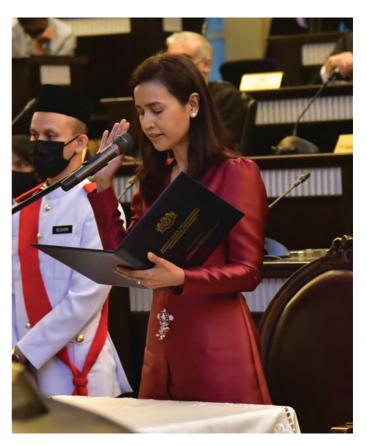
Judicial Commissioner Kenneth Yoong Ken Chinson St. James



Judicial Commissioner Leong Wai Hong



Judicial Commissioner Noor Hisham Ismail



Judicial Commissioner Roz Mawar Rozain



Judicial Commissioner Fathiyah Idris



Judicial Commissioner Wan Fadhilah Nor Wan Idris



Judicial Commissioner Rofiah Mohamad



Judicial Commissioner Wong Mee Ling

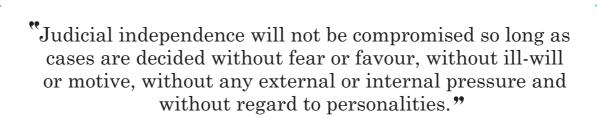




Judicial Commissioner Raja Ahmad Mohzanuddin Shah Raja Mohzan



Judicial Commissioner Suria Kumar Durairaj Johnson Paul



by **The Right Honourable Tun Tengku Maimun Tuan Mat** Chief Justice of Malaysia



RETIRED JUDGES

Tan Sri Rohana Yusuf



Tan Sri Rohana was born on May 9, 1956 in Bachok, Kelantan. She obtained her LLB degree from the University of Malaya in 1980, followed by Diploma in Syariah Law and Legal Practice (DSLP) and Master of Comparative Law (MCL) from the International Islamic University Malaysia (IIUM) in 1992 and 1993 respectively.

Tan Sri Rohana held several positions in the Judicial and Legal Service, amongst them are Assistant Parliamentary Draftsman (1980), Legal Advisor to the Ministry of Defence (1982), Senior Federal Counsel, Advisory Division (1986), Legal Advisor to the Ministry of Agriculture (1989) and Sessions Court Judge, Kuala

Lumpur (1994). She opted for early retirement from the Judicial and Legal Service after 18 years in service. Tan Sri Rohana continued her journey in the legal profession by joining the private sector in 1997 as Legal Advisor and Company Secretary of Kumpulan UCM Industrial Corporation Berhad and Legal Advisor and Company Secretary of International Bank Malaysia Berhad. She proceeded to practise as an advocate and solicitor and was a partner of Messrs. GH Tee & Co in 2000. Before joining the Judiciary, Tan Sri Rohana was the Deputy Director of the Islamic Banking and Takaful Department, Bank Negara Malaysia from 2001 to 2005.

On September 1, 2005, Tan Sri Rohana was appointed as a Judicial Commissioner of the High Court of Malaya at Kuala Lumpur. She was later elevated as a Judge of the High Court of Malaya at Kuala Lumpur on April 11, 2007. On January 8, 2013, Tan Sri Rohana was elevated as Judge of the Court of Appeal. Having served in the Court of Appeal for more than five years, on April 27, 2018, she was elevated as a Judge of the Federal Court.

Following Justice Ahmad Maarop's retirement on December 5, 2019, Tan Sri Rohana was sworn in and became the first woman to be elevated as the President of the Court of Appeal since its inception in 1994. Over the years, Tan Sri Rohana has written numerous insightful judgments. She has adjudicated on a wide range of subjects and delivered many decisive judgments which went on to spur active discourses which developed Malaysian jurisprudence in several main areas of law such as corporate law, banking (including Islamic banking), contract, land, tort, civil procedure, medical negligence, criminal law and procedure, law of contempt, and administrative and constitutional law.



Tan Sri Dato' Sri Azahar Mohamed



Tan Sri Dato' Sri Azahar Mohamed was born on April 27, 1956 in Johor Bahru. He obtained his LLB degree from University of Malaya in 1980 and LLM from London School of Economics in 1997. Tan Sri Dato' Sri Azahar had a long career with the Judicial and Legal Service from 1980 to 2004. He held several positions: Senior Assistant Registrar, High Court, Johor Bahru (1980); Magistrate, Johor Bahru (1982); Deputy Public Prosecutor, Pahang (1983); Deputy Public Prosecutor, Negeri Sembilan (1987); Sessions Court Judge, Johor Bahru (1988); Deputy Public Prosecutor, Kelantan (1990); Senior Federal Counsel, Anti-Corruption Agency (1991); Legal Advisor, Royal Customs and Excise Department Malaysia (1992);

Deputy Registrar of Companies (1992); Head of the Unit of Classified Cases, Prosecution Division, Attorney General's Chambers (1994); Deputy Head of Prosecution, Attorney General Chambers (1996); Head of Prosecution, Attorney General's Chambers (1997); and Head of Civil Division, Attorney General's Chambers (2000).

On August 1, 2004, Tan Sri Dato' Sri Azahar was appointed a Judicial Commissioner and served the High Court at Johor Bahru. He was elevated as a High Court Judge of Malaya on July 27, 2006. On January 1, 2009, he served the Commercial Division, Kuala Lumpur High Court and later he presided as Intellectual Property Judge, Kuala Lumpur High Court on May 1, 2009. On May 11, 2011 Tan Sri Dato' Sri Azahar was elevated as a Judge of the Court of Appeal and on September 12, 2014 he was elevated as a Judge of the Federal Court. From October 9 to December 31, 2015, he was awarded a Visiting Fellowship of Inns of Court at the Institute of Advanced Legal Studies, University of London. Tan Sri Dato' Sri Azahar was also the Managing Judge of Kuala Lumpur High Court (Civil Division, Criminal Division, Family Court, Construction Court and Appellate and Special Powers Division) (2012-2017).

On August 8, 2019, following the retirement of Tan Sri Datin Paduka Zaharah Ibrahim, Tan Sri Dato' Sri Azahar was appointed as the 11th Chief Judge of Malaya. Throughout his service at the superior bench, he decided and wrote judgments on numerous cases which were causes célèbres on various subject matters which ultimately spearheaded active legal discourses on the development of Malaysian jurisprudence in several main areas of law such as commercial law, criminal law, constitutional law and administrative law.



Datuk Seri Mohamad Zawawi Salleh



Datuk Seri Mohamad Zawawi Salleh was born on January 16, 1956 in Pengkalan Chepa, Kota Bharu, Kelantan. He graduated with LLB (Hons) from the University of Malaya and later completed his LLM from the University of Bristol, United Kingdom in 1992.

He began his legal career as a legal officer at the High Court of Kuala Lumpur in 1979 and continued to hold several posts during his career, amongst others, Magistrate in Kuantan, Sessions Court Judge in Seremban, Head of Prosecution Unit in Johor, Director of Legal Aid Department, Senior Assistant Draftsman in the Drafting Division and Head of Advisory Division of the Attorney General's Chambers. He also served as Federal Counsel in the Ministry of Home Affairs and Senior Federal Counsel in various ministries and agencies, such as the Ministry of Agriculture of Malaysia, Jabatan Kemajuan Islam Malaysia (JAKIM) and the State Legal Advisor of Negeri Selangor.

Datuk Seri Mohamad Zawawi was appointed as a Judicial Commissioner of the High Court of Malaya in Johor Bahru on March 1, 2007 and was appointed as a High Court Judge on October 14, 2009. On January 8, 2013, he was elevated to Court of Appeal and thereafter he was appointed as a Federal Court Judge on April 27, 2018. Datuk Seri Mohamad Zawawi retired on July 16, 2022.

Throughout his career, Datuk Seri Mohamad Zawawi demonstrated a serious commitment to judicial integrity and had a disciplined mind. He consistently undertook a rigorous analysis of the facts, the legal issues and the arguments on all the cases before him.



Puan Sri Dato' Zaleha Yusof



Puan Sri Dato' Zaleha Yusof was born on November 2, 1955 in Kuala Lumpur. She graduated with LLB (Hons) from the University of Malaya. She began her legal career as a Magistrate at the Magistrate's Court Kuala Lumpur. She also served as a Senior Assistant Registrar of the High Court in Kuala Terengganu, Terengganu, Senior Federal Counsel at Jabatan Pemegang Harta (currently known as Malaysian Department of Insolvency (MdI)) and at the Advisory Division of the Attorney General's Chambers.

She continued to hold several posts during her career, amongst others as a Deputy Head of the Advisory and International Division of the Attorney General's Chambers, Sessions Court Judge at the Sessions Court Kuala Lumpur, Commissioner of Law Revision, Parliamentary Draftsmen and Solicitor General II. She served as the Solicitor General I in her last post before being appointed as a Judicial Commissioner.

Puan Sri Dato' Zaleha was appointed a Judicial Commissioner of the High Court of Malaya on January 5, 2009 and was appointed a High Court Judge on August 9, 2010. On March 21, 2016, Puan Sri Dato' Zaleha was elevated to the Court of Appeal. She was appointed as a Federal Court Judge on December 5, 2019. Puan Sri Dato' Zaleha Yusof retired on May 1, 2022.

Puan Sri Dato' Zaleha 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, Puan Sri Dato' Zaleha was known to show utmost respect, understanding and kindness.





Dato' Indera Mohd Sofian Tan Sri Abd Razak



Dato' Indera Mohd Sofian Tan Sri Abd Razak was born on January 1, 1956 in Kuala Lipis, Pahang. He graduated with LLB (Hons) from Thames Valley University, London on December 31, 1982. He was then admitted as Barrister-at-Law at Lincoln's Inn, London.

Dato' Indera Mohd Sofian began his career as a Legal Assistant at Messrs. S. Siva Subramaniam on September 1, 1984 and practised until November 30, 1987. He then set up his own legal firm under the name and style of Mohd Sofian & Co, Kuantan on December 1, 1987. He was also the former Treasurer and Secretary of the Malaysian Bar. Dato' Indera Mohd Sofian was appointed a member of the Housing Tribunal prior to his elevation.

Dato' Indera Mohd Sofian was appointed as a Judicial Commissioner of the High Court of Malaya on September 1, 2005 and a High Court Judge on September 5, 2007. He was then elevated to the Court of Appeal on March 25, 2020. Dato' Indera Mohd Sofian Tan Sri Abd Razak retired on December 31, 2021.



Datuk Darryl Goon Siew Chye



Datuk Darryl Goon Siew Chye was born in Ipoh, Perak on June 22, 1956. He graduated with a LLB (Hons) (Lond) in 1979. He was called to the Bar of England and Wales on July 24, 1980 and admitted as Barrister-at-Law at Lincoln's Inn, London.

Datuk Darryl pursued his LLM (Lond) at University of London and Diploma in Air and Space Law at London Institute of World Affairs in 1981. He was admitted as an Advocate and Solicitor of the High Court of Malaya on September 18, 1982 and as an Advocate and Solicitor of the Supreme Court of the Republic of Singapore on November 10, 1993.

Datuk Darryl practised as a litigator for 35 years and was a co-founder of the legal firm, Messrs Raja, Darryl & Loh. In his career at the Bar, he had held positions as a member of the Listing Committee of Bursa Malaysia, member of the Malaysian Bar Council, Council Member of the ASEAN Intellectual Property Association, President of the Medico-Legal Society, Honorary Treasurer of the Malaysian Intellectual Property Association and was a part-time Lecturer at the Penang Medical College. He had also sat as an arbitrator and is a Fellow of both the Malaysian Institute of Arbitrators and the Chartered Institute of Arbitrators.

Datuk Darryl Goon Siew Chye was appointed as a Judicial Commissioner on March 20, 2018. He was appointed as a Judge of the High Court on April 9, 2019 and, subsequently, of the Court of Appeal on March 25, 2020. He retired as a Court of Appeal Judge on June 22, 2022.



Datuk Nor Bee Ariffin



Datuk Nor Bee Ariffin was born on August 29, 1956 in Kuala Kangsar, Perak. She graduated with LLB (Hons) from the University of Malaya in 1980.

In 1981, she joined the Judicial and Legal Service where she began her legal career as a Magistrate in Pulau Pinang. She served as a Magistrate from 1981 until 1985 in the Magistrate's Courts in Pulau Pinang and Kangar, before being appointed as a Senior Assistant Registrar of the High Court of Pulau Pinang from 1985 until 1989. She was in the judicial service until 1992 as a Sessions Court Judge in Kuala Lumpur.

Thereafter, Datuk Nor Bee was appointed as a Senior Federal Counsel attached to the Civil Division of the Attorney General's Chambers in 1992. She served in various capacities at the Attorney General's Chambers from 1992 until 2009. The positions she held include Senior Assistant Draftsman, Deputy Draftsman and Parliamentary Draftsman in the Drafting Division. She also served as the State Legal Advisor of the State of Malacca from April 1, 2001 until August 15, 2003. From August 16, 2003 until September 30, 2004 Datuk Nor Bee was appointed as the State Legal Advisor of Perak.

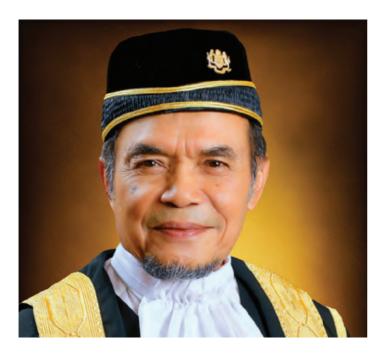
Datuk Nor Bee's career on the Bench began with her appointment as a Judicial Commissioner on January 5, 2009. She served at the Civil Division of the High Court in Shah Alam. She was then appointed as a High Court Judge on August 10, 2011. The year 2018 marked a memorable judicial experience for Datuk Nor Bee when she was elevated to the Court of Appeal on November 26, 2018. She served as the Judge of the Court of Appeal until reaching the mandatory retirement age of 66 years in August 2022.

Throughout her career, Datuk Nor Bee demonstrated a serious commitment to judicial integrity and made a huge contribution to the development of the law as demonstrated by the voluminous judgments written by her. Her contribution to the Judiciary is indeed meaningful and respected.





Dato' Haji Ghazali Haji Cha



Dato' Haji Ghazali Haji Cha was born in Alor Setar, Kedah on October 17, 1956. He graduated with LLB (Hons) from University Malaya in 1981.

Dato' Haji Ghazali began his legal career as a Magistrate on May 2, 2981 at the Magistrate's Court, Alor Setar, Kedah. He continued his career as a Senior Assistant Registrar from January 1, 1987 to September 1989. On October 1,1989, he was appointed as a Sessions Court Judge and continued to hold the post until August 2005.

Dato' Haji Ghazali was appointed as a Judicial Commissioner on September 1, 2005. On September 5, 2007 he was appointed as a Judge of the High Court. Dato' Ghazali was appointed as a Court of Appeal Judge on April 1, 2021. On October 17, 2022, Dato' Haji Ghazali reached his mandatory retirement age.

Datuk Nurchaya Haji Arshad



Datuk Nurchaya Haji Arshad was born on May 4, 1956 at Keningau, Sabah. She graduated from the University of Buckingham in the late 1970s. She was then admitted as a Barrister-at-Law at Lincoln's Inn. She first started her career in the Judiciary at the Kota Kinabalu Magistrate's Court. A year later, she was posted as a First-Class Magistrate at the Tawau Magistrate's Court. On April 16,1984, she served the same post at the Labuan Magistrate's Court for four years.

In September 1988, Datuk Nurchaya was promoted as the Deputy Registrar at the Kota Kinabalu High Court where she served in the post for two years. On September 16, 1990, she was assigned as a Sessions Court Judge at the Sessions Court, Kota Kinabalu. Subsequently, two years later on September 16, 1992, she held the position of Deputy Registrar (Administration) at the High Court of Kota Kinabalu. She was then transferred to the Attorney's General Chambers and held the position of Senior Federal Counsel for two years. In 1997, from the Attorney's General Chambers, Datuk Nurchaya was transferred to the Shah Alam Sessions Court as a Sessions Court Judge until 2005.

On September 1, 2005, Datuk Nurchaya was appointed as a Judicial Commissioner where her first posting was at the High Court of Tawau. Two years later, she was appointed as a High Court Judge at the Kota Kinabalu High Court. In 2009, Datuk Nurchaya was transferred to the Miri High Court, then to the Seremban High Court and Shah Alam High Court where she remained for six years until 2015. Her last posting was at the Kota Kinabalu High Court where she retired as a High Court Judge on May 4, 2022.

Dato' Indera Hj. Ab Karim Hj. Ab Rahman



Dato' Indera Hj. Ab Karim Hj. Ab Rahman was born on November 13, 1956 in Kuala Linggi, Melaka. He graduated with a LLB (Hons) from the University of Malaya.

He began his legal career in the service as a Senior Assistant Parliamentary Draftsman and later as a Magistrate in the Magistrate's Court Kulim, Kedah before continuing to hold several posts during his career, among others as a Magistrate in Kuala Pilah and Seremban, Senior Assistant Registrar in the High Courts of Seremban and Kuala Lumpur, Sessions Court Judge in Melaka, Deputy Public Prosecutor in Negeri Sembilan and Prosecution Department in Attorney General's Chambers and Legal Advisor in Terengganu and Perlis. He also served as the Head of Drafting Division in Attorney General's Chambers, Head of Attorney's General Chamber's branch in Federal Territory of Kuala Lumpur, Deputy Director of Malaysian Department of Insolvency and Chairman of the Advisory Board at the Prime Minister's Department.

Dato' Indera Hj. Ab Karim was appointed as a Judicial Commissioner of the High Court of Malaya on December 2, 2013 and was appointed as a High Court Judge on April 27, 2018. Dato' Indera Hj. Ab Karim retired as a High Court Judge in Shah Alam on November 11, 2022.

Dato' Haji Mohd Yazid Haji Mustafa



Dato' Haji Mohd Yazid Haji Mustafa was born on November 29, 1956 in Besut, Terengganu. He graduated with a LLB (Hons) from the University of Malaya.

Dato' Haji Mohd Yazid began his legal career in the service as a Magistrate in Kuala Terengganu. He held several posts during his career, among others as a Senior Assistant Registrar in Kota Bharu, Kelantan, Deputy of Public Prosecutor in Kelantan and Pahang and Sessions Court Judge in Taiping, Perak and Kota Bharu, Kelantan. He also served as the Head of Prosecution Division and Senior Federal Counsel in Sabah, Chairman of Co-operative Tribunal and Registrar of the High Court of Malaya.

Dato' Haji Mohd Yazid was appointed a Judicial Commissioner of the High Court of Malaya on August 10, 2007 and a High Court Judge on April 14, 2010. He retired as a High Court Judge in Shah Alam on November 29, 2023



Mr Awang Armardajaya Awang Mahmud



Mr Awang Armardajaya Awang Mahmud was born on December 15, 1966 in Sarawak. He graduated with a LLB (Hons) from the International Islamic University of Malaysia.

Mr. Awang Armadajaya began his legal career as a Deputy Public Prosecutor and Federal Counsel in Sarawak. Throughout his career, Mr. Awang Armadajaya held various positions, including as a Deputy Public Prosecutor, Selangor, Deputy Public Prosecutor, The Royal Malaysia Police Kuala Lumpur, Deputy Director at the Judicial and Legal Training Institute (ILKAP), Head of Appeal Division, Deputy Head of Appellate and Trial Division and Chairman of the Advisory Board at the Prime Minister's Department.

Mr. Awang Armadajaya was appointed a Judicial Commissioner on May 3, 2019. During his tenure on the Bench, he served in the High Court at Johor Bahru and Muar. His tenure ended on May 2, 2022.

Puan Maidzuara Mohammed



Puan Maidzuara Mohamed was born on October 19, 1966 in Alor Setar, Kedah. She obtained her Bachelor of Laws (LLB) (Hons) from the London School of Economics and Political Science, London. She was called to the Bar of England & Wales in 1989 and admitted as a Barrister-at-Law at Gray's Inn, United Kingdom. Puan Maidzuara was admitted as an Advocate & Solicitor of the High Court of Malaya in 1990.

Puan Maidzuara was in practice as an Advocate & Solicitor for almost 30 years and was involved in various areas of the law with emphasis on medicolegal matters. She is also a highly experienced advocacy trainer and has conducted advocacy training throughout Peninsular Malaysia and in Sarawak.

Puan Maidzura took her oath as a Judicial Commissioner on May 3, 2019. Her tenure ended on May 2, 2022.

Datuk Amirudin Abd Rahman

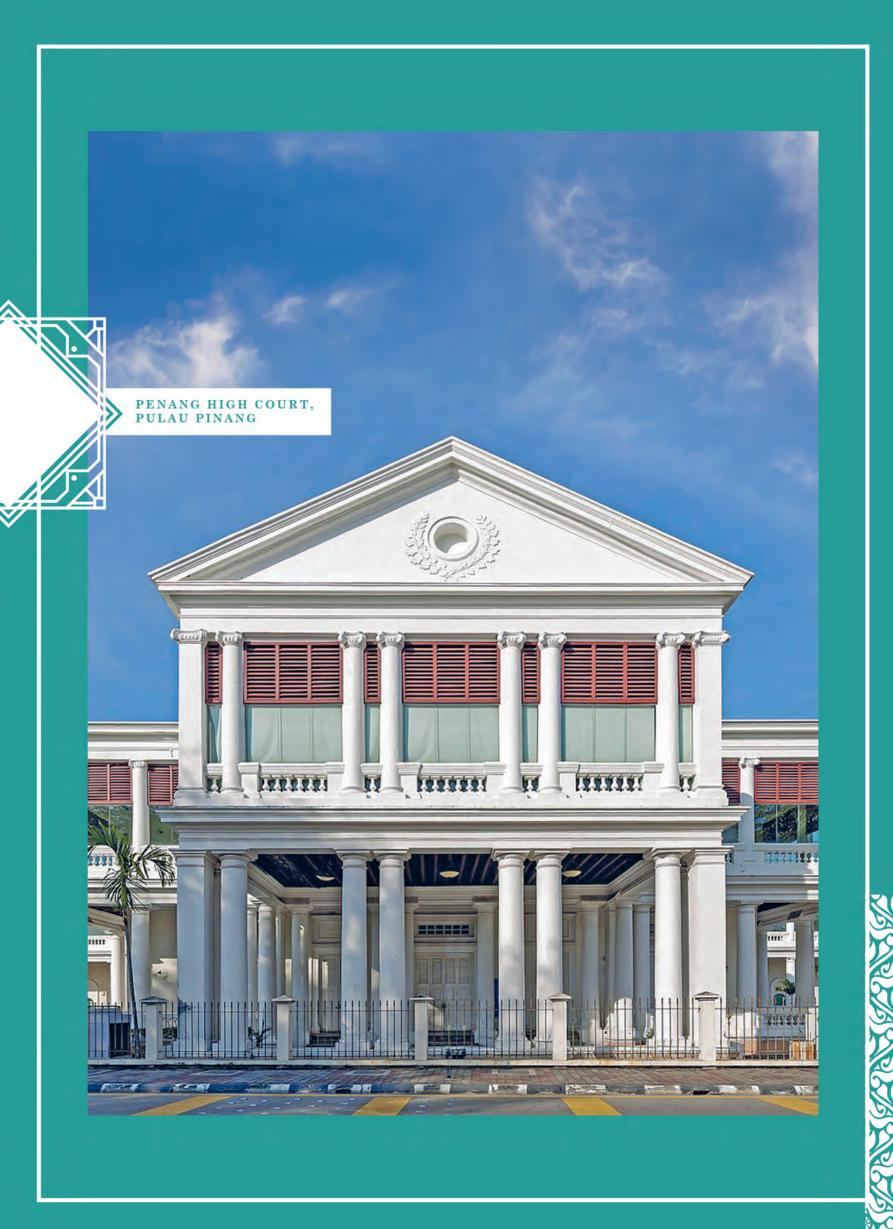


Datuk Amirudin Abd Rahman was born on June 20, 1962 in Pahang. He studied at International Islamic University and graduated with LLB (Hons) in 1987.

He started his career by joining the Judicial and Legal Service on October 1, 1987. He was a Magistrate at Pontian, Johor from 1987 to 1991 before he was transferred to the Attorney General's Chambers. During his tenure at the Attorney General's Chamber, he held several positions: Deputy Public Prosecutor, Federal Counsel and Senior Federal Counsel in various ministries and agencies such as Ministry of Energy, Telecommunication and Post, Ministry of Energy, Communication and Multimedia, Economic Planning Unit and Public-Private Partnership Unit. He was also appointed as Deputy Head of Advisory Division (Municipal) II and Deputy Head of Advisory Division I.

Datuk Amirudin was appointed a Judicial Commissioner on July 10, 2020. He completed his tenure on July 9, 2022.







NO

COURSES ORGANISED BY THE TRAINING COMMITTEE OF THE JUDICIAL ACADEMY, JUDICIAL APPOINTMENT COMMISSION

The following courses were conducted by the Training Committee of the Judicial Academy in 2022.

1. INDUCTION PROGRAMME FOR JUDICIAL COMMISSIONERS 2022

TOPICS

Induction Programme for Judicial Commissioners 2022 was held from January 25-28, 2022 at the Conference Hall, Palace of Justice, Putrajaya. The objective of this programme was to expose the participants to the scope and areas of work and best practices that must be followed when fulfilling their duties and responsibilities as judicial commissioners. 10 judicial commissioners attended the course which covered 14 topics related to the judicial duties of a judicial commissioner. There topics were:

SPEAKERS

110	101105	
1.	Judges' Code of Ethics	The Right Honourable Justice Rohana Yusuf President of the Court of Appeal
2.	Salient Features of the Rules of Court 2012	Justice Hasnah Dato' Mohammed Hashim Judge of the Federal Court
		Justice Mary Lim Thiam Suan Judge of the Federal Court
3.	Transition to The Bench	YBhg Tan Sri Datuk Suriyadi Halim Omar Member of Judicial Appointments Commission
		YBhg Datuk Dr Prasad Sandosham Abraham Member of Judicial Appointments Commission
4.	Virtual Hearing	Justice Wong Kian Kheong Judge of the High Court
5.	Joint Session with Chief Judge of Malaya & Chief Judge of Sabah and Sarawak	The Right Honourable Justice Azahar Mohamed Chief Judge of the High Court in Malaya
		The Right Honourable Justice Abang Iskandar Abang Hashim Chief Judge of the High Court in Sabah and Sarawak
6.	Contempt Proceedings	Justice Vazeer Alam Mydin Meera Judge of the Court of Appeal
7.	When to Recuse	Justice Zabariah Mohd Yusof Judge of the Federal Court
8.	How to Conduct Criminal Trials Section 302 of the Penal Code Section 39B(1)(a) of the Dangerous Drugs Act 1952	
		Judge of the Federal Court
9.	How to Read Statutes	Justice Nor Bee Ariffin Judge of the Court of Appeal
10.	Managing Procrastination and Competing Priorities	Justice Haji Mohd Zawawi Salleh Judge of the Federal Court

NO	TOPICS	SPEAKERS
11.	Case Management in Civil Cases and Court- Annexed Mediation	Justice Vernon Ong Lam Kiat Judge of the Federal Court
12.	Judgment Writing Workshop Issues-Based Approach in Judgment Writing Challenges in Judgment Writing	_
13.	E-Court System and E-Review	Puan Hamidah Mohamed Deril Director of E-Court Division Office of the Chief Registrar of the Federal Court of Malaysia Tuan Muhammad Kamil Nizam Deputy Registrar Registrar's Office of the Subordinate Courts of Malaya
14.	Salary, Allowance and Benefits for Judges	Puan Laila Khalidah Ismail Director of Management Division Office of the Chief Registrar of the Federal Court of Malaysia



 $\label{localization} \mbox{Induction Programme for Judicial Commissioners 2022 was held from January 25-28, 2022 at the Conference Hall, \\ \mbox{Palace of Justice, Putrajaya}$



The Right Honourable Justice Rohana Yusuf, President of the Court of Appeal and Justice Mohd Zawawi Salleh, Judge of the Federal Court addressing the newly appointed judicial commissioners during the Induction Programme for Judicial Commissioners.



Group photo taken after the Induction Programme



2. WRITING BETTER JUDGMENTS COURSES 1/2022 AND 2/2022

Writing Better Judgments Course 1/2022 was held from March 24-26, 2022 at Zenith Hotel, Putrajaya and Course 2/2022 was held from October 27-29, 2022 at Double Tree Hotel by Hilton Putrajaya Lakeside, Putrajaya. The objective of this course was to introduce the main concepts on better quality of grounds of judgment by using the 5C concept: clear, concise, comprehensive, coherent and convincing. Course 1/2022 was participated by 7 High Court judges and 12 judicial commissioners whilst Course 2/2022 was participated by 10 High Court judges and 8 judicial commissioners. The Right Honourable Chief Justice Tengku Maimun Tuan Mat also attended this course. Each participant was given a task to re-write their ground of judgment based on the 5C concept to be reviewed by their respective group facilitator. The participants were divided into groups of three to six members facilitated by three facilitators who were judges of the Federal Court and the Court of Appeal.

The various sessions organised for the three-day course were as follows:

SESSION	TITLE	FACILITATORS
1	Why Good Judgments Matter?	The Right Honourable Justice Azahar Mohamed Chief Judge of the High Court in Malaya The Right Honourable Justice Abang Iskandar Abang Hashim Chief Judge of the High Court in Sabah and Sarawak
2	Issues-Based Approach to Judgment Writing: The Conceptual Framework	Justice Nallini Pathmanathan Judge of the Federal Court Justice Vazeer Alam Mydin Meera Judge of the Court of Appeal
3	The First Page and Creating Headings	Justice Vernon Ong Lam Kiat Judge of the Federal Court
4	Individual Feedback Session and Exercise on Re-writing the First Page and Creating Headings	
5	The Challenges of Judgment Writing	Justice Lee Swee Seng Judge of the Court of Appeal
	The Structural Construct of an Issues-Based Judgment	Justice Vazeer Alam Mydin Meera Judge of the Court of Appeal
6	The Road to Judgment	The Right Honourable Justice Rohana Yusuf President of the Court of Appeal
7	Workshop on Practical Issue Identification	All facilitators
8	Workshop – Review of the Re-written First Page and List of Headings	All facilitators
9	Issues-Based Approach Judgment Writing in Criminal Cases (Section 39B of Dangerous Drugs Act 1952 and Section 302 of the Penal Code)	
10	Managing Procrastination and Competing Prioritie	Justice Haji Mohd Zawawi Salleh Judge of the Federal Court
11	Workshop – Review of The Re-written Submitted Judgment	All facilitators





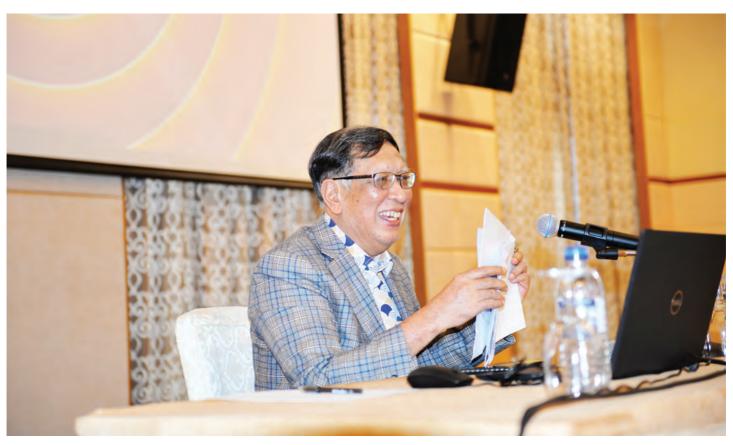
The Right Honourable Tun Tengku Maimun Tuan Mat Chief Justice of Malaysia, addressing the participants at the Writing Better Judgments Course



The Right Honourable Justice Rohana Yusuf, President of the Court of Appeal, the facilitator at the Writing Better Judgments Course



The Right Honourable Justice Azahar Mohamed, CJM and the Right Honourable Justice Abang Iskandar Abang Hashim, CJSS, the facilitators at the Writing Better Judgments Course



Justice Haji Mohd Zawawi Salleh was giving his talk on "Managing Procrastination and Competing Priorities"





A group photograph of the participants and the facilitators at the Writing Better Judgments Courses 1/2022



A group photograph of the participants and the facilitators at the Writing Better Judgments Courses 2/2022





3. MEDIATION SKILLS AND TECHNIQUES WORKSHOP IN A HYBRID MANNER (PHYSICAL AND ONLINE) FOR THE JUDICIARY

A Mediation Skills and Techniques Workshop was carried out physically and online for members of the Judiciary from September 7-8, 2022 at Sapphire Room 1, Asian International Arbitration Centre ("AIAC"), Kuala Lumpur. The objective of the workshop was to ensure all members of the Judiciary are able to act as mediators with basic mediation skills based on proper and effective techniques.

There were 24 participants consisting of 13 High Court judges and 11 judicial commissioners who attended the workshop. Justice Vernon Ong Lam Kiat, Judge of the Federal Court cum the Chairman of the Training Committee of the Judicial Academy also attended the programme.

The two-day workshop was officiated by YBhg Tan Sri Datuk Suriyadi Halim Omar, Director of the AIAC. The speakers for the workshop were YBrs Mdm. Gunavathi Subramaniam, a private legal practitioner and part-time lecturer in alternative dispute Resolution at University of Malaya, and YBrs Mr. Chia Loong Thye, a certified adjudicator at AIAC since 2016. The topics covered were Mediation Styles, Negotiation Exercise and Debrief, Negotiation Principles and Styles, The Facilitative Mediation Process Model, Mediation Demonstration and Debrief, Judicial-led-mediation, Mediator Skills, Communication Skills and Communication Barriers.



YBhg Tan Sri Datuk Suriyadi Halim Omar, Director of the AIAC officiated the Mediation Skills and Techniques Workshop



Discussion session at the Mediation Skills and Techniques
Workshop

4. CHALLENGES ON HEARING ONLINE FORUM

Challenges on Hearing Online Forum was held on October 16, 2022 at Shangri-La Hotel, Kuala Lumpur in conjunction with the 54th Judges' Conference 2022. The forum was co-organised with the Office of the Chief Registrar of the Federal Court. The objective of the forum was to discuss the issues and challenges faced when hearing cases online. The moderator for the forum was Justice Vernon Ong Lam Kiat, Judge of the Federal Court while the panelists were Justice Has Zanah Mehat, Judge of the Court of Appeal, Justice Ravinthran N Paramaguru, Judge of the Court of Appeal, Justice Abu Bakar Jais, Judge of the Court of Appeal, and Justice Nantha Balan ES Moorthy, Judge of the Court of Appeal.



5. COURSE ON SECTION 302 OF THE PENAL CODE

The Course on Section 302 of the Penal Code was held at Double Tree Hotel by Hilton Putrajaya Lakeside, Putrajaya on October 20, 2022. The objective of the course was to better understand section 302 of the Penal Code.

There were nine High Court judges and 16 judicial commissioners who attended the course. Justice Vernon Ong Lam Kiat, Judge of the Federal Court cum Chairman of the Training Committee of the Judicial Academy was also present. Facilitators of the course were Justice Abdul Rahman Sebli, Judge of the Federal Court and Justice Abdul Karim Abdul Jalil, Judge of the Court of Appeal. Justice Yaacob Haji Md Sam and Justice Vazeer Alam Mydin Meera, Judges of the Court of Appeal were also present as observers of the course. 5 participants presented topics of discussion which were "The Offence of Murder and the Offence of Culpable Homicide Not Amounting to Murder Under the Penal Code – Concept and Elements of the Offences", "Sections 34 and 149 of the Penal Code, Evidence of Forensic Pathologist", "Witnesses" and "Corroboration".



Justice Vernon Ong Lam Kiat, Judge of the Federal Court cum Chairman of the Training Committee of the Judicial Academy





(L-R) Justice Vazeer Alam Mydin Meera, Justice Abdul Rahman Sebli, Justice Vernon Ong Lam Kiat, Justice Abdul Karim Abdul Jalil and Justice Yaacob Haji Md Sam during the course on Section 302 of the Penal Code



A group photo of Judges and Judicial Commissioners at the course

6. COURSE ON ELECTION PETITION

Course on Election Petition was held on November 20, 2022 at the Palace of Justice, Putrajaya. The objective of the programme was to provide a better understanding of election laws and procedures.

Thirty six High Court judges and three judicial commissioners attended the course online. The opening speech was delivered by The Right Honourable Tun Tengku Maimun Tuan Mat, Chief Justice of the Federal Court of Malaysia. The Right Honourable Justice Abang Iskandar Abang Hashim, Chief Judge of the High Court in Sabah and Sarawak and Justice Vernon Ong Lam Kiat, Judge of the Federal Court cum Chairman of the Training Committee, Judicial Academy were also present.

This programme was co-organised with the Office of the Chief Registrar of the Federal Court. The course consisted of three lecture sessions and one sharing session. Speakers for this course were Justice Mohamad Zabidin Mohd Diah, Judge of the Federal Court cum acting Chief Judge of the High Court in Malaya, Justice Harmindar Singh Dhaliwal, Judge of the Federal Court and Justice Azizah Haji Nawawi, Judge of the Court of Appeal while the panelists of the sharing session were Justice Harmindar Singh Dhaliwal, Judge of the Federal Court Judge, Justice Hanipah Farikullah, Justice Azizah Haji Nawawi, Justice Vazeer Alam Mydin Meera and Justice Lee Heng Cheong, Judges of the Court of Appeal.



Seen in the photo Justice Vernon Ong Lam Kiat, Judge of the Federal Court, the Chairman of the Training Committee and Justice Mohamad Zabidin Mohd Diah, Judge of the Federal Court acting Chief Judge of Malaya



Justice Azizah Haji Nawawi, Judge of the Court of Appeal, speaker at the course on Section 302 of the Penal Code

COURSES CONDUCTED BY THE STRATEGIC DEVELOPMENT AND TRAINING DIVISION, OFFICE OF THE CHIEF REGISTRAR FEDERAL COURT OF MALAYSIA

The following courses were conducted by the Strategic Development and Training Division, Office of the Chief Registrar of the Federal Court in 2022:

1. Standard Operating Procedures on Court Security in Malaysia / Kursus Tatacara Operasi Standard bagi Keselamatan Mahkamah di Malaysia









This course was held on February 8, 2022 at the Conference Hall, Palace of Justice, Putrajaya in conjunction with the launching of Standard Operating Procedures (SOP) on Court Security in Malaysia ("Court Security SOP") by the Right Honourable Chief Justice of Malaysia. The objective of this course was to brief the participants regarding the newly launched Court Security SOP and to enhance knowledge on issues and challenges of court security. Members of National Court Security Committee and State Court Security Committees consisting of judges, top management from the Chief Registrar's Office, the state court directors, judicial officers and delegates from other agencies attended the court. Chief Inspector John Seagraves from the United States Department of Justice and ACP Glenn Anthony Sinnappah from the Royal Malaysian Police were invited to share their expertise on court security.

2. Empowerment and Enhancement of Work Culture for Court Orderlies / Kursus Pemantapan dan Pemerkasaan Budaya Kerja Odeli

This course was held from February 24-26, 2022 at the National Institute of Land and Survey (INSTUN), Tanjong Malim, Perak. A total of 45 court orderlies from the Federal Territories of Putrajaya and Kuala Lumpur, Selangor and Negeri Sembilan attended the course. The objective of this course was to enhance the participants' understanding and knowledge of the job scope for court orderlies. The course was delivered by experienced judicial officers. Through comprehensive talks on psychology and etiquette, participants were encouraged to adopt a positive mindset in order to attain higher job satisfaction, motivation and performance. At the end of the course, the participants embarked on a sharing session and lively discussion among panel members on good practices and issues faced by orderlies. This sharing session was chaired by the Director of Strategic Planning and Training Division and paneled by representatives from the Management Division of the Chief Registrar's Office, the High Court of Malaya, the Court of Appeal and the Federal Court.



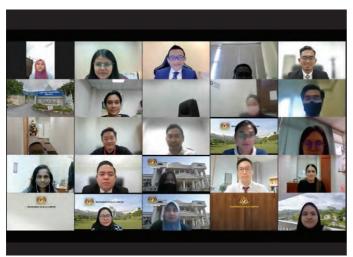






3. Webinar on Preparation of Proposal Paper for Postgraduate Studies under Hadiah Latihan Persekutuan (HLP) / Webinar Penyediaan Kertas Cadangan Melanjutkan Pengajian di bawah Tajaan Biasiswa Hadiah Latihan Persekutuan (HLP)

The objective of this webinar was to equip the participants with the necessary knowledge and skills on preparing proposal papers for *Hadiah Latihan Persekutuan* ("HLP"). HLP is a postgraduate scholarship program offered by the Public Service Department ("PSD") to the members of public service, including judicial officers. All judicial officers were invited to join the webinar, which was held on February 16, 2022 via Zoom. Dr. Arwan Sabri from PSD's Human Capital Development Division was invited to brief the participants on the HLP program. Judicial officers Dr. Azrol Abdullah and Dr. Iriane Isabelo were also invited to share their experience as alumni of the program.





4. Webinar on Formal Email Writing for Judicial Officer / Webinar Penulisan E-mel Rasmi bagi Pegawai Kehakiman

The webinar was designed to develop writing and editing skills and to write more effective and efficient emails using a designated format and language for official purposes. It was held on October 3, 2022 via Zoom. Tuan Abdullah Siddiq Haji Mohd Nasir, Special Officer to the Chief Registrar of the Federal Court Malaysia was invited to share his knowledge and experience for the benefit of 120 participants.





5. Webinar on Judicial Temperament / Webinar Pembawaan Kehakiman

A webinar on Judicial Temperament was held online via Zoom on October 26, 2022. Justice Aslam Zainuddin, High Court Judge from Kuala Lumpur was invited to share his knowledge on the topic. This webinar was held to train judicial officers on the quality of judicial temperament needed for Session Court judges and magistrates in conducting their cases in court.





6. Webinar on Cases Involving Persons of Unsound Mind under Chapter XXXIII of the Criminal Procedure Code (from the Court's Perspective) / Webinar Kes Melibatkan Orang Tak Sempurna Akal di Bawah Bab XXXIII Kanun Prosedur Jenayah (Perspektif Mahkamah)

This webinar was held on November 16, 2022 via Zoom with the participation of 100 judicial officers throughout Malaysia. The objective of this webinar was to enhance the knowledge of judicial officers in respect of Chapter XXXIII of the Criminal Procedure Code and laws relating to mental disorder from the court's perspective. Tuan Mohammed Mokhzani Mokhtar, the Pahang state court director was invited to share his knowledge and experience.





7. Webinar on Conducting Drug Cases at Magistrates' Courts / Webinar Pengendalian Kes-Kes Dadah di Mahkamah-Mahkamah Majistret

This webinar was held on November 30, 2022 via Zoom. Judicial officers who attended this webinar had the opportunity to learn about legal procedures and case management skills for cases involving drugs-related offences. Tuan Syahrul Sazly Md Sain from the Kajang Magistrate's Court was invited to share his knowledge and experience on the topic.





8. Webinar on Mediation in Car Accident Cases (Case Management and Basic Principles of Liability and Quantum) / Webinar Mediasi Kes Kemalangan Jalan Raya (Pengurusan Kes dan Prinsip-Prinsip Asas Liabiliti dan Kuantum)

This webinar was held as part of the Judiciary's initiative to increase the efficiency of hearings of traffic accident cases. The objective of this webinar was to enhance the knowledge of judicial officers regarding the mediation process for traffic accident cases as well as on issues relating to the ascertainment of liability and assessment of damages. It was conducted via Zoom on December 13, 2022 with the participation of 120 judicial officers throughout Malaysia. Tuan Zaman Mohd Noor, the Kelantan state court director was invited to deliver his expertise on the topic.











THE 54TH ANNUAL MEETING OF THE COUNCIL OF JUDGES



The 54th Council of Judges' Meeting at the Westin Desaru Coast Resort, Johor

The 54th Council of Judges' Meeting was held from February 24-27, 2022 at the Westin Desaru Coast Resort, Johor. A total of one hundred and twenty seven (127) judges of the superior courts attended the meeting.

The first day began with registration and the judges were then treated to a welcome dinner. The meeting proper was held the following day where the Right Honourable Tun Tengku Maimun Tuan Mat, the Chief Justice of Malaysia presided over the 54th Council of Judges' Meeting. Various issues were raised and discussed during the meeting, amongst others, the Judges' Dinner Account, the role of the Managing Judges and the position of Managing Judges in the United Kingdom and South Africa, the establishment of *Persatuan Bekas Hakim* and the organising of a talk by a psychologist to help judges deal with second-hand trauma. A resolution on the usage of the Judges' Dinner Account was also unanimously passed.

The meeting continued with a presentation by a renowned speaker, Madam Rahimah Yeop, Learning and Development Director of Jendela Ilmu Solutions on personal appearance and social etiquette. In the afternoon, the judges were enlightened by a talk entitled "Permodalan Nasional Berhad – An Institution in Trust" by Mr. Fadzihan Abbas Mohamed Ramlee, Chief Strategy Officer of Permodalan Nasional Berhad. Later in the evening, the judges were invited to a dinner reception at the Grand Ballroom where they enjoyed scrumptious authentic Johor cuisine.

On the third day, the meeting continued with the breakout sessions for the Federal Court, the Court of Appeal, the High Court of Malaya and the High Court of Sabah and Sarawak. During the breakout session for the Federal Court, among the issues discussed were criminal appeals, habeas corpus, review applications, leave applications, single judge leave applications, postponement of cases and *curia advisari vult*.



(L-R) The Right Honourable Justice Azahar Mohamed, The Right Honourable Justice Rohana Yusuf, Madam Rahimah Yeop, Justice Mohd Zawawi Salleh, The Right Honourable Justice Abang Iskandar Abang Hashim



A group photo of Judges and Judicial Commissioners at the $54^{\rm th}$ Council of Judges' Meeting

At the Court of Appeal breakout session, the discussions held were on issues such as the number of cases per sitting, grounds of judgment, broad grounds, costs, recording of proceeding, submissions, leave for judges, fixing criminal cases involving capital punishment and disposal of cases.

The breakout session for the High Court of Malaya discussed issues relating to statistics, disposal of cases, online hearings, grounds of judgment and shortage of officers. Justice Vernon Ong Lam Kiat, Managing Judge, was invited to present on case management in complex and lengthy trials and a knowledge sharing session was also held by Justice Wong Kian Kheong and Justice Ahmad Fairuz Zainol Abidin on virtual hearings and online proceedings protocols. Justice Tee Geok Hock then presented on section 24A of the Courts of Judicature Act 1964 (Reference to Special Referee). The e-Court Division was also given the opportunity to deliver presentations on the e-PG, e-Denda, e-Rekod Rayuan and Recording & Voice to Text (RVT).

In the breakout session for the High Court of Sabah and Sarawak, the topics discussed included the implementation and use of artificial intelligence (AI) under section 12(2) of the Dangerous Drugs Act 1952 since its launch in February 2020 and how its use will be extended to section 380 of the Penal Code, matters relating to late birth registration, significance of court's finding after an inquiry and whether the result of the inquiry can be used to establish whether one is a native or not. Justice Dean Wayne Daly was invited to present on the development of native customary rights (NCR) cases in Sarawak while the judicial officers were also given the opportunity to present on AI on court sentencing (AiCOS), e-Kehakiman Sabah & Sarawak (e-KSS) and Late Birth Registration Cases: The Rationale for Revision to the High Court and Issues & Challenges in Hearing Birth Extracts Cases by the Magistrates: The Way Forward.

The day ended with a gala dinner specially curated for all the superior court judges held at the Grand Ballroom, the Westin Desaru Coast Resort. Judges were entertained with live band performances and karaoke sessions. This beautiful soiree was indeed a perfect occasion to reconnect with a strong sense of camaraderie and forge new bonds amongst all Judges.

The 54th Council of Judges Meeting 2022 ended on February 27, 2022.



Madam Rahimah Yeop delivering her presentation on personal appearance and social etiquette

THE 55[™] ANNUAL MEETING OF THE COUNCIL OF JUDGES

Section 17A of the Courts of Judicature Act 1964 [Act 91] ("CJA") provides for a Council of all the Judges meeting to be convened as and when necessary but there shall be at least one meeting in each year. However, no meetings could be convened for the years 2020 and 2021 due to the Coronavirus Disease 2019 (COVID-19) pandemic that affected the world.

In 2022, the Council of Judges Meeting was held twice: the 54th Council of Judges Meeting was held in February 2023, at the Westin Desaru Coast Resort, Johore, and the 55th Council of Judges Meeting was held on October 14-16, 2022, at the Shangri-La Hotel Kuala Lumpur.

A total of 156 judges of the superior courts attended the 55th Council of Judges Meeting, which commenced with an online symposium entitled Constitutional Amendments and the Basic Structure in Malaysia hosted by the University of Malaya. It was then followed with the first dinner of the event.

The meeting continued on the second day with opening remarks by the Right Honourable Tun Tengku Maimun Tuan Mat, the Chief Justice of Malaysia. During the opening remarks, the Chief Justice explained that pursuant to section 17A of the CJA, a council of judges meeting is required to be held at least once a year. Since the holding of this meeting is a statutory requirement, Parliament approved modifications to section 17A of the CJA via section 52 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 [Act 829] to dispense with such requirement for the years 2020 and 2021.

The Chief Justice also touched on the 54th Council of Judges Meeting 2022 which was held on February 24-27, 2022 at the Westin Desaru Coast Resort in a hybrid manner which was presided by the Chief Justice via Zoom.



Back Row (L-R) Justice Vernon Ong Lam Kiat, Justice Abdul Rahman Sebli, Justice Rhodzariah Bujang, Justice Mary Lim Thiam Suan, Justice Zabariah Mohd Yusof, Justice Hasnah Mohammed Hashim, Justice Mohamad Zabidin Mohd Diah and Justice Harminder Singh Dhaliwal

Front Row (L-R) The Right Honourable Justice Azahar Mohamed, The Right Honourable Chief Justice Tun Tengku Maimun Tuan Mat,
The Right Honourable Justice Rohana Yusuf and The Right Honourable Justice Abang Iskandar Abang Hashim





Dr. Ian Llyod delivering his talk on Stress on the Bench

The meeting discussed matters arising including membership of the Asean Law Association. Justice Mary Lim Thiam Suan, Judge of the Federal Court informed the meeting that Malaysia would be hosting the ASEAN Law Association's (ALA) General Assembly in 2023 and at the same time Malaysia would also be hosting the meeting of its General Council.

The meeting continued with a talk on Stress on the Bench by Dr Ian Lloyd, Clinical Psychology Officer, Department of Psychiatry & Mental Health, Hospital Bahagia, Ulu Kinta followed by a Wellness Programme by Kevin Zahri. These programmes appeared to be well received, and similar ones should be considered in the future.

The second night's dinner was a memorable event. At the Gala Dinner, two books were launched: one by the then President of the Court of Appeal, the Right Honourable Rohana Yusuf and another by the then Chief Judge of the High Court in Malaya, the Right Honourable Azahar Mohamed.

The books were published in conjunction with the retirement of the then President of the Court of Appeal and the then Chief Judge of the High Court in Malaya. A fond farewell was also bid to others judges who were retiring namely, Justice Indera Haji Ab Karim Ab Rahman, Justice Haji Mohd Yazid Haji Mustafa and Justice Haji Ghazali Haji Cha, for whom the 55th Council of Judges Meeting would be their last.

On the last day, the meeting proceeded with a forum that was conducted by the Judicial Appointments Commission (JAC). The forum entitled "Challenges on Hearing Appeal Online" was moderated by Justice Vernon Ong Lam Kiat while the panellists were Justice Has Zanah Mehat, Justice Ravinthran N Paramaguru, Justice Abu Bakar Jais and Justice Nantha Balan ES Moorthy. The forum mainly focused on the discussion of the trials and tribulations faced in appeal cases conducted online. The forum invited many queries and sharing of experience from the judges who have conducted their cases via the online platform. The end of the forum marked the end of the 55th Council of Judges Meeting 2022.



The Right Honourable Justice Rohana Yusuf, PCA delivering her farewell speech at the Gala Dinner



The Right Honourable Justice Azahar Mohamed, CJM delivering his farewell speech at the Gala Dinner

THE COUNCIL OF ASEAN CHIEF JUSTICES WORKING GROUP ON FACILITATING SERVICE OF CIVIL PROCESS AND THE COUNCIL OF ASEAN CHIEF JUSTICES WORKING GROUP ON CASE MANAGEMENT AND COURT TECHNOLOGY MEETINGS

August 21-23, 2022 Sama-Sama Hotel, KLIA, Kuala Lumpur



The Right Honourable Justice Azahar Mohamed chaired the Working Group on Facilitating Service of Civil Processes

The Council of ASEAN Chief Justices ("CACJ") Working Group Meeting was organised by the Malaysian Judiciary and was held from August 21-23, 2022 at the Sama-Sama Hotel, KLIA, Kuala Lumpur.

Two Working Group Meetings were held during this session, both led and chaired by the Right Honourable Justice Azahar Mohamed, the Chief Judge of Malaya ("CJM"), and the Right Honourable Justice Abang Iskandar Abang Hashim, the Chief Judge of Sabah and Sarawak ("CJSS") respectively. The two Working Groups that met were:

(i) Working Group on Facilitating Service of Civil Processes (chaired by CJM); and

(ii) Working Group on Case Management and Court Technology (chaired by CJSS).

Other delegations from the Malaysian Judiciary who were in attendance included the Right Honourable Mohamad Zabidin Mohd Diah, Dr. Noradura Hamzah, Director of Policy and Legislation Division, YBhg. Dato' Edwin Paramjothy Michael Muniandy, Director of Research Unit as well as the Malaysian Judiciary CACJ Liaison Officers including Ms. Siti Zahirah Zaidon, Senior Assistant Registrar.

The meetings were well attended by the representatives of each Working Group and representatives from the



The Right Honourable Justice Abang Iskandar Abang Hashim chaired the Working Group on Case Management and Court Technology

CACJ secretariat. Those in attendance included the Vice President of the Supreme Court of Cambodia and other judges and judicial officers from each ASEAN Member State.

Working Group on Facilitating Service of Civil Processes

The Chairman of the of the Working Group underscored the pressing need for more consistency in civil procedure involving the taking of evidence for foreign proceedings, considering the worthwhile benefits it would harness throughout the ASEAN region to aid cross-border litigation. It was emphasised that the ASEAN Member States' reports and feedback served as the foundation for the Model Rule on Evidence.

The aim was not only the adoption of the Model Rule on Evidence; rather it sought an agreement or consensus to approve the model rule or the model provision, which each jurisdiction will then have to consider for implementation in consultation with their relevant rule-making bodies. This was done while acknowledging that the legal systems of the ASEAN nations differ from one another, i.e. where

some are based on common law and others on civil law.

The Chairman further emphasised the importance of making efforts to identify a compromise that can be reached to encourage uniformity in the application of the law. The Chairman ended his address with a note of reminder on the Working Group's commitment under the Jakarta Declaration, which is to consider and deliberate on the working draft of the Model Rule on Evidence which was presented at the 9th CACJ Meeting and to submit a finalised draft for the CACJ's consideration at the 10th CACJ Meeting.

The working draft of the Model Rule on Evidence was then discussed in detail and the Working Group members expressed their comments and gave their preliminary recommendations to further strengthen the working draft.

Taking into consideration the comments and proposals by the members of the Working Group, the Chairman recommended that the final draft of the Model Rule on Evidence be presented to the Council at the 10th CACJ Meeting for their consideration and approval.



Working Group on Case Management and Court Technology

The Chairman recalled that the idea of exploring further the emerging and potentially disruptive areas of legal technology, such as artificial intelligence ("AI"), big data, and blockchain technology in the respective ASEAN countries was conceptualised at the 5th CACJ Meeting in Singapore.

Upon considering and studying the feedback from each ASEAN Member State, the view taken is that it is imperative for ASEAN, as a union, to remain abreast with the development of AI-related technology. It was further acknowledged that the ASEAN regulation of AI was still at its infancy, nevertheless it was determined that AI can improve judicial decision-making to enhance the rule of law.

In this regard the Working Group on Case Management and Court Technology has drafted the AI Governance Framework to fit within the ASEAN legal system. The Working Group considered the underlying objective that there should be some kind of harmonisation of the legal framework within ASEAN, which could be adopted by countries with either a common law or civil law system.

During the meeting, the Chairman of the Working Group sought the consensus of the members to enable the AI Governance Framework to be tabled for adoption by the Council Members at the 10th CACJ Meeting. An overview of the working draft of the Framework was presented for deliberation by the members of the Working Group. In general, the Framework consists of three parts namely: Part A – Introduction, Part B – The Governance Framework, and Part C – Appendix: Report on the Feasibility Study of AI in ASEAN Member States.

The members of the Working Group were briefed on the methodology and flow of the AI Governance Framework. They were also taken through the consultation process involved in the preparation of the Framework. Important features of the Framework were highlighted which included:

- Inclusivity and sustainability
- Fairness and human oversight
- Transparency and explainability
- Accountability and auditability

- Set-up of the organisational and leadership structure
- AI adoption process
- Stakeholders' consultation
- Promotion of research and development
- International cooperation

The Working Group also emphasised on the non-legally ding nature of the Framework. ASEAN Member States may voluntarily opt to use the Framework and it does not substitute any current or future regulations or policies of the Member States.

Based on the discussion, the Working Group proposed the following recommendations to be considered in the upcoming 10th CACJ Meeting in November 2022:

- Present the progress update on the finalised draft AI Governance Framework for the Council's attention.
- Finalise the draft AI Governance Framework to be tabled for consideration by the Council during the 10th CACJ Meeting.
- iii. Recommend the adoption of the finalised draft AI Governance Framework by the Council.
- iv. Consider publishing on the ASEAN Judiciaries Portal (AJP) the AI Governance Framework which was sanctioned and recommended for adoption to facilitate public access to the same.



Group photo of the representatives of each Working Group and representatives from the CACJ secretariat

THE 10[™] COUNCIL OF ASEAN CHIEF JUSTICES AND THE INAUGURAL ASEAN+3 MEETING

November 3-6, 2022

Grand Hyatt Hotel, Kuala Lumpur

The 10th Council of ASEAN Chief Justices ("CACJ") and the Inaugural ASEAN+3 Meetings were hosted by the Malaysian Judiciary from November 3–6, 2022 at the Grand Hyatt Hotel, Kuala Lumpur. This was the first time since the COVID-19 outbreak that the Chief Justices, Heads of Delegations, and senior judicial officials of the ASEAN Judiciaries were able to meet in-person.

THE 10^{TH} COUNCIL OF ASEAN CHIEF JUSTICES' MEETING

The Meeting was attended by the Chief Justices and Head of Delegations of each ASEAN country, accompanied by their judges and senior judicial officials who are members of the Working Groups under the CACJ. The Malaysian Judiciary was led by the Right Honourable Tun Tengku Maimun Tuan Mat, the Chief Justice of Malaysia, accompanied by the Right Honourable Justice Abang Iskandar Abang Hashim, the Chief Judge of Sabah and Sarawak (CJSS) as well as Justice Mohamad Zabidin Mohd Diah. The Right Honourable Tun Tengku Maimun Tuan Mat was also elected as Chair of the CACJ.

The 10th CACJ held wide-ranging discussions on core areas of judicial collaboration. Areas which were discussed included:

- establishing a social media taskforce based on an approved constitution and terms of reference to consider the use of social media as an additional platform for engagement with the public;
- adopting a common set of values and principles for ASEAN Judiciaries in cases of cross-border child disputes within ASEAN;
- working towards developing a new online learning management system for future online self-learning content for ASEAN judges; and
- continuing to engage the Judiciaries of the People's Republic of China, Japan, and the Republic of Korea to explore further areas of collaboration, and

to explore opportunities with other jurisdictions for the ASEAN+ More Meetings.

Justice Mohamad Zabidin Mohd Diah substituting for The Right Honourable Justice Azahar Mohamed, as Chair for the Working Group on Facilitating Service of Civil Processes Within ASEAN presented the report by the said Working Group. His Lordship explained that essentially, the model rules empower the courts in the requested states to make an order for evidence to be taken at the behest of the requesting state. The model rules lay down the procedure to record such evidence for use in court proceedings in the requesting state. A judicial authority in a requesting state may request the judicial authority of the requested states to obtain evidence which is intended for use in the requesting state.

The Working Group proposed for the Council to consider and approve the final draft of the Model Rule on the Taking of Evidence for Foreign Proceedings in Civil or Commercial Matters and to recommend it for adoption subject to, and in accordance with, the respective ASEAN Member States' laws, regulations, and legal framework with such modifications as each jurisdiction deems fit.

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 AI solutions. The Working Group proposed for the Council to consider and approve the finalised draft AI Governance Framework and to recommend it for adoption subject to and in accordance with respective ASEAN Member States' laws, regulations, and legal framework with such modifications as each jurisdiction deems fit.

The $10^{\rm th}$ CACJ agreed and adopted these key documents presented by both Working Groups.





The Meeting was attended by the Chief Justices and Head of Delegations of each ASEAN country, accompanied by their judges and senior judicial officials who are members of the Working Groups under the CACJ



The Right Honourable Chief Justice Tun Tengku Maimun Tuan Mat with Chief Justices and Head of Delegations of each ASEAN country

Finally, the CACJ agreed on new initiatives to be explored, such as establishing a framework for holding Special Interest Group Meetings, establishing a new Working Group on the Conduct of Videoconferencing Hearings chaired by the Philippines, and holding an Inaugural CACJ Retreat in 2023 involving the ASEAN Chief Justices to reflect on the CACJ's milestones and achievements over the past ten (10) years and chart the CACJ's strategic agenda for the next ten (10) years.

The 10th CACJ Meeting ended with a signing ceremony of the Kuala Lumpur Declaration by all attending Chief Justices and Heads of Delegations.

THE INAUGURAL ASEAN+3

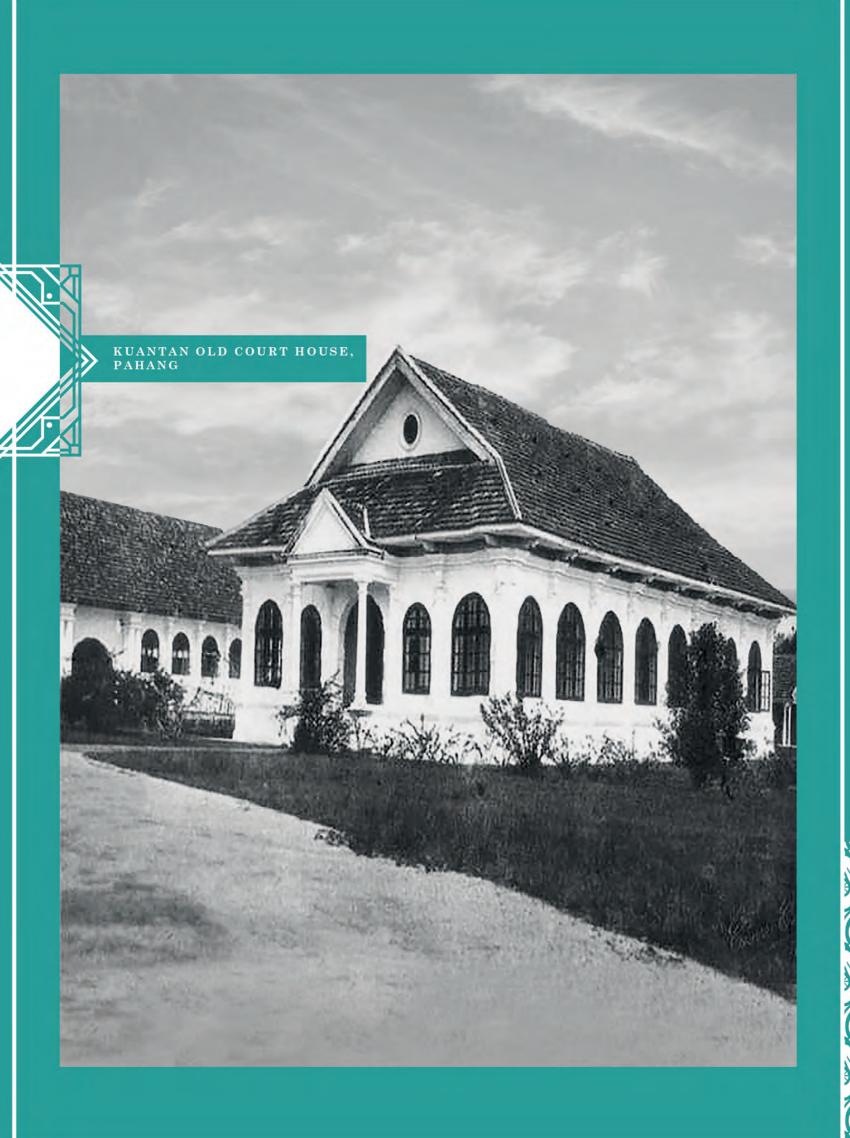
The Inaugural ASEAN+3 Meeting took place on November 5, 2022. It was a hybrid meeting, with the Chief Justices and representatives of the People's Republic of China, Japan, and the Republic of Korea attending remotely to share and discuss with the CACJ on the areas of technological developments and use of technology to facilitate access to justice.

As a welcoming gesture and to celebrate the attendance of the ASEAN Delegations at the 10th CACJ Meeting, the Malaysian Judiciary hosted a Royal Dinner on November 4, 2022 with Duli Yang Maha Mulia Paduka Seri Sultan Perak Darul Ridzuan Sultan Nazrin Muizzuddin Shah Ibni Almarhum Sultan Azlan Muhibbuddin Shah Al-Maghfur-lah and Duli Yang Maha Mulia Raja Permaisuri Perak Darul Ridzuan Tuanku Zara Salim gracing the Dinner with their Royal Highnesses' presence. The Malaysian Judiciary also hosted a Gala Dinner on November 5, 2022 in conjunction with the 10th Anniversary of the formation of the CACJ.

The CACJ will next meet in September 2023 for the Inaugural CACJ Retreat hosted by Malaysia.



The Inaugural ASEAN+3 Hybrid Meeting with the Chief Justices and representatives of the People's Republic of China, Japan, and the Republic of Korea





COURT-ANNEXED MEDIATION IN MALAYSIA

Introduction

Resolving disputes through the court system is costly, emotionally devastating and time consuming which may lead to the backlog of cases. In response to this, the Malaysian Judiciary had taken an initiative to reduce these backlog of cases where from 2003 and 2005, the Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim (as he was then), started the move to clear the pre-2000 cases.¹

Moved by such initiative, in 2003 Justice Su Geok Yiam, High Court Judge in Penang (as she was then) introduced Court-Annexed Mediation ("CAM").² Interestingly, court mediation was relatively new at that time because there was no specific legislation governing it.

Subsequently, a Practice Direction on Mediation came into effect in 2010 where CAM emerged as an alternative in dispute resolution. As an alternative to the traditional court system, CAM has played a vital role in transforming the landscape of conflict resolution by promoting mediation.

This article will mainly discuss the concept of CAM as one of the processes of alternative dispute resolution ("ADR"). This article also explores the remarkable development of CAM as part of the judicial landscape and achievements of CAM in Malaysia after more than a decade of its establishment and performance. In addition, this article will discuss the challenges faced in mediation and the way forward.

Definition of Court-Annexed Mediation

The notion of CAM was created by the courts in the United States of America ("US") as a viable solution to the problem of backlog and delays, as well as for efficient and effective case determination. Generally, CAM means that "mediation is available and may be mandated, as part of the litigation process. A mediator is appointed by or at the instigation of the court to help the parties explore and achieve settlement".³

For better understanding, reference was made to Singapore, the US and Australia. According to the Model Standards of Practice of the Subordinate Courts of Singapore, "Court Annexed Mediation is a conflict resolution process in which a court appointed mediator assists the disputing parties to negotiate a consensual and informed settlement".⁴

In the US, the Alliance for Education in Dispute Resolutions states in its website that "court mediation program may be based in the court, or may be invoked by the court to outside ADR programs run by bar association, non-profit group of the court or private ADR providers".⁵

Further, the National Centre for State Court (NCSC) on its website illustrates that, "in court-connected or court-annexed mediation, the Court may refer parties to roster from which a mediator is selected, a private mediation program, or a particular mediator. In some Courts, an alternative dispute resolution coordinator is available to assist parties in selecting mediation program or mediator that suits their needs. Mediators may be in-house court employees, PART XVII: Mediation and Civil Procedure private mediators (who are paid through a grant or contract), or volunteers".⁶

¹ Harbans Singh KS, Samrith Kaur, Rammit Kaur, Louise Azmi, Practice and Procedure of Mediation (Thomson Reuters, 2020).

² Rashid, SK, Mediation & Arbitration in Asia Pacific: Conference Proceedings (2010).

³ Jan, MNI & Mohamed, AaA, Mediation in Malaysia: The Law and Practice (2010).

Datuk Haji Khutubul Zaman Bukhari, "Court Annexed Mediation", ADR Conference on Medical Negligence (Kuala Lumpur, Jul/y 24-25, 2009).

⁵ Jan, MNI & Mohamed, AA, Mediation in Malaysia: The Law and Practice (2010) at p 433.

⁶ Nurah Sabahiah ti Mohamed "Mediation In The New Dispute Resolution Landscape; A Case For The Enhancement Of Its Application In Malaysia" UM (2013) at pg 340

In Australia, the Supreme Court of New South Wales stated that "Court annexed mediation is where a registrar or other officer of the court is the mediator". The source states that the registrars and officers who conduct mediations are qualified as mediators. Thus, the parties cannot select which registrar will mediate their dispute. In Malaysia, Chief Justice Tun Zaki Tun Azmi (as he was then) defined CAM as "a free mediation programme using judges as mediators to help the disputing parties in a litigation find a solution". Thus, in the Malaysian legal landscape, CAM means judges and judicial officers act as mediators to litigating parties after they have filed their action in the courts, where the mediation service is free.

The objectives of CAM are as follows:

- (a) to encourage parties to use mediation as an alternative to resolve their disputes without having to go through lengthy trial process;
- (b) to enable parties to reach an amicable settlement in a win-win situation;
- (c) to minimise the number of "backlog" cases; and
- (d) to save costs, time and energy of parties involved.

Development of the law with regard to CAM in Malaysia

Rules of the High Court 1980

CAM as a pilot programme started in 2005⁹ at the Penang High Court. It must be noted at this time there was no legislation mandating or regulating mediation.

At this initial stage, Justice Su Geok Yiam (as she was then) was of the opinion that a case could be disposed of in a "just, expeditious and economical manner" when it is settled by mediation¹⁰ and moved to introduce CAM under Pre-Trial Case Management pursuant to Order 34 r 4 of the Rules of the High Court 1980 [PU(A) 50/1980] which states that:

- 4. First pre-trial conference (O. 34, r. 4)
- (1) Where the parties to an action appear in person or by an advocate on the return date appearing in Form 63 (hereinafter referred to as "the first pre-trial conference"), then the Judge to whom the action has been assigned shall, after conferring with them, make such orders and give such directions as to the future conduct of the action to ensure its just, expeditious and economical disposal.

Statistics of cases referred to mediation in Penang as at May 20, 2005 showed a success rate of 70%. ¹¹ A year later, as at July 12, 2006, it was increased to 75% which means that 70% to 75% cases sent for mediation had been successfully settled. ¹² Due to this success, the former Chief Justice, Tun Dato' Sri Ahmad Fairuz (as he was then) expressed his full support for CAM to be introduced in all courts in Malaysia. ¹³



^{7 &}quot;Court-annexed mediation" from https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_mediationin-thesc/court annexed mediation.aspx.

⁸ https://www.theborneopost.com/2011/08/26/chief-justice-says-court-annexed-mediation-a-free-programme/.

⁹ Pilot programme (2015). Retrieved May 30, 2023, from https://www.law.cuhk.edu.hk/en/research/crj/download/presentations/20150130-nca-presentation.pdf.

¹⁰ Rashid, SK, Mediation & Arbitration in Asia Pacific: Conference Proceedings (2009).

¹¹ Ibid

Alwi Abdul Wahab, "Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience" (2003). Retrieved May 31, 2023 from https://vuirvu.edu.au/24331/1/Alwi%20Abdul%Wahab.pdf

¹³ Ibid.

Practice Direction No. 5 of 2010¹⁴

Practice Direction No. 5 of 2010 came into effect on August 16, 2010. The Practice Direction governs mediation for civil and commercial cases in the High Court and subordinate courts. Pursuant to this Practice Direction, all judges of the High Court and the deputy registrars and all judges of the Sessions Courts, Magistrates' Courts and their registrars may, at the pre-trial case management stage, give such directions to facilitate the settlement of a matter before the court by way of mediation.

Introduction of Rules of Court 2012

The Rules of the High Court 1980 was repealed by the Rules of Court 2012 [PU(A) 205/2012] and came into operation on August 1, 2012. CAM was mentioned for the first time in the Rules and became part of the law. This can be seen in Order 34 r 2 of the Rules of Courts 2012 which provides as follows:

- 2. Pre-trial case management when directed by the Court (O. 34 r. 2)
 - (1) Without prejudice to rule 1, at any time before any action or proceedings are tried, the Court may direct parties to attend a pre-trial case management relating to the matters arising in the action or proceedings.
 - (2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including
 - (a) mediation in accordance with any practice direction for the time being issued;

It is important to note that Parliament had enacted the Mediation Act 2012 [Act 749]("MA") which came into force on August 1, 2012 Act 749 seeks to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in dispute to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.

However, this Act is not applicable to CAM pursuant to paragraph 2(b) of the MA, which provides that the MA is not applicable to mediation conducted by a judge, magistrate, or officer of the court pursuant to any civil action that has been filed in court.

The reason the MA is not applicable to CAM is because the mediation process in CAM is governed by the Rules of Court 2012 and by the Practice Direction applicable at that time, i.e Practice Direction No. 5 of 2010, unlike mediation conducted by private persons or entities.

To further emphasise, according to the Explanatory Statement of the Mediation Bill 2012 [D.R. 01/2012]—

Clause 2 seeks to provide that the Act shall not be applicable to matters specified in the Schedule, mediation conducted by the courts pursuant to any civil action that has been filed in court and any mediation conducted by the Legal Aid Department. The Act thus intends to cover mediation conducted by private persons or entities.

 $^{14 \}qquad https://intranet.kehakiman.gov.my/EAA/arahanamalan/55.\%20 Practice\%20 Direction\%20 No.\%205\%20 Of\%202010.pdf.$

Practice Direction No. 2 of 201315

In 2013, Practice Direction No. 2 of 2013 entitled "Proses Mediasi bagi Kes-Kes Kemalangan Jalan Raya di Mahkamah Majistret dan di Mahkamah Sesyen" dated January 30, 2013, issued by the Office of the Chief Registrar, Federal Court of Malaysia, required all traffic accident cases to be referred to CAM and other matters as required under Order 3 r 2(2)(a) of the Rules of Court 2012.

Practice Direction No. 4 of 2016¹⁶

In 2016, Practice Direction No. 4 of 2016 entitled "Practice Direction on Mediation" dated June 30, 2016 issued by the Office of the Chief Registrar, Federal Court of Malaysia, details out the direction to facilitate the settlement of the matter before the court by way of mediation. This Practice Direction also revoked the earlier Practice Direction No. 5 of 2010.

Order 34 rr 1A and 1B of the Rules of Court 2012

In 2020, Order 34 of the Rules of Court 2012 was amended via the Rules of Court (Amendment) 2020 [PU(A) 351/2020] (came into force December 15, 2020) as follows:

- (a) by inserting the following provision:
 - 1. (1) Notwithstanding anything in these Rules, the Court may, at any time after the commencement of proceedings, of its own motion, direct any party or parties to the proceedings to appear before the Court, in order that the Court may make such order or give such direction as it thinks fit so that
 - (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and
 - (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.
 - (1A) If a judge of the High Court identifies that an issue arising in the action or proceedings between the parties can be resolved by way of mediation, the judge may refer the parties to mediation as prescribed by practice directions issued from time to time.
 - (1B) All running down cases shall be subject to mediation.
 - (2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including –; and
- (b) by deleting paragraph (a) of Order 34 r 2(2).

From the above, we can see that Order 34 of the Rules of Court 2012 after the amendment in 2020 provides that all running down cases are to be referred to mediation. Prior to the amendment, the referral for running down cases was made according to the Practice Direction in force at that time.



 $^{15 \}qquad https://intranet.kehakiman.gov.my/EAA/arahanamalan/30.%20Arahan%20Amalan%20Bil%202%20Tahun%202013.pdf$

 $^{16 \}qquad https://intranet.kehakiman.gov.my/EAA/arahanamalan/9.\%20 Practice\%20 Direction\%20 No.\%204\%20 of\%202016.pdf$

Practice Direction No. 2 of 2022

In 2022, Practice Direction No. 2 of 2022: "Matters and Mediation Procedures for Cases in the High Courts and the Subordinate Courts" dated March 24, 2022 was issued by the Right Honourable the Chief Justice, Tun Tengku Maimun Tuan Mat, to reflect the Malaysian Judiciary's commitment to mediation, as a medium for expeditious and economical disposal of cases.

The salient features of Practice Direction No. 2 of 2022 are as follows:

- (a) applies to mediation matters and procedures in civil proceedings in the High Courts and Subordinate Courts throughout Malaysia;
- (b) mandatory reference (for road traffic accident claims) and establishing mediation procedures for road traffic accident cases;
- (c) establishing the Procedure of Mediation Process By Judge-Led Mediation;
- (d) mediation may be conducted by-
 - (i) Judge-led mediation;
 - (ii) Institutions providing mediation services as agreed by the parties;
 - (iii) a Private Mediator as agreed by the parties;
- (e) determination of location for mediation process depends on the type of mediation as follows:
 - (i) judge-led mediation either in Court Mediation Centres or any location within the premises of the Court as may be determined by the mediator; and
 - (ii) conducted by an Institution providing mediation services or Mediation by a Private Mediator agreed by the parties, either at any location as determined by the mediator, or at any place agreed by the parties. Under this type of mediation, the parties shall not use the facilities of the Court Mediation Centre or any of the premises of the Court;
- (f) functions of the mediator;
- (g) listing of Court Mediation Centres via website link;
- (h) parties to maintain confidentiality; and
- (i) revocation of
 - (i) Practice Direction No. 2 of 2013 "Proses Mediasi bagi Kes-Kes Kemalangan Jalan Raya di Mahkamah Majistret dan di Mahkamah Sesyen";
 - (ii) letter dated January 30, 2013 from the Office of the Chief Registrar of the Federal Court "Proses Mediasi Bagi Kes-Kes Kemalangan Jalanraya di Mahkamah Majistret dan di Mahkamah Sesyen yang dirujuk di dalam Arahan Amalan Ketua Pendaftar Bil 2 Tahun 2013"; and
 - (iii) Practice Direction No. 4 of 2016 "Practice Direction on Mediation".

Mediation Centre and Mediation Division

The Kuala Lumpur Mediation Centre was established in August 2011 and to date, all states in Malaysia have their own mediation centres with a total of 13 judicial officers sitting as permanent mediators.

The Office of the Chief Registrar of the Federal Court of Malaysia has made a tremendous effort by establishing court mediation centres across Malaysia. As of today, thirteen (13) centres have been established. The list of the court mediation centres throughout Malaysia are as follows:



List of Court Mediation Centres in Malaysia

STATE	CENTRE
Kuala Lumpur (Klcmc)	Pusat Mediasi Mahkamah Kuala Lumpur
Selangor (Sacmc)	Pusat Mediasi Mahkamah Shah Alam
Kelantan (Kelcmc)	Pusat Mediasi Mahkamah Kota Bharu
Perak (Icmc)	1) Pusat Mediasi Mahkamah Ipoh 2) Pusat Mediasi Mahkamah Taiping
Johor (Jbcmc)	1) Pusat Mediasi Mahkamah Johor Bahru 2) Pusat Mediasi Mahkamah Muar
Kedah (Ascmc)	1) Pusat Mediasi Mahkamah Alor Setar 2) Pusat Mediasi Mahkamah Sg Petani
Negeri Sembilan (Scmc)	Pusat Mediasi Mahkamah Seremban
Terengganu (Ktcmc)	Pusat Mediasi Mahkamah Kuala Terengganu
Perlis (Kgrcmc)	Pusat Mediasi Mahkamah Kangar
Pahang (Kcmc)	Pusat Mediasi Mahkamah Kuantan
Melaka (Melcmc)	Pusat Mediasi Mahkamah Melaka
Pulau Pinang (Pcmc)	1) Pusat Mediasi Mahkamah Georgetown 2) Pusat Mediasi Mahkamah Butterworth
Sabah (Kkcmc)	Pusat Mediasi Mahkamah Kota Kinabalu
Sarawak (Kccmc)	Pusat Mediasi Mahkamah Kuching

On June 1, 2016, the Mediation Division was established to oversee the progress of the mediation practice in courts throughout Malaysia under the purview of the Office of the Chief Registrar, Federal Court of Malaysia. Among the functions of the Mediation Division are as follows:

- (a) to establish a CAM Centre in each and every state;
- (b) to provide training, consultation, and advice regarding the administration of CAM;
- (c) to supervise CAM throughout Malaysia; and
- (d) to serve as a central location for the collection of data and information regarding the mediation process in Malaysia.



Statistics at Mediation Centre

Table 1: Statistics of Mediation on High Court Cases from Jan 2020 until December 2022

MONTH	2020						2021							2022							
STATES / STATUS	B F L C O L A R W N R W C R A E Y R D D	R E G I S T R A T I O N	S U C C E S S F U L	U N S U C C E S S F U L	C A N C E L L E D	P E N D I N G	S U R C A C T E E S	B F L C O L A R R W N R A C R A C Y R D D	R E G I S T R A T I O N	S U C E S S F U L	U N S U C C E S S F U L	C A N C E L L E D	P E N D I N G	S U R C A C T E E S	B F A C O L A R W N R A C Y R D D	R E G I S T R A T I O	S U C C E S S F U L	U S U C C E S S F U L	C A N C E L L D	P E N D I N G	S U R C A C T E E S
KLCMC - KUALA LUMPUR	59	226	65	87	45	88	43%	88	316	72	135	43	154	35%	154	289	100	174	60	109	36%
SACMA - SELANGOR	29	110	59	39	7	34	60%	34	227	82	81	35	63	50%	63	260	90	118	42	73	43%
KelCMC - KELANTAN	3	4	2	2	0	3	50%	3	11	3	5	1	5	38%	5	52	10	6	33	8	63%
ICMC - PERAK	7	25	10	11	3	8	48%	8	64	21	27	10	14	44%	14	72	24	44	6	12	35%
JBCMC - JOHOR	6	25	14	6	8	3	70%	3	77	43	23	6	8	65%	8	110	50	40	6	22	56%
ASCMC - KEDAH	13	44	21	10	11	15	68%	15	48	22	24	6	11	64%	11	92	40	37	7	19	52%
SCMC - NEGERI SEMBILAN	4	38	15	5	22	0	75%	0	62	21	20	21	0	51%	0	69	21	25	14	9	46%
KTCMC - TERENGGANU	0	0	0	0	0	0	0%	0	0	0	0	0	0	0%	0	9	1	7	1	0	13%
KgrCMC- PERLIS	1	0	0	0	1	0	0%	0	4	2	2	0	0	50%	0	3	0	2	0	1	0%
KCMC - PAHANG	1	3	0	2	0	2	0%	2	6	1	2	3	2	33%	2	11	3	4	1	5	43%
MelCMC - MELAKA	0	25	7	6	8	4	54%	4	20	9	7	3	5	56%	5	35	15	15	5	5	50%
PCMC - PENANG	17	45	23	21	3	15	52%	15	98	27	31	44	11	47%	11	126	58	47	23	9	55%
KKCMC - SABAH	19	0	0	0	0	19	0%	19	20	9	11	5	14	45%	14	12	10	2	1	13	83%
KcCMC - SARAWAK	0	62	16	3	1	42	84%	42	71	18	1	8	86	95%	86	43	17	23	6	83	43%
TOTAL	159	607	232	192	109	233	55%	234	1024	330	269	185	373	47%	312	1183	439	544	205	297	45%

Reference:

- 1. Total Cases = New Registration + Carry Forward Cases
- 2. Success Rate Percentage = (Successful ÷ (Successful + Unsuccessful)) x 100

Table 2: Success Rate of Mediated Cases in the High Court from January 2020 - December 2022

SUCCESS RATE	2020	2021	2022
TOTAL	55%	47%	45%

Based on Table 1 and Table 2, the overall successful cases mediated throughout Malaysia in the High Court are as follows:

- (a) in 2020 232 cases which reflects 55% of success rate for that year;
- (b) in 2021 330 cases which reflects 47% of success rate for that year; and
- (c) in 2022 439 cases which reflects 45% of success rate for that year.

Table 3: Statistics of Mediation on Subordinate Court Cases from January 2020 until December 2022 (Excludes "running down cases")

MONTH	2020						2021							2022							
STATES / STATUS	B F A C O L A R N R W C Y R D D	R E G I S T R A T I O N	S U C C E S S F U L	U S U C C E S S F U	C A N C E L L D	P E N D I N G	S U R C A E T E E S	B F A C O L A R R W N R W C R A E Y R D D	R E G I S T R A T I O N	S U C C E S S F U L	UNSUCCESSFUL	C A N C E L L E	P E N D I N G	S U R C A C T E E S	B F A C O L A R W N R W C R A E Y R D D	R E G I S T R A T I O N	S U C C E S S F U L	U S U C C E S S F U L	C A N C E L L D	P E N D I N G	S U R C A C T E E S
KLCMC - KUALA LUMPUR	91	516	222	171	103	11	56%	111	480	202	213	59	117	49%	117	506	208	192	86	137	52%
SACMA - SELANGOR	56	205	101	75	15	70	57%	70	508	192	219	83	71	47%	71	546	254	183	65	115	58%
KelCMC - KELANTAN	9	30	26	12	0	1	68%	1	11	2	9	0	0	18%	0	23	6	12	3	2	33%
ICMC - PERAK	4	786	355	245	183	7	59%	7	30	19	5	4	9	79%	9	49	21	20	4	13	51%
JBCMC - JOHOR	3	43	9	4	20	13	69%	13	50	13	29	10	8	31%	8	57	29	19	5	12	60%
ASCMC - KEDAH	8	32	13	11	6	10	54%	10	59	30	26	11	6	54%	6	100	53	40	4	9	57%
SCMC - NEGERI SEMBILAN	2	54	18	6	32	0	75%	0	87	29	30	27	1	49%	1	88	31	36	16	6	46%
KTCMC - TERENGGANU	7	30	4	9	15	9	31%	9	45	4	11	24	8	27%	8	37	10	15	16	4	40%
KgrCMC- PERLIS	6	58	56	8	0	0	88%	0	448	214	180	117	0	54%	0	3	1	1	1	0	50%
KCMC - PAHANG	25	151	137	38	0	1	78%	1	20	6	11	3	0	35%	0	26	1	14	3	7	7%
MelCMC - MELAKA	0	28	13	12	1	2	52%	2	24	15	3	6	2	83%	2	22	8	11	5	0	42%
PCMC - PENANG	29	32	26	15	8	12	63%	12	91	36	22	32	25	62%	25	101	57	41	17	11	58%
KKCMC - SABAH	26	39	8	39	8	10	17%	10	38	18	5	8	20	78%	20	27	11	15	13	8	42%
KcCMC - SARAWAK	0	392	90	16	30	259	85%	256	318	75	20	70	5	79%	5	33	8	12	12	6	40%
TOTAL	256	2396	1078	661	421	502	62%	502	2209	855	783	454	272	52%	272	1618	698	611	251	330	53%

Reference:

- 1. Total Cases = New Registration + Carry Forward Cases
- 2. Success Rate Percentage = (Successful \div (Successful + Unsuccessful)) x 100

Table 4: Success Rate of Mediated Cases in the Subordinate Court from January 2020 – December 2022 (Excludes "running down cases")

SUCCESS RATE	2020	2021	2022
TOTAL	62%	52%	53%

Meanwhile, Table 3 shows the overall statistics and Table 4 highlights the overall success rate in the subordinate courts throughout Malaysia which are as follows:

- (a) in $2020 1{,}078$ cases which reflects 62% of success rate for that year;
- (b) in 2021–855 cases which reflects 52% of success rate for that year; and
- (c) in 2022 698 cases which reflects 53% of success rate for that year.

Overall, the above statistics show that the implementation of CAM in Malaysia is successful to reduce the backlog of cases.



Training for judges, judicial commissioners and judicial officers

Judges and judicial commissioners

A mediation course for judges and judicial commissioners conducted by the Judicial Academy assisted by the Mediation Division entitled "Mediation Skills and Techniques Workshop via Physical and Online for the Judiciary" was held from September 7-8, 2022 at the Asian International Arbitration Centre (AIAC), Kuala Lumpur. The objective of this workshop was to ensure that all judges and judicial commissioners have mediation skills with effective techniques and can act as mediators.

A total of twenty four (24) participants consisting of thirteen (13) High Court judges and eleven (11) Judicial Commissioner attended the workshop.

Judicial officers

Currently, there are fifty four (54) judicial officers who are accredited as mediators. Courses for other judicial officers to be accredited as mediatorswill be held in September 7-8, 2022 for twenty four (24) officers. Apart from this, refresher courses for inhouse mediators will be held in July 2023. In addition, talks on mediation through the Continuing Legal Education Programme (CLE) is being planned for Kuala Lumpur Court's officers in March 2023 entitled via zoom "Judicial Referral to Mediation" by the Mediation Division. Talks similar to this will also be held in other states from time to time.

Creating awareness among judges and judicial officers about court-annexed mediation is an ongoing process. Constant communication, education, and collaboration are key to fostering a deeper understanding of and integrating mediation within the judicial system.

Therefore, in coming years, more courses and talk for judges and judicial officers need to be conducted to increase level of awareness on CAM programme.

Challenges in mediation

Among the challenges in mediation are as follows:

(a) Voluntariness and willingness of parties to negotiate

Litigation parties may not necessarily want to go for mediation voluntarily, particularly in cases referred to CAM under the court's direction. This will result in cases not being settled through mediation. Lack of trust and good faith towards the other party can also contribute to unsuccessful mediation.

(b) Parties are already at the stage of preparation for trial

When the parties are at the preparatory stage of a trial, they will have reached a stage where they are in an adversarial mode as opposed to a settlement mode. Mediation may not be attractive to them because the parties may already be unwilling to compromise at this stage. They would have also spent a substantial amount of money on legal fees by then.

(c) Legal complexity of the case

Certain cases involve statutes and other laws that might be too complicated for mediation. These types of cases may only be resolved through a full trial.

(d) Limited powers of mediators

Unlike arbitrators, mediators do not have the authority on the settlement by the parties. If a case is settled through mediation, it is not complete unless a consent judgment is recorded before the court. Even after a successful mediation, parties sometimes change their mind before recording a consent judgment at the court.

(e) Part settlement of mediated cases

Some mediated cases may be recorded as unsuccessful. However, this does not mean that the parties have completely failed to come to a settlement. There are instances where not all disputed issues are resolved but only some issues are settled.

(f) Non-appearance of parties

When cases are referred to mediation, some parties do not attend the mediation session. The said session is wasted and could have been used for another mediation case.

(g) No mandate to settle

In some cases, parties attending the mediation and their lawyers only have mandate to settle the claim on the trial date.

Way forward

Promotion

Although the Centre has been in operation for more than a decade, there is still a need for the Centre to be promoted to the public and the litigants. Such promotion can be more effective with the assistance of court officers and lawyers. Through proper promotion and exposure, there will be a greater understanding of the role of the Centre. The Mediation Division is planning to promote and enhance public awareness and education on CAM through a series of roadshows across the country, and internal collaboration with –

- (i) eKehakiman to set up a new system for mediation;
- (ii) Corporate Communication brochures on mediation and visits to CAM Centres to promote mediation;
- (iii) Training Unit to provide training and mentoring.

Undergraduate exposure to mediation

There is an initiative to promote mediation to undergraduate law students. For example, Universiti Teknologi MARA (UiTM) is offering a mandatory course on ADR including mediation, for students to learn the theory and general principles of alternative dispute resolution processes available to any disputing party.

In addition, the ASEAN Law Students Association (ALSA) also organise the ALSA International Mediation Competition (AIMC), which is open to law students from around the world. AIMC is a means to promote and encourage mediation and to disseminate information on the use of mediation among the younger generation of professionals to spur a mindset of effectively resolving disputes. ¹⁷ In the past, the competition has attracted teams from universities in Asia, Europe, North America, and Australia. AIMC also provides valuable opportunity for law students to develop their skills in mediation and negotiation, as well as to network with their peers from around the world.



¹⁷ See http://aimc.alsainternational.org/

Enhancement of mediation skill

To be accredited as mediators, judicial officers will need to attend courses to enhance their knowledge and skills in mediation. This will enable them to mediate and settle all cases that are registered before them.

Conclusion

After a decade of the establishment of CAM in Malaysia, many achievements have been recorded in line with the objectives of the establishment of CAM. The law has been amended to pave the way for mediation to be implemented. CAM's aim to minimise the number of "backlog" cases, to save costs, time and energy of the parties involved is being fulfilled.

From the court's perspective, if mediation is successful and the number of cases are reduced without having to go through the trial process, the judge (be it in the High Court, the Sessions Court or the Magistrate's Court) will have more time to prepare for and carry out his/her judicial function. If the mediation is not successful, the case then reverts to the judge to continue hearing the case through a full trial. The case, however, can proceed more quickly as the issue(s) would have been narrowed down during the mediation process.

CAM Centres have to increase targeted awareness campaigns, educational initiatives, and training programmes to enhance public knowledge and promote the utilisation of mediation. These efforts have the potential to foster a more informed society, leading to greater acceptance and engagement with mediation as an effective means of resolving disputes.

The growing number of mediation cases referred to CAM shows the increased confidence of parties in using this mode to resolve disputes. CAM also has reduced legal costs for parties, resulting in mediation emerging as an attractive option for resolving disputes.

The overwhelming approval and positive experiences shared by participants highlight the importance of maintaining and enhancing the quality of mediation services. By doing so, mediation can continue to provide an invaluable and highly regarded approach for resolving disputes, benefitting individuals, communities, and the overall justice system.

Court Mediation Centre Kuala Lumpur



MEDIATION ANECDOTES

The following is a collection of anecdotes from some judges who have conducted mediation of cases. Their stories demonstrate that, with a little out-of-box thinking, cases can sometimes be resolved without the attendant ardours of a trial, frequently presenting a win-win solution for the parties.

JUSTICE VAZEER ALAM, JUDGE OF THE COURT OF APPEAL

The (allegedly) defamed politician

The plaintiff was a politician, who claimed he was defamed by a newspaper when it carried a story that the plaintiff had misused certain funds. Because the suit was filed before the transformation efforts in the Judiciary, it took some four years before the case came before me for trial in the NCVC courts in Kuala Lumpur.

I called the parties into chambers to discuss the possibility of settlement. Both sides were opposed to the idea of any amicable settlement, but I persisted and asked to see the parties separately. The plaintiff complained that, because of the article, he had been denied a seat at the last elections, and, therefore, wanted not just damages for his reputation loss, but also an apology from the defendant.

The defendant's editor also dug his heels, and stood by their journalistic integrity, claiming that the story they ran was truthful. They were not prepared to pay a single red cent in damages.

In the four or five years that it took for the case to come to be heard, the plaintiff had since risen in the ranks of his political party. It occurred to me that he must be doing some good for the community to have progressed that far. I put this to the editor of the defendant, to which he replied that the plaintiff had instituted a very good youth programme, which was well-received by the local community.

"Why don't you offer to write about that?" I asked the editor. The editor readily agreed. When the proposal was put to the plaintiff as a possible settlement, his eyes lit up. An article of that nature would put the plaintiff in good light. To drive the point home, I reminded the plaintiff that the general public had already long forgotten about the allegedly defamatory words uttered years before, but if the trial were to proceed, it would all be dragged back into the glare of public scrutiny.

The plaintiff agreed to the proposal on condition that the defendant published a full-page article in their Sunday Edition, and that too in colour. The editor initially protested that this would be costly, but relented when I pointed out that it was not really an additional out-of-pocket cost.

They both thought that it was a great settlement. A consent judgment was recorded, and the plaintiff's commendable youth programme obtained full-page coverage in colour in the Sunday edition of the newspaper. No damages were paid, and no apologies tendered. A win-win outcome from a successful judicial mediation. Many years later, I bumped into the plaintiff at a community gathering. By then, he had become a high-ranking party member. Once he recognised me, he greeted me warmly and said to me that the settlement was one of the best things that had happened to him. The plaintiff and the editor became good friends, and his newspaper became a strong supporter of the plaintiff's career.

The lesson here for me was to ask questions and to listen carefully to the answers. When I had asked the editor about what good work the plaintiff had undertaken, it was little more than a shot in the dark. The alert mediator, however, can take full advantage of the opportunity presented.



The silent mediation

The second case involved a suit over shares that was before Justice Nallini. The plaintiff was a businessman and politician of considerable wealth. He was suing his protégé over shares that he alleged had been held on trust. Justice Nallini asked me to assist in mediating the case, and I obliged.

The parties agreed to mediation. I called in the lawyers before the mediation date to better understand the relationship dynamics. According to the lawyers, they had tried to mediate the dispute themselves – which was a rare thing for lawyers to do! They also tried to enlist the help of the parties' mutual friends, all to no avail. The problem was, the parties did not want to meet. I understood that there was possibly some bruising of egos.

I would usually fix mediation at 4.00 p.m., after my cases have ended so that there is no time pressure placed on the mediation negotiations. This time, however, I decided to do it differently.

I directed the parties to come to court at 9.30 a.m., on a day that I was hearing a full trial. As I was conducting the trial, I saw the defendant come into the courtroom and take a seat in the gallery. About five to ten minutes later, the plaintiff walked in.

I had told myself to pay particular attention to their body language and the interaction between the parties. When the plaintiff walked in, the defendant immediately stood up and kissed the right hand of the plaintiff, in the way that is customary in the Malay culture to show deference to elders.

I knew immediately what to do. While trial was going on, I whispered to my interpreter to lead the parties to the witness room, where they would be alone in each other's company. When the trial broke for recess, I called the parties' lawyers into chambers, but told them not to interrupt their clients' discussions. As we were shooting the breeze in my chambers, at some point there was a knock on the door. The defendant poked his head in and informed everyone assembled that they had settled their differences. I had not uttered a word to the litigants. All I had done was to facilitate their meeting in private. They resolved their dispute by themselves.

Justice Nallini treated me to lunch, which was probably the best return on investment on any mediation ever, given that I had not lifted a finger, except to bring the parties into the same room together!

Mediation by dinner

The third case involved a commercial dispute, in which the plaintiff claimed that one shipment of dairy products supplied was bad. The defendant counterclaimed for the payments outstanding. The case was fixed for a three-day trial. Like all NCVC cases, by the time the case came to me, it was ready for trial, and I had not had the opportunity to manage the case before trial.

As it was a commercial dispute, it was apparent to me that it was all a matter of dollars and cents, and that it was unlikely that the parties had invested much personal emotion into the case. On the first day, I called the representatives in, to explore the possibility of settlement. The plaintiff's representative was a New Zealander, while the defendant's was Iraqi. The parties had dealt through intermediaries and had never met before. They were ready to sit and talk directly. I thought it best that they be given time and space to facilitate settlement. I suggested that the case start the following day. As they were unfamiliar with Kuala Lumpur, I proposed that they have dinner at La Bodega in Bangsar where they could discuss the dispute. They agreed.

When they arrived in court the following morning, they informed me that they had resolved the dispute, and that the plaintiff would be dropping its claim and the defendant its counterclaim. They would resume their business relationship, because the future value of the continued relationship far outweighed the sum in dispute arising from that single delivery of dairy products. They happily informed me that La Bodega was an excellent choice.

There is now no longer a La Bodega outlet in Bangsar, but I would venture that any of its new outlets would be just as effective!

JUSTICE DATUK S NANTHA BALAN, JUDGE OF THE COURT OF APPEAL

Demise of the "Smith" probate file

Before I share my anecdote on mediation, I have to first tell you a story about a very old probate solicitor who worked very hard and built a successful probate practice. He never took a day off and never went on any holiday. He was very frugal. He educated his son who became a qualified solicitor. The son joined the father. The son was sad that his aged father had sacrificed all his life for his legal practice and never enjoyed life.

The son told the father, "Dad, please take a well-earned holiday. I will manage the office." With some hesitation, the father agreed, and he took a month-long holiday.

Upon the father's return, the son greeted the father and said, "Dad, I have good news for you." Father asked, "What is it?" The son said, "What I am about to tell you will make you happy and you will be proud of what I did." The father responded, "What did you do?"

The son said, "You know, the Smith probate file which you had been working on for so many years."

The father (who was by this time getting very anxious) asked, "What about the Smith probate file?" The son dropped the bombshell and said, "I managed to sort out everything and closed the Smith probate file."

The father barked, "You idiot, how do you think I managed our lifestyle and put you through law school. It was the Smith probate file. You have killed my golden goose?"

And now to the topic at hand.

I started my judicial career in Penang. A very senior lawyer appeared before me. He had a reputation for being troublesome, a.k.a. cantankerous. I was forewarned by others. He made an ex parte application. I told him in my usual polite fashion that his application was defective (incompetent). I advised him on what to do. He was grateful. He withdrew his application. I think I earned his respect and trust. We got along well.

Later he appeared in several cases involving a well-known Chinese family-owned business. On one occasion, I suggested that the instant matter should be settled. He said, "I will leave it in your good hands to suggest a reasonable sum as settlement." I did the calculations and came up with the figure. He agreed. The other side was happy. The matter was settled.

This Chinese family had many cases which were pending at various levels of the Penang courts. There were also cases pending in the Industrial Court and other forums as well. The litigation involved a multitude of disputes between the families, the siblings and nephews/nieces, etc. The litigation had spanned several years.

I was due to be transferred to the Kuala Lumpur High Court.

The senior lawyer appeared before me for one of these cases and I asked whether he would like me to try and resolve all outstanding disputes via mediation. He agreed. The mediation was scheduled to be held during the last week of December of that year.



The family members (brothers, uncles, nephews) assembled before me. The uncles were all in their 70's and 80's and visibly in varying states of poor health. It did not take me too long to convince them that their interand intra-family disputes should be settled. After a few hours of mediation, everything was amicably settled. The parties had been litigating for several years and they had not had any Chinese New Year reunion dinner for many years. I told the parties that they must celebrate their settlement by having a grand reunion at the upcoming Chinese New Year the following year. They all clapped hands. There were tears streaming down some of their faces. They said, "My Lord, you must join us for the reunion dinner." I said, "I am being transferred to Kuala Lumpur and in any event, I still cannot attend as it would be highly improper." I said, "Please go ahead and have a good reunion dinner." I extended my best wishes to them.

I now come to the senior lawyer. I turned to him and said, "You must be pleased." He said, "My Lord, thank you for resolving all these cases, but to be quite honest, this Chinese family litigation was my income stream and my practice in recent years was dependent on this lucrative litigation. I may have to close my practice." I said, "You have worked very hard, and I can see that it has taken a toll on your health. You need to rest." I wished him well. Quite clearly, my over-enthusiasm to mediate and settle all the cases involving this Chinese family litigation had brought about the untimely demise of this Penang lawyer's equivalent to the Smith probate file.

He passed away a few years later. Hence, mediation, however well intended, could result in all kinds of unintended (fatal) consequences.

JUSTICE AZIZUL ADNAN, JUDGE OF THE HIGH COURT

Russian roulette

Disputes over shareholdings in joint venture companies are common. Where the joint venture agreements have been entered into by sophisticated commercial entities, these agreements tend to be comprehensively drafted, with water-tight deadlock resolution clauses.

The difficulty often arises when joint ventures are entered into on the basis of mutual trust and without the benefit of legal advice. "No need to be legalistic, what could ever go wrong?", is a familiar refrain. When things become a little pear-shaped, complainants then have to resort to the equitable jurisdiction of the courts, to resolve predicaments that, frankly, ought not have arisen had appropriate care and diligence been applied before the parties cemented their relationship.

In circumstances where there is one party who wishes to continue with the business venture and the other wishes to exit, a solution is usually fairly easily found by the process of mediation. Parties can be persuaded to agree on the appointment of an independent accountant to undertake a valuation of the shares belonging to the party that wishes to be bought out. A consent order can be recorded to document the mechanism by which the shares are to be valued. Where parties cannot agree on the identity of the accountant, I have frequently included a mechanism in the consent order by which each party nominates three accountants to the court, at the same time providing the court with the accountants' fee estimates. Where an accountant has been nominated by both sides, then usually that will be the accountant that I choose; failing that, the court will make a subjective evaluation of the relative merits of the nominated accountants and choose one from among the six.

In one case, however, I encountered a problem. The plaintiff had filed a petition for the winding up of a 50:50 joint venture company on just and equitable grounds. I offered to mediate the parties' dispute, which they agreed. When the parties turned up for mediation, however, the plaintiff threw a spanner into the works. Even though he had initially petitioned the court for the joint venture company to be wound up, at the mediation meeting he stated that he now wanted to take over the company.

I was faced with the situation where both parties wanted to buy the other out. How could the dispute be resolved through mediation?

It was obvious to me that proceeding with the petition on its merits would not usually yield a favourable outcome, as the assets of the company would have to be realised at a discount in the liquidation process. Of course, that is presuming that a winding-up would be ordered in the first place. If the court refuses to grant the winding-up order, then the parties would be in exactly the same position as when they started.

It struck me, rather serendipitously, that I could employ what is commonly known as a "Texas shootout" clause in mediating a settlement. This clause, along with other variations known by colourful labels such as "Russian roulette", are frequently employed as a deadlock resolution mechanism in joint venture or shareholder agreements. Under the arrangement that I proposed to the parties, the court would receive a sealed bid from each of the parties by a specified date. These bids would contain the price at which the party would be willing to purchase the 50% shareholding of the other shareholder. Thereafter, at a case management conference, the court would open the bids in the presence of the parties. The party with the higher bid would be the purchaser of the shares belonging to the other party.

The attraction of this mechanism is that the selling shareholder would have no reason to complain, as he would be getting for his shares a price that was higher than what he was willing to pay for his opponent's shares. Happily, the parties agreed to this proposal, and I drafted the terms of the "Russian roulette" clause into the consent order, together with the attendant completion clauses. I did, however, have to remind parties that I was not their legal advisor and undertook no liability in drafting the terms of the consent order!

Looking beyond the dispute at hand

The role of a judge sometimes extends beyond deciding between right and wrong in the case before him or her, and entails the resolution of bigger disputes.

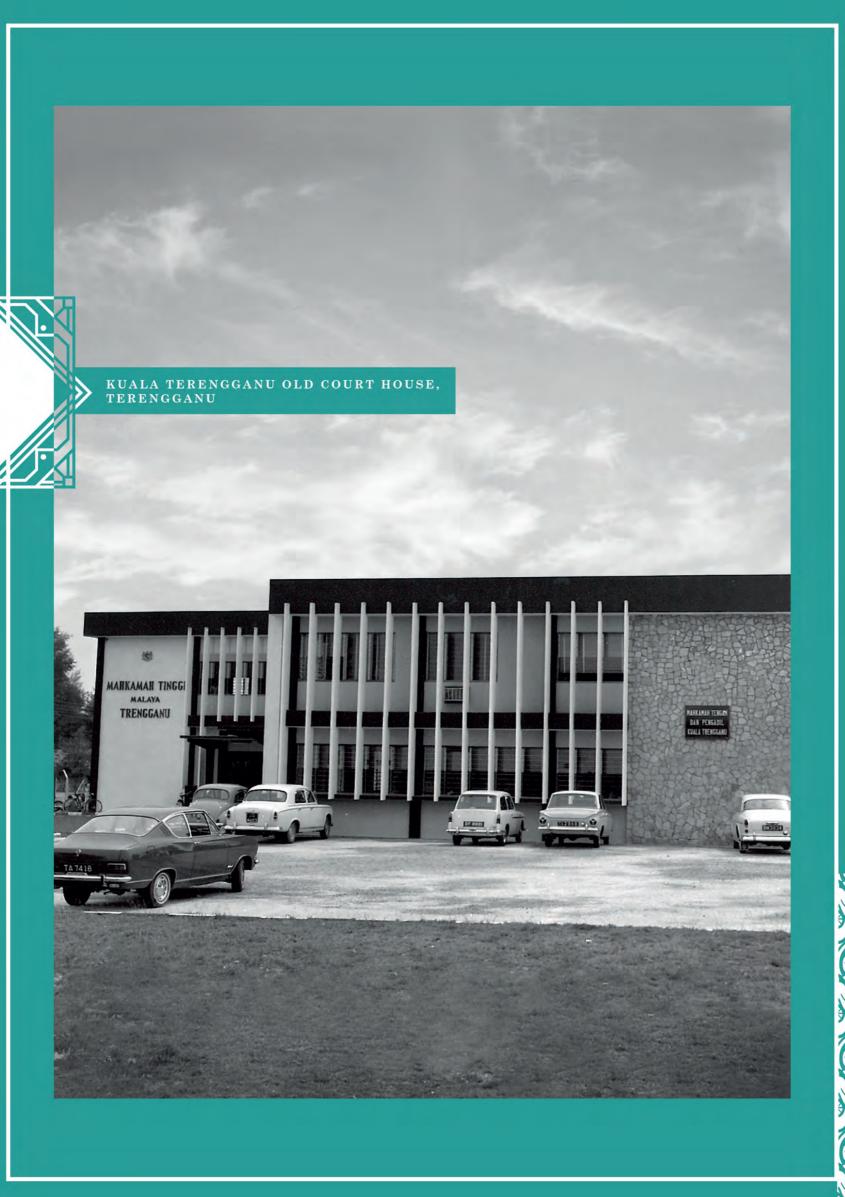
In one case, a company had sued one of its directors and ultimate shareholders in respect of a matter that, in the greater scheme of things, could be said to be relatively inconsequential. The suit, however, was symptomatic of a greater mistrust and discontent that had arisen between the shareholders, all of whom were members of the same family. Suit and countersuit followed, until there were 11 suits in all in the commercial division of the High Court in Kuala Lumpur.

It became evident that, even if that particular suit before me were disposed of on its merits, other disputes would subsequently arise between the parties over some other matter. If that were the case, why not seek to reorganise the family companies so that a portion of the businesses could be given to each of the siblings?

The parties agreed for the court to mediate a corporate reorganisation of the family companies. It took some 18 months before a roadmap could be settled, which set out the mechanism by which the restructuring would be effected. After the roadmap was agreed, 10 of the suits were withdrawn, leaving one suit alive so that I may continue to be involved in the settlement process. The implementation of the reorganisation still continues at the time of writing, some *five years* after the initial suit was filed. All the companies and their assets are in the process of being valued, which entails the involvement of real estate valuers and accountants. The division of the businesses requires corporate and tax advice. In certain cases, regulatory approvals need to be obtained in order to subdivide plots of land held by the family companies.

Even though the mediation has been long drawn, it brought to the fore the best long-term solution for the parties, and emphasised the broader role of the court in resolving disputes between litigants.







TUN DATO' SERI MOHAMED DZAIDDIN ABDULLAH - A BIOGRAPHY

By Adlin Abdul Majid, Judicial Commissioner, High Court of Malaya



The ink of history is regularly written by tumultuous events and controversy. Scandals make headlines and feed the human fondness for gossip. There is however less appreciation for those whose responsibility it is to quietly pick up the pieces after the storm, and after the stories disappear from the headlines.

Tun Dato' Seri Mohamed Dzaiddin Abdullah, our third Chief Justice and the ninth head of the Malaysian Judiciary, is one such individual. He was appointed as Chief Justice of Malaysia on December 20, 2000, and served for more than two years until his retirement on March 15, 2003.

Tun Dzaiddin's appointment came at a time of extremely low public confidence in the Judiciary. Tun therefore made it his priority, in his own words, "to put our house in order". In his first speech as Chief Justice at the annual meeting of the Council of Judges on January 13, 2001, he explained his mission and addressed the loss of respect for the judicial institution. His message to judges was direct:

... I have to say what needs to be said. I wish to remind all of you that we should always try to uphold our dignity as judges. We need to be ethical and honest. We need to be decorous in our behaviour inside and

outside of court. I have already received letters complaining about some judges. From these letters I form the view that there are some judges who lack refinement, arrogant and bearing of judgeship, who use intemperate language on or off the Bench and display scant regard for propriety. Any criticism against any one of us is a reflection on the Judiciary as a whole. It is my mission to try to bring the Judiciary back to its past glories, when it was highly respected – good, strong, efficient, incorruptible and just. It is important as a custodian of justice and protector of the individual's rights, we should have the trust and respect from the people. I believe it would be beneficial and would certainly reinforce the people's confidence if we carry ourselves with dignity and decorum.

From Arau to the Embankment

Tun Dzaiddin's disdain for arrogant behaviour is reflected in the way he led his life, from his early days as a lawyer, to his life in the Judiciary and beyond his retirement. His two children with wife YM Toh Puan Tengku Noriah Tengku Ismail, Nadjihah and Azlan, expressed that Tun Dzaiddin desires to be remembered for his deep sense of humility.





Photographs taken during the Oath of Office Ceremony of Tun Dzaiddin as Chief Justice of Malaysia on December 20, 2000 by Yang di-Pertuan Agong Sultan Salahuddin Abdul Aziz Shah and newspaper cutting dated December 7, 2000 on the appointment of Tun Dzaiddin as the third Chief Justice of Malaysia

Tun Dzaiddin after all came from humble beginnings. He was born in Arau, Perlis, on September 16, 1937. His parents were teachers. He began his early education in a Malay school in Arau, before continuing at Kolej Sultan Abdul Hamid in Alor Setar, Kedah. It was there that he sat for the Cambridge Higher School Certificate.

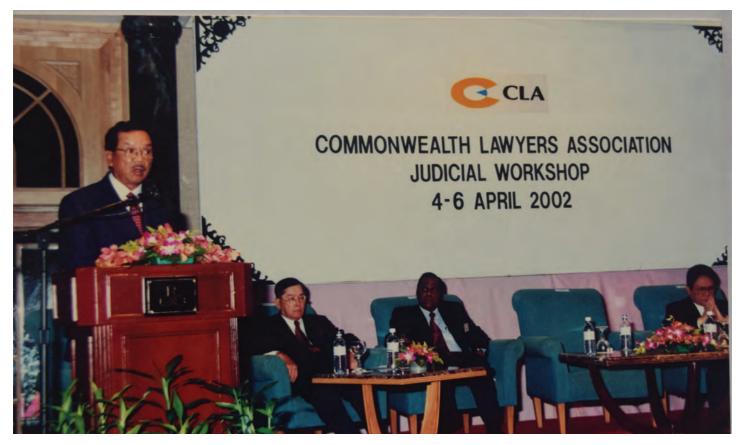
Tun started working in 1956. The choice of his first job, a journalist for the *Malay Mail*, was predictable as he had always had a flair for the written word. However, his stint as a journalist was rather short, as he joined the Royal Malaysia Police as an Inspector soon thereafter.

While Tun Dzaiddin was serving with the police force, Tun Mohamed Suffian Mohamed Hashim encouraged him to pursue a career in the law. Tun Dzaiddin speaks of Tun Suffian with affection, and credits Tun Suffian for getting him into Middle Temple, London.

Having qualified as a lawyer, Tun Dzaiddin returned to Malaysia and commenced his career in the law in private legal practice, although the expectation would have been for him to join the Judicial and Legal Service. Tun thrived as a lawyer, holding leadership positions at the Malaysian Bar and at ASEAN level. He was also a director of Sistem Penerbangan Malaysia (MAS) from 1973 to 1982.



Tun Dzaiddin (left) and Datuk Dr. Rais Yatim (right) with Yang Dipertuan Agong, Tuanku Syed Sirajuddin ibni Almarhum Tuanku Syed Putra Jamalullail (centre) at the official visit of the YDPA to the Federal Court on May 5, 2003 at the Sultan Abdul Samad Building



Tun Dzaiddin at the Commonwealth Lawyers Association Judicial Workshop at Renaissance Hotel Kuala Lumpur, April 4-6, 2002





The ascension

In 1979, Tun Dzaiddin was appointed as a part-time judicial commissioner, sitting in both the Kuala Lumpur and Penang High Courts. He described this time as a welcome break from legal practice. He did nonetheless maintain his legal practice, until his appointment as a High Court judge in 1982.

It was also Tun Suffian who offered Tun Dzaiddin a position as a High Court judge. Tun Dzaiddin was appointed on October 1, 1982, initially serving at the Kuala Lumpur High Court, then moving to the Penang High Court on January 1, 1984. He remained in Penang until his elevation to the Supreme Court on January 1, 1993.

The move from a thriving legal practice to the Judiciary would not have been easy for Tun Dzaiddin. The quiet and secluded life of a judge is in stark contrast to the vibrant social world of a lawyer, a life that Tun Dzaiddin had been comfortable with. Yet, he took the solemnity of his oath very seriously and threw himself into his new vocation with great rigour. His children observed that this single-minded focus on his judicial responsibilities even resulted in him losing friends from legal practice.

Charting a new course

On December 20, 2000, Tun Dzaiddin was appointed as the Chief Justice of Malaysia, succeeding Tun Dato' Seri Mohd Eusoff Chin. Tun's appointment came at a critical time for the Judiciary specifically and for Malaysia, generally.

As mentioned earlier, it was a time of low confidence in the Judiciary. The relationship between the Bar and the Judiciary was severely strained, and sorely needed rebuilding. Tun Dzaiddin placed great importance on this restoration, not just with the Bar, but with public faith in the Judiciary. He made this his clarion call throughout his term of office. Tun reminded both the Bench and the Bar of the need for mutual respect, compromise and reconciliation. He strongly believed that as a primary constituent, the Bar's relationship with the Bench was a critical bellwether by which the public would view the Judiciary.



Visit to International Criminal Court of Justice at the Haque on September 9, 2002



Tun Dzaiddin was bestowed the Grade of Seri Setia Mahkota (SSM) by the Yang DiPertuan Agong, which carries the title "Tun" on June 4, 2002

As if this turmoil was not already significant, the world was also in a new state of flux brought on by rapid technological advancement. The internet had come into its own and was disrupting every facet of life from social to commerce. Tun Dzaiddin was clairvoyant enough to recognise that things needed to change if the Judiciary hoped to serve in a more digital landscape. He cautioned that the Judiciary's traditional conservatism should not stem the tide of technology. He spoke eagerly of the future of the courts, recognising that technology must be used to the advantage of the Judiciary, to ensure that judges have better access to information and ultimately to achieve more efficient disposal of cases. This vision set the pace for the digitalisation of the courts, as we see today.

Beyond the Bench

Tun Dzaiddin retired on March 15, 2003.

His active professional engagements post-retirement are a testament to his commercial and business acumen. He was the Chairman of Bursa Malaysia from 2004 to 2015. He was also the Chairman of Deutsche Bank during the same period.

On February 4, 2004, Tun Dzaiddin was appointed as the Chairman of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police. As a former man in blue, Tun was especially proud of this responsibility. In April 2005, the report of the commission was handed over to the government. It recommended the formation of the Independent Police Complaints and Misconduct Commission (IPCMC). Tun was vocal in his views that the Enforcement Agencies Integrity Commission (EAIC), which was set up instead of the IPCMC, was insufficient and had severely limited powers. He called for all quarters to accept nothing less than a zero-tolerance approach towards the abuse of police powers and deaths in police custody.



Tun Dzaiddin with Sultan Azlan Muhibbuddin Shah ibni Almarhum Sultan Yussuff Izzuddin Shah Ghafarullahu-lah during the opening ceremony of the High Court of Ipoh on February 24, 2003



A man for all seasons

While Tun Dzaiddin will be remembered by most for his string of achievements and accolades, it is his role as father and husband that those close to him most cherish. His two children recall growing up in a strict household, with their father present and very much involved in their lives and interests.

One cannot speak of Tun Dzaiddin without mentioning his love for golf. His son Azlan, who shares his golfing interests, recalls an incident in the early 1990s, when Tun decided to fly off to Singapore on the spur of the moment to watch the live telecast of the British Open, which was not accessible on Malaysian television. They spent a memorable Sunday evening until the early hours of Monday bonding over golf. And Tun still made it back for work, first thing Monday morning.

I asked the children, who were interviewed for this article, what Tun's true personality is. After all, the world sees Tun Dzaiddin as the judge, but he was a lawyer and a corporate figure first. Their answer was a surprise; that Tun was more comfortable with his corporate persona. He had many friends, and he liked entertaining and making connections. Despite this, Tun Dzaiddin validated the idea of what a judge should strive to be. He led a quiet and reserved life as a judge, focusing on his responsibilities, and avoiding the trappings and hubris of his office.

In that sense, Tun was truly the right man to lead the Judiciary out of stormy seas. He undertook the challenging task of restoring public confidence in the Judiciary, not with bluster and rhetoric, but with quiet resolve and steely determination. He recognised that change was not going to happen overnight, and that he might not even see the fruits of his labour within his time in office. This did not deter him. It was his dedication to the law, steadfastness to justice and commitment to the Constitution that helped set the wheels in motion for the Judiciary that we have today.



Tun Dzaiddin at the Annual golf Tournament between Chief Secretary's Team and the judges on January 14, 2001





R-L: Dr. Noradura, Justice Adlin, Datuk Azlan Tun Dzaiddin and Madam Nadjihah Tun Dzaiddin sharing a light moment during the interview



Justice Adlin presenting a souvenir to Madam Najihah and Datuk Azlan

THE HIDING OF WEALTHIMPLICATIONS FOR THE PREVENTION AND CONTROL OF CRIME AND THE PROTECTION OF ECONOMIC STABILITY

Keynote address delivered by the Right Honourable Tan Sri Mohamed Dzaiddin Hj Abdullah, the Chief Justice of Malaysia at the Nineteenth International Symposium on Economic Crime at Jesus College, University of Cambridge on September 10, 2001.

Money laundering and its effects

Ladies & Gentlemen,

To be here this morning, in the midst of distinguished individuals from various places and disciplines can only be described as a tremendous honour and pleasure for me.

To the organisers, thank you for inviting me to this symposium.

Coming as I am, from a much warmer climate, the slight chill and bracing air today does nothing, however, to dampen my spirits, for I am heartened to be so warmly received here.

Cambridge is truly wondrous. With its quaint streets and dreaming spires, one's thoughts naturally fly to Wordsworth's memorable lines which says, "Earth has not anything to show more fair...". I can go on waxing lyrical about this wonderful place, but we are gathered here this morning for a serious task at hand.

Ladies & Gentlemen,

Let me begin by saying that there are few aspects of finance, be it national or international, more fascinating than secrecy. Whether or not the images that we have of secret money stashed away can find any parallel in the real world, what is crucial is that several reasons motivate the desire not to disclose financial information.

The reasons run the gamut – it can be personal, business, political, fiscal or criminal. Since each has a unique pattern of demand that goes towards defining the structure of the global market for financial secrecy, it remains true that financial information is proprietary.

But what we are here concerned today, is the hiding of wealth through illegal means, since the effect of this to our economic and financial systems is devastating.

One clear example is the problem engendered by the laundering of money.

The intricacies of organised crime and its involvement in money laundering have flummoxed law enforcers for years.

It was not too long ago that money laundering and the evasion of tax for example, were not exactly conjunctive with one another. But today they are almost symbiotic.

The laundering of money is certainly as old as the hills; it is only the term which is new.

I am not certain what it was called then, but now every process which conceals the existence, illegal source or illegal application of income, and then disguises that income to make it appear legitimate, is an act of money laundering. The guile and guise of the money launderers know no bounds, since what they achieve from their dastardly deed is indeed lucrative.

In fact, so potent is cash as the medium of illegal transactions, that it has become the principal medium. Given this and the need to legitimise the scheme, the laundering of money becomes crucial.

As succinctly put by South American drug barons, "Dirty money is best passed through clean hands". This brings to mind, somewhat ironically, the words of Samuel Pepys who said that:

"... it is pretty to see what money will do ..."

Well, I can tell you how unpretty it can be really, when deception is at the heart of the laundering of money and the hiding of wealth.

Money laundering and the hiding of wealth have become endemic to our social, economic and political framework; it eventually affects and would as likely as not, subvert institutions such as banks and corporations, the legal systems, political parties and the media. In fact, money laundering erodes the income tax base of many nations, thus creating fiscal policy problems.

Since cash is the preferred medium of exchange in the criminal world, it helps lend anonymity to a variety of criminal activities.

As most of us know, the problem of controlling secret money is devilishly difficult.

The problem is exacerbated with the widening of the global financial market, since there has been greater mobility of capital flows as money glides from market to market in search of short-term returns.

It is of course known that money laundering is a world-wide phenomenon and it has been estimated that a cool USD600 billion to USD1.5 trillion, or 2 or 5 percent of the world's GDP is laundered, taken at a conservative estimate.

Thus, countries large and small, rich and poor are becoming more vulnerable to the risks of money laundering, for its effect is contagious.

People are surely right when they point to secret money as being a system rather than a cause. But others have an equally valid point when they say that attacking secrecy may do more damage to the underlying illicit transactions than trying to deal with them head-on.

Since whole economies can be severely debilitated and may even collapse taking this problem at its worst, the need to fight this pestilence becomes compelling.

Although I wouldn't go so far as to agree completely with John Keynes who said that Lenin was right in saying that there is no surer means of overturning the existing basis of society, than to debauch the currency, there appears to be some truth there.

But here, the "debauchery" is done to money in reverse, i.e. to make dirty money respectable, far removed from its sullied origin – but the effect is still the same.

Ladies & Gentlemen,

It is now over a decade since the first formal and concerted international action to combat money laundering was taken.

In the past, each approach to raise barriers to secret money flows had its problems, since unilateral efforts were necessarily partial.

In fact in 1988, most enforcement officials admitted that they could still only discourage and not prevent money



laundering – though subsequent efforts were made to deal with it. We then expected the flow of secret money to change in form, in direction and in size, but it is never completely obliterated. In fact it is likened to a situation, where Macbeth had said:

"we have scorch'd the snake; not killed it."

We thus need greater international cooperation to overcome this threat. In fact in recent years, the efforts of various jurisdictions and organisations to come to terms with this problem have indeed been a welcome respite.

One of the more important breakthroughs is found in the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which requires parties to criminalise the offence of international drug-related money laundering as part of their domestic laws, including the knowing conversion, transfer, participation in the conversion or transfer of property derived from the illicit drug trade for the purpose of concealing the illegal source, location, disposition, movement, or ownership of such property.

It would of course go a long way towards easing the problem of investigation and eventual prosecution if the legal and constitutional definitions of money laundering adopted by various governments do not differ too greatly and are in fact compatible with each other, so that a crime committed in one jurisdiction will be recognised and punishable as such in others.

Although reports have it that the UN Convention's viability as an effective weapon in the anti-money laundering arsenal is marginal, I am sure all of us are hopeful that we can succeed in other areas.

It is crucial from the international regulatory perspectives that we recognise the forces that we are pitted against, even as we painstakingly enforce within national jurisdictions, largely against domestic players, measures against nefarious activities.

One of the more welcome ground-breaking issue seen in the UN Convention document is that it has resulted in the elimination of bank secrecy laws in some countries.

In the not too recent past, bank secrecy laws and the related sovereignty, political and economic concerns of individual nations all too often impede and frustrate legitimate criminal investigations and prosecutions of money laundering and other international economic crime. Coupled with this, is the problem of civil rights issues, i.e. the right tofinancial privacy and confidentiality.

Thus for years, the delicate balance between legitimate criminal investigations and the individual civil rights to financial privacy have caused tensions.

As alluded to earlier, there are any number of reasons for individuals to hide their assets especially from their home governments by placing them in countries where favourable local laws provided protection.

In fact, the view that the fiscal laws of one country need not and should not be supported or enforced by other countries, is too often the loophole through which the entire money laundering industry is driven.

People feel comforted to have their money huddled in cold vaults in some sunny islands in the Caribbean for instance, in order to avoid the taxman.

Most tax havens around the world have extremely strict bank secrecy laws and will not disclose information to foreign tax authorities except where crimes like money laundering or drug trafficking are suspected.

The Organisation for Economic Cooperation and Development ("OECD") is trying to change that through a mixture of sanctions or moral suasion.

The OECD is waging war against "harmful tax practices" in an offshore financial industry that is said to hold more than \$5 trillion in accounts. Thus, these tax havens have become a virtual paradise for criminals and tax evaders.

In the country where there are bank secrecy laws, the tradition is founded upon the notion that bankers there have no business disclosing private bank account information. Since the bank secrecy jurisdiction is a sovereign nation with its own political and economic concerns, where banking is an important industry in the local economy, it is difficult to break through the barriers put up.

Understandably it will not help the bank secrecy jurisdiction should the criminals realise that the bank secrecy jurisdiction is providing foreign prosecution with evidence that can be used to convict them. Very likely, the illicit deposits will be whisked away, as will the jobs that depend upon them. In other words, the laws ostensibly in place to protect the financial privacy of individuals might well be inspired by more practical concerns.

Thus, it is imperative that parties agree that the existence of confidentially and bank secrecy laws, if blindly applied, can damage legitimate criminal investigations and prosecutions. There should be more attention placed upon what reasonable expectations of privacy exist with respect to the ownership of assets and less focus upon rules for their own sake.

It is good to know that there have been steps taken recently, to persuade bank secrecy jurisdictions to waive secrecy provisions and to permit the release of banking information as part of the international effort to combat the laundering of money obtained through criminal activity.

Some countries appear reluctant to release information of a foreign government. I believe that a key element in the effort to ease secrecy laws is to convince the bank secrecy jurisdiction that participating in a conspiracy to facilitate money laundering is more damaging to its national interest than the economic benefit obtained by retaining absolute bank secrecy laws.

Ladies & Gentlemen,

I might add that of all the various organisations that have been established to combat money laundering and the hiding of wealth, the OECD's Financial Action Task Force on Money Laundering ("FATF"), has done a commendable job in developing a set of policy recommendations which now provide a world standard.

The Commonwealth has itself been very visible in its efforts to fight money laundering. The spin-off effect from the international standpoint has been heartening.

I am particularly partial to the results of the 1990 meeting of the Committee of Ministers of the Council of Europe, which adopted a new Convention of Laundering, Search, Seizure and Classifications of the Proceeds of Crime.

This Convention deals with all types of criminal offences, and so goes beyond the Vienna Convention. It recognises that the major criminal organisations do not specialise in one product alone, and thus gave birth to the establishment of an international "all crimes" money laundering strategy.

Recognising this, there is a need for us to reassess the ethical bases of the criminal system, leading to better standards and systems.

We won't want to wait too long to come to grips with the problem, lest we distance ourselves from reality and might come to the stage where the tail is wagging the dog!

Closer to home, in my country, our experience of the financial market turmoil in East Asia in 1997 and 1998 has left us with a nasty aftertaste.

Even without referring to destroyed industries, destroyed jobs and markets, which caused hardship and dislocation, we recognise very quickly the ethical imperative to protect whole systems of market and finance, so as to counter insidious actions.



Conscious of the pervasive influence these two evils can have, we recognise early on that legislation alone is not enough to contain the problem, although it is crucial that legislation has first to be put in place.

It is then a natural progression that Malaysia recently passed its Anti-Money Laundering Act 2001. This is testimony to Malaysia's commitment in fighting moneylaundering and related activities.

Though Malaysia did not take the lead in the region in having a legislation on money laundering, we take comfort in the knowledge that we have now joined the ranks of the forerunners.

This Act makes it an offence to launder money obtained from activities such as drug-trafficking, corruption, kidnapping, robbery, human trade, gambling, vice and fraud.

The Act covers most of the 40 recommendations of the FATF.

The uniqueness of this Act is that the powers of enforcement are reposed in several relevant agencies.

The importance of this is especially manifested when "placing" and "layering" of the monies, utilise several components of the system. Only a multitude of agencies can effectively combat the multitude of sins involved.

It might be mentioned too that the Act contains provisions as regards the prevention, detection and prosecution of money laundering, as well as the forfeiture of property derived from, or involved in money laundering.

The Act provides the "know your customer" approach to record-keeping in a comprehensive way, and the efficacious policy of reporting of suspicious transactions by reporting institutions.

The penal provisions seem palpable enough, where a RM5 million (equivalent to USD1.5 million) fine, five years' jail, or both, are imposed on conviction.

Our stance has always been anti-money laundering, for we believe that the economic benefit of a sound financial system cannot be overemphasised.

Consequentially, Malaysia's tax haven, i.e. the island of Labuan, is considered a low-risk jurisdiction for money laundering and does not have a serious organised crime or money laundering profile. In fact, the nature of Labuan's business attracts high quality investment funds and solid reputable banking institutions.

However, having said that, it does not detract from the fact that money laundering and tax evasion have in recent times, gained some ground there. And coupled with various murky issues caused by the recent financial market turbulence, one can never be too complacent or too smug, for otherwise one is guilty of misplaced optimism.

Thus, to combat this problem, it is imperative for us to immerse ourselves with a high degree of seriousness in addressing concomitant issues.

What is also crucial is not so much the fretful question of the allegedly inadequate observance of international standards, as much as the ongoing technical assistance and training to facilitate compliance.

The training of people in the industry is very much on the cards, for otherwise the law will have no bite. For instance, the reports which bank employees are supposed to file are useless if the large volume of information lie in untutored hands.

An internal audit could also be in place to evaluate the effectiveness of money laundering awareness, and compliance levels among those involved.

The Bank of Credit & Commerce International's case (The BCCI case) in the 1990s, is a grim reminder of the need for internal controls.

Then again, to merely look at compliance with due diligence as only a means to fulfil our obligation, is to miss the woods for the trees – as these practices bring about higher professional standards, greater disclosure of information and more accurate representations – without which the integrity of our economies will be severely undermined.

So, if we are ever to be guardians of financial truths, we would indeed be in a spot if we do not practise the highest standards possible in the respective roles we assume.

The truth may not be easy to weed out, for there are of course difficult and grey areas. But expose them we must, even though as Oscar Wilde says, the truth is rarely pure and never simple.

Accountants, for example, in their role as independent and impartial auditors of financial statements must be truthful, so must bankers who would have to blow the whistle if need be; for, while financial institutions owe a duty of confidentiality to their customers, the maxim that "there should be no compliance in iniquity" should prevail.

Thus, everyone involved must take greater responsibility for their positions as lead advisers – to probe and scrutinise thoroughly all aspects of transactions involving money.

They must have the courage and integrity to own up to their findings – even if it means losing a customer, or a client.

Surely, we do not relish a situation where, whenever there is a problem, the response from any of these lead professionals is typically Clintonian: Don't ask; Don't tell!

Ladies & Gentlemen,

The painful truth is that money laundering and the hiding of wealth have simply become a fact of life that threatens the integrity of our economic and social well-being.

The covert and insidious character of this evil makes its complete eradication difficult – but with the coming together of various jurisdictions and organisations which provide valuable linkages to fight this problem, there is still hope; for I believe that the whole is not the sum of the parts.

However, even with regional and international cooperation, the scope and magnitude of the problem is understated.

And though the criminal in the money laundering scams is hard to pin down, the pursuit should not be any less rigorous; and likewise, our quality of mercy should not be strained. This is so, since money laundering and its effects lead to economic and social disorder. In this, there is no ethics, let alone morality.

In fact, some people might even go so far as to say that if only Dante had seen the horrendous problems that money laundering and the hiding of wealth have brought about, he would have added another circle to his vision of Hell!

Talking of which, whenever there are hellish intrusions into my thoughts, I find that when speaking to a crowd, I invariably find my voice rising and my ideas fading away!

Ladies and Gentlemen, it is time enough for me to now end at this point; and with that, I thank you for your kind attention.



FIXED-TERM EMPLOYMENT CONTRACTS – ARE THEY AN ABUSE OF THE CONCEPT OF SECURITY OF EMPLOYMENT TENURE IN MALAYSIA

By Anand Ponnudurai, Judge of the High Court of Malaya



Introduction

This article seeks to examine and discuss the ever-increasing popular method of employers utilising what is commonly known as fixed-term contracts of employment as opposed to a conventional permanent employment contract. The usage of fixed-term contracts of employment has gained traction, especially for management employees as it allows the employer to sever the employment relationship upon expiry of the fixed term. However, as this article will highlight, the issues pertaining to a fixed-term employment contract are not as straightforward or uncomplicated as employers may hope and think.

Concept of security of tenure

As the title of this article indicates, the cornerstone of employment law in Malaysia is premised on the concept of security of tenure, i.e. that an employee is entitled to have security to be in continued employment and can only be dismissed/terminated on valid grounds. It is now trite law that grounds that can be relied upon by the employer to justify a dismissal include misconduct, poor performance and retrenchment.

Security of tenure is linked to the right of livelihood as enshrined in the Federal Constitution. In the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Other Appeals*, the Court of Appeal held as follows:

- "[1] Section 20 of the Industrial Relations Act, relating to representations on dismissals, must receive an interpretation that will have the effect of advancing the purpose for which Parliament passed the Act. The Court should not in the process of determining the true nature and scope of s. 20, apply a rule of construction which will have the effect of thwarting the object which Parliament has entered the section. The section is obviously a remedial provision, housed in an Act that is itself a piece of beneficent social legislation. It should therefore receive a broad and liberal interpretation.
- [2] The right of livelihood, quite apart from being a proprietary right, is one of the fundamental liberties guaranteed under Part II of the Federal Constitution. The expression "life" in Art. 5(1) of the Federal Constitution is wide enough to encompass the right of livelihood.
- [3] The desire of Parliament to protect the nation's work force from the harshness of an unbending and inveterate common law and doctrines of equity, as expressed by the provisions of the Industrial Relations Act, may be seen to be entirely in harmony with the terms of the Federal Constitution the Supreme Law of the Federation. The high standards of social justice so carefully established by the legislators and by the framers of the Federal Constitution ought not be consciously lowered by any decision of this Court."

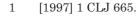
In almost all employment contracts, one will find an express termination clause allowing either party to terminate the employment contract with the provision of notice or payment of salary in lieu of such notice. Most employers are often of the mistaken view that they may simply invoke such an express termination clause and terminate an employee's services with the appropriate notice. However, this contractual right of termination has been curtailed by the provision of section 20 of the Industrial Relations Act 1967 which allows an employee to challenge the dismissal as being without just cause and excuse through proceedings in the Industrial Court.

Fixed-term contracts

Of late, the use of fixed-term contracts of employment seemed to be favoured by employers as the effluxion of time can and is often relied upon by them to justify the termination of the employment relationship. In such circumstances, where they are relying on the expiry of the contract, there is then no need to justify the termination of employment. However, in situations where an employee's employment is terminated on account of the expiry of the fixed term, an employee may similarly file a representation under section 20 of the Industrial Relations Act 1967 on the basis that he considers himself to have been dismissed without just cause and excuse.

It is a common view that fixed-term contracts have evolved as a direct consequence of the concept of security of tenure. Decided cases, especially in the 80s and 90s, will reveal that an employer would on many occasions fail to discharge its burden of proving that the dismissal was with just cause or excuse. This was sometimes primarily due to the fact that a dispute at the Industrial Court may only be heard several years after the actual dismissal and an employer may no longer be able to justify the dismissal at that later stage for a variety of reasons. In fact, the Industrial Court in the past was very commonly regarded and/or referred to as an "employee's court" or a "pro-employee" court. This led to the development of concepts such as indirect dismissal and constructive dismissal which are other forms of dismissal by an employer to rid itself of an employee(s) by either forcing them to resign or making life extremely difficult for an employee(s).

As such, it is no wonder that the use of fixed-term contracts has become popular now as rather than having to undertake the arduous task of justifying a dismissal, an employer could attempt to merely rely on the expiry of the fixed term to terminate in an effort to escape any liability.





However, the issue relating to fixed-term employment contracts is indeed a complicated one as whilst there could be situations where there is a genuine need for a fixed-term contract, on the contrary, there are situations where a permanent contract is disguised or cloaked as a fixed-term contract. This cloaking as a fixed-term contract is done by the employer to unconscionably evade the statutory protection afforded to employees.

It is often contended that an employer should be allowed to employ workers for a fixed duration of time as it is the employer's prerogative. However, such prerogative must be exercised bona fide² and an employer should not be allowed to place employees on a fixed term for the purpose of deliberately evading and/or preventing the employee from invoking his protection provided by the legislature.³

Therefore, not surprisingly, there are now many cases in the Malaysian courts in relation to fixed-term contracts and the starting point as to how they have dealt with this issue is the case of *Han Chiang High School v National Union of Teachers in Independent Schools, West Malaysia.* In that case, for many years, teachers were employed on a fixed-term contract of employment. These contracts were for the duration of two years each and would be automatically renewed by the school. Some teachers had been on a fixed-term contract for up to 20 years. Subsequently, the school did not renew the employment contracts of 35 of its teachers, coincidently after they became members of the Union of Teachers in Independent Schools ("the union"). The 35 teachers claimed that their termination was without just cause or excuse. The Industrial Court held that the teachers in the school were employed on fixed-term contracts, not out of genuine necessity but as a means of controlling them. The intention of the school was to get rid of the union which was why the school relied on the fixed-term contracts to flush out the teachers who were members of the union.

The court held as follows:

"[13] In the case at hand, although there might have been a genuine need for fixed-term contracts for the teachers when the School was first inaugurated, the Court cannot see such a need when it had become established successfully. Some of the teachers have taught there for more than 20 years and have had their contracts renewed unfailingly during those years. Indeed, the practice had long been to give automatic renewal of the contract to the teachers by the end of November or early December. Each teacher, as a matter of course, called at the office of the Principal, signed the new contract, and continued to teach. Indeed, Encik Chng Seh Hon, the Chairman of the Board of Governors (Witness CW-3) in effect admitted in his testimony that the so-called fixed-term contracts had by the material time become nothing more than a chess-piece in the School's attempt to prevent the formation of the Union.

..

- [15] On the basis of this offer alone, the Court finds that the system of fixed-term contracts in the School was employed not out of genuine necessity but as a means of control and subjugation of its teaching employees.
- [16] For the aforestated principles and reasons, the Court finds that the employments of the 35 Claimants are ordinary employments dressed up in the form of fixed-term contracts. These are not genuine fixed-term contracts. There exist between the Claimants and the School ordinary contracts of "permanent" as opposed to "temporary" one-off employment. As such, they come within the framework of the law on workmen's right to security of employment and the right not to be dismissed without just cause or excuse.

William Jacks Co (M) Sdn Bhd v S Balasingam [1997] 3 CLJ 235.

^{3 [2010] 3} ILR(A) xxv.

^{4 [1988] 2} ILR 611.

[28] The dismissals of the Claimants are clearly without just cause or excuse. The intention of the School was to rid itself of the Union. The School's attitude and action blatantly fly in the face of the law and Government's policy on the freedom of workers to form trade unions. The members of this Court are unanimously of the view that the only remedy in the circumstances is to put back all the 35 Claimants to their former employment, in their former positions as teachers and Union members or officials. Any other remedy would infringe the right of workmen to form unions and to security of employment."

The above decision was undoubtedly a precursor to the current situation where the Industrial Court is now particularly cautious of employers engaging their employees on a fixed-term contract and hence often undertake the exercise of deciding/determining whether or not a fixed-term contract is a genuine one or in reality, a permanent contract disguised as a fixed-term contract.

The primary duty of a court when dealing with the issue of whether an employment contract is a genuine fixed-term employment contract was clearly stated in the case of *M Vasagam Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor*⁵ where his Lordship Justice Faiza Tamby Chik J had opined:

"The applicant contended that the Industrial Court had not applied the correct test in making its decision by first asking itself whether there was a dismissal and secondly that if there was a dismissal, whether the dismissal was with just cause or excuse. I am of the opinion that the Industrial Court had correctly addressed the issue in this case by determining first whether or not the contract in question was a genuine fixed term contract (see pp 3 and 4 of the said award). If the Industrial Court made a finding that it was not a genuine fixed term contract but was really a contract of employment, then only would the Industrial Court be required to ask whether there was a dismissal or not and that if so whether it was with just cause or excuse. In the instant case, since a finding was reached that the contract concerned was indeed a genuine fixed term contract, the question of there being a dismissal or not does not arise. Once it was established that there is a genuine fixed term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company."

His Lordship Justice Abdul Kadir Sulaiman JCA delivering the judgment of the Court of Appeal in the case of *M Vasagam Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor*⁶ further explained the consequence of the non-renewal of a genuine fixed-term contract of employment in the following manner:

"Having analysed the evidence before him, at p 450, the learned chairman of the second respondent came to this conclusion:

"That being the case, that it was a genuine fixed term contract of employment, in normal circumstances such a contract automatically comes to an end of itself, in the absence of express renewal. In normal parlance, there is neither a resignation nor a termination and the letter of notice not to renew the Claimant's contract in exhibit CLA-30 was not a letter of termination. It was simply a letter of non-renewal."

... The learned Chairman of the second respondent found that the appellant's contract of employment with the first respondent was a genuine fixed term contract and therefore the first respondent has a right to not renew the said contract upon expiry. This is a pure finding of facts based on the evidence before it ..."



 $^{5 \}hspace{0.5cm} [2002] \hspace{0.1cm} 3 \hspace{0.1cm} MLRH \hspace{0.1cm} 886; \hspace{0.1cm} [2003] \hspace{0.1cm} 5 \hspace{0.1cm} MLJ \hspace{0.1cm} 262; \hspace{0.1cm} [2003] \hspace{0.1cm} 5 \hspace{0.1cm} CLJ \hspace{0.1cm} 448, \hspace{0.1cm} HC.$

^{6 [2005] 4} CLJ 93, CA.

Ultimately the issue of whether or not a fixed-term contract is a genuine one or not will depend on the particular facts of each case. In the case of *M Vasagam Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor*, the Court of Appeal held as follows:

"No two sets of facts are alike. Each case is to be decided purely on its own facts before the tribunal called upon to adjudicate on the matter."

From decided cases, in its effort to decide whether or not a fixed-term contract is genuine or not, the court will look at certain factors and circumstances including the operational requirement of the business, the conduct of the parties, and whether or not there were assurances of renewal by the employer.

Operational requirements

The genuineness of fixed-term employment contracts is usually determined by looking at the operational requirements and/or necessity of the establishment/business, e.g. the nature of the work which the employee was to perform and/or whether the employee's work forms an integral part of the business.

It would be worthwhile to refer to the case of *Malaysia Airlines Bhd v Michael Ng Liang Kok*^s whereby in that case, the claimant's fixed-term contract of employment as a pilot had been continuously and automatically renewed over a period of eight years. Therefore, the claimant contended that his contract was permanent in nature. The issue before the court was whether the claimant was hired on a genuine fixed-term contract of employment. The court held that the mere labelling of a contract as "fixed term" is not conclusive that it is indeed a genuine fixed-term contract but that the court is required to undertake a meticulous study of the facts to determine the need for the services of an employee for a fixed duration. The court held as follows:

"The issue before the court is one which is fraught with difficulties. The true question is whether the employer's business or that part of his operations or undertaking in respect of which an employee is employed under a fixed term can be seen to be one which is ongoing for an undefined and indefinite period of time or which is required for only a certain fixed term. In examining employment contracts to determine their true character, i.e. whether an ordinary contract or one for a fixed term, the court must take into consideration, inter alia, the nature of the employer's business and the nature of the work which an employee is engaged to perform. Of particular importance in this regard is a consideration of the temporal circumstances under which the employer carries out that aspect of his business for which the employee has been engaged to work and the actual outworking of the contract. This inquiry focuses on the issue whether the employee's services were in fact required for a definite fixed term or were an ongoing part of the employer's business and his operations."

In that case, the court held that the circumstances of the claimant's employment tenure with the company clearly showed that he was employed in an integral part of the company's ongoing business operations. The facts such as the claimant being confirmed, promoted, given increments for each completed year of service, paid bonuses, and also the automatic renewal of contracts for four times in eight years, led the court to conclude that the claimant's employment was not one for a fixed term. The court held as follows:

"Taking the above factors into consideration the court observes that the service for which the claimant had been engaged by the company can hardly be said to be one off in nature. Is it temporary in nature? The court does not see that the Rural Air Service is temporary in the sense that that part of the business of the company in which the claimant is working has a definite duration beyond which the cessation of the business is inevitable and hence the requirement for the claimant's service must end. Notwithstanding the nomenclature attached to the document containing its terms and conditions,

⁷ Ibid.

^{8 [2000] 3} ILR 179.

the company has not shown in what manner the Rural Air Service is not an ongoing business activity of the company in providing air transport services to rural communities of Sabah and Sarawak for an undefined if not indefinite period of time rather than for a fixed duration."

The same approach was taken by the court in the case of *Audrey Yeoh Peng Hoon v Financial Mediation Bureau*, where the claimant therein was employed as a mediator pursuant to a fixed-term contract of two years which was subsequently extended for a further two years. Just before the end of her extended period of employment, she was informed that the contract would not be renewed. In finding that the contract was not a genuine fixed-term contract, the court held that "the Claimant was an integral part of the company's main function". The Industrial Court stated as follows:

"[24] In the present case before this court, it is not disputed that the company's business or undertaking under which the claimant was employed under a fixed term contract was an ongoing and are permanent operations with no definite period of time. The company is in the business of receiving and mediating references in relations to complaints, disputes or claims against institutions licensed under the Banking and Financial Institutions Act 1989, institutions under Islamic Banking Act 1983, licenses issued under Insurance Act 1996 and others registered as members with the company. The claimant was engaged by the company to carry out the very core functions and objectives of the company as a mediator. The claimant was an integral part of the company's main functions. In fact, the claimant carried out the company's main functions and objectives."

However, it is acknowledged that there may indeed be situations where employees may reasonably be expected to be hired on a genuine fixed-term contract. The construction sector for example is one which utilises genuine fixed-term contracts as employees may be hired purely on a project-to-project basis.

Conduct of parties

Apart from identifying operational necessity, the conduct of parties in the performance or renewal of the contract of employment is also an important consideration in deciding the genuineness or otherwise of a fixed-term contract.

In this regard, in the case of *Malaysia Airlines Bhd v Michael Ng Liang Kok*,¹⁰ the company's conduct in renewing the claimant's employment four times continuously without a break clearly reflected that the employment was permanent in nature.

Another case example is the case of *Ahmad Zahri Mirza v AIMS Cyberjaya Sdn Bhd*.¹¹ In that case, the claimant was on successive fixed-term contracts which were renewed automatically by the employer several times. The Industrial Court found that the claimant was in fact a permanent employee of the employer and that his fixed-term contract was not a genuine one as the facts clearly revealed that there were no breaks in the claimant's employment as his contracts were automatically renewed by the same CEO throughout the years without any application by the claimant.

The said award was upheld by the High Court but overturned by the Court of Appeal. However, upon obtaining leave to appeal to the Federal Court, the Federal Court affirmed the Industrial Court award and held that it was



^{9 [2015] 3} ILR 371.

^{10 [2000] 3} ILR 179.

^{11 [2020] 5} MLJ 58.

of the opinion that a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between, is, in reality, a permanent employment. The Federal Court answered the following question of law in the affirmative on November 28, 2019:

"Is a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between in reality permanent employment?"

The court will also examine the employee's conduct and/or ascertain his state of mind when deciding the issue. In the case of *Gerald Blaise Ryan v See Hua Marketing (Sabah) Sdn Bhd*, ¹² the court in dismissing the claimant's claim, held that the fact that the claimant had requested the company in writing to grant him an extension of his contract was clearly indicative that the claimant himself acknowledged that he was not on permanent employment. The court held that the claimant was aware that the contract was an "annual contract" and this was most probably the reason why he had to seek its renewal.

In recent decision, the one factor which the court considered is whether or not the employee was aware and acknowledged that he or she was on a fixed-term contract and thereby having no legitimate expectation of permanent employment. This issue came to the fore in the case of A Gilbert D'Cruz v Sapuraacergy Sdn Bhd & Anor.¹³ In that case, an employee commenced employment on a fixed-term contract in 2007 which was renewed several times until his dismissal in 2015 on the grounds of the expiry of the final contract. The employee considered his contract of employment not a genuine fixed-term contract. The Industrial Court, however, held that the initial employment contract and the seven subsequent extensions were genuine fixed-term contracts and such a finding was upheld by the High Court in a judicial review application. However, in allowing the employee's appeal, the Court of Appeal held as follows:

"It was not disputed that (i) the appellant's contract of employment was renewed continuously and consecutively from 2008 to 2015; (ii) all the renewals were done automatically by the first respondent without the need of the appellant making the application; and (iii) although the period of the renewal was not uniform, in that, the renewal ranges from one month to 46 months, the renewals were backdated and had the successive effect. These undisputed facts were not considered at all by the IC. Instead, the second respondent had taken into consideration irrelevant points, namely the appellant knew and understood his contract of employment stated that it was a fixed term contract. The approach adopted by the IC was plainly wrong."

However, in a recent decision of the Industrial Court in Award No 1087 of 2023,¹⁴ the court took into account the conduct of the employee in having agreed and accepted the continuous contracts of employment on fixed terms which were clear and unambiguous. In fact, the court held as follows:

"[34] To this Court's mind, the Claimant being the COO and having shown remarkable aptitude, leadership qualities and various impeccable qualities befitting her position and in line with the Hogan Assessment measures cannot be said or seen as a person who is not aware of the consequence of her action when accepting and agreeing to all the terms and conditions of her three fixed terms contracts of employment. Surely the Claimant is fully aware of the all [sic] her actions when engaging with the Company in relation to her career advancement in the Company and in entering into new and successive fixed term contracts of employment which immensely benefited her in terms of the remuneration packages.

^{12 [2013] 4} ILJ 494.

^{13 [2022] 1} CLJ 49.

^{14 [2023]} MELRU 1087.

[35] This Court now finds that the words used in the three fixed term contracts of employment between the Claimant and the Company were plain and unambiguous and clearly shows that the three fixed term contracts of employment were genuine fixed terms contracts of employment and it was the intention of the parties namely the Claimant and the Company that these contracts were

indeed to be construed, recognised and accepted as genuine fixed terms contracts of employment and not otherwise and this Court must respect the intention of the parties at the time of entering into these three genuine fixed term contracts of employment. This Court finds support for the findings made herein by referring to the instructive passages in the judgment of his lordship Justice Gopal Sri Ram JCA in the Court of Appeal case of *Datuk Yap Pak Leong v Sababumi* (Sandakan) Sdn Bhd [1996] 2 MLRA 1; [1997] 1 MLJ 587; [1997] 1 CLJ 23:

That the role of the Court in upholding agreements adverted to by Lord Wright is not confined to documents drafted by laymen and includes those prepared by lawyers was recognised by Gibbs J (as he then was) in Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] 129 CLR 99. He said (at p 109):

It is trite law that the primary duty of a Court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the Court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The Court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust...."

We find the opinion expressed by Gibb J in the foregoing passage to coincide with what we apprehend to be the true legal principles that govern the interpretation of contracts. For that reason we would gratefully adopt his honour's views as our own.

It boils down to this. Where a contract is couched in unambiguous language, the Court must give effect to it. But where the terms of a contract are ambiguous then the Court may imply a term in order to uphold the transaction. See, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLRA 225; [1995] 1 MLRA 496; [1995] 1 MLJ 719; [1995] 3 CLJ 520; [1995] 2 AMR 969."

However, one would argue that the reliance on common law cases on strict contractual law principles is not to be applicable to the Industrial Court as section 30(5) of the Industrial Relations Act 1967 provides that the Industrial Court "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form".

Assurances of renewal by employer

One of the factors which courts will also consider is whether or not the employer had made any representation or assurances of a renewal or extension.



In the case of Lim Im Tee v Ansell Industrial & Speciality¹⁵ the court concluded that the contract was not a genuine fixed-term contract as the company had given assurances of renewal and continuity. The court held as follows:

- "[60] Another documentary evidence which support the finding is the assurance given by the Respondent in Clause 13 on CLB, pg. 92 which stated that "your service will be treated as if it had commenced with Company as from the date when MIM employed you". It is crystal clear that the Respondent had conveyed to the Claimant that her employment was a continued employment instead of contractual or fixed-term contract as alleged by the Respondent.
- [61] In addition, the Court finds that the fixed-term contract was indeed not genuine as the Respondent has failed to prove that the Claimant's employment was temporary in nature due to the work assigned to her being temporary or seasonally in nature. Findings made justified that the Claimant's employment had been continuous in nature since she started her employment with the Respondent."

In the case of *Lim Boon Leong v Sime Darby Auto Selection Sdn Bhd*, ¹⁶ after having served the company for 18 years as a permanent employee, the company intended to promote the claimant but such promotion would entail him being placed on a fixed-term contract for three years. However, not being happy with this change of status, the employee approached his immediate superior but was informed and given the assurance that the contract would be renewed after its expiry if he performed. Based on this assurance, the claimant then accepted the promotion and the offer. He was then terminated at the end of the three-year contract. The Industrial Court, in holding that it was not a genuine fixed-term contract, took into account such representation when it held as follows:

- "[49] It is thus reasonable to expect the Claimant to rely on the said representations of COW-1 and COW-2 as the Company never had any issues with his performance prior to the date the fixed term contract was entered into. There was a clear understanding that the contract will be renewed upon expiry. The Claimant thus had a legitimate expectation that his employment contract would be renewed as the representations that had been made by COW-1 and COW-2 to him was clear and unambiguous and it was reasonable for him to rely on those representations. The representations made by COW-1 and COW-2 had induced the Claimant to enter into the fixed term contract dated 29th April 2013 and the Claimant had relied on those representations to his detriment.
 - [50] The gap in the period of time between the date of the letter (29th April 2013) and the date the Claimant accepted the offer (8th May 2013) goes to show that the Claimant had indeed taken time to raise his concerns and only after the assurances were given by his superiors in the Company did the Claimant put pen to paper.
 - [51] As highlighted above, the Company had failed to give any explanation or justification with regards to its policy of placing employees in senior management under fixed term employment. Such a policy is clearly open to abuse as any Company who is dissatisfied with a particular employee who has had a long-standing service with that company, puts that employee under a fixed term contract for say 2 or 3 years and simply doesn't renew the contract thereafter, claiming the contract had simply come to an end due to effluxion of time. By which time, the employee's long years of service with the company would have counted for nothing. The employee would have lost the benefits he would have received had he remained under permanent employment."

The above decision was quashed by the High Court subsequently but that was before the decision of the Federal Court in *Ahmad Zahri Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd*.¹⁷

¹⁵ Award No 1842 of 2019.

^{16 [2018] 2} LNS 2483.

^{17 [2020] 5} MLJ 58.

In cases where employees are hired on fixed-term contracts past their retirement age, the courts are more inclined to conclude there is a genuine fixed-term contract as was held in the case of *Vincent Pillai Leelakanda Pillai v Subang Jaya Hotel Development Sdn Bhd*. ¹⁸

The normal practice in a particular industry may also be a relevant consideration. In the case of *Sredharan Ramakrishna Nair v Bumi Armada Bhd/Bumi Armada Engineering Sdn Bhd*, ¹⁹ the court was of the opinion that since it is a norm for employment contracts in the oil and gas industry to be for a fixed term, the claimant's fixed-term contract was indeed genuine.

Foreigners employed under fixed-term contracts

It is undeniable that Malaysia is an employment hub for many foreigners/foreign workers. In most situations, especially expatriates in higher management, it will be a requirement to obtain a work permit and it will be common for the contracts of employment to be for a fixed term to coincide with such work permits which are generally for terms of two years. The issue then is whether such foreigners/foreign workers have the legitimate expectation of permanent employment and does the fact of the requirement of a work permit have any relevance in determining the issue of genuineness of the fixed-term contract.

In the case of *Toko Inomoto & Ors v Malaysian Philharmonic Orchestra*²⁰ the claimants who were foreigners, were employed on a fixed-term basis as their employment in Malaysia was subject to them obtaining necessary work permit/employment pass from the Immigration Department. Some of them had been in employment for more than 10 years under several successive two-year contracts. At the Industrial Court proceedings, several of the claimants alleged that they currently held a Residence Pass and therefore are able to work in Malaysia without a work permit. The court held that the fact that the claimants currently hold a Residence Pass does not change the fixed-term nature of their employment because, at the time they signed the contract, they were foreign workers under a work permit. The High Court in affirming the Industrial Court decision, took the view that the claimants' citizenship status is not a material consideration to determine the genuineness of their fixed-term contracts.²¹

Azizul Azmi Adnan JC (as his Lordship then was) held as follows:

" [23] I agree with counsel for the applicant that the issue of citizenship was not a material consideration for the Industrial Court to take into account."

In the case of Robert Henry Hawkins v Rusch Sdn Bhd & Rusch Asia Pacific Sdn Bhd,²² the claimant was a British expatriate who had worked in Malaysia on an employment pass. He was employed on a fixed-term contract which was renewed eight times until he was terminated on the grounds of redundancy. One of the issues that had to be determined by the Industrial Court was whether the claimant's fixed-term employment contract had been genuine. In determining the same, the court took into consideration of the claimant's status as a foreign worker and found that the claimant's contract was indeed a genuine fixed-term contract. The court held as follows:

"Further, since the claimant had worked on an employment pass, he could not be put on the same footing as a Malaysian citizen. Hence just because the contract had been renewed without a break could not by itself convert a fixed term contract into a permanent one."



^{18 [2018] 2} ILR 158.

^{19 [2019] 4} ILR 113.

^{20 [2015] 2} LNS 1034.

^{21 [2017] 1} LNS 201.

^{22 [2010] 4} ILR 175.

In the recent case of *Peter James William Dyer v Yayasan UEM*,²³ the claimant who was a British citizen, had been employed by the company as a teacher. The claimant's second contract of employment was not renewed and the claimant contended that his contracts had been permanent contracts and that he had been dismissed without just cause or excuse. The court held that the company had not been in a position to employ him permanently as his employment had been subject to him obtaining a work permit. The court held as follows (ILR headnote):

"(3) As a British citizen, the claimant had been subject to Malaysian immigration laws pertaining to his employment with the company and his employment had been contingent upon him obtaining a valid residential visa and work permit or employment pass. Due to the above and his status as an expatriate, the company had not been in a position to offer him permanent employment and as such, no such understanding could have existed between the parties. Even though his job functions had been ongoing, it had not overridden the fact that his employment had been contingent on him obtaining a valid work permit. In any event, his contracts had not provided for such a permanent situation. Thus, the claimant's contracts of employment had indeed been genuine fixed-term contracts and the issue of dismissal had not arisen. The claimant's fixed-term contract had come to a natural end on the 30 June 2016."

However, the recent Federal Court decision in the case of *Ahmad Zahri Mirza v AIMS Cyberjaya Sdn Bhd* appears to have settled the issue. The claimant in that case was a Singaporean national and commenced his employment with the company in 2009 on the understanding that he would invest and build a business for the company. The claimant then invested and became a shareholder of the company. It was undisputed that the claimant at that point already had a valid 10-year working pass in Malaysia by virtue of being married to a Malaysian.

The Industrial Court found among others that the claimant's role to develop new businesses and a five-year business plan for the company was indicative of employment with no fixed term as the development of business by nature would take time. This decision was later affirmed by the High Court. However, the Court of Appeal allowed the appeal by the company and one of the grounds for doing so was that being a foreigner, the claimant could not be a permanent employee.

The matter was pursued to the Federal Court²⁴ where the claimant was given leave to appeal based on following question of law "Whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed term contract?".

The Federal Court allowed the appeal and held that the fact that the claimant is a foreign national is irrelevant to the determination of the question whether an employee's contract is a genuine fixed-term contract or permanent employment.

Mohd Zawawi Salleh FCJ (delivering the judgment of the Federal Court) further held as follows with regard to the issue of foreign nationals being placed on fixed-term contracts:

"In our view, the proposition of law propounded above is correct in law. The citizenship of the appellant/claimant has no bearing in deciding whether the appellant/claimant was in permanent employment or in employment under a fixed term contract. We also note that the Industrial Relations Act 1967 does not make any distinction between the citizens of Malaysia and non-citizens."

At this juncture, it is pertinent to consider the definition of "workman" in s 2 of the Industrial Relations Act 1967:

"workman' means any person, including an apprentice employed by an employer under a contract of employment to work for hire or reward, and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."

^{23 [2019] 2} ILR 491.

^{24 [2020] 5} MLJ 58.

According to this definition, a workman is "any person" employed under "a contract of employment", and in the case of a "trade dispute", he is a person whose dismissal, discharge or retrenchment from employment leads to or is the cause of the dispute. But what is the meaning of any "person", "contract of employment" and "trade dispute"?

The word "person" is interpreted in s 3 of the Interpretation Acts 1948 and 1967 (Act 388), as including body of person, corporate, or unincorporated.

"Contract of employment" is defined by the s 2 of the Industrial Relations Act 1967 as "any agreement whether oral or in writing and whether express or implied, whereby the person agrees to employ another as a workman and that other agrees to serve his employer as a workman".

Meanwhile, "trade dispute" is defined in s 2 of the Industrial Relations Act 1967 to mean "any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment, or conditions of work of any such workmen".

It is pertinent to understand the comed effects of these definitions. Salleh Abas LP in the case of *Inchape (M) Holdings Bhd v RB Gray & Anor* [1985] 2 CLJ 305; [1985] CLJ (Rep) 132; [1985] 2 MLJ 297 said:

"The comed effect of these definitions is that a person is a workman if the contract of employment under which he is employed requires him to serve his employer as a workman and in the case of a trade dispute a person is a workman if the dispute between him and his employer is connected with his employment as a workman. The definition, therefore, does not go very far and in fact it goes in circle. I am still left with the same question: who is a workman? But one thing is clear in that whilst a contract of employment is part of the definition, it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed as a workman. If he is employed in other capacity he cannot be a workman."

...

Now let me turn to the definition of workman in our IRA. Although it may appear to be wide, in fact it is limited by its own definition of contract of employment, which means any agreement whereby (an employer) agrees to employ his employee as "a workman", and the (other employee) agrees to serve his employer, (also) as "a workman". We were urged to disregard the expression "as a workman" as being a mere labelling. I cannot agree. I have no right to treat it as mere surplusage. It was included there for good measure just as the words "or otherwise" in the National Arbitration Tribunal case (supra) were held to extend the definition beyond the natural and common sense meaning of the word "workman". In my view the expression "as a workman" indicates the intention of the legislature in that in construing the term "workman", the purpose for which a person is employed must be taken into consideration. In other words, the function and responsibility of an employee are the criterion and must be looked into." (Emphasis added.)

Further, in *Assunta Hospital* (supra), the Federal Court also upheld the finding of the Industrial Court that, Dr A Dutt, a professional radiologist, who was employed under a contract of service was a workman. The court rejected the narrow definition of workman adopted by Indian courts because the expression "in any industry" which is part of the statutory definition of workmen in Indian Industrial Disputes Act 1947 is conspicuously absent from the definition under our Industrial Relations Act 1967.

One other important point to note is that Malaysia is a member country of International Labour Organisation (ILO). Article 10 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975, states:

"Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory." (Emphasis added.)



This ILO Convention, to which Malaysia is a party, expressly provides that states should undertake to promote and guarantee equality of opportunity and treatment between migrant workers and nationals.

This ILO standards apply to migrant workers and nationals equally. In *Nacap Asia Pacific Sdn Bhd v Jeffrey Ronald Pearce & Anor* [2011] 5 CLJ 791, the learned judge referred to article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 and stated:

"This ILO Convention, to which Malaysia is a party, expressly provides that where laws and regulations which control the movement of migrants for employment – such as the Immigration Act – have not been respected, the migrant worker shall nevertheless enjoy equality of treatment in respect of rights arising out of past employment. This is the international labour standard prescribed by the ILO." (Emphasis added.)

Based on the above reasons, we take the view that all workers should be treated with fairness, dignity, and equality without distinction whether they are local or foreigners. This is also consonant with art 8(1) of the Federal Constitution which essentially provides that all persons are equal before the law and entitled to the equal protection of the law.

In light of the above, it would now appear to be the position that foreigners subject to work permits may also be considered employees on permanent contracts.

The effect of Minimum Retirement Age Act 2012 ("MRAA") towards fixed-term contracts

Retirement is a type of termination of the contract of service that is based on the ground of age.²⁵

Effective July 1, 2013, the minimum retirement age of an employee in the private sector shall be upon him or her attaining the age of 60 years. Under section 4(1) of the MRAA, it is provided as follows:

"Notwithstanding any other written law, the minimum retirement age of an employee shall be upon the employee attaining the age of sixty years."

The unique part of the MRAA is its impact on fixed-term contacts that exceed 24 months (inclusive of any extension) with a basic wage of RM20,000 per month and above ("the said requirement"). Such employees, who fulfil the said requirement, qualify by virtue of section 2(1)(h), to be in permanent employment until the minimum requirement age of 60.

The above was applied in the Industrial Court case *Wong Mei Yoke v Tien Wah Press (Malaya) Sdn Bhd*²⁶ where the court held that when there is a fixed-term contract of 24 months or more, then the employee has security of tenure like a permanent employee as the MRAA has removed this cause for termination of contract for employees who qualified under the MRAA. This decision was affirmed by the High Court. The following was held:

"[29] Based on the above provisions of the MRA 2012, the effect of the Act is straightforward. An employee who qualifies under the Schedule would by operation of law have a retirement age of at least 60 years. It follows that an employee who qualifies, including an employee on a fixed term of 24 months or more, would have the right to work until that age. Any contract of employment which exceeds 24 months would by operation of law bring the employee within the scope of MRA 2012. In fact, a fixed-term contract of 24 months or more, then the employee has security of tenure, like a permanent employee beyond the limited liability under the original fixed-term contract. Employers can no longer claim that a contract has "come to an end" by way of effluxion of time. The MRA 2012 has removed this cause for termination of contracts for employees who qualifies under the MRA 2012.

Amardeep Singh Toor, "Decoding the Law on Fixed-term Contracts" [2016] 4 ILR(A) xxi.

^{26 [2018] 1} ILR 20.

[30] In the present case, although the claimant had already retired, she had retired at age of 50 years and not 55 years. Section 2 Schedule 1(i) of the MRA 2012 makes it clear that she is, therefore, covered by the MRA 2012. The company's first reason for the claimant's termination is, therefore, not valid and ought to be rejected. She has another 5 years 2 months before she attains her retirement age of 60 years. The company must now prove to the court that the termination is for just cause or excuse."

What about a situation where a contract does not have a retirement age clause or the employer does not have an established retirement age policy by conduct and an employee surpasses the age of 60? In such a situation, the Industrial Court decision of *Gill Satwant Singh v Assunta Hospital*²⁷ sheds some light where the Industrial Court held as follows:

" [54] Since the claimant has not only attained, but passed the minimum retirement age under the statute, the Hospital was entirely correct when it opted to exercise its right to retire the claimant in 2016 although the contractual provision is silent on whether or not the claimant can be retired by the Hospital after the attaining the age of 60 years. The contention that the claimant could work as long as he wished since the Minimum Retirement Age Act does not provide for a maximum retirement age is not to the claimant's avail. The court's construction of the law would be that in the absence of a provision on retirement age, in an employment contract, the earliest age upon which an employee could be retired would be upon the employee attaining the age of 60. Since the claimant has passed the minimum retirement age of 60, the Hospital can decide to retire the claimant at any point of time since he had passed the minimum retirement age. The claimant's contention that he cannot be retired at any point of time since there was no maximum retirement age stipulated in his contract of employment does not hold water. This was the reason why the Minimum Retirement Age Act was introduced; vis-a-vis to ensure that an employee has a right to remain in employment up to the time he attains the minimum retirement age. Once an employee attains the minimum retirement age of 60, it would be perfectly lawful for the employee at any time to be terminated by way of retirement, in the absence of a contractual term providing the employee's retirement age above 60 years."

Conclusion

Whilst it may now seem that the law relating to fixed-term contracts in the sphere of industrial law is settled, it is nonetheless a difficult task for the courts to balance the competing interests of the employer and the employee. As is the famous quote: "Each needs the other: Capital cannot do without Labour, nor Labour without Capital." Hence, whilst the courts are ever mindful of the need for flexibility to employers in conducting their business and its treatment of employees, the courts have to nonetheless be vigilant as to the exploitation of employment, and in particular, any transgression on the concept of security of tenure.

Similarly, whilst the courts are prepared to acknowledge the necessity and/or managerial prerogative to place employees on fixed-term contracts, they ought to continue to be vigilant and to scrutinise the facts of each case to determine whether or not they are in fact genuine fixed-term contracts. If the courts, upon its scrutiny of the facts, conclude that they are not, the court should not hesitate to strike down the same and ensure that the concept of security of tenure is continually guarded.



TECHNOLOGY AT ITS BEST

By Nurulhuda Nur'aini Mohamad Nor, Judicial Commissioner of the High Court of Malaya



Introduction

The pace of the development of technology the world is currently and continuously experiencing does not appear to be decelerating. With the clock seemingly ticking at a speed faster than before, innovative inventions are now a necessity to make everyone's life more organised and promising. When the wave of COVID-19 hit our shores, the Judiciary was compelled to incorporate technology widely into our legal system.

Hearing of civil matters and certain criminal applications was modernised when the virtual mode was implemented. In actuality, the existence of technology in relation to not only the mode but the type and nature of the evidence brought before the court is nothing new. To illustrate, section 272B of the Criminal Procedure Code recognises this advanced area that would be beneficial towards ensuring the security and comfort of a witness when testifying by providing the avenue to adduce evidence by video link. Section 45 of the Evidence Act 1950 focusses on the areas of science or art that inevitably need expert witnesses with his or her accurate and precise views to assist the judge in forming a view of a particular fact.

Adequacy of the law on evidence derived from technology

Section 90A Evidence Act 1950 on computer-generated documents are one of the many examples to show that technology has been acknowledged in our laws, much earlier. It acknowledges indirectly the danger of computer-generated documents and seeks to avoid it by stipulating the conditions to be satisfied for its

admissibility.¹ Having said that, not all technology is exactly rocket science. Certain applications are consumer friendly, easily understood and need not require an expert witness under section 45 to be present before the court to explain its purpose and operation.

It is undeniable that the majority of us, including judges, are also consumers of technology ourselves. However, our Evidence Act 1950 is quite lacking in matters addressing judicial notice. The main concern is the law on judicial notice is not extended to permit our daily experience in handling these applications or technology tools as admissible and relevant. Such examples are photographs taken via smart handphones and digital cameras (to name a few) that would reflect the time stamp of the said photographs taken.

Some smartphones can even go further and provide more details of the photographs which are saved in the photographs of a handphone such as where the photographs were taken and captured – displaying the sequence date and time recordings on the said photographs. This is undoubtedly, a part of our daily use of technology. The party proposing such approach may argue that it is no longer a foreign subject of science but a necessity tool which everyone is familiar with, from day-to-day usage. It would probably be argued further that it is evidence of fact and not opinion; hence does not require any expert testimony.

Interestingly in *Director of Public Prosecutions v McD* [2016] IESC 71, the English appellate court in addressing the said issue said as follows:

"Quite obviously, without someone giving evidence as to the workings of the mainframe computer, no trier of fact could be expected to understand how such a machine operates or even what its function or role was in the overall process. The same could not be said of a CCTV camera, as such devices have become ubiquitous in everyday life and their essential purpose and operation would be readily apparent to any reasonable person, even if an explanation at a scientific or technical level might understandably be difficult for most members of society to follow."

In the Malaysian context, the Federal Court in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265, ruled that on the chemist evidence that centres on the identity and weight of the drugs, the chemist is testifying on the facts the chemist observes, arising from the result of the various tests and experiments conducted. In the judgment written by Abdul Hamid Omar LP, his Lordship quoted *Phipson on Evidence* (14th Edn) at pp 805-806 as follows:

"There is an important if elusive distinction to be made in the categorization of expert evidence. It is generally accepted that there is a difference between evidence of fact and evidence of opinion, notwithstanding that it may be difficult to identify the line which divides the two. It is also well understood that in practice a witness of fact may not be able entirely to disentangle his perceptions from the inferences he has drawn from them. Although the courts often talk of "expert evidence" as if it were a single category, representing in every case an exception to the rule against the reception of opinion evidence, it is suggested that a similar distinction exists in the evidence of experts, and it is one which has considerable relevance both to the procedural aspects and to the assessment of the weight of expert evidence. Expert witnesses have the advantage of a particular skill or training. This not only enables them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to a lay witness. The latter might simply be described as "scientific evidence", the former as "expert evidence of opinion". A microbiologist who looks through a microscope and identifies a microbe is perceiving a fact no less than the bank clerk who sees an armed robbery committed. The only difference is that the former can use a particular instrument and can ascribe objective significance to the data he perceives. The question of subjective assessment and interpretation which is the essence of opinion evidence hardly enters into the matter at all."

² Section 57 of the Evidence Act 1950 limits the facts that courts must take judicial notice of whilst section 58 dispenses with proof of facts admitted by parties but the section is not applicable to criminal proceedings.



¹ WION The World is One News, "Fake Al images of Donald Trump being arrested have gone viral", YouTube Video, March 24, 2023, Twitter's Community Notes #ai #trumparrest #wion.

Hence, in *Khoo Hi Chiang* what can be sieved from the said decision is that although scientific methods by way of scientific tools are used in carrying out the various tests, the result is merely one of fact arising from direct observation of the data displayed by these technological tools. In short, the data displayed does not come about in a situation where it must pass a human mind before the result could be obtained.

A similar analogy would be the use of applications widely available now such as the "Grab Rider" app. It has online instructions on how the application works and how to sign up for one, whilst the route of the destination is open to the option of the driver either automatically linked to the Google map or map available on the "Waze" app. A witness from Grab may be necessary to extract the data and to testify as witness of fact as to the particulars on who made the booking, the time the booking was made and its destination as captured from the printout map, to enable focus on which route the Grab driver opted to take. Hence, his technical expertise may not be necessary to be presented before the court as he is merely perceiving the facts extracted from the printout data.

To believe or not to believe: A crucial determination

In this age of technology, the courts ought to be permitted to take judicial notice of the existence of a variety of programmes and software that can be downloaded to produce outputs different than the original input feed, as can be seen advertised and marketed on Facebook. It is for this reason that in the course of presenting computer-generated documents, compliance with the requirement of section 90A of the Evidence Act 1950 is crucial although the failure to do so, may not be fatal. What the court looks at is the authenticity of the contents of such documents, for example, the photographs.

This may be proved or disproved by the testimonies of the witnesses themselves. For example, an eyewitness who said a victim was slashed whilst the victim was sitting on a steel railing by the roadside and a photograph using a digital camera of this steel railing was taken by the forensic team. When the analysis was done by the chemist, the blood DNA of the victim was found on the said steel railing. This, to a certain degree, goes towards proving the authenticity of the photographs taken even in the absence of the memory card coming from the photographer and the section 90A certificate.

In a recent decision by the Court of Appeal in *Abdul Rahman Mohd v PP* [2021] 1 LNS 804, the court relied on the dicta of Augustine Paul J in *PP v Ramli Shafie* [2002] 8 CLJ 846 on the issue whether photographs can be tendered without calling the photographer. Augustine Paul J admitted the photographs neither with the need to call the photographer nor the need to tender the negatives as these photographs were identified by other prosecution witnesses and there was no challenge to them being a fair and accurate representation of the content.

Augustine Paul J in his judgment said as follows: In further elaboration, I refer to a passage from *Evidence: Proof and Practice* by Graham Roberts at p 545:

"A question that arises where photographs are to be tendered is whether it is necessary to call the photographer. Generally speaking, there is no need to call the photographer provided that a witness is available who can testify that what is shown on the photograph is a fair and accurate representation of the scene at the relevant time. Calling the photographer will generally only be necessary when no such witness is available or in special cases when technical details of the photographer's art are likely to be in question. In other words, what is required, in the usual case, of a witness through whom a photograph is to be tendered is first-hand knowledge of what is shown in the photograph rather than first-hand knowledge of the taking of the photograph (see JW McElhaney, Trial Notebook (2nd Ed, Litigation Section of the American Bar Association, 1987) pp 202-203)." (Emphasis added.)

The decision in *Abdul Rahman* suggests that the authenticity of the photographs is the paramount matter to be decided irrespective that the requirement of the law, specifically section 90A of the Evidence Act, has not been

complied with in relation to its admissibility. This court agreed that the ultimate fact in issue is whether the photographs tell the true story and are not fabricated.

In *R v Maqsud Ali; R v Ashiq Hussain* [1965] 2 All ER 464, the Court of Criminal Appeal as far back as 1965, having to deal with advantages of evidence produced by technological mode of proof and its admissibility, was open to admit it when the court said clearly at p 469 as follows:

"What is clear to this court is that this case appears to have raised for the first time in the grounds of appeal the question whether a tape recording is inadmissible in law. Counsel for the appellants did not seem eager to argue the matter with any great force or in any real detail, but the court nevertheless invited counsel for the Crown to address the court, if he desired, on the issue and this he has done. We think that the time has come when this court should state its views of the law on a matter which is likely to be increasingly raised as time passes. For many years now, photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or oculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged."

In carrying out the assessment exercise whether to admit or not to admit such evidence, having acknowledged that it is within the discretion of the courts to do so, courts would be guided by the ultimate task to ascertain the genuineness of the said evidence, although undeniably, this may not be as easy as it appears taking into consideration the existence of the artificial intelligence issue now, as highlighted earlier.

In support of the openness to accept such advanced nature of evidence, the English cases suggest a logical reasoning that "the fact that a recording is produced mechanically without human intervention makes no difference to its general admissibility in evidence. This stand is applicable not only where the device in question processes information supplied to it, but also where the device itself gathers information". (See *DPP v Murphy* [2005] 2 IR 125.)

In *Director of Public Prosecutions v McD* (supra), distinctions were made as to whether any printouts from a device that processes information supplied to it, is hearsay or not, as opposed to a device that gathers information itself without any human intervention. In this case, it was submitted by the respondent that no evidence had been put before the trial court on how the camera system operated to enable the court to know whether there had been any human intervention in the creation of the footage, the absence of which leads to the footage being inadmissible. On the contrary, the deputy public prosecutor ("DPP") in that case submitted that the closed-circuit television ("CCTV") footage was not inadmissible hearsay and should not be equated with computer printouts/records.³

In *The Statue of Liberty* [1968] 1 WLR 739, evidence of a film of echoes recorded by radar at a shore station which was unmanned at the time was sought to be admitted by the plaintiff. The defendants argued that the evidence was produced mechanically and without human intervention; hence it was inadmissible as hearsay. Rejecting this submission, Sir Jocelyn Simon P said:

³ Please read the full judgment as the argument and decision on the admissibility of the CCTV footage would also centre on the state's section 23 of the Criminal Procedure Code on "compelling evidence".



"If tape recordings are admissible, it seems that a photograph of radar reception is equally admissible — or indeed, any other type of photograph. It would be an absurd distinction that a photograph should be admissible if the camera were operated manually by a photographer, but not if it were operated by a trip or clock mechanism. Similarly, if evidence of weather conditions were relevant, the law would affront common sense if it were to say that those could be proved by a person who looked at a barometer from time to time, but not by producing a barograph record."

Be that as it may, the issue on admissibility of such evidence in *The Statue of Liberty* case, is dependent on the "proof to the contrary arising from cross-examinations". Interestingly, the DPP in *Director of Public Prosecutions* v McD (supra) whilst conceding it is relevant to call witnesses to testify on the system's operation, possibly citing the case of R v Cochrane (1993) Crim LR 48 ("R v Cochrane"), where it was held by the Court of Appeal (Criminal Division) that "before the judge could decide whether the computer printout in that case should be treated as real evidence or as hearsay, it was necessary to call appropriate authoritative evidence to describe the function and operation of the computer in question", addressed this issue as going only to weight. The submission of the DPP is extracted below:

"... that the lack of evidence, if such be the case, as to the date or time of the footage, its sequence, or whether it had been edited, might be factors which go to the weight or reliability of the evidence, but would not of themselves render the footage inadmissible as hearsay. Likewise, other details – such as whether the camera is wall-mounted or handheld, records continuously or in bursts, is motion-activated or constantly switched on, is static or swivels, or requires to be switched on and off to commence and conclude recording – all may be relevant, but not as to admissibility. In essence, ... in dealing with real evidence, the Court must merely satisfy itself as to the authenticity of that evidence; issues of weight are matters for the jury ($R \ v \ Robson; R \ v \ Harris \ [1972] \ 1 \ WLR \ 651$)."

The appellate court in *Director of Public Prosecutions v McD* (supra)_disagreed with this submission to the extent that the facts in Rv Cochrane (supra) were distinguishable as follows:

"56. In my view, however, *Cochrane* does not require evidence of such a nature in respect of the workings of a CCTV system, whose output, as I have said, must be regarded as real evidence. That decision related to the absence of any evidence to explain how critical information contained in the till roll came into existence. All that was established as to how the ATM associated the applicant's PIN number and card with his bank account was that it was dependent on a mainframe computer about which nothing was known, not even its location. The same concerns would not appear to have arisen if all of the information was generated solely by the branch computer, which was the only device about which evidence was tendered at trial. Therefore, it may well be to over-read the judgment even to say that it applies to all computers. Whether this is correct or not, the facts of the case are wholly different from those in the instant situation."

As it appears, there was a slight reservation that can be seen in the paragraph extracted above as to the correctness of the decision arrived at. Having said this, the appellate court did not disagree that the evidence of a CCTV is open to challenge if there had been any suggestion that the recording that would have been favourable to the defence was not produced as part of the download, it was edited, tampered with or fabricated. Hence, trial courts are cautioned "to remain vigilant to ensure the integrity of each piece of such evidence used in the prosecution of an accused person".⁴

The development of issues and the law as it stands

With today's technology and innovation, crimes are now committed on different platforms. Commercial crimes, for example, would now need new enhanced investigative skills to extract the necessary evidence which exists in this new medium. Bitcoins and related offences are good examples of this new mode of commercial crime offences. As we equip ourselves with these new modern ventures, the defences available would also vary.

⁴ See para 61 of *Director of Public Prosecutions v McD* (supra).

In Robert Ong Thien Cheng v Luno Pte Ltd & Anor [2019] 1 LNS 2194, an offer by the appellant to return a mistaken transfer of 11.3 bitcoin by the trading platform in the form of cash, was rejected by the respondent. An interesting defence of technical error was raised by the respondents, whilst the appellant argued the defence of unlawful interference resulting in the suspension of the appellant's account. Why it was raised as a technical error was because an earlier request by the appellant for 11.3 bitcoin from his e-wallet to be transferred to his other e-wallet had already been performed by the respondents but a technical glitch occurred that caused another 11.3 bitcoin to make its way into the appellant's e-wallet.

In this case however, the appellant did not dispute that there was an error when a subsequent transfer of the 11.3 bitcoins was made to his e-wallet. Thus, this would perhaps have made it easy on the part of the respondents to prove "a technical glitch"; otherwise experts would need to testify how this could have possibly occurred. More interesting is that although the claim centres on digital assets or cryptocurrency stored electronically in the blockchain, the domestic law does not recognise it as legal tender under the Currency Act 2020, yet it is accepted as a form of security, based on the rules and regulations issued by the Securities Commission of Malaysia.

The appellate court in the court's determination held that "up until the point the Bitcoins are assigned to a specified user, it is just a pool of Bitcoins that the respondents have full custody and control of and as such, the respondents have the requisite locus standi to initiate the action for recovery". The court also found that the word "anything" within the term "anything delivered by mistake" under section 73 of the Contracts Act 1950, a law that existed even before the creation of such technological innovation, is wide enough to include "bitcoins"; hence it ordered for its return to the respondents.

As technology is widely available, one positive impact of technology is that complaints and information on commission of offences can be made contemporaneously available with speed and can be viralled within seconds by way of video sharing via Facebook, Twitter, TikTok and YouTube subject to the admissibility of the contents as permitted by the Evidence Act, for example the rules for admission on *res gestae* or rules against hearsay.

In *State v Jackson* 2022-Ohio-3483 (Ohio Ct App, Lake County September 30, 2022, the Court of Appeals of Ohio, Eleventh Appellate District, Lake County), exchanges of threats between the suspect and the victim via text messaging on social media were improperly excluded by the trial judge as being hearsay. On appeal, a retrial was ordered by applying the exception to hearsay falling under the state of mind rule.

Interestingly, technology has made access to foreign art or science, easier. One example of a new defence which is now recognised in court is the defence of autism which has made its way into the legal system. Autism is raised as a defence as people are more sympathetic if a victim suffers from autism but less sympathetic if an accused suffers from it despite the fact that it has the same effect on both persons. Some of the recent experiences encountered domestically as reported by the media are highlighted to demonstrate this.

To begin with, autism is "a complex, lifelong developmental disability that typically appears during early childhood and can impact a person's social skills, communication, relationships, and self-regulation. Autism is defined by a certain set of behaviours and is a 'spectrum condition' that affects people differently and to varying degrees". A person with mild autism may look normal but a person with severe autism may need certain external control such as physical restraint by internal family members who are already familiar with the autistic meltdown behaviour. It should be noted that the meltdown of an autistic individual may be something normal to members of the family of the autistic individual but to an enforcement team, it may appear as a form of resistance put up by the said individual that may result in an adverse view being taken against him.



⁵ https://www.asaheartland.org/what-is-autism.php (accessed on February 7, 2021).

Similarly like the Bitcoin, autism has made its way into court proceedings in Malaysia, and with the wide research done abroad and the results shared online, more information can be gathered and understood. It is crucial to comprehend this diagnosis as there are different degrees of severity of autism suffered by different people. Certain people may lack social skills and tend to present aggressive behaviours when agitated. The best example is the case of Adam.⁶

Adam was diagnosed with severe Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactivity Disorder (ADHD) when he was two years old. He is non-verbal, lacks social skills and tends to present aggressive behaviour when agitated. Iman (Adam's father) does not hide his family's struggles. There are photographs of scratch marks on Iman and his wife's face, and bruises on their limbs, that resulted from efforts to calm and restrain Adam during these episodes. A number of Adam's outbursts have been documented, showing him screaming, shouting and biting his parents. The images may be disturg to some people but in reality, they are part and parcel of Iman's family situation.

As far as the legal fraternity is concerned, under the criminal law spectrum, although a person suffering from severe autism may be able to perform the *actus reus*, citing Adam as an example, an expert doctor's view may be required on whether the person would be able to have the requisite *mens rea*. Interestingly, ICT software has been developed within the medical field to facilitate early detection and assess the degree of severity suffered by this group of autistic people and to distinguish them from typically developing children by way of motor imitation tests captured by EEG (electroencephalogram) signals.⁷ This is important as it will assist the relevant parties in coming to a determination whether an autistic person has the necessary mental capacity or even knowledge when carrying out any particular act or whether he is able to comprehend the surrounding events that have taken place.⁸

On this subject of autism, technology that enables online search would bring the attention of readers to an article by Mohammad Ghaziuddin, MD Professor of Psychiatry Section of Child Psychiatry University of Michigan "Violent behaviour in autism spectrum disorder (ASD): Is it a fact, or fiction?" who wrote to share his research as follows:

"In this article, I examine the evidence behind the claim that people who have ASD/AD (Asperger's disorder) are predisposed to criminal violence ...

Although autism is a childhood-onset disorder, its symptoms persist across the life span. If the diagnosis is missed in childhood, which is likely to happen if the person has normal intelligence and relatively good verbal skills, he (she) might come to medical attention for the first time as an adult.

Because most psychiatrists who treat adults do not receive adequate training in the assessment of childhood psychiatric disorders, ASD/AD might be misdiagnosed as schizophrenia or another psychotic disorder.

He wrote further sharing the experiences he encountered in handling ASD individuals as follows: I once cared for a young man with ASD who had been fired a few days after landing his first job selling used cars because he was "sexually harassing" his colleagues. When questioned, he said that he was only trying to be "friendly" and "practicing his social skills"."

https://www.thestar.com.my/lifestyle/living/2019/04/12/adamsautismfamily-autism "Autism Awareness: Malaysian family take to social media to share their child's journey" by Sheela Chandran April 12, 2019 (accessed on February 7, 2021).

⁷ Institute for Public Health Technical Report Autism Spectrum Disorder Research in Malaysia (Institute for Public Health, Ministry of Health Family Health Development Division, Ministry of Health, 2015) ISBN: 978-983-2387-10-7; MOH/S/IKU/40.15 (HB).

See: Carter v Superintendent 2011 US Dist. LEXIS 23551, a case involving a charge of molest on an autistic victim and if she is competent to testify. See also: United States v Marks 2022 US Dist. LEXIS 164261; 2022 WL 4129539 on accused mental competency to stand trial.

In Malaysia, a similar occurrence was once reported in the media — this involved the MRT adventure of an autistic boy Ahmad Ziqri Morshidi. Ziqri was 20 years old at the time he took a ride on the MRT in 2016 but according to his mother, he was 11 or 12 years old emotionally. Ziqri was found an hour later thanks to the help rendered by the MRT personnel, security and auxiliary police.

Ziqri made news again in 2021 when there was public outcry on how an autistic individual, Ahmad Ziqri Morshidi, was handled by the police then. ¹⁰ In Ziqri's case, the learned magistrate refused the police's application to remand him for four days on a sexual harassment complaint, following the representation of an *amicus curiae* team of lawyers who appeared to address the court on the medical history of Ziqri with the subject of autism in focus. ¹¹ This instantly moved the Royal Malaysia Police (PDRM) to initiate standard operating procedures on handling autistic individuals. ¹² The question whether the decision to refuse remand was correct or not, would depend on the available reports and evaluation done on Ziqri. ¹³

The capabilities of the technology tools: The comprehension of the jargon

With vast development of technology, the language, terms and their reference to each process and function have now become technical jargon that needs a more accurate definition for each term. As far as Malaysia is concerned, more specific translations of these jargons to Bahasa Malaysia are required, it being the official language of the court subject to the Legislature declaring the English text as the official one.

Understanding the distinction of some basic words such as "uploading" and "downloading", "copy and paste", "computer programs" and "computer software", "platforms", "applications", their capabilities such as "zoom in", "enlarge", just to identify a few, is very essential towards a more comprehensive understanding of the technology tools or gadgets and how they operate and function.

Hence, the court as the trier of fact ought to be permitted to rely on section 165 of the Evidence Act 1950 to pose questions to experts with the ultimate aim of seeking clearer and conclusive evidence. Cory J of the Supreme Court of Canada, in *R v Nikolovski* [1996] 3 SCR 1197 which was a case involving a videoed robbery in which the employee was unable to identify the robber in court, said as follows:

A police officer who knew the accused, testified that the accused's appearance in court differed from that at the time of his arrest.

The trial judge took the view that the video was sufficiently clear to allow her to conclude that the robber was the accused and found him guilty. The Court of Appeal quashed the conviction on the basis that the trial judge ought not to have relied solely on her own comparison of the video images and the accused in court and concluded the conviction as unsafe. The Supreme Court, by a majority of seven to two, reinstated the verdict at first instance.

The trial judge would have certainly used the capabilities of the tools to lighten and enlarge the image but without altering the real evidence, for her to be convinced and come to that determination. Cory J said further as follows:

"28. Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph)



⁹ https://peraktoday.com.my/2016/12/autistic-boy-finds-way-home-after-mrt-adventure/ (accessed on February 9, 2021).

¹⁰ https://www.thestar.com.my/news/nation/2018/09/17/youre-in-a-gerak-khas-movie-mother-told-adult-autistic-son-when-he-was-arrested/ (accessed on February 9, 2021).

https://www.newmalaysiaherald.com/2020/09/12/what-happened-to-ziqri-two-years-ago-trauma-lingers/ by Hasnah Abdul Rahman – September 12, 2020 (accessed on February 9, 2021).

https://www.malaymail.com/news/malaysia/2019/03/25/igp-police-to-follow-new-sop-when-dealing-with-autistic-sus-pects/1736374 (accessed on February 9, 2021).

¹³ See *United States v Marks* (supra).

real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused."

The accuracy of such evidence would be the convincing factor for the court in accepting the identity of the accused in the video as one and the same suspect before the court. It would have been a different story if the defence put forward is one of alibi that would make it impossible for the accused to have committed the offence. This again, would depend on where the accused said he was during the commission of the offence.

Otherwise, the distance of the two locations of the crime scene and his alibi, the availability of a smooth route and the modern transport that can carry him to and from the location "in a speed faster than lightning" would either make or break his defence. This much, the technology can do.

In *Nikolovski*, the defence denied committing the said offence and argued that he was at home with his mother and brother. The mother and brother however were not called by the defence. As far as this defence is concerned, it is one of mere denial and not alibi. Thus, such defence was rejected by the Supreme Court.

Interestingly, the Court of Appeal in the judgment by Arbour JA, although agreeing with the trial judge that the videotape was of very good quality and that the image was sharp and clear that would permit a comparison to be made between the robber and the accused appearing before the trial judge, expressed doubt whether the prosecution could be successful where identification evidence was made solely on the basis of a photograph or videotape without confirmatory evidence from a witness linking the accused to the crime.

She observed that no one identified the respondent as the man in the videotape, except the trial judge. She expressed the view that the Crown ought to have called the detective who had known the respondent for some years to testify as to whether the person on the videotape and the respondent were one and the same. As it appears in the opinion of the Court of Appeal, corroboration by a witness that the person shown in the videotape is the accused is essential and its absence is fatal to the case.

Application of section 165 of the Evidence Act 1950

The application of the decision in *Nikolovski* within Malaysia may face some reservations as firstly, it would be dependent on how much power is vested in the trial judge under section 165 and secondly, whether in a jurisdiction that practises an adversarial rather than inquisitorial system, the entering into the arena by the trial judge is permissible.

Locally, in *Elonita Abayon Chua v PP* [2018] 1 LNS 273, a case that centred on the application of section 165 of the Evidence Act 1950, the Court of Appeal in dealing with the issue raised by the appellant where the trial judge encroached into the arena thus acting in favour of the prosecution, very sternly reminded that "the active and dynamic involvement of the trial Judge in the trial of the case left much to be desired". Having said that, the Court of Appeal significantly acknowledged that a judge is not a "mere recording machine" and/or "silent spectator". Having found the conviction safe, the Court of Appeal affirmed it. The Federal Court similarly did not dispute the guilt of the appellant but substituted the finding of guilt on trafficking to one of possession based on the issue of knowledge and the application of the statutory presumption.

Therefore, section 165 should be viewed as an enabling factor for the trier of fact to come to a fair and just decision, having put the totality of evidence and the issue arising from it to be addressed adequately by the parties. Otherwise, what ought to be viewed as an advantage and relevancy would further injure the moral and legal aspect of the fact in issue.

Technology opens pertinent defence

One interesting issue of technology which may be open to manipulation is in the area of medical technology such as life support systems or other medical advancements, which have made it possible for patients who would otherwise have died, to survive. In an attempt to cast doubt, the issue of the use or absence of such technological remedy has often been raised by the defence in challenging the actual cause of death of a murdered victim so as to mitigate the act of the accused. It is definitely not an easy task for the trial judge as at times, it would be a borderline issue which he or she would be required to analyse and deliberate on in order to come to a finding.

Conclusion

Technology therefore can be viewed as being capable of providing benefit on the one hand but on the other hand, exposing users to other risks. To cite an example, a Facebook user may seem to think that his or her information is safe within the domain and is shared with only those listed friends on Facebook. But in reality, borrowing the words of Dr Bradley Schatz in his article "Digital Evidence: The End of Golden Age", ¹⁴ on the truth and reality of the digital world:

"In the more modern paradigm, users of Webmail services such as Hotmail or Gmail, or social networking services such as Facebook, store the entirety of their information with the proprietor of these services, generally in a jurisdiction other than Australia." ¹⁵

Whether there was a breach or not of the Personal Data Protection Act by the proprietor of Facebook came to light recently. ¹⁶ Innocent unsuspected users were unaware of the risks. However, the discovery and consequences of this breach are still not settled. Inevitably, it boils down to the issue with regard to the technical operation of the technology tools. It remains open to be debated whether expert evidence must be adduced by a witness who understands the creation of such innovation before the authenticity of the output it produces can be determined and to eliminate whatever issue of tampering of the data. This perhaps would require the trial judge to strike a balance between areas that ought to be left to the experts and areas which should be safely eliminated by the trier of fact.

^{16 &}quot;Crisis Yet, Pledges ..." The New York Times, https://www.nytimes.com > 2018/03/21 > technology > ...on "Zuckerberg, Facing Facebook's Worst Crisis Yet, Pledges Better Privacy" (accessed on May 11, 2023).



^{14 [2013] 1} LNS(A) xii.

¹⁵ Dr Bradley is a Director of the independent digital forensics consultancy Schatz Forensic, and an adjunct Associate Professor at the Queensland University of Technology (QUT), hence Australia was used as the perimeters.

THE COVID-19 PANDEMIC AND ITS IMPACT ON TAX DOMICILE RULES

By Arief Emran Arifin, Judicial Commissioner of the High Court of Malaya



The recent COVID-19 pandemic has affected people's choices and daily routines in many ways (e.g. where they reside, where, when and how they work, as well as their work-family balance. Some have argued that these changes demand changes in personal income tax law. Should the concept of taxation based on domain and habitual residence be revisited?

I. Introduction

When one reads Albert Camus' "The Plague", one finds an uncanny resemblance to what the world faced today during the COVID-19 pandemic. Like the plague that swept through the city of Oran, the COVID-19 pandemic has led to physical isolation, social distancing, as well as changes in the way people work and where they work – resulting in strains on relationships within the family and affecting work-life balance.

Given the above, perhaps these changes ought to be considered and provisions made to amend the personal income tax law to reflect the current pressures faced by taxpayers. Whether changes ought to be made will depend on what one believes constitutes the rules and mechanisms of taxation. These, according to Sagit Leviner, involve questions that are "first and foremost ... concerning the nature of society". What should be subject to tax and how the tax base is to be calculated are based on "society's underlying beliefs and values

 $^{1 \}qquad \text{Leviner, S, "The Normative Underpinnings of Taxation" (2012) 13 Nev LJ \ 95.}$

vis-à-vis the meaning and attainment of justice". As stated by Levine, irrespective of the political theories one may subscribe to, taxpayers are entitled to expect to receive a net return on labour and capital – gross return on their income or investments less the sum needed for the maintenance of the existing social order.

Section A of this article will present the general common law position on the issue of deductions and nexus rules pertaining to personal income tax and explain the issues that were faced by taxpayers due to the COVID-19 pandemic. Section B discusses whether these identified rules should change because of COVID-19 and present justification for either a change or maintenance of the current system. This article explains that these changes caused by the pandemic require personal income tax law to be modified to take into account current issues and the personal circumstances of taxpayers.

II. Section A

The personal income tax laws of most common law countries are derived from or at the very least are an adaptation of the income tax laws of the United Kingdom ("UK"). For this article, examples will be taken from the laws of the UK and Malaysia. The specific rules that will be discussed here are pertaining to the nexus rule of income and the deductibility rule that are generally similar in the UK and Malaysia. These rules will then be applied to two fictional taxpayers facing the same issues due to COVID-19 but have different abilities to deal with such issues due to their characteristics and the current rules. Note that for this article one assumes that the taxpayer only has a domestic income for personal income tax.

Under the income tax law of the UK and Malaysia, a person will be deemed to be a resident in each country and be subject to taxation on his personal income at the applicable tax rate, if he is in the UK for 183 days or more and in Malaysia for 182 days or more in a tax year. Other factors will be considered even if the taxpayer does not fulfil the aforesaid number of days requirement. This will include family ties, social ties, business ties, previous history of tax residency and location of property owned by the taxpayer. These rules are intended to ensure that the taxpayer is subject to taxation on their personal income based on their real economic affiliation to either Malaysia or the UK. The reason why the issue of nexus is chosen is because COVID-19 has caused a disconnect between the tax jurisdiction and the taxpayer and even an unfortunate connection justifying the imposition of taxation due to temporary relocation to a foreign jurisdiction. Taxpayers may have been unable to return to their original jurisdiction due to lockdown rules or restriction of international travel – causing some to, unfortunately, fall within these nexus rules despite having no real economic connection to either Malaysia or the UK.

The second area that will be discussed is the deductibility rule. Most taxpayers have found themselves unable to undertake their work based on normal circumstances. Usually, work is undertaken at the office at the expense of the employer or by their chosen business entity and it is separated from their personal life. There is a dichotomy between work life and personal life, where a taxpayer can separate his personal expenses and work-related expenses. Section 33(1) of the Malaysian Income Tax Act 1967 allows the deduction from a taxable income of any amount that is incurred wholly and exclusively for the production of the said income. The same test appears under section 34 of the UK Income Tax (Trading and Other Income) Act 2005.

Unlike the nexus rule identified earlier, the application of the wholly and exclusively rule is not straightforward and is relatively unclear in the legislation. As a result, the courts have had to step in and provide their interpretation as to how the said test is to be applied. The leading case on this issue is Mallalieu v $Drummond^4$ where the English House of Lords held that the rule is only satisfied if (i) the expense relates to the production of the income; and (ii) the expense is for the purpose of the production of the income. If it is shown that there exists a non-trade purpose or a dual purpose, then the expense will not be deductible.



² Ibid.

³ Section 7 of the Income Tax Act 1967 (Malaysia) and the Statutory Residence Test, Schedule 45 of the Finance Act 2013 (UK).

^{4 57} TC 330.

The application of this test is less than satisfactory. One can see that there exist many instances where the courts have imposed their own normative judgments in determining the application of the above said rule. The two contrasting cases of *Morgan v Tate & Lyle Ltd*⁵ and *Boarland v Kramat Pulai Ltd*⁶ show this.

The expenses incurred by the taxpayer in *Morgan v Tate & Lyle* in its campaign against nationalisation of the sugar industry was held by the House of Lords to be an expense wholly and exclusively incurred in the production of income. It was considered that such an expense was a valid deductible expenditure to prevent the nationalisation of its trade and to ensure that the trade continued. This is to be contrasted to the expenses claimed in *Boarland*, which also concerned the costs of the taxpayer's campaign to prevent the nationalisation of the company. However, the said expenses were not allowed, and the courts made a very fine distinction between the two sets of facts based on whether the campaign was specific to the taxpayer's business or merely an attack on the general policy of the government. This distinction is clearly artificial and shows normative principles that are ingrained in the tax legislation.

Let us then apply the said wholly and exclusively rule to a taxpayer facing the COVID-19 pandemic. Both in the UK and Malaysia, taxpayers have been forced to work from home. They will have to incur additional costs due to these activities. For example, in Malaysia, taxpayers will have to ensure that they have an active internet line available to enable them to connect to their office servers and undertake work. They will also have to incur additional electricity bills and even need to purchase additional computers for their use. The dining room, that was previously an exclusive enclave of family activity, may have to be converted into a makeshift office. Additional expenses overall will have to be incurred by the taxpayer to ensure the continuation of productivity despite the pandemic.

One then considers the above issue from the point of view of two taxpayers who are for all intents and purposes equal save for the fact that taxpayer A is a lawyer and undertakes his business through an existing home office, whilst taxpayer B is employed by a corporation. The deductibility of the expenses by A is allowed under both the Malaysian and UK legislation if the wholly and exclusively rule is fulfilled subject to appropriate reasonable apportionment undertaken to ensure that part of the expense can be identified for the said business. However, taxpayer B is left without any real remedies as the expense incurred by him will most likely not fulfil the test. This is unfair for taxpayer B as he is now faced with additional expenses that were only incurred because of the extenuating circumstances. If the tax system only taxes to extract the sum needed for the maintenance of the existing social order, then surely adequate allowance can be given for such expenses under these extenuating circumstances.

III. Section B

In this section, I address the question whether the tax rules discussed in Section A should change because of COVID-19. The issue of nexus as identified above has received an immediate response from the tax authorities of the UK and Malaysia. In the UK, HM Revenue & Customs confirmed that for tax residence purposes, an individual may not fall under the statutory residence test if they are stranded in the UK because of COVID-19.8 The same rule has been issued by the Malaysian tax authority.9 As a result, COVID-19 has caused an immediate response to change temporarily the nexus rule that may have impacted individuals who were stranded in these two jurisdictions. This was a relatively simple modification of the rules pertaining to nexus and it will only have a temporary application. This was lifted once the pandemic subsided, and individuals were able to travel and leave the jurisdiction.

^{5 35} TC 367.

^{6 35} TC 1.

⁷ Gazelle v Servini [1995] STC 324.

⁸ https://www.pwc.com/m1/en/services/tax/me-tax-legal-news/2020/uk-personal-tax-residency-clarifications-individuals-impacted-covid-19.html.

 $^{9 \}qquad https://www2.deloitte.com/content/dam/Deloitte/my/Documents/tax/my-tax-espresso-may 2020-special-alert-faq.pdf.\\$

However, both jurisdictions have yet to introduce any measures that may assist taxpayers who are facing the dilemma concerning the fact that they are now forced to work from home and the related expenses that they now must incur. Should the personal income tax system adapt to these new circumstances? If indeed the tax system contains our normative values and beliefs to achieve what we identify as a just society or even strives towards the attainment of justice, then these expenses ought to be allowed. At the very least, horizontal equity requires that taxpayers A and B, as identified in the above scenario, ought to be subject to the same tax treatment.

Let us assume that one accepts Dworkin's theory of distributive justice as a measure according to which the above differences and treatment are to be assessed. Although his views are rather complex, for the purposes of this article we will simplify it to analyse whether personal taxation ought to be modified due to the current events.

According to Dworkin, the allocation of "resources constitute the means through which people are able to pursue their own ends". These resources are what he refers to mean "impersonal marketable resources that individuals may own and exchange". He relies on two principles of what he refers to as "ethical individualism: (1) a principle of equal importance that requires any political community that exercises dominion over and demands allegiance from its citizens to treat them with equal concern; and (2) a principle of special responsibility that regards individuals as having a particular responsibility for the choices that shape their lives". 12

The first principle requires "government to adopt laws and policies that insure that its citizen's fates are ... insensitive to who they otherwise are – their economic backgrounds, gender, race, or particular sets of skills and handicaps". The second principle on the other hand demands "that government work ... to make their fates sensitive to the choices that they have made". Taken as a whole, these principles define a conception of distributive justice that distinguishes between a person's circumstances and their choices, making the justice of distributive outcomes as neutral as is possible to people's circumstances and as sensitive as possible to the choices made by them. Dworkin also accepts that a person's circumstances include factors that are completely beyond his control such as genetic endowment and other fortuitous circumstances that he refers to as brute luck. 15

Based on the above concepts, the personal tax system must then ensure that its taxpayers' fate is neutral to the events that have occurred due to the pandemic. These events are not caused by the taxpayers' personal choices but are thrust upon them. For the tax system and the authorities to justify their dominion over and demand allegiance from their taxpayers and citizens, the authorities must ensure that these taxpayers are treated with equal importance and that they should only be treated differently if these differences arise because of their personal choices. Therefore, the deductibility of expenses and the nexus rule that arise out of the personal income tax law must consider the events that have arisen due to the pandemic. The law must be modified to adapt to these changes that have occurred, and which were not caused by the taxpayers' own choices.

The traditional analysis of a tax system is usually based on either equity or efficiency. An efficient tax system, absent of market forces, is one that does not interfere with market outcomes to preserve taxpayers'



Duff, DG, "Tax Policy and the Virtuous Sovereign: Dworkinian Equality and Redistributive Taxation" in Monica Bhandari (ed), *Philosophical Foundations of Tax Law* (Oxford: Oxford University Press, 2017), pp 167-89.

¹¹ Ibid, at p 172.

¹² *Ibid*, at p 173.

¹³ *Ibid*.

¹⁴ Ibid.

¹⁵ *Ibid*.

choices absent taxes.¹⁶ Equity on the other hand requires the allocation of the costs of government in an equitable manner. This will be based on normative concepts such as fairness, equality, and distributive justice. One will then have to determine whether the allocation of taxes is fairly distributed horizontally and vertically.¹⁷ However, these normative choices should be seen to be exclusive of one another, but a holistic approach should be adopted.

From an equity perspective, to not allow the deductions for these expenses that are not caused by the taxpayers' choices would be unfair and inequitable. The personal income tax system should be able to absorb these costs that have arisen under these unforeseen circumstances. They are not merely limited to a single taxpayer alone but is suffered by the whole society. Therefore, it is equitable that these costs are absorbed by the society through the tax system allowing these deductions from the gross income earned by the taxpayer.

If one adopts efficiency solely as the means to assess the tax system, then even these costs should also be absorbed by society being part of the necessary costs incurred to produce the income. The market in which the taxpayer is involved would have taken into consideration the pandemic and made adjustments requiring taxpayers to make choices that are relevant and reasonable in their personal circumstances. To interfere and not allow such expenses that were incurred reasonably as adjusted by the marketplace would mean that the taxes may not be efficient. Especially when the system allows some taxpayers to claim such deductions based on the mechanism in which they undertake their businesses whereas others, although belonging in the same category, are not provided the same right.

According to Prof Dagan, tax law inevitably affects or even moulds preference formation, behaviour, and social norms. Personal income tax law contains normative assumptions of the character of the taxpayer and their potential choices. Therefore, any analysis of tax law must go beyond merely notions of efficiency and distributive justice. Instead, as taxation impacts "identity formation and community building", a "proper understating of income taxation thus requires an examination of our most profound conceptions of identity and community". In her article, Prof Dagan chose commuting costs as the test case and argues that changes to the personal tax system should be undertaken to ensure that individual liberty, family life and the right to choose, subject to the concept of reasonableness, be preserved. The business-like structure that personal tax laws are arranged are not suitable and should be corrected.

Similarly, there must be an analysis of the impact of COVID-19 on the assumptions of the characteristic of the taxpayer and the potential choices he may have. One cannot merely adopt a business-like test to determine whether any income or expense should be considered for the purposes of the personal taxes of the individual. As an example, under the nexus rule, the 182-day requirement for residency assumes that the taxpayer has a choice in the number of days the person resides in a particular jurisdiction. The same assumption applies regarding expenses. There is an assumption that a taxpayer has a choice in the expenditure and whether it is in fact solely to produce the income or for other purposes. The fact that there is a pandemic is simply ignored. There may be incentives or subsidies issued by the government to curtail these issues but that is simply not enough. Some changes to the personal income tax law must be made to ensure that reasonable expenses incurred caused by the pandemic can be deducted from the gross income of a taxpayer.

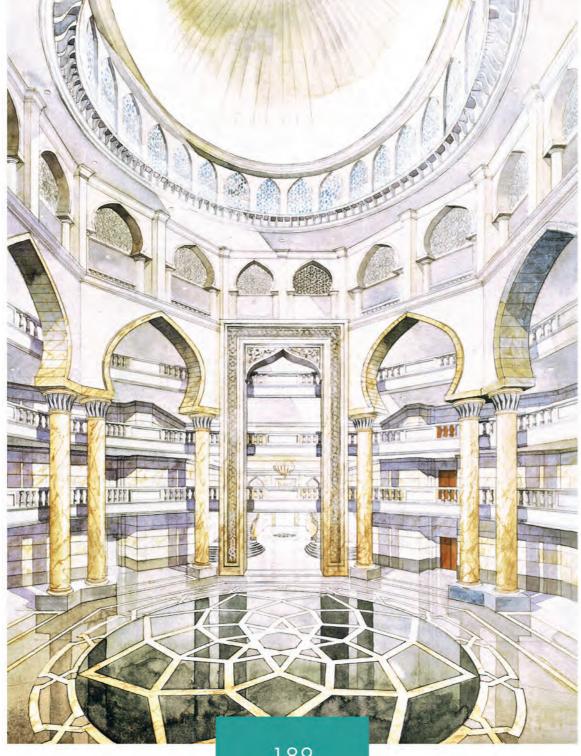
Bittker, BI, "Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?" (1979) 16 San Diego L Rev 735 at 739-44.

¹⁷ Ibio

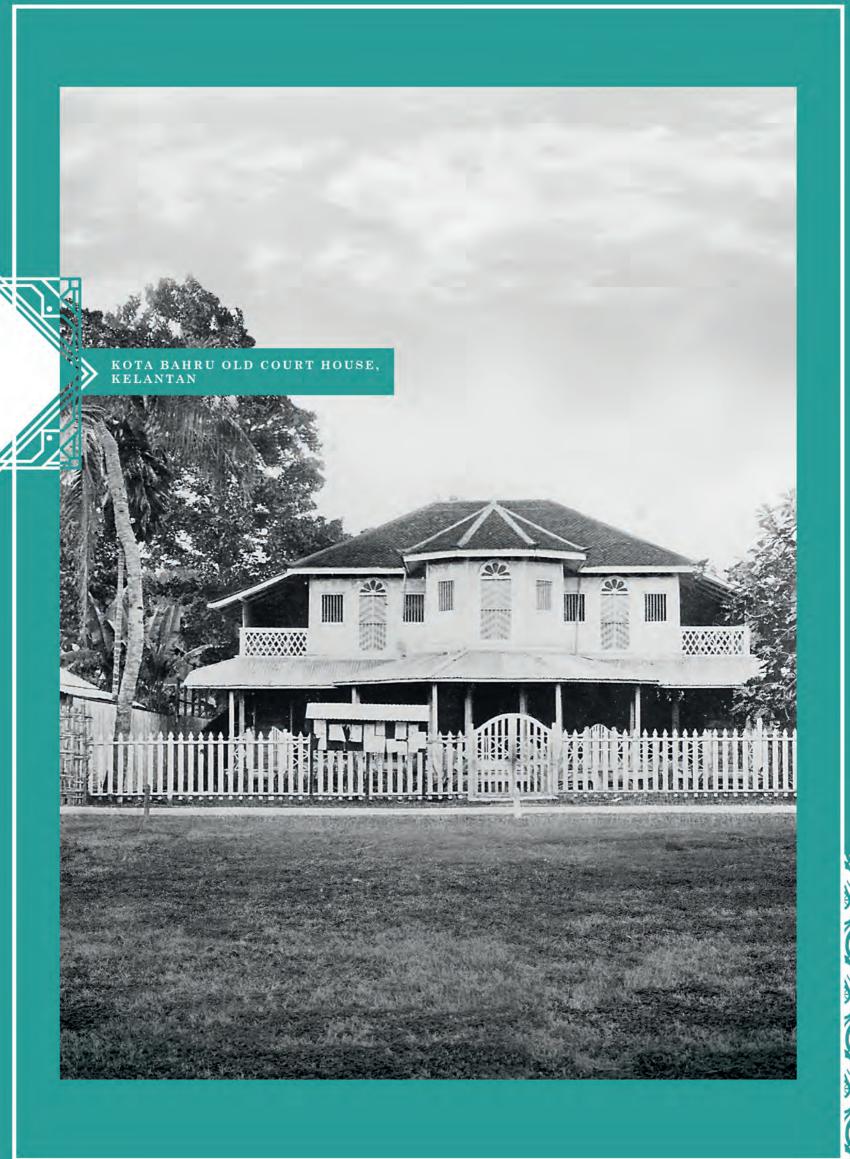
¹⁸ Dagan, T, "Commuting" 26 VA Tax Rev (2006), p 185.

IV. Summary

As stated by various academics such as Prof Dagan and S Levine, our tax laws reflect our normative beliefs. Therefore, as society has been affected by the COVID-19 pandemic, changes to the normal way the personal tax system is structured and the rules in which the taxes are determined must be revisited and reviewed. It may not require the whole uprooting of the system as that will cause issues of its own. However, as shown above, the tax system incorporates certain normative beliefs of the personal character of the taxpayer and the potential choices he is empowered to make. The expenses incurred due to the pandemic and the changes to family-life and work structures must be considered. This may be temporary as seen in the exemptions provided by the revenue authorities to react to the nexus rule but where one deals with potential long-term changes one must revisit and remould the tax system. As stated by Prof Dagan, it may not be suitable to merely adopt a business-like view of personal income tax law.









CASES OF INTEREST: CIVIL

FEDERAL COURT

If Bursa Malaysia is served with a winding-up order of a specific corporation, this does not necessarily mean that this corporation must be de-listed with immediate effect. If there is any appeal pending final determination, the exercise of de-listing should be held in abeyance until the appeal is disposed of. The liquidator for such corporation must still adhere to and comply with the Listing Requirements as provided under the law.

1. Bursa Malaysia Securities Bhd v Mohd Afrizan Husain [2022] 4 AMR 641, [2022] 4 CLJ 657; [2022] MLJU 502, FC

This is the latest case on statutory interpretation. The Federal Court referred to section 17A of the Interpretation Acts 1948 and 1967 ("IA") and held that in the construction of statutes, any reading which is purely textual, as opposed to contextual, is to be rejected. The purposive rule of construction prevails over the literal rule of construction when one is construing a statute. Prior to this decision, the majority of the Federal Court in AJS v JMH & Another Appeal [2022] 1 CLJ 331; [2022] 1 MLJ 778; [2022] 1 AMR 617, held that the standard canon of construction has always been that the courts should, in usual cases, begin with the literal rule and that the purposive rule only ought to be relied on where there is ambiguity.

Wintoni Group Berhad ("Wintoni") is a corporation listed on the ACE Market of the appellant ("Bursa Malaysia"). Wintoni was wound up by the High Court on August 17, 2017 and the respondent, Mohd Afrizan was appointed as the liquidator for Wintoni. Afrizan took the position that since Wintoni has ceased operations, the corporation will be de-listed immediately and there is no requirement to adhere to the Listing Requirements such as preparing the annual audited financial statements of the corporation. The High Court agreed and viewed that Afrizan

as the liquidator for Wintoni was essentially tasked to wind up the business of Wintoni and he cannot be directed to perform any duty beyond the scope of his powers. As such, the demand by Bursa Malaysia for Afrizan to prepare the annual reports is wholly inconsistent with the statutory duties of the liquidator under the Companies Act. The Court of Appeal shared the same views as the High Court. Bursa Malaysia then lodged an appeal to the Federal Court.

Justice Nallini Pathmanathan disagreed with the findings of both the High Court and the Court of Appeal. Her Ladyship held that the word "shall" in the ACE [Access, Certainty, Efficiency] Market Listing Requirements ("AMLR") does not mean Bursa Malaysia must immediately delist a listed corporation when the corporation was ordered to be wound up. The word "shall" needs to be construed in its proper context and due consideration must be given to the interests of the public. This is because the exercise of de-listing has dire consequences on both the corporation and the public investor at large. The reputation and the value of the corporation will be damaged, and the interest of all the investors who have invested in the listed corporation will be impacted. Hence, when a winding-up order is issued against a listed corporation, the primary concern of Bursa Malaysia is to ensure the corporation continues to comply with the Listing Rules. There must be continuous disclosure on the workings of this listed corporation and the public investor(s) is entitled to be kept apprised of what is going on in this wound-up entity. As such, the liquidator who steps in and having the primary control over the operations and assets of the company must continue to observe the Listing Requirements such as AMLR.



The Tribunal for Homebuyer Claims has limited jurisdiction and insofar as section 16N(2) of the Housing Development (Control and Licensing) Act 1966 is concerned, the Tribunal can only entertain claims based on a cause of action which arises from the statutory sale and purchase agreement. A claim before the Tribunal seeking to enforce terms not embodied in the statutory sale and purchase agreement cannot succeed and should stand dismissed *in limine*.

2. Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor [2022] 4 AMR 425; [2022] 5 CLJ 173; [2022] MLJU 678, FC

The second respondent entered into a sale and purchase agreement ("SPA") with the appellant for the purchase of a unit of apartment. The second respondent, after taking vacant possession, then commenced renovation works on the apartment and complained that the apartment unit delivered was different from the display model which had a covered balcony. The unit delivered by the appellant to the second respondent has an open balcony. The specification for a covered balcony was not a term of the SPA. A technical inspection was then conducted by the technical team, and being dissatisfied with the findings in the Technical Inspection Report, the second respondent commenced an action against the appellant at the Tribunal for Homebuyer Claims, i.e. the first respondent ("the Tribunal"). The Tribunal allowed the claim and held that there were unauthorised changes made to the specifications in the SPA which resulted in losses to the second respondent. The Tribunal issued a ruling under section 16Y(2)(e) of the Housing Development (Control and Licensing) Act 1966 ("HDA") to amend the specifications of the apartment in the SPA which has the effect of entitling the second respondent to obtain an apartment unit with covered balcony. The appellant filed for a judicial review to challenge the decision of the Tribunal. However, both the actions at the High Court and the appeal at the Court of Appeal were unsuccessful.

The Federal Court allowed the appeal. Justice Zaleha Yusof held that the Tribunal being a

creature of statute, can only act within the four walls of the statute. Section 16N of the Act expressly limits the Tribunal's jurisdiction to a claim based on a cause of action arising from the SPA between the homebuyer (i.e. the second respondent) and the housing developer (i.e. the appellant). The Tribunal did not have the requisite jurisdiction to deal with the second respondent's complaint as the provision of covered balcony was not in the SPA. Hence, the apex court held that the decision of the Tribunal was irrational and unreasonable. The decision was also tainted with illegality.

The Road Transport Act 1987 should be construed in a manner so as to protect the interest of innocent third-party road users against risks caused by motor vehicles. The competing interests of both the innocent third party as well as those of the insurance company are to be weighed to ensure that neither party is victimised by the other. In the event loss has to be borne by a party, that loss must be borne by the insurance company since it is a compulsory requirement for all vehicle owners to obtain motor insurance coverage in order for the issuance of road tax.

3. AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals [2022] 6 AMR 1; [2022] 5 MLJ 825; [2022] 8 CLJ 175, FC

There were eight appeals heard together by the Federal Court. The disputes largely converged on the liability of insurers. The issues involved were of concern for a significant time as there were also conflicting Court of Appeal decisions on some of the matters. Ultimately, these eight appeals arrived at the right time for our apex court to deal with them and to pronounce a finality on the contrasting contentions. In essence, it is common for the insurer to seek recourse under section 96(3) of the Road Transport Act 1987 ("RTA") to declare the insurance policy void and unenforceable. More often than not, this section 96(3) declaratory order was obtained even before the liability action has been determined. Specifically, the liability action involves parties such as the third-party claimant, the insured, the driver of the vehicle arising from the road traffic accident, and it deals with



the imputation of civil liability on the respective parties in relation to the tort of negligence. The predicament arises where, as a result of the liability action the insured and/or the driver is liable to compensate the third-party claimant. Can the insurer then be held liable to compensate the third-party claimant given the insurer is armed with the section 96(3) declaratory order? This is one of the issues at play in these eight appeals.

The Federal Court explained that the insurer must adhere to the requirement under the proviso to section 96(3) of the RTA for it to benefit from the section 96(3) declaration. The insurer must serve the cause papers for the section 96(3) application to the parties in the liability action and a failure to abide with the proviso to section 96(3) is a fundamental defect. The failure to fulfil the statutory requirement means the declaratory order can only d the insurer and the insured, and it does not and cannot prejudice the rights and interest of an innocent party injured by the accident. Besides, a section 96(3) application purely deals with the issue of "voidness and unenforceability" of an insurance contract based on established contractual principles, and this section cannot be used to determine the core factual issues in the tort of negligence which ought to be properly dealt with in the liability action.

The apex court held in one of the appeals that so long as the insured is the registered owner of the motor vehicle, notwithstanding the fact that the insured ceased to have insurable interest in the said vehicle at the time of the accident, the insurer could not resile from its promise to indemnify the insured by raising the technical ground that the insured had no insurable interest in the said vehicle at the time of the accident, unless the insurance policy had expired or had been lawfully terminated.

In a landmark ruling, the apex court also held that a third-party claimant who had obtained judgment from the trial court against the insured should be automatically compensated by the insurer and there was no necessity to obtain another judgment against the insurer before enforcing the trial court's judgment against the insured. The RTA must be construed to protect innocent third-party road users against risks caused by motor vehicles. The court must balance two competing interests.

While it has to protect innocent third parties against the risks, it must also protect an insurance company from being victimised by fraudulent claims. Where there are two competing interests, the loss falls on one party. The Federal Court ruled that such a loss should be borne by the insurer, following the observations by Justice Sarkar in the 1959 Supreme Court of India case of *British India General Insurance v Capt Itbar Singh*.

If parties have mutually consented to the appointment of an expert, they are bound by the findings of the expert. The court cannot intervene on matters which are purely within the jurisdiction of the expert save in narrow circumstances where the parties are able to demonstrate vitiating factors, such as fraud, collusion or bias.

4. Integrated Training and Services Sdn Bhd v Kerajaan Malaysia & Ors [2022] 4 AMR 389; [2022] 3 MLJ 77; [2022] 4 CLJ 697, FC

The appellant is a flight academy engaged in, among others, flight training and flight simulator training. It entered into an agreement with the respondent to provide flight training courses and the respondent is to provide a certain number of trainees to attend the training courses. The respondent failed to send the requisite number of trainees. As a result, the appellant was forced to end the training courses early as it could not afford to bear the cost due to the insufficient numbers. The appellant commenced an action to recover damages for of breach of contract. The action was allowed by the High Court and the claim for special damages was only allowed in part. The Court of Appeal agreed with the High Court's findings of breach of contract, but set aside the damages and remitted the matter to the High Court for the registrar to assess the damages ("2015 Order"). In light of this 2015 Order and for the purpose of the assessment of damages, the parties agreed for a chartered accountant to be appointed as an independent auditor. Pursuant to the accountant's report, a sum of RM21,735,613.50 was ordered to be paid by the respondent. The respondent, dissatisfied with this decision, successfully appealed to the judgein-chambers. The appellant appealed to the Court of Appeal in vain and thus, the present appeal.



Justice Zaleha Yusof allowed the appeal and held that clause 27.4 of the contract expressly provides that the parties are to mutually appoint an independent auditor to determine the amount due and payable in the event of termination of the contract. This is the commonly known "expert determination clause" which means that both the 2015 Order and clause 27.4 actually directed the registrar to assess the damages in accordance with the determination made by the independent auditor. The primary complaint of the respondent on the assessment of damages is that it was not given the opportunity to crossexamine the expert. However, this is clearly not the case as the evidence shows that the senior federal counsel ("SFC") had the opportunity to do so during the clarification stage and in one of the meetings, the SFC had said that she left it to the expert to determine the amount. The court will not generally intervene in a matter which is within the jurisdiction of the expert save in the narrow circumstances where vitiating factors such as fraud, collusion or partiality/bias can be shown. The respondent has not demonstrated any vitiating factors, for instance, that the expert was dishonest in preparing the report. The mere fact that the respondent is dissatisfied with the methodology of assessment used by the expert cannot be a reason to set aside the expert's determination.

A workman cannot be dismissed by mere reason of his participation in a trade union activity carried out in his capacity as a trade union officer or member. The employer must determine whether the said activity is carried out maliciously, or was knowingly or recklessly false. The employer must consider the dual aspects, i.e. the employee's work as well as the statutory provisions affording protection in relation to the trade union activities, before deciding on the employee's dismissal.

Ismail Nasaruddin Abdul Wahab v Malaysian Airline System Bhd [2022] 7 AMR 641; [2022] 6 MLJ 414; [2022] 9 CLJ 801, FC

The appellant was an employee of the respondent ("MAS") for 25 years. At the material time, the appellant was also the President of the trade union. On or about 2013, the employees were unhappy

with MAS's weight loss exercise and the fleet realignment exercise ("FRE"), the latter affecting the schedule and wages of many ca crew. The FRE became a trade dispute. The appellant issued a press statement in his capacity as the President of the trade union which highlighted that the ca crew were overworked and underpaid, urging MAS to enact policies to safeguard their welfare and safety, and also calling for the resignation of the CEO of MAS for his inability to resolve the problems faced by the ca crew under his leadership. A day after the press statement was issued, the appellant was suspended and then dismissed by MAS. His challenge against this dismissal was in vain. The Industrial Court held that the dismissal was made with just cause and excuse. The appellant then succeeded in a judicial review application before the High Court to quash the award of the Industrial Court but the High Court's findings and orders were reversed by the Court of Appeal.

This case is important as it examines the issue of the extent to which the nation's laws protect trade union activity. Justice Nallini Pathmanathan observed that the existing legislation do not prohibit the issuance of press statements by trade union officers or members. As such, the appellant's conduct of issuing the press statement while acting in the capacity of the trade union leader comprised an integral part of his contract of employment and this aspect therefore must be duly considered in determining whether he should be dismissed. This means that the role of the appellant as the President of the trade union is actually intertwined with his existing employment as a steward of MAS. Hence, in deciding whether the appellant should be terminated, MAS must consider the dual aspects of his work as well as the statutory provisions which afforded him protection in relation to his trade union activities. MAS must ascertain the conduct of the appellant vis-à-vis his role as a union representative. If the acts in question which are closely connected to the appellant's role as a trade union representative come within the scope of trade union activities, he must be afforded the protection as provided by the law. The question was whether the act of alleged misconduct is knowingly or recklessly false, or tainted with unreasonableness, malice or illegality such that it could not reasonably be said to fall within the scope of bona fide trade union activity. The apex court opined that the appellant did not abuse his



position as the President of the trade union for personal interest. The press statement issued by the appellant was merely aimed at addressing the predicaments faced by the employees and criticised the management for failing to address the same. The appellant's press statement amounted to participation in the lawful activities of a trade union and was not unreasonable, malicious, or knowingly or recklessly false. His conduct is not misconduct and cannot warrant his dismissal.

The purchaser under clause 12 of the statutory sale and purchase contract under Schedule H to the Housing Development (Control and Licensing) Regulations 1989 for a housing unit is entitled to sue the developer for damages if the latter used different construction materials for the property without obtaining his prior consent. The mere fact that the purchaser has a remedy in seeking a price reduction for the property does not *ipso facto* exclude his right to claim for damages.

Chong Nge Wei & Ors v Kemajuan Masteron Sdn Bhd [2022] 4 AMR 674, [2022] 3 MLJ 135; [2022] 4 CLJ 833, FC

The appellants entered into a sale and purchase agreement ("SPA") with the developer, i.e. the respondent to purchase six apartment units in a housing project. The appellants later claimed for breach of contract on the basis that the respondent had breached clause 12 of the SPA. Specifically, it was contended that the respondent altered the building material for the outer brick walls of the properties without the prior written consent of the appellants. The claim was allowed by the High Court and damages was ordered to be assessed. The respondent, dissatisfied with the damages assessed, appealed unsuccessfully to the judge-inchambers. The respondent's appeal at the Court of Appeal succeeded, the whole decision of the High Court was reversed and set aside, leaving the appellants with no compensation at all, not even nominal damages. The Court of Appeal held that appellants failed to adduce any evidence of their losses due to the respondent's breach of clause 12, and further was of the view that the appellants had the option to claim for a reduction in the purchase price of the properties but instead claimed damages, although the change in material had no adverse effect on the value or purchase price of the properties, thus implying that the appellants were attempting to make a double recovery from the respondent's breach of contract. Hence, the present appeal by the appellants.

The Federal Court allowed the appellants' appeal and held that the inference of the Court of Appeal was unjustifiable and sent a wrong message to other housing developers that they are permitted to alter the contract materials unilaterally at their whims and fancies without having to face any legal consequence. The Federal Court held that it was unfair for the Court of Appeal to draw any unfavorable inference against the appellants for opting to claim for damages instead of claiming for a price reduction of the properties and to conclude that because of that, the change in the material had no adverse effect on the value or purchase price of the properties.

A political party has no cause of action in defamation. As a registered society, it has no separate existence of its own and are therefore dependent on their members to sue or be sued. As such, it does not have the requisite reputation to complain about or to be protected within the law of defamation. It is not in the public interest to put the public in fear of a defamation suit by a political party. A political party must not be thin-skinned and must always be open to public criticism.

7. Lim Lip Eng v Ong Ka Chuan [2022] 4 AMR 753; [2022] 4 MLJ 454; [2022] 5 CLJ 847, FC

The respondent is a public officer of a political party, a society registered as Malaysian Chinese Association (MCA) while the appellant is a Member of Parliament. The respondent sued the appellant for defamation allegedly for having made a defamatory remark at a press conference. The appellant then applied to strike out the action. The application was dismissed as the High Court held that the appellant did not demonstrate that the respondent's action was "obviously unsustainable". The appeal against the High Court's decision to the Court of Appeal was also unsuccessful and thus the present appeal. The leave question for the

Federal Court was whether a political party can maintain an action for defamation.

The Federal Court answered the question posed in the negative and allowed the appeal. The Federal Court held that the respondent did not have a reputation for it to maintain an action for damages for defamation. A political party is dissimilar with other entities such as an individual, a corporation and a government. As a political party being a registered society, it is not a legal entity which could sue or be sued in its own name; consequently, it did not even have any reputation to complain about.

Parliament has the power to enact the Traditional and Complementary Medicine Act 2016. Being a law specifically legislated to address the subject of "medicine and health", it is not wrong in law for it to deal with Islamic medicine and Malay traditional medicine.

8. Ramli Ghani v Kementerian Kesihatan Malaysia & Anor [2022] 4 AMR 792; [2022] 3 MLJ 674; [2022] 5 CLJ 518, FC

The appellant is a practitioner of Islamic medicine. He intended to commence an action against the respondent but prior leave was necessary. The appellant thus filed an application seeking leave to commence proceedings against the Health Ministry and the federal government ("respondents"), for a declaratory order that the Parliament does not have the requisite power to enact any provision that regulates matters relating to Islamic medicine and Malay traditional medicine in the Traditional and Complementary Medicine Act 2016 ("TCMA"). According to the appellant, Islamic medicine and Malay traditional medicine are matters falling within the exclusive jurisdiction of the State Legislative Assembly; that Islamic medicine and Malay traditional medicine are matters associated with the Malay customs and hence fall within the purview of the Malay Sultans. Accordingly, the whole TCMA is contended to be null and void as it did not obtain the prior consent from the Rulers.

The Federal Court disagreed with the appellant's contentions. The apex court held that Parliament has the power to make laws relating

to Islamic medicine and Malay traditional medicine because it falls under the category "medicine and health" as envisaged in item 14 of the Federal List of the Federal Constitution. The power of the Parliament to make laws in respect of "medicine and health" must necessarily include any of those ancillary matters such as Islamic medicine and Malay traditional medicine. The TCMA is therefore a valid piece of legislation as it was introduced to regulate the traditional and complementary medicine services in Malaysia, including Islamic medicine and Malay traditional medicine. The TCMA does not in any way touch on precepts of Islam, and any rule, conduct, principle, commandments and teaching of Islam as prescribed by Syariah laws.

The power of judicial review is solely vested with the two High Courts due to constitutional design. The Syariah court does not have the power of judicial review. The jurisdiction of the Syariah court is solely confined to the matters envisaged in Item 1, State List, Ninth Schedule of the Federal Constitution.

9. SIS Forum (Malaysia) v Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 2 AMR 633; [2022] 2 MLJ 356; [2022] 3 CLJ 339, FC

Following the issuance of a fatwa in 2014, the petitioner, SIS Forum (Malaysia), filed a judicial review application in the High Court contesting the validity of the said fatwa. The said application was dismissed on the basis that the determination of the fatwa's validity is beyond its jurisdiction and the application ought to be determined by the Syariah High Court pursuant to section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("ARIE"). The petitioner then successfully obtained leave from a single judge of the Federal Court pursuant to Articles 4(3), 4(4), and 128 of the Federal Constitution ("FC") to file the present petition to challenge the constitutional validity of section 66A. The question was whether the Selangor State Legislative Assembly ("SSLA") is empowered to enact section 66A which conferred judicial review powers on the Syariah High Court.



The Federal Court observed that judicial review is a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of government. This was because a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance. Judicial review, whether constitutional judicial review or statutory judicial review (also known as the administrative judicial review) is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of government can perform its constitutional function vis-à-vis the other branches of government. The judicial power of the Federation which includes judicial review (constitutional and statutory) is vested by constitutional design solely in the two High Courts.

In the context of constitutional judicial review, Chief Justice Tun Tengku Maimun Tuan Mat explained that it is only the civil superior courts that possess such supervisory power over all legislation passed by the Federal and State Legislatures. Statutory judicial review, on the other hand, covers a wider spectrum of review provided that they do not fall within the ambit of constitutional judicial review. The apex court held that section 66A of the ARIE as it stands empowers the Syariah Court to undertake judicial review in a general sense, without prescrig any limitation at all, such as confining it to Syariah matters. Hence, the said provision appears incompatible with the legislative list as it also confers power of judicial review to the Syariah courts that transcends beyond the matters enumerated under Item 1, State List, Ninth Schedule to the FC.

Further, given the demarcation of jurisdiction between the civil and Syariah courts, such demarcation will be rendered illusory should the Syariah courts also enjoy parallel powers of judicial review and public law remedies. Section 66A, in its present form, relates to the public law powers of Majlis Agama Islam Selangor, instead of purely relating to doctrinal matters or the religion of Islam or hukum syarak. It has been made clear in Rosliza Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 301 that matters which require constitutional (and by extension statutory) interpretation are within the exclusive jurisdiction of the civil courts. Matters involving obligations under and compliance with federal and state

written laws, or public law powers are subject to judicial review by the civil courts notwithstanding the essence of the subject matter. The Syariah courts, on the contrary, only possess jurisdiction over matters which relate to personal law and adat in substance. Evidently, the present section 66A constitutes an attempt to confer jurisdiction of judicial review on the Syariah courts. Thus, this provision was declared unconstitutional.

A landowner is a "person interested" under the Land Acquisition Act 1960 and as such, he is legally entitled to intervene and participate in land reference proceedings. This is notwithstanding the fact that he had previously accepted the award of compensation by the land administrator without any objection.

10. Spicon Products Sdn Bhd v Tenaga Nasional Bhd & Anor [2022] 4 AMR 228; [2022] 2 MLJ 721; [2022] 4 CLJ 195, FC

The appellant was the registered proprietor of a piece of land situated in the District of Alor Gajah, Melaka. This particular land was acquired for the benefit of the first respondent ("TNB") for the purpose of constructing its main electricity substation. The Land Administrator conducted a land enquiry and the appellant was awarded the sum of RM467,154.22 which he accepted. The appellant did not file any objection through Form N. TNB objected to the award, particularly on the "incidental costs" and filed Form N. The Land Administrator referred the matter to the High Court. In the land reference proceeding, the appellant was not named as a party and applied to intervene. The basis of the intervener application was that as the owner of the land in question and the recipient of the compensation paid arising from the land acquisition exercise, it would be prejudiced by the outcome of the land reference proceeding in the event the High Court decided to reduce the amount of compensation. The High Court allowed the intervener's application, but this decision was set aside by the Court of Appeal. The Court of Appeal viewed the intervener's application as an abuse of the court's process as it was they who did not adhere to the requirement of filing Form N as provided under the Land Acquisition



Act. Therefore, the leave question posed to the Federal Court was whether a landowner such as the appellant who did not file any objection (i.e. accepted the compensation awarded by the Land Administrator) can nevertheless intervene and participate in the land reference proceeding commenced by another interested party (such as TNB in the present appeal) who is the paymaster and had objected to the award.

The Federal Court allowed the appeal and held that the appellant is entitled to participate in the land reference proceeding. Her Ladyship Justice Mary Lim explained that the land reference proceeding is essentially to determine the adequacy of compensation in light of the rights to property envisaged under Article 13 of the Federal Constitution ("FC"). Obviously, this means that the appellant as landowner has the requisite interest and is entitled to appear in the land reference proceeding. This participation does not mean that the appellant is changing his stance concerning the compensation – from a person who had accepted the award without protest, to a person who now objects to the award. This is not the case. Instead, the participation of the appellant was due to the rights and interests envisaged under Article 13 of the FC. The appellant's participation is due to the rule of natural justice and to assist the court in assessing the objection. The objection by TNB was targeted on the grant of incidental costs which affected the interests of the appellant. It is therefore correct for the High Court to allow the participation of the appellant in the land reference proceeding.

The power of TNB to disconnect electricity supply to a customer's premises is legally permissible upon the discovery of meter tampering. However, this power abates the moment the tampered meter has been remedied. Section 38(1) of the Electricity Supply Act 1990 ("ESA") does not allow for future disconnection of electricity due to a past history of meter tampering.

11. Tenaga Nasional Bhd v Chew Thai Kay & Anor [2022] 1 AMR 721; [2022] 2 MLJ 25; [2022] 2 CLJ 333, FC

This appeal dealt with the statutory power of the appellant, i.e. Tenaga Nasional Berhad ("TNB") to disconnect the supply of electricity to the consumer. The first respondent is a registered user of electricity supply for premises located in Hutan Melintang, Perak. He sold his premises to the second respondent. It is undisputed that the first respondent remained as the registered electricity consumer with TNB. On June 7, 2018, TNB performed an inspection exercise on the electric meter installed at the premises and discovered the meter had been tampered with. The tampered meter was not able to correctly record the actual utilisation of electricity at the premises. TNB replaced the meter, continued with the electricity supply to the premises and issued a notice of disconnection and intended to disconnect electricity supply to the premises. The respondents thus commenced an action at the High Court against TNB seeking an injunction to restrain TNB from disconnecting electricity supply to the premises. The High Court was of the view that once the tampered meter has been remedied and the offence of meter tampering no longer subsists, TNB does not have the power to issue such notice of disconnection. The Court of Appeal agreed with the findings of the learned trial judge. TNB then filed the appeal to the Federal Court.

The Federal Court dismissed TNB's appeal and held that TNB has no lawful power to disconnect a consumer's electricity supply pursuant to the current section 38(1) of the ESA once the impugned meter has been rectified and replaced, and the offence under section 37 was no longer subsisting and ceased to exist at the material time when the notice of disconnection was issued to the customer. After the tampered meter has been rectified, there was no subsequent tampering by the respondents at the premises. The issuance of notice of disconnection by TNB cannot be valid. This is the correct interpretation of the law to balance the competing interests of both the consumer and TNB.



A case for reference of a representation under section 20 of the Industrial Relations Act 1967 falls squarely within the jurisdiction of the Industrial Court. If the representation raises serious questions of fact or law calling for adjudication, it ought to be referred to the Industrial Court. In this case, the issue pertaining to the restrictive doctrine of sovereign immunity is within the purview of the Industrial Court. The Minister of Human Resources was right not to entertain the question of immunity and referred the matter to the Industrial Court.

12. The United States of America v Menteri Sumber Manusia & Ors and Another Appeal [2022] 5 AMR 213; [2022] 4 MLJ 589; [2022] 6 CLJ 493, FC

The second respondent was employed as a security guard at the Embassy of the appellant. The second respondent was dissatisfied with the termination of his employment as he was dismissed without any reason. The second respondent proceeded with filing a representation under section 20(1) of the Industrial Relations Act 1967 ("IRA") seeking for reinstatement to his position. The Minister of Human Resources ("minister") then referred the section 20 representation to the Industrial Court as the minister viewed that the said representation concerned the issue of immunity and this should be properly decided by the Industrial Court instead.

However, before the matter was dealt with by the Industrial Court, the appellant filed an ex parte application for leave to commence judicial review at the High Court to challenge the decision of the minister for referring the matter to the Industrial Court. The High Court allowed the leave application and viewed that the main issue to be resolved in the judicial review application was whether the appellant and its Embassy were immune from the jurisdiction of the Industrial Court. It appears that the second respondent's employment as a security guard was not only to provide security but also to maintain the inviolability of the Embassy's premises and this is integral to sovereign activity of the appellant and the Embassy. However, on appeal, the Court of Appeal held that the nature of the work of the second respondent as well as his dismissal is a question of fact and hence, the proper forum to hear this dispute is the Industrial Court. As far as the application of the doctrine of sovereign immunity is concerned, this concept only arises after the fact finding is made by the Industrial Court. Thus, a further appeal was filed to the Federal Court.

The Federal Court dismissed the appeal and explained that section 20 of the IRA empowers the minister to assess the facts and materials before him and to determine whether the representation should be properly dealt with by way of adjudication. If the representation raises a serious question of fact or law, the only proper forum to deal with such issue is the Industrial Court. Although the issue of restrictive doctrine of sovereign immunity was raised in the representation, the apex court explained that not all acts of the sovereign foreign state are immune from legal action. The Industrial Court needs to determine the precise nature, duties as well as the job scope of the second respondent in order to ascertain the applicability of this restrictive doctrine of sovereign immunity. Hence, the minister herein did not err in referring the matter to the Industrial Court.

The Federal Court has the inherent power to revisit and even to set aside any leave previously granted. This is especially so if it is found that leave ought not to have been granted at the outset.

13. Wong Shee Kai v Government of Malaysia [2022] 7 AMR 221; [2022] 6 MLJ 102; [2022] 10 CLJ 1, FC

The petitioner filed a petition to challenge the constitutional validity of both sections 63 and 64 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATPUAA 2001") and contended that they are void on the ground of being inconsistent with Articles 5 and 8 of the Federal Constitution ("FC"). The respondent resisted the petition, among others, on the ground that the subject matter of the petition is beyond the original jurisdiction of the Federal Court on the basis that leave to file this petition ought not to have been granted at the first instance by a judge of the Federal Court.



The Federal Court held that it has the inherent jurisdiction to revisit the grant of leave and to set it aside if the leave is found to be bad for want of jurisdiction. In fact, rule 137 of the Rules of the Federal Court 1995 expressly spelt out the inherent power of the court to hear any application or to make any order necessary to prevent injustice or an abuse of the court's process. The apex court highlighted that Article 128(1) of the FC provides for the exclusive original jurisdiction of the Federal Court to hear certain limited matters. Exclusive original jurisdiction simply means it is a jurisdiction which is neither exercisable nor capable to be exercised by any other courts in Malaysia. The petition filed under Article 4(3) of the FC largely revolves around the determination by the apex court on the constitutional validity of sections 63 and 64 of the AMLATPUAA 2001 as well as the power of the Federal or State Legislature to enact such laws. However, leave must first be obtained from a judge of the Federal Court in accordance with Article 4(4) of the FC. Leave was granted. The Federal Court ruled that this petition is an "inconsistency challenge" and must be raised at the High Court and is clearly beyond the exclusive original jurisdiction of the Federal Court under Article 4(3) and hence the leave to file the petition ought not to have been granted. The Federal Court held that it could revisit the grant of leave and to set it aside, if it is found that leave ought not to have been granted in the first place. On this basis, the Federal Court proceeded to set aside the leave order and struck out the said petition.

An applicant aggrieved by the decision of a single judge dismissing the application for leave to appeal, is permitted within 10 days to file another leave application to be heard before a panel of three judges. However, the burden rests on him to justify as to why his leave application should be allowed under section 97(4) of the Courts of Judicature Act 1964.

14. Ng Hoe Keong & Ors v OAG Engineering Sdn Bhd & Ors [2022] 4 AMR 399; [2022] 3 MLJ 641; [2022] 5 CLJ 321, FC At the High Court, the respondents sought a permanent injunction against the appellants (hereinafter referred as "applicants"). Prior to the service of the statement of claim, the respondents had, *vide* an *ex parte* application, successfully obtained an Anton Piller order and a protective order. The applicants thereafter sought to set aside both orders as well as to dismiss the entire proceeding, citing the respondents' failure to serve the statement of claim ("SOC").

However, the applicants' applications were dismissed by the High Court whilst the respondents were directed to serve the redacted SOC to the applicants. An appeal was filed by the applicants to the Court of Appeal in vain. Aggrieved by the decisions, the applicants proceeded to file a notice of motion, seeking leave to appeal to the Federal Court pursuant to section 96(a) of the Courts of Judicature Act 1964 (Act 91) ("CJA"). The notice of motion was dismissed by a single judge of the Federal Court. This led to the present notice of motion by the applicants to discharge the order of the single judge pursuant to section 97(4) of the CJA.

The notice of motion was dismissed by the apex court. Justice Zaleha Yusof held that a section 97(4) application is not a matter as of right and to assert otherwise would undesirably open the floodgates and run afoul of the legislative intention. A section 97(4) application must not be filed arbitrarily. The applicants bore the burden to provide cogent reasons and must demonstrate that the single judge had erred in arriving at his/her decision. No cogent reason was provided by the applicants in their motion and affidavit-in-support. Thus, there is no basis for the Federal Court to undertake a review of its own prior decision made by a single judge.



CASES OF INTEREST: CIVIL

COURT OF APPEAL

An interlocutory injunction is rightfully refused especially if the applicant did not file it promptly as required by the law. If damages are an adequate remedy, this further substantiates the ground for dismissing the interlocutory injunction.

Perak Hydro Renewable Energy Corporation Sdn Bhd & Anor v Wak Ngah Pili Bah Adim [2022] 6 MLJ 698; [2022] 10 CLJ 540, CA

In this action, the respondents who are the aborigine tribe of Semai claimed that they are the residents in an area known as Ulu Geruntum. Sometime in 2011, the Semai were notified by the appellants on the proposal to build minihydroelectric dams in Ulu Geruntum along the Geruntum River. The Semai objected to this proposed plan and proceeded with lodging several police reports. They also reached out to the federal and state governments, government bodies, and non-governmental bodies to obtain support and assistance to put a halt to the hydroelectric project. Unfortunately, the Semai did not receive any positive response from those authorities and they thus decided to seek remedy by way of commencing a suit at the High Court on April 25, 2018. In spite of the legal proceeding, the appellants continued with the hydroelectric works on the said lands. The Semai then filed an interlocutory injunction in October 2020. The High Court granted the interlocutory injunction and thus, the present appeal.

The appellants argued that the application for the interlocutory injunction was tainted by undue delay. They had invested large capital into the project and the said interlocutory injunction did not merely put a halt to the progress of the project but also exposed them to serious financial risk. This is so as the appellants actually started the preliminary works since 2011 and the construction work had commenced in 2016. The injunction application was filed some four years

after the commencement of the construction work and such application would bring grave injustice.

The Court of Appeal allowed the appeal and viewed that given the preliminary works commenced since 2011 and that the construction work began since 2016, the unexplained inordinate delay in filing the injunction application by the Semai alone is enough to dismiss the injunction application. The Semai must have been aware of these preliminary works as well as the construction work and could have filed the injunction application at the earliest opportunity. The failure to do so promptly can only suggest that no serious damage had been suffered by the Semai and that they could continue with their livelihood despite the existence of the construction work. The appellate court further agreed that the injunction application would pose disastrous financial consequences to the appellants. This is because the injunction effectively required the appellants to cease and abandon all their works, withdraw their workers and contractors from the site in which they had heavily expensed time, effort and money. The learned JC failed to strike a balance of convenience because the injunction would cause the appellants to suffer massive financial and/or commercial loss which were not capable of being compensated via damages. On the other hand, the Semai could be adequately compensated in the event that the trial eventually decides in their favour.

The defence of absolute privilege is "absolute" in nature. Once established, the court is not concerned with whether the impugned statements made in the course of court proceedings are made maliciously, irrelevant and not in good faith.

Kinta Riverfront Hotel & Suites Sdn Bhd v Chang Yoke Yee & Anor [2023] 1 AMR 509; [2023] 1 MLJ 84; [2023] 1 CLJ 483, CA

The filing of the present action stemmed from an incident that happened at the hotel run by the appellant. At the material times, the first respondent (a businesswoman) and the second respondent (a lawyer) were in a hotel room where it was claimed that they were assaulted by the husband of the first respondent ("second defendant"). The second defendant was alleged to have obtained an access card from the reception staff and thereafter barged into the hotel room of the respondents. The respondents then commenced an action at the Sessions Court against the second defendant as well as against the appellant. In particular, the cause of action against the appellant was premised on the tort of negligence because if the room access card was not given to the second defendant, he would not have been able to access the hotel beyond the reception area. The appellant argued, among others, that the entire events occurred due to the respondents' adulterous relationship which then resulted in the second defendant acting in such a manner. In light of this line of averments, the respondents commenced a defamation action at the High Court contending that the allegation of adultery in the appellant's statement of defence is defamatory in nature. The High Court ruled in favour of the respondents as the appellant failed to establish the defences of justification and fair comment. The present appeal hence deals with the issue of whether the appellant could rely on the defence of absolute privilege since the impugned statements were published in the course of court proceedings in their statement of defence.

The Court of Appeal allowed the appeal and explained that pleadings and documents filed in court proceedings are protected by absolute privilege. Justice Ravinthran Paramaguru

held that since the impugned statements were published in the statement of defence, it means that the defamation was published within the four corners of a court proceeding. The defence of absolute privilege could be relied on by the appellant and the court is not concerned with whether the impugned statements were recklessly or maliciously made.

The court has the power to order a nonparty to bear the costs of the suit. This is, of course, if the non-party has been warned at the earliest opportunity that costs would be sought personally against him.

3. Twin Faber Sdn Bhd v Ng Cheng Keng [2022] AMEJ 0891; [2022] 6 MLJ 585; [2022] 9 CLJ 74, CA

Pursuant to sections 465(1)(e) and 466(1)(a) of the Companies Act 2016 ("CA"), the appellant commenced a winding-up petition against a company named LKD Trading Sdn Bhd ("LKD"). At the material time, the respondent was a manager of LKD. He had affirmed four affidavits on behalf of LKD. The said affidavits were for, among others, to contest the winding-up petition and also to strike out the winding-up petition. The respondent resigned on August 7, 2020 and, on the day of hearing of the petition on September 8, 2020, he was absent. LKD was then wound up, and costs on an indemnity basis was ordered against the respondent ("the order"). In other words, the respondent was directed to bear the costs personally. The respondent, dissatisfied with the order, thus proceeded to file an originating summons against the appellant. The respondent contended that the order was void and illegal as it contravened section 462 of the CA. It was further argued that such order is contrary to the rule of natural justice as he was not a party to the windingup proceedings. The learned judicial commissioner agreed with the respondent and hence, the order on costs against him was set aside.

However, the Court of Appeal held that costs can be ordered against a non-party to the proceeding if the non-party was notified in advance that costs will be ordered personally against him based on



the ratio in the decision of Takako Sakao v Ng Pek Yuen & Anor (No. 3). In the instant case, the appellant's solicitors had informed the respondent to attend the hearing of the winding-up petition and had also warned him that they will apply for costs to be borne personally by the respondent. The respondent cannot now come to the court and complain that the court only heard the appellant. The respondent only had himself to blame.

The duty of a solicitor is trite. The corpus of case laws reiterates the importance of a solicitor's duty to act with reasonable care, skill and diligence, failing which it may subject him to an action in professional negligence. If the solicitor fails to abide with the court's directions or fails to act within the time limits, or for want of prosecution, and ultimately rendered the matter struck out, he must be answerable for such omissions and it is no defence to an action for damages for breach of duty to plead ignorance of the law, or to shift the blame on to others unless such action or inaction is consented to by the client and he is also liable to pay damages for the breach of duty.

4. Techrew Sdn Bhd v Nurhamizah Hamzah & Ors [2022] 4 MLJ 633; [2022] 6 CLJ 56, CA

The appellant sued the respondents for damages amounting to RM5.85 million for professional negligence. At the material times, the first respondent was engaged as the solicitor of the appellant in a suit commenced by Miracle Assets Builder Sdn Bhd ("MAB"). Later, on April 17, 2018, MAB succeeded in its striking out application as the court agreed that the appellant's defence was a bare denial disclosing no reasonable defence. An appeal was then filed to the Court of Appeal and the appellate court forwarded a notice to the first respondent informing that the record of appeal should be filed within 90 days from the date of the High Court's decision. For reasons only known to the appellant, it decided to terminate the services of the first respondent and informed her to forward all the documents to its new solicitors, i.e. the second and third respondents' law firm. However, the notice of change of solicitors was not filed.

Despite the non-filing of the change of solicitors, the second respondent appeared at the case management before the learned deputy registrar of the Court of Appeal on July 18, 2018 by which time, the date for filing of the record of appeal had already lapsed. The deputy registrar gave the appellant until July 27, 2018 to file a notice of motion for extension of time to file the record of appeal. This, however, was not done. The Court of Appeal then informed the second and third respondents that the date of disposal of the appeal would be August 27, 2018. None of the respondents appeared on August 27, 2018. Thus, the appeal was struck out for reasons, among others, that no record of appeal was filed and no application for extension of time was filed. Faced with a winding-up notice from MAB, the appellant negotiated a settlement with MAB and then commenced action against all the respondents for negligence. The High Court allowed the claim against the first respondent and nominal damages was awarded. The claim against the second and third respondents was dismissed. The appellant argued that the learned judicial commissioner had erred in failing to hold the second and third respondents liable as there was a breach of duty of care. It was contended that both the second and third respondents should be held liable for their failure to attend and/or sufficiently attend to the appellant's appeal.

The Court of Appeal allowed the appeal and found on the evidence that there was a clear breach of duty of care. Given the manner in which the duty of care was breached by all the respondents, the sum of RM2.85 million being the settlement sum with MAB is appropriate to be awarded as damages. The basis for awarding such damages is that the negligence of the respondents deprived the appellant from defending MAB's claim which the appellant had real prospect of succeeding in its appeal. Accordingly, the damages of RM2.85 million was apportioned equally in the sum of RM1,425,000 each between the first respondent on one part and the second as well as the third respondents on the other.



A bank has to exercise reasonable skill and care in performing banking duties. The standard of the reasonable care and skill to be exercised by a bank towards its customer is an objective standard. It should endeavour to adhere to this objective standard so as to combat the facilitation of fraud in order to protect its customers and innocent third parties. The bank cannot and should not negligently divert the sum invested by the depositor into the account of a third party in the absence of mandate from the depositor and would be held accountable for the loss.

5. Koperasi Sahabat Amanah Ikhtiar Bhd v RHB Investment Bank Bhd [2022] 8 AMR 645; [2022] 6 MLJ 722, CA

The main issue in the appeal concerns whether RHB as an investment bank should be held liable for alleged negligence when it allowed a sum of RM10 million issued in favour of RHB ("D1") to be transferred to one Abhar Capital Holdings Sdn Bhd ("D3") (who had a trading account with D1) without the authority/instruction from the plaintiff. The plaintiff's case was that it was induced by one Lofti Miskin ("D2") to issue a RM10 million cheque in favour of RHB for the purpose of investment. The plaintiff did not realise the existence of fraud until it was notified by the Cooperative Commission and the Securities Commission. The transfer of the monies was done prior to the plaintiff's discovery. It appeared that the sum was transferred from the account of RHB to the account of D3 upon the instruction of D2. The plaintiff argued that it had no knowledge of D3 and neither had it given any authorisation for RHB to channel the sum to D3. The plaintiff's cheque was issued in favour of RHB and not in favour of D3. However, the High Court ruled that since the plaintiff was not the customer of RHB, RHB does not owe a duty of care to the plaintiff. The plaintiff appealed.

The Court of Appeal in a judgment delivered by Justice Lee Swee Seng allowed the appeal and explained that there is no need for one to be in a contractual relationship with another before a duty of care could arise. The law on the tort of negligence is flexible and the three-tier test of proximity, foreseeability and policy considerations

allows the courts to impose a duty of care when the justice of the case demands it. In the present case, there was a duty of care owed by RHB towards the plaintiff when RHB received the RM10 million cheque. The receipt of this cheque meant that the plaintiff would be regarded as a "customer" of RHB irrespective of whether any formal contract was entered into between the parties. The bank must ensure that payment can only be made with the authority of the customer. It will be a breach of duty of care if the bank makes payment without the customer's authority or mandate. In the present case, it was clear that prior to transferring the RM10 million into the trading account of D3, RHB failed to verify and ascertain whether the plaintiff had, in fact, instructed RHB to transfer its RM10 million into D3's account and thus breached its duty of care to the plaintiff.

The Bar Council does not have power under section 80(8) and (9) of the Legal Profession Act 1976 ("LPA") to issue Guidelines which have the effect of restricting claims only to the acts of dishonesty of advocates and solicitors who are sole proprietors. The Bar Council is a statutory body and its exercise of statutory powers are justiciable and open to scrutiny of the courts. The Bar Council's decision made vide an *ultra vires* act, could not be shielded by applying section 111 of the LPA.

Michael Joseph Carvalho & Anor v Majlis Peguam Malaysia [2022] 6 AMR 833; [2023] 1 MLJ 139; [2022] 9 CLJ 849, CA

The appellants and their siblings were the beneficial owners of a property owned by their parents. The said property was a house situated in Ipoh and this property was then sold to Kawan Properties Sdn Bhd at the approximate sum of RM2.52 million. There is no dispute that Shan Theivanthiran ("Shan") from Messrs Thevin Chandran & Associates ("Messrs Thevin") was the solicitor acting for the appellants and their siblings for this sale transaction. On May 2, 2014, the purchaser's solicitor forwarded the balance purchase price amounting to RM2.14 million to Messrs Thevin. The appellants and their siblings were to receive their respective portion of RM521,427. each. On



March 17, 2016, cheques were duly drawn by Shan in favour of the appellants, but Shan then notified the appellants not to proceed with cashing out the cheques until he notified them to do so. On March 31, 2016, Shan deposited a cheque in the sum of RM1,042,854 into the first appellant's Maybank account as the total payment due to the appellants. Shan later instructed the bank to stop payment of the cheque. Despite repeated assurances, Shan failed to make the payment of RM1,042,854.

The appellants lodged a complaint to the Advocates

and Solicitors Disciplinary Board ("Disciplinary Board") against Shan for professional misconduct arising from dishonesty, i.e. failure to make payment of the stakeholder sums of RM521,427 to each of the appellants. The Disciplinary Board found Shan guilty of professional misconduct. Shan was ordered, among others, to be struck off the Roll of Advocates and Solicitors of the High Court in Malaya and to make restitution in the sum of RM521,427 to each of the appellants within one month from the date of the order. Shan failed to adhere to the order. The appellants wrote to the respondent, i.e. the Bar Council and brought the order to their attention. The appellants enquired whether the appellants can be compensated for their loss from the Compensation Fund. The respondent denied their request pursuant to its Guidelines on Making a Claim for Compensation ("Guidelines"). The respondent cited the reason that the claim could not be acceded to was because Shan was practising as a partner and not as a sole proprietor. The appellants thus filed an action at the High Court and argued that the Guidelines were ultra vires the Legal Profession Act 1976 ("LPA") and were discriminatory, unjustified, unreasonable and therefore, void. The High Court held in favour of the respondent and held that the respondent acted within its powers to issue guidelines concerning the Compensation Fund as provided in section 80 of the LPA in rejecting the appellants' claim. Hence, the appellants appeal to the Court of Appeal.

Justice Vazeer Alam Mydin Meera, delivering judgment of the Court of Appeal, allowed the appeal and held that the Compensation Fund is a statutory fund established under section 80(1) of the LPA. The purpose of establishing the Compensation Fund is to mitigate any loss suffered by any person who becomes the victim of

dishonest advocates and solicitors. The law does not vest the respondent with the power to issue any guidelines which have the effect of imposing a restrictive condition to limit payments out of the Compensation Fund to only losses arising from the dishonest act of a sole proprietor. The Bar Council's decision in rejecting the appellants' claim *vide* an *ultra vires* act, could not be shielded by applying section 111 of the LPA.

Section 67 of the Insurance Act 1996 merely prohibits the parties from effecting the contract of acquisition or disposal of more than 5% shares of a licensee without the prior approval of Bank Negara Malaysia. It does not forbid the parties from entering into an arrangement of such nature. So long as the prior approval of Bank Negara Malaysia is obtained for the carrying out of the contract which would lead to the acquisition or disposal of more than 5% shares, the exercise to carry into effect such contract will be valid.

7. Detik Ria Sdn Bhd & Anor v Prudential Corporation Holding Ltd & Anor [2022] 7 AMR 669; [2022] 5 MLJ 541; [2022] 10 CLJ 171, CA

The dispute in this action centered on the purchase of the shares of a company known as Sri Han Suria Sdn Bhd ("SHS"). SHS was the sole shareholder of Prudential Assurance Malaysia Berhad ("PAMB"). The second respondent and the first appellant respectively held 51% and 49% of the shareholding in SHS. The second respondent and the first appellant entered into a call/put option agreement dated February 27, 2002 ("CPOA") where the latter agreed to grant a call option to the former in respect of its shares in SHS. This CPOA was conditional upon the approval of the Foreign Investment Committee, the Minister of Finance, Bank Negara Malaysia ("BNM") and other relevant authorities in Malaysia. On December 15, 2018, the first appellant issued a notice of exercise of option to sell its 49,000 shareholdings in SHS to the second respondent. Both parties then executed several other agreements including a supplemental CPOA. On April 30, 2018, the first appellant decided to rescind its exercise of the put option and indicated its wishes to maintain its 49% shareholding in SHS. Dissatisfied, the respondents commenced an action at the High Court seeking for a declaration that the agreements were valid, subsisting and ding on the first appellant. The respondents' case was that the first appellant's notice of exercise of option dated December 15, 2008 was irrevocable. Thus, a mandatory injunction was also sought against the first appellant to execute the share transfer form.

The appellants argued that the prior approval of BNM was necessary before entering into the CPOA. According to the appellants, this is a statutory requirement specifically set out in section 67 of the Insurance Act 1996. The respondents argued otherwise and submitted that the prior approval of BNM was not required to enter into the CPOA and that the approval was merely a condition to the enforceability of the CPOA. The High Court ruled in favour of the respondents and hence the present appeal. Justice Nor Bee Ariffin, delivering judgment on behalf of the Court of Appeal, dismissed the appeal and held that the appellants' complaints were without basis. Her Ladyship held that the statutory prohibition was against the carrying out of the transaction, i.e. its implementation without obtaining the prior approval from BNM and does not prohibit the mere execution of a conditional contract such as the CPOA and supplemental CPOA. The true construction of section 67 of the Act indicates that the prohibition was focused on the acquisition or disposal of the shares, and not a mere proposed acquisition or disposal of the shares. Since the entire transaction was made contingent upon obtaining BNM's approval, no question of illegality arose. The said agreements were not invalid.

The power of the court under section 469(1) (c) of the Companies Act 2016 is not without limit. The phrase "any other order as the court thinks fit" means that the orders directed by the court must associate with the winding-up petition where the ultimate result is either to allow the application for the winding up or to dismiss it. A court order that imposes a condition for the company to pay a judgment sum within a certain period of time before a winding-up order is made effective is fair and reasonable as a company is given time to pay its debts; the condition is also relevant because it relates to the winding-up application where the ultimate result is the winding-up of the company. A conditional winding-up order is therefore in accordance with the provision of the said section 469(1)(c).

8. Prolink Marketing Sdn Bhd v Ambank Islamic Bhd [2022] 6 MLJ 170; [2022] 10 CLJ 247, CA

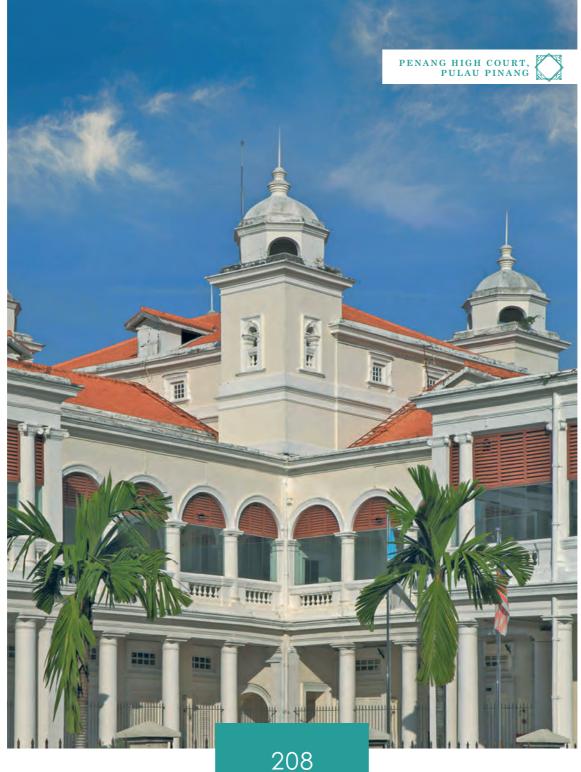
On October 21, 2019, the respondent, i.e. Ambank Islamic Bhd obtained a final judgment against the appellant to recover several sums as well as late payment charges. To recover the judgment sums, the respondent served on the appellant the statutory notice of demand pursuant to sections 465(1)(e) and 466(1)(a) of the Companies Act 2016 ("CA"). The statutory notice also notified that unless the appellant paid the said sums to the respondent within 21 days from the date of the service of the notice, the appellant shall be deemed unable to pay the appellant's debt and winding-up proceedings may be taken against the appellant. The appellant failed to settle the judgment sums and a winding-up petition was then presented at the High Court. The High Court ordered a conditional winding-up against the appellant for the appellant to pay the judgment sums on or before January 5, 2021, failing which the appellant will be wound up on January 5, 2021. The main issue in the appeal was whether the High Court was empowered to issue a conditional winding-up order.

The Court of Appeal dismissed the appeal. Justice Nordin Hassan in his judgment held that the wordings of section 469(1) of the CA is plain

and unambiguous. The provision vests the court with a discretion to either dismiss the petition, to adjourn the hearing of the petition, to issue an interim order, or to make any other order as the court thinks fit. The phrase "any other order as the court thinks fit" under section 469(1) (c) is significant as it permits the court to issue any order which it thinks fit that relates to the winding-up petition.

In the present case, the High Court ordered that the appellant to be wound up on January 5, 2021

if it failed to settle the judgment sums by that date. This is an order relating to the winding-up petition and falls within the provision of "any other order as the court thinks fit" as envisaged in section 469(1)(c) of the CA. Thus, the contention that the power of the High Court upon hearing a winding-up petition is only confined to "decide or dismiss" the petition is misplaced.





CASES OF INTEREST: CRIMINAL

FEDERAL COURT

Dato' Sri Najib Hj Abdul Razak v Public Prosecutor

The appellant, a former Prime Minister of Malaysia, was charged with seven offences against his conduct in relation to SRC International Sdn Bhd, a government-related company owned by the Minister of Finance Inc. The High Court found him guilty and convicted him on all seven charges. The sentence imposed on the appellant was an aggregate concurrent custodial sentence of 12 years and a fine of RM210 million, in default of payment, five years' imprisonment. The Court of Appeal affirmed the conviction on all seven charges and the sentence imposed. The appellant appealed to the Federal Court, and there were a series of decisions delivered regarding this appeal.

1. Dato' Sri Najib Hj Abdul Razak v Public Prosecutor & Other Appeals (No. 1) [2022] 6 AMR 117; [2022] 8 CLJ 363, FC

(i) Application to adduce fresh evidence

Issue: Whether the appellant crossed the legal threshold to adduce additional or fresh evidence to establish conflict of interest giving rise to bias on the part of the trial judge?

Background: Three motions were filed by the appellant/applicant, collectively, to adduce additional or fresh evidence to establish a conflict of interest giving rise to bias on the part of the learned trial judge and on that ground to seek the trial to be declared null and void, with further relief, among others, for a re-trial to be held. It was argued that the additional evidence, which constitutes documentary and oral evidence of certain witnesses, will establish the fact of conflict and/or bias on the part of the trial judge on account of his previous role as Group Counsel and Group Company Secretary of the Maybank Group of Companies including Maybank Investment Berhad, around the time material to the seven charges against the appellant.

Judgment: The Federal Court reiterated the law on adducing additional evidence at the appellate stage, that the evidence must not have been available during the trial, it must be relevant, it must be credible, and whether there might have been a reasonable doubt in the mind of the judge as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

The Federal Court held that part of the documents sought to be adduced, were for a fact, available during the trial. Further, the Federal Court was not convinced that the proposed evidence established anything to the effect that the trial judge's findings were in any way mired by any discreet or undisclosed personal interest on his part on the establishment of SRC International Sdn Bhd and its subsequent operation such as to render him a conflicted or biased judge. It was also held that there was nothing in the motion that the trial judge had any particular knowledge or was inspired by any extraneous considerations gained from his previous employment with Maybank to sustain any of his factual or legal findings in respect of the seven charges against the applicant. The Federal Court was also convinced that the trial judge made his findings based on the evidence on record, and there was no nexus between the trial judge's previous employment with Maybank and the charges against the applicant so as to suggest conflict of interest, giving rise to bias.

As the high threshold of section 93 of the Courts of Judicature Act 1964 that governs the adducing of additional evidence was not crossed, the applications were dismissed.

2. Dato' Sri Najib Hj Abdul Razak v Public Prosecutor & Other Appeals (No. 2) [2022] 6 AMR 132; [2022] 8 CLJ 378, FC

(ii) Application for adjournment

Issue: Whether a change of solicitor at the eleventh hour could be a good reason to apply for an adjournment of a hearing of an appeal?



Background: Having dismissed the motions to adduce additional evidence, the Federal Court directed counsel for the appellant to proceed with the appeals. Counsel, in turn, moved the court for an adjournment, citing that he and his team had taken over the brief recently and that the records involved tens of thousands of documents.

The sequence of events showed that the Federal Court Registry issued a notice of hearing dated April 29, 2022 informing all parties that the hearing of the appeals was scheduled from August 15, 2022 to August 26, 2022.

On July 26, 2022, the Registry received a letter dated July 25, 2022 from the former solicitor, stating they had discharged themselves from representing the appellant. The new solicitor wrote in on July 26, 2022, stating they had taken over the brief and requested to participate in the case management on July 29, 2022. The Registry, in a letter dated July 28, 2022, confirmed the case management on July 29, 2022 and expressed the court's instruction that the hearing would proceed as scheduled. The minutes of the case management on July 29, 2022 also stated that the court reminded parties no fewer than four times that the appeals would proceed as scheduled, notwithstanding the change of solicitor.

Judgment: Reference was made by the court to r. 6(a), as well as r. 24(a) and (b) of the Legal Profession (Practice and Etiquette) Rules 1978, stating where counsel has accepted a brief, he should be deemed as "reasonably certain of being able to appear and represent the client on the required day" and counsel shall make every effort to be ready for trial (and by extension, appeals) on the day fixed. The 1978 Rules are not, in a sense, ding on the courts. But they are nevertheless ding on members of the Bar who are obliged to comply with them. And they are indicative of the fact that any disciplined lawyer, such as counsel for the appellant, would not have accepted a brief with dates already fixed for hearing unless he was prepared.

In the context of this case, we accept unreservedly the notion that the right to a fair trial is part and parcel of the right to life and personal liberty guaranteed by Article 5(1) of the Federal Constitution. See *Yahya Hussein Mohsen Abdulrab v PP* [2021] 8 AMR 719; [2021] 9 CLJ 414; [2021] 5 MLJ 811. The right of the accused to meaningful legal representation by counsel of his choosing is another important component of the right to a fair trial. This much is also apparent from Article 5(3) of the Federal Constitution but we hasten to add that this right is not absolute.

Per Justice Tengku Maimun Tuan Mat, Chief Justice, Justice Abang Iskandar, Chief Judge (Sabah & Sarawak), Justice Nallini Pathmanathan, Justice Mary Lim, and Justice Mohamad Zabidin Mohd Diah, Judges of the Federal Court

The appellant, well aware of the dates fixed for hearing, elected to discharge his former solicitors and appoint new solicitors. It was his right to do so but he could not, after having made that decision, turn around and say that his new lawyers were not ready to proceed with the hearing of the appeals. The new lawyers too, having accepted the brief, were not entitled to say they needed more time to prepare, knowing fully well that the dates had been fixed well in advance. Thus, the appellant's motion to adjourn and vacate the appeals for a period of at least three to four months was unanimously refused.

3. Dato' Sri Najib Hj Abdul Razak v Public Prosecutor & Other Appeals (No. 3) [2022] 6 AMR 139; [2022] 8 CLJ 387, FC

(iii) An application to recuse the Chief Justice from hearing the appeal

Issue: Whether a posting on social media by the spouse of a judge could be a basis for recusal and whether a "non-objection" by the Chief Justice for lawyers to apply for an adjournment to attend an event relating to the trial judge of the present appeal, showed bias on her part?

Background: During the hearing of the appeals, the appellant filed an application to recuse the Chief Justice from hearing the appeals and for the appeals to be reheard before a different panel. The application was based on two reasons; first, a Facebook post dated May 11, 2018 by the Chief Justice's husband, and secondly, a letter from the Bar Council of Malaysia stating that the Chief Justice had no objection if lawyers would apply for adjournments to attend an event called Walk of Justice on June 17, 2022 relating to the trial judge.

Judgment: As to the Facebook posting, it was held that the fact of spousal connection in itself does not give rise to either actual or apparent bias, adopting the reasoning of the Federal Court of Australia case in Kaycliff Pty Ltd v Australian Broadcasting Tribunal And Another (1989) 18 ALD 782. In addition, there was no nexus between the Facebook posting and the subject matter of these appeals, for the posting was made four years earlier when the case was not even in existence. As to the letter pertaining to the Walk of Justice, it was stated that the Chief Justice had no objection should lawyers seek to apply for the adjournments of their cases from the panels hearing their cases. It was not a blanket grant of adjournments. It was simply to say that the different panels and different chairs retained their discretions to grant or refuse adjournments. It was a standard letter and did not disclose any fear or real danger of bias sufficient for the Chief Justice to recuse herself. The fact that certain other judges recused themselves in cases involving the appellant in this case did not itself present a reason for the Chief Justice to do the same. The motion was unanimously dismissed.

4. Dato' Sri Najib Hj Abdul Razak v Public Prosecutor & Other Appeals (No. 4) [2022] 6 AMR 144; [2022] 8 CLJ 393, FC

(iv) The main appeal

Issue: (i) Whether counsel could refuse to submit; and (ii) were there reasons to disturb concurrent findings made by the Court of Appeal and the High Court?

Background: After refusing the solicitors' application to discharge themselves, the Federal Court invited counsel for the appellant to submit, which was not acceded to by counsel. The court then proposed that the respondent submitted first with a view of providing the appellant's counsel time to prepare his submission.

The respondent completed the oral submission in two days. The court turned back to the appellant's counsel and gave them three days to prepare, until August 23, 2022. On August, 23, 2022, the court received the same response from the appellant's solicitor, that they would not be submitting.

Judgment: (i) Considering section 313(2) of the Criminal Procedure Code ("CPC") the Federal Court ruled that while the appellant and his counsel were physically present, they deliberately refused to participate in the appeal hearing. That was equivalent to the appellant "not appearing to support" the appeals and in such circumstances, pursuant to section 92 of the Courts of Judicature Act 1964 ("CJA"), the court was empowered to proceed with the appeals. (ii) As there were concurrent findings made by the High Court and the Court of Appeal, the apex court would not be inclined to disturb those findings unless it could be shown that they were perverse. The trial judge correctly held that all the ingredients of the seven charges were established at the close of the prosecution case. The appellant was thus rightly called upon to enter his defence on all the seven charges. The appellant did not dispute that RM42 million entered his personal bank accounts. As to the defence, the trial judge had undertaken a thorough analysis of the evidence produced by the defence. There was no perverse finding made by the High Court, similarly, by the Court of Appeal. On the totality of the evidence, the conviction of the appellant on all seven charges was safe. The sentences imposed were not manifestly excessive. The appeals were dismissed, the convictions and sentences were affirmed.

5. Vigny Alfred Raj a/l Vicetor Raja v PP [2022] 7 AMR 113; [2022] 8 CLJ 1, FC

Issue: Once the Public Prosecutor decides not to continue with a prosecution against an accused person pursuant to section 254 of the Criminal Procedure Code ("CPC"), should the court make an order of discharge not amounting to an acquittal ("DNAA") or an order of discharge amounting to an acquittal ("DAA")?

Background: In the High Court, the appellant was charged under section 130V of the Penal Code ("PC") for being a member of an organised criminal group. He claimed trial. On the day of the trial and before any evidence was led, the deputy public prosecutor ("DPP") informed the court that after examining the charge,



the prosecution has decided not to continue with the prosecution. The DPP sought an order of DNAA: the application was made pursuant to section 254(1) of the CPC. The High Court granted an order of DNAA for the following reasons: (i) the court did not have the power to acquit and discharge the appellant without hearing any evidence; and (ii) pursuant to Article 145 of the Federal Constitution ("FC"), the power to prosecute was vested in the Attorney General. Counsel for the appellant submitted his client ought to be discharged forthwith with a DAA.

Judgment: Implicit in section 254 of the CPC is the power of the Public Prosecutor under Article 145 of the FC to discontinue any criminal prosecution. While the prosecution is entitled to make the decision that it will not further prosecute the appellant upon the charge for which the appellant had already entered his plea, once that decision is conveyed to the court, it is for the court to decide what order is most appropriate to be made. That decision depends on the law and on the facts. Section 254(3) goes on to provide for the effect of the discharge; it expressly states that "such discharge shall not amount to an acquittal unless the court so directs". The court must specifically direct that the discharge is a DNAA, otherwise, the default position is that the discharge is a DAA. The Federal Court allowed the appeal. The orders of the High Court and the Court of Appeal were set aside. The appellant was discharged and acquitted.

6. Sathya Vello v Public Prosecutor [2022] 4 AMR 902; [2022] 5 CLJ 659, FC

Issue: When the trial judge in a drug trafficking case under section 39B of the Dangerous Drugs Act 1952 ("DDA") calls an accused to enter his defence, should the judge state whether the defence is called on presumed trafficking or on direct trafficking, and should he state whether any of the presumptions has been invoked?

Background: The appellant and another person faced two charges under section 39B of the DDA in the High Court. After a full trial, the High Court judge found that the prosecution had succeeded in proving the charge of trafficking beyond reasonable doubt against the appellant. He was found guilty on both charges and convicted accordingly. As for the other person, the High Court found on the evidence, the other person had rebutted the presumption of possession. She was accordingly acquitted and discharged of both charges.

Judgment: Under section 180 of the Criminal Procedure Code ("CPC"), a trial judge is not required to inform an accused person verbally or in writing the reason or reasons why he is calling for the accused to enter his defence. What is required is for the trial judge to be satisfied that the prosecution has adduced credible evidence to prove each ingredient of the offence charged. There is no other requirement, and the law reports are replete with authorities on what constitutes "prima facie case". It follows that if the law does not require the trial judge to give any reason for calling for the accused's defence, there is no reason why he is required to inform the accused at the close of the prosecution case whether any presumption of law applies against him. Despite not being informed whether his defence was called on presumed trafficking or on direct trafficking, it did not stop the appellant from putting up a defence that was not structured to rebut the presumption of trafficking under section 37(da). On another note, in this case, the appellant's defence was a blanket denial of any knowledge of the drugs, and it was never his defence that the drugs were not for the purpose of trafficking, in rebuttal of the presumption under section 37(da). This completely demolishes his argument that he had been prejudiced in the preparation of his defence by the trial judge's failure to inform him whether his defence was called on presumed trafficking or on direct trafficking. The appeal was accordingly dismissed.

7. Dhinesh a/l Tanaphil v Lembaga Pencegahan Jenayah & 2 Ors [2022] 4 AMR 317; [2022] 5 CLJ 1, FC

Issue: Whether section 15B of the Prevention of Crime Act 1959 ("POCA") is unconstitutional for ousting the court from exercising judicial review on orders made pursuant to POCA, except in regard to any question on compliance with procedural requirements?

Background: The appellant, Dhinesh Tanaphil was detained pursuant to a detention order issued by the Prevention of Crime Board Chairman under section 19A(1) of the POCA. In the High Court, Dhinesh sought to secure his release by applying for a writ of habeas corpus pursuant, inter alia, to Article 5(2) of the FC and section 365 of the CPC. The application was dismissed, hence the appeal to the Federal Court.

Judgment: The Federal Court declared section 15B of the POCA to be null and void, being inconsistent with Article 4(1) of the FC. While a legislation enacted

under Article 149 of the FC is valid notwithstanding its inconsistency with Articles 5, 9, 10 and 13, this is not equivalent to excluding or suspending the application of Article 5(2) of the FC in relation to preventive detention legislation. Article 5(2) of the FC has not been expressly suspended in relation to preventive detention legislation under Article 149 of the FC. The basis for the remedy of the issuance of a writ of habeas corpus, which is founded on Article 5(2) of the FC, is not expressly excluded by Article 149 of the FC: it expressly confers a right of constitutional review on the High Court to review the legality of the detention. It also expressly confers a right of "satisfaction" on the part of the High Court, to the effect that the court must itself be convinced that the detention is lawful. The Federal Court had thoroughly discussed the doctrine of basic structure as well the source and scope of judicial power within the ambit from Article 4(1) of the FC read in conjunction with Article 121(1). It held that the provision cannot operate to immunise all decisions made under the POCA by use of the ouster clause, except for procedural irregularities. On the merits, the Federal Court held section 4(2) of the POCA was not complied with, as a statement from the Public Prosecutor for an inquiry under the POCA was not produced during the remand proceeding before the Magistrate. It was also held, there was a failure to permit one Mathan Raj to give evidence, thus there was a breach of natural justice as contained in Article 151 of the FC. For the reasons stated, the appeal was allowed, and a writ of habeas corpus was issued.

8. Muhammad Redzuan Omar v Timbalan Menteri Dalam Negeri Malaysia & Anor [2022] AMEJ 0312; [2022] 1 LNS 880, FC

Issue: Whether there was delay on the part of the investigating officer and the inquiry officer in preparing and submitting their respective reports to the Minister of Home Affairs ("the minister"), if the submission was made within the prescribed 60-day period under section 32 of the Dangerous Drugs (Special Preventive Measures) Act 1985?

Background: The appellant was ordered to be detained for two years pursuant to section 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("DDSPM"). He applied for a writ of habeas corpus in the High Court and the application was dismissed. He appealed to the Federal Court. It was argued, among others, that there was delay on the part of the

Investigating Officer and the Inquiry Officer, for both took 35 days to submit their reports to the minister.

Judgment: Section 5(2) of DDSPM does not prescribe the time frame in which the investigating officer must commence and complete the investigation nor prescribe the period required for the Inquiry Officer to commence and complete his inquiry under section 5(2) of DDSPM after receiving the investigation report from the investigating officer. However, section 5(2) of DDSPM must be read harmoniously with section 3(2), that is, submission of reports by both the investigating officer and the inquiry officer must be submitted within the period of 60 days as prescribed under section 3(2) of DDSPM. So long as the submission of the required reports is made within the prescribed 60-day period of the detention order, there is no procedural noncompliance.

9. Samat Yamin v PP [2022] 1 LNS 3343, FC

Issue: (i) Whether the Federal Court is seized with jurisdiction to hear a bail application despite there being no appeal filed against its dismissal by the lower courts? (ii) Whether section 13 of the Security Offences (Special Measures) Act 2012 ("SOSMA") contravenes the principle of equality under Article 8 of FC?

Background: The applicant was charged under sections 26A and 26D of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM"), which offences are listed in Part IIIA of the Act and by reason of the same, the First Schedule of the SOSMA applies. The applicant was detained pending trial pursuant to section 13(1) of the SOSMA. The applicant filed an application for bail pending his trial in the High Court of Klang and it was dismissed. The same application was filed in the Court of Appeal, which was similarly dismissed, as the Court of Appeal upheld the preliminary objection raised by the respondents. The applicant then filed an application for bail in the Federal Court.

Judgment: (i) The Federal Court dismissed the preliminary objection by the Public Prosecutor that the application was incompetent, for there was no pending appeal before the Federal Court in order for the application to stand on. The Federal Court is seized with the jurisdiction as rule 106 of the Rules of the Federal Court 1995 ("RFC") provides that the Federal Court shall exercise, for all purposes incidental to or



arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the court. The court is also vested with inherent power under rule 137 of the RFC, to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

(ii) Section 13(1) of the SOSMA provided absolute prohibition of granting bail, except for those who fall within the exceptions stated in subsection (2), which are a person below the age of 18, a woman or a sick or infirm person. The Federal Court held there is cogent evidence from a study conducted by the United Nations, which justifies the legislative intent in this case to allow a woman charged under the SOSMA to be on bail. Obviously, the discrimination based on gender here is both reasonable and permissible. As for the other leeway given to those below the age of 16 years, the rationale of this exception is plain that there is a special law governing juveniles accused of crime, i.e. the Child Act 2001. As for a sick and infirm person, it can safely be assumed that given the medical conditions suffered by such an accused person, there would be a much lesser risk of the sick and/or infirm accused absconding or interfering with the witnesses if freedom before and during trial was granted. The Federal Court held that the prohibition of bail is proportional to the very object of the SOSMA and what it aims to achieve for the security and peace of the nation.

The application for bail was dismissed by the Federal Court.

There [are] more than enough worldly historical events which demonstrate the extremely devastating effect on a nation when such peace and security are destroyed which we need not have to go into. Thus, the harshness of the law on the freedom of a person charged under SOSMA is one, which is militated and justified by the very aim that the said law is promulgated.

per Justice Rhodzariah Bujang, Judge of the Federal Court

10. Ariff Arhannan Che Udin v PP [2022] 3 AMR 705; [2022] 4 CLJ 1, FC

Issue: Whether a conduct of an accused amounts to a statement under section 37B of the Dangerous Drugs Act 1952 ("DDA"), and whether the conduct of picking up bag and handing it over to the raiding officer ("SP6") could not be admitted because there was no caution administered under section 37B of the DDA?

Background: The appellant was charged with two offences under the DDA, the first charge under section 39B of the DDA while the other under section 6, read with section 39A(1) of the DDA. In the High Court, he was sentenced to death for the first charge and three years' imprisonment for the second charge. The appeal to the Court of Appeal was dismissed. The appellant appealed to the Federal Court.

Judgment: Section 37B of the DDA provides, among others, that no statement made by a person after his arrest shall be admissible in the case, unless the court is satisfied that a caution was administered to him. Nonetheless, to hold that the conduct of an accused amounts to a statement under section 37B of the DDA would be to overstretch the language beyond its common usage. A conduct cannot be considered as a statement under the section that requires a caution to be administered before it can be admitted in evidence.

The appeal was dismissed by the Federal Court.

The word "statement" in section 37B of the DDA must be confined to "something that is stated" or "written or oral communication" (Bhogilal Chunilal Pandya [1959] 1 MLJ 101, Cormac McCarron [2001] SASC 365, supra) and does not include conduct such as the act of the appellant in the present case of picking up the black bag containing the drug and handing it to SP6. If it were otherwise, the conduct of an accused running away from the police would also amount to a "statement" and would be inadmissible in evidence unless he had been cautioned under section 37B of the DDA before he takes flight.

per Justice Abdul Rahman Sebli, Judge of the Federal Court

11. Lei Meng & 24 Lagi v Inspektor Wayandiana Abdullah & 3 Lagi [2022] 2 AMR 733; [2022] 3 CLJ 177, FC

Issue: (i) When a detention ceases, does it render the appeal against the detention order, academic? (ii) Whether online gambling falls within the purview of the Prevention of Crime Act 1959 ("POCA")? (iii) Whether the POCA applies to a non-citizen or a foreign national?

Background: There are two series of cumulative appeals relating to preventive detention under the POCA brought by all the appellants, who were detainees at the time of the filing of their applications for habeas corpus and other declaratory relief. The first set of appeals deals with six cases, while the second set of appeals deals with 19 cases. The appellants in both sets of appeals are nationals of the People's Republic of China. They were detained under the POCA in relation to "the organisation and implementation of online gambling" which was stated to be in contravention of the provisions of the POCA.

Judgment: (i) The Federal Court held the application for habeas corpus must be viewed as of the date of the filing of the application for release under Article 5(2) of the FC or habeas corpus. The jurisdiction of the High Court or a High Court judge is not determined by the fact of physical detention but the legality of the detention itself assessed from the date of the filing of the application for habeas corpus. The fact that a detenu was, subsequent to the date of the filing of his application, preventively detained by some other authority or under some other provision, legislation or order does not vitiate his right to judicial scrutiny over the legality of his initial detention. When a detenu is released after the date the application is filed, but before the return or hearing date, it does not affect the jurisdiction of the court to review the legality of the detention which is under challenge and, when a detenu is under detention during the hearing but released after an appeal to the Federal Court is filed, it also does not render the application "academic".

The live issue before the Federal Court is no longer simply the detention but the correctness of the decision of the High Court as assessed from the lens of the High Court judge.

per Justice Nallini Pathmanathan, Judge of the Federal Court

- (ii) On the merits, the Federal Court held that on an objective assessment of "online gambling" and "organised violence", there is no immediate nexus or link between them per se. The fact that illegal gaming may in some, or even many instances result in violence, does not warrant the conclusion, reasonably or coherently, that online gambling simpliciter must include organised violence per se. Such an interpretation does violence to the purpose and intent of the POCA and fails to comply with the express and narrow provision set out in Article 149(1)(a) of the FC.
- (iii) On its application to citizens and non-citizens, a reading of the POCA itself discloses that there is nothing in that Act which discriminates between citizens and non-citizens as reference is made to "person".

12. Zulkiple Mohamad v PP [2022] 2 AMR 905; [2022] 1 CLJ 673, FC

Issue: Whether the prosecution is required to prove there is an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death, for a charge of murder under section 300(c) of the Penal Code("PC")?

Background: The appellant was charged with murder, punishable under section 302 of the PC. The victim was a 75-year-old lady. The evidence showed that on one fateful morning, SP3 and SP4, the children of the deceased arrived at SP3's shop, which had one bedroom occupied by the deceased. They knocked on the door and received no response from the deceased. They broke the iron door and found the shop was in a mess. It appeared to have been ransacked. Just outside the door to the deceased's bedroom, SP4 saw a knife (P11A(1)) and a baseball bat (P10A) which had bloodstains on it. The knife and the baseball bat were items that belonged to the shop. When SP3 went out of the bedroom, he saw a hole measuring about 2 x 4 feet



at the ceiling of the shop. Apparently, the perpetrator appeared to have entered the shop through the ceiling after removing the roof tiles. SP3 then called the Batu Pahat Police Station. Police investigation led to the arrest of the appellant on January 22, 2014 for the murder of the deceased. The appellant in his defence given under oath, admitted hitting the deceased twice on the head with a baseball bat but denied having any intention of killing her. The reason why he hit her with the baseball bat was because she shouted for help upon seeing him in the shop. He said he did not know that by hitting the deceased's head with the baseball bat, it would kill her. He went on to say that he hit the deceased's head on the spur of the moment and not intentionally. The appellant was convicted by the High Court of murder and sentenced to death, which was affirmed by the Court of Appeal.

Judgment: Section 300(c) of the PC provides that culpable homicide is murder if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The Federal Court held that where the prosecution relies on section 300(c), it is not required to prove intention to cause bodily injury of a kind that is sufficient in the ordinary course of nature to cause death. All that is

required is proof of intention to inflict the injury that is proved to be present, irrespective of whether the injury is grievous or trivial. In the context of the present case, proof of that intention is the appellant's deliberate act of hitting the deceased's head with the baseball bat, which is totally unrelated to the question whether he intended to cause injury that is sufficient to cause death in the ordinary course of nature.

On our part, we have no doubt that the appellant's act was murder under clause (c) of section 300 of the Penal Code, not because it was done with the intention of causing death, or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, or with the knowledge that it was likely to cause death, or because it was so imminently dangerous that it must in all probability cause death, but because the injuries were intentionally inflicted and the injuries were sufficient in the ordinary course of nature to cause death.

per Justice Abdul Rahman Sebli, Judge of the Federal Court

CASES OF INTEREST: CRIMINAL

COURT OF APPEAL

 Danaraj Sasekumar lwn PP & Satu Lagi Rayuan [2022] AMEJ 1624; [2022] 1 LNS 2806, CA

Issue: Whether a trial judge who takes over a criminal case ought to recall witnesses who had already testified before the previous judge?

Background: The two appellants were charged under section 302 of the Penal Code ("PC") for murder. Both were convicted and sentenced to death. They both appealed to the Court of Appeal. In the High Court, 12 prosecution witnesses testified. The evidence of these witnesses was taken before a judicial commissioner and the case was taken over by a High Court judge who only heard part of the PW12's evidence, the last

witness for the prosecution. It was argued that the trial judge who convicted the accused had failed to evaluate whether the accused's brother ("PW4") and a relative of the accused ("PW8") did, for a fact, witness and identify the appellants as the persons who slashed the deceased to death. The accused's other brother ("PW10") arrived at the scene later and there was no mention by PW4 and PW8 to PW10 about the appellants slashing the deceased. Nowhere in PW4 and PW10's police reports was it mentioned that the appellants were the assailants. There were also discrepancies as to how many people attacked the victim, three persons according to PW4 and PW8, while PW10 said there were five persons.

Judgment: The Court of Appeal held that since the succeeding trial judge relied heavily on the evidence of PW4 and PW8 who witnessed the incident, the

two ought to be recalled as the trial judge had not heard directly from them, taking into account PW4 is the sister of the victim and PW8 is a relative. The supposition of possibility of concoction by the two against the appellants should not be taken lightly and ruled out as irrelevant. The appeal was allowed. The conviction and sentence against the appellants were set aside. Both were acquitted and discharged.

2. Siva Sangker Mani v PP [2022] AMEJ 1664; [2022] 1 LNS 2850, CA

Issue: In accepting the evidence on identification, must a trial judge caution himself and mention *Turnbull* guidelines in the ground of judgment?

Background: The appellant was convicted of murder under section 302 of the Penal Code ("PC") by the High Court. On appeal, one of the issues raised was whether the identification of the appellant at the crime scene by the relevant eyewitnesses was safe to be relied upon, since the trial judge did not mention the *Turnbull* guidelines.

Judgment: The Court of Appeal held that even though the judicial commissioner did not caution herself and did not expressly mention the Turnbull guidelines in her grounds of judgment, her acceptance of the identification evidence was not done without evaluating the accuracy, quality, and credibility of the witnesses' identification evidence. What matters is the trial judge's evaluation of the accuracy and quality of the witness' identification evidence even though the trial judge did not expressly mention the Turnbull guidelines in the grounds of judgment. The appeal was dismissed, and the conviction and sentence passed by the High Court were affirmed.

3. Shohel v Public Prosecutor [2022] AMEJ 1648; [2022] 1 LNS 2812, CA

Issue: Whether voluntariness is a prerequisite of admissibility of information leading to discovery, and whether such evidence ought to be admitted under section 24, or section 27 of the Evidence Act 1950 ("EA").

Background: The appellant was convicted under

section 302 of PC and in his appeal to the Court of Appeal, had raised, among others, the issue of admissibility of information leading to the discovery of the murder weapon, a parang. In the evidence adduced, Inspector Muhammad Azizul (PW11) stated the appellant said "saya ada simpan itu parang masa saya guna hentam itu Bangla di tempat kerja di tapak projek, saya boleh tunjukkan mana saya buang itu parang (I kept the parang I used to hit the Bangla at the workplace at the project site, I can show you where I threw the parang)". It was argued that the statement given by the appellant while in police custody ought not to be accepted, for it fell within the scope of section 24 of the EA, unless it could be shown it was not given on the pretext of any inducement, threat or promise. It was also argued the statement did not fall under section 27 of the EA, as the appellant was not warned, there was no interpreter, and it was not recorded in verbatim anywhere in any document. It was also argued, the purported statement mentioned "parang" while the police discovered an axe.

Judgment: The Court of Appeal observed that a prior warning is not a pre-condition for information to be admitted under section 27 of the EA. It was also held that section 27 is to be read independently from section 24 which provides inadmissibility of confession caused by inducement, threat or promise. Section 27 governs admissibility of information leading to a discovery regardless of whether the information was given voluntarily or otherwise, unless it can be shown that the prejudicial effect outweighs the probative value of the information. In the present case, the discovery of an axe instead of a parang cannot be a reason to exclude the information. The appellant showed the place and said the weapon recovered was used to hit the deceased, apart from the DNA of the deceased found on the axe. Since the appellant is from Bangladesh, he could have mistaken between parang and kapak (axe). The appeal was dismissed, and the conviction and sentence were affirmed.

4. Lokman Noor Adam v PP & Another Appeal [2022] 8 AMR 689; [2022] 10 CLJ 850, CA

Issue: Whether absolute privilege is attached to a police report and subsequent publication of the report, and as such, could absolve one from being held in contempt of court?



Background: A witness gave evidence in a criminal trial before the High Court. Based on what the witness said during the trial, the appellant lodged a police report (exh A2) and he made a press statement to the media later that day which was recorded on video. In gist, the appellant's report and his statement were questioning the credibility of the witness who purportedly admitted to many corrupt practices while testifying. The appellant urged appropriate action to be taken against the witness. The Attorney General instituted a contempt of court proceeding against the appellant and the court found the appellant guilty of contempt of court and sentenced him to one month's imprisonment. The appellant appealed to the Court of Appeal against the conviction and sentence while the Attorney General appealed too, stating the sentence was inadequate.

Judgment: Based on the strong words employed by the appellant in his police report exh A2, the Court of Appeal held the principle of absolute privilege should not be extended to the report. After all, the appellant's actions did not end with the lodging of the police report. On the same evening, he made a press statement to the media commenting on his police report and passing further unnecessary remarks against the witness and the would-be witness. It is trite that absolute privilege would not attach to the subsequent publication of the contents of the police report to the public at large, except where the contents were made in or in connection with judicial or quasi-judicial proceedings. The appellant's actions were held to be an intimidation of the witness and the would-be witnesses and all courts have a duty to protect those who give evidence or who are brought into court to participate in the administration of justice. For this reason, all courts must be ready to use all powers that are available, including contempt of court proceedings. The High Court did not err in its decision and there was no reason to disturb the sentence. The appeal by the appellant was dismissed and the appeal by the Attorney General against the inadequacy of the sentence was similarly dismissed.

We are in agreement with the LHCJ's finding that whether the witness is actually deterred or influenced by the appellant's statement is of no consequence. It is sufficient if the action complained of is inherently likely to interfere with the administration of justice.

> per Justice Che Mohd Ruzima Ghazali, Judge of the Court of Appeal

5. Satish Mohanadran v PP [2022] 3 CLJ 844, CA

Issue: (i) When the prosecution fails in impeaching its own witness, can the prosecution then submit on falsity of the version offered by the witness that survived impeachment? (ii) Whether the prosecution had excluded involvement of other persons in relation to the drugs? (iii) When an affirmative finding of possession had been made, could a trial judge invoke the presumption of knowledge and possession under section 37(d) of Dangerous Drugs Act 1952 ("DDA")

Background: The appellant faced four charges under the DDA, one for trafficking and three for possession of drugs. He was sentenced by the High Court to death for the trafficking charge and various imprisonment sentences and whipping for the charges of possession. During the prosecution's case, the police witnesses testified that they found drugs at various places inside the house where the appellant resided. The wife of the appellant (PW9) was also called to testify as the prosecution's witness. She said she was present during the raid and the search, but no incriminating article was found by the police party, and she saw PW8 bring in a blue Tupperware box. PW9's oral evidence appeared to contradict her section 112 (of the Criminal Procedure Code) statement recorded by the police where she stated on the night in question, she was not at the said house with the appellant but was at the house of the babysitter. With the leave of the court, an impeachment proceeding against PW9 was commenced by the prosecution and PW9 said she was forced to agree and to sign her section 112 statement at the risk of her and her 11-month-old child being arrested. The trial judge accepted PW9's explanation and ruled that her credibility was preserved. The defence also put during the prosecution's case that a person by the name of Vicky was also an occupier of the house, a fact which was mentioned by the appellant to the police in his statement and affirmed by two other prosecution witnesses in court. The trial judge also ruled that there was actual possession of the drugs, yet he invoked the presumption of presumed knowledge and possession under section 37(d) of the DDA.

Judgment: (i) On the impeachment proceedings, the Court of Appeal held that the prosecution, having

availed the impeachment proceedings and failed, cannot thereafter submit on the falsity of the version offered by the witness that survived impeachment. It follows that the prosecution has adduced two conflicting versions of evidence, one striking at each other, and it cannot be said that a prima facie case has been made out by the prosecution.

This, in our judgment, should be applied with greater rigour when the conflicting evidence comes from the prosecution's witness. In the present case, to put it in a less elegant language SP4's credibility has been compromised, the prosecution's case is killed by its own witness and in consequence, no reliable evidence that the drugs, which were the subject of the four charges, were found inside the said house

per Justice Ahmad Nasfy Yasin, Judge of the Court of Appeal

- (ii) On the existence of Vicky, failure on the part of the trial judge to appreciate that the prosecution had failed to exclude Vicky, which was an unchallenged evidence, amounted to a misdirection, warranting appellate intervention.
- (iii) It was also held that on the finding of possession, the law does not allow a case of actual possession and at the same time reliance to be made on presumed possession under section 37(d) of the DDA. It reflects the uncertainty on the part of the trial judge in making a finding.

The appeal was allowed, the conviction and sentence on all four charges were set aside. The appellant was acquitted and discharged.

6. Datin Seri Rosmah Mansor v PP and Another Appeal [2022] 3 AMR 446; [2022] 4 CLJ 523, CA

Issue: Does a High Court exercising criminal jurisdiction have the power to issue declaratory reliefs?

Background: At the time of the filing of two appeals in the Court of Appeal, the appellant faced three charges under section 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009. The appellant had, prior to the decision at the end of the prosecution's case, filed an application seeking for the

production of Dato' Sri Gopal Sri Ram's (GSR) letter of appointment to conduct the criminal prosecution of her case under sections 376(3), 376(3A) and 379 of the Criminal Procedure Code ("CPC"). The application was dismissed by the High Court, and it went on appeal to the Court of Appeal, which ended with the prosecution consenting to produce a copy of the letter of appointment (fiat). The appellant then filed two other applications. The gist of the first application was that the appointment of GSR via fiat dated July 8, 2020 was illegal, irregular and defective. The second application sought, inter alia, a declaration that the criminal trial in the High Court up until the close of the prosecution's case be declared null and void, a mistrial, and a declaration that the conduct of GSR was an abuse of the court's process. It was also prayed that the appellant be acquitted and discharged. The High Court dismissed both applications.

Judgment: The central issue of the matter brings into focus whether the sitting High Court in exercising its criminal jurisdiction has the power to issue declaratory reliefs as sought by the applicant. The declaratory reliefs have always been treated as civil in its essence. A criminal court does not have similar powers as a civil court for it to be deemed as a civil court for the purpose of entertaining a declaration. It must be emphasised that the criminal justice system must avoid becoming involved in civil matters.

The appeals were dismissed, and the High Court was directed to proceed with the trial.

In so far as the applicants had chosen to bring criminal proceedings in the High Court by way of their criminal motion, they could not then say that those criminal proceedings were, in fact, in the nature of civil proceedings. Litigants should not be allowed the luxury of "switching" their cases between the criminal and civil realms with complete impunity. To allow parties to successfully mount such arguments would encourage future resort to unorthodox and objectionable manoeuvres in the hope of circumventing onerous procedural requirements.

per Justice Hanipah Farikullah, Judge of the Court of Appeal



CASES OF INTEREST: CRIMINAL

HIGH COURT

1. PP v Muhammad Shafee Md Abdullah [2022] AMEJ 1496; [2022] 1 LNS 2568, HC

Issue: Whether receiving payment for legal fees and failing to furnish return or making incorrect return to the Inland Revenue Board amount to receiving illegal proceeds under section 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA")?

Background: The accused faced four charges of money laundering under section 4(1)(b) of the AMLA. The first charge related to his involvement in money laundering activity by receiving a cheque of RM4,300,000 from Mohd Najib Hj Abd Razak on September 13, 2013, while the second charge related to the receipt of a cheque of RM5,200,000 also from Mohd Najib Hj Abd Razak on February 17, 2014. The third and fourth charges were in relation to the accused's failure to furnish a return of chargeability of his income and making incorrect returns to the Inland Revenue Board of Malaysia ("IRB") for the sums of RM4,300,000 and RM5,200,000 received under sections 112 and 113 of Income Tax Act 1967.

The accused is an advocate and solicitor practising under the style of Messrs Shafee & Co. The monies in question were meant for services rendered by the accused to UMNO and Barisan Nasional (BN) in handling 46 election petitions in 2004 and 2006, as well as legal consultations since the 1990s. The bulk part of the monies was used to purchase a house at Bukit Tunku. It was contended that the accused did not report the RM9.5 million as income of Messrs Shafee & Co to the IRB for 2013 and 2014 respectively. The accused replied that the RM9.5 million was considered a loan from Mohd Najib Abd Razak until the necessary works to rationalise the income of Messrs Shafee & Co for 2018 is completed and only then it would be declared as income in year 2018 to the IRB.

Judgment: With regard to the first and second charges, while the receipt of the monies was not

disputed, there was no evidence proferred by the prosecution to show that the monies was proceeds of illegal activity nor was there any predicate offence committed at the time when the money was received. The monies did not become subjects of predicate offences under sections 112 and 113 of the Income Tax Act 1967 for failure to furnish and for filing incorrect returns to the IRB because the alleged violations of the Income Tax Act came later, not at the time when the monies was received in 2013 and 2014. Pertaining to the third and fourth charges, the failure to furnish return or to provide incorrect return cannot be considered as "transaction" under section 4(1)(a) of the AMLA, as section 3 of the AMLA defines "transaction" to include "an arrangement to open an account involving two or more persons and any related transaction between any of the persons concerned and another". The act of making incorrect returns in 2013 and 2014 was one-sided and did not involve another party. On the same note, the trial judge held the acts in 2013 and 2014 did not appear to be proceeds of illegal activity. The accused was acquitted and discharged at the end of the prosecution case.

PP v Rosmah Mansor [2022] 7 AMR 152; [2022] CLJ 83, HC

Issue: (i) Whether the evidence of witnesses complicit in the corrupt dealings can be accepted without corroboration? (ii) Whether solicitation can be carried out through an intermediary? (iii) Whether failure to charge accomplices implies mala fides on the part of the Public Prosecutor in the exercise of his discretion? (iv) What is the effect of non-calling of a witness by the prosecution? (v) Whether documents obtained by the Malaysian Anti-Corruption Commission ("MACC"), by default, is admissible?

Background: The accused at the material time, was the wife of the Prime Minister of Malaysia. She was charged with three offences under section 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") for corruptly

soliciting a gratification of RM187.5 million and corruptly receiving gratifications of RM1.5 million and RM5 million respectively. The alleged offences revolved around a project called "Projek Bersepadu Sistem Solar Photovoltaic (PV) Hibrid dan Penyelenggaraan dan Operasi/Diesel bagi 369 Sekolah Luar Bandar Sarawak" ("the project"). The project was proposed by Jepak Holdings Sdn Bhd ("Jepak"). Saidi ("PW17"), the founder of Jepak, approached Dato' Seri Mahadzir Khalid ("PW5"), the then Minister of Education to lobby for the project, yet PW5 did not share the same enthusiam. PW17 together with one Rayyan ("PW16") decided to obtain the Prime Minister's approval, through his wife, the accused. A series of events took place which led to the accused's special officer, Rizal Mansor ("PW21") arranging a meeting between PW17, PW16 and the accused around January or February 2016, whereupon Jepak's letter of proposal with the Prime Minister's minutes was shown to the accused. They also conveyed their intention to donate 10% of the contract value of RM1.25 billion. The accused was supportive of the project and informed PW21 that the percentage should be increased to 15%. It was eventually agreed that payment would be made in stages, namely 15% from each progress payment received until it reached RM187.5 million. Saidi also agreed to pay PW21 RM20 million for his part. There were meetings and follow-ups by PW21 and PW5. A second instruction came from the Prime Minister dated June 2, 2016 requiring PW5 to execute the previous minutes. PW5 then approved the project. Once the letter of award was issued to Jepak, the accused instructed PW21 to follow up on the payments due to her. The sums of RM5 million and RM1.5 million respectively were eventually paid to the accused on two occasions.

Judgment: (i) The High Court held, of all 23 witnesses, three of them were material witnesses, namely PW21, PW17 and PW16 who were complicit in the corrupt dealings. However, by virtue of section 52(1)(a) of the MACC Act, they were deemed to be accomplices and consequently, any conviction based on the uncorroborated evidence of any accomplice shall not be deemed illegal and any conviction shall not be set aside even if the court failed to cite in its judgment the need to warn itself of the danger of convicting on such evidence. Nonetheless, it was necessary for their evidence to pass the test of credibility.

- (ii) As to whether the accused had, through PW21, solicited 15% of the contract value amounting to RM187.5 million from PW17, the High Court held the act of solicitation need not be done by an accused directly as it can be done through an intermediary.
- (iii) Pertaining to the complaint that in the prosecution failing to charge PW21, PW17 and two others for corruption, the Public Prosecutor had acted mala fide in exercising his discretionary power under Article 145(3) of the FC, the High Court failed to see how the failure of the prosecution to charge the others could exonerate the accused or provide her with a defence. Even if one assumes that the others were guilty of committing a crime, it does not exculpate the accused from an offence she may have committed. In addition, it is not uncommon for the prosecution to opt not to charge an accomplice and utilise him as a witness for the prosecution to strengthen its case.
- (iv) In relation to whether a butler who took two knapsacks containing RM1.5 million to the accused's room ought to be called to substantiate PW21's contention, the High Court held that there is no necessity for the butler to be called to testify, as PW21's testimony was sufficient. There was no necessity for the prosecution to call all witnesses to complete its narrative of the prosecution's case.
- (v) Pertaining to two audio recordings IDP 36 and IDP163 which the High Court ruled inadmissible as exhibits, reference was made to section 41A of the MACC Act which provides for the admissibility of any document or its copy when obtained by the MACC, notwithstanding anything to the contrary in any other written law. The High Court then revisited its earlier ruling and admitted the recordings as evidence.

The High Court held the prosecution had successfully proved prima facie cases of the three charges and called the accused to enter her defence. At the end of the defence case, the High Court ruled the accused had failed to rebut the presumption under section 50(1) of the MACC Act on a balance of probabilities and her defence was a bare denial, devoid of credible evidence and unsubstantiated in order to create reasonable doubt. She was convicted of all three charges and sentenced to 10 years'



imprisonment for each charge, to run concurrently and a total fine of RM970,000,000.

3. PP v Samirah Muzaffar [2022] 1 LNS 1785, HC

Issue: (i) How to approach two contradicting reports prepared by expert witnesses? (ii) The applicability of "the last seen together" principle. (iii) Whether the burden lies on the prosecution when a case relies on circumstantial evidence? (iv) The significance of motive when the prosecution case is made on circumstantial evidence.

Background: The accused together with her two children and another person who was at large (her maid) were accused of murder under section 302 of the Penal Code. The facts showed that fire broke out inside a room at the accused's house. The accused obtained help from a security guard (SP4), who managed to break into the room which was on fire and full of smoke. Within 15 minutes, a party of fire fighters arrived at the scene and they managed to put out the fire in 2 minutes. The accused's husband was found dead on a bed. A doctor (SP26) arrived at the scene and certified the husband was dead. At that juncture, since there was no determinative finding made by the Fire Department as to the cause of the fire, the case was filed by the police as sudden death. Postmortem was carried out on the body of the deceased by SP46 who found, among others, penetrating wounds at the head region. SP46 concluded the cause of death was "complication of blast and blunt penetrating injuries". The body was buried at Kota Damansara. An officer from the Fire Department (SP15) continued carrying out forensic analysis at the scene and the samples were sent to the chemist (SP14) who found there were traces of petrol. SP15 did a reconstruction as to how the fire broke out and concluded that a firecracker was lit, which burned papers splashed with petrol. The case was re-classified as murder and the body of the deceased was exhumed under an order of a magistrate. A second post-mortem was carried out by a pathologist from Pusat Perubatan Universiti Malaya (SP50). He concluded the cause of death was multiple blunt impacts to the head.

Judgment: (i) In respect of discrepancy as to the cause of death in the two reports prepared by two pathologists SP46 and SP50, the High Court held

that when expert opinions are in conflict with one another the court is obliged to assess the evidence and accept, if necessary, the most reliable parts in forming its decision. Despite the discrepancy, both SP46 and SP50 agreed that there was a "penetrating wound measuring 5 x 4 cm at left parietal region" which caused "damage to the brain".

(ii) Pertaining to application of "the last seen together principle" the court held it was insufficient for the prosecution to show that the accused persons were the last persons seen together with the deceased, for there must be something more to establish the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused persons.

(iii) The only evidence available was circumstantial evidence as there was no eye witness who saw how the injury took place, therefore where circumstantial evidence is the basis of the prosecution case, the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused persons. Since there were many inferences that could be made in this case, the court was not convinced of the guilt of the accused and the two children.

(iv) In relation to the conduct and motive of the accused persons, too many inferences could be drawn. The prosecution failed to establish ulterior motive on the part of the accused persons. It is trite that when a case relies solely on circumstantial evidence, it is an essential factor that motive ought to be considered.

The High Court ruled that the prosecution had failed to establish a prima facie case against the accused persons and ordered all to be acquitted and discharged.

4. PP v Ahmad Zahid Hamidi [2022] 9 CLJ 713, HC

Issue: (i) Whether the defence of political donation was successfully raised? (ii) Whether selective prosecution is a good defence? (iii) Whether the main witnesses were credible? (iv) Was the element of receipt of money proven by the prosecution in order to invoke the presumption under section 50(1) and



(3) of Malaysian Anti-Corruption Commission Act 2009 ("MACC Act")? (v) Whether the charges were defective for failure to provide particulars as to the identity of the persons who delivered the monies to the accused in all the charges. (vi) What weightage is to be given to ledgers obtained by the Malaysian Anti-Corruption Commission ("MACC")?

Background: The accused at the material time was a former Deputy Prime Minister of Malaysia. He faced 33 charges under section 16(a)(B) of the MACC Act for corruptly receiving gratification from a company called Ultra Kirana Sdn Bhd ("UKSB") with 33 alternative charges under section 165 of the Penal Code ("PC"), for offences of receiving a valuable thing without consideration in the accused's capacity as a public servant. In addition, the accused was also charged with seven alternative charges under section 165 of the Penal Code. The accused was charged with having corruptly received the sums of SGD200,000 from October 2014 to February 2015, SGD300,000 from March 2015 to May 2017, and SGD520,000 from June 2017 until March 2018. Based on seven of the alternative charges, the accused was said to have received a total amount of SGD4,240,000. All the monies stated in the 33 main charges relate to the contract which was awarded by the Ministry of Home Affairs ("MOHA") to UKSB. MOHA, UKSB and the Immigration Department of Malaysia ("Immigration") had engaged in a series of negotiations to expand the visa facilitation services ("VFS") to other countries and to introduce a new system called Visa Luar Negara ("VLN").

Judgment: (i) Political donation is only a good defence provided that first, the money was received as a political donation and secondly, the monies was spent purely for political purposes with supporting evidence to that effect. The defence has however failed to lead evidence to suggest that the political donation of RM200,000 received was in fact spent for political purposes. Therefore, political donation is not a defence for the accused and not applicable in the context of the present case.

(ii) On the issue of selective prosecution, Article 145 of the Federal Constitution is clear in that the learned Public Prosecutor is fully empowered to institute prosecution based on the outcome of an investigation carried out by an authority.

(iii) Having considered the evidence adduced in its totality by the prosecution through the oral testimony of PW15, PW16 (both directors of UKSB) and PW17 (the administrative manager of UKSB) as well as the ledger produced, the High Court concluded that the three key witnesses called by the prosecution, i.e. PW15, PW16 and PW17 were not reliable and neither were they trustworthy or credible. The notations of "Z" and "ZH" that appear in the ledger (P63) are not sufficient to prove that the accused in fact received the monies and/or gratification. The court further held that even though there was suggestion that the accused had received political donations of RM200,000 on two occasions, there was insufficient evidence of particulars before the court for the judge to come up with any amended charge(s). The same reasons above apply to the seven alternative charges under section 165 of the PC and the two additional amended charges.

(iv) It is trite in order to invoke the presumption that gratification has been corruptly received pursuant to section 50(1) and presumption of knowledge under section 50(3) of the MACC Act, the prosecution must prove the primary fact that the accused in fact received the cash in the present case. As the prosecution had failed to prove the element of receipt for offences under section 16(a) (B) of the MACC Act as well as section 165 of the PC, the statutory presumption under subsections 50(1) and (3) were not applicable and could not be invoked in law and fact against the accused.

(v) In all charges preferred against the accused, it must be noted that there was no mention of the representative of UKSB who had given the monies to the accused. The High Court observed that section 153 of the Criminal Procedure Code (CPC) required the prosecution to provide the particulars as to the identity of the persons who delivered the monies to the accused in all the charges. The absence of such important details as to who delivered the cash to the accused amounts to a serious prejudice of the accused's rights in the preparation of his defence. Thus, the absence of such particulars is fatal and renders the charges against the accused defective.

(vi) Despite the ledgers being admitted as evidence and the makers testifying and by virtue of it being a document obtained by the MACC pursuant to



section 41A of the MACC Act, the evidence of PW15, PW16 and PW17, as key prosecution witnesses, was not credible, trustworthy, believable nor reliable. As their evidence was based heavily on the ledger, no weightage should be given to it.

The accused was acquitted and discharged from all charges without his defence being called as the prosecution failed to make out a prima facie case.

5. Lukman Hakim Mohamed Yousef v PP [2022] 1 CLJ 271, HC

Issue: (i) Is it fatal when a charge is amended and the amended charge is not read to the accused person? (ii) Whether the failure to state the description or characteristics of the weapon ("parang") as how it appears to fit in either paragraph 8 or 9 of the Second Schedule to the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ("the Act"), as well as the omission of "without lawful purpose" in the charge, cause the charge to be defective?

Background: The appellant was charged at the Butterworth Sessions Court with the offence of being in possession of a scheduled weapon pursuant to section 7(1) of the Act. The appellant was unrepresented during the proceedings in the Sessions Court. Based on the notes of proceedings, the appellant pleaded guilty to the aforesaid charge at the very first instance when he was brought before the Sessions Court and the charge was read out to him. Subsequently, the deputy public prosecutor sought for an oral amendment to be made to the charge to remove the words "Kanun Keseksaan" after the words "(Akta 357)". The Sessions Court judge ("SCJ") allowed the oral amendment. Immediately thereafter, the SCJ had explained to the appellant that the sentence which was provided for the offence in question carries a minimum of five years' imprisonment and a maximum of ten years' imprisonment. The appellant understood the sentence involved and still maintained his plea of guilt. He was eventually convicted and sentenced to five years' imprisonment to commence from the date of arrest. He then appealed to the High Court.

Judgment: (i) Sections 158 and 159 of the CPC require an amended charge to be read and

explained to the accused and for the plea to be taken from him. Despite the procedural non-compliance, this irregularity had not caused any prejudice to the appellant nor had any form of miscarriage of justice occurred. The essence of the charge that was read to the appellant remains the same as the words "Kanun Keseksaan" would not bring any additional meaning.

(ii) The charge against the appellant had only used the word parang and it failed to provide the description or characteristics of the parang as regards how it appears to fit in either paragraph 8 or 9 of the Second Schedule to the Act. This court was of the view that the omission to state that the parang was a parang which characteristics relate to either paragraph 8 or 9 of the Second Schedule had caused the charge to be defective. It also did not disclose any offence which was known to law in the said charge against the appellant. In addition to that, the omission of inserting "without lawful purpose" in the charge had deprived the appellant from knowing that it only amounted to an offence if he had possessed the parang without lawful purpose and if he did have lawful purpose he should said so; thus, there was a material defect when a charge under section 7(1) of the Act failed to include the words "without lawful purpose".

The conviction and sentences passed by the Session Court were quashed. The appellant was acquitted and discharged.

6. PP v Mohammad Fadil Hanapi Md Sahidek [2022] AMEJ 1667; [2022] 1 CLJ 469, HC

Issue: (i) When a criminal trial has already completed but the decision has not been delivered before the trial judge passed away, is it right for the succeeding trial judge to exercise his discretion in ordering the trial *de novo*? (ii) Whether a succeeding judge could revisit the finding of prima facie case made by the previous judge?

Background: The respondent was charged under section 376(1) of the Penal Code ("PC") on April 28, 2019 before the Sessions Court in Batu Pahat. The prosecution completed their case by calling four witnesses and the Sessions Court judge (previous judge) held a prima facie case was successfully proved and ordered the accused

to enter his defence. The defence was completed, and submissions were duly filed. The date for decision was set on June 14, 2021, but as a result of movement control order, it was postponed. The previous judge was then transferred to Kuala Lumpur. On July 27, 2021, the previous judge passed away, hence the decision could not be delivered. The case went before another Sessions Court judge who presided over the Sessions Court in Batu Pahat. The Sessions Court judge ordered the trial *de novo* (to start afresh). The deputy public prosecutor applied to the High Court to exercise its revisionary power pertaining to the *de novo* order made by the Sessions Court.

Judgment: (i) Section 261 of the Criminal Procedure Code ("CPC") on the change of magistrate, which includes a judge, during hearing, ought to be read in the light of the existence of video recordings, which facilitate the viewing of witnesses' testimonies like never before. Even judges are up for scrutiny on their conduct in open court. Witnesses more so. Recalling witnesses for the sake of analysing demeanour has taken a backseat. Demeanour may now be seen at first instance except in rare circumstances where the recordings are lost or pictures are too fuzzy to make out what transpired in the courtroom or the files were corrupted. As the life of a man in society evolves and progresses with time and technology, so too must the interpretation of law and its applications.

(ii) When the previous judge ruled a prima facie case has been made out by the prosecution, it is not for the succeeding Sessions Court judge to rule otherwise, no matter what his personal thoughts are.

In the upshot, the *de novo* order made by the succeeding Sessions Court judge was set aside and the ruling by the previous Sessions Court judge that the prosecution has made out a prima facie case against the respondent, was restored. It was also ordered that the defence may call their witnesses to the stand and the provisions of section 173 of the CPC must be complied with, in particular, section 173(ha) onwards, and, the succeeding Sessions Court judge will then evaluate the evidence and make the necessary ruling at the end of the defence case.

7. PP v Ravichanthiran Ganesan [2022] 1 CLJ 804, HC

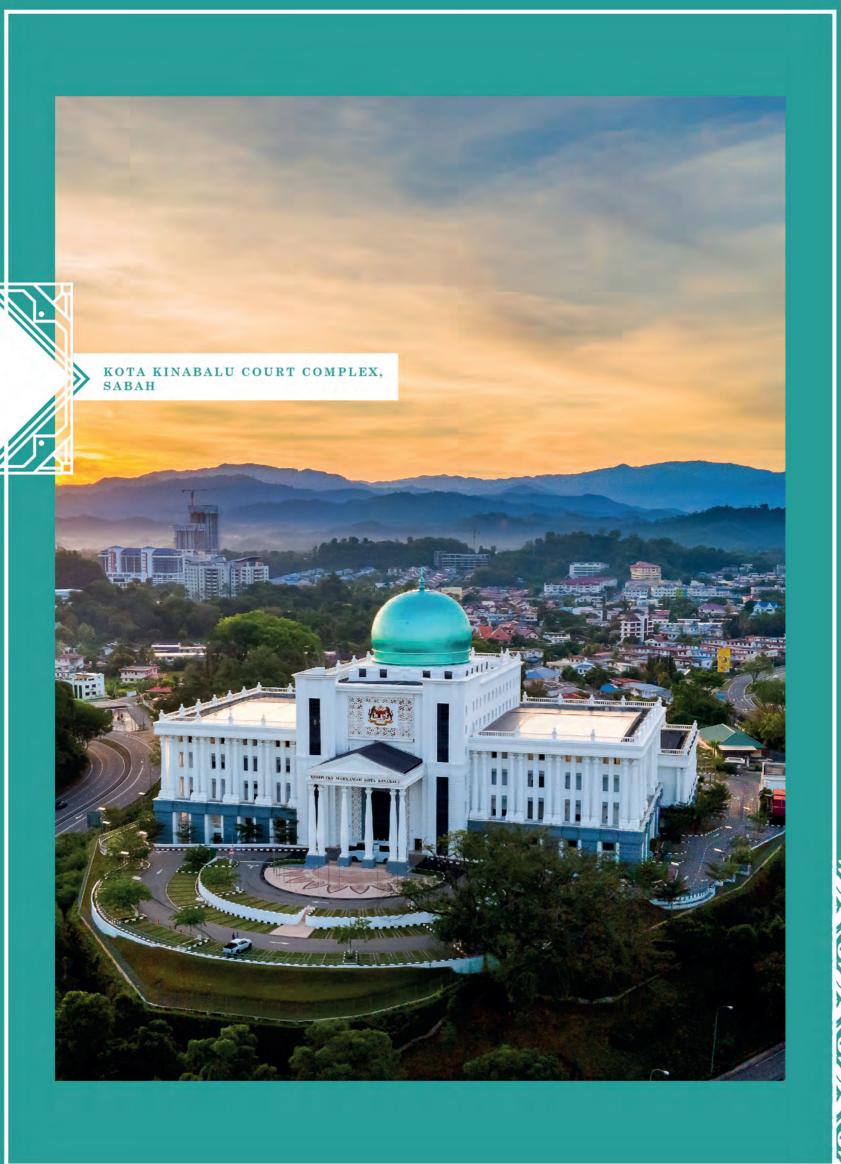
Issue: Whether a person's refusal to provide the password to his email requested by a police officer conducting an investigation, amounted to an offence under section 186 of the Penal Code.

Background: A charge was brought against the respondent at the Magistrate's Court for obstructing the police officer in charge ("SP1") from carrying out his official duties because of the respondent's refusal to give SP1 the password to his email, when the latter was recording the respondent's statement pursuant to section 112 of the Criminal Procedure Code ("CPC") during an investigation. The magistrate acquitted and discharged the respondent without calling for his defence to entered. The prosecution appealed the decision to the High Court.

Judgment: The High Court held that the respondent was well within his rights under section 112 of the CPC to refuse SP1's question as regards his email password. The proviso in section 112 of the CPC allows a person to refuse to answer any question which would have a tendency to expose him to a criminal charge, penalty or forfeiture. For there to be an offence under section 186 of the Penal Code, the prosecution must show that the accused had voluntarily obstructed a public servant in the discharge of his public duties. In this case, there was no physical obstruction or criminal force by the respondent.

In addition, a charge under section 186 of the Penal Code must state that the public servant was carrying out his public functions when he was obstructed by the respondent. The charge in this case was defective as it was missing the element that the respondent had voluntarily obstructed a public servant in his public function.







GLOBAL PERFORMANCE OF CIVIL CASES IN YEAR 2022

COURTS	2022							
	CIVIL							
	BALANCE BROUGH FORWARD FROM PRE-2021	REGISTRATIONS	DISPOSALS	BALANCE CARRY FORWARD	RATE OF DISPOSALS	BACKLOG %		
FEDERAL COURT	649	811	971	489	66.5%	33.5%		
COURT OF APPEAL	4,537	4,105	4,032	4,610	46.7%	53.3%		
HIGH COURT	45,680	121,271	130,242	36,709	78.0%	22.0%		
SESSIONS COURT	23,590	49,005	48,312	24,283	66.6%	33.4%		
MAGISTRATES' COURT	40,063	178,115	176,933	41,245	81.1%	18.9%		
TOTAL	114,519	353,307	360,490	107,336	77.1%	22.9%		

- The Federal Court disposed of 971 civil cases leaving 489 cases pending disposal. This translates to a disposal rate of 66.5%.
- The Court of Appeal cleared a total of 4,032 cases leaving a total of 4,610 cases pending disposal. This is a disposal rate of 46.7%.
- The two High Courts globally disposed of a total of 130,242 civil cases and 36, 709 cases remain pending disposal. This is a disposal rate of 78.0%.
- The Session Courts throughout Malaysia disposed of a total of 48,312 civil cases. A total of 24,283 cases remains pending disposal. That is a disposal rate is 66.6%.
- As for Magistrate's Courts, a total number of 176,933 civil cases were disposed of and 41,245 remain pending disposal. The disposal rate is a very healthy 81.1%.



GLOBAL PERFORMANCE OF CRIMINAL CASES IN YEAR 2022

COURTS	2022							
	CRIMINAL							
	BALANCE BROUGH FORWARD FROM PRE-2021	REGISTRATIONS	DISPOSALS	BALANCE CARRY FORWARD	RATE OF DISPOSALS	BACKLOG %		
FEDERAL COURT	300	248	387	161	70.6%	29.4%		
COURT OF APPEAL	1,770	1,114	1,194	1,690	41.4%	58.6%		
HIGH COURT	5,411	5,903	5,671	5,643	50.1%	49.9%		
SESSIONS COURT	16,145	49,270	51,952	13,463	79.4%	20.6%		
MAGISTRATES' COURT	347,182	2,142,537	2,159,571	330,148	86.7%	13.3%		
TOTAL	370,808	2,199,072	2,218,775	351,105	86.3%	13.7%		

- As for criminal cases in Federal Court, 387 were disposed of leaving 161 cases pending disposal. This is a disposal rate of 70.6%.
- In terms of criminal cases, the Court of Appeal disposed of 1,194 cases. There remain 1,690 cases pending disposal. This is a disposal rate of 41.4%. This rate is particularly acute in relation to criminal appeals as the presence of the accused is necessary especially so for capital offences.
- As for criminal cases, the two High Courts globally disposed of 5,671 cases. 5,643 cases remain pending disposal. The disposal rate is 50.1%.
- The Session Courts throughout Malaysia, disposed of a total of 51,952 criminal cases. Leaving a balance of 13,463 cases pending disposal. This is a disposal rate of 79.4%.
- As for Magistrate's Courts, the total number of criminal cases disposed of is 2,159,571 though a staggering 330,148 cases remain pending disposal. The disposal rate is a healthy 86.7%.



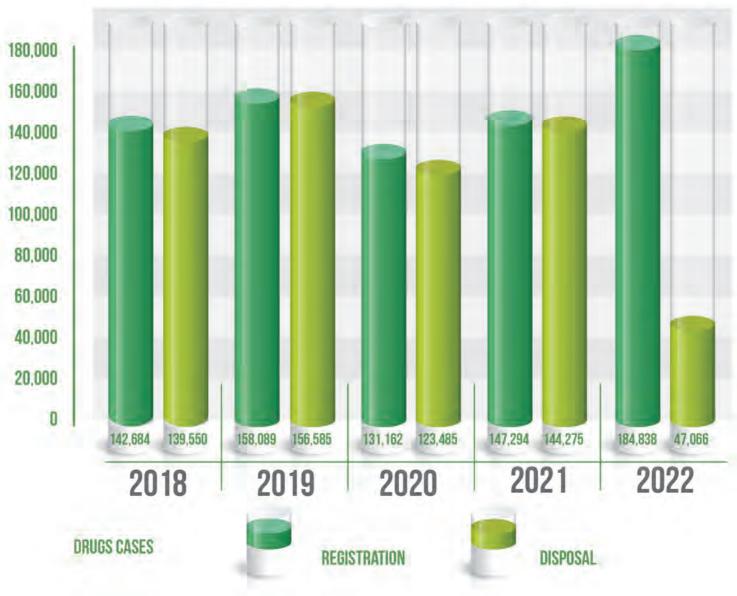
GLOBAL PERFORMANCE TRAFFIC CASES IN 2022

COURTS	2022 TRAFFIC CASES					
	BALANCE BROUGHT FORWARD FROM PRE- 2021	REGISTRATIONS	DISPOSALS	BALANCE CARRIED FORWARD	RATE OF DISPOSALS %	BACKLOG %
MAGISTRATES' COURT	261,048	1,641,924	1,650,589	252,383	86.7%	13.3%
TOTAL	261,048	1,641,924	1,650,589	252,383	86.7%	13.3%

- The large number of criminal cases registered in the Magistrate's Courts in 2022, namely 1,641,924 cases, is largely attributable to the sizeable number of traffic summons cases in those Courts comprising about 500,613 (76.6%) 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 sentence aspect of traffic summons should greatly alleviate the load on such Courts, as well as provide better access to justice for the public.



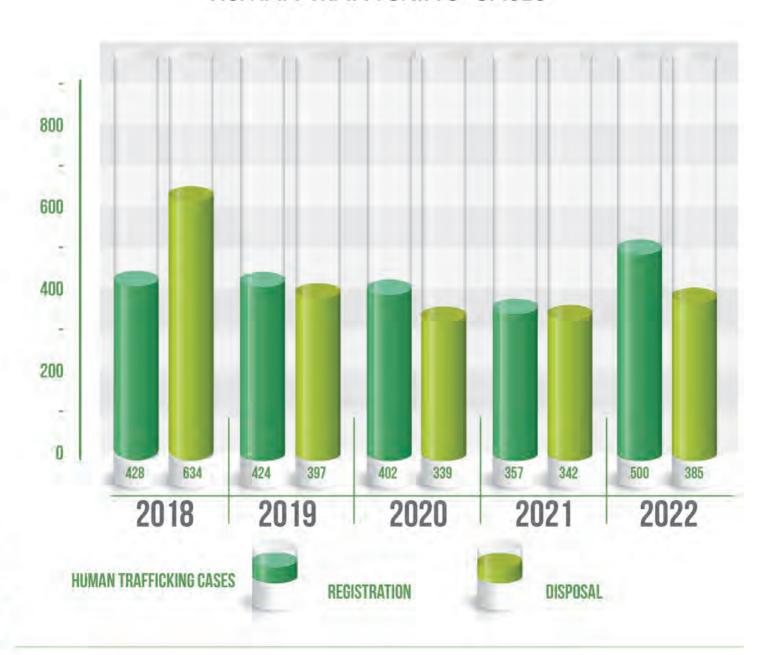
DRUGS CASES



- The graph shows the registration and disposal of drugs cases in Malaysia from 2018 to 2022.
- There has been a major change in the number of drugs cases recorded. There was a large increase in registrations between 2021 and 2022 about 25.5%. The number of cases registered between 2018 and 2022 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 curg this category of crime. In 2020, the registration declined by -17.0% as compared to 2018.

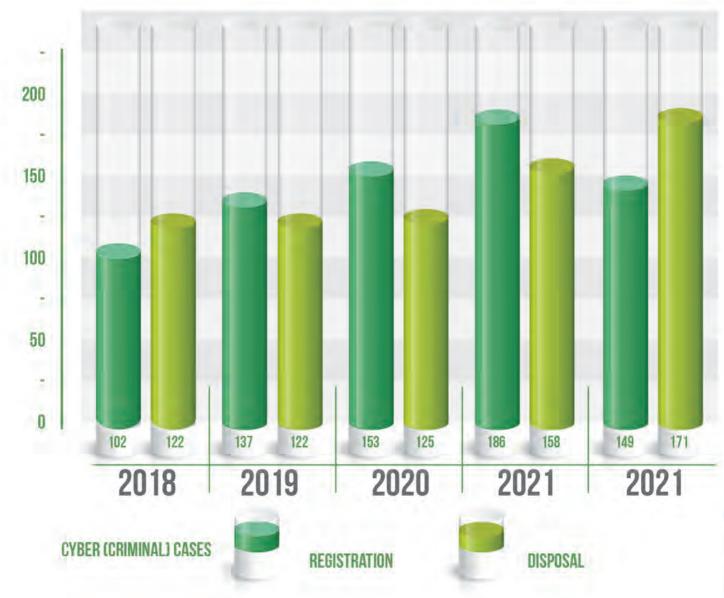


HUMAN TRAFFICKING CASES



- The figures are between the years 2018 and 2022. Over that four-year period, the number of cases appear not to deviate too much from year to year although the trend appears to show a decline in the number of registrations. The 24 pandemics has greatly reduced movement in and out of the country and it is possible that the decline in the number of cases from 402 cases in 2020 to 357 cases in 2022 is attributable to the pandemic.
- However, the statistics show that there was also a slight decline between 2018 and 2019 well before the pandemic. However, 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.

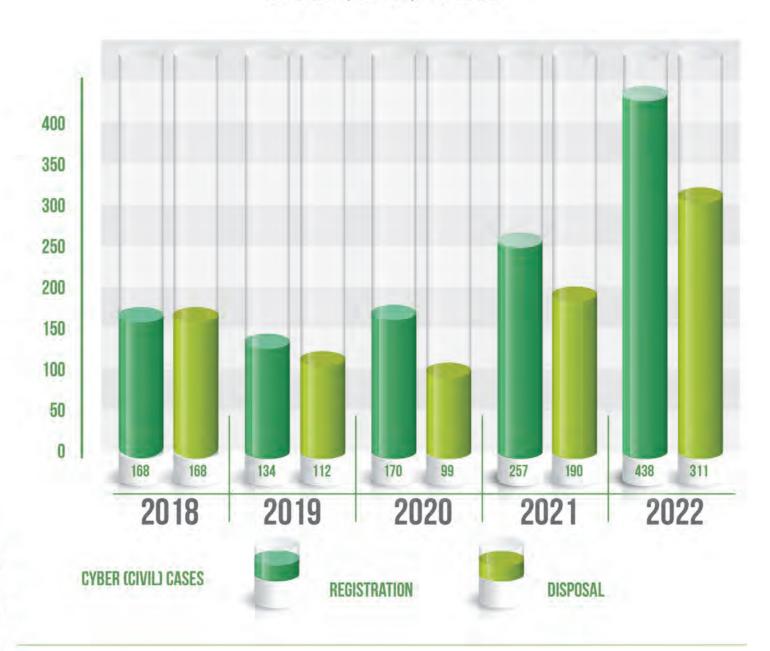
CYBER (CRIMINAL) CASES



- The criminal cyber cases have been consistently increasing as well, with 2022 marking a slight decrease from 2021 by -19.9%.
- The steady rise of such cases reflects the greater use of social media and perhaps the greater tendency to misuse it.



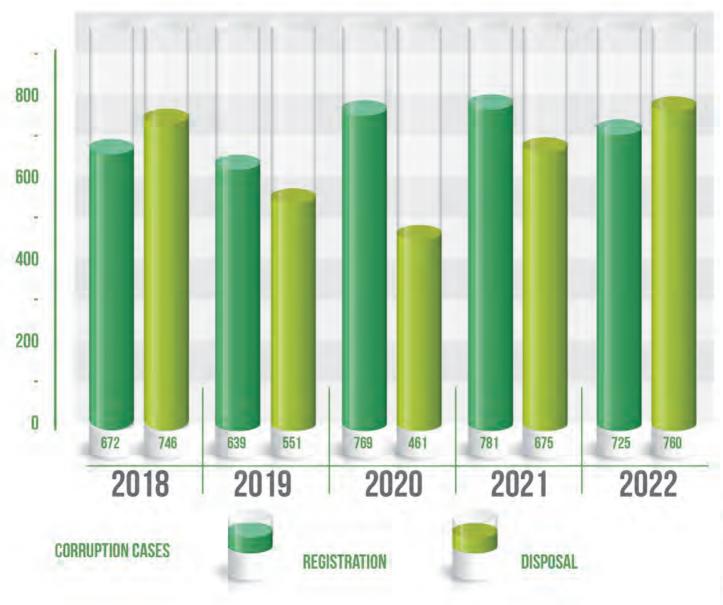
CYBER (CIVIL) CASES



Explanatory Notes:

• Civil cyber cases, refer mostly to cyber defamation cases. There was a large increase of 70.4% of civil cyber cases between 2021 and 2022.

CORRUPTION CASES



Explanatory Notes:

The number of corruption cases registered between 2018 and 2022 has not been consistent, with some years recording more cases than others. However, the total number of cases registered in 2021 and 2022 shows a small decrease. 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.



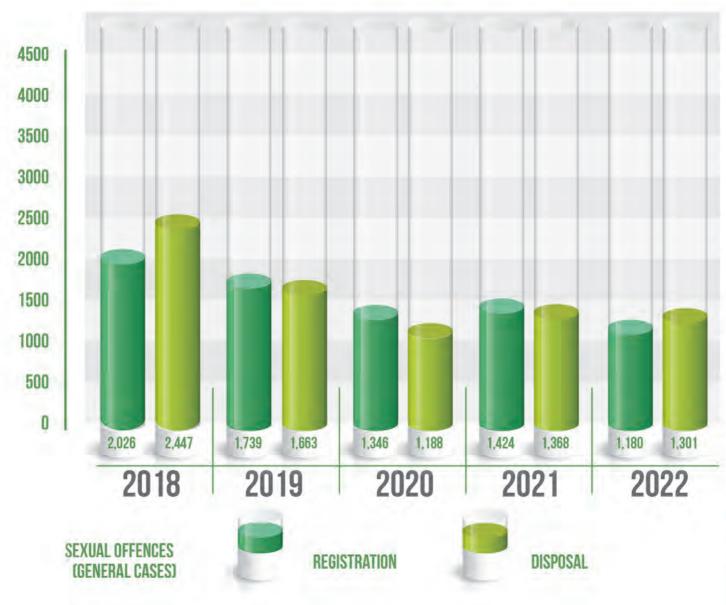
STREET CRIMES CASES



Explanatory Notes:

Street crime cases have been on the steady decline between the period of 2018 to 2022. 2022 recorded the lowest number with a -17.9% 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

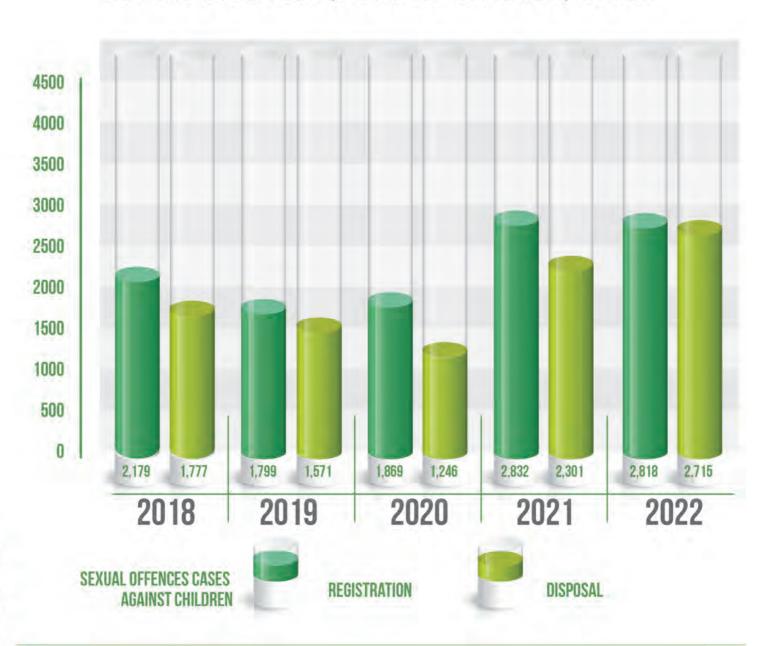


Explanatory Notes:

 Sexual offences against children. By and large, there was a slight decrease in the number of registrations by -0.5% between 2021 and 2022.



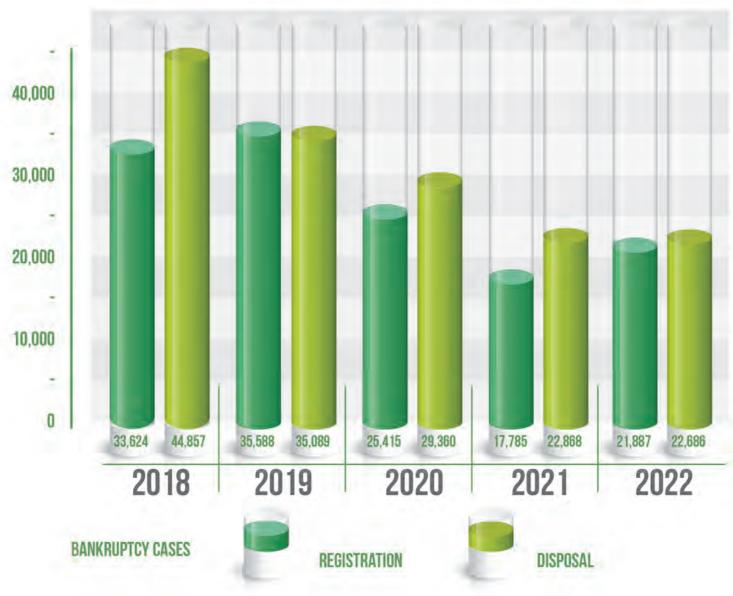
SEXUAL OFFENCES (AGAINST CHILDREN) CASES



Explanatory Notes:

• General sexual cases on the other hand appear to be recording a decreasing trend of registration for the period between 2018 to 2022. Specifically, the drop between 2021 and 2022 was -17.1%.

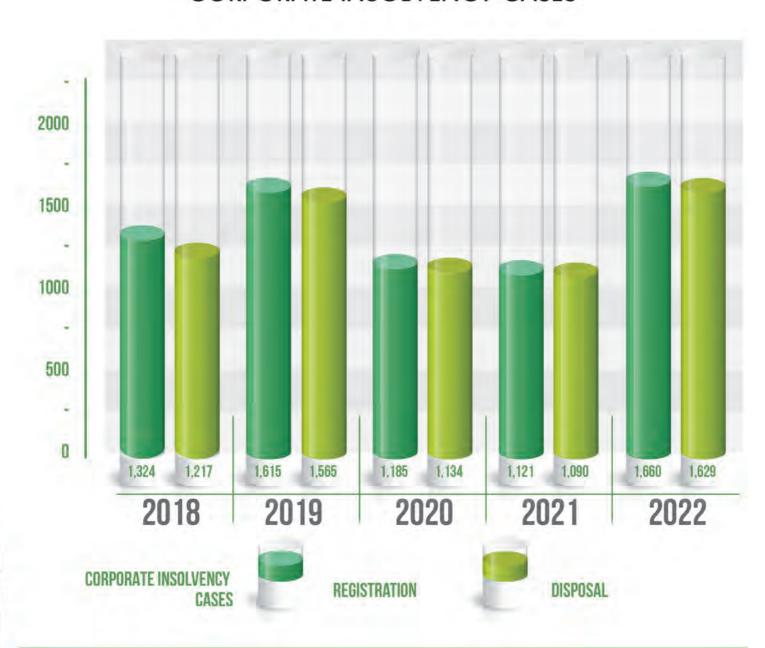
BANKRUPTCY CASES



- Bankruptcy cases have seen al drop in the number of registrations between the years 2020 and 2021. However, in 2022 recorded an increase of 23.1% in registrations.
- The amendments to bankruptcy laws that increased the threshold for bankruptcy claims along with other amendments has naturally reduced the number of such cases filed.

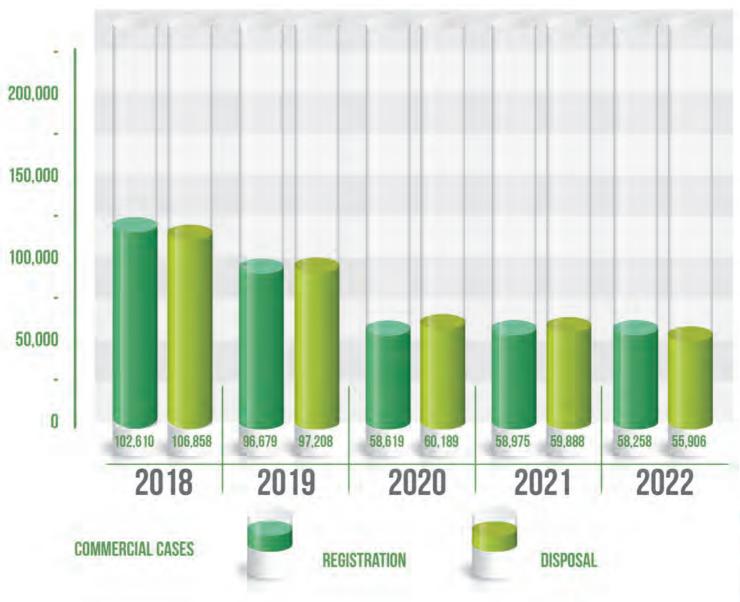


CORPORATE INSOLVENCY CASES



- In terms of corporate insolvency cases, a similar trend can be seen in that the number of cases registered yearly between 2018 and 2021 has been on the decline.
- The period between 2021 and 2022 recorded the highest increase in registrations which is up to 48.1%.

COMMERCIAL CASES

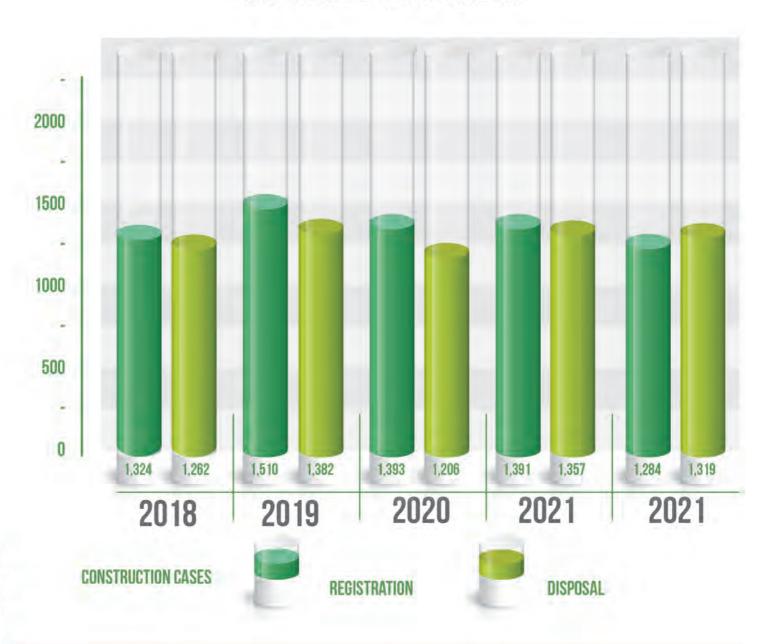


Explanatory Notes:

- Commercial cases are of significance, as they are, to some extent, an indicator of the country's economy as disputes are some measure of active business and trade.
- The registration number of commercial cases has been on the decline between 2018 and 2020.
- The registration figures slightly rose in 2021 and between 2021 to 2022 there was a decrease about -1.2%.



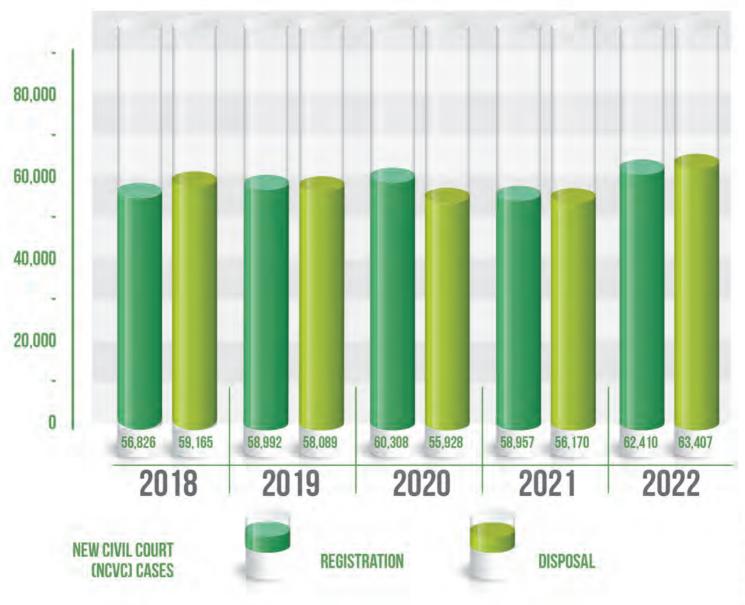
CONSTRUCTION CASES



Explanatory Notes:

- The number of construction cases over the same period of time also shows a minimal drop with registrations averaging about 1,200 cases a year.
- This may well be traceable to the pandemic as well as the construction payment industry mechanism and the other alternative dispute resolution mechanisms in place.

NEW CIVIL COURT (NCVC) CASES

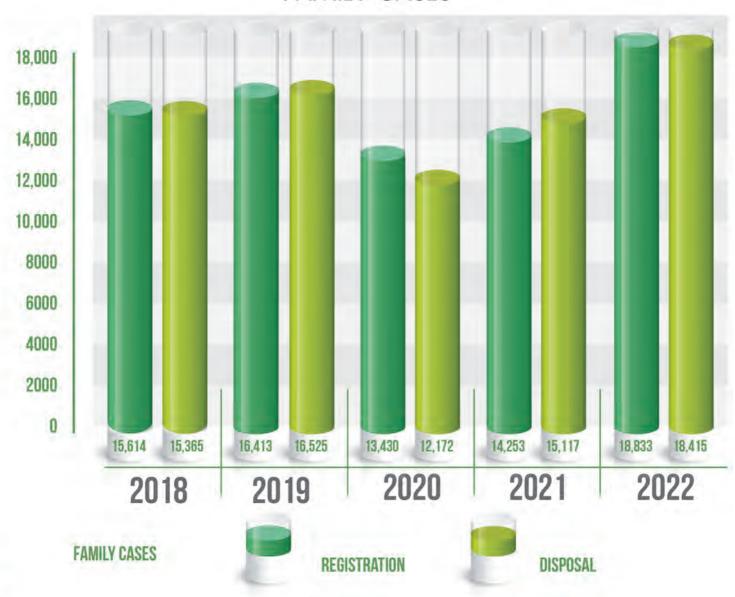


Explanatory Notes:

General civil cases also appear to have increased by 5.9% in 2022 compared to 2021.



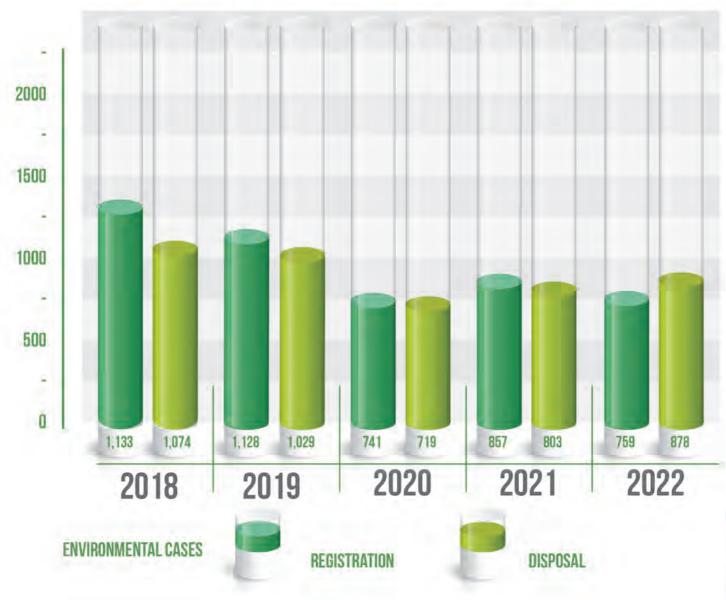
FAMILY CASES



Explanatory Notes:

• The number of family cases increased by 32.1% in 2022 compared to the previous year. However, this figure may not be reflective of the toll taken on numerous households during the pandemic period as reported by the media.

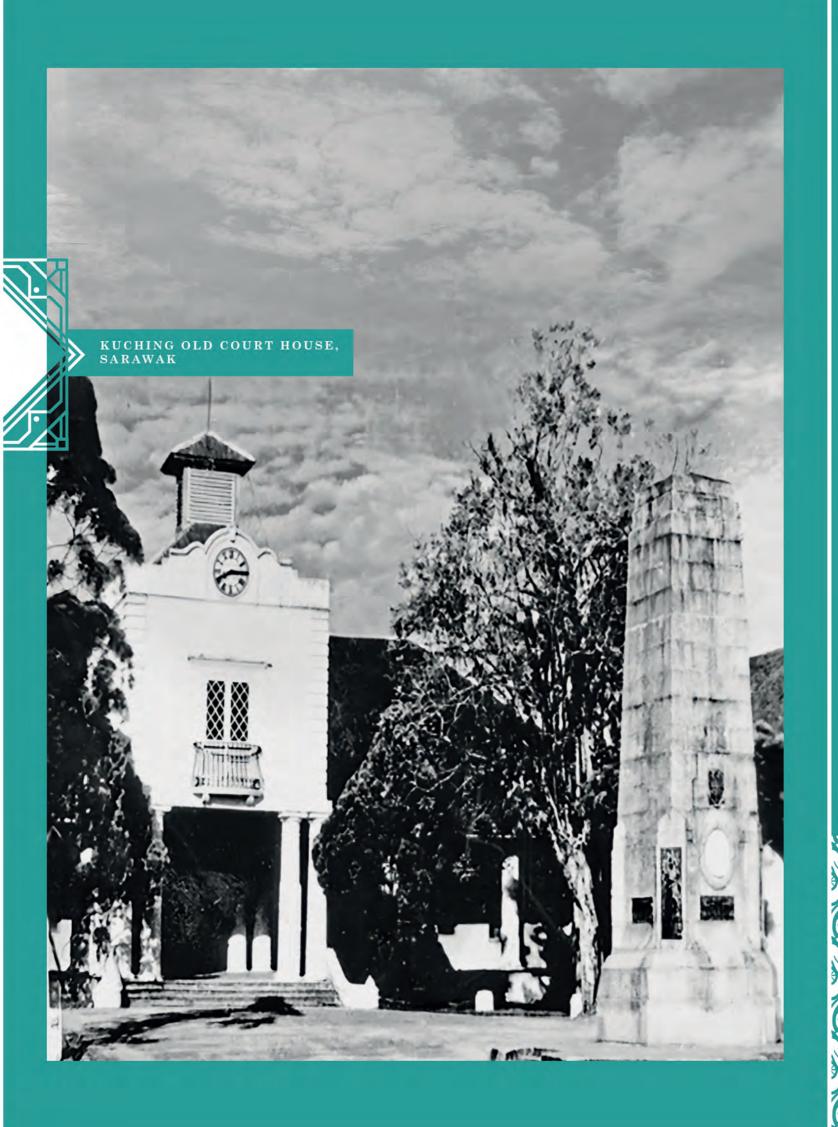
ENVIRONMENTAL CASES



Explanatory Notes:

- As for environmental cases, registration has also been on the decline for the period between 2018 and 2020.
- 2018 recorded the highest registrations whereas 2022 recorded only 759 cases or a decrease by -11.4% from 2021.
- However, the registration figures slightly rose in 2021.











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