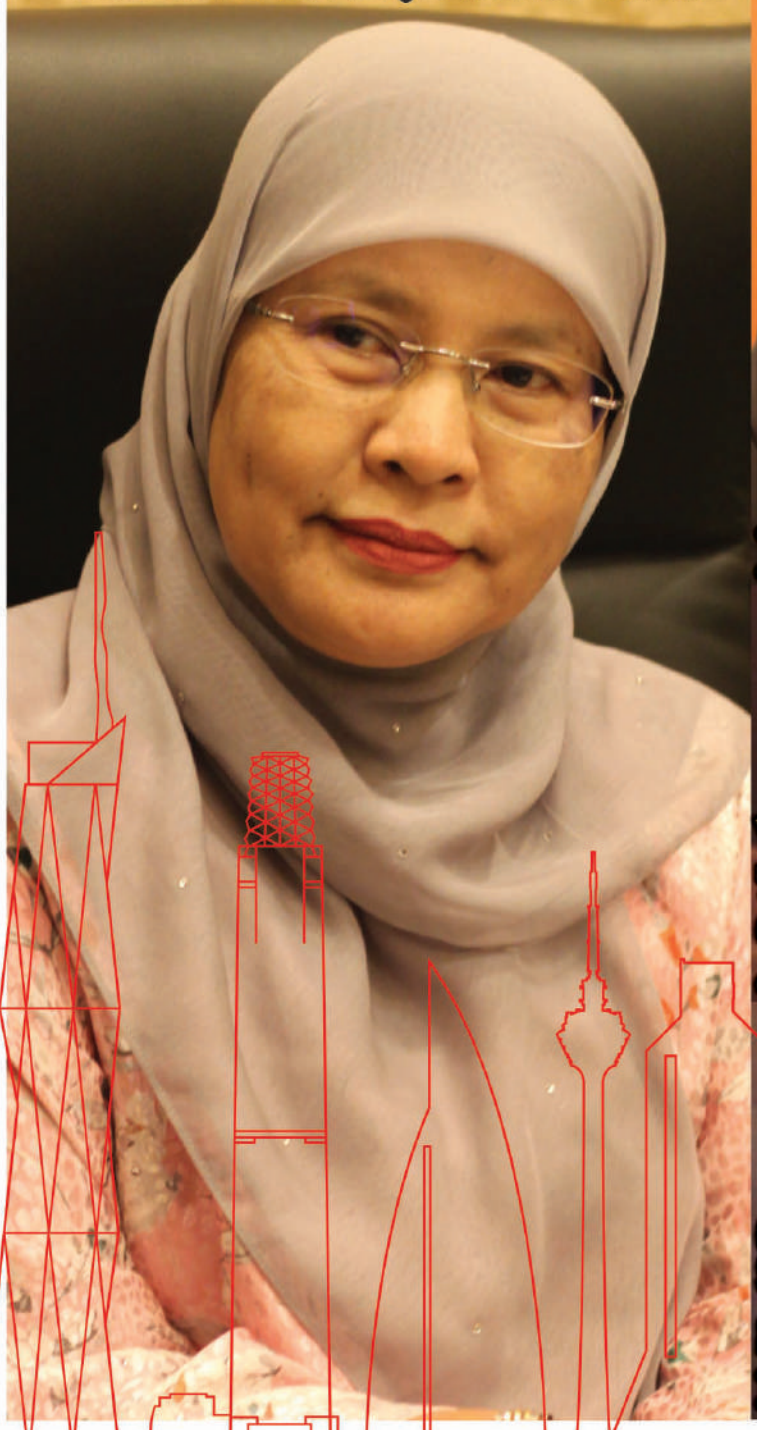
AdREM
JOURNAL OF THE SELANGOR BAR
Volume 1, 2022
PP 10031/08/2014(-28256)

CRITICISMS DON'T MATTER

Chief Justice YAA Tengku Maimun Tuan Mat





Tan Sri Suriyadi

CREATE UNREST OR PROMOTE HARMONY



YA Datuk Nallini

THE EXPANSION OF MALAYSIAN JURISPRUDENCE



Chairman of the Selangor Bar

SERVE TO EMPOWER WITH KINDNESS AND COMPASSION

One stop specialise in offset printing



concept . design . print

LIAN BROTHERS ENTERPRISE (PUCHONG) SDN BHD (880416-U)
No. 8-1, Jalan Puteri 7/7, Bandar Puteri, 47100 Puchong, Selangor Darul Ehsan.
Tel : +603 8068 5388 / +6012 672 8982 Fax : +603 8068 9999 Email : lianbro@yahoo.com

Letter Head, Name Card, Envelope, Corporate Folder, Booklet, Bill Book, Note Book, Packaging Box, Money Packet, Invitation Card, Post Card, Greeting Card, Wedding Card, Newsletter, Table Tent Card, Book Mark, Non Woven Bag, Flyer, Brochure, Catalog, Calendar, Paper Bag, Sticker, Poster and more ....

LIAN BROTHERS



AdRem
Journal Of
The Selangor Bar
Volume 1, 2022
PP 10031/08/2014(-28256)
Cover:
Chief Justice YAA Tengku Maimun Tuan Mat
Tan Sri Datuk Suriyadi
YA Datuk Nallini
Ms Kokila

FROM THE EDITOR'S DESK

The Ad-Rem magazine has always been the Selangor Bar's landmark production throughout the years which showcases exciting and thought-provoking articles and interviews, to increase our Members reading pleasure. This year is no different with the Ad-Rem having an exceptional line-up of interviews.

This term's magazine features interviews with the current Chief Justice of Malaysia YAA Tun Tengku Maimun Bt Tuan Mat, Federal Court Judge YA Datuk Nallini Pathmanathan, and the Director of Asian International Arbitration Centre (AIAC) Tan Sri Suriyadi Halim Bin Omar.

YAA Tun Tengku Maimun Bt Tuan Mat's brilliant interview is one not to be missed as Her Ladyship spoke about lessons she learned as Chief Justice, the notion of separation of powers and public's access to Courts (including understanding the decisions made by Courts).

YA Datuk Nallini Pathmanathan's interview was equally indulging where Her Ladyship spoke about our nation nurturing the Rule of Law, the direction Malaysian Law is heading towards and the quality and improvements the Bench would like to see from the Bar.

In Tan Sri Suriyadi's interview, he spoke about the role members of the Bar play in influencing public perception and how that can create unrest or promote harmony. Tan Sri Suriyadi also adviced that lawyers of today should not only think of themselves but to be for the people and what their profession represents.

Apart from our customary interview with the present Chairman Ms. Kokila Vaani who spoke on how she persevered the challenges she had whilst being the youngest and first female chairman of the Selangor Bar, there are also numerous articles contributed by members of the legal fraternity which include 'Employment (Amendment) Act 2022; What is in Store?', 'The Spirit and Objectives of the Road Traffic Act 1987, ...', 'Judical Management: Automatically Academic' and 'Judgng Judges : The removal of superrior court judges from office in Malaysia'.

We thank members of the Editorial Board for their endeavoring effort, guidance and leadership throughout the production of this magazine. We further thank Cik Adlin who worked tirelessly behind the scenes particularly in collating the structure for production after every interview.

Dato' Rajpal Singh
On behalf of Editorial Board

Hj. Zainal Abidin & Dinesh Nandrajog
Publication Sub-Committee



Dato' Rajpal Singh
On behalf of Editorial Board



Hj. Zainal Abidin
Publication Sub-Committee



Dinesh Nandrajog
Publication Sub-Committee

AdRem
Journal Of The Selangor Bar

Articles and photographs found within this publication are effort of the Publication Sub-Committee of the Selangor Bar. If you are interested in contributing to it, please call Mr.N.K.Thinnagaran at +603-5519 6219 or email to secretariat@sgorbar.org. However the Publication Sub-Committee reerves the right not to publish them or edit them according to editorial policies and space constraints.

The views expressed by the authors are the responsibility of the authors and are not those of the Selangor Bar.

www.selangorbar.org

The Selangor Bar **Committee** 2022 - 2023



Row 1 (Left to Right):
K. Theivaendran, M K Thas (Bar Representative), Haji Zainal Abidin Shaikh Zakaria, Nurul Muhaniza Hanafi, Alvin Neo (Honorary Secretary), Kokila Vaani Vadiveloo (Chairman), Yu Ai Ting, Syahrul Syazwan Salehin, Eugene Roy Joseph

Row 2 (Left to Right):
N.K. Thinnagaran (Executive Secretary), Richard Teh, Dinesh Nandrajog, Yohendra Nadarajan, Afifuddin Hafifi

Not In the Photograph: Ambiga Rajendran

Editorial Board

Publication Chairpersons: Dinesh Nandrajog & Hj. Zainal Abidin
Editorial Board Members: Dato' Rajpal Singh & Salim Bashir
Advertising Sales Enquiry: N.K. Thinnagaran
(+603-5519 6219 or secretariat@sgorbar.org)

All payments towards the advertisements booked are to be crossed and made payable to "Selangor Bar Committee" at least a week prior to publication deadline. Advertisement material to be submitted two weeks before production.

Secretariat Staff



Sitting (Left to Right - Row 1)
Khairul Nizam Bin Abdul Samad, Shariza Binti Mohamad
N.K. Thinnagaran,
Vasantha Kumari,
S. Gunaalan

Sitting (Left to Right - Row 2)
Ellavhersee, A. Tulasi, Sree Kumare,
Farizan Binti Abdul Satar,
Priya Dharshini

AdRem is the offical publication of the Selangor Bar Commitee.
For correspondence through post:
The Editor
39-1, Jalan Bola Jaring, 13/15 Section 13,
40100 Shah Alam, Selangor Darul Ehsan, Malaysia

Communication
Tel: +603 5519 6219
Fax: +603 5519 9037
Email: secretariat@sgorbar.org

Design & Layout
Ermes Design & Advertising
Tel:+6012 303 9818
Email: edmondlee.2643@gmail.com

Print Production
Lian Brothers Enterprise (Puchong) Sdn Bhd
No. 8-1, Jalan Puteri 7/7, Bandar Puteri,
47100 Puchong, Selangor Darul Ehsan.
Tel: +603 8068 5388 / +6012 672 8982
Fax: +603 8068 9999
Email: lianbro@yahoo.com













COVER STORY & INTERVIEW

04 CRITICISMS DON'T MATTER
Interview with Chief Justice YAA Tengku Maimun

22 CREATE UNREST OR PROMOTE HARMONY
Interview with Tan Sri Suriyadi Bin Halim Omar, Director AIAC

60 THE EXPANSION OF MALAYSIAN JURISPRUDENCE
Interview with YA Datuk Nallini

70 Serve To Empower With Kindness And Compassion
Interview with the Chairman, Selangor Bar

TALKS (135-140)

Rajagopal Nadassan, Samuel Payara & Pervex Mash, Richard Teh, Sim Miow Yean, Sharifah Shafika Binti Syed, Dinesh Nandrajog, Mohamad Ezri Bin Abdul Wahad, Janice Ooi Huey Peng, Teoh Kheng Siang, Siti Munirah Binti Maarof, Prof. Dr. Ida Madleha Binti Andul Ghani Azmial, Hastiny Subramaniam, T.Vijayandran, Valerie Chong Wei Chen, Datuk Dr. Baljit Singh Sidhu, Daphne Rethual, Sharmila Ravindran, Salim Bashir, Mak Hon Pan, Jerald Joseph, Foong Cheng leong & Pauling Hee, Kee Hui Yee, Siew Li Foo, Zemilah Binti Mohd Noor, Jocelyn Lim, Varghese Onny, Yudisgtra Darma Doral & Ong Yu Jian, Dato' Nazri Bin Mustafa, Murshidah Binti Mustafa & Mohamad Redzwan Bin Idrus, Wendy lee Wan Chieh, Aarthi Jeyarajah, Rasjsurianj Pillai,Steven Perian K.C, Kamilah Kasim

ARTICLES

18 Employment (Amendment) ACT 2022; What is in Store?
(by Dr. Pathma Raj Ramasamy)

36 The Spirit and Objectives of the Road Traffic Act 1987, ...
(by Kandiah Chelliah & Kenneshwaran Kandiah)

55 Judical Management: Automatically Academic
(by Joshua Kong, LL.B (Cardiff), Barrister at Law)

87 Judging Judges : The removal of superrior court judges from office in Malaysia
(by Dr Jenita Kanapathy)

SBC ACTIVITIES (96 - 134)

Buka Puasa, Charity Contribution Raya, Charity Contribution Madrasatul Quran Yakubiah, Meeting with Selangor Police, SRC Raya Movie Night, Civil Law Conference, Meeting with Managing Judges & High Court Judges, Meeting with Lower Court Judges, Meeting with Pengarah Pendakwaan Negeri (PPN), Meeting with Jabatan Kimia Malayisa, Petaling Jaya, Inauguration of the DBGS Programme, Emoot Competition, Laser Tag, Make a Wish to the Selangor Bar, Chinese New Year Celebration, Deepavali Charity Event, Convevancing Hi-Tea & Get Together 2022

96 SELANGOR BAR ANNUAL DINNER & DANCE

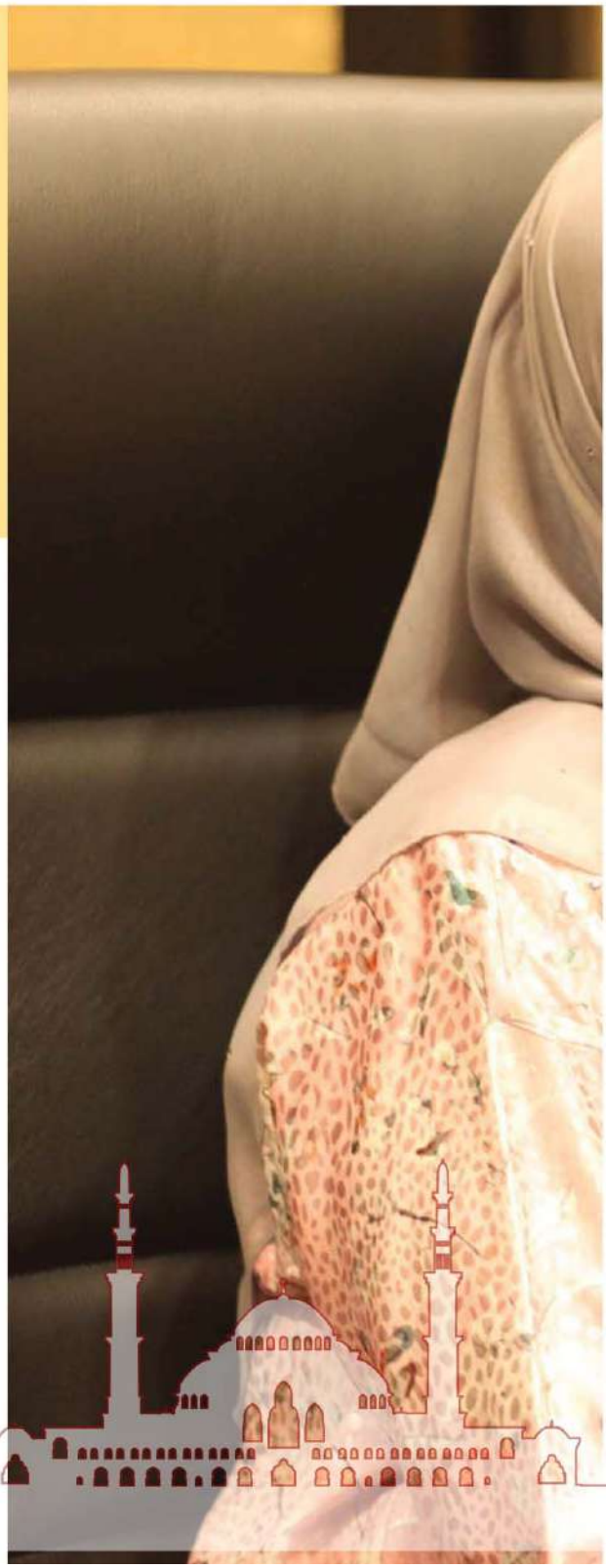
124 INTERSTATE BAR GAMES

CRITICISMS DON'T MATTER

INTERVIEW WITH CHIEF JUSTICE YAA TUN TENGKU MAIMUN

Shouldering the responsibility of being the key person upholding the Judges' Code of Ethics in the highest standards of personal and judicial conduct comes with the role of a Chief Justice. Under the present leadership, the Judiciary has started to broadcast its hearings to ensure the continuity of the system in the midst of the COVID-19 pandemic and this has created greater transparency.

The public's understanding and literacy of the Law has never been vital now, more than ever. The Judiciary calls for practitioners as well as academicians to play their role in educating the public and elucidate judgments in layman terms to close the gap. The public needs to understand that the Judiciary has always been, and will always be on the side of the Law.



Chief Justice Tun Tengku Maimun Binti Tuan Mat broke the ceiling for women in the service for Justice when she was elevated to her current position as head of the Judiciary on 2 May, 2019. An intelligent lady who rules objectively, Her Ladyship seeks to ensure the rights of those who appear before her will be provided with the best of Malaysia's Justice system all the while preserving the integrity and independence of the Judiciary.

Coming full circle of the various roles she fills in life, Her Ladyship credits her significant other, Datuk Zamani Ibrahim and her family as being some of her greatest supporters on her journey to where she is today.

The AD REM team was honoured to have been greeted by the bubbly personality of Her Ladyship from the first moment she entered the meeting room of her Chambers at the Istana Kehakiman in Putrajaya.

"I applied for Law, but it was not something that I did because it was my ambition to become a lawyer, a judge or anything like that."



Let's start from the beginning. Can you take us through your early childhood and how you ended up pursuing law?

I was born and raised in Kota Bharu. My early years was spent there, right up to secondary school. After the results of my Malaysia Certificate of Education (MCE), which is the equivalent to Sijil Pelajaran Malaysia (SPM) now, I was offered to do my Form Six in Tunku Kurshiah College (TKC), a boarding school in Seremban. Having been raised by doting grandparents, I was pampered and was very reluctant to move out of my comfort zone.

But my father was adamant, and so, I went to TKC and by God's Grace and Mercy, I came out the best student for the Arts Stream in 1977 High School Certificate (HSC). It was tough initially because I was terribly homesick but at the same time, I was determined not to disappoint my father. I wanted very much to make him proud. So I studied very hard. When the High School Certificate (HSC) Form Six results were out, I applied for Law, but it was not something that I did because it was my ambition to become a lawyer, a judge or anything like that. It was just a matter of me applying for a course that I thought suited my qualification.

Before you were appointed to be a Judge of the High Court, you had served in the AG Chambers. Who was the most influential figure in your early years of practice?


“ It's easier for the younger officers now. They can just surf on the internet.”

While there was no one in particular whom I saw as an influential figure, I must say that I was very grateful for the exposures that I have had.

I served so many bosses in the Judicial and Legal Service. In the Judicial service, I was privileged to have served 11 judges, including two Chief Justices, one Chief Judge of Malaya and prominent judges like, Yang Berbahagia Tan Sri Dato' V.C. George, The Honourable Dato' Seri Hj. Shaik Daud bin Md. Ismail, the late Honourable Datuk Wira Hj. Mohd Noor bin Hj. Ahmad, Yg Berbahagia Tan Sri Zainun Ali, to name a few.

Whilst I was a Senior Assistant Registrar (SAR) serving Tan Sri V.C. George, one of the things he told me was to follow up and be updated with all the decisions that had been appealed against. In that way, one could keep abreast with the law and learned our mistakes if that decision was reversed.

Upon elevation as a judicial commissioner/judge of the High Court, I maintained my own statistics. I also maintained my own record to keep track of the appeals to the Court of Appeal and the Federal Court.

I am truly grateful to all my previous bosses. They have guided me, and that assisted me immensely in discharging my own responsibilities as a Superior Court judge now.

Aside from keeping a record of my statistics, whist being a SAR in the Commercial Division of the High Court in Kuala Lumpur (KL) where there are a lot of cases filed, I kept a record of all the authorities submitted by lawyers. In those days, we do not have a personal computer (PC). I kept a notebook with an index where I wrote the subject matter, the issues and the decision. Such that the next time a matter comes up, and I recall a case with a similar issue, I would just open my notebook. I need not go to the library, or ask anyone else what the authorities are on particular issues. That helps me a lot in terms of keeping abreast with the law.

It's easier for the younger officers now. They can just surf on the internet.

It has been almost three decades of you serving the Judiciary, from your appointment as a Magistrate, to a Sessions Court Judge, Judicial Commissioner of the High Court, Judge of the High Court, and subsequently your elevation to the Court of Appeal and Federal Court. What inspired you to join the judicial services/Judiciary?

My decision to join the government service was more on security of tenure.

When I graduated in 1982, the salary of an officer in the Judicial and Legal Service, or other public service for that matter, was very much lower than those in private sector.

However, looking at the stability and benefits of being a public servant, such as the medical benefits, better working hours, retirement benefits, these were factors that made me chose to be in service. There were no specific elements or personalities that inspired me to join the service.

Being in the Attorney-General Chambers (AGC) and then moving to Judiciary, which one do you relate to better?

I would relate to the Judiciary better.

I was in the AGC for a relatively shorter period as compared to the Judicial Service because I spent most of my Judicial and Legal service years in the courts.

While at the AGC, I was attached to the Drafting Division. And, a short while as an Assistant Director in the Legal Aid Bureau in Kuala Terengganu. Thereafter, I served in the Judicial Service until my appointment as the Judicial Commissioner.

During your time so far as a Judge, what is the most memorable moment of your judicial service?

The most memorable moment for me as an officer in the Judicial and Legal service would be serving as a magistrate in Port Dickson. One of my decisions ultimately came up to the Federal Court. I came to know about it when I received a letter from a Federal Court Judge Tan Sri Dato' Mohd. Azmi Kamaruddin, in which he said,

"My purpose of writing to you is to congratulate you for the short and concise judgment which I feel should be a model for other magistrates to emulate. If you continue to keep abreast with the law, I am sure you will achieve excellence in your future legal and judicial career."

It motivated me so much that I had his letter framed and hung up in my Chambers. His secretary called me and she said that Justice Azmi told her that after having spent all the long hours reading through bundles of cases and judgments, it was a pleasant surprise to come across a short and concise judgment from a magistrate. My judgment in that case was a 2-page judgment on an application under Order 14 rule 21 of the Subordinate Court Rules 1980.

What was your reaction when you were offered and subsequently appointed to be the first woman Chief Justice of Malaysia?

I was surprised because never in a million years did I imagine that I would become a Chief Justice.

At the same time I was humbled and grateful to be given the opportunity to serve the nation. It is no doubt a heavy responsibility. I was initially sceptical of my own ability to undertake that responsibility. However, with the support of my fellow judges, I shouldered on, and I am happy to say that their support was a tremendous boost to my confidence.

What do you find most challenging about your role as Chief Justice?

As I have mentioned in my first interview with the media, I thought the biggest challenge would be to manage the negative public perception of the Judiciary then.

As a Chief Justice, was gender at any point restrictive or limiting for you to perform your duties to your full capabilities?

No. Even as an officer, it never occurred to me that I could not do, or not do well in certain things because I am a woman. Now, as you know in the Judicial and Legal Service, one is very much acknowledged by merits and senior officers may be passed over by the juniors on merits.

But those days, when there were not as many officers as now, it was basically a matter of course, when you reach a certain level, or a certain grade, and after serving a certain number of years, you can expect to be promoted.

When I got my first promotion, I was heavily pregnant with my second baby. That promotion caused me to be transferred out from Port Dickson to Kuala Terengganu where I was posted as the Assistant Director of the Legal Aid Bureau. When I accepted the promotion, I had to travel in my condition from Kuala Terengganu to Besut, to Dungun and to Kemaman to conduct cases and we did not have highways then. I persevere. Clearly, being a woman and being in such a condition was not a consideration to deny me of a promotion.

As a woman, I think it is important that we get the support from our family, particularly, from our husband. And my husband has been very supportive. He is the one who has always been telling me, 'Write your grounds because that is your legacy.' He is one person who is not going to ask me, 'Where is my drink? Where is my lunch? Where is my dinner?' I can tell him, 'I have got homework today, so let's have a quick lunch or dinner,' and then I'm back at my study table.

'Write your grounds because that is your legacy.'



What other people say does not matter. Whether I have been praised, or whether I have been criticised fairly or otherwise, it really does not matter so long as I know and believed that I am on the right track.

The support of our male colleagues is also important. I must say I am very lucky to have theirs and I am very grateful for that. Gender issues never arose.

In those days, we learn not only from our bosses, our colleagues, but we also learned from the staff because when they were there for so long, there were things that they know better. In the first few days that you came, especially to a small station and not knowing what or where to look, you called on the experienced staff and they would be your first point of reference.

What were the dynamics at home between two practitioners, where one is a senior criminal practitioner and you in the AGC. Did you have any discussions about general ideas and how do you cope with that?

Sometimes, when he appeared in Court and he came across certain authorities, and he won because of them, he would let me know.

We would share that kind of knowledge but I will not discuss with him my cases or the issues that confront me because at the back of my mind, he has his own weight to bear. We also did not have much time to talk about law. During our younger days, we lived in Seremban and his office was in Malacca. He travelled a lot as he was a litigation lawyer doing cases all over the country.

As we did not have much free time to discuss, we were basically doing our own things. But when I became a magistrate, he gave me a very good insight. He shared the news that most practitioners expect a reasoned judgment for all the cases that they argued, win or lose.

I took the cue from him. Whenever I adjourn, even for a simple application, I will make it a point to state my reasons. I would not stop at simply recording 'application dismissed', 'application allowed' or 'case dismissed' or 'allowed'.

Having heard from someone who is a stakeholder, I appreciated how important it was for me to state the reasons and I understood from my early years in service the significance of giving reasons for my decision.

What is the most important lesson that you have learned since being Chief Justice?

I have been praised, and I have been criticised for the judgments that I delivered, and that is to be expected. Because when we decide on cases, there will only be one winning party. You cannot expect the losing party to be happy.

The most important lesson that I've learned is this:
What matters most is for me to do the right thing according to the law. In other words, what other people say does not matter. Whether I have been praised, or whether I have been criticised fairly or otherwise, it really does not matter so long as I know and believed that I am on the right track.

You can't let these criticisms make you lose your sleep. Once you know that you are doing the right thing and you are on the right track, everything else doesn't matter.



What career do you think you would have pursued if you didn't study Law?

Well, perhaps a school teacher teaching history. I love History whilst in school.

Much has been said and written about the Rule of Law. How are we as a nation nurturing this fundamental right?

It must first be understood that when it comes to the question of the nation and fundamental rights, the task to protect and preserve them cannot be on the Judiciary alone. It is an obligation that also befalls on the shoulders of the other two Branches of the Government: Executive and the Legislatures. The Executive is the body that enforces the Law, and they therefore stand to run afoul of the Law the most. The police, the licensing authorities, et cetera, must learn to continue to respect fundamental rights in exercising their powers.

The same goes to prosecutors who must not prosecute with the intent to secure a conviction at all costs. Doing so would deprive innocent persons of their right to freedom and allows the guilty party to get away.

The Legislature too must ensure that our laws are always updated and capable of protecting those it was enacted for adequately and effectively. In this regard, there have been numerous local and international complaints on the state of our preventive detention laws that only the Legislature can look into. Then there are also the outdated laws such as Section 8 (2) of the Civil Law Act that debars the estate of a deceased person from claiming for exemplary damages. We have seen the negative effect of this provision on the estate of persons who unfortunately died in police custody.



Insofar as the Judiciary is concerned, I think the nurturing and preservation of fundamental rights is an important part of upholding the Rule of Law.

We all know the Rule of Law has many components amongst which, include equality of the law and independence of Judiciary. It is my view that the Judiciary has markedly improved in both aspects of upholding the Rule of Law. For example, see recent decisions in:

- Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209;
- Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anor [2017] 3 MLJ 561;
- Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeaks [2018] 1 MLJ 545;
- Alma Nudo Atenza v Public Prosecutor [2019] 4 MLJ 1;
- SIS Forum (M) Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, Intervener [2022] 2 MLJ 356;
- Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323.

Fundamental rights are preserved when the public knows that no one is above the law and they remain confident that the Judiciary will act predictably and fairly so that anyone who seeks to deprive those rights is deterred from doing so. No one gets special treatment. And of course, independence of the judiciary ensures that the judges always decide cases fairly and only on the evidence and the law.

In terms of nurturing the fundamental rights, I think we are not fully there yet and we have much work to do in this regard. But we are slowly moving towards that as a nation.

AdRem

Following from that, what you just said in regard to the cases you mentioned, what is your take on the Separation of Powers? We see in your recent decisions that you have made the three pillars of the Constitution clearer.

Yes. I think Separation of Powers is also an important component of the Rule of Law. Because from there we derive the authority of the Judiciary.

I think it is important for us to understand the basic elements of the Separation of



I think Separation of Powers is also an important component of the Rule of Law. Because from there we derive the authority of the Judiciary.

Powers. The Executive decides on policy matters, the Legislature passes the Law, and the Judiciary interprets the law. As we also know, the current system in Malaysia, as other Common Law countries, there will always be some overlapping between the Executive and the Legislature, but not so the Judiciary. It stands on its own.

Article 4 (1) says that the Federal Constitution is supreme and any law which is inconsistent with the Federal Constitution, shall to the extent of the inconsistency, be void. This brings us to the ouster clauses. If the Courts are not allowed to check whether that particular law is valid or not by virtue of the ouster clause, we will never be able to uphold Article 4.

Now everyone seems to be interested in the basic structure doctrine. The basic structure

The core of our problem now is public understanding and literacy.

doctrine is said to be a foreign doctrine imported from India, perhaps because it started from the case of Kesavananda Bharati v State of Kerala AIR 1973 SC 1461, from India. Forget about the nomenclature.

In the case of Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, Raja Azlan Shah whilst rejecting the Indian doctrine, mentioned specifically that our Federal Constitution has three basic features, namely, Separation of Powers, Fundamental Liberties, and the relation between Federal and State.

So, there we have it - Separation of Powers is a basic structure. If you do not want to call it basic structure doctrine, call it basic structure features. And if you do not want to call it basic structure features, call it basic structure element. The point is, we have Separation of Powers in our Federal Constitution.

There is no issue of importation of a foreign doctrine and there is no cause for worry as some claimed, that we will be losing our own identity from its implementation.

We need to understand that when we are talking about Separation of Powers, it is an important feature in our Federal Constitution.

And from that flows the authority or functions of the Judiciary.

What do you think are the improvements you would like to see in regard to the public's access to Courts (including understanding the decisions made by the Courts)?

Proceedings are open to public and Court events are broadcasted. Access to the Courts is not so much an issue these days. We also coordinate with the media who broadcast our decisions to the public, and we provide summaries of our judgments so that the public may understand better. In that sense, we are more open now.

The problem arises because when we are too open, we tend to be misunderstood. The public does not read the judgment and they give comments without understanding the judgment.

The core of our problem now is public understanding and literacy. Greater transparency and openness must be met with adequate literacy and understanding. In this regard, I think there need to be a third party assistance. Practitioners and academicians must play their role to educate the public and explain judgments in layman terms.

The Court cannot come out and defend ourselves. Also, whatever the court says does not carry much weight as compared to what the Bar says, as it has done with a recent case and I really appreciate that. While the Courts can write a simpler judgment so that the public can understand them, the fact remains that sometimes judgments cannot be written simply for the public to understand when the issue is quite technical.

The public trusts lawyers to understand. If the public trusts them to understand and when in fact, they don't, they spread misinformation and it will become more confusing.

That is why I think it is important for the judiciary to get assistance from the Bar and the AGC. The Bar has been very helpful in this regard and I am grateful for that.

In your opinion, which area of Law requires reform?

One aspect, and the most current one would be the citizenship matter. Perhaps it is time for legislative intervention.

In recent times, I have observed a number of amendments for example, to the Employment Act 1955, the Courts of Judicature Act 1964, in terms of expediting the Court processes. I think even more recently, the Anti-Sexual Harassment Bill was passed in Parliament which marks a step forward in coping with the issue.

The state of affairs concerning Family Law in our legal landscape is far from satisfactory. I say this because I look at the Singapore model and I see that they have transitioned from an adversarial approach to an inquisitorial one because I think a family-related case should not be treated like it is a commercial or a civil case.

There needs to be a greater informality and in Malaysia, judges are bound by the law and precedent. Unless there is a wholesome legislative reform, we are bound to work within that limited model. Certain areas need to be more informal, especially when it comes to cases involving children.

In my view, that particular area of law needs to be looked into. The other areas, perhaps are the preventive detention laws and the Civil Law Act, the outdated or archaic laws which should be revisited, if not revamped.



What are your thoughts on the movement towards the implementation of Artificial Intelligence sentencing? Does this take away the sole discretion of a magistrate or a Sessions Court Judge?

Artificial Intelligence is not going to replace the magistrate's role. The idea is to provide a compendium of sentences which is similar, like we have a Compendium for accident cases, for example. If you lose a finger, or if you suffer head injury, what is the range of the award to be granted. That was the idea.
Officers have been and will often be reminded that this will not take away the discretionary powers of the magistrate. It only serves as a guide and it is not meant to be something that they refer to and strictly apply in passing sentence.

Be patient. Whatever the circumstances, never, ever sacrifice integrity.

What improvements do you think need to be made intheprivate legal practice/Judicial services?

The young lawyers sometimes surprise me because they do not seem to be practising the proper etiquette of being in court. Though I understand they attend etiquette classes.

There have been calls to separate the Judicial and Legal service, as well as to separate the appointment of the Attorney-General and the Public Prosecutor. I think that will be a matter of policy by the Executive, so I shall not comment on that as it is entirely a matter for the AGC.

What advice would you give to young Lawyers/students in regard their pursuit and career in law?

The young lawyers today face different kind of challenges from what we had before because now things have changed not just in the profession itself, but the education is quite different from how it used to be. Legal Education is more accessible now.

The profession has become more competitive, and while it is an admirable quest, they must not forget to keep themselves grounded, open, and yet principled.

That is the advice that I would give them. It is not just about one's physical strength or endurance these days, but it is about the mental fortitude and above all, how one is willing to stay true to his or her principles in the face of adversity.

In spite of what they go through, they must always consider how far they would be willing to depart from what they believe in, and that they must never sacrifice their integrity in the pursuit of their aspirations.

The advice I can give young lawyers is that, they must remain steadfast in every aspect of their live and career. Be patient. Whatever the circumstances, never, ever sacrifice integrity.

What one seeks may not necessarily come quickly, and in the face of tribulations, we are quick to falter. Remain steadfast and of course, be honest.

Honesty is the virtue.

What are your thoughts about the different qualification requirements into the Bar. Should there be a Common Bar Course?

I am aware this issue has been outstanding for quite some time, but my first impression would be, is it not a policy matter? Because if it is, then it is a matter for the AGC and the authorities and I shall not comment.

What do you think of the lawyers appearing before the Courts in terms of their quality, and their demeanour?

Generally, I have no complaints. I think we have a good batch of lawyers except for a few who do not quite observe the ethics of appearing before the Court.

The AD REM team from the Selangor Bar was pleased to receive the acknowledgment of Her Ladyship for the Bar's support of the Judiciary and having worked closely together recently.

As someone who holds integrity in high esteem and her conscience led by the law, Her Ladyship sets the tone for other passionate upholders of the Constitution. The interview has lent us a glimpse into the personality of the Right Honourable Chief Justice as she faces the challenges that come with her role with grace and dignity.

The message to all practitioners of the Law is clear: Stand by your principles. Remain steadfast and above all, hold on to your integrity.

The Selangor Bar thanks Her Ladyship for carving some time in her busy schedule to meet with the editorial team and making us feel welcome.





EMPLOYMENT (AMENDMENT) ACT 2022; WHAT IS IN STORE?

by DR. PATHMA RAJ RAMASAMY

The initial plans to implement the Employment (Amendment) Act 2022 ("EA 2022") in place of the Employment Act 1955 ("EA 1955") from 1st September 2022 created huge panic and chaos amongst Malaysian employers. However, the Malaysian Human Resource Ministry then agreed to postpone the implementation of the act till 1st January 2023. Therefore from 2023, EA 2022 will effectively govern the employment industry in Malaysia. This article seeks to analyse the major changes with implementation of EA 2022 along with some humble inputs on how these changes could well affect the employment industry in Malaysia.

Understanding an employment contract

Before examining the impact of EA 2022, the main question that needs to be dealt with is what is an employment contract? To answer this question reference can be made to S2(a), S2(b) and S3 of the Contracts Act 1950. Essentially an employment contract will usually be termed as a contract of service wherein the employer is said to have some sort of control over the employee.

Reference can be made to the Federal Court case of HOH KIANG NGAN v MAHKAMAH PERUSAHAAN MALAYSIA & ANOR [1995] 2 MLRA 435 wherein the court had clearly stipulated that the difference between a contract of service and contract of service is a question of fact that is to be determined on case-to-case basis.

Therefore, an employment contract can be determined based on the control test and EA 2022 will only play a part in an employer-employee scenario. Contract for service will not usually fall under the purview of EA 2022 as the contract is only entered into for a specific purpose and is not usually formed under the pretext to create an employer-employee relationship.



The implementation of EA 2022 is bound to bring about certain changes to the employment industry in line with the changing employment conditions in Malaysia. Some notable changes are highlighted as follows:

Widening of the scope of EA 2022

One of the major changes with the implementation of EA 2022 is that the First Schedule of EA 2022 will now protect any person who is under a contract of service regardless of the wages earned by the employee in question. This makes EA 2022 a blanket law which will governs all employees in the employment industry. This also puts the onus on the employers to comply with the minimum employment standards provided by EA 2022.

However, certain provisions within EA 2022 such as provisions among others in respect of overtime benefits as well as termination benefits will only be applicable to employees earning below RM4,000.00.

One of the main benefits of this change is that an employee will be clearer on their rights as an employee in general regardless of their salary as the EA 2022 can be referred to by them. EA 2022 can also be used as the guide by employers when drafting an employment contract as well. There will be a clear precedent for reference as a less favourable employment terms can be deemed as void and unenforceable.

Creating a better work life balance

EA 2022 also seeks to create a better work life balance for an employee. This is by reducing the number of maximum working hours in a week from 48 hours a week to 45 hours a week. The main aim is to have lesser working hours for an employee to allow the employee to have more rest time and a life outside work.

This new change also seeks to prevent exploitation of employees by their respective as any additional hours from the stipulated 45 weekly hours shall entitle an employee to claim for overtime from their respective employers.

EA 2022 also has come up with provisions which prohibits forced labour and an employee who threatens or forces an employee to do additional work and/or prevents an employee to leave work as the employer can now be subject to a fine or prison sentence if found guilty. This change is essentially an amalgamation of Article 6 of the Malaysian Federal Constitution which essentially prohibits slavery and/or forced labour.

Further, EA 2022 will also now have the option for an employee to have a flexible working arrangement. One of the many things that the recent Covid 19 pandemic has generally thought the society is that not all job requires physical presence of an employee and EA 2022 seeks to adapt this arrangement into employment industry moving forward. However, an employee seeking employment must always bear in mind that not all jobs can adapt a flexible working arrangement.

Creating protection for new parents

Expectant mothers can now benefit from an increase in paid maternity leave which is now 98 days through EA 2022. This is a significant increase from the earlier 60 days paid leave under EA 1955. This change would essentially allow mothers time to recover and to exercise better care towards their newborns as well as being in line with the international labour law precedent.

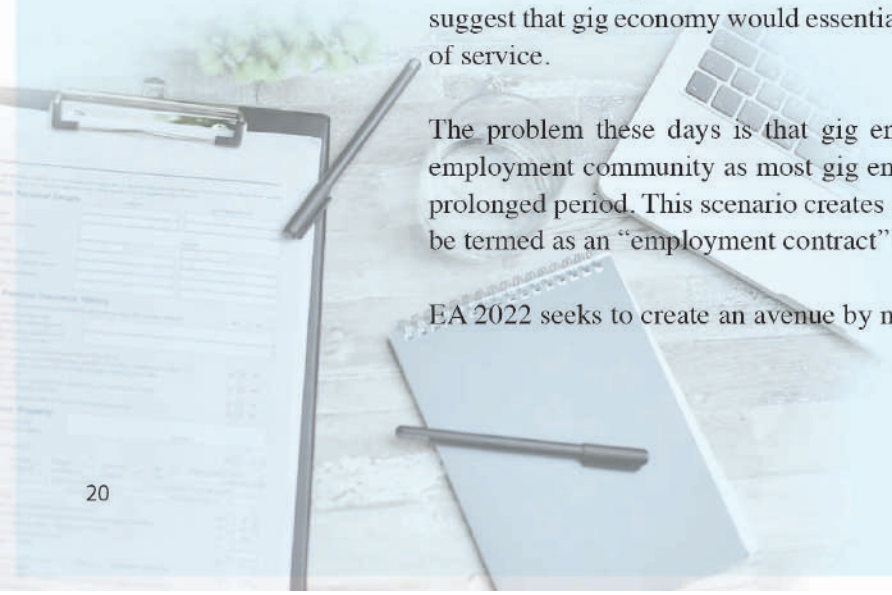
Further, EA 2022 also provides paid paternity leave of 7 days to fathers which is subject to only 5 confinements. Although many might raise an eyebrow stating the amount days given as paternity leave is rather less, one most consider that this is a start on the recognition of paternity leave in the employment industry in Malaysia. This new recognition should be welcomed, and one can only expect the law to improve with more amendments in the future.

Attempts to Recognise Gig Economy Employees

One group of employees who are often caught in the "penumbra of uncertainty" of the employment industry would most definitely be gig employees. Gig employees essentially mean an employee who is employed for a specific purpose i.e., a "gig" and therefore is only paid on for the completed "gig". This arrangement initially seems to suggest that gig economy would essentially be a contact for service rather than a contract of service.

The problem these days is that gig employees form a rather significant part of the employment community as most gig employees are engaged by a gig employer over a prolonged period. This scenario creates a grey area in law wherein this arrangement can be termed as an "employment contract" through the conduct of the parties.

EA 2022 seeks to create an avenue by now stating that if there is no written contract of



employment then a person can still be considered as an employee provided the person can show that he had acted through the control and instruction of the other person, the person has used the material provided by the other person in completing the work, the person is being paid regularly by the other person for the work done and the work done benefits the other person.

In other words, the control test that had been explained in the case of Hoh Kiang Ngan (supra) has been now "expanded" wherein gig employees can also be categorised as employees. This would then mean that a gig employee can now rely on EA 2022 as an employee to their respective gig employer providing the gig. However, the effectiveness of this provision can only be accessed once EA 2022 is fully in force. Nevertheless, this new provision can well be used to ensure that gig employers do start taking steps towards protecting the wellbeing of their respective gig employees.

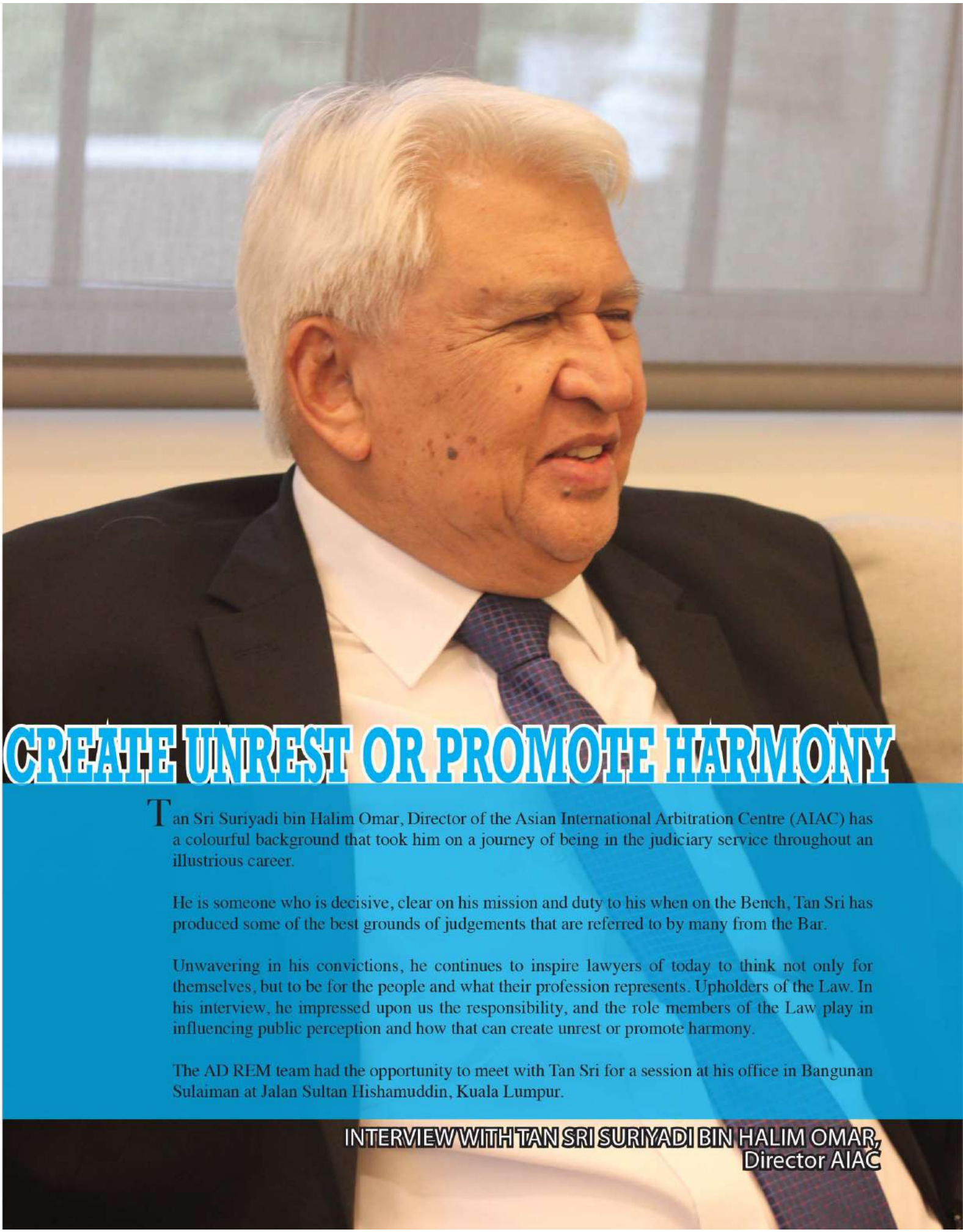


Conclusion

EA 2022 is much needed "plastic surgery" to EA 1955 which was in dire need of a make-over. The depth of the scope of EA 2022 is much welcomed as the law now can act as the holy book for the employment world in general. Several revamps such as the broadening of the scope of application of EA 2022, the reduction in working hours, the consideration of implementing flexible working hours and implementation of paternity leave is a much-needed change according to the development of the nation in general. EA 2022's efforts to also try and cater to gig economy employees also shows that the law in the words of popular jurist is indeed "a living phenomenon".

References

- Employment (Amendment) Act 2022
- Employment Act 1955
- Contracts Act 1950
- Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 2 MLRA 435
- Article 6 Federal Constitution of Malaysia



CREATE UNREST OR PROMOTE HARMONY

Tan Sri Suriyadi bin Halim Omar, Director of the Asian International Arbitration Centre (AIAC) has a colourful background that took him on a journey of being in the judiciary service throughout an illustrious career.

He is someone who is decisive, clear on his mission and duty to his when on the Bench, Tan Sri has produced some of the best grounds of judgements that are referred to by many from the Bar.

Unwavering in his convictions, he continues to inspire lawyers of today to think not only for themselves, but to be for the people and what their profession represents. Upholders of the Law. In his interview, he impressed upon us the responsibility, and the role members of the Law play in influencing public perception and how that can create unrest or promote harmony.

The AD REM team had the opportunity to meet with Tan Sri for a session at his office in Bangunan Sulaiman at Jalan Sultan Hishamuddin, Kuala Lumpur.

INTERVIEW WITH TAN SRI SURIYADI BIN HALIM OMAR,
Director AIAC

Starting off right at the beginning, can you take us through your early childhood and how you ended up pursuing law as a career?

I come from Port Dickson. At that time, the schools were English government schools. I did well for my Lower Certificate of Education (LCE) which secured me a place with Sekolah Datuk Abdul Razak where I gained a first class for the Malaysian Certificate of Education (MCE) and Senior Cambridge (SC). Following that, I did the Higher School Certificate (HSC) in Form Six for which I got results that were decent and from there, I went to Warwick University in Warwickshire in the town of Coventry. There, I did my LLB (Honours) and completed my Bar at Lincoln's Inn.

I came back here right away after I did my Bar, because I was under a scholarship with the government, with which I signed a contract for seven years. But when I came back, the term was extended to 10 years. So, that's an overview of my early background.

I was thereafter sent to Malacca as a Magistrate by our late Tun Salleh Abbas. He was a no-nonsense man, a very fair man. You must impress him with your competency and maturity, or he wouldn't give you his time. I remember when I went to see him in the Sultan Abdul Samad building, which was back then the Attorney General's Chambers, where he was the Solicitor General. I was there to pay my courtesy call to him and I found him sitting in a corner, but he wouldn't even look at me.

There I was, thinking I'm in for trouble. He asked me, "What do you want to be?" "I told him, "I don't want to work in Kuala Lumpur."
He asked, "Why?"
"I don't have money."

"So, you want to be a Magistrate? Everyone wants to work in Kuala Lumpur." "No, I want to work where I can survive."

That was the point when he suddenly turned to me, and I saw that he accepted my response.

That was the beginning of my relationship with him—in the sense of a boss and a Magistrate, of course. I was in Malacca for about three and a half years, including as a Legal Aid Officer for one year and two months, a DPP and of course a Magistrate. That was when I saw human beings; friends in their true colours. When I was a Magistrate, I had a lot of friends then. But when I became a Legal Aid Officer, they called it Penolong Pengarah Biro Bantuan Guaman, my friends left me.

In those days, being a Magistrate was perceived as being very powerful. It's different today. And when I then became a Deputy Public Prosecutor in Malacca, those friends who left me came flocking back. I guess that's human nature.

After that, I went to Seremban also as a Deputy Public Prosecutor and thereafter I was transferred to the Income Tax State Department for about three and a half years, and got my promotion there. I was later sent to the Anti-Corruption Department

TAN SRI DATUK SURIYADI impressed upon us the responsibility, and the role members of the Law play in influencing public perception and how that can create unrest or promote harmony.

I was passionate about getting rid of drugs from this world, which was quite a scourge for us in Malaysia.

in Kuala Lumpur which was a very interesting, eye-opening experience for me.

I got my promotion again and was sent to the Civil Division for a few years. At that time, the AGC had shifted to the Bank Rakyat building, and I was there in an Advisory capacity for a while, during which time I had the opportunity to travel a bit. I was sent to Austria. At that time it was Tun Mahathir who wanted to send somebody there because he wanted to be the United Nations Elected Chairman of International Conference on Drug Abuse and Illicit Trafficking.

So, I was taken out of the Advisory Department and they sent me to Vienna where I spoke out in the United Nations. I had some fun experience while being there. I quarrelled a bit with foreign representatives because I said we should ban poppy, when it was an important element that goes into their food. Everybody had a good laugh.

I was passionate about getting rid of drugs from this world, which was quite a scourge for us in Malaysia.

After some time, I went to the Sessions Court in Johor Bahrul on promotion, before I went back to the Anti-Corruption Agency as a Senior Federal Counsel. It was the Anti-Corruption Agency (ACA) then, as it was then not yet the Malaysian Anti-Corruption Commission (MACC). I remember the ACA sent me to Hong Kong to investigate a Malaysian politician.

In the AGC, I was doing matters related to Constitutional Law, Administrative Law, Civil Law and criminal cases. By the time I became the Deputy Head of Crime in the AGC, I was of course expected to go to the Federal Court to attend to appeal cases.

My opponent then, inter alia, was Datuk Seri Gopal Sri Ram. We had a few good fights and he was a tough bloke, but also because of that, we became very good friends to this day. After being appointed as the Deputy Head of Crimes in the AGC, I went on to become the Public Trustee of Malaysia. Within a year though, I was called up and then began my life as a Judicial Commissioner. I was 42 years old at that time.

Tun Mohamed Eusoff bin Chin sent me as a Judicial Commissioner to Malacca for five years. I was a Judicial Commissioner for a year before I was confirmed as a Judge.

I was confirmed as a High Court Judge on 12th January 1996. I remember Tun Eusoff Chin was impressed with my whole group. There were seven of us. We called ourselves the Magnificent Seven. In our group, were Tun Mohamed Raus bin Sharif, Tan Sri Zulkefli bin Ahmad Makinudin, Tan Sri Abdull Hamid bin Embong, Tan Sri Jeffrey Tan Kok Wha, Tan Sri Abu Samah bin Nordin, Datuk K.N. Segara, and I.







Datuk Segara was my boss in the Civil Division at one time. He was in charge of the Alienation of Land which later became the Arbitration Unit in the Civil Division of the Attorney General's Chambers.

Who was someone you took notice of, one who inspired you?

I can mention only one person. Tan Sri Abu Talib bin Othman. He was the Solicitor General, and then later on he became the Attorney General. He never made me a Legal Advisor, because I wasn't exactly a diplomatic person. I was a bit of a rough guy though. But he knew he could always depend on me to do criminal cases, or to deliver when the need arises.

In the course of your career as a Deputy Public Prosecutor (DPP), what was the toughest decision you had to take?

To answer this question, I need to answer it this way. There was this case in which I prosecuted. A solider shot his boss. The bullet went through his body and the bullet even struck another man. I managed to get him convicted for murder and sentenced to hang, but this is the kind of case I would say is straight-forward, i.e., run-of-the-mill case. Now, let us compare it with another case. A tougher one.

Tough cases for me will be like that of Mona Fandey where she, her husband Affandi and Juraimi murdered Datuk Mazlan Idris. At the time, when one is arrested you can only hold them for 15 days. I was then the Deputy Head of Crime and my boss Tan Sri Abu Talib was in Brunei when the case popped up.

Because it was a major case, Tan Sri Abu Talib asked that he be informed before I charge them with anything. I couldn't contact him at the time, so I went to see

Tan Sri Mohd Ghazali bin Mohd Yusoff and having no choice, I had to charge them before telling my boss. Of course, I got an earful subsequently. In short, the procedural/ administrative route was the difficult part.

A bit about this case. I completed the last Preliminary Inquiry in Malaysia in front of Judge Jalaluddin Salleh and I had the DPP Narimah Moris to help me out. We managed to convince the court to permit this case to be transferred to the High Court. My witnesses were frightened. There was a Magistrate who recorded a confession and initially refused to come forward and provide evidence as Mona Fandey was a 'bomoh' (shaman).

AdRem **In the course of your career as a Judge, which case had left the most lasting impression on you?**

I had cases from the High Court, Court of Appeal, as well as cases from the Federal Court. The cases from the High Court are run-of-the-mill cases; even the Court of Appeal. I have more memories with the Federal Court.

Some cases are like the Altantuya case, for which I wrote the grounds of judgement, the Kalimah Allah's case, Sosilawati's case, and quite a few other major ones.

Deciding a case is easy. If you know your Law and your facts, you're fine. What is important is the big picture. What is the big deal with the Kalimah Allah's case? What is outside? The result of the case could lead to a riot.

Thus, we must be wise as a judge. You should not only just decide on the law, but you have to look at the country. We are the last bastion. There were threatening noises coming from the outside. We don't make a decision on the spot.

The decision may be right but the outcome may be wrong. Luckily, we diffused that situation. Things like that were difficult. Lawyers play a very important role, a duty to the Rakyat not to incite in order to win at all costs.

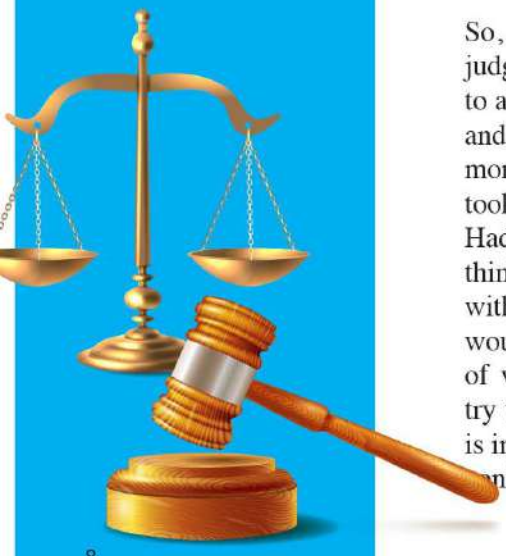
You need to be wise. It's not just about winning.

There was another case where I sat with Tan Sri Hassan bin Lah, and Datuk Seri Gopal Sri Ram over the case of Subashini v. Saravanan. A non-Muslim man who had converted to Islam had converted his eldest son who was in his custody at the time, without the child's mother's permission. It was a majority decision by myself and Hassan Lah while Sri Ram dissented. Not going into too much detail concerning the case, on another issue of the same case, Sri Ram decided with Hassan Lah and I dissented, which was fine. But a report was produced to show the race of parties involved being Indians, and the one who dissented has a Muslim name. The name obviously indicated that I am Muslim, implying I was partial. This report came out of New York.

People perceive things and as Judges we have to be very careful. We need

We must be wise as a judge. You should not only just decide on the law but you have to look at the country.

We try to educate people that arbitration is in fact safer, provides privacy, and confidentiality.



to be cautious of what we say just as much as how we say things.

You retired from the Bench in November 2017. What do you miss most about being a Judge?

The camaraderie. I like to talk, but as you grow older, you become a bit more reticent. The other thing I miss, and which I like is writing grounds of judgement. I was recently told that one of my High Court cases was mentioned in the Federal Court as it was the only case of its kind. This gave me a sense of pride. I'm grateful.

That was the Bench for me. I now touch on the issue of arbitration. There was this report where the then Chief Justice was not happy with arbitration and he wrote about it. Unfortunately, his paper got passed around, and arbitration and Alternative Dispute Resolution (ADR) suffered a bit.

Years later, when we provided him with the statistics, he changed his mind. He considered, apologised and admitted that arbitration was actually better than the courts. Naturally, we were happy!

So, is arbitration costly? I was a judge for over 23 years. In reference to a case, I led the panel of the court and the cost of the court came to more than RM2 million. The case took more than 10 years to conclude. Had it gone through arbitration, I think it could have been sorted out within 18 months and the costs would probably never exceeded 10% of what they incurred in court. We try to educate people that arbitration is in fact safer, provides privacy, and confidentiality. Moreover, to start off, related parties have to consent in order to initiate arbitration. So, when the decision comes out, it'll be a win-win situation where everybody's happy because they had consented to an arbitration whereas in court, consent is irrelevant.

In court proceedings, the claimant sues the respondent and the latter will have to take whatever comes, and they will argue their respective cases. Chances are, the cost would be in the hundreds of thousands, or like that case I mentioned, over RM2 million. Even the legal cost I endorsed was RM1 mil and another sum of RM2.6 million, Justice Su Tiang Joo also referred to that case. He writes excellent grounds of judgement by the way. I just need to mention that I hope more lawyers get elevated to the Bench. Some of the best judgements came from the Bar. I'm an admirer of those from the Bar making it to the Bench.

Upon retirement from the Bench, you were subsequently appointed as a member of the Judicial Appointments Commission. What criteria do you look for in a candidate when recommending that candidate be appointed a JC of the High Court?

I look at the person. If the candidate is young, I ponder if he or she has what it takes to become a judge? Do you have the knowledge, the competency, are you going to be honest and forthright enough to do the job or do you have inhibitions?

I'll give an example of inhibitions. In a clear-cut case for a drug related case, for example, if a person is found guilty, will he be willing to sentence the accused person to



death? That's a very relevant question and you have to be honest to yourself. But some will refuse to convict due to perhaps, his or her conscience, or affected by religious factors. The JAC will know immediately if this person has got reservations about the death penalty but we have to respect his views.

Some don't want to hang the criminal, saying it is a job for God to take someone's life. This is true across all races.

But remember, Muslims also have such reservations. In Islam, like other religions on this matter, there are two sides of the story. There are chapters in the Qur'an that will tell you that if such a punishment has to be carried out, and if you have to, then do what is better. When I was the High Court judge in Kelantan, I had the opportunity to ask the late Tok Guru Nik Aziz (Nik Abdul Aziz Bin Nik Mat), "what do you think of a Muslim passing a conviction leading to hanging a criminal?". He said, carry on!

So, it all depends on that individual if they are able or willing to convict, especially when confronted with a clear-cut case. Remember, in such cases there are so many other stages and there's nothing to say you can't sentence someone to death if the law says so. You are not the final decider. You only carry out what the law says.

If you think you cannot serve, it is best to respectfully bow out. Remember that judge who couldn't speak Malay well? She was honest about that and tendered her resignation honourably. I respect that.

Candidates have to answer these questions themselves. It is very important to be impartial so you can decide clearly. You have to be fair.

Get a well-rounded knowledge in Criminal Law, Civil Law, Trust, Legislation, Construction, etc. Civil Law itself is very wide, not to mention Land law and Family Law. If you think you will learn as you go along, then this will be a problem not only to yourself, but to those in front of you. You are expected to know the law already when functioning as a judge. Not learning along the way.



While there are no age requirements to apply for the position, one needs to understand that knowledge and experience have to come with the desire to become a judge. My seven friends, took nearly 12 years to become Court of Appeal Judges. Nowadays after two or three years, you can already be a judge of the Court of Appeal!

The elevation is really quick nowadays because we don't have enough people. We need to be better at succession planning as not to be caught in a situation where 10 people of the same age, retire at the same time, leaving a huge hole to be filled.

AdRem **In December 2020, you were also appointed as Director of the AIAC. AIAC predominantly deals with alternative dispute resolution processes like arbitration and adjudication. How different is AIAC from the Courts?**

The difference between the judiciary and AIAC is that the AIAC facilitates an action. We serve you.

For example, let's say a claimant and his friend consent to an ADR for an AIAC administered arbitration. The participant will write to the AIAC, and we will advise him in an advisory capacity. We will provide a list of arbitrators and the participants can decide among themselves who to choose.

The AIAC will then go to the arbitrator to check whether they have any conflict with the parties. So, if everything goes well, then AIAC will set it up. We are the facilitators who will work for you for an administrative fee. The arbitrators will be paid according to the Schedule, so we don't decide ourselves as regards the fee.

Comparatively, ADR is cheaper and can be done very quickly. Also, as

I've said earlier, it has a consenting element where parties require consent to have their case solved through arbitration. So, when you come before the arbitrator, whatever decision is final and not appealable unless there was something illegal about it.

Once an award is made from the arbitration, the decision can be enforced in the United States of America, London, Belgium, or anywhere in the world. It is different from a Court Order, where if you go to another country, you have to start the procedure all over again.

And with ADR, the hearings of all arbitrations are confidential. You won't hear of arbitrated cases in the newspapers.

Our society has become very litigious these days. In your opinion, when should a person pursue a case at the AIAC, as opposed to the Courts? In the UK, proceedings for particular types of civil claims has to be referred to ADR first as a pre-action protocol (PAP). We do not have that in Malaysia.

When people look at AIAC, they see only arbitration. Actually, arbitration is only one part of it. We have arbitration, adjudication, mediation, domain name dispute resolution. Anything under the sky can be arbitrated. Construction matters specifically in Malaysia, come under the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012). That is statute based.

Any dispute may be resolved through the AIAC, even matters between husbands and wives. No one else needs to know. It will stay confidential.

We have seen the Singapore International Arbitration Centre (SIAC) lately and Hong Kong International Arbitration Centre (HKIAC) previously being preferred choices for international arbitration. Has AIAC achieved that same feat? What is the future of AIAC under your Directorship?

I'll start it off this way. Every year there will be the Willem C. Vis Moot competition in Vienna and they will use a certain set of institutional arbitral rules. They will have pre-moots before the finals in Vienna, Austria. Earlier this year in April, the AIAC was invited because they used our Rules, which was amazing. We helped the organisers draft the moot problem and they gave me the honour of reading out the winners and I was also asked to give a speech.

So, in that sense, by using our Rules, it shows that they respect our Rules. Our Rules are really good, because they are up to date and they are complete.

Now, we have consolidated the Fast Track Arbitration Rules, that is equivalent to Order 14, into our 2021 Rules and it is fantastic. Since I came in, I had been driving for it to be included, seen it accepted, and now it has proven itself effective.

Where is the AIAC going from here? The answer is, it will be a success story. There's no doubt about that. Why wouldn't we be successful? By 'we' I mean you and me. It's Malaysia's AIAC. When we amended the AIAC Rules, we have people

When people look at AIAC, they see only arbitration.

We try to educate people that arbitration is in fact safer, provides privacy, and confidentiality.

from the Bar joining to work together to produce the Rules, whether it be Islamic Rules, or conventional Rules. The Bar will come and help us because it's ours. We facilitate what you want.

In terms of a legal career, your source of work is not just one. You can take the route of arbitration, you can go to court, and you can also work with the AGC. You have more than one way to make a living as a lawyer and not many people know this. It's a well-kept secret!

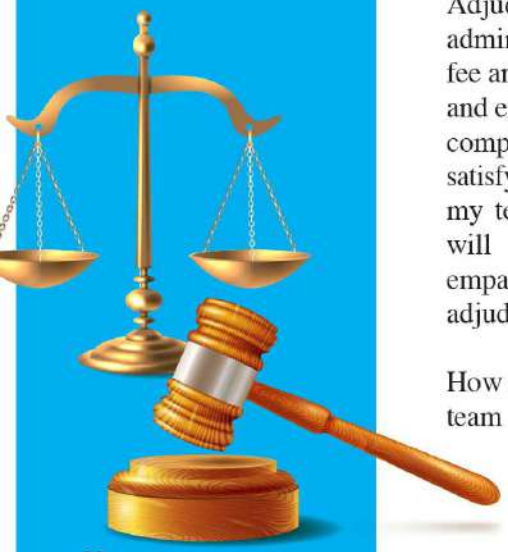


Lawyers should take up the Adjudication Course which is administered by the AIAC. There's a fee and you'll have to take the course and examinations. Upon a successful completion of the course and satisfying the criteria for empanelment, my team and I will make sure you will have a fair chance when empanelled with us as an adjudicator.

How do we choose adjudicators? My team will go through the list first, and they will come to me with the shortlisted list of who has not been assigned a case and I'll ensure everyone gets their turn. It is a fair approach. You may even cover your course fee with the first case you get.

I think the AIAC is on the right path. We have got the rules which we have amended and brought them up to a fantastic level where they are accepted internationally. Students are also using our rules. We have a set of good arbitrators, adjudicators, and all that we have, is sufficient. The country is doing fine in Islamic arbitration rules too.

There was a time when people said Islamic banking was nonsense, and that it will die a natural death. That was some time in the 1970s. They wouldn't have believed it then, but now Islamic banking is very much relevant and the whole world now follows us. How about arbitration? Let me tell you this. We are now set for Islamic Arbitration.





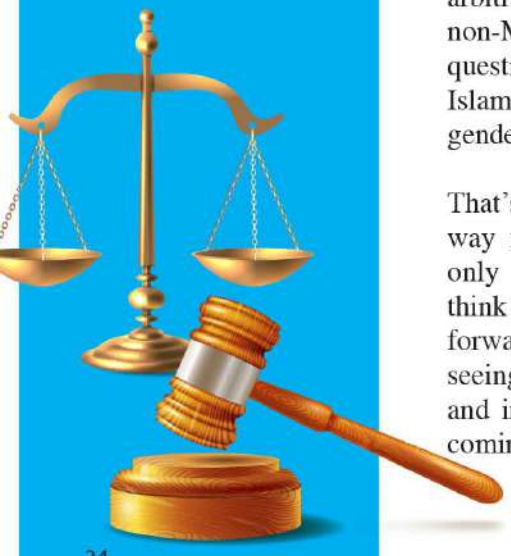
In 2012, we received an award for the Islamic Arbitration Rules by the prestigious Global Arbitration Review Award for 'Innovation by An Individual or Organisation in 2012' at the 3rd Annual GAR Awards in Bogota, Colombia. What did we do after we received the award? We did nothing because by then we realised there was some defect in the Rules.

So, when I joined AIAC in 2020, not only did we revamp the conventional Arbitration Rules and launched it in August 2021, but in the same year, we revamped the Islamic Arbitration Rules as well. We made sure everything was in order, and now we can truthfully say it is the one and only in the world. I had to make sure we revamped and launched both Rules in 2021. It had to be in the same year. No delays.

So, on 1 November 2021, when everything was done, it was officiated by our then Minister in the Prime Minister's Department (Parliament and Law), Dato Sri Dr. Hj. Wan Junaidi bin Tuanku Jaafar.

There is no limitation in Islamic Arbitration. One can be a non-Muslim, yet you can still practice Islamic arbitration. In the Shariah Court, a non-Muslim lawyer may be questioned for representing an Islamic case. There is no religious or gender bias in Islamic arbitration.

That's the difference and it is the way forward. We are the one and only in the world. So, when you think of this, how can we not move forward? Just give us time. We are seeing people in Dubai about this, and in fact, university lecturers are coming here. We have asked them to push for Islamic arbitration because it is not just for Muslims. As with Islamic Banking, they thought it was a joke until it became a real thing and Malaysia is now the hub for it. Give us time.



What advice would you give to young budding lawyers in regard to their pursuit and career in law? These days young lawyers have cited stress and wages being two main factors of why they are leaving the practice.

If one becomes a lawyer to make money, I don't know if they will be happy. For example, though I cannot write grounds of judgement here in the AIAC, yet I am happy. The job gives me a sense of satisfaction.

I never had an actual reason for becoming a lawyer. I was in Form 6 when a friend said let's do Law. I didn't even know what it was all about, or where London was. I just went along with him, filled the Universities Central Council on Admissions' (UCCA) application form, and with the trial exam results from my Form 6 examinations, I managed to get everything I applied for. For me, there was nothing spectacular telling me to go to London.

I think it is important to reach your target. If being a lawyer leads to making money and happiness, then you become one. Nothing you can do about that, but ensure that you see the bigger picture.

Tan Sri Datuk Suriyadi's recommendation for more lawyers to come to the Bench is a statement that carries its weight in experience,



invaluable insight, and faith. Faith that the younger generation of Law practitioners will continue the legacy he and his fellow Benchers have left them to lead with honesty, courage, and a resolution to do what is best not only for one, but for all.

The AD REM team is encouraged with the sound judgements of such leaders as Tan Sri heading the AIAC and poised to make waves in the arbitration scene on a global scale.

We thank Tan Sri and his team for making the time to sit with us and share what is going on with the world of arbitration as well as how its rise to prominence will be inevitable.

The Spirit and Objectives of the Road Traffic Act 1987, vis-à-vis Third Party claims were superbly exemplified by the Federal Court on 5th August 2022 in eight (8) appeals





By Kandiah Chelliah & Kenneshwaran Kandiah

1. The apex Court heard jointly the Questions of law in eight (8) appeals all involving road traffic accident claims on 11th and 13th January 2022 and handed its decisions on 05-08-2022.
   It is reported as **AmGeneral Insurance Bhd v Sa'Amran Atan and other Appeals (2022) 8 CLJ 175.**

2. In the landmark and unprecedented decisions, all the eight (8) third party claimants succeeded in their claim for loss and damages with an extraordinary award of costs in the sum of RM150,000/- to each claimant. The Panel of three Federal Court Judges took around six (6) months for their deliberations and in depth analysis of numerous earlier High Court and Court of Appeal decisions and as a result several significant and exceptional issues troubling the High Courts, Courts of Appeal and legal practitioners were laid to rest impeccably, the relevant laws well-elucidated and the statutory provisions of the RTA 1987 were methodically examined.
   Added to this, the relevant decisions of other Commonwealth jurisdictions especially U.K, India, Australia and Canada too were exhaustively referred.

3. **Negligence Liability**

"The primary importance of carelessness as the relevant fault engaging liability in tort naturally lies in the tort of negligence itself. The defendant will be liable in negligence if he falls below the standard of care demanded by the duty of care which he owes the claimant. What constitutes that standard of Care can be said to be the degree of care, competence and skill to be expected from a person engaging in the activity or function undertaken by the defendant."

"The standard of care applied to the tort of negligence is objective, since it does not depend on the defendant's subjective state of mind"

(per para 1-66: Clerk & Lindsell on Torts – 23ed - 2020).

4. Now, let us superimpose on the above definition of 'negligence liability', the thoughts of the Federal Court Panel in its findings headed "Abstract"

"The Road Transport Act 1987 must be construed to protect innocent third party road users against risks caused by motor vehicles. In a claim involving motorist and insurance companies, the Court is bound to weigh the competing interests of both parties to ensure that neither party is victimized by the other. In the event that the loss has to be borne by a party, that party has to be the insurance company, as it is compulsory for all vehicle owners to obtain insur ance coverage ..... In order for the Road Transport Department to issue road taxes for the motorists; the insurer should automatically step in and indemnify the victim without the victim having to sue the insurer."

In these vital and significant words the Court is attempting to examine and explain the spirit and purpose underlying the RTA 1987 and the factors and reasoning behind Parliament enacting this Act of 1987 (and amending the earlier Road Traffic Ordinance 1958) that attempts to lay the groundwork and cover all aspects concerning road traffic, ie the roads, the vehicles and member of the public using roads, lanes etc, as drivers, passengers etc.

The crucial, decisive words contained in the "Abstract" are as follows:-

(a) **"..... must be construed to protect innocent third party road users....."**

(b) "..... the Court is bound to weigh the competing interests of both parties to ensure neither party is victimised....."

(c) "In the event the loss has to be borne by a party, that party has to be the insurance company, as it is compulsory for all vehicle owners to obtain insurance coverage....."

(d) '..... the insurer should automatically step in and indemnify the victim without the victim having to sue the insurer".

5. Obviously, it ought to be understood that the "Abstract", is merely an Obiter or that which exists in thought only.



But nonetheless, its an idea/concept being floated or thrown about by the apex Court, with a modicum of rational basis in law. Some legal practitioners would gladly raise that this 'Abstract', contains elements of the system of 'No Fault liability', but arguably its not the issue here.

6. **Next, let us examine the thrust or the crucial issue being given its decisive force in these '5th August 2022 Decisions" of the Federal Court.**
The apex Court is conspicuously and in all abundance of seriousness is conveying the message to all insurers of motor vehicles (and probably to other general insurers) that the contractual and other issues/problems between the Insurer and their Insured (ie the purchasers of their policies), ought not to be tossed or hurled at the innocent third party victims of road traffic accidents who have suffered injuries, death, and are seeking compensation for negligence liability from their insured ie the negligent party.

Common examples are:

a) Transfer of interest ie vehicle sold, without complying with legal requirements as per the RTA 1987 and the Hire Purchase Act 1967. Thus, Insurers in this instance would claim the new owner/buyer is continuing to use the existing insurance policy and settling the monthly instalment to the Finance Company or Bank under the name of the previous owner, and/or continuing to obtaining further yearly policies in previous owner's name.
b) Third party claim is doubtful or elements of fraud exist.
c) Judgment or default judgment obtained: Is there a necessity for a "Recovery Action".
d) Insurable interest has ceased to exist.

Misrepresentation

(Note : The following issues/cases were not dealt in the eight appeals)

e) Obtaining insurance policy for a motorcycle but using it on a motorcar/motorbus or other vehicles or vice-versa (See **Berjaya Sompo Insurans Bhd v Shamisa Holiday & Travel Sdn Bhd and 2 ors. (2022) 1 LNS 1946 H. Ct)** or obtained subsequent to an accident giving rose to the claim (See **Pacific & Orient Insurance v Hameed Jagubar (2018) 9 CLJ 691 FC).**
f) Continuing to obtain policies on a deceased person. (a common occurrence by family members of deceased) See Balamoney Asoriah v MMIP Services Sdn Bhd (2020) 1 CLJ 476.

7. In the above instances, the Motor Insurance company concerned, on being notified by its Adjusters would at speed instruct their Solicitors to secure a declaration pursuant to Sect. 96(3) of the RTA 1987, declaring their policy as null & void and unenforceable. Thus the injured third party claimant's claim in the trial Court is thrown in jeopardy.

8. Addressing issue (a) as above the Federal Court in **Appeal No. 1 : Amgeneral Insurance Bhd v Sa'Amran & Ors (2022) 8 CLJ 179** (at para 1) ruled as follows:-
   a. The Court had not been shown which clause of the Third party risks insurance policy, was the insured in breach of, that rendered the policy null & void.
   b. The policy did not even contain a clause that required the insured to notify the insurer of the sale of the car, not that the existence of such clause would absolve, the insurer of liability.....
   c. The insurer failed to prove transfer of ownership of the car.
   d. Transfer of interest is not Transfer of ownership.
   e. A valid Transfer must comply with the mandatory procedure laid down by Sect. 13(1) of the RTA 1987.
   f. The Court under Headnote 2 clearly emphasized that Section 109 RTA 1987, applies clearly to Civil and criminal proceedings.
   g. Being the registered owner at the material time, the insured was deemed by Sect. 109(2) of the RTA 1987, to be liable for the act or omission of the third respondent (driver) in causing the accident.
   h. The proviso to Sect. 109(2) is intended to shield the registered owner from prosecution for the driver's contravention of Sections 41 to 49, and not the driver's tortious acts such as negligent driving.
   i. In Headnote 3, the Panel members distinctly ruled that Sect. 109 (1) (2) and (3) leaves no room for doubt that it applies to civil and criminal proceedings alike....."
   j. In para 4, the apex Court ruled that by accepting premiums from their insured for issuing third party risks insurance policy, the Insurers could not resile from its promise to indemnify the insured when indemnity become due by raising the technical ground that the insured had **no insurable interest, in the motor vehicle at the time of the accident, unless the insurance policy had expired or had been lawfully terminated.**



Section 96(3) RTA 1987 and mandatory requirements for a Declaration.

9. On the common practice of Insurers, resorting to obtain a Declaration unilaterally pursuant for Sect. 96 (3) RTA 1987, to declare their insurance policy as null & void and unenforceable, the Court ruled (at headnote 5):
   "5. In Appeal No.2, the insurer despite knowing about the pending Magistrate's Court proceedings, chose not to comply with the statutory requirements laid down by the proviso to Sect 96(3). Neither the notice nor the cause papers for the Sect. 96(3) application were served on the respondents in breach of the proviso..... Thus the declaration order for the High Court is unsustainable in law....."

The Court of Appeal decisions in Rasip Hamsudi (2016) and Letchumanan Gopal in 2011: Is there a contradiction?



10. The salient facts in **Letchumanan Gopal v Pacific & Orient Insurance Co (2011) 5 CLJ 806** are:-

a) The issue before the Court of Appeal was a Recovery Action. The claimants ie family/dependents of one Kanisan (deceased) succeeded in the Sessions Court in securing damages against defendant lorry owner and driver, subse quent to full trial.
b) The Insurers refused payment of judgment sum on the grounds they are not liable as per policy terms/clauses since deceased is not an employee of Insured.
c) Thus Recovery Action was filed.
d) The Sessions Court allowed the Recovery Action but the High Court and COA held in favour of the Insurers.

11. The main facts in **Pacific & Orient Insurance Co v Rasip Hamsudi & Ors (2017) 4 CLJ 572**, are:

a) While the Sessions Court's proceedings was still pending, the appellant ie the Insurer applied to the High Court successfully vide on originating summons and secured a declaration pursuant to Sect. 96 (3) RTA 1987, that the Insurer is not liable to pay any judgment sum under the policy issued to owner of M/cycle WFE 1937 which was involved in an accident with another M/cycle No. WET 275.
b) Judgment in the sum of RM6,453,550/- with costs was entered in the Sessions Court.
c) The injured Plaintiffs in the Sessions Court and respondents here, then filed an Originating Summons and sought for a **declaration to quash the declaratory order obtained by the Appellant insurer** under 96(3) RTA 1987.
d) The High Court held, that appellant insurers were not entitled to the benefit of the declaratory order, against the judgment obtained in the Sessions Court.

12. **Issues before the Court of Appeal**

a) Whether the respondents (ie Plaintiffs in the Sessions Court) had sufficient interest to commence their O.S (referred to as 0S-2) to negate the effect of the declaratory order obtained by the appellant insurers, in their originating summons (referred to as OS 1).
b) Whether on a proper interpretation of Sect.96(3) of RTA, in particular the proviso thereto, it was incumbent upon the appellant insurer to give notice to the Respondents before or within seven (7) days after the commencement of O.S. 1, and if so whether this had been complied with.

13. **The COA held as follows:-**

a) The appellant had not served the requisite notice to the respondents,

therefore the declaratory order was clearly a violation of the provisions in Sect. 96(3).

b) Once **judgment had been entered** in the Sessions Court's proceedings (**unless stayed or overturned**) the respondents (ie Plaintiffs were entitled to enforce the judgment obtained against the insured M/cycle owner.

(Note: This enforcement of a judgment of any Court, which had not been stayed or appealed, is clearly laid out in Sect. 96(1) RTA 1987)



14. On considering the above factual matrix, the provisions in the RTA 1987 and the Court's decisions / judgments therein in these two (2) cases, the Federal Court, (in Appeal No. 2) ruled as follows: (See para 87-96)

"(87). There was nothing wrong for the Court of Appeal in **Rasip Hamsudi** to refuse to follow or to omit to refer to the decision of another Court of Appeal in **Letchumanan Gopal v Pacific & Orient Insurance** although referred to it by learned counsel in his submissions.

"(88). In any event we are inclined to agree with the reasoning in **Rasip Hamsudi** rather than the reasoning in **Letchumanan Gopal**. In the first place, the issue in Letchumanan is markedly different from the issue in Rasip Hamsudi. In Letchumanan the focus of the Court of Appeal's attention was on the issue whether the victim of the road accident was in the employment of the company which owned the lorry involved in the accident. Since, he was not, it was held that the insurance company was not liable for the negligent act of the lorry driver."

(Note: But in **Malaysian Motor Insurance Pool v Tirumeniyar (2019) 10 CLJ**, the Fed. Court ruled that in all motor Insurance Policies there is a "two-contract' principle ie one covers the lorry owner (the insured) and the other the lorry driver.
See Article on: "Two Contract Approach : Tirumeniyar", in Vol. 1 -2020 Ad Rem, page 29) by this writer.

15. One significant issue posed in Sect. 96(3) are the words **"before the date the liability was incurred"**.

At first glance it means before the judgment in the tortious claim by the Third Party claimant is obtained against the insured as the tortfeasor.

Thus its not surprising the Insurers, even though the proceedings are continuing on at the trial Court, they could proceed with the application for a declaration without serving or giving notice to the claimant and on securing one, instruct their Solicitors in the trial Court to discharge themselves.



But the Federal Court's findings on 5th August 2022 in Appeal No. 2 were as follows:- (as per paragraphs in its judgment).

"(95). The point to note is that while Sect. 96(3) gives the insurer the right to obtain a declaration that the insurance policy is void and unenforceable, Sect. 96(1) makes it mandatory for the insurer to make payment after judgment has been obtained against the insured by the Third party claimant.....

"(96). What Sect. 96(3) mandates is that where the insurer intends to repudiate liability under the policy, it must comply with the following procedural requirements:

i) Notice must be given to the plaintiff in the tortious claim action before liability is incurred.
ii) The notice must state the grounds relied on by the Insurer to obtain a declaration.
iii) The notice must be served on the Plaintiff in the tortious claim within seven days after commencement of the claim.
iv) Thenoticemustbeservedonthepartieswhohaveinterestinthe proceedings."

16. **Is Pacific & Orient InsuranceCovAzharAzizan1LNS1097,H.Ct. decision, relevant & binding?**

The High Court Judge interpreted "liability" in Sect 96(3) RTA 1987, to mean judgment, thus a declaration could be granted since these is no judgment obtained as yet, against the Insured negligent party.

"Section 96.(3). No sum shall be payable by an insurer under subsection (1) (ie 96(1) if before the **date of liability** was incurred, the insurer had obtained a declaration....."

The learned HCJ's interpretation maybe correct but he failed to examine the applicable proviso. Unfortunately the same can be said of numerous other H.C. Judges who failed to grasp this significant issue prior to granting the declarations.

The apex Court referred to this High Court decision and cast it aside by saying:

"(99). Thus the 1st Appellant's failure to comply with the proviso to Sect. 96(3) disentitled it to the benefit of the provision. It was however urged upon us, that the High Court case of **Azhar Azizan** should be accepted are good law.....

"(100).With due respect we do not see how Azhar Azizan is relevant to the issue before us as the facts are poles apart from the facts of the present case.....(ie Appeal No. 1 : AmGeneral Insurance v Sa'Amran)

"(101). **Of more significance to note is that the learned Judge in that case failed to direct his mind to the mandatory requirements laid down by the proviso to Sect 96(3). The Judgment was therefore made per incuriam.....**

17. **As a consequence, it can concluded, that at the end of the day, the insurer was concerned with and relied on the contractual provisions as per the insurance policy between them and their insured but failed to sufficiently appreciate the intent and impact of the statutory provision ie Sect. 96(3) especially its proviso which clearly states that such Applications must be served on a then third party claimant who is an interested party.**



18. **Is there an ecessity for a Recovery Action against Insurers**

The heading to Section 96(1) RTA 1987 states:

"96. Duty of Insurers to satisfy judgments against person insured in respect of third party risks."

It must be conceded that the Insurer may have a legitimate grounds for refusing to pay the judgment sum and they are:

i) Claimant/Plaintiff failed to give **Notice of proceedings** pursuant to Sect. 96(2)(a) of the RTA 1987.
ii) The Judgment has been **stayed or pending appeal** or has been **set aside**.
iii) Policy issued by the insurer has been **cancelled or revoked** prior to the road accident that gave rise to the claim/action.
iv) Policy was issued subsequent to the road accident that gave rise to the claim ie **backdated by a few hours or a few days**. See **P & O Insurance Co v Hameed Jagubar**, decided by the Fed. Ct on 24-09-2018 (2018) 9 CLJ 69-FC.
v) Judgment Sum is **not a "disputed"** debt. 12

19. In **Pacific & Orient Insurance Co v Muniammah Muniandy (2011) 1 CLJ 947** the Court of Appeal ruled as follows:- (headnote 3)

"(3). Nowhere does Sect. 96(1) say that the respondent must first obtain another judgment against the appellant before she could proceed to enforce the said judgment against the insured. Therefore the question of the respondent having to file recovery proceedings under Sect 96(1) against the appellant did not arise at all.....

20. In **Pacific & Orient Insurance v Rasip Hamsudi (2017) 4 CLJ 572** the COA ruled as follows: (headnote 3)



"(3). Once a judgment has been entered in the Sessions Court's proceedings (unless stayed or overturned) the ..... respondents (ie Plaintiffs) were entitled to immediately enforce the judgment obtained against the insured by any appropriate execution mode levied on the Insurer".

(See Article by this writer in AD Rem"- Selangor Bar Committee publication titled: "Sect. 96(1) RTA 1987: Is there a necessity for a Recovery Action against Insurers", at page 56 – Vol.1-2019)

21. The Federal Court's (05-08-2022 decisions) dealt with 'Recovery Action' in Appeal No. 1 (Amgeneral Insurance Bhd v Sa'Amran Atan & Ors and other Appeals) and ruled as follows:- (as per paragraphs numbered therein)

"(102).The first appellant had another argument, it was contended that the respondent as the Third party claimant could not apply to set aside the order (declaration) pursuant to O35r1(2) Rules of Court 2012 because he had a specific remedy provided by Sect. 96(1) RTA, to file for **'recovery action'** against the Insurer. The argument must fail. **There is nothing in Sect. 96(1) to say that the third party claimant must first obtain another judgment against the insurer before he could proceed to enforce the judgment that he had earlier obtained against the Insurer.** After all the judgment debt of the insured becomes the judgment debt of the Insurer. See Pacific & Orient Insurance v Kamacheh Karuppan (2015) 4 CLJ 54."

As a consequence the insurer is bound to settle the judgment sum without the need for another action by the third party claimant ie 'recovery action' against the Insurer once the conditions on Sect. 96(2) and (3) are fulfilled."

(Note: Sect 96(2)(a) requires the third party claimant to give notice of proceedings to Insurers and 96(3) contains the provision for declaration)

22. With this one stroke, the **Federal Court has demolished the concept or action ie the so called "Recovery Action"** that has been the practice for all these decades among road accident claims practitioners.

This writer had criticised and raised the issue of :

"Where is the basis for "Recovery" proceedings against Insurers"

In, the earlier referred Article in 'Ad Rem' it was commented "it is not provided by any statute since 96(1) RTA 1987 circumvents the privity concerns as per our Contract Act 1950, as exemplified in P & O Insurance v Kamacheh Case.

Further it must be acknowledged that it is the Insurer who is appointing Solicitors and defending the third party's claim in the trial Court.

To agitate and seek another action against the Insurers concerned can be surmised as a duplicitous effort.
Or is it due to long held practice of legal practitioners who saw the need for another action against the unnamed Insurance company in the judgment obtained. This writer fails to see any substantive supporting evidence for such a second adventure in the Common Law System. If so, this is a classic example of the proverbial 'second bite at the Cherry" syndrome.



23. **The case for 'Recovery Action'**

As seen in earlier (in paragraphs 12-14), the Federal Court over-ruled to a large extent **Letchumanan Gopal v Pacific & Orient Insurance, vis- à-vis Rasip Hamsudi.**

Letchumanan Gopal decided by the COA panel of Abdul Hamid Embong JCA; Abdul Malik Ishak JCA and Kong Hwee Gee- JCA on 14-04-2011 ruled as follows in headnotes (3) and (4).

"(3). The **liability** and **recovery action** were distinct from each other. The former was a claim in tort whereas the latter was based on a **statutory right provided under the provisions of the RTA.** For these reasons alone it would be unjust to bar the insurers from raising a fresh the issue of liability ....."

"(4) Pacific & Orient Insurance was not a party in the liability action ....."

24. Most senior practitioners acting for road accident claimants, fail to understand till this day what the COA panel in headnote (3), meant by these words.

"(3). The liability and recovery actions .... Whereas the latter was based on a **statutory right provided under the provisions of the RTA.**

The big question to be posed is, which Section in RTA contains this "statutory right"

The COA Panel failed to point out which Section contains this right. Thus it is obviously decided 'per incuriam".

It is submitted Letchumanan on this specific issue was wrongly decided and is absolutely devoid of any legal basis.



25. **The thrust of the Federal Court's eight appeal decisions on 05-8- 2022 (AmGeneral Insurance Bhd v Sa'Amran (2022) 8 CLJ 175 and seven (7) other appeals) is to convey to the motor Insurance Industry, the spirit and purpose of the provisions in the Road Transport Act 1987, and their proper interpretation vis-à-vis the various issues that arise in third party claims. <u>They are:</u>**

26. **<u>StatutoryorContractualprovisions</u>**

i) All matters between the Insurer and their Insured (ie those buying an insurance policy) the terms, conditions and clauses in the policy, its coverage, the payment of premium thereof etc are matters of contract between these two (2) parties

ii) Statutory provisions are those contained in the Road Transport Act 1987; the Financial Services Act 2013; and the Civil Law Act 1956.

iii) The apex Court's findings in the eight (8) appeals are quite extraordinary and the Panel of FCJ's concluded that issues between the insured and the insurer, should not be thrown or cast against the innocent third party claimants as a bulwark to resist the claims. The Court will only strictly examine and deliberate the provisions applicable in the statutes, when a third party's claim comes before it.

iv) Insurers ought to strictly comply with the RTA 1987 provisions especially from Sections 91 to 97, since by virtue of Sect. 90, they are collecting vast sums for premiums for issuing compulsory motor insurance policies for all vehicles using roads in the Country. It has been stated, some Motor Insurers' premium collections runs into billions of ringgit. And the sums paid out as compensation to third party victims is only about 50 to 60% of the premiums collected from motorists.

Available data indicates that the number of registered vehicles with the Malaysian Road Transport Department is 17,728.482 as of December 2021, whereas in Australia it was 19,229.139 in 2020, and 22,587,923 in Indonesia in 2021, according to CEIC data (Census and Economic Information Centre)

27. **<u>AimsandObjectivesofCompulsoryMotorInsuranceSystem.</u>**

The 'Abstract' as formulated by the apex Court was referred earlier in para 4 here in above:-

The Court at para 263, stated:

"(263) ..... There are two competing interests (ie victims to be compensated and insurers challenging liability). Having regard to the object and purpose of the RTA, which a to protect innocent third parties..... we are inclined to the view that the conflicting interests must be resolved in favour of innocent third party accident victim."



28. In these stinging words, deliberately and carefully chosen, the apex Court is attempting to sent a message to all Motor Insurance Companies, that the innocent third party or dependents of deceased ought not to be further victimized or burdened subsequent to suffering injuries or death.

Enormous sums are collected as premiums for such insurance policies, but the insurers too have a mandatory obligation to settle the requisite compensation to these victims.

The FC panel went on to quote the following observations by **Justice Sarkar of the Supreme Court of India in British India General Insurance v Capt. Itbar Singh (1960)(1) SLR 168 on 15-5-1959:**

"..... the loss has to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems to as to be equitable for the loss falls on the insurer in the course of carrying on his business, a business out of which he makes a profit....."

29. **Issue of insured to act with utmost good faith – the principle of 'uberrimae fidei", when applying for a motor Insurance policy.**

(i) The insurer referred to Sect. 96(5) of the RTA 1987, which is a codification of the requirement to make full and frank disclosure on the part of the insured.

The Court in para 12, found as follows:

"(12). In any case, the doctrine of ubberrimae fidei is a common law doctrine that is only applicable between the insured and the insurer and does not affect the rights of third parties under the provisions of Sections 94 and 95 of the RTA, which protects third parties against risks arising out of the use of motor vehicles".

Sect. 129 and Schedule 9 of the Financial Services Act 2013

This Section and schedule deals with Pre-Contractual disclosure and



representations and remedies for misrepresentation.

(i) Schedule 9 sets out the pre-contractual duty of disclosure & representations for contracts of insurance....."

(ii) Rule 1 Subrule 3 in **Schedule 9 of the Financial Services Act 2013**, states as follows:

"(1)(3). For the purposes of obtaining a declaration under Sect. 96(3) of the Road Transport Act 1987, this schedule shall apply to determine if a consumer insurance Contract which provides cover for third party risks, may be avoided by a licensed insurer for **misrepresentation.**

Rule 5: Pre-Contractual duty of disclosure for consumer insurance Contracts.

This rule provides for both the insurer to request all pertinent facts and the consumer to provide all or answer all in the Proposal Form.

And Rule 5 (9) states:

Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with other....."

Rule 5(5):

"If a licensed insurer does not make a request in accordance with sub paras (1) and (3) as the Case maybe, compliance with the consumer's duty of disclosure in respect of those sub paras, shall be deemed to have been waived by the insurer".

30. These pre-contractual duty to disclose by both the Insured and Insurer were deliberated extensively in **Balamoney Asoriah v MMIP Services S/B (2020) 1 CLJ 476** by the Court of Appeal on 14-10-2019 and further appeal to the Federal Court was dismissed on 03-09-2020.

The main issues were:-

a) Failure of disclosure
b) Policy renewed in deceased's name after death of deceased
c) Whether insurance policy null & void
d) Whether there was fundamental breach of principle of uberrimae fidei
e) Whether there was mutual duty of utmost good faith owned by both insurer and consumer

f) Whether insurer deemed to have waived right to complain and failed to safeguard own interest and obligations.
g) Whether insurer failed to comply with Sect. 129 of the F.S.A. 2013 and Schedule 9.

The Court of Appeal ruled as follows:



Headnote 1 (in brief)
The appellant (the third party claimant and mother of deceased who died in the motor vehicle collision) was not a party to the insurance policy, and the circum stances and conditions regarding the renewal of the policy were unknown to her.

Headnote 2 (in brief)
Schedule 9 of the F.S.A 2013 applied to this appeal.

Headnote 3 (in brief)
The duty of utmost good faith was owed at all times by both parties to the insurance contract. The 'doctrine of waiver' operates to the insurer, when they fail to undertake the exercise of posing questions to the intended insured ie the proposer for insurance, prior to issuing the policy.

Headnote 5 (in brief)
Failure and omissions by the Insurer to comply with Sect. 129 and Schedule 9 of the F.S.A 2013, would disentitle him from the Declaratory Order granted by the High Court, which declared the policy null & void and unenforceable, with regards to the claim by the third party.
It would bring untold injustice and prejudice to innocent third parties such as the appellant in this appeal.

31. But in **Etiqa General Takaful Bhd v Personal Representative of Fatimah Adam (deceased) (2022) 6 CLJ 385**, decided on 20-4-2022 the High Court Judge distinguished or appears to challenge Balamoney and ruled:

Headnote 5 (in brief)
"..... As far as the Plaintiff was concerned, the policy was renewed by Fatimah who was already dead at the time of renewal of policy. As there could be no Contract that could validly exist as a matter of law, when the policy was issued to Fatimah, it must follow that the Plaintiff was entitled to the declarations prayed for....."

With due respect, the learned HCJ, failed to understand. Sect 129 and schedule 9 of the F.S.A 2013, as exemplified in Balamoney, by the COA and Federal Court.



32. **<u>Insurer (and his Insured) ought to contest the claim at the trial Court and not by way of collateral action in High Court by obtaining declaration etc and consequently discharging themselves from the ongoing Trial Court proceedings.</u>**

(i) It must be noted that when Solicitors for the insured discharge himself, Plaintiff's ie third party claimant's Solicitors would proceed in the trial Court to obtain a default judgment.

In Appeal No. 6 (Pacific & Orient Insurance v Yeap Tick In), the Court ruled: (Headnote 12)

"(12). In Appeal No. 6, the default judgment obtained by the third party claimant from the Sessions Court was a regular and enforceable judgment, which has not been set aside nor appealed against. Under Sect. 96 (1) of the RTA, the insurer was bound to pay the judgment sum to the third party claimant. The question of the insurer's entitlement to a permanent injunction (to prevent execution proceedings to recover the judgment sum) does not arise..... Also there was no necessity for a third party claimant who had obtained a judgment from the trial Court against the insured to obtain another judgment against the Insurer (ie Recovery action) before enforcing the trial Court's judgment against the Insured."

ii) **And in Appeal No. 8 (Pacific & Orient Insurance v Navin Naicker), the Court ruled: (Headnote 14).**

"(14) The evidence of fraud in Appeal No. 8, could and should have been produced at the trial in the High Court but was not made available by the appellant. Hence the finding of the High Court after the Sessions Court entered judgment against the insured should not be allowed to stand in the way of the decision of the Sessions Court which was never appealed against. (nor set aside).

Under Headnote 10, the Court ruled (in Appeal No. 4)

"(10) The trial in the Sessions Court was to determine, amongst others, if the third respondent was involved in the accident, and if so, whether he was negligent in causing the accident. It was not viable for the appellant to convert the originating summons to a writ action. There was to the insurer's knowledge already on ongoing trial in the Sessions Court, when it filed the application under Sect 96 (3) of the RTA ..... **<u>A Sect. 96(3) application is only for deter</u>**

mining the issues of voidness and unenforceability of an insurance contract and not to determine core issues in the tort of negligence.

33. **MIB Guidelines and the substituted Domestic Agreement**

The Court referred to the MIB Guidelines as per letter dated 18-01-1985 and the later Agreement and stated as follows in Headnote 11.



"(11) In Appeal No. 5, the insurer was bound by the MIB guidelines vide letter dated 18-1-1985 which makes insurers liable under the policy for motor vehicles. ..... Even assuming there was a breach of policy conditions by the insured for failing to inform the insurer of the Sale of the Car, the insurer could not deny liability by virtue of the Statutory requirement under Sect. 91(1)(b) read with Sect. 99 & 95 RTA. The Court of Appeal was not wrong in referring to the MIB guidelines as an additional issue in determining liability....."

34. **Allegation of fraudulent claims by third party victims.**

On the allegations of fraud raised by the Insurers, the Court took the view that these matters and all facts/evidence ought to be presented and thrashed out at the trial Court stage.

The insurers action by way of a declaration under Sect. 96(3) to declare the relevant policy void and unenforceable or such other courses of action supported by Affidavit evidence was deemed improper.

And further if the insured or insurer's Solicitor discharge themselves from the trial and a default judgment is obtained, the Court ruled that it is a valid and regular judgment of the Sessions Court which has the necessary powers and jurisdiction.
In view of the above the FCJ's under headnote 13, declared:-

"(13) The issue of fraud raised by the appellant must be considered in light of the decision of the Sessions Court which found liability to have been established against the rider.
..... This finding of fact must be accepted as the truth as it was not appealed against....."

In headnote 14, the court held:-

"(14) **The evidence of fraud in Appeal No. 8 could and should have been produced at the trial in the High Court but was not made**



been produced at the trial in the High Court but was not made available by the appellant. Hence, the finding of the High Court, delivered after the Sessions Court entered judgment against the insured, should not be allowed to stand in the way of the decision of the Sessions Court, which was never appealed against....."

35. **"Transfer of ownership and Transfer of Interest"**
And motor vehicle sold by a private deal/arrangement and the system of "sambung bayar' to the hire purchase owner

Transfer of interest is not transfer of ownership. A valid transfer of owner ship can only be affected by following strictly the procedure laid down by Sect. 13 (1) of the RTA and not merely by selling the car to a third party.

Under Headnote 1, the Court ruled that "..... The policy did not even contain a clause that required the insured to notify the insurer of the sale of the Car, not that the existence of such clause would absolve the insurer of liability, in the event of an accident involving the car.

The procedure under 13(1) is mandatory and is meant to ensure that there is proper transfer of the motor vehicle....."

As per headnote 2, the precise interpretation of Sect. 109(2) of the RTA was explained.

"Being the registered owner of the car at the material time (as per JPJ records) the insured was deemed by Sect. 109(2) to be liable for the act or omission of the third respondent (ie the driver / new owner) in causing the accident. The proviso to 109(2) is intended to shield the registered owner from prosecution for the driver's contravention of Sections 41 to 49 (of the RTA) **and not for the driver's tortious acts such as negligent driving. The registered owner is still liable for the negligent act or omissions of the driver.**

The Court quoted **Muhammad Haqimie Hasim v Pacific & Orient Insurance (2018) 1 LNS 627** and agreed with the finding of the Court of Appeal : (at para 24 page 206 of this case)

"(i) The central issue for consideration here is whether the alleged transfer of interest from Normala to Lalmiya had the effect of rendering the policy ineffective or causing it to lapse.

(ii) Sect 13 of the RTA sets out the procedure to be adopted upon change of possession upon transfer pursuant to a Sale ..... which must be done within seven days of such change in possession....."

(iii) Further the Court too observed in para 24(vi) one pertinent statutory provisions as per the Hire Purchase Act 1967 especially Sect. 12 (1), in these vehicle 'sold' and 'Sambung Bayar' to the owner ie the finance companies/Bank, situation.

(iv) Sect 12(1) : The right, title and interest of a hirer under a hire purchase agreement may be assigned with the consent of the owner, or if his consent is unreasonably withheld without his consent".



(viii) The principle governing a vehicle under hire purchase had also been set out by this Court in **Ong Siew Hwa v UMW Toyota Motor Sdn Bhd (2018)** as follows:-

"under this hire purchase agreement, the Plaintiff is "the hirer" of the car and second defendant is the 'owner'. Under the law what was obtained by the Plaintiff under P5 was possession not ownership of the car, which remained with the second defendant....."

36. **Conclusion**

The Federal Court panel at the end of their arduous task in deciding the various questions of law in these eight (8) appeals had this to say in their concluding paragraph:-

"(263) ..... Having regard to the object and purpose of the RTA, which is to protect innocent third parties..... We are inclined to the view that the conflicting interest (between Insurers and Claimants) must be resolved in favour of the innocent third party accident victims".

Thus it is rather explicit, the apex Court in the Country is leaning towards the innocent third party claimants who had suffered injuries (or death in a claim by dependents).

And the panel quoted Justice Sarkar of the Supreme Court of India again in their concluding remarks that is:

"..... The loss has to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems to be equitable **for the loss falls on the insurer** in the course of carrying on his business out of which he makes a profit....."

37. It must be emphasized that High Court Judges' paramount duty is to place the law in its proper perspective as per the relevant, applicable statues and other



appropriate laws, and decided cases, here and from other commonwealth jurisdictions.

As observed above, that duty has indeed, in numerous instances, fallen on the Court of Appeal and the Federal Court.

Legal Practitioners involved in third party claims have declared their tremendous appreciation to the Federal Court's panel in their arduous task involved in deciding these eight (8) appeals. This writer who was called to the English Bar at Lincoln's Inn in July 1978 and the High Court of Malaysia on September 1979, and who was the Counsel in Appeal NO. 6- Pacific & Orient Insurance v Yeap Tick In, did in fact on behalf of all Counsel precent, conveyed the sincere appreciation to the F.C. panel on their decisions for placing the law in its proper perspective brilliantly in these appeals. The Panel's ninety five (95) page grounds are well deliberated, insightful and erudite.

It must be commented that Magistrates, Sessions Court Judges and High Court Judges in conduct of motor accident claims, ought to appreciate that the Road Traffic Act 1987 is a Social Legislation attempting to lay out the format, to compensate innocent third party victims. This I believe was the intention of Parliament when the earlier RTO 1958 was amended to the RTA 1987. Strict rules that maybe relevant in others contractual matters in banking, financial or Corporate fields ought not to be imposed or considered here. The Court should be guided by one principle, that Insurers collect vast sums in premiums and as a consequence, their primary aim should be to compensate, the innocent road traffic accident victims. Correspondingly the not so innocent victims may not be compensated.

It is no small matter when the apex Court used these final words in its 'Abstract'.

"..... the insurer should automatically step in and indemnify the victims, without the victim having to sue the insurer."

Extraordinary and fitting words indeed.
12-10-2022.



JUDICIAL MANAGEMENT: AUTOMATICALLY ACADEMIC

by Joshua Kong, LL.B (Cardiff), Barrister at Law

"Everything has to come to an end, sometime."
L. Frank Baum, The Marvelous Land of Oz.

*W*riting on New Year's Eve presented its own set of challenges. At the stroke of midnight, fireworks dutifully made their way towards the sky. They were entertaining and loud, and while they distracted me momentarily from the writing, those same fireworks sparked inspiration in me to write this article.

This article is a discussion of a crucial stage of judicial management which has yet to receive much legal treatment: what happens to Court proceedings in the judicial management court after a judicial management order (**"JMO"**) expires?

But let's turn back to the fireworks for a moment.

The fireworks tell us that the year is at an end, but it also marks a celebration of the year to come. A new beginning. The same cannot be said for judicial managements and certain recent decisions, the facts of which the writer is not at liberty to discuss because of ongoing appeals.



The short of it is that there has been some indication from the bench that when a JMO expires, all proceedings in the Court supervising the judicial management would become academic. There are no fireworks, the proceedings end abruptly.

The Law

Section 406(1) of the Companies Act 2016 ("CA 2016") tells us that a judicial management is for a limited time of 6 months and capable of another extension of 6 months only. [1]

On the face of it, **Section 406(1)** means that a judicial management should automatically end once the judicial management period expires.

> **"Automatic":** ***Having a self-acting or self-regulating mechanism***
> **The Merriam-Webster Dictionary**

However, we should also consider **Sections 424 and 417 CA 2016** as these provisions impose certain obligations on the judicial manager prior to and upon the expiry of the JMO. Here is what these provisions say:

Section 417

(1) Thejudicialmanagerofacompanymay–
(a) atanytimeberemovedfromofficebyorderoftheCourt;or
(b) resign his office by giving notice of his resignation to the Court with leave of the Court and subject to such conditions as the Court may impose.

(2) Thejudicialmanagerofthecompanyshallvacateofficeif–
...
(c) the judicial management order is **discharged**.

(3) Whereatanytimeapersonceasestobeajudicialmanagerofacompany...-
(a) any sums payable in respect of any debts or liabilities incurred while the person was a judicial manager under contracts entered into by him in carrying out of his functions; and
(b) any remuneration and expenses **properly incurred** by him,

shall be charged on and paid out of the property of the company in his custody or under his control in priority of all other debts...

Section 424 – Duty to apply for discharge of a judicial management order

(1) The judicial manager of a company shall apply to the Court for the judicial managementorder to be discharged if it appears to the judicial manager that the

purpose specified in the order either has been achieved or is incapable of achievement.
...

(4) Where a judicial management order has been discharged under this Subdivision or where a person ceases to be a judicial manager under Section 417, the judicial manager may apply to the Court for his discharge.

(5) Upon receipt of an application under subsection (4), the Court may, if it thinks fit–
(a) make an order discharging him from liability in respect of any act or omission by him in the management of the company; or
(b) make an order discharging him in relation to his conduct as a judicial manager,

but any such discharge shall not relieve him from liability for any misapplication or retention of money or property of the company or for which the judicial manager has become accountable or from any law which he would be subject in respect of negligence, default, misfeasance, breach of trust or breach of duty in relation to the company.

A Digest

In this writer's humble opinion, **Sections 417 and 424** read together with **Section 406(1)** have the following implications:

(1) **Firstly,** a judicial manager is duty-bound to apply for a discharge of the JMO before it expires.

Section 424(1) provides for only 2 situations where the judicial manager must make such an application. Both situations are mutually exclusive: either the judicial management is a success or it has failed. There is no middle ground.

(2) **Secondly,** the discharge application is vital to the judicial management because it empowers the Court to decide:
(a) whether there are sufficient grounds to discharge the JMO;
(b) whether the judicial management has been successful or has failed;
(c) whether the judicial manager ought to be discharged from any liability towards the company (subject to Section 424(5) CA 2106);
(d) whether the judicial manager has completed his tasks and can be properly discharged as the judicial manager; and
(e) whether the judicial manager's remuneration, costs and expenses have been **properly incurred**.

(3) **Thirdly**, it appears that the CA 2016 does not expressly provide for an automatic



discharge of the judicial manager's duties, if and when the JMO expires;

(4) **Lastly,** the judicial manager requires leave from Court to resign from his post.

Automatically Academic?

What would be the effect of the Court's decision if all proceedings are treated as academic once the JMO expires?

(1) This would require a selective application of **Section 406(1)** without considering the other provisions of the CA 2016. Since **Sections 417 and 424** provide an express mechanism for how the judicial management should be properly discharged, judicial managements that expire automatically indicate that the judicial manager had failed to carry out his duties properly;

(2) This would not be in line with established principles of statutory interpretation. Each statutory provision needs to be read harmoniously with other provisions in the same Act. In the recent decision of **Tebin bin Mostapa v Hulba-Danyal bin Balia & Anor [2020] 4 MLJ 721**, the Federal Court had the opportunity to summarise the law on statutory interpretation, as follows:

> *"In our opinion, the rules governing statutory interpretation may be summarised as follows.*
>
> *First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it...*
>
> *Second, if, however, the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used...*
>
> *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purpose of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance."*
>
> **Refer also: Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1 (FC).**

(3) If judicial managers are not held accountable for failing to properly discharge the JMO, there is a real danger that the Court's process would be open to abuse.

Essentially, the judicial manager would escape from seeking permission from the Court to discharge the JMO and from accounting to the Court the conduct of the judicial management;

(4) Further, **Sections 417 and 424** would become superfluous provisions. It would be convenient (to judicial managers) to simply allow the JMO to expire especially with the added benefit that since proceedings are academic, there is no forum to challenge whether the judicial manager's remuneration, costs and expenses have been properly incurred; and

(5) Depending on the facts of the case, there may still be live issues to be decided by the Court. For example, it may be disputed:
   (a) WhethertheJMOwasproperlygrantedinthefirstplace;
   (b) Whether the judicial manager has properly carried out his duties during the judicial management; and
   (c) Whether the judicial manager has properly incurred his remuneration, costs and expenses.

A Way Forward?

Since the judicial management mechanism has been introduced through the CA 2016, there is a dearth of judicial guidance on this area of law. However, this writer hopes that the established principles of law will guide future judicial managements on the right path.

One suggestion is to look towards the Federal Court decisions on habeas corpus in **Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203, Zaidi Kanapiah v ASP Khairul Fairoz Rodzuan & Or cases [2021] 3 MLJ 759 and Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449.**

The Federal Court in all 3 decisions held, amongst others, that the lawfulness of detention under a detention order did not become academic just because the detention order had expired.

Similarly, if the legality of a judicial management order is being challenged or if the conduct of the judicial manager is questioned, it stands to reason that those proceedings should not become automatically academic once the JMO expires. Instead, it should depend on whether there are any live issues remaining for the Court to decide on.

Conclusion

Just as we look towards a new year with great anticipation, this writer will be on the look-out for judicial illumination from the appellate Courts on this topic. Like fireworks, all it takes is one spark to bring light to the darkest night.



The Expansion of MALAYSIAN JURISPRUDENCE

Interview with YA Datuk Nallini

Yang Arif Datuk Nallini Pathmanathan was elevated to the nation's apex court on 26 November 2018 and became the first female of Indian ethnicity to sit as a judge of the Federal Court of Malaysia.

As an advocate and champion for a progressive judiciary, Justice Nallini has long promoted the need for the expansion of Malaysian jurisprudence, to reflect an independent Malaysia with its own unique set of laws. This is achieved by a considered, responsible and stable interpretation of our laws in accordance with Malaysia's present economic, political, social cultural and religious composition, rather than adopting in toto the interpretation of jurisprudence in accordance with English law. The nation has, in its own right, matured sufficiently to develop and expand its own laws and standards,

having achieved Independence from colonisation for some 65 years. The interpretation to be accorded to our laws should reflect this maturity and development.

A modern and progressive woman, Justice Nallini is also a great believer of digitalisation in order to cut across all social classes and structures, so as to make justice more accessible. Similarly Justice Nallini moved us to consider the fundamental aspects of life as a barrister, the duty owed to clients, the duty to the Court in terms of candour and to promote access to justice for all levels of society.

The AD REM team, led by Chairwoman Kokila Vaani Vadiveo, had a lively and enlightening session with Justice Nallini at her chambers in Istana Kehakiman.

Starting off right at the beginning, can you take through your early childhood and how you ended up pursuing law as a career?

As a child, I had always wanted to study medicine because my family comprises largely doctors – my grandfather, father, brother and various uncles and aunts. I was exposed primarily to life in that field. However I couldn't achieve that objective and pursued a degree in Physiology at the University of London. When I finished I realised I did not want to pursue a career Physiology.

My father had a great interest in the law, despite being a paediatrician. It was he who suggested that I consider studying law. I then undertook the conversion course at the University of Westminster and then the Bar. I was called to the Bar at the Honourable Society of the Middle Temple.

The minute I started with law, I found it both interesting and rewarding. I found my degree in the sciences of considerable use because it had taught me to analyse in a rational and cogent manner, which is a useful, if not essential skill in the law. I enjoyed the Bar, but I really only started to appreciate and comprehend the law more fully as a consequence of practice. Truth be told, I learn every day.

The minute I started with law, I found it both interesting and rewarding.

Who was the most influential figure in your early years of legal practice?

It would have to be the eminent Justice Tan Sri Eusoffe Abdoolcader. I had the extraordinary honour of being called to the Malaysian Bar by this exceptional judge. It is an experience I will always treasure. He had an outstanding mind, and the book chronicling his life and achievements – The Lion of the Commonwealth – is most apt.

In the course of your career as a practitioner, what was the toughest decision you had to take?

There were so many. I wouldn't single any particular decision as being the toughest.

During your days of legal practice, who was the most inspiring to you as a lawyer (colleague or opponent)?

Again, there are so many persons from the Bar and from the Bench who inspired me in terms of different

Life in practice is very stressful and has grown more so, as I note, for practitioners today.

aspects of the law, ranging from intellectual ability, advocacy and integrity. I learned from various figures so it would be difficult to name only one person whom I could say solely inspired me.

You have expended 15 years serving the judiciary, from your appointment as Judicial Commissioner of the High Court to your appointment as Judge of the High Court, elevation to the Court of Appeal and finally to the Federal Court. What inspired you to join the Bench?

I was invited to the Bench by Tun Richard Malanjum while I was a partner practicing in Skrine. There were no female Malaysian Indians in the superior judiciary then, in 2007. For me, becoming a judge was a culmination of what I had dreamt of achieving in the law. I did not think I could or would ever become a judge. I consulted my husband given the financial consequences of my giving up practice. He was very encouraging. There is no doubt that having a supportive spouse and child has been one of the greatest factors that has helped me to be where I am today.

Do you miss legal practice?

Yes, I did initially. I missed the camaraderie of practice, my friends at the Bar and my colleagues at Skrine. Over the years I have grown used to working alone.

Life in practice is very stressful and has grown more so, as I note, for practitioners today. The stress is completely different on this side. It is achieving a rationally correct and just solution, which is in accordance with the law.

What I enjoy so much about the Bench is being able to analyse a matter solely on its own facts and the law. There is no interference. One does not have to fashion an argument to meet a client's case. You do not suffer the strain of having to adopt positions that are sometimes perverse, even though you maintain your integrity. As a judge you are free to truly decide in accordance with the law.

In the course of your career as a Judge which case left the most lasting impression upon you?

I would not name any one case. However, the cases dealing with deaths in custody, habeas corpus and constitutional matters have left a strong imprint on me. These are matters which often concern persons with less of a voice, and who are often not heard at all. Enabling them to be heard and understood is important.

Much has been said and written about the Rule of Law. How are we as a nation progressing with regards to adherence to the Rule of Law?

That is a broad and difficult question to answer comprehensively. I shall focus on one aspect of the multi-faceted Rule of Law – access to justice.

The reality in Malaysia today is that an insufficient percentage of society has true access to justice. In as much







as the Rule of Law requires that no one is above the law, equally too, each person should have access to justice so that everyone has the resources to protect their fundamental rights and needs.

This is a crucial requirement that we need to acknowledge and fulfil. The younger lawyers of today, the millenials, are far more aware of this need, stemming from their consciousness of the disparity between the upper and lower echelons of society.

For example studies show that during the pandemic the top 1.5% of the world earned as much as the bottom 50%. What does that say about wealth distribution? This jurisdiction is no stranger to this phenomenon. It is important that as part of society, lawyers are cognisant of this reality and strive to do their part to alleviate this inequality. We cannot live in silos.

The reality is the disparity cannot be too great. Therefore, the need for exponential growth per se, without giving due regard to the need to address this inequality should be re-evaluated conceptually and practically.

There is a need to subsidise for the poor, so that the average man on the street can afford legal representation.

It goes without saying that the legal aid system needs a great deal of monetary resources to enable it to truly serve the nation. That source should ideally be the Government. However, contribution from each of us by the undertaking of some pro

bono work, individually and collectively, would go a long way towards achieving this goal. If every lawyer took this into consideration, the disparity in terms of access to justice would reduce.

Where do you see Malaysian Law going from where it is now?

In order to answer that question, I would have to go back a little in history. If you study Malaysia's legal history, you will note that while we achieved our Independence in 1957, and are therefore free from colonial strictures, we still have a colonial mindset. I speak about the "colonisation of the mind", which simply put, is the legal thinking and approach that is subconsciously imbued within us, namely that the laws of our colonisers are superior to our own laws. That's because we have always relied on English law and often adopted it in its entirety when construing our laws despite the differences in our circumstances.

In other Commonwealth jurisdictions like Singapore, India, Australia and New Zealand, the divergence from English law to meet their individual needs and which best suits their own unique culture and legal thinking have been adopted and implemented. In my view, we have not been quite as incisive. And that may well be because we do not expend enough time analysing our own laws or undertaking such analysis in the context of the particular circumstances of our nation. We need to foster true regard and respect for our law, starting with our Federal Constitution.

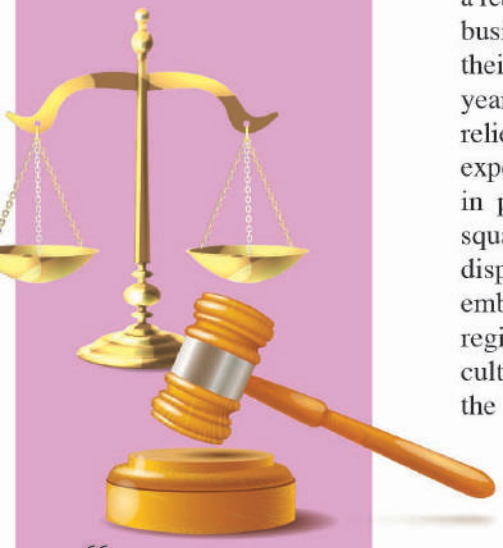
Our Federal Constitution is an amazing instrument, as it is very robust and affords protection to individual citizens and the three arms of government as a whole. We should always start with our own law and then trace the position from there. The interpretations accorded by other Commonwealth jurisdictions which also share the same common law approaches, are useful references in this context. The final construction should reflect a balanced and nuanced approach that reflects our culture, our communities, and the pluralism of the Malaysian way of life within the law.



Having said that about colonisation, I must also say, as I have said elsewhere, that you cannot downplay the importance of the common law which we inherited from the British, as it has provided Malaysian law with an architecture for a rational development of our law. Methods of analyses employed under the English common law, which is the incremental approach, has stood the test of time

Our Federal Constitution is an amazing instrument, as it is very robust and affords protection to individual citizens and the three arms of government as a whole.

Therefore, the duty of candour or honesty is the bedrock of advocacy, which a judge relies on in a barrister when depending on his recitation of the salient facts to make a decision.



and is utilised everywhere. Therefore, I hope we maintain that aspect, which is what the other Commonwealth countries have done, but apply it in the context of our own law.



Apart from this intellectual premise, I see a real need to focus on mediation, conciliation and arbitration. That is where the future of the law is heading, particularly mediation. It is a reality that the populace, particularly business men want a resolution to their disputes that does not take years, fails to achieve precisely the relief they want and is unduly expensive. Mediation and conciliation in particular meet this requirement squarely. These are methods of dispute resolution that were embraced by the countries in this region as being in accord with their cultural and societal way of life. As the legal world becomes global, there is a need to focus on opportunities to capitalise on these modes of dispute resolution.

That is not to say that we should in any way, neglect our goals in terms of arbitration and litigation in the courts. Cross-border litigation, for example, urgently requires attention in the form of legislative development of our current laws. There is a need to update our laws continuously, to ensure that we meet contemporary legal standards world-wide, and to ensure consistency and certainty in our outcomes which match those of other jurisdictions.

AdRem **Many are reluctant to have Malaysia as their seat of arbitration. What do you say to that?**

That is regrettable, as Malaysia has adopted the UNCITRAL Model Law in relation to the recognition and enforcement of arbitral awards. Our judicial decisions reveal that we are arbitration friendly. There should not be undue concern about the ability to register and enforce arbitral awards, local or international. In addition to this, our commercial laws are certain and consistent, both in terms of statute and case law.

I would say that Malaysia is an ideal seat for arbitration.

AdRem **What is the quality of members of the Bar appearing in the Courts presently?**

<u>QUALITY OF ADVOCACY</u>

The quality of advocacy, both written and oral, of members appearing in the Courts, varies somewhat. My experience is of course somewhat



restricted as I only sit at one level of the hierarch of the Courts. The quality ranges from brilliance to a more general standard of being good and regretfully, to poor. This needs to be addressed.

It must be said however that the best of our lawyers more than match the best in other jurisdictions. I say this from hearing the advocacy and reading the work of advocates from other jurisdictions. There is a need to acknowledge and publicize this fact ourselves, rather than to denigrate from our own expertise, which is considerable.

DUTY TO THE COURT

There is a need for lawyers as a whole to appreciate that their duty of candour to the Court overrides their duty to win a case. The duty of candour extends both to the facts of a case as well as the law.

A factual omission or exaggeration will make a complete difference to the outcome in law. Therefore, the duty of candour or honesty is the bedrock of advocacy, which a judge relies on in a barrister when depending on his recitation of the salient facts to make a decision. Such an omission or a failure to give a full account destroys confidence and trust in the advocate.

Equally, an omission of a legal authority or as is more commonly the case, when only particular parts or lines of a judgement are read, without reference to other parts which might well have a relevant influence or consequence on the line or part of the judgement read out by counsel, is misleading. It conveys a deceptive or distorted impression which again will adversely affect the outcome of the matter.



The best advocates are those the Court has confidence will not make such submissions. It is therefore imperative to practice such that the need to win a case does not override a lawyer's duty of candour to the Court which is the foremost duty.

What are the improvements you would like to see from members of the Bar appearing before the appellate Courts?

The improvements that would be welcomed include intellectual honesty, responsibility for the administration of the system of justice, rather than winning at all costs. In short adherence to the Rule of Law.

I would further particularize sufficient preparation and comprehension of a brief, such that litigants are conscientiously and adequately represented.

What advice would you give to young budding lawyers in regard to their pursuit of a career in law?

As I said earlier, it is of importance that lawyers do not forget their societal role and the values they represent as professionals. These values are integrity, intellectual honesty and a need to serve the community. As lawyers we provide a service to society. I have already spoken of the need to accommodate pro bono work as a part of working life.

How do you spend your time when not sitting or hearing cases in Court?

Time with my family is very important to me. I also appreciate having time to think and reflect. We have two dogs and I enjoy taking them for walks, though not as often as I would like. I exercise a fair amount, as it alleviates stress enormously.

It is evident that Justice Nallini is a woman of vision and insight. Her championing of Malaysian talent, her unabashed patriotism and her push for access to justice serves as inspiration for us all to work together towards a better Malaysia.

AD REM thanks Justice Nallini for her time, hospitality and most of all for sharing with us her thoughts on the subjects brought forth in this interview.

It is of importance that lawyers do not forget their societal role and the values they represent as professionals.





SERVE TO EMPOWER WITH KINDNESS AND COMPASSION

Interview with the 1st Youngest Female Chairman of Selangor Bar

"I BROKE THE SELANGOR BAR'S GLASS CEILING"

Lawyer Kokila Vaani Vadiveloo, or more familiarly known as 'Koki' to many who have met her, is a lady of many traits. She delves in both worlds of litigation and beauty pageantry with ease challenging conventional norms. Her evident vivaciousness tells us how she managed to balance both sides equally well.

Lawyer Koki pushed the boundaries when she became the first female and the youngest member to be elected as Chairman of the Selangor Bar during Malaysia's most challenging period of the Covid -19 of recent times and followed it up with winning a second term.

She lent AD REM a moment from her busy schedule to speak about her experience, the inspiration that got her to take her seat as Chairman of Selangor Bar, and her aspirations for the Bar.

What inspired you to take on the challenge to run for Chairman of the Selangor Bar?

It was never something I thought I would have done had I not been nominated for it. Having been on the committee of the Selangor Bar for six terms, I had always served and during that time it never occurred to me to take the helm one day. Running for the Selangor Bar Chairmanship was the craziest decision I have ever made because it wasn't something I had prepared myself, but I must say it was also the best decision and the most fulfilling one. No regrets.

When I ran for Chairmanship, it was during the peak of the Movement Control Order (MCO) period. That decision brought about a lot of concerns as well as along with it grouses from members of the Bar. They had my best interest at heart, and whilst many of them told me not to take on this job during the pandemic because first of all, what could I possibly do in a lockdown? It was also not the best of times to introduce something new and untested. Further, in 55 years since the Selangor Bar came into being, there had never been a young female who ran for Chairmanship.

During the pandemic, a lot of us were questioning ourselves not only about our lives, but our career, our personal growth and decisions. Here I was coming into it with no compass for directions because the past 55 years were relatively stable pre-pandemic times. There were things that we must do, of course like the AD REM, which I must say is the Selangor Bar jewel and we guard it jealously.

In hindsight, I realise while I wasn't sure what was expected, I saw this as the silver lining in the clouds. For the fact that I did not have, nor did I have to follow past precedents because of the pandemic, it was the best time for me to carve my own vision for Selangor Bar. The challenges were different. So I had to figure out what I wanted to do. I decided then that I want to empower Selangor Bar members amidst the period of uncertainty and restlessness.

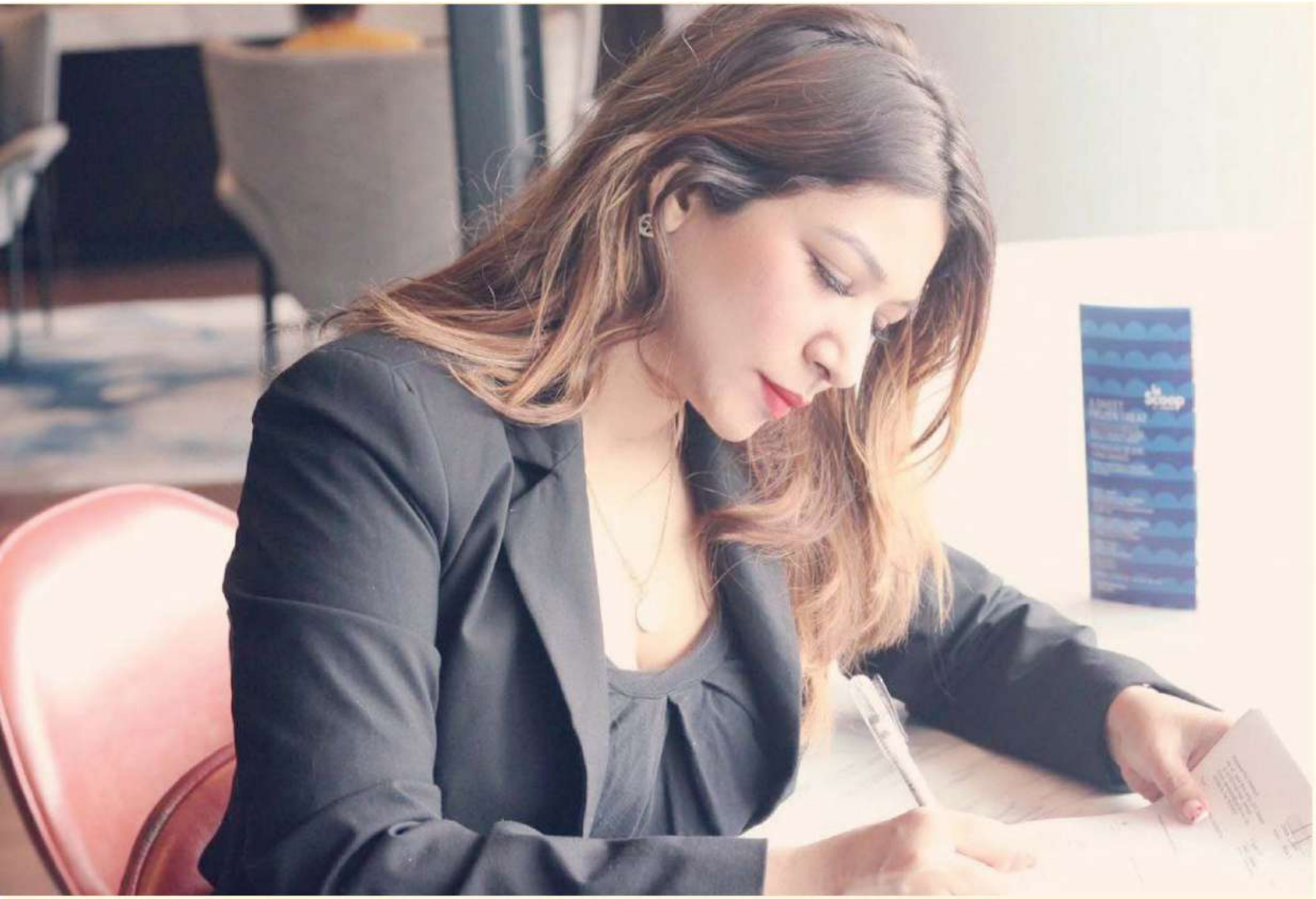
That was when I came up with the Selangor Bar hashtag #SelangorBar Cares. That became a theme and I could not find a more important and relevant one.

How does it feel to have been elected by Members of the Bar as the youngest and first female Chairman of the Selangor Bar?

First, I had to face the facts of my situation being the youngest and first female Chairman of the Selangor Bar. I don't even know whether the members were ready for me on top of it being a pandemic year, I had to quickly earn the love and respect of my members and pupils.

The lady member simultaneously, who nominated me actually came up to me and asked me; how does one nominate a candidate? I answered her, well one just has to mention their name. So then, I was having my cup of coffee and of course, we were campaigning—except I was running for committee and that same lady just got up and nominated me for the Chair.

The seniors all turned and looked at me, probably to see if I had planned this all along. I assured them no, I



did not do this, and I even withdrew my nomination.

And then, the phone calls came streaming in. I was getting calls from female lawyers, and they were asking me why had I withdrawn my nomination? They expressed their displeasure, and this was when I realised this incident has just opened up something new for me. They said to me that I should do it for the female lawyers of Selangor. Of course, as a member of the committee one can only do so much for the respective portfolio given. So, if I am in a position to make changes to the system, why run for a spot on the committee, when I can go for the Chairmanship and make a real substantial difference.

So, after a year I went back to them, and told them, I am taking your mandate so vote me in. I felt I wasn't ready at first, but now that I've thought about it, if you really want a female Chairman then give me a mandate. It was also a time for me to discover whether they were serious, and I can't worry about it if this was a joke out to get me.

And so, I ran for the Chairmanship. I left the winning or losing in their members' good hands, irrespective male or female.

I had nothing to lose at that point. Winner takes all, right? At the time I thought with the same pressure, why not go for a higher position and I went for it. Little did I know when I

ran the pressure was multiple fold more.

My senior members were concerned that perhaps I did not have the maturity for handling a large Bar, but I remembered elsewhere in the world, another woman was running for the seat of Vice President to the United States of America. And she too would be the first female to hold a highest-ranking female official seat in U.S. history. It felt like it was the best time, more than ever.

So there I was, Kokila Vaani Vadiveloo, KVV and Kamala Devi Harris, KDH, our names similar, both women, running for a position that will see its first female elected if we win our respective seats. That would become a sort of tagline for me. People were making that same reference to me, "What, you're going for Vice President?" and I said to them, don't take it away like that because the truth was whilst I wanted to be the first, I was very sure I was not going to be the last, or at the very least to be nominated to run for the Chairmanship.

In the early days of my seat as the Chairman of Selangor Bar, I received a lot of counsel about who I should be mindful of as well as who I should align myself with. I felt the heat of that and at one point asked myself what had I gotten myself into? Being the Chairman of Selangor Bar is a full-time job. It's not even a paid job and people should know this.

I even had people starting to remind me that it was a thankless job, why do I even want it? For me though, if everybody says that, we are never going to see the Bar that we want. We're always going to be disconnected. So yes, though the odds were against me at that point, I know it was important for me to introduce myself as a package where every part of it was new to a regime of 55 years of men with far more experience than I had. Young. Female. Pandemic.

I remembered thinking, somebody has to do it because there had never been even a female nomination, so forget winning.

What frustrated me was the



"In the face of people talking about you, just stand tall."

realisation that most of my past Chairmen who were males never faced a contest. For me, that said because she's a woman, 'Let's give her some competition.' In hindsight, having that competition made me stronger. The campaign was not easy. I have never been a participant in gutter politics so I never abused my power or position for a campaign and I wasn't about to start then.

It was hard for me to even make the team because I had multiple corner fights, and it wasn't just me. My whole line-up also had that. I told myself then, as far as it goes, I'm running for a democratic spot. Elections are democratic and anybody can run. I should not get upset because let's face it, because even I ran, right? What gave me an edge was the fact that I had served six terms as a member of the Selangor Bar Committee. So I wasn't a parachute candidate. I've served, and I've been in the system. I know how it works.

My first term was tough. Competition for my second term was tougher. It was gratifying to know I had a better majority for the second term because it made me realise that my members have actually been watching me work. It was definitely better than winning without a contest. Maybe I needed the competition to know that my members know.

Though the stress was high with a new team coming in and I still had to organize the AGM because I was a sitting Chairman at that point of time, I looked at things positively. I remembered talking to a lot of people along the way, and just last year for AD REM when I was talking to the Attorney General Tan Sri Idrus Bin Harun; he told me, "In the face of people talking about you, just stand tall."

And then there were other voices like The Right Honourable Chief Justice Tun Tengku Maimun binti Tuan Mat, Justice Datuk Nallini Pathmanathan, among others who told me, 'You need to just do what you need to do, and forget the noise. Ignore them.' There are certain things you need to respond to if you want to change perception. One can't just keep quiet. So choose what you want to respond to.

If people ask me if my second term has been a bit easier, the answer is no. I read an article that said, how people thought they were having a mental breakdown due to the lockdown during the COVID pandemic, just wait until endemic sets in because then, while some meetings are still held online, physical meetings are also held. There are conferences every day, weddings, and the hotels are fully booked, and inflation just shot up in a short time.

I was just glad to have members who celebrated having the first youngest female Chairman in Selangor Bar. For me, it was never about just being the youngest female Chairman and I can't be riding on that. I promised my members I will do something, right? So that's exactly what I did. My mindset was, if my members can accept me as their Chairman then I'll serve them to my best. But if they can't, then I'll take a break and go back to my practice. I have already contributed to the Bar for the past six terms, after all.

When I won the Chairmanship, it

was God's Grace because maybe Selangor Bar needed a female Chairman at the time to be empathetic and understand how the dynamics of a pandemic work. I remembered last term when I got the prioritisation of COVID vaccination for all my members. A senior member called me and he said, 'We Hindus have a goddess who comes and helps us in our time of need and this is how I see you.'

That was very heart-warming because he has always been a serious and strict member. So when he called, I thought it was going to be a complaint but actually he called just to thank me for getting him that vaccine. It was very reassuring and there was a very nice touch to it.

Going through the MCO wasn't easy, but I went to knock on the doors of Wisma Sunway where the Pengarah Kesihatan Negeri Selangor is, every day just to talk to them about getting the prioritisation of vaccination for my Selangor Bar members.

That in itself was challenging because to travel, we had to have a letter. Though it wasn't easy, I know it was something I had to do for the members. By the time they finally agreed to a meeting with me and told me to come, it was just after my first dose. I was experiencing the full effects of the vaccine, but the gravity of what I was doing pushed me to go ahead and turn up for the meeting.

So there I was in such a state, already reaching the place we agreed to meet, and they suddenly called me to let me know they changed the venue. I didn't drive myself that time, I just couldn't so I appealed to the Grab



Those who are in position should know that people voted for you because they believed in you and every single one of them equally counts.

driver to please take me to this other location. I think the driver could see the state I was in and just drove me to wherever I needed to be.

I recall at that time, I felt like it may break me into tears but now I shed tears of happiness to know I did that for my members and I would not have done anything less for them. I couldn't reschedule anyway because that was the only day they were all available. So I had to make it.

So we dispensed the vaccine to our members over two days. The members were generally excited and grateful for it. I also had to speak to the Ministry of International Trade and Industry (MITI) because I remembered many of my members were having problems with whether or not they could open their offices for business.

It was a difficult time. To say, 'Have I sat down and celebrated my victory?' No. It was never about that. This is a job. It is not for you to celebrate your win, but it's about sitting and doing the work you've signed up for. Now that requires celebration. Not you winning the position. I think that was something I realised very soon after I won the Chairmanship because it was the very next morning when I received my first phone call for a complaint.

There were so many members whom I did not know, maybe I have not met personally due to the MCO and I remember them coming up to me to say a word of thanks. I think essentially, that is what is going to carve out my term as the Chairman of Selangor Bar. That would be my celebratory note, when they come and say, '..for what you've done for us, we will definitely do this for you.'

Some of the members asked me, "Can we have you for 20 years?" This made me laugh. I told them, we need new blood. When I come in, I should also know that somebody new should come in because one gets too jaded when one is in a position for too long. We should always welcome change. It is my hope that the person who comes next will be putting the members first as I have. I don't want the good work my team has done to go down in vain. Personally, I have put so much into it. It was like my MCO baby.

Every time the members come up to me or call me to say, madam, thank you for whatever it is I have done for the Bar, I will say to them, actually you are my boss because I only became Chairman because of our members. I am the one serving them, and I think no Chairman should ever forget that. So I think, in that sense, we are all equal. Those who are in position should know that people voted for you because they believed in you and every single one of them equally counts.

Adlem

It has been a year since you have been elected as the Chairman of the Selangor Bar, what are some of the main challenges you have faced over the last year?

The main challenge is when attempts were made to smear your name. Not just to discredit you, but telling me I am not doing enough. The one complaint I could not get around was, '..she's okay, but she doesn't shout and therefore she's not a strong leader.'



If you think that a trait of a good or strong leader is one who shouts and intimidates people, I have nothing for you.

If you think that a trait of a good or strong leader is one who shouts and intimidates people, I have nothing for you. I, for one, do not ever subscribe to dirty politics, and I think that's something we should all frown upon. We are in a civilised, and more importantly a noble profession. We don't need aggression to lead, to impose or do our job.

That wasn't my biggest challenge, though. Over the last term, my biggest challenge was the rumours. The most pointless remark I thought went something like, '...she's great but don't you think she keeps coming out on TV?'

If the complaint had merits, it would be different. This was encroaching into my personal life and I thought that was a really offhand remark. I thought that was sad when you have nothing good to say about the person, and the only criticisms you have can't even hold weight. I think that is gutter politics and we should all rise above that.

The attacks I had were directed to my personal life. They questioned why I was still single, and a demeaning comment about how I won my votes because I was pretty, but I was a Beauty Queen so she cannot be smart or have what it takes to Chair the Selangor Bar. I refuse to believe that my members make their decisions on such superficial grounds. These kinds of comments need to stop.

It diminishes all the efforts I have put in to give Selangor Bar my best. Some members, males included, called out for a stop to these revolting remarks and I am grateful for them.

I'd rather the members come to me on the policies I made. First of all, if they want to go there anyway, Beauty queens are supposed to be



the Voice. A voice that inspires but not only that, also a convincing voice. A Beauty Queen carries her own voice for something she believes in to put her country in a better light. As a Beauty Queen who believed in her voice, I even opted out of the bikini round because I felt that should not be a way to objectify a woman. I lost points, but that was all right. I stood for what I believed in. I never wavered against pressure like that. I believed my chances for winning should not require me to compromise my principles.

So if anybody relates me to the Beauty Queen, they should believe that I would carry a strong, convincing voice for my members too. If I had what it took to represent my country against so many others, they should know I am also capable of standing for the rights and betterment of members of the Bar.

My first interview with a mainstream newspaper, I said that I want to lead with compassion, and that's exactly what I'm here for. Many didn't think being a Beauty Queen and leadership go hand in hand, but I would like to think with my tenure as Chairman, I showed them they did.

We are in the era where we can stop this stereotyping, name smearing, and this bullying just because I am female. We know better so we should do better so we should do better. And also, just because I am young, they think I'm easily impressionable. People need to remember that I have been part of the Selangor Bar system as a member of its committee for the past six terms. I know exactly what I'm coming into when I run for the Chairmanship.

I have fused both what I have learned and taken with me from the six terms as a committee member, with my new system together so that's what the Bar gets from 2021 up till now, a Selangor Bar that cares. It gives me great pleasure when I hear people tell me the Selangor Bar is one that is highly spoken about in other Bars. It makes my heart smile.

What changes would you like to see among the Members and Pupils of the Bar to better the legal profession?

For this, I think I am not alone when I say, change has to be in terms of a better attitude and to persevere harder because many of us feel like the young members of the Bar give up too easily perhaps because they feel like the numeration is not great.



And the job is not easy. Maybe it's the long hours, or it's not something easy to adapt because you have to understand we have seniors who come from the pre-digital, pre-online era. Now suddenly everything is online. With the digitalisation of the Courts, we have e-Courts and e- Hearings.

There needs to be this adaptation and we need to be fluid. I've always felt lawyering is a strict, and a rigid profession. We are handling people's lives, people's money, and their assets. People's liberty is at stake and you are entrusted with such a big responsibility. You can't take that lightly and your core must be strong. Your passion to serve and search for justice must be at an absolute high.

My message to the young members is don't give up easily and be quick to leave the profession.

My message to the young members is don't give up easily and be quick to leave the profession. The money will come with seniority and that is because in this profession, you will be valued for your experiences. I know some juniors are doing very well in their practices because they have found their mark in some niche market and that is good, but we must be able to realise that we need to balance it out that our ethics in this profession should not be outweighed by the fact that we want the monetary rewards. We should never veer towards that.

As the Chairman, what is your advice to lawyers who are interested in being a Committee Member of the Selangor Bar?

I love seeing new faces and we always encourage them. Whoever is interested in being a committee member of Selangor Bar, we welcome them with open arms.

The Bar should be more inclusive. We've always strived to get young members to come in just to engage with us. Selangor Bar doesn't have enough young lawyers coming to join us but I do hope that will change because we do have a lot of activities lined up to bring them in. We have done a lot of games, such as laser tag, and we do a lot of online talks. So we hope that will take a positive turn.

The Malaysian Bar had the Selangor Bar host the interstate Bar games. Our goal was for the young lawyers from the other states to mingle with the young lawyers here. It was a huge event that saw about a thousand participants towards the end of July 2022.

What steps have you taken since being elected Chairman that you are most proud of and that you think made the most difference?

I am most proud of the vaccination prioritisation. That made a huge difference for my members to bravely come out because in this profession, we have to meet people. They could not even secure a vaccination before the exercise. So I think that bold action I took on that day, with my many trips to the Pengarah Perubatan Negeri Selangor's office, made a whole difference in my position as new Chairman. I'm very proud of that.

There are many other things that I am proud of also, notable ones such as the most recent achievement whereby I managed to secure a RM3 million grant from the Selangor State government for Selangor Bar lawyers to provide legal aid. The fees will be paid by the Selangor State government, so you register with us as a Selangor Bar lawyer and you get to participate in this selfless endeavour.

The grant is for family and employment matters, RM3 million over three years. The first year programme has already started and that was really tough to sit and get done, because we had to look through the Standard Operating Procedures (SOPs), write up the Agreement, the Memorandum of Understanding (MOU) and deal with its trust monies. It was a heavy task, all the more tough because we are all lawyers. We had to make sure everything that needed to be dealt with was airtight. Plus, we were not the only ones working on it. We also had the Selangor State government,

and Unit Perancang Ekonomi Negeri (UPEN) working on this too.

This year, 2022, I spent my birthday at the Setiausaha Kerajaan (SUK)'s office. That's how much I wanted to do this. I don't know whether the other States have got this programme for their members, but I know this was my way of giving back to my members this term.

They just have to take on a file, and though the money is not much, at least the fees are paid so they may take on these cases with ease. This was my opportunity to help those who need encouragement. After the pandemic, disbursements can be high. So how does one serve back the community? Take up a DBGS case and keep your heart filled with the knowledge that you have provided service to someone in need of legal aid. So this was my way of giving back to them.

What area of the legal profession, in your opinion, do you think highlights the inequality faced by female lawyers?

I would say, litigation though I wouldn't say that there's a huge inequality. I just feel that some clients may prefer male lawyers to litigate in Court because they see female lawyers as the weaker sex.

Of course that cannot be, because I've seen some really good female litigators. The bias doesn't stop at gender, there's also race bias because they felt like Indian lawyers are better at litigation. It must be said that I've seen some excellent Chinese and Malay litigators in Court.

So, inequality is not faced only by female lawyers, I think as a Bar, we should be inclusive of race, religion, and gender. I have gone up against some really good Chinese and Malay litigators and if I thought I was going to call and ask for advice, I would call them. The only requirement



should be a lawyer who practices with high integrity and does their work first before getting the job done.

How do you balance not only being an active member of the Selangor Bar and the Chairman, with your day-to-day job as a lawyer?

Selangor Bar takes the priority first, then my firm and then my family unfortunately comes last. I told my mother, let me finish my chairmanship term. My belief is this. You know you want the position, so you must be willing to put in the hours which is why I find it very funny when people don't do their job to the full extent. There are 24 hours

And a fuel called passion is something that nobody can underestimate.

in a day. Yes, I do get tired and I could do with an extra hour of sleep but the fact that you know when you go out there, you want to make a difference.

For instance, everybody has been talking about the limited parking of the Shah Alam Courts for years now. Now that I am Chairman, I decided let's make life easy for lawyers, and this is one way to do it. Selangor Bar now hires a driver to pick up members from the lake where they are parked and drive them up to the Court. This is something for our members. My philosophy is simple. If you can't beat the system, then at least find a way to ease the situation.

Selangor Bar is something I am very passionate about. I wouldn't say it's easy as the saying there's 24 hours in a day. I think it is because my passion drives me so I'll put in the extra one, or two hours to just get something done.

I'll probably say okay, tonight I will finish my work with the firm first. Then at home, I'll switch to my Selangor Bar work. It's that kind of balance. You just need to make sure you have a very high passion for all the things you do, and it goes back to what results you want to see.

And a fuel called passion is something that nobody can underestimate. Sometimes I go to Court and people tell me I look tired. I think, 'Oh, no.' However the frown quickly disappears and changes into a smile when my members immediately pay a compliment when they say you have been doing good work as a chairman but then again in my mind it's also in the knowing that I signed up for this job and the members have voted. I owe it to them to deliver. The same goes for my clients. They pay me for what I do, and I owe my duty to them as well.

As I mentioned earlier, the ones to suffer the most are my family members because though there's a sense of duty to them, there's no obligation but the commitment to turn up when it matters most. I am fortunate that they understand and accept my hectic schedule. I do take them out on important festive days and spend time with them on important days. I do my best to make up for lost time with them. They are my backbone and the best support one can ask for.

Another great support I have is I have got good colleagues. Generally, you have to take it as it comes. You can't really lock in a time for balancing the two jobs. You need to be fluid and have, like I said, that fuel called passion.

You have also previously competed in beauty pageants, how were you able to balance your career as a litigation lawyer while competing, and did you face many challenges during this time?

I am and have always been also passionate about beauty pageants. I remember when I was young, I told my dad that I wanted to be a Beauty Queen and he gave me the affirmation that "..of course you can be one day."

My favourite part is always the Questions and Answers segment. I'd always love to listen to them and I just admired how they answered off the cuff.


My philosophy
is simple.
If you
can't beat
the system,
then at least
find a way
to ease
the situation.

I believe one cannot go wrong when leading with kindness and compassion.

Though some may think it similar, I do realise speaking in Court and talking in a beauty pageant on a stage are very different. On a stage there are spotlights that sometimes are really too bright they may cause you to blackout. Sometimes you can't even see the judges.

At least in Court, you can see, and you will have some documents to back you up. On a pageant stage, you are wearing high heels, a beautiful gown that is probably tight, and overall uncomfortable but even so, I wouldn't have it any other way.

In 2018, I suffered a massive acid reflux and the doctor told me that 50% of his patients are lawyers with the same problem. The nature of the job sometimes causes us to have bad eating habits, and as there is good refreshments at every meeting so you just keep eating.

Then there will be times when you realise the only time you can sit and do the actual work is at night. And then when the morning comes, the phone starts ringing again.

In 2019, I had this friend who opened a beauty pageant for empowered women business owners. She wanted the maturity that she felt was lacking in beauty pageants. When she asked me, I first turned her down because I didn't think I'd have the time. But when I thought about what my doctor said, I realised the pageant would require me to go on a healthy diet, and exercise. I didn't like either, but I do love pageants. So I realised that if I joined, then I would have to do these two things alongside the pageant because obviously, I want to look good in the pageant. So I got back into pageantry in 2019 knowing that I needed a healthy lifestyle.

We would have weekend activities or charity events. The good thing is that because the pageant is for women of career, they had very little programmes that had to go on during work days. I could work on weekdays and dedicate my weekends to the pageant. The period was for three months, which was quite alright.

I won the Malaysian round, so following that, I had to compete with other countries. I thought what I had going for me was that Malaysia was playing host country. So when you're on home ground, it makes everything easier. There was no travelling time required, no jet lag to get over, it just made everything a little easier.

AdRem

You have been quoted saying that you believe law and pageants are the best avenues to pursue a passion for doing charity, may you expand more on why this is so?

I believe one cannot go wrong when leading with kindness and compassion and I'm a big believer of this. How can you go wrong if your heart is in the right place?

The whole world was facing a trying time and it is during this time more than ever that I think kindness and compassion are most important so law and activism can go together and that define most of my Chairmanship.

When running for the Chairmanship and people were saying, 'Oh she's a Beauty Queen how can she even manage Selangor Bar.' I felt that it was exactly why I was the right Chairman for Selangor Bar. I knew

how to lead with compassion. That was really what inspired me because I knew that no matter what happens, you have to go on the path of kindness and use that as a source of inspiration and everything else will follow.

I had to be very fluid as well because I didn't know what was going to happen. There was always one goal and that was to make sure that whatever we do, Selangor Bar always had kindness. There was never a point where I derailed from the activities, practices, and the goal for kindness. Let it be the pandemic or when the floods hit us, I thought Selangor had one of the most horrible experiences with both, but it made us all stronger.

The floods didn't just hit the general public, it affected everyone. Lawyers too were affected because we also had firms, our houses were affected as well. I remember how my heart broke when some of my members had to come to Court with slippers because they said their shoes were lost in the flood. Further, after the Batang Kali landslide, I personally rang all four (4) law firms situated in Batang Kali to ensure the safety of my members. Only when I knew they were safe, I let out a sigh of relief, when a member from Batang Kali commented, "This is why I love Selangor Bar.".

I took it upon myself to do the job of the Chairman of Selangor Bar to ensure that my members were safe. And then it came the time to empower my members back to their normal lives so they can go back to their bread and butter.

If someone asks me how did I know to do all that I have done for the Bar? The answer is so simple. It is what I want from the Bar. People just don't realise it. Some members may come to me with plumbing issues at the Courts. There's no water, or the toilet is locked, or the lifts don't work and I have some friends who will say to me that is not your job. They are right, but I do take it upon myself.

Of course I won't play janitor, but I ensure that the maintenance personnel came and fixed the problems. People must understand also that Selangor Bar is not the Courts. Selangor Bar is not the land office. Selangor Bar is not Putrajaya.

We take the members' grouses and I think this has been the hardest part, but I serve as the bridge that connects their issues with the relevant parties that can change or improve the situation.

Unless it's a complaint that cannot be looked into, or a frivolous complaint, I have always tried to solve their problem.

Like issues with the land office, my subcommittee has always made sure that though it may not be our case, we need to sort them out because the livelihood of our members is at stake.

Honestly, I didn't think it was going to be that difficult. I just did what members wanted or what I personally wanted. So I became the change I wanted in the Bar and executed it.



If you could take away one lesson from your time as Chairman of the Selangor Bar, what would it be?

When you have nothing to fear, you know that you have done the very best and that's all you take that home with you as a consolation.

For this I am going to quote our Tan Sri AG Idris Harun on this and say, "stand tall". When you have nothing to fear, you know that you have done the very best and that's all you take that home with you as a consolation.

When you aren't busy being in charge of the Selangor Bar and practicing law, what do you enjoy doing?

I actually enjoy watching pageants, which is something I haven't been doing a lot of recently. I enjoy reading a good book, I love to travel too, which I haven't been able to do.

But what I consider as my 'me time' will be a good book and it has to be chick lit, I consider them good reads. Coffee or tea, and I also love watching movies. Sometimes I also unwind with good fine dining. I think it does a lot for your soul. Especially when you go out with your girlfriends, just to catch up, and get that boost for a revived spirit.

If I have not been feeling myself, I feel the need to do things that rejuvenate me. I love being a woman, hence the beauty pageant, and I wouldn't want to take that away from me. I think it's important to have a quality 'me time', to just maintain myself with all the things that bring back the "woman" in me. To all female lawyers and just women in general, I hope you do not ever forget to take care of yourself. Let it be something not just physical, but let it also be your inner beauty, and especially your mental health. These three things are so important and do not ever take that for granted. Your work can wait. The world can wait. Taking care of yourself cannot, and should not wait.

Selangor Bar Chairman Koki thinks outside the box because she herself does not fit into a box of traditional rules and standards. She has great respect for the Law, history and what brought the Selangor Bar to where it is today.

Her drive for the continuous betterment of her members is supported by her ability to be fluid in a new post-COVID world that helps the Bar adapt to changing environments and face up to new challenges.

Her call for young lawyers to hold true to the noble profession of litigation and to join the Bar should not be ignored. She has set the example of the changes a young professional can make to impact a community on uncharted grounds and she is eager to pass along the torch when the time comes.

Her advice: Members first, always.
AD REM thanks Koki for her valuable time and insights to what it took to balance a demanding post as the Chairman of Selangor Bar as well as heading the litigation unit at her firm.



Judging Judges : The removal of superior court judges from office in Malaysia

In a press conference after being sworn-in as the 10th Malaysian Prime Minister, Dato Seri Anwar Ibrahim cited that he will not compromise on certain core issues including judicial independence. It is imperative to note that the mechanism for removal of judges from their office is an indispensable component of judicial independence. The implementation of a free and effective judicial appointment system in any jurisdiction would not be worth its salt if higher court judges can be facilely vacated from their office especially to the whims of the executive. Therefore, mechanisms involved in judicial removals should be accorded an even higher weightage of importance compared to judicial appointments. In fact, international instruments have expressed three foundational principles that shall guide and guard the removal of judges.

The first is that the grounds of removals should not be ambiguous and there is clear evidence to institute removal proceedings against a judge as enshrined in Article 19 of the United Nation Basic Principles on the Independence of the Judiciary. Secondly, Article 18 of the United Nation Basic Principles on the Independence of the Judiciary states that countries ought not to embrace a removal mechanism that undermines judicial independence, and the removal shall be only on grounds of incapacity or misconduct. Thirdly, international instruments mandates that the gravity of the misconduct committed by the judge should be sufficient to warrant a removal proceeding. The Latimer House Guidelines provide some guidance in this respect.

In addition, the Annual Report 2014 of the United Nation Special Rapporteur states that the removal and disciplinary procedures against judges should focus on grave and intolerable professional misconduct that tarnishes the reputation of the judiciary. Moreover, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa defined the threshold for judicial removal as misconduct unbecoming of a judicial office whereas Article 30 of the IBA Minimum Standards of Judicial Independence states that a judge is deemed unfit for judicial office if the judge has committed any act of crime or grave or repeated neglect. All international instruments examined above unanimously concur that judges must not be removed from office on any other grounds save for incapacity and misconduct. They also prescribe a high threshold of burden on the state when removing any judge from office. The instance of the Chief Justice of Gibraltar would be a genuine case where the Privy Council emphasized on the requirement for a thorough evaluation to be made to determine if the appointed judge might be entrusted to remain in his or her judicial office. The Privy Council asserted that the test for judicial removal requires any failings of the judge to be severe enough to undermine trust in the judge's ability to perform his or her duty properly. Further in the case of Re Levers, the Privy Council highlighted that although the standard of behaviour to be expected of a judge is set out in the Bangalore Principles of Judicial Conduct (Resolution 2006/23 of the United Nations Economic and Security Council), these standards should aspire all judges to achieve but it does not follow that a failure to do so will automatically amount to misconduct. The Privy Council expressed that the public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit.

In addition, the United Nation Human Rights Committee reported that the right to an independent and fair trial of a judge would be threatened if the power to remove judges is vested with the executive. The IBA Minimum Standards of Judicial Independence advocates that, as a minimum standard, an independent judicial tribunal be established to hear cases involving judicial removal via Article 4(a) and on the other hand, by virtue of Article 4(c) the IBA Minimum standards does also allow for removal of judges via legislative council but based on the recommendation of an independent commission. The Venice Commission in its 2010 report on the Independence of Judicial System recommended that the arbiter in such judicial removal cases shall be a court of a permanent status or a judicial council.



Most Commonwealth nations have indicated the reasons for judges to be removed were due to judges' inability to carry out their judicial functions or conducts which are not in conformance to the standards set out in the Commonwealth Latimer House Principles and other international standards for judicial conduct. In South Africa, however, gross ineptitude is an additional ground which might warrant removal of a judge as permitted under Section 177(1)(a) of the South Africa Constitution. Ineptitude might be acceptable grounds for dismissal in certain circumstances especially when judges deliberately disregard the obligations of their office, however, this may also expose judges to unfair and indiscriminate accusations of ineptitude for delays or errors

attributable to other factors such as work overload and lack of administrative support. In the Malaysian context, Article 125(3A) of the Federal Constitution allows the Chief Justice to exercise discretionary powers to refer any judge to a disciplinary body for minor breach of codes of ethics. The vesting of such discretionary power on a single actor, the Chief Justice in this case, creates ambiguity and gives an appearance of lack of judicial independence as currently there is no expressed guidelines on what constitutes a minor breach of ethical conduct that require lesser disciplinary sanctions or a grave misconduct which warrant a judge to be removed from office.

JUDICIAL REMOVAL MECHANISMS

Nations all over the world require a system for removing judges from office. Nonetheless, the challenge for legal frameworks is to ensure that the removal process is not used to intimidate judges. There are several different types of mechanisms to remove a judge from office in Commonwealth nations, which are ad-hoc tribunals, disciplinary councils, a hybrid mechanism involving the legislative assembly or Parliament and a disciplinary council, and a mechanism involving only the legislative assembly or Parliament. There is not a single Commonwealth nation that gives sole discretionary power to the executive to remove judges from office. Figure 1 shows a percentage breakdown of the types of judicial removal mechanism employed for higher courts across Commonwealth nations. A summary of findings revealed that in 42% of Commonwealth jurisdictions, once an initial investigation establishes that a question of removal has arisen, an ad hoc tribunal is formed to resolve the issue. Furthermore, a permanent disciplinary council is established in another 21% of jurisdictions for that purpose, and a parliamentary removal mechanism is found in 34% of jurisdictions, while in the remaining 4% of jurisdictions, some judges are removed through a parliamentary process and others through a disciplinary council.

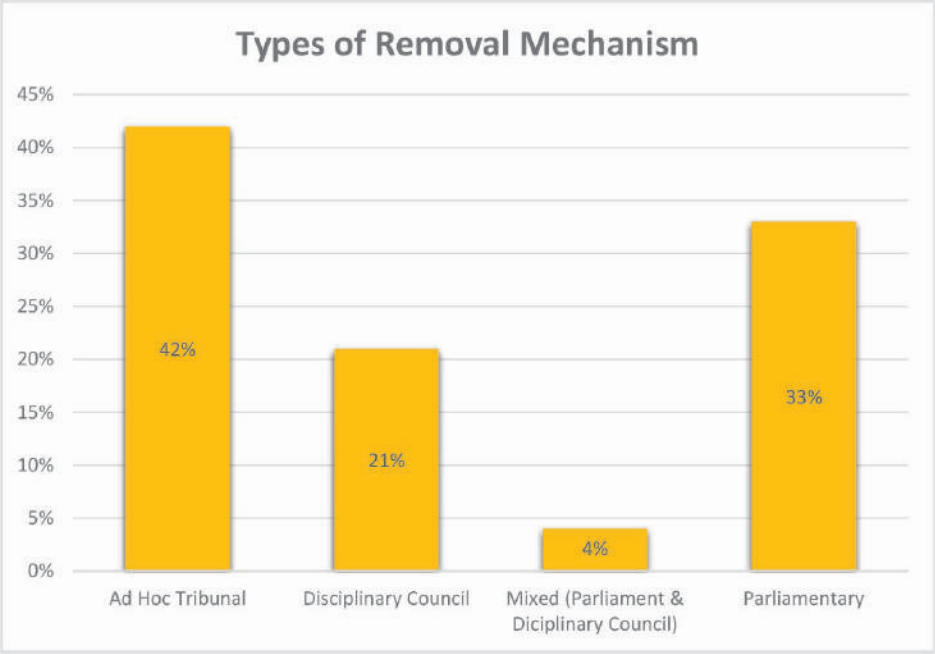


FIGURE 1: Types of removal mechanism of higher court judges in the commonwealth countries.

AD-HOC TRIBUNAL

The ad-hoc tribunal model for removing judges from office is the most popular amongst Commonwealth nations. It was found that 20 Commonwealth jurisdiction subscribe to this model which includes Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organization of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda, and Zambia. Australian states of Victoria and Queensland, and the Australian Capital Territory. The ad-hoc tribunal model is popular because it is found to be the most viable amongst all other types of mechanisms. In this type of model, the tribunal is given the mandate to examine whether there are any valid grounds to remove the judge accused of being unfit to perform his or her judicial duties. The tribunal is usually made up of a combination of current and former judges and members may also be invited from foreign judiciary to give the tribunal a sense of international legitimacy and to allay any unbiased perception of domestic political interference. Also, foreign expertise is considered to ensure that the tribunal proceedings follow best practices as adopted in similar jurisdictions. This kind of foreign appointments are allowed for in Malaysia. The Federal Constitution under Article 125(4) allows for the appointments of tribunal members from other Commonwealth jurisdictions provided the said appointees meet the stipulated qualification criteria.

Generally, a preliminary inquiry phase is initiated prior to any removal proceedings. This is a salient part of the judicial removal mechanism to determine whether an ad-hoc tribunal is warranted or otherwise. The United Nation Basic Principles and Article 25 of the Beijing Statements of Principles of the Independence of the Judiciary both advocates that some form of initial investigation be conducted before instituting removal proceedings against any judge. In most of the commonwealth countries that practice the ad-hoc tribunal mechanism, the Chief Justice or a commission is tasked with the duty to first conduct a preliminary inquiry to ascertain the validity of the charges against any judge and to determine if the said judge is to be subjected to a removal proceeding as currently practiced inter alia in Barbados, Bahamas, Fiji, Ghana, Guyana, Jamaica, Kenya, Mauritius, the Organisation of Eastern Caribbean States, Papua New Guinea, Seychelles and Trinidad and Tobago. However, if the accused judge is the Chief Justice or in some cases the President of the Court of Appeal, then the removal process is generally initiated by the executive. This applies to all countries mentioned earlier except for Kenya. In Seychelles, the appointment and removal of judges fall under the purview of the Constitutional Appointments Authority (CAA). It should be noted that it is not mandatory for the CAA to include judges as members.



In some commonwealth countries, the judicial removal mechanism involves a hybrid adhoc tribunal mechanism which combines both the Chief Judge or a commission and the executive as who are jointly responsible to decide to initiate tribunal proceedings.

The countries that practice this type of hybrid system are Botswana, Lesotho, Malaysia, Singapore, Solomon Islands, Tanzania, Uganda, and Zambia. Figure 2 illustrates the various types of appointments in the ad-hoc tribunal model.

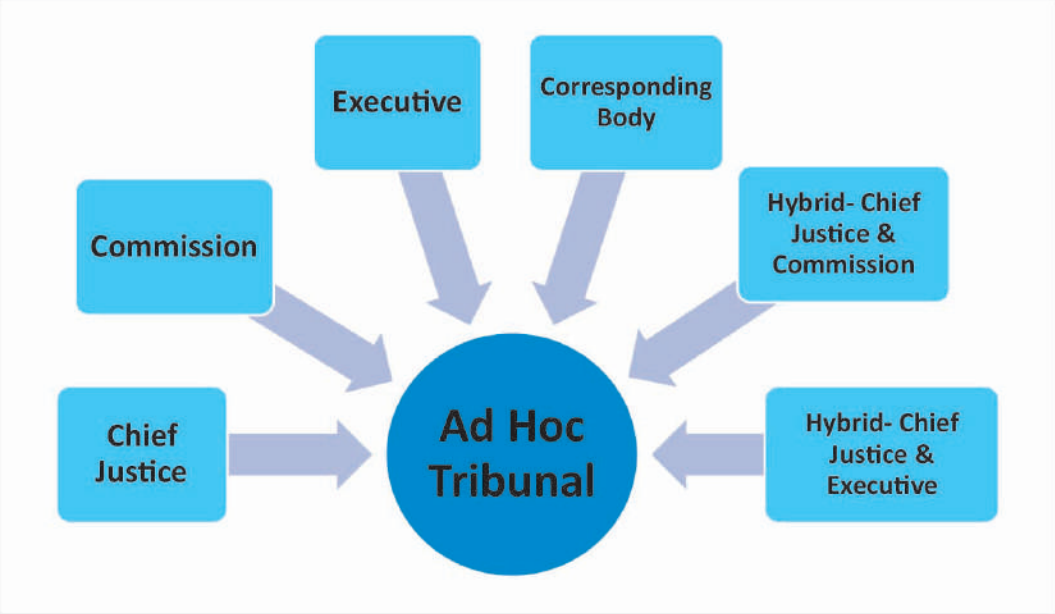


FIGURE 2: Types of appointment of Ad Hoc Tribunal

However, there is an inherent risk of abuse of power by the executive in this type of ad-hoc tribunal model when the power to commence removal proceeding against judges is vested in the executive. An example of this was the tribunal of the former Lord President of Malaysia, Tun Salleh Abas, where it was alleged that the Prime Minister purportedly used his constitutional powers under Article 125 of the Federal Constitution to select the members of the tribunal; the qualification of some members remains questionable until today. This dark episode in the history of the Malaysian judiciary seems to demonstrate that the model does not guarantee an independent judicial removal proceeding if safeguards in such a mechanism does not adequately shield the judiciary against executive intimidation. According to Harding, it is not a bad idea to have fellow judges scrutinize the alleged breach of ethics or misconduct of their brother or sister judges if there are clear and guiding principles that expressly delineates the rules in the composition of the tribunal members, the procedures as well as the grounds for such removal proceedings. He pointed out that the reason for Malaysia to choose the tribunal mechanism for instituting judicial removals is to avert any manipulation by an executive with a majority control of Parliament in a legislative council judicial removal mechanism. However, there is an ominous weakness in the Malaysian system that manifested in the Tun Salleh case which is that the Prime Minister holds the constitutional discretionary powers in the removal process under Article 125.

PARLIAMENTARY REMOVAL

Another mechanism that is widely used in the removal judges in Commonwealth nations is the Parliamentary removal mechanism. Although, it is not as popular as the Ad-Hoc tribunal method, it is nevertheless found acceptance in countries such as Australia, Bangladesh, Canada, India, Kiribati, Malawi, Maldives, Malta, Nauru, New Zealand, Samoa, Sierra Leone, South Africa, Sri Lanka,

Tuvalu and also the United Kingdom. It is also applicable to Nigeria and Rwanda for certain judicial positions. The minimum standards set by Article 4(c) of the IBA Minimum Standards of Judicial Independence requires that in a Parliamentary removal system, the judicial removal powers exercise by the parliament should be founded on the recommendation by a commission. Notwithstanding this, Chief Justices namely from the Asia- Pacific region had expressed their concerns that this parliamentary removal system is susceptible to abuse by the executive if the parliament is under the control of the executive.

In a situation where the executive commands the support of the parliament, any judge whose decisions are unfavorable to the Government of the day could potentially see the said judge being ousted from his or her judicial position with a simple majority vote in the parliament. Any opposition voice would be drowned and futile against majority rule of the executive and the executive could potentially pack the courts with executive-minded judges. Considering this, most commonwealth jurisdictions adopted a hybrid system combining both the Ad-Hoc Tribunal and parliamentary instead of a vesting removal power solely on parliament for instance in the United Kingdom and South Africa. Alternatively, the threshold for parliamentary approval to remove judges could be set higher by requiring a two-third majority instead of a simple majority for parliament to remove any judge from office. This would further enhance safeguards in the countries adopting the parliamentary removal mechanism.

REMOVAL BY DISCIPLINARY COUNCIL

Judicial service commissions, judicial councils, and other permanent bodies are examples of disciplinary councils that are authorised in some Commonwealth jurisdictions to decide whether a judge should be removed from office. International norms require these to be judicial bodies, but in some Commonwealth states that follow this model, only a minority of members are required to be judges, with some jurisdictions entrusting the executive with the power to appoint council members. It is still common practice for disciplinary bodies, such as ad hoc tribunals, to recommend that a judge be removed to the Head of State, who oversees the formal act of removal. The role of the head of state are merely perfunctory in the removal process. In the absence of a viable review or appeal mechanism, it is not inconceivable that a Head of State would refuse to act on such a recommendation if there is clear evidence of illegality or irregularity in the disciplinary process. To affirm a broader discretion on the Head of State would be to reintroduce an element of executive control over the removal of judges, which would be incompatible with the judiciary's independence. It is pertinent to note that an advantage of entrusting removal decisions to disciplinary councils rather than ad hoc tribunals is that their members are not chosen for the purpose of investigating a specific judge, making manipulation of the body more difficult.



DUAL REMOVAL MECHANISM

There are countries that have adopted a combination of two types of removal mechanism in their judicial removal system consisting of the judiciary and the legislative assembly. In the context of this article, the dual system for England and Wales in United Kingdom and South Africa were selected for discussion.

THE SOUTH AFRICAN MODEL

The South African Constitution under section 177(1)(a) empowers the Judicial Service Commission to conduct investigation to ascertain if any judge is incapacitated or is grossly incompetent or is guilty of gross offenses of misconduct. If the commission finds prima facie evidence of such incapacity, incompetence, or misconduct then a tribunal shall be established to initiate a removal hearing. The full hearing shall be before a tribunal consisting of two judges and a lay person who is not a member of the national assembly. The exclusion of legislative council members in the tribunal ensures conformance with the Latimer House Guidelines and assures of an independent and impartial tribunal in accordance with Section 178(5) of the South African Constitution. The accused judge would be given reasonable notice to defend himself or herself and could also be represented by a counsel of his or her choice and given the right to call and question witnesses. If the judge is found to be incapacitated or guilty of gross incompetency or misconduct, the said judge would be referred to the National Assembly for a parliamentary resolution as prescribed under section 22 and 33 of the Judicial Service Commission Act 1994. A two-third majority would be required in the National Assembly to remove the judge from office in accordance with section 177(1)(b) of the South African constitution. In the South African model, the safeguards in the judicial removal under section 177 (1)(a) reduced the risk of parliamentary interference as it limits the parliament to act at the advice of the tribunal. Once the two-third majority endorsement is complied with, section 177(2) of the South African constitution mandates the President to remove the affected judge from office.

THE UNITED KINGDOM (ENGLAND AND WALES) MODEL

For key judicial position such as the Lord Chief Justice, Lords Justices of the Appeal Court and judge of the High Courts, Her Majesty the Queen of England is the final authority in the removal of higher court judges from their positions. However, this is subject to an address in the Parliament pursuant to section 11(3) of the Supreme Court Act 1981. However, the Lord Chancellor can exercise powers given under Constitutional Reform Act 2005 to remove other judicial officers not mentioned above on grounds of incapacitation and misbehavior. In the United Kingdoms, Judicial Conduct Investigations Office (JCIO) was established as an independent statutory organisation to assist the Lord Chancellor and Lord Chief Justice in conducting investigation into complaints of judicial misconduct with exception of Supreme Court judges. Rule 1 of the Judicial Conduct (Judicial and other office holders) Rules 2014 Supplementary Guidance states that the overall responsibility to conduct proper investigation and ascertain whether there is any credibility in the complaints of misconduct against judges shall be shared by the Lord Chancellor and Chief Justice. The officers in JCIO are appointed by the Lord Chancellor with the consent of the Chief Justice as per Regulation 4 of the Judicial Discipline (Prescribed Procedures) Regulations 2014 and is tasked to handle complaints against conduct of judges in a consistent, fair, and efficient manner.

When a complaint had been filed, the Lord Chancellor and the Lord Chief Justice may assign the case to any designated person or body for investigation as per Regulation 13(2) of the Judicial Discipline (Prescribed Procedures) Regulations 2014 (JDR 2014). The designated person may be a nominated judge or a disciplinary panel. In cases involving tribunal judges, the President of the relevant tribunal may be nominated to investigate the complaint whereas if it involves a magistrate, an advisory committee may be tasked to conduct the investigation. If the outcome of the investigation into any

complaints does not warrant removal or suspension of a judge, the matter may be referred to a disciplinary panel constituted jointly by the Lord Chancellor and Lord Chief Justice in accordance with Regulation 14 of the JDR 2014. The possible penalties or sanctions against any judge found guilty of judicial misconduct is set out in The Constitutional Reform Act 2005 (CRA). Regulation 15 of the JDR 2014 describes that the sanctions shall commensurate the degree of severity of the offense. These includes sanctions such as a formal advice, formal warning, reprimand, and removal from office. Hodge indicated that the UK model espouses shared responsibility in disciplinary or judicial removal cases as to avert any perception or suspicion that the Lord Chief is protecting his or her fellow judges.

The United Kingdom model is founded on a consensus between the Lord Chancellor and the Lord Chief Justice. There is also an additional protection to safeguard the system by requiring both chambers of the UK Parliament to vote on the matter concerning High Court judge and above. These are stipulated in regulation 2, 4(2), 14(b) and 15 of the JDR 2014. The mechanism for the removal of Supreme court judges is based on provisions under Section 33 and Note 219 of the CRA which allows removal only if passed by both the House of Commons and the House of Lords.

CONCLUSION

The comparative analysis of different types of removal mechanism in the commonwealth countries illuminated the benefits and inadequacies of various removal mechanism and had also assisted in determining the most viable method in the removal of higher court judges. It is incumbent on legislators to create a suitable legal framework with best practices and standards that adopts a more executive-free approach in the removal of higher court judges in order to regain the public trust in the judiciary and as not to repeat the judicial crisis of 1988.

After considering the various types of removal mechanism used in the commonwealth countries in particular the United Kingdom, South Africa and Malaysia, the question arises whether Malaysia's method of adopting ad hoc tribunal should be retained or changed. Removal of higher court judges by way of parliament is a far cry from our intention to have a more independent judiciary, whereas a hybrid system of both ad hoc tribunals and parliamentary removal or setting a higher threshold of two-thirds majority would also not be a viable option for Malaysia given the history of political consideration in the removal of judges in the Malaysian higher courts. This type of mechanism may be abused by the executive if it commands the majority in the parliament. Furthermore, the current political landscape and the suspension of parliament due to the Covid 19 pandemic by the former Prime Minister Tan Sri Muhyiddin Yassin led Government does not augur well for the removal mechanism method by parliament. Therefore, parliamentary removal system is also not viable in Malaysia.



The next question is whether the ad hoc tribunal system appointed by the Head of State on advice of the executive would be the best removal mechanism for higher court judges in Malaysia. As previously stated, the reality is that the removal of the judges at higher courts in Malaysia may be initiated by the Prime Minister. Therefore, this concentration of power in the executive would still

impose an inherent risk of abuse and the errors of the past can still be repeated when the Prime Minister's position is challenged be it within his political party or externally in the parliament. The case of Tun Salleh Abbas proves that the ad hoc tribunal system has its flaws if there is executive interference and involvement.

Although the author agrees that the ad hoc tribunal system must be maintained as it appears to be the best method to guarantee a more independent method of removing judges from the higher courts compared to a parliamentary system, the degree of independence of the ad hoc tribunal is heavily dependent on the extent of executive involvement in its appointment as well as the appointment of members to the ad hoc tribunal. The best way forward in a Malaysian context is to amend the Federal Constitution to ensure that appointment of the ad hoc tribunal and its members is conferred to an independent commission as opposed to the Prime Minister or confined only to the top judges of the land. The commission should be composed of pertinent stakeholders in the Malaysian judicial system including the quadrumvirate of the top judges in Malaysia (the Chief Justice, President of the Court of Appeal, Chief Judge of Malaya and Chief Judge of Sabah and Sarawak), the Attorney General, Presidents from the private bars from West Malaysia, Sabah and Sarawak and also eminent persons from the Judicial Appointments Commission. If any of the quadrumvirate of the top judges in Malaysia is being subjected to a tribunal then he or she should be excluded from the commission. In this way, there is a greater possibility of ensuring separation of powers and independence in the removal process of the higher court judges in Malaysia without executive or legislators interference.

By Dr Jenita Kanapathy
Email: jenitha.kanapathy@yahoo.com

SELANGOR BAR ANNUAL DINNER & DANCE 2022
















ANNUAL DINNER & DANCE


SELANGOR BAR


ULL&BEA




SELANGOR BAR







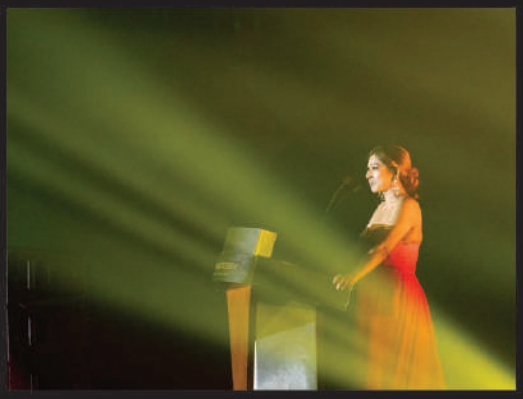



































LexisNexis










DINNER & DANC






ANNUAL DINNER & DAN








ANNUAL
















SELANGOR BAR


SELANGOR BAR






















SELANGOR BAR



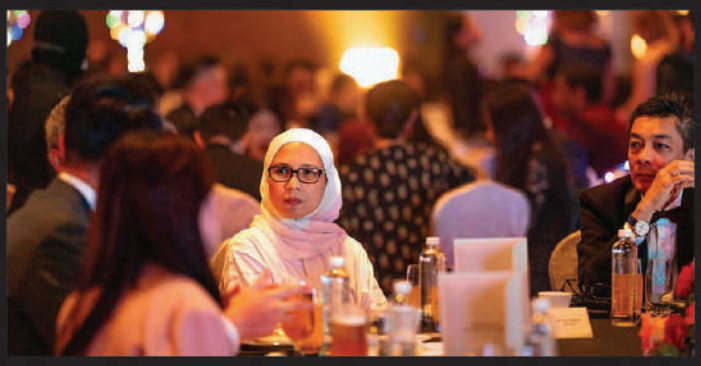

ELANGOR BAR


SELANGOR BAR













PRISM+ | Q55QE




Buka Puasa

Kipidap Sandwich & Cafe Puchong on 27042022













Charity Contribution Raya
Rumah Nur Sakinah
on 27042022













Charity Contribution Raya
Rumah Amal Subang on 27042022



Charity Contribution Raya
RECTAR Subang on 28042022













Charity Contribution Madrasatul Quran Yaakubiah

Subang Jaya
on 28042022





Meeting with Selangor Police
on 10052022







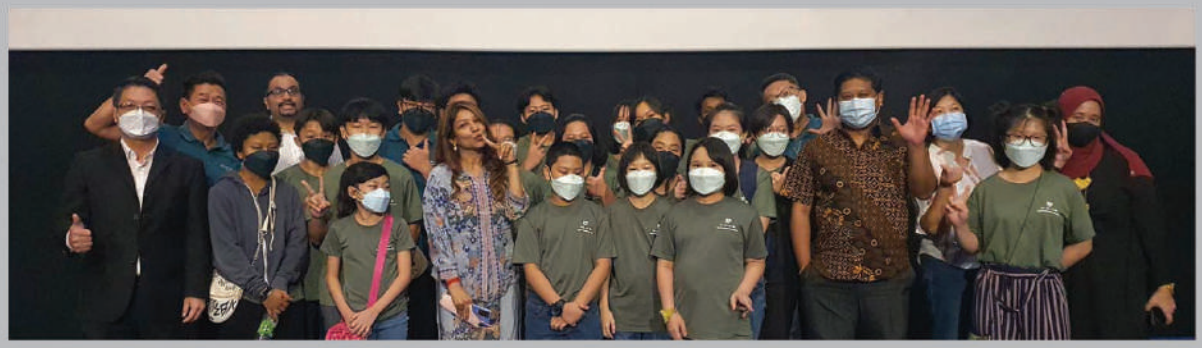






SBC Raya Movie Night
on 20052022





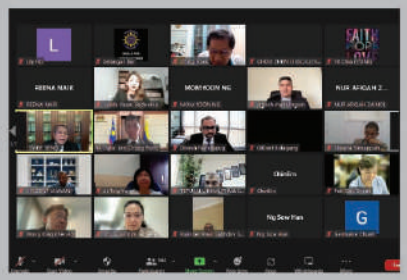


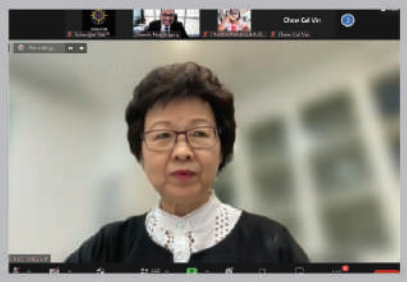
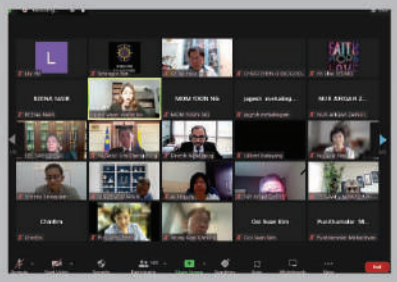
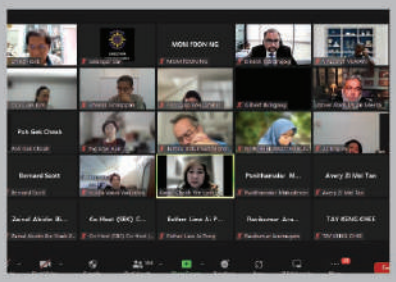




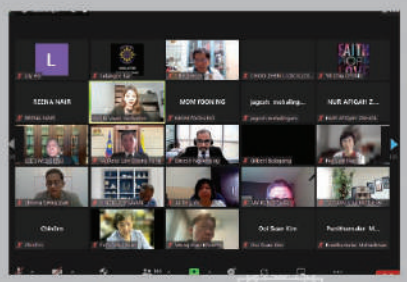
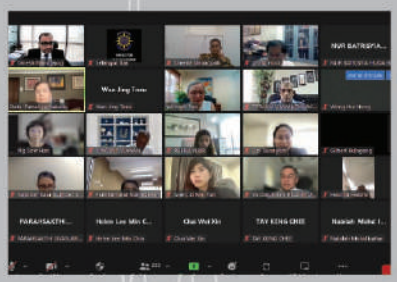


Civil Law Conference on 01072022 & 02072022












Meeting with Managing Judges & High Court Judges
on 17062022





Meeting with Lower Court Judges
on 13122022









Meeting with Pengarah Pendakwaan Negeri (PPN) on 22062022









Meeting With Jabatan Kimia Malaysia Petaling Jaya

on 14072022







Inauguration of the DBGS Programme on 30082022





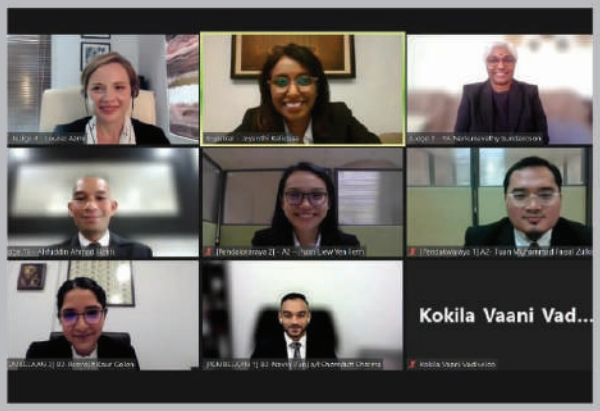








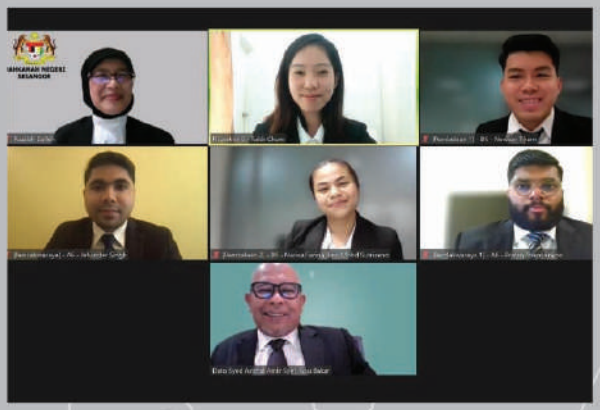
Emoot Competition
on 24092022











Laser Tag
on 18062022









Make a Wish to The Selangor Bar
on 16122022













Chinese New Year Celebration

on 03022023













Deepavali Charity Event
on16102022














ICE CREAM











Conveyancing Hi-Tea & Get Together 2022
on 11112022















Interstate Bar Games 2022
on 29 & 30 July 2022













Interstate Bar Games 2022
on 29 & 30 July 2022













Interstate Bar Games 2022
on 29 & 30 July 2022







Interstate Bar Games 2022

on 29 & 30 July 2022













Interstate Bar Games 2022

on 29 & 30 July 2022



















Interstate Bar Games 2022

on 29 & 30 July 2022

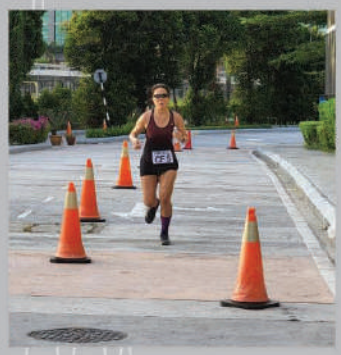


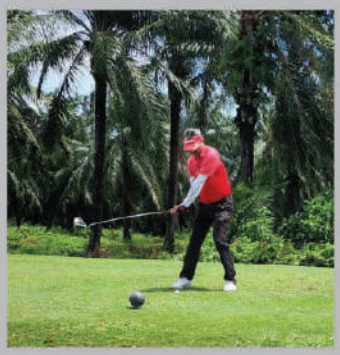
















Interstate Bar Games 2022

on 29 & 30 July 2022















Interstate Bar Games 2022

on 29 & 30 July 2022















Interstate Bar Games 2022

on 29 & 30 July 2022











Interstate Bar Games 2022

on 29 & 30 July 2022



















Interstate Bar Games 2022

on 29 & 30 July 2022

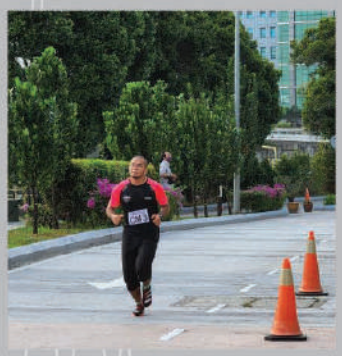














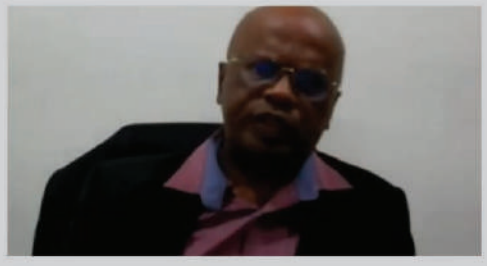




Introduction To Income Tax For Lawyers

Rajagopal Nadassan

24.03.2022



Introduction To Conveyancing for Pupils & Young Lawyers

Richard Teh

15.04.2022



Abbas Alsagoff

Sharifah Shafika Binti Syed

12.05.2022



Importance of Human Rights

Samuel Payara & Pervez Mash

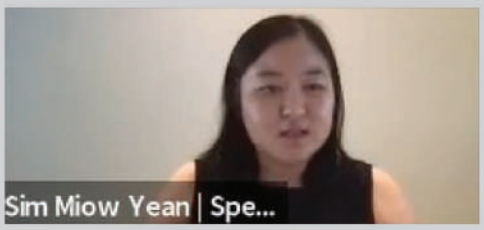
08.04.2022



Practical Issues

Sim Miow Yean-WILLS

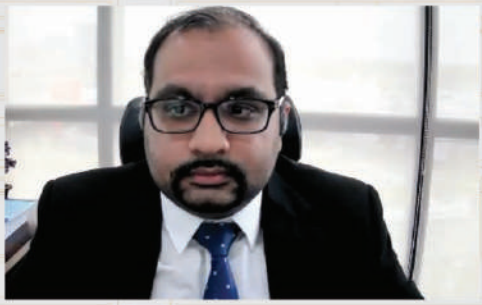
26.04.2022



Introduction To Civil Litigation

Dinesh Nandrajog

26.05.2022



Pengurusan Harta Pusaka Firma Guaman

Mohamad Ezri Bin Abdul Wahab

09.06.2022



Dennis - Crafting The Final Sale & Purchase Agreement

Teoh Kheng Siang

07.07.2022



Fair Comment and The Law of Defamation - Are You Being Fair in Making a Comment

Saraswathy Shirke Deo

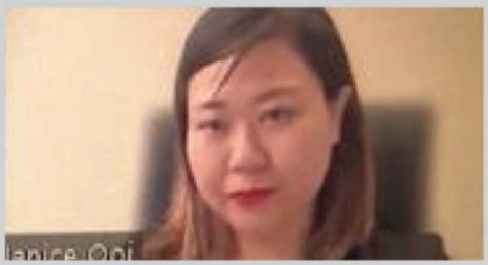
19.07.2022



Company Law - What's Trending

Janice Ooi Huey Peng

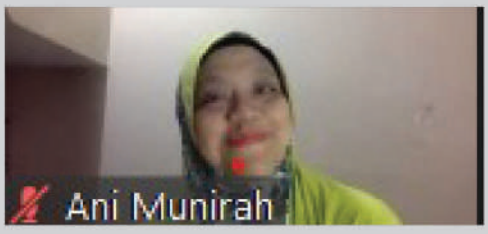
06.07.2022



Machine Learning In The Legal Industry

Siti Munirah Binti Maarof, Prof. Dr. Ida Madieha Binti Abdul Ghani Azmial

14.07.2022







Real Property Gains Tax
Rajagopal Nadassan

21.07.2022



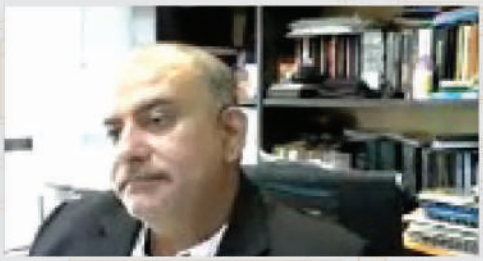
Autopsy Report In Murder Cases
T. Vijayandran

11.08.2022



Application of Section 112 & 113 Criminal Procedure Code in Criminal Trial
Datuk Dr. Baljit Singh Sidhu

25.08.2022



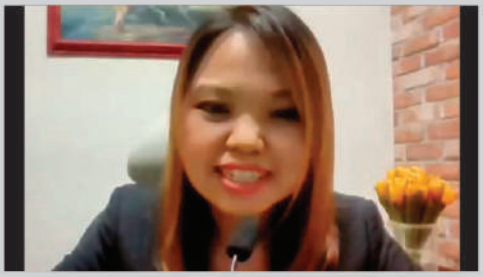
Sexual Harassment - Identifying IT & Seeking Help
Hastiny Subramaniam

03.08.2022



Strata Management And Tribunal
Valerie Chong Wei Chen

18.08.2022



Wills And Administration of Estates
Daphne Rethual

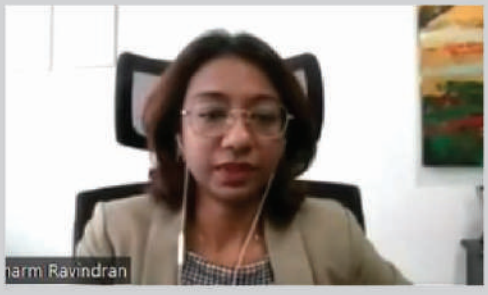
08.09.2022



Interlocutory Application - An In-built Mechanism To Strategic Litigation

Sharmila Ravindran

14.09.2022



Paths To Resolving Construction Disputes

Mak Hon Pan

27.09.2022

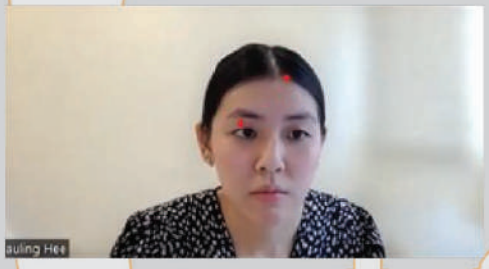


Franchise Law

Foong Cheng Leong & Pauling Hee

05.10.2022





Sexual Offences And Criminal Trial

Salim Bashir

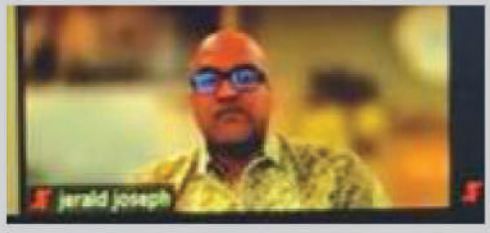
22.09.2022



Effective Functioning of National Human Rights Institutions (NHRI) - Suhakam as Oversight for Human Rights in Malaysia

Jerald Joseph

04.10.2022



Basics of Judicial Review for Pupils & Young Lawyers

Kee Hui Yee

13.10.2022



Basics of Conveyancing Practice

Zemilah Binti Mohd Noor

21.10.2022



Immigration Act and Passport Act (The relevant sections that can be used to prosecute the Foreigners)

Varghese Onny

07.11.2022



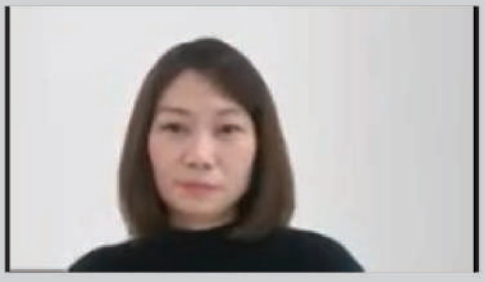
An Introduction to Industrial Court Procedures

Siew Li Foo 20.10.2022



Disputes in the Construction Industry

Jocelyn Lim 27.10.2022



Yudisgtra Darma Dorai & Ong Yu Jian

15.11.2022





Dokumen Asas Proses Jual Beli Hartanah

Dato' Nazri Bin Mustafa

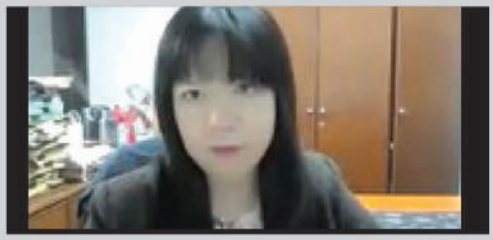
17.11.2022



Intellectual Property Practice and Advocacy in Malaysia

Wendy Lee Wan Chieh

29.11.2022



Remand, Bail & Mitigation

Rajsurianj Pillai 19.12.2022



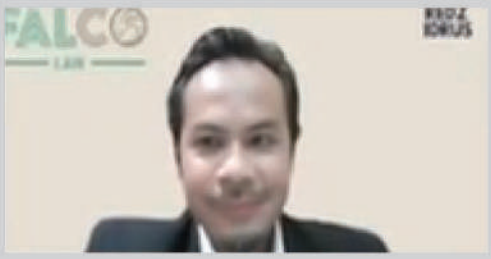
Art of Advocacy from the Perspective of a Practitioner

Steven Perian KC



Murshidah Binti Mustafa & Mohamad Redzwan Bin Idrus

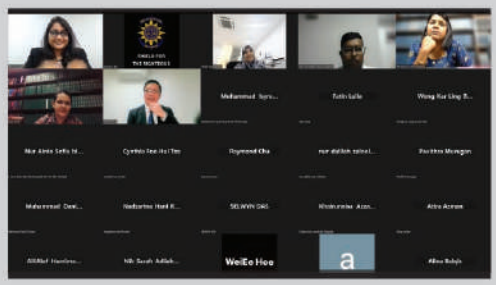
22.11.2022





Introduction to the New Era of Civil Litigation

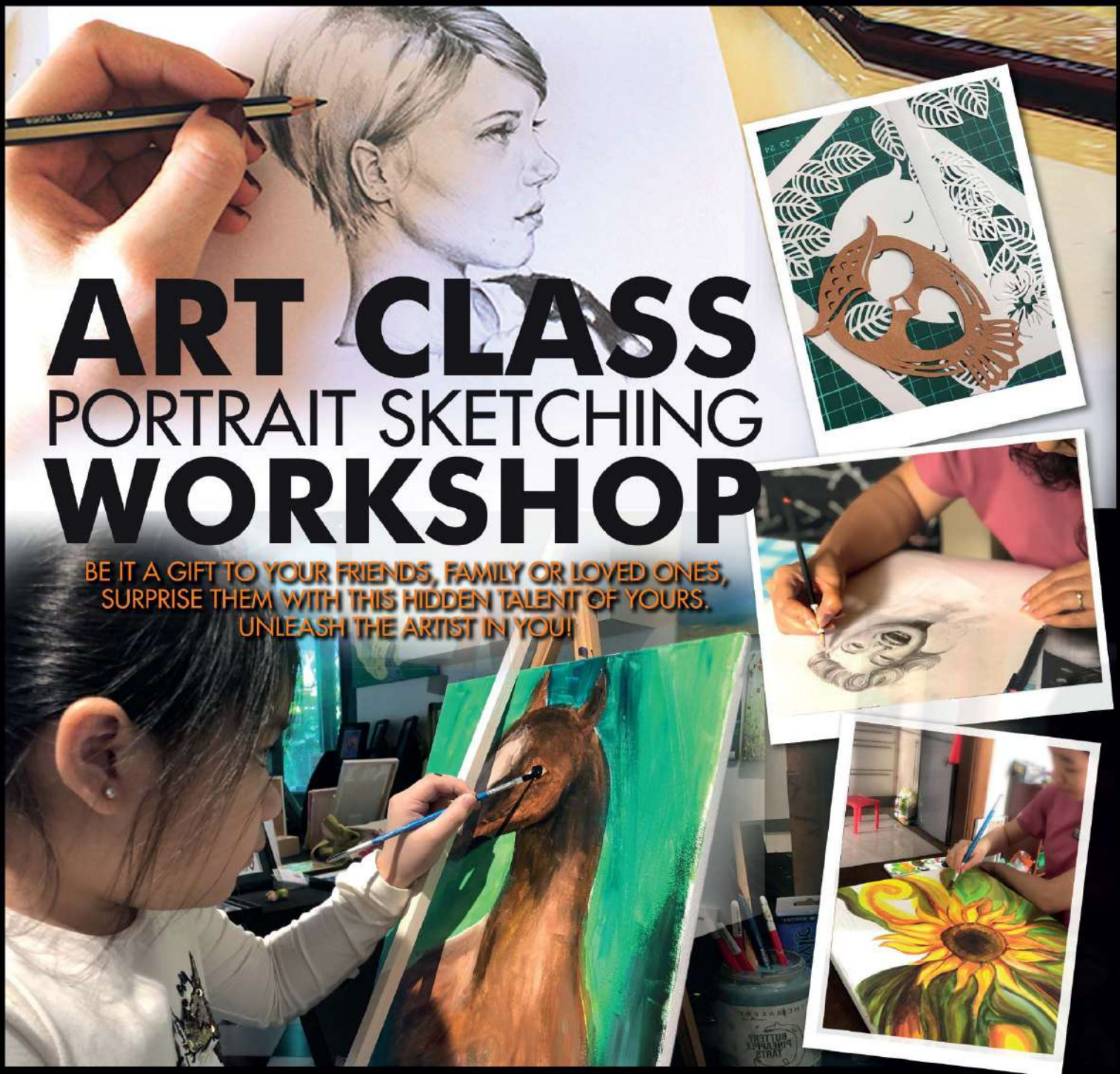
Aarthi Jeyarajah 15.12.2022



Infrastruction, Energy & Projects, Practical Contract Administration Checklists & Management of Issues, Disputes

Kamilah Kasim 22.12.2022





ART CLASS
PORTRAIT SKETCHING
WORKSHOP

BE IT A GIFT TO YOUR FRIENDS, FAMILY OR LOVED ONES,
SURPRISE THEM WITH THIS HIDDEN TALENT OF YOURS.
UNLEASH THE ARTIST IN YOU!

New norm is to paint at your own place with ease as we bring all the art supplies and assist you in learning and painting. Painting course of 4 sessions or monthly session. You can choose to learn charcoal drawing, sketching, watercolor painting, acrylic painting or paper cutting.

ART CLASS PACKAGES
a) Four sessions / Monthly b) Two classes c) One class / Workshop

Art supplies includes easels, high quality stretched canvas, acrylic colors, watercolour paper, watercolour paints, sketching pencil and sketch papers.

Note - our classes are limited to 4 students to maintain a positive learning environment.

+60 12 303 9818 ermes art & design ermes art

Are you looking for a new lawyer or staff?



- **Executive Search**
  Hunting for the ideal candidates to fill up the roles.
- **Job Advertisement**
  Starts as low as RM296.80 for 2 months job listing.



> 10000
Registered Job Seekers

> 21000
CVs in Our Database

> 450000
Web Hits Per Month

> 20000
Social Media Connections

> 1500
Successful Placements

** As shown in the statistics above, our brand has a 12 year track record with good online traffic that offers a high level of visibility to any job advertisement.*

For more details, please visit our website at **www.elawyer.com.my** or call **016- 234 1177** (Thasha).

info@elawyer.com.my www.facebook.com/elawyer

eLawyer
Connect • Innovate • Aspire