



# VOIX D'ADVOCAT

THE SAME VOICE. A LAWYER'S VOICE

ISSUE 01/2020

FOR MEMBERS ONLY



**KEEP CALM  
AND  
PUT YOUR MASK ON**

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Contributions from individuals that are published contain the personal views of the writers concerned and are not necessarily the views of the Penang Bar.

# VOIX D'ADVOCAT

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# A WORD FROM THE EDITOR



Dear Members,

As we ushered in the new millennium, and a brand new decade with zeal and aspiration, least we expected to be ‘slapped’ with an unprecedented pandemic that is currently sweeping around the world. COVID-19 has caused global chaos and brought about some changes in our lives. It has embedded an extensive impact on mankind in various aspects, both good and bad. Standard operating procedures and new normalcy have become part of our lives in battling against this unseen foe.

In line with the pandemic, the Editorial Board has created an edition to address it, in an effort to create, yet, another enlightening edition. There are interesting articles on the effect of COVID-19, marching along with the regular segments, to keep you informed. There is an inclusion of an article, among others, on Amendments to the Industrial Relations Act 1967, to keep you abreast with the latest developments. This edition carries an exclusive interview with our former Bar Council President, who has been elevated to the Judiciary recently. We were privileged to interview the Honourable Y.A. Tuan George Varughese, the Judicial Commissioner, High Court of Penang, who has shared his insight on his career, experiences, and aspirations. A man of great sagacity!

In the hype of COVID-19, the election of the Penang Bar Committee, which was held in February, is not forgotten. Hearty congratulations to the Committee for pledging to lead the Penang Bar.

We received overwhelming contributions from our fellow members for this edition, very encouraging, indeed. Regretfully, due to space constraints, we were unable to publish some of the articles. We assure the articles shall be published in the next edition. On behalf of my team, I extend our sincere thanks to the members for the contributions.

Once again, it is impossible to present this edition without the joint effort of the members of the Editorial Board. My heartfelt gratitude to my team.

We might be experiencing a rather slow kick off this year, but we will soar once again.

Stay safe!

Enjoy the edition!

Warm regards,

***Krishnaveni Ramasamy***

Editor

June 2020

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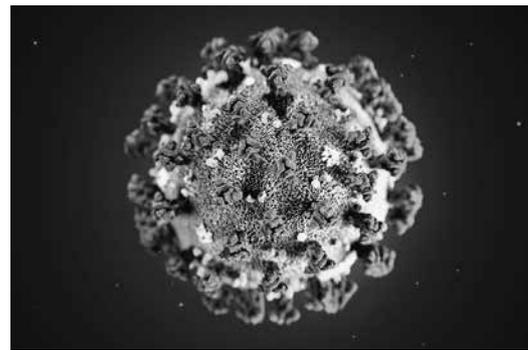


## COVID-19 Pandemic: Suggestions for Maintaining a Positive Mindset

by Lee Jing Yao

Have you ever wondered where the name “coronavirus” comes from? Fun fact, according to the U.S Centres for Disease Control and Prevention, the coronaviruses derived their names from the fact that each virion is surrounded by a surface of crown-like spikes forming a “corona” or halo. Human coronaviruses were identified as early as the mid-1960s with four common human coronaviruses around the world. Unfortunately, a new mutation has left us with the COVID-19 resulting in our current global pandemic.

At the point of this article, the World Health Organisation (WHO) reports at least 2,565,059 coronavirus cases worldwide, with tragically 177,496 deaths but a positive outlook of already 686,608 recovered cases. In Malaysia, the Department of Statistics Malaysia reports around 5,482 confirmed cases with 92 deaths and 3,349 recovered cases.



*The “Corona” or Halo surrounding the virion*



*Have you ever seen a supermarket cleared out?*

In response, the Malaysian Government imposed a Movement Control Order (MCO) on 18 March 2020. Our government encouraged and recommended measures like social distancing and self-isolation. Similarly, other countries have imposed versions of their Movement Control Order or a complete lockdown to curb the spread of COVID-19.

The initial news of such preventive measures had prompted “panic buying” where people stocked up on essential goods ranging from fresh produce to cleaning products, resulting in unprecedented events like the “Great Toilet Roll Grab”, and supermarkets being emptied of eggs and bread. With the mood being so serious and dreary, people were rightfully concerned over the

wellbeing of their loved ones with stress and anxiety. Other unavoidable consequences from the MCO have also started to rear their heads like fears of recessions, Small to Mid-size Enterprises (SME) facing financial difficulties, and students falling behind on their education.

However, it is not all sombre and macabre. Humanity, if anything, has always been resilient. The challenges posed by COVID-19 and the adaptive measures taken have, unintentionally, gave rise to a new societal landscape. The following are just some of the developments that will likely materialise after this global pandemic:

## **A paradigm shift in working culture**

Due to the MCO, most employees had to work from home. This, in itself, is a true statement of how far technology has advanced. Many types of office jobs can be completed as long as the user has good internet access and a computer. The MCO showed that work could be brought and executed all in the comfort of an employee's own home. Once thought of as a luxury, we now see working from home is a concept doable with the right support and motivation.

The potential consequences are far-reaching. For instance, we could see a shift where employees can work from home on a rotational basis or need basis. Here, a need base would be when a single employee living alone has to stay home for genuine reasons like waiting for a contractor to come over. In such scenarios, the employee is entirely capable of working, but the employee needs to be home to open the door and monitor some activities. Having fewer employees present in an office at a time further suggests a need for fewer office spaces, which translates into lower cost and expenditure. Fewer people travelling to work also equals less traffic on the roads at peak hours. Moreover, organisations will have to adapt their leadership abilities because there is now a need to sustain working synergy between employees in the office and those at home.

The flip side, of course, is mental health becoming a bigger concern. For many, the home is a safe space, a haven to escape from work pressures and outside commitments. Since the work is now in the employee's home, there is now no escape. Furthermore, the work-life balance might be affected as employees might struggle with drawing the boundary. A common complaint during the MCO was that employees did not know what was the appropriate time to stop working.



*From the office to working from home*

## Rapid developments in e-commerce

The idea of e-commerce has been steadily gaining popularity over the last few years. People are being more open to buying clothes, furniture, or even services online. Consequently, retailers have been bearing the brunt of this new trend, some even being forced to shut due to the loss in foot traffic.

With the MCO, consumers were forced to turn to e-commerce platforms to purchase their daily needs. Online food delivery particularly gained huge traction as a steady in consumer behaviour. Platforms like GrabFood and Foodpanda have risen in popularity. The MCO had presented an opportunity, that forced even those not technologically savvy to give Food Delivery platforms a try once they were tired of their home-cooking.



*Always a joy to see  
the food delivered*

However, why should we stop at only cooked food? With the right infrastructure and support, this is a prime time for supermarkets to invest in delivering groceries. For instance, Tesco does deliver groceries but is currently limited to only a few locations. However, with the right demands, the supermarkets have the opportunities to secure their positions as a convenient brand to household groceries.

## Virtual Learning

Advancement in technologies has also given rise to new tools of learning. Since the MCO has stopped students from entering the classroom, education institutions did the next best thing and brought the classroom to the students. Lectures and podcasts are ever more heavily relied on, and some professors took initiatives to pre-record lectures for their students' benefit.



*No, you did not read the timetable wrong.  
However, you forgot today's the first day of MCO*

immediately turned to online apps like “Zoom” and “Periscope” to conduct online fitness classes. Gym trainers turned to post home workout tutorials, too. As such, their usual classes can now all be accessed remotely.

Recording lectures and podcasts are not exactly a new development. However, COVID-19 has given birth to stronger need and motivation. Never before had educators need to rely so heavily on their e-learning tools. With the right motivation in place, naturally, the quality of e-learning tools will increase accordingly.

However, it is not just virtual learning in e-learning. When the MCO came into effect, fitness instructors

In a nutshell, “When life gives you lemons, make lemonade”. COVID-19 has wreaked havoc on everybody's lives, and the disruption has caused much suffering and confusion. At the same time, new opportunities are born, and societal behaviour as a whole is bound to change once we survive this global viral pandemic.



## Amended Section 95 – How much further?

*by Matt Wong Chong Ee  
Selangor Bar*

Are parents required to maintain their children until the completion of their bachelor's degree, or master's degree, or further? These questions about children's maintenance are frequently asked. So, is there an end to such provision of maintenance?

The Law Reform (Marriage and Divorce) Amendment Act 2017 ('Act 1546') introduced a few amendments<sup>1</sup> to the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). These amendments came into operation on 15 December 2018<sup>2</sup>. Two amendments are particularly significant to matrimonial and custody proceedings – the amended Section 76 on the division of matrimonial assets, and the amended Section 95 on the duration of custody and maintenance order. This article briefly discusses the impact of the amended Section 95, and 3 issues it poses.

### Pre-Amendment

Prior to the coming into operation of Act 1546, parents were duty-bound to maintain their child until the attainment of the age of 18 years. While Section 2 of the Act provides generally the meaning of "*child of the marriage*"<sup>3</sup>, Section 87 qualifies that to mean a child "*who is under the age of eighteen years*". There was only one<sup>4</sup> exception where such duty to maintain would extend beyond its expiration - if a child is under physical or mental disability, maintenance would then continue until the ceasing of such a disability<sup>5</sup>. There were attempts to inject involuntary financial dependence of a child as a physical disability under Section 95 of the Act, most notably the decision of *Ching Seng Woah @ Cheng Song Huat v Lim Shook Lin*<sup>6</sup> at the Court of Appeal. This was, however, put to rest by the decision of *Karunairajah Rasiah v Punithambigai Poniah*<sup>7</sup> at the Federal Court.

The legal position prior to the amendment was clear. Without consent, the courts had no power to extend an order for maintenance beyond a child's attainment of the

1 Sections 3, 12, 51, 76 and 95 of the Act, and introduced the new Section 51A.

2 PU(B) 697/2018

3 Section 2 of the Act: "child of the marriage" means a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption.

4 Unless the maintenance order was expressed to be for any shorter period or has been rescinded.

5 Section 95 of the Act.

6 [1997] 1 CLJ 375 - at P389, Para b.

7 [2004] 2 CLJ 365

age of 18 years<sup>8</sup>. If an order for maintenance was silent as to its duration, then it shall expire by operation of law<sup>9</sup>. It is, however, common for parties to agree to maintain their child until the completion of his or her first degree. This is in keeping with the current socio-economical environment where a bachelor's degree is usually the bare minimum qualification when seeking a job. Without maintenance payment, many children are unable to support themselves, let alone pay for the most expensive stage of their education. This is just the current reality.

## **Post-Amendment**

### **1st Issue: Is there an end to orders for maintenance?**

The current legal position is unclear. Is there an end to “*further or higher education or training*”? Does it mean that children can now continue to pursue their studies to obtain a PhD at their parent's expense if they wish to? The plain reading of the amended Section 95 seems to suggest that there is no end to the duration of orders for maintenance. Dato' Sri Azalina Dato' Othman, the then Minister in the Prime Minister's Department, in response to a similar question in the House of Representatives during the parliamentary debates of the amendment bill, appeared to have left it open too<sup>10</sup>. This means it is now in the hands of our courts to decide the period for which orders for maintenance shall expire, taking into consideration primarily the welfare and best interests of the child, and Section 92 of the Act. While it may be necessary for the child to be maintained until the completion of his first bachelor's degree, one may argue that extending the maintenance further may negatively impact the child's attitude and impair his ability to be financially independent.

The answer is, therefore, in the negative.

### **2nd Issue: In the absence of an order for maintenance pre-amendment, are adult children entitled to maintenance post-amendment?**

For adult children<sup>11</sup>, who have completed their first bachelor's degree, the position is clear. They should not be asking for handouts from their divorcing parents. It is also unlikely that such maintenance would serve the adult children's interest when they have acquired earning capacity. For adult children who are currently pursuing their first bachelor's degree, however, it is my humble opinion that the amended Section 95, is of no help. Despite the amendment, reading together Sections 87, 92, and 93 of the Act indicates that the courts are only empowered to order maintenance for children who are under the age of 18 years. The amended wording, which reads as an additional exception to Section 95, affects only the duration of orders for maintenance. It suggests that orders for maintenance must have been in existence for their expiration to be deferred under the amended Section 95. The duration cannot be extended in vacuo.

The answer to the question is, sadly, no.

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8 The decisions of *Manmeet Kaur Bhar A/P Kultar Singh v Balbeer Singh A/L Ajit Singh* [2016] 1 LNS 1584 and *Renuka A/P Muniandy @ Ramakrishnan v Jeeva A/L Kalia Perumal* [2017] 1 LNS 441, both cases from the Penang High Court that ordered for maintenance to extend until the completion of the children's tertiary education, are therefore per incuriam.

9 At the child's attainment of 18 years under the unamended Section 95.

10 Hansard – Penyata Rasmi Parlimen Dewan Rakyat (Parlimen Ketiga Belas, Penggal Kelima, Mesyuarat Kedua) dated 9 August 2017, at P153.

11 Children who attained the age of 18 years.

### **3rd Issue: Where an order for maintenance expired pre-amendment, can the order be varied post-amendment?**

For example, the father of Child A ceased maintenance after his 18<sup>th</sup> birthday in November 2018 as the order for maintenance had expired by virtue of the unamended Section 95. Some may argue that Section 8 of Act 1546 provides that “*any action or proceeding commenced or pending immediately before the date of coming into operation of this Act shall, after the date of coming into operation of this Act, be continued under the provisions of the principal Act as amended by this Act*” applies to this example. The applicability of Act 1546 to the example is, however, problematic.

It is true that the action<sup>12</sup> would have commenced prior to the amendment. It is, however, quite a stretch to say that such commencement occurred immediately before the date of coming into operation if it had long been concluded<sup>13</sup>. It is equally untenable to argue that proceedings remain pending in view of Rule 2(2)<sup>14</sup> of the Divorce and Matrimonial Proceedings Rules 1980 if the variation application is only filed after the amendment. Further, Act 1546 makes no express provision to allow for variation applications under Sections 96 or 97 of the Act in view of the amended Section 95. Had Parliament intended to allow that, it could. It is, thus, my view that Act 1546 only applies to variation application which had been filed prior to the amendment and remains pending.

I have no answer to this question. In the absence of reported cases, it is unclear whether Act 1546 will apply to fresh variation applications where orders for maintenance had expired, whether courts are empowered to revive an already expired maintenance order, and whether the coming into operation of Act 1546 constitutes a material change in the circumstances in favour of variation.

### **Conclusion**

Twenty three years prior to the coming into operation of Act 1546, our Court of Appeal made an interesting observation in the case *Ching Seng Woah* – “*An 18 year old computer whiz-kid who is a wheelchair case and therefore well able to earn a living at that age could here be contrasted with another 18 years old who is physically and mentally fit but is otherwise totally unable to fend for himself on the job market*”<sup>15</sup>. Perhaps the issue with the duration of maintenance is never about disability or the level of education, but whether such maintenance is necessary<sup>16</sup> for the child.

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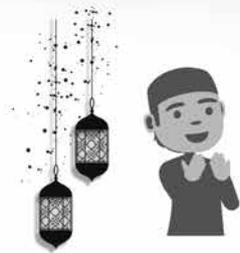
12 Section 3, Courts of Judicature Act 1964

13 *Hong Leong Bank Bhd v Staghorn Sdn Bhd & Other Appeals*, [2008] 2 CLJ 121, FC, at P146, Para 30.

14 Rule 2(2), Divorce and Matrimonial Proceedings Rules 1980 provides a **cause begun by application** shall be treated as pending for the purposes of these Rules notwithstanding that a final decree or order has been made on the petition.

15 At P388, Para 8.

16 See Singapore’s Women’s Charter (Chapter 353), Section 69(5).



## THE SELECTION OF WOMEN AS JUDGES IN THE SYARIAH COURTS IN MALAYSIA

*by Abu Bakar Kugaselva bin Abdullah*

### ABSTRACT

Contemporary Western thinking advocates the idea that personal competence should be the only criteria for selection in a particular vocation. There is no room for gender considerations. This view has spread worldwide to the extent in Malaysia, where the highest Judicial Office is currently held by a lady. The consideration in Syariah Courts should be based on Al-Quran, the main source of Islamic law, the Sunnah of the Prophet, and views of renowned scholars of Islam.

According to Imam Al-Qurtubi, women should not indulge in a role involving the leadership of men and women. According to Al-Hanafiyah, women can assume judicial jurisdiction on matters of muamalat as stipulated in Surah Al Baqarah verse 282 in which a man and two ladies are accepted as witnesses in Civil matters of muamalat like debt collection, business transactions or even contractual, and family obligations. The acceptance of a woman witness means Islamic law allows the testimony of a lady and gives due evidential recognition in the Court of Law.

This view is not shared by Al-Saffiyah, Al-Hanabilah and Al-Malikiyyah in which it is clearly stated that women should not get involved in areas of Judicial adjudication.

If we take the Hanafi's views, then there should be no problem in women assuming the role of a judge in the Syariah Court because the Syariah Court has limited application of family and faraid matters. Even its criminal jurisdiction is based on **TAZIR** rather than **HUDUD** or **QISAS**.

Selangor state has been the front runner in appointing women as Syariah Court judges in its state. In the state of Penang, there is no fatwa to enable the selection of a woman as a Syariah Court judge.

On 28 June 2016, two women have been appointed for the first time in Shah Alam Syariah High Court. They are:

1. Judge Noor Huda binti Roslan, age 40  
and
2. Judge Nenny Shuhaidah binti Shamsuddin, age 41

There is a hadith of Rasulullah SAW narrated by Abi Bakrah which states that:

**“There is no success in a race for the appointment of a woman as a leader in general.”**

This hadith was proven true in the Battle of Jamal, where Aisyah RA was selected to **lead**, but it ended up as a miserable failure.

**Al Hattabi**, referring to the hadith mentioned above, states that the selection of a woman to hold Premiership or High Judicial Office, or even being a wali (giving away of a bride) should be prohibited.

**Buraidah** refers to the verse in hadith stated by Rasulullah SAW that:

**Al Qadhi belongs to 3 groups. One group will go to heaven, and the other two groups will go to hell.**

**The groups that will go to heaven are those who know Islamic principles and apply them correctly.**

**The second group - reckless of the truth or do not make endeavour to find out the truth through various Islamic sources will go to hell.**

**The third group - who knows the truth, but decides otherwise due to personal gain or lust will go to hell.**

The words used to refer to Qadhi in this hadith **“RAJUL”** a term only used for male in the Arabic language.

Generally, there are three broad views on the matter of the selection of women as judges in the Syariah Court.

1. Views of Saffiyah, Malikiyyah and Hanabaliah do not accept the selection of a woman as a Judge in the Syariah Court.
2. The view of Al-Hanafiyyah only accepts women as judges on family matters and not on Hudud or Qisas.
3. The view of Imam Al Tabari states that there is **no restriction** in selecting a woman as a Syariah Court Judge.

In Malaysia, if we adopt the Al-Hanafiyyah approach or even Imam Al Tabari’s approach, there is no obstacle in appointing a woman as a Syariah Court Judge. To what extent will the approach in Selangor be followed by other States is yet to be seen.

**Let us ponder on certain psychological aspects in the selection of women as Judges:**

1. Women are blessed with the innate quality of being protective. This enables a woman to be of 1st choice in care, custody and control of children.
2. This same protective attitude will also be an obstacle to mete out punishment when it involves criminal perpetrators of the same sex or relations.
3. Women are also emotional, and, unlike men, do not have the sense of calmness and sense of control that is required in the determination of a particular punishment in the criminal jurisdiction.
4. Women tend to be more family oriented rather than career minded as it is God’s ordained principle in Islam to impose the responsibility on a man as a provider, unlike in a western society where a “house husband” is an acceptable social concept.

5. Men in the Malaysian society dislike the idea of their spouse being the source of public criticism.

In conclusion, whatever considerations we apply, we should always direct our minds on Islamic principles when appointing female judges in the Syariah Court.

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## *Attorney Humour*



# *Face to Face with...*



## **YA TUAN GEORGE VARUGHESE JUDICIAL COMMISSIONER, HIGH COURT OF PENANG A CALL TO SERVE JUSTICE**

*by Indranshitan Suppiah and Clarie Ann Malar Jochaim*

YA Tuan George Varughese was recently appointed as Judicial Commissioner on 28 November 2019. The former litigator was elected as the President of the Malaysian Bar in 2017 and was well known for being a bold and vocal personality during his tenure.

All the glory and achievements that he had gained for the past twenty-eight years was not obtained overnight but was built upon every day by sheer hard work, determination, and passion. He had his fair share of hardship at a very young age, but instead of asking, “Why did this happen to me?” he was determined to take up responsibilities and believed that things would change for the better.

There is a famous quote by Oprah Winfrey - “Everybody has a calling. Your real job in life is to figure out why you are here and to get about the business of doing it”. It is his calling to use his work as a platform to bring the principles of justice to the people.

On 21 February 2020, the Publication Subcommittee of the Penang Bar Committee was grateful to have a brief interview with Yang Arif despite his hectic schedule.

**Q: Please give us a brief background about yourself.**

A: Going back 57 years, I was born in Klang, Selangor, but lived and had my early education in Pandamaran, which is a New Village, located about 8 km from Klang. Eventually, my parents moved to Klang when I was 12, and have been there all this while, until I moved to Shah Alam about 2 years ago.

I read law in the United Kingdom in 1984, and after having been admitted as a barrister at the Honourable Society of Lincoln’s Inn, returned to Malaysia



and did my pupillage at Syarikat Richard Ho in 1990. I was then admitted as an advocate and solicitor of the High of Malaya in 1991 and started practice as a legal assistant at Manjeet & Associates in Kuala Lumpur and was, subsequently, made a partner. In 1997, I joined the firm of Thomas Bala & Associates, and a year later I established my firm, Messrs George Varughese, and managed the same till I ceased practice in November 2019.

**Q: What inspired you to be a judge?**

A: Well, it was definitely not because I was tired of practice, as I enjoyed being a litigator. However, when the opportunity to join the judiciary arose, I took it as a new challenge and the chance to play a different role in the Malaysian legal system. By serving the judiciary, I would also be able to play a role in terms of developing the law and dispensing justice.

**Q: YA, what are the differences between standing as a lawyer and addressing the bench, and today, presiding as a judge and addressing the bar as you have experienced both sides?**

A: Both as a lawyer and as a judge, you need to know the facts and the law in respect of the files you are handling. However, as a judge, I do not have a client to deal with. Thus, although the work demands of a judge are arduous, personally, I find that lawyering was much more stressful. As a lawyer, dealing with clients, preparing cases, appearing in court, and, thereafter, explaining the decision to the clients, especially, when the outcome was not in your client's favour, can be extremely strenuous and taxing.

However, as a judge, I am not subjected to such demands. The biggest challenge that I now face is finding time to do in-depth research in order to be able to write well-reasoned grounds of judgment, which would stand up to scrutiny on appeal. In view of the sheer volume of cases, time management is crucial, as time is such a rare commodity for judges.

**Q: YA, perhaps you have not been in such a situation yet, assuming that you are presiding a case where both parties have presented a fairly good case, how would you make a decision?**

A: I have yet to encounter such a predicament, where both sides have presented and argued their cases so well that I am unable to make a decision. I believe, more often than not, guided by the pertinent authorities, a decision can be made by applying the relevant laws to the facts of the case.

In a situation where there is no legal precedent involving a novel point of law, guidance can be sought from decisions from other jurisdictions. Thereafter, to interpret it accordingly by applying the relevant laws to the facts at hand.

**Q: YA, do you think everyone is equal before the law?**

A: In my court, everyone is equal and, it matters not who you are. The status or position of the litigant or the lawyer representing the party will not influence the decision-making process.

Thus, personalities will not be an influencing or persuading factor. All parties will be treated the same. Decisions are made based on the facts of the case and the laws applicable to the facts.

**Q: YA, you were very vocal when you were formerly the Malaysian Bar President. Do you think your opinion on certain matters and your social life has been curtailed now?**

A: When I was the President of the Malaysian Bar, I was the voice and face of the bar, and it was part of my responsibility to publicly assert the views of the bar.

However, although there are no express prohibitions as a judge, it would be judicious to speak through the decisions and judgments that I deliver. I am also free to voice my views and opinions, in a proper manner and at the appropriate forum.

In terms of social life, again, there are no specific provisions on what judges can or cannot do. It is left to the discretion of the judge. Restrictions, if any, are self-imposed to avoid unnecessary speculation and unwarranted allegations of misconduct.

In my early years as a lawyer, it was not uncommon to see a judge having breakfast or lunch with lawyers in the court canteen and, after the meal, for the judge to deliver a decision which may not be in favour of the client of the lawyer. However, this is no longer a common occurrence, perhaps due to some not so innocuous meetings between lawyers and judges in the recent past. Further, due to such incidents, the public and litigants have become apprehensive or wary when they see judges in close association with lawyers or litigants.

Further, in this day and age, where almost everyone has a mobile phone equipped with a camera, the risk of an innocent meeting between a judge and lawyer to be photographed and widely circulated, is very great. This could then

give a wholly inaccurate and wrong impression. Hence, to avoid such needless rumours and gossip, judges tend to impose some self-restrictions on themselves. As a lawyer, you definitely have more freedom to mingle around!

**Q: YA, what do you think is your greatest strength and weakness?**

A: My greatest strength would be the ability to cope well with stress. Perhaps, due to the various challenges I faced, especially, during my teens have made me stronger and more resilient. Having lost my father very early in life, I had to shoulder many responsibilities at a very young age. As a result, I do not get flustered easily when faced with the many hurdles in life, be it personal, financial, or professional. There are solutions to most problems and issues, and one needs to be calm in assessing and dealing with them.

My greatest weakness is, probably, impatience. Although at times I may be long drawn out, my patience wears thin when others are long-winded.

**Q: YA, you would have appeared before many judges in your 28 years of practice. Which judge do you admire the most based on their decisions and judgments?**

A: The name that instantly comes to mind is Datuk KC Vohrah. I found him to be extremely calm, composed, and fair when presiding over cases. Even when the decision goes against your client, you leave the court satisfied with having had a fair and impartial hearing.

I also had the opportunity to appear before him when he chaired the Committee for Institutional Reform (IRC), which was formed after the last general elections. Here too, Datuk Vohrah led the Committee in a most admirable fashion and delivered the findings of the Committee to the Prime Minister in a timely manner.

Another name that comes to mind is Tan Sri Dato' V.C. George. What I admired most of Tan Sri, was his uncanny ability to tell off lawyers in a most professional way without leaving lawyers feeling embarrassed or belittled. He was also well known for injecting humour when conducting matters in his court.

**Q: In your opinion, is the judiciary independent?**

A: In respect of the appointment of judges, after the vetting process by the Judicial Appointments Commission (JAC), the names of the shortlisted candidates are given to the Prime Minister, on whose advice the Yang Dipertuan Agung

would then formally appoint. I recall, when I was the President of the Malaysian Bar, during our meeting with Tun Dr Mahatir Mohamad, the former Prime Minister, assured us that he does not interfere in the selection process.

In the short time, I have been on the bench; I have not faced any form of interference. I have not been told how to decide on any particular case nor how to manage the files in my court. All that judges are reminded of is, to manage and dispose of cases efficiently and soonest possible. Therefore, I am allowed to carry out my duties independently.

I am also guided by the advice given during the swearing ceremony, where the Chief Justice said judges are lions in their own den and need not show loyalty to their superiors. The Chief Justice emphasized that all that is expected of a judge is to defend the principle of separation of powers and the independence of the judiciary, whilst at all times upholding the rule of law.

This reminder by the Chief Justice and the appointments of more members of the bar to the bench, I believe, is the dawn of a new era.

**Q: YA, do you think we need more lawyers to become judges?**

A: The bar currently is made up of almost 20,000 members, whereas there are approximately 2000 lawyers in the Judicial and Legal Services. Therefore, the bar clearly has a large talent pool to choose from. In many countries, e.g., the United Kingdom, the judiciary is predominantly made up of senior members of the bar.

In the last batch of appointments of Judicial Commissioners in November 2019, for the first time, more members of the bar were appointed. I believe, if this trend continues, it will surely augur well both for the judiciary and the bar.

**Q: What is your opinion on the recent appointments of female judges in the Judiciary, especially after the appointment of the current Chief Justice?**

A: A lot of ladies have been appointed to the bench even before the appointment of the current Chief Justice. In my view, this is in recognition of the fact that women are equally capable to be appointed to the bench and to hold high office in the judiciary.

The appointment or promotion of judges should never be based on gender. It should, instead, be based solely on merits. The objective should not be to increase the number of men or women on the bench, but, should be to appoint the right candidate regardless of gender.

**Q: YA, in your opinion, what differentiates a good lawyer from a great lawyer?**

A: It has been said, “A good lawyer knows the law, and a great lawyer knows the judge!”

On a more serious note, a good lawyer must know the facts of his brief, thoroughly, and the relevant and applicable laws that apply to the facts of the case. A good lawyer must also ‘know’ the judge, i.e., the idiosyncrasies of the judge, in order to be able to convince the judge without getting on his wrong side. And if a lawyer is able to do this regularly and consistently, I believe, he would eventually be a great and much sought-after lawyer!

**Q: YA, what do you expect out of young lawyers like us appearing before you?**

A: Whether one is a young lawyer or a senior lawyer, all lawyers must be well versed with their file when appearing in court.

Young lawyers must be prepared to put in a lot of work, which inevitably will mean working long hours, in order to excel in your career. Life as a lawyer involves a continuous learning process. You do not stop learning once you graduate from law school. One must keep pace with the endless changes and developments in law and the practice of law.

The legal profession is highly demanding and stressful. Thus, in order to be relevant and effective in the long term, young lawyers must incorporate proper work-life balance in their schedule.

Thus, young lawyers must be prepared to work hard in order to shine.

**Q: YA, for the Penang lawyers, what are the dos and don'ts in your court?**

A: There are no special or additional rules in my court. All the existing rules of decorum and etiquette would apply.

However, I have observed that some counsels are prone to interject when the opposing counsel is addressing the court, be it in open court or chambers. This should never happen, save in exceptional circumstances. Counsels will not be deprived of the opportunity to address the court. All that is required is to allow the opposing counsel to finish and, thereafter, to present your objections or counter-arguments.

All lawyers must strive to diligently observe this basic rule of etiquette. Lawyers must respect each other and allow the opposing counsel to present his case without any unnecessary interruptions.

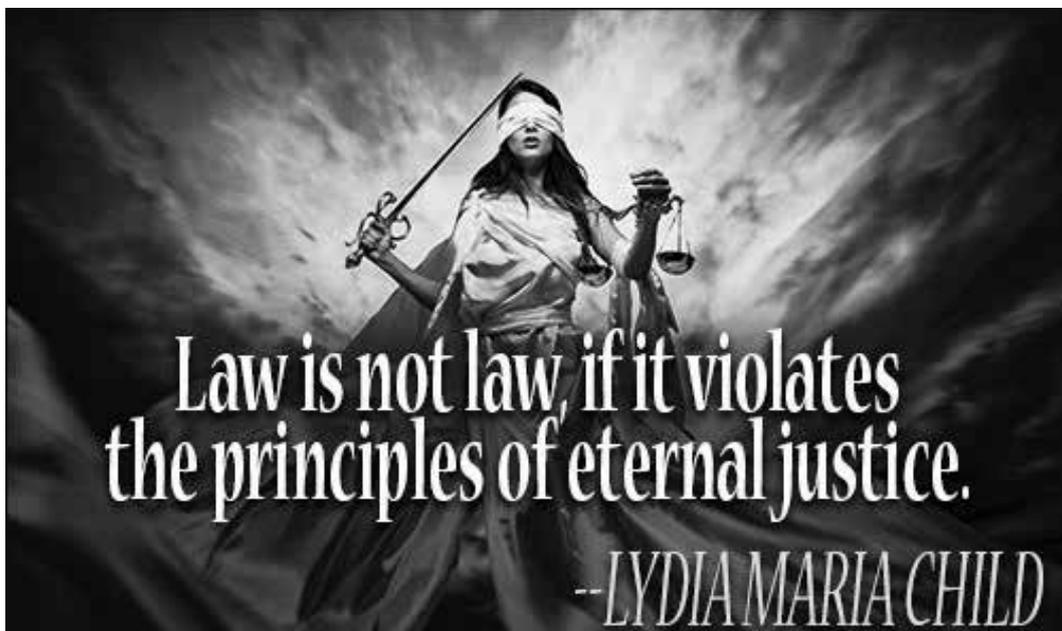
**Q: YA, how do you see the Malaysian Legal System ten years from now?**

A: If the government of the day is receptive to change and reform, the legal system in this country will evolve and change for the better. Being an optimist, I am certain there will be improvements, but perhaps we need to be patient especially with regard to the speed of reform.

**Q: What do you hope to achieve as a judge?**

A: I hope to dispense justice in an impartial and equitable manner. When lawyers and litigants leave my court knowing that they had received a fair and unbiased hearing or trial, then I would have achieved what I had set out to do.

*Thank you, Yang Arif. It was an honour to have interviewed you. We hope that you will achieve your goal to be well known for your independence and fairness during your time on the bench.*



# Medley of Moments

## Bar Council Office Bearers' Dialogue with Penang Bar Members (7 Jan 2020)



## Practical Data Privacy...without the boring bits! (10 Feb 2020)



## Basics of Adoption (13 Feb 2020)



# Handling Expert Witnesses in Court (20 Feb 2020)



# Advocates & Solicitors Disciplinary Board Roadshow for Disciplinary Committee Members - "DCs: Overcoming Practical Problems"

(21 Feb 2020)



# LAWYERS ARE NOT RATS

*by Carolyn Oh Li Lin*

The year 2020, under the Chinese zodiac, is the Year of the Rat, which so happens to be the first animal zodiac in the Chinese zodiac cycle. It seemingly reflects an opportunity for a new “squeaky” clean start.

Lawyers, unsurprisingly, have been given a multitude of descriptions, some complimentary, and others less flattering.

This article hopes to reinforce the merits of our profession, and one of the sacrosanct rules to not **rat on** one’s client, or for that matter anyone, who confides in a lawyer in their professional capacity.

## **Hippocratic, not Hypocritical**

As doctors have their Hippocratic Oath, which is “First do no harm”, lawyers offer legal professional privilege (“**LPP**”) wherein all communication between the lawyer and his client is privileged and confidential, and may not be disclosed without the specific permission of the client concerned.

Simply, the principle behind LPP is to ensure that when a person wants to access the judicial system and be represented, there should not be any fear or concern that what was confided to his lawyer may be utilised in his disfavour. To be clear, LPP is that of the client and not that of the lawyer.

## **Breaking a Promise**

We have all experienced this in varying degrees when a promise made to us is broken, for example, “if I tell you this, promise not to repeat it”, and the next thing you know so and so is mentioning the same confidential subject. Breaking a promise or a vow, or simply to renege on an oath of confidentiality is not an option for a practising lawyer. In Malaysia, LPP is reflected through statutory and common law, as well as through the Rules and Rulings of the Bar Council of Malaysia being the regulatory authority for all advocates and solicitors in Peninsular Malaysia.

## **Section 126(1) of the Evidence Act 1950 provides:**

*“No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for his professional employment, or to disclose any advice given by him to his client in the course and for such employment.”*

LPP is nonetheless not absolute. LPP:-

**may be waived by a client**, for example, by the client inadvertently furnishing a piece of privileged document to a third party and not similarly imposing any confidentiality requirements;

**may be abrogated by statutes** which possess express laws meant specifically to prevail over LPP and in Malaysia, the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 is a prime example; and can **never be used for the furtherance of any illegal purposes**.

It is also important to note that LPP does not apply to ALL communications from and with a lawyer but only those which are construed as “confidential” advice.

### **Rule 14.21 Chapter 14 of the Rules and Rulings of the Bar Council of Malaysia** provides (vis-à-vis credit reporting agencies):

*“It is conduct unbecoming of an Advocate and Solicitor to disclose or forward information to credit reporting agencies of a person, who is not his/her client, save to correct or update the information of his/her client and provided such client has instructed him/her to do so.”*

Both the relevant sections of the Evidence Act and the Rules and Rulings reflect the standard of duties a lawyer has to uphold his role towards the client concerned, which also leans on why a lawyer can only and should only act for a specific client in a particular transaction or suit so that the lawyer’s commitment and duty to that specific client are clear.

### **LPP -v- transparency**

Admittedly, we are now in a world where transparency and lifting the veil is the expected norm. Governments all across the world have enacted statutes, laws, rules, and regulations to circumvent tax evasion and to monitor unlawful and/or terrorist activities. Armed with such “serious” nation-affecting reasons, our LPP has even been called into question.

In the case of **Malaysian Bar v Director General of Inland Revenue [2018] 4 CLJ 635**, the High Court held that the general provisions of Section 142(5) of the Income Tax Act 1967 did **not** override the specific provisions of Section 126 of the Evidence Act 1950. The court held that the Inland Revenue Board could not use the Income Tax Act as an instrument to raid law firms seemingly to ascertain information on their clients. The Inland Revenue Board has appealed, and the eventual outcome, needless to say, will have a significant impact on our LPP creed.

### **Conclusion**

Some things are meant to be sacred; a pledge, a promise, a vow, and the cloak of legal professional privilege, which sets apart what this profession can offer, i.e., a level of privacy and confidentiality no other profession can guarantee. All lawyers should, unequivocally, stand firm in support of this doctrine and simply never allow themselves to be called a rat.

# Remedies for Infringement of Constitutional Rights

*by Joshua Wu Kai-Ming*  
*Selangor Bar*

In *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141 (“**Hassan bin Marsom**”), the Federal Court affirmed the long-standing legal maxim ubi jus ibi remedium:

“The law wills that in every case where a man is wronged, he must have a remedy. More so when his constitutional rights have been infringed. Ubi jus ibi remedium — there is no wrong without a remedy (see also *Educational Co of Ireland Ltd v Fitzpatrick (No 2)* [1961] IR 345 Budd J at p 368).”<sup>1</sup>

Zainun Ali FCJ, in her dissenting judgement in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184 (“**Nurasmira Maulat**”), opined that “the doctrine of ubi jus, ibi remedium (that there is no wrong without a remedy) is still very much alive.”<sup>2</sup>

Her Ladyship went on to state that, “... a breach of a constitutional right should result in an appropriate constitutional remedy, which would, in my view, be separate and distinct from remedies under the statute, common law, and equity.”<sup>3</sup>

An examination of case law will reveal that the Courts have awarded differing remedies for infringement of constitutional rights.

## Remedies

### A) Prerogative orders

Paragraph 1 of the Schedule of the Courts of Judicature Act 1964 states that the High Court has the additional powers to:

“... to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.”

In *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641, the Federal Court issued a mandamus in favour of the Respondent for a breach of the Respondent’s right to property:<sup>4</sup>

“... Here, the respondent has obtained a judgment. There is a judgment debt owed to him. Payment has not been made. Upon obtaining the certificate, it becomes a statutory duty of the State Government of Sabah to make payment. By not paying,

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1 *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141, at paragraph 115

2 *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184, at paragraph 22

3 Ibid.

4 The right to property is protected under Article 13 of the Federal Constitution

clearly, the State Government of Sabah has deprived the respondent of its property contrary to law.”<sup>5</sup>

In Nurasmira Maulat, Zainun Ali FCJ (dissenting) remarked that:

“The remedy for the contravention of a constitutional right is usually a declaration.”<sup>6</sup>

Zainun Ali FCJ’s remarks are consistent with the position taken by the Federal Court in Hassan bin Marsom wherein the Federal Court had granted a declaration that the Respondent’s rights under Article 5 of the Federal Constitution had been breached.<sup>7</sup> Balia Yusof FCJ (majority) opined that:

“The power to grant a declaration has been stated by Raja Azlan Shah Ag LP (as His Lordship then was) ‘to be exercised with a proper sense of responsibility and after a full realisation that judicial pronouncement ought not to be issued unless there are circumstances that properly call for their making’ (see: *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29). We hold this is one instance that properly calls for the making of such pronouncement and for a good reason.”<sup>8</sup>

## **B) Monetary compensation**

In *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, Proposed Intervenors)* [2004] 3 MLJ 301 (“**Ng Kim Moi**”), Gopal Sri Ram JCA (as His Lordship then was) in his dissenting judgement asserted that:

“One of the appropriate remedies for the breach of a fundamental right guaranteed by the Constitution is an award of monetary compensation.”<sup>9</sup>

In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, the Federal Court found for the Appellant and awarded monetary compensation<sup>10</sup> for the breach of the Appellant’s right to livelihood.<sup>11</sup>

Zainun Ali FCJ (dissenting) in Nurasmira Maulat observed that:

“... where a wrong is committed by the state or an instrument of the state which has the effect of depriving the victim of his life (in the widest sense as held by this Court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, *in a manner not in accordance with the law, the victim is entitled to an award of exemplary or aggravated damages*). Thus, as in this appeal, the Respondent is entitled as a matter

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5 Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, at paragraph 35

6 *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184, at paragraph 30

7 *Hassan bin Marsom & Ors v Mohd Hady bin Ya’akop* [2018] 5 MLJ 141, paragraph 8 read together with paragraph 118

8 *Hassan bin Marsom & Ors v Mohd Hady bin Ya’akop* [2018] 5 MLJ 141, at paragraph 115

9 *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, Proposed Intervenors)* [2004] 3 MLJ 301, at paragraph 51

10 *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, at page 185

11 *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, at page 225

of right guaranteed to them by the Constitution, to exemplary or aggravated damages for the deprivation of the deceased's (Kugan's) life. (Emphasis added)."<sup>12</sup>

Zainun Ali FCJ's dissenting judgement in *Nurasmira Maulat*, with regards to an award of exemplary or aggravated damages, was cited approvingly by Balia Yusof FCJ in *Hassan bin Marsom*.<sup>13</sup> In *Hassan bin Marsom*, the Federal Court increased the award of exemplary damages to RM100,000 to reflect the court's indignation towards the actions of the police.<sup>14</sup>

The award of exemplary and aggravated damages, however, appears to be limited to cases of violations of Article 5(1) of the Federal Constitution.

### C) Consequential orders, etc

In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 ("**Hong Leong Equipment**"), Gopal Sri Ram JCA (as His Lordship then was) opined that:

"... the wide power conferred by the language of para 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. *They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.*" (emphasis added)

The above extract from *Hong Leong Equipment* was cited approvingly by the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141 ("**Muziadi bin Mukhtar**").<sup>15</sup>

In *Muziadi bin Mukhtar*, the Federal Court made a consequential order "for the purpose of assessing fair compensation/damages to the dismissed employee"<sup>16</sup> as the dismissed employee "had been denied procedural fairness as mandated by [Articles] 5(1) and 8(1) of the Federal Constitution."<sup>17</sup>

### Conclusion

What can be gleaned from the above is that there are various remedies for the infringement of constitutional rights. While some are more common than others, the courts are willing to and are empowered to mould the remedy to suit the justice of the case.

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12 *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184, at paragraph 71

13 see *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141, at paragraphs 125-126

14 *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141, at paragraph 127

15 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141, at paragraph 108

16 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141, at paragraph 109

17 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141, at paragraph 89

# CRIMINAL JUSTICE



*Mysteries excite any individual, regardless of age. Our own land has her fair share of age-old unsolved murders, which warrants a Sherlockian detective to solve it. We open the veil of this edition with yet another mystifying murder that left Malaysians spellbound, the killing of Hasleza Ishak, the beautiful royal bride of the Raja di-Hilir Perak.*

## THE MODEL, THE BLACK MAGIC AND THE ROYAL FAMILY

*by Nurul Hidayah binti Tajuddin*

What could be a more sensational headline on the front page of a newspaper than the murder of a beautiful royal bride – featuring a cast that comprised the first wife of the second in line to the throne as the mastermind behind the death of the new bride?

All of this would not have happened if it wasn't for the Raja di-Hilir Perak. He had expressed his desire to marry another woman, a young and beautiful model, and actress, Hasleza Ishak. He then started treating his first wife, Raja Nor Mahani, coldly. Meanwhile, Raja Nor Mahani had started vomiting blood and diamonds; wall mirrors shattered all of a sudden, and the servants of the palace would find carcasses of dead birds in the palace's compound. The cries of a baby could be heard at night, even when there was no baby living in the palace. Raja Nor Mahani had believed that she was a victim of dark magic. Having to live in such a situation would definitely drive anyone insane, but could that be enough reason to end someone's life?

The circumstances leading to the murder of Hasleza Ishak began when she exited her house. The young beauty was abducted by five men acting on the instructions of one royal figure. A witness came forth to describe the scene; how Hasleza was dragged out of her own car before being forced into another car near her residence. Later that day, Hasleza was reported dead. Five of the men, Mat Saad Isa, a paddy planter, a bomoh named Rahim Ismail, a palace aide, Tengku Aristonsjah Tengku Mohamad Ansary, a carpenter, Sabarudin Non and a fisherman, J. Manimaran, were accused of killing Hasleza, but only one (Mat Saad) confessed to the murder and was sentenced to 14 years in prison.

Mat Saad had claimed that the bomoh (Rahim) told him about the Raja di-Hilir's first wife's intention of killing Hasleza using spells from here, Indonesia and Thailand, but none worked out, resulting in the first wife's desire to have her rival killed by hand, instead. He added to his story by saying that his refusal could risk the safety of his own family members. Mat Saad had also said that Rahim convinced him to carry out the murder stating that the Raja's people would cover for him. From his own version, it was clear that he was reluctant to kill Hasleza, but he was threatened by the bomoh and the palace aide. Also, the fact that he knew so much about the Raja's secrets would cause him trouble if he refused to follow their instructions.

On 6 October 2002, Mat Saad, Sabarudin Non, and J. Manimaran went to Hasleza's house to abduct the beauty queen. Mat Saad said that Hasleza had shouted at them for not driving their

car properly (and this was when their car blocked her car) before he came out of the vehicle, and went over to smash her car window. Mat Saad and Manimaran dragged Hasleza out of her car and shoved her into their car as they drove away. Mat Saad added that prior to his conversation with the bomoh, Rahim, he was told to dump her body at an isolated road in Grik, considering that the area was not used by many people.

They drove to Jalan Sumpitan, where all of them exited the car to discuss how exactly to end Hasleza's life. Hasleza tried to run from the car, and they held on to her tightly. It was then two motorcycles passed by that Mat Saad struck the back of her neck with his hand to silence her, and then went on to suffocate her by placing his hand over her mouth and nose. Noticing her lifeless body, Mat Saad took the body and, immediately, threw it into the ravine.

Based on the statement given by Mat Saad, two of the accomplices, Sabarudin Non and J. Manimaran, were found guilty of committing culpable homicide not amounting to murder of Hasleza. Rahim Ismail and Tengku Aristonsjah were found guilty of abetting the murder after the trial judge amended their charge, and each was to serve 20 years in prison.

The question arose as to why the first wife of the Raja was not charged along with all the accused if it was indeed her plan, in the first place, to have Hasleza murdered. Was it because of her fairytale-like story of developing a rash and the strange sounds of bamboo being struck on the ground after midnight, and the fact that she knew she was the victim of 'santau' (evil spell) that made her aware of how dangerous Hasleza was as a person? Or was it because that any act done to Hasleza would jeopardise her position, and the good name of her royal family, and the state? Or did she convince everyone that the only thing she had done was to remove the spell and rekindle her husband's affections towards her, and nothing else? Whatever the reason might be, we will never know who was the real mastermind behind the murder of Hasleza Ishak.

Sources :

1. Four jailed 20 years each in Hasleza Ishak's murder case:  
<https://www.thestar.com.my/news/nation/2003/04/26/four-jailed-20-years-each-in-hasleza-murder-case>
2. Sabarudin Bin Non & Ors v PP [2005] 4 MLJ 37



*Hasleza Ishak,  
the beautiful victim*



*Mat Saad Isa, the co-accused  
in the murder trial*



*Rahim (left) with Tengku  
Aristonsjah leaving the  
courtroom*



*Raja Nor Mahani (centre) with  
her lawyer, Datuk Mohammad  
Shafee Abdullah and her  
brother, Raja Aman Shah, sitting  
in the court's waiting room*

# A QUICK LOOK AT THE LATEST AMENDMENTS TO THE INDUSTRIAL RELATIONS ACT 1967

*by Vince Tan Hoo Seh*

The Industrial Relations Act 1967 (IRA) was last amended in 2015, and it is high time for the legislation to be fine-tuned to keep up with recent developments, especially the Industrial Revolution 4.0.

It is predicted that the use of technology will reduce the dependency of labour, and this will affect jobs in the market and increase the rate of retrenchment, thus, contributing to more industrial relation disputes at the Industrial Court.

The Industrial Revolution 4.0 will take off from the third Industrial Revolution as we will now deal with Artificial Intelligence (A.I), smart data, and automated systems. People on the job market will have to keep up with the times or face the exit door in this heavily competitive world we live in.

Even the legal profession is not spared from the use of technology, and we now see the use of the e-filing system to file documents and manage Court matters. This has reduced the need for runners to file our Court documents and sending lawyers to attend Court matters before the Registrar.

There is a need for fast disposal of cases at the Industrial Court as employees who are seeking reliefs in terms of reinstatement, compensation, or backwages will want to obtain the said reliefs faster. Should matters go beyond the Industrial Court stage, it will take up time before the matter is finally resolved at both Judicial Review stage at the High Court or further appeals to the Appellate Courts.

The amendments passed by both Houses of Parliament are yet to be enforced and are awaiting notification from the Minister of Human Resources regarding the date of enforcement.

There are several notable changes to the IRA, namely:

## **i) Appeal and Not Judicial Review**

### **New Section 33C of the IRA**

The new amendments eliminated the Judicial Review process of an Industrial Court Award, and any grievances against the said Award is to be done by way of an Appeal.

Notice of Appeal would have to be filed at the High Court 14 days from the date the Industrial Court Award is given as compared to the 90 days period for a party adversely affected to file an Application for Leave for Judicial Review. The Rules of Court 2012 will govern the procedure of appeal for IR cases, and it will be as though the appeal cases originated from the Subordinate Courts.

## **ii) Transfer of Powers of the Minister to the Director-General of Industrial Relations (DGIR)**

### **Amendment to Section 20(3) of the IRA**

The new amendments will see the transfer of power from the Minister of Human Resources to the DGIR in several aspects, namely the referral power to refer matters to the Industrial Court.

At the moment, all Industrial Relations representations which are not able to be resolved by the DGIR will be referred to the Minister, who will not vet the reference and straight away refer it to the Industrial Court. This was part of the then Pakatan Harapan government's law reform. However, the automatic reference is only by practice and not by law.

The new amendments will compel the DGIR to refer the representations to the Industrial Court for an award when there is no likelihood for the representation to be settled between parties.

## **iii) Representation for workman by next of kin**

### **New Section 20(6A) of the IRA**

Where a workman has a mental disability but does not have a guardian ad litem, a next of kin of the workman may apply to the High Court for an order to appoint a guardian ad litem for the workman at all Industrial Court proceedings from reconciliation to dismissal hearings.

## **iv) Penal clauses**

### **Amendment to Section 40 of the IRA**

There will be an increase in the fine amount for offences under the IRA, such as calling illegal strikes and lock-out from RM500.00 to RM5,000.00. The imprisonment part is taken away in total under the new amendments, and such penalties also apply to those instigating illegal strikes and lock-out.

Previously there was a fine of RM1,000.00 or imprisonment not exceeding one year or both.

## **v) Interest on top of Industrial Court Award**

### **Amendment to Section 30 of the IRA**

The new amendments will provide an interest of up to the rate of 8% per annum on Industrial Court awards, calculated from the 31st day from the date of the making of the award until the day the award is satisfied. The Industrial Court is given the discretion to decide if the date of interest should run on any other day depending on an application made by an aggrieved party and where the Court is satisfied there exists special circumstance to do so.

## vi) Trade Union

### Amendment to Section 26 of the IRA

The Director-General of Industrial Relations will assume the role previously handled by the Minister pertaining to Trade Unions to determine if a workman falls under the category of managerial, executive, or security capacity.

An employee will now be given a choice to vote by secret ballot to choose which trade union he or she wishes to be represented by should there be more than one trade union eligible to represent the said workman when it comes to sole bargaining rights.

As for disputes relating to reference to the Court, refusal or deadlock in collective bargaining reference to the Court shall not be made without written consent from both sides unless:

- a) the trade dispute refers to essential services (as defined in the First Schedule);
- b) the trade dispute relates to the first collective agreement;
- c) the trade dispute would result in acute crisis if not resolved expeditiously; or
- d) the parties to the trade dispute are not acting in good faith to resolve the trade dispute expeditiously.

We look forward to see the new amendments take place though it is still early to comment on the effect of the new amendments. What we can conclude is, the most important point to take away from this, parties to an Industrial Court proceeding will have to make a quick decision whether to challenge the Industrial Court Award by way of an appeal 14 days from the date the Award is received. There will also be strict timelines to fulfil for the filing of the Record of Appeal as per the Rules of Court 2012. As lawyers, we need to be mindful of the new amendments in order to advise our clients appropriately, especially after the Industrial Court Award is received.

Understanding the new amendments is not rocket science, and the explanatory statement of the bill highlights the important points of the new amendments and serves as a guiding point to note the changes made.

### *Attorney Humour*





## COVID-19: Force Majeure Clause in Sale and Purchase Agreement - A Malaysian Perspective

*by Zemilah binti Mohd Noor & Norsheila binti Sofian Gan*

The novel Coronavirus 2019 (COVID-19) was declared by the World Health Organisation (WHO) as a worldwide pandemic on 11 March 2020, and to curb the spread of the COVID-19, the Government of Malaysia announced a Movement Control Order (MCO) on 18 March 2020 pursuant to the Police Act 1967 and the Prevention and Control of Infectious Diseases Act 1988 as part of the preventive measures to fight the outbreak of this pandemic. As a result, the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) (No. 3) Regulations 2020 was gazetted to give effect to the said announcement.

The MCO generally banned mass gatherings as well as overseas travel. All businesses, educational institutions, and specified premises were closed temporarily except for those deemed as essential services. This pandemic has altered the operation of small and big businesses<sup>1</sup> and, consequently, affected society and the economy as a whole. Regardless of this fear, we as Malaysians must demonstrate an altruistic response in assisting our country to combat the crisis.

The MCO led to the closure of law practices as well. Lawyers were very concerned with their contractual liabilities in regards to the completion of tasks, and the provision of legal services as well as the adherence to strict timelines. Hence, the Malaysian Bar called upon Bank Negara Malaysia, and all financial institutions to suspend or temporarily reduce the standard operating procedures which require strict compliance with timelines, while the regulations remain in force<sup>2</sup>. Nevertheless, the conveyancers should be prepared and know which way the wind blows and come out with possible solutions.

**Example of a sub-sale case during MCO:** The vendor, Mr Ali, and the purchaser, Mr Chong, have entered into a sale and purchase agreement (SPA) on 14 January 2020. As the completion date for the SPA is 3 months from the date of the SPA, the expected completion date would be on 13 April 2020. Due to the MCO, which started on 18 March 2020, a delay in the completion is forecasted. The issue at hand is whether Mr Chong can request for an extension of the completion date pursuant to the force majeure clause OR whether Mr Ali can opt to terminate the contract.

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1 Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) (No. 3) Regulations 2020 [P.U.(A) 117/2020]

2 Malaysian Bar President Press Release "Banks and Other Financial Institutions Not to Impose Unrealistic and Unreasonable Demands" on 18th March 2020

## **Step 1: The First Step is to Check whether the SPA has any ‘Force Majeure’ Clause.**

Force majeure is a situation where the performance of a party under any agreement or contract is rendered impossible due to unexpected circumstances which are beyond the reasonable control of any contracting parties, and the clause will relieve the parties from performing contractual obligations for a period of time or allow the parties to terminate the contract when certain circumstances beyond their control arise. Notwithstanding the definition, the concept of force majeure in Malaysia is dependent on the wordings of the force majeure clause, and every word matters as it can change the impact of the clause’s applicability.

Supposing the SPA has the ‘force majeure’ clause, then it is best to consider if the said clause covers the current COVID-19 pandemic or the said ‘force majeure’ clause specifically refers to ‘epidemics’, ‘pandemics’ or ‘contagious diseases’ or there is a phrase referring to the happening of an event that leads to an act ‘beyond the reasonable control of the parties’. As decided by the Federal Court in the case of *Finmark Consultants Pte Ltd v Development & Commercial Bank Berhad*<sup>3</sup>, if any party intends to invoke the force majeure clause, the said party must exhibit that the force majeure clause exists as one of the terms in such an agreement.

Even if there is a ‘force majeure’ clause in the SPA, it does not mean that one has the right to invoke relief as a result of the impact of the COVID-19 pandemic. Before invoking the ‘force majeure’ clause, there are several factors that need to be considered, such as:

- i) Whether the event **qualifies as force majeure** under the agreement;
- ii) Whether any party has **taken reasonable steps to avoid** such a force majeure and it is **able to be mitigated**;

The one who is relying on the force majeure event needs to show that reasonable steps have been taken to mitigate the effect of force majeure to the agreement.

The High Court in the case of *Sunway Quarry Industries Sdn Bhd v Pearl Island Vista Sdn Bhd & Anor*<sup>4</sup> held that if the parties concerned do not take reasonable steps to avoid such events (i.e. force majeure), it cannot be said that the occurrence of the event was beyond the control of the parties concerned. The party requesting for force majeure is usually under a duty to show that it has taken all reasonable endeavours to avoid the event and its effects.

- iii) Whether the **performance is truly impossible**;

Even if the party complies with other requirements, if performance is merely impracticable, or economically difficult rather than truly impossible, the party cannot invoke the said clause.

In reference to the recent COVID-19 pandemic, Mr Chong may be able to argue that the outbreak constitutes one of the specified force majeure events, and it is,

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3 [1994] 3 CLJ 519

4 [2019] 1 LNS 1052

obviously, beyond the control of both of them, so that the event is qualified as a force majeure. By referring to the **Circular No. 069/2020** issued by the Malaysian Bar on “Notifications of Closure from State Offices of Director of Land and Mines and District Land Offices”, which states that all tasks namely; generation of a private and official land search for certain states, execution of transfers (in form 14A) in front of the District Officer (for Malay Reserve Land), adjudication of transfers (in form 14A), applications of consent to transfer and charge, registration of private caveats, transfers (in form 14A), charge (in form 16A) and all other kinds of registrations under the National Land Code that need to be done at the respective land offices, collection of consent letter, original title deeds or any documents at the respective land offices; will be put on hold until further notice. Therefore, all the said performances are impossible to be completed by 13 April 2020.

## **Step 2: The Second Step is to Check Whether These Clauses Provide for Specific Timelines, Notifications or Procedures to Suspend Your Contractual Obligations**

The effect of this force majeure clause will depend on what has been provided in the contract between both contracting parties. This means that it may differ depending on how it was drafted. Some may provide for an extension of time for the performance of the contract. Some may provide that the contract will be put on hold until the force majeure event is resolved or for renegotiation of the terms of the contract. Some may provide for a limitation in time after which either party may terminate the agreement with written notice to the other if the event is prolonged and lastly, some may provide for only one option, and that is for a party to terminate a transaction instead of allowing for an extension of time. Therefore, it is vital to see how the force majeure clause is drafted and to understand the agreement as a whole.

### **Example:**

“Under the circumstances of a force majeure event herein neither Party shall be in breach of its obligations under this Agreement and the **Completion Date** is automatically **extended for a period of six (6) months** from the date of the Force Majeure Event (hereinafter referred to as the ‘Extended Period’). In the event the **Force Majeure continues from the Extended Period**, and either party reasonably considers such event of Force Majeure applicable to it to be of such severity or to be continuing for such period of time that it effectively frustrates the original intention of this Agreement, **either Party may opt to suspend their contractual obligation** until the force majeure event is resolved or over and upon such option both Parties shall renegotiate the terms of the contract and certain liabilities that are capable of being excluded in the event that there is either non-performance or delay of obligations **OR either Party may opt to terminate this Agreement** by giving notice to the other Party. Upon such termination the Vendor shall refund the deposit, and all monies paid by the Purchaser to the Vendor free of interest within fourteen (14) days from the date of the said notice of termination, and upon such refund this Agreement shall thereafter become null and void, and of no further effect whatsoever.”

Tips: Drafting New Agreement With Force Majeure Clause: What To Consider?

- Extension of time to perform obligations
- Suspension of specific obligations
- Renegotiation or reduction in the scope of work
- Exclusion of certain liabilities not capable of being performed
- The option of termination of contract if the event is prolonged
- Waiver or reduction of late interest penalties or agreed damages

## **Question: What if the SPA is Silent or does not have a ‘Force Majeure’ Clause?**

If the SPA does not contain a specific clause on force majeure, pursuant to the guidelines and suggestions of the Bar Council Conveyancing Practice Committee (Bar Council CPC), the contracting parties may resolve or negotiate within the ambits of the contract<sup>5</sup>.

### **Example:**

#### **1 “Computation Of Time” Clause**

“To compute the time for the payment of the Balance Purchase Price, the Purchaser shall be entitled to such extension of time, which corresponds with any delay in time on the part of the Vendor and/or its agents in the delivery of the relevant documents discharging the Vendor’s obligation hereunder. For the avoidance of doubt, the delay is defined as fourteen (14) days from the date of request by the Purchaser’s Solicitors of the relevant documents to the date of receipt by the Purchaser’s Solicitors of the same. In such an event, the delay shall be taken into account in the computation of the Completion Date, and the Completion Date shall be automatically extended for a period equivalent to such period of delay”

#### **2 “Suspension Of Time” Clause**

“Notwithstanding anything stated to the contrary neither party shall be liable for any failure or delay on its part in performing any of its obligations or for any loss or damage caused, charges or expenses incurred or suffered by reason of such failure or delay in so far as such failure or delay shall be occasioned by any cause beyond the control of the party in default including that of workmen, riot or civil commotion, administrative action, rules, regulations or legislation of the Government, refusal of the Relevant Authority to give the permission, compulsory acquisition of the said Property or any part thereof, Acts of God, enemy action or any inevitable accident and in the event of any such cause intervening, this Agreement shall stand suspended until the cause giving rise to such suspension shall no longer prevail.”

#### **3 “Variation” Clause**

“The provisions of this Agreement may be varied or changed only by mutual agreement evidenced in writing specifying such amendment(s) referring to this Agreement and executed by the parties hereto or by their duly authorised agents.”

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5 Bar Council Circular No 084/2020 dated 1st April 2020

#### 4 Or any other relevant clause

Based on the variation clause, if both parties mutually agree to change the terms, i.e., to freeze the transaction or performance, they can vary the agreement by a **letter of variation**. This means that both parties will need to execute a variation letter to extend the completion date to another decided date.

On the other hand, if there is no force majeure clause or the force majeure clause cannot be invoked, the contract could be discharged on the grounds of ‘frustration’ upon which the contract will become void<sup>6</sup>. Based on **Section 57 of the Contracts Act 1950**, a contract is said to be ‘frustrated’ when there is a change in the circumstances supervening or subsequent to the formation of the contract, which renders a contract legally or physically impossible to perform. However, this option is only if the parties intend to bring the agreement to an end. The doctrine of frustration can only be applied within very narrow limits. As stated in the case of *Pacific Forest Industries Sdn Bhd v Lin Wen-Chih & Anor*<sup>7</sup>, the court held that the frustration of a contract is when the change of circumstances occurs only after the contract is made and it will not be considered frustrated merely because it becomes difficult to perform.

For instance, in the case of *Chinaya a/l Ganggaya v Sentul Raya Sdn Bhd*<sup>8</sup>, the Plaintiff, who was the purchaser of one condominium unit, sued the Defendant (developer) for late delivery of vacant possession and claimed damages. The defendant then invoked frustration on the ground of delay due to dire financial position caused by the 1997-1998 economic crisis, which was beyond their control. The court held that it was not impossible to complete the condominium because the said condominium was eventually completed. Hence, the contract could not be discharged on the ground of frustration as it was not sufficient for the defendant to purely refer to the national economic crisis. There has to be a radical change in circumstances.

In conclusion, if there is a force majeure clause in the SPA, it is crucial to look into the clause as a whole. Each force majeure clause differs from one agreement to another, and it depends on the contracting terms of each agreement. If there is no force majeure clause in your agreement, there are other alternatives to choose from, as elaborated above. Moreover, the Bar Council CPC further urges that every solicitor do his/her utmost to communicate with the client on the delay in the transaction and to request for the client to consider granting the appropriate extension to the SPA transaction and/or to consider waiving any late payment interest caused by the MCO period<sup>9</sup>. Also, we greatly anticipate the enactment of the COVID-19 (Temporary Measures) Bill by our government to attend to all issues of non-performance of contractual obligations by the contracting parties. This COVID-19 pandemic is putting our nation to a huge test of perseverance & diligence, and as citizens, we must stay united to rise to this challenge and unprecedented event. Let’s do our part!

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6 Section 57(1) of the Contract Act 1950

7 [2009] 6 MLJ 293

8 [2008] 2 MLJ 468

9 Bar Council Circular No 084/2020 dated 1<sup>st</sup> April 2020

# **CONVICTIONS**

## **Illegal Immigrants –The Bigger Picture**

The deliberations over immigration and its policies did not just stem out in recent memory. On the contrary, one could contend that the cogitation over this matter dates back to aeons. It is widely assumed that every nation is to be the origination of overlapping generations of immigrants. In fact, it is vital to comprehend that the current influx of migrants in the progressions of international immigration and globalization is profoundly contrasting than in former times. Presently, immigration is one of the core issues central to international affairs, even Malaysia is not spared from its repercussions.

Recently, the Malaysian Government was criticized and accused by various international media platforms as being inhumane due to the detainment of undocumented immigrants amidst the Pandemic. However, it is in my view that the immediate measures that have been administered by the Government on the basis of Public Interest speak volumes. It is unquestionable that the illegal inhabitation of the undocumented immigrants in Malaysia is against the law (Immigration Act). The Malaysian legal system requires action to be taken upon anyone who has breached the law, including the undocumented immigrants, be they man, woman or even a child, notably when there is no specified timeline in exercising the laws concerning criminal matters. Nonetheless, this is not the sole justification of the Government's actions in taking such measures, and there is more to this than meets the eye.

It should be noted that the Malaysian media has reported that some of these undocumented immigrants were still operating businesses like restaurants and serving food despite the imposition of the Movement Control Order (MCO) by the government. This is an issue of concern because they are known to live in very unhygienic conditions, which may increase the chances of being found Covid-19 positive. Their nonchalance in not adhering to the rules and regulations of the MCO and the admission of some immigrants in an interview by the local media that they are not aware of MCO are classic examples that undocumented immigrants do not understand the law, culture or the lifestyle of Malaysians. Consequently, they may be a means of spreading the virus to Malaysians as they are involved in the food sector, including the markets, fruit supply, sundry shops, and so on. The medical costs, as well as, the handling of the affected areas and people where the immigrants are large in numbers, would be exceedingly high and difficult, ergo, the usage of Malaysia Tax monies would be increasing due to the actions of the undocumented immigrants spreading not only Covid-19 but also other ailments, like tuberculosis.

At the same time, there are those working in industries where the owners are avaricious to make additional profit. In this regard, the owners do not send them to undergo any medical test, which is a fundamental requirement upon entering our country for any foreign workers, be it general or professional. Hence, if the workers have tuberculosis or any other disease, there is a danger of them exposing and spreading other diseases to all Malaysians. After an exceedingly long time, Malaysian hospitals are seeing an increase in the number of cases concerning tuberculosis, as well.

In recent times, there have been several acts of violence and threats against Malaysians and the Malaysian authorities, including the police, local authorities and Immigration officers. Additionally, there have been ample Facebook postings from these undocumented immigrants themselves claiming involvement in gangsterism. It is unknown whether some of them have links with terrorist groups as no information is available for the Malaysian authorities to conduct prior checks. The Malaysian authorities should take exemplary steps to show the syndicates handling these undocumented immigrants that the law will be enforced on them. This will eventually reduce the number of undocumented immigrants in the country.

Recently, Langkawi saw the arrival of many undocumented immigrants even when our borders were closed due to the MCO. Looking at how they came into Malaysia further shows that they lack respect for the laws of our country. They are willing to do anything to leave their own countries and illegally enter our country. Should the Malaysian government accept and subject themselves to more problems in the near future due to such incidents?

The final nail in the coffin was when the undocumented immigrants', via the Myanmar Ethnic Rohingya Human Rights Organization in Malaysia (MERHROM), President, Zafar Ahmed Abdul Ghani, demanded equal rights akin to any Malaysian citizen. In fact, Zafar Ahmed Abdul Ghani and some of the immigrants violated the MCO when they gathered in the streets to demand this. All those who had gathered in a public area while the MCO was still in force should have been detained, charged, and convicted of breaching the MCO. The Rohingyas, who are Muslim, constitute a large number of undocumented immigrants in Malaysia. Why did they not choose to immigrate to other developed Muslim nations such as Saudi Arabia? They claimed that they were oppressed in their own country, which resulted in them moving to Malaysia. If there were valid evidence against the leaders of Myanmar, they would have by now been charged in the International Criminal Court. Aung San Suu Kyi was awarded the Noble Peace Prize even though the Rohingyas were crying for help from the world. The Noble Peace Prize was not retracted even when the Rohingyas were complaining against the government-administered by Aung San Suu Kyi. Thus it is my opinion that the oppression towards the Rohingyas is not due to the country's action but only as a result of a communal clash.

We, Malaysians, and our authorities should not give any space to those who have entered our country without proper documentation to behave or react in an unacceptable manner. Furthermore, why must Malaysia be open to such situations? Letting undocumented migrants in with ample freedom to roam around the country could increase the number of problems Malaysians are already facing in addition to the existing ones at hand.

The international media's opinion that detention of the undocumented immigrants is not acceptable is illogical. This kind of selective reporting without disclosing the other side of the coin should be avoided, and responsible journalism should be practised by the international media, especially during these trying times. The Malaysian authorities have not resorted to shooting to kill policies, which were previously practised by certain countries. Our Government is still being considerate and is willing to only detain them, thus spending Malaysian taxpayers' monies in order to take care of them while

in detention. This is more humane than the shoot to kill policy. The international media should appreciate the steps taken by the Malaysian authorities in handling undocumented immigrants as the government has a duty to each one of its citizens as well. I urge some of the Malaysian media to take a bold stance in answering the baseless allegations thrown by the foreign media.

It is an undeniable fact that placing these undocumented immigrants in a detention centre prevents the risk of them spreading any unwanted illness to the Malaysian public as this is a matter of public health. Concluding my views on the situation of undocumented immigrants, they are not only unwelcomed guests to our country, but we, Malaysians, do not wish for them to become the reason for the continuous increase of the number of Covid-19 cases and other problems.

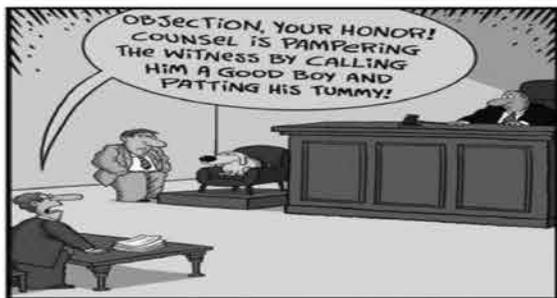
*Contents by Muniandy Vestanathan (Selangor Bar)*

*Compiled by Loshanaa Malar Senthil Mohan (3rd year Law student, MMU)*



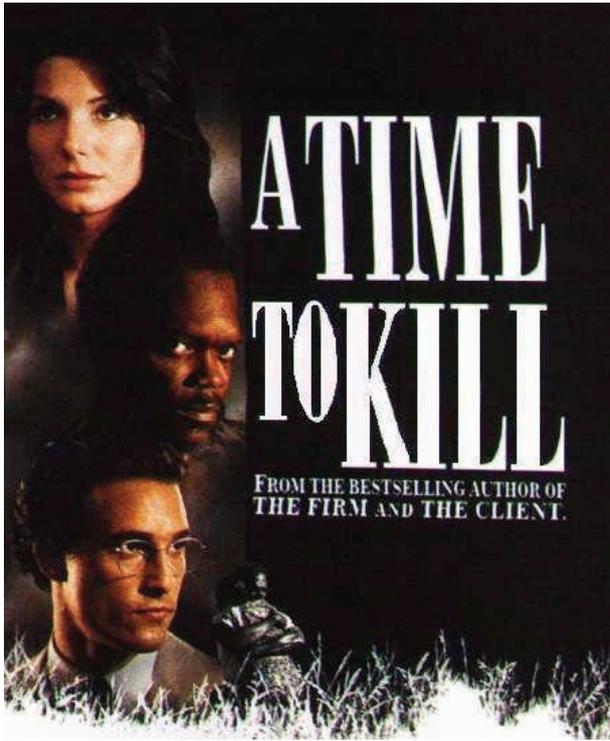
# Attorney Humour

Compiled by Guhapria Kumaravellu



"In my legal opinion, Mr. Humpty, you should avoid treating your cracks till after we sue the owner of the wall."





## Legal Movie Review A TIME TO KILL

*by Ramesh Rajadurai*

A 1996 American crime drama based on John Grisham's 1989 novel *A Time to Kill*, directed by Joel Schumacher. Sandra Bullock, Samuel L. Jackson, Matthew McConaughey, and Kevin Spacey star, supported by Oliver Platt, Ashley Judd, Kiefer, and Donald Sutherland. The film is about the rape of a young girl, the arrest of the rapists, their subsequent murder by the girl's father, and the father's trial for murder. The film was a critical and commercial success, making \$152 million at the worldwide box office.

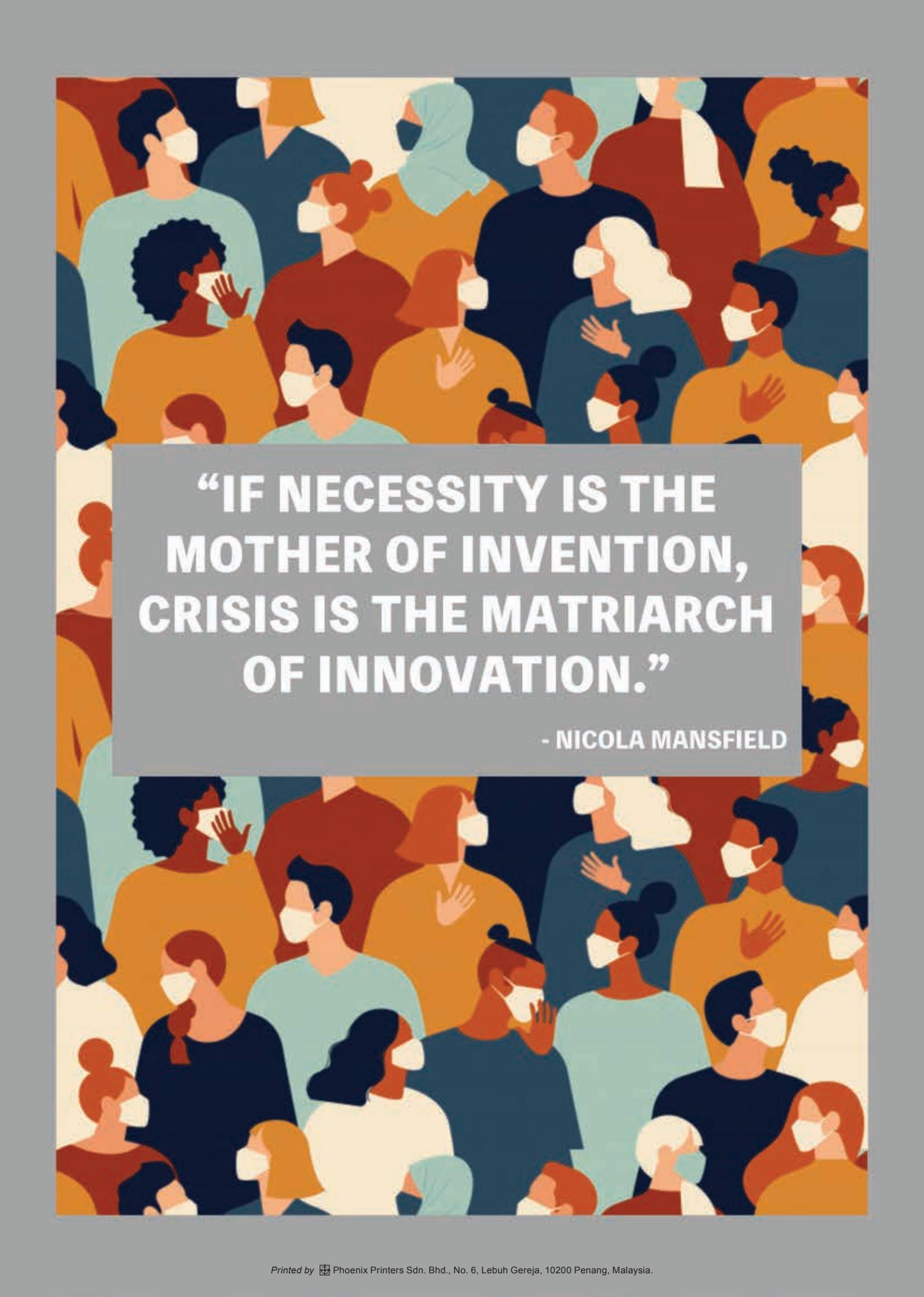
Matthew McConaughey plays Jake Brigance, a charming, whisky-loving lawyer who decides to represent a black man who shot and killed his daughter's rapist.

With echoes of Atticus Finch, Brigance is a lawyer with commitment and heart. The murder trial brings a small Mississippi town's racial tensions to the flashpoint. Amidst a frenzy of activist marches, clan



terror, media clamour and brutal riots, an unseasoned but idealistic young attorney mounts a stirring courtroom battle for justice.



A vibrant, stylized illustration of a diverse crowd of people. The individuals are depicted in various colors and styles, representing different ethnicities and ages. Many of the people are wearing white face masks, symbolizing a global health crisis. The background is a mix of warm and cool tones, creating a sense of a busy, interconnected community.

**“IF NECESSITY IS THE  
MOTHER OF INVENTION,  
CRISIS IS THE MATRIARCH  
OF INNOVATION.”**

**- NICOLA MANSFIELD**