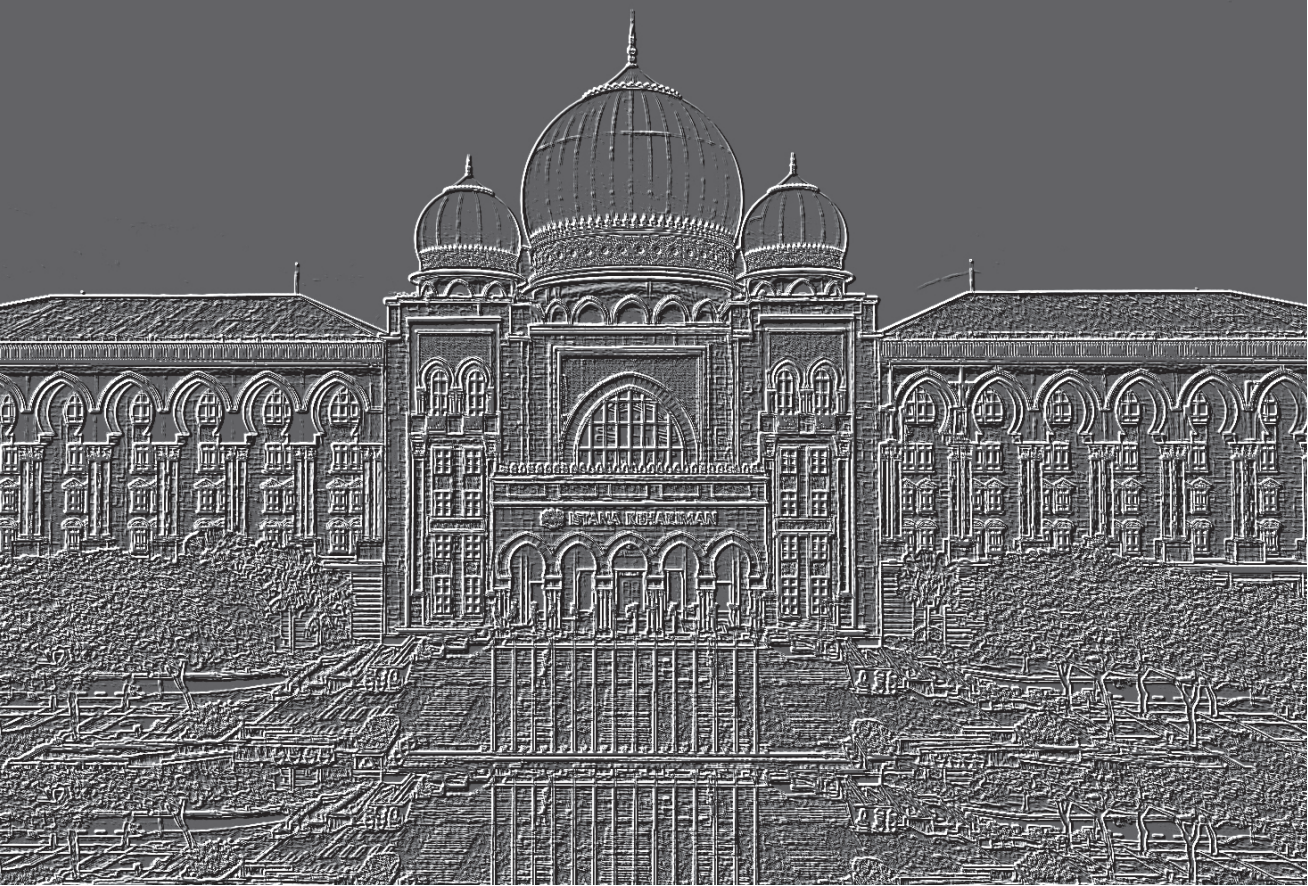
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PREFACE

The July 2025 edition of the *Journal of the Malaysian Judiciary* offers a curated selection of thought-provoking articles and addresses, showcasing the continously evolving realm of law and justice. This issue presents insightful contributions that examine essential legal principles, tackle contemporary challenges, and consider the future trajectory of the Judiciary, both within Malaysia and internationally. We take great pride in presenting these articles, which enhance our comprehension of the law and its relevance.

This edition opens with an address by The Right Honourable The Chief Justice of Malaysia, YAA Datuk Seri Utama Wan Ahmad Farid bin Wan Salleh, on his appointment as the 17th Chief Justice. In his address, he conveys his heartfelt appreciation for the appointment and commits to ardently defending and unwaveringly preserving the independence of the Judiciary with every ounce of his strength. He presents a vision for a Judiciary that is not only independent and resilient but also efficient and knowledgeable, ensuring its relevance for the future.

Justice Judith Prakash's talk on "Section 37 of the Civil Law Act" delves into the landmark Singapore Court of Appeal case of *Hii Chii Kok* and the subsequent legal standard set for the duty of doctors to advise patients and ensure informed consent. The speech explains how a workgroup formed by the Ministry of Health reviewed the issue, leading to the enactment of section 37 of the Civil Law Act to modify the legal propositions laid down in the case.

The Honourable Conrad Seagroatt's article, "Cause and Effect: The Use and Misuse of a Court of Appeal" highlights the challenges faced by appellate courts due to the misuse of the right to appeal. He explains that some advocates treat the Court of Appeal as a court of original trial, emphasising that the appellate court should exercise strict control over its proceedings to protect its jurisdiction.

Justice Evrol Mariette Peters provides a critical examination of the no-fault principle in divorce in her article, "Divortium Sine Culpa". The piece delves into the historical fault principle, or *divortium cum culpa*, which required one party to prove the other was to blame for the marriage's breakdown. It also assesses the extent to which Malaysia's Law Reform (Marriage and Divorce) Act 1976 has incorporated no-fault elements in line with global developments.

On the same note, in "The No-fault Divorce in English Law", HHJ Madeleine Reardon traces the history of divorce law in England, noting how the campaigning of law reformer AP Herbert led to the introduction of further

grounds for divorce in the Matrimonial Causes Act 1937. The article reflects on how it took several decades for England and Wales to eventually introduce a "no-fault" divorce system, a significant shift in legal reform.

Justice Nadzarin Wok Nordin in "Stateless Children and their Rights to Citizenship" highlights the difficulties stateless people, particularly children, face in Malaysia, such as a lack of access to basic rights like education and healthcare. It examines the legal principles of *jus soli* and *jus sanguinis* and discusses the need for amendments to the law to prevent statelessness and provide a clearer path to citizenship for these children.

Justice Alice Loke, in her article "Exemplary Damages and Custodial Deaths: Recent Developments", discusses the legal maxim *ubi jus ibi remedium* ("where there is a right, there is a remedy") and its application in awarding damages. The piece focuses on the approach courts have taken in awarding damages, particularly exemplary damages, in cases of custodial deaths and wrongful acts by enforcement officers, and proposes a timely review of the relevant statutory provisions.

In this edition, I contributed two articles. One of them is a keynote address delivered at the Asian International Arbitration Centre in 2024 titled, "Beyond Boundaries: The Rise of Asia in Global Dispute Resolution". The article discusses the evolving growth of Asia in global dispute resolution, both literally and conceptually. The address also invites alternative dispute resolution practitioners to extend their reach beyond national borders and highlights the need to change their perspective so as to ensure dispute resolution systems are responsive to the needs of the business community.

"Thriving in the Age of AI: Moving Forward in the Present and Future" is a second contribution in this edition which addresses the integration of artificial intelligence (AI) in legal practice and public dispute resolution. The article discusses the viability, benefits, and risks of AI, reflecting on concepts such as "legal singularity" and the importance of bridging the gap between the sciences and the humanities for lawyers to comprehend and potentially master AI.

We trust that this edition of the *Journal of the Malaysian Judiciary* will serve as a valuable resource and a source of scholarly inspiration for legal professionals and academics. The diverse topics covered reflect the complex and crucial role of the Judiciary in upholding the rule of law and adapting to new frontiers.

We extend our sincerest gratitude to all the esteemed contributors for their invaluable insights and to our readers for their continued support.

On behalf of the Editorial Committee
Nallini Pathmanathan

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Appointment as Chief Justice of Malaysia*

by

The Right Honourable The Chief Justice of Malaysia,
YAA Datuk Seri Utama Wan Ahmad Farid bin Wan Salleh

[1] Marilah kita sama-sama menzahirkan kesyukuran ke hadrat Allah Subhanahu Wataala kerana dengan kurnia dan izinNya dapat kita bersama-sama hadir pada majlis meraikan pelantikan saya sebagai Ketua Hakim Negara pada petang ini.

[2] Di majlis ini, saya ingin merakamkan setinggi-tinggi junjung kasih kepada KeBawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong Sultan Ibrahim ibni Sultan Iskandar atas perkenan Baginda melantik saya sebagai Ketua Hakim Negara yang ke-17 atas nasihat YAB Datuk Seri Anwar Ibrahim, Perdana Menteri Malaysia, setelah berunding dengan Majlis Raja-Raja.

[3] I thank all the distinguished guests, my brother and sister judges and former judges for making the time to be here this afternoon. I am deeply moved by your presence although one could say that it is an understatement. Overwhelmed would be nearer to the mark.

[4] Let me also thank my learned sister YAA Tan Sri Hasnah binti Dato' Mohamed Hashim, Chief Judge of Malaya, for your Ladyship's incredibly generous words. Looking at the body language of my wife in the gallery, she may be forgiven if she thought that your Ladyship was describing a different person altogether.

[5] I also thank Mr Attorney, President of the Malaysian Bar, President of the Advocate's Association of Sarawak and President of the Sabah Law Society for your kind and generous words. I am particularly grateful for the pledges of support that you have extended.

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* Speech delivered by The Right Honourable The Chief Justice of Malaysia on the occasion his Lordship's appointment as Chief Justice of Malaysia on August 6, 2025.

[6] The poet and civil rights activist Mary Angelou said:

> I have great respect for the past. If you don't know where you've come from, you don't know where you're going.

[7] For the Malaysian Judiciary, this means recognising and appreciating – and most importantly, learning from – the events that shaped the Judiciary in the past, including the judicial crisis of 1988, and incidents that led to the establishment of the 2007 Royal Commission of Inquiry. Only then will we be able to chart a meaningful future for ourselves.

[8] Gleaning insights from the past, three important players within the legal system, namely the Attorney General's Chambers ("AGC"), the Malaysian Bar and its counterparts in Sabah and Sarawak, and most importantly leadership within the Judiciary itself, have equally important roles in contributing to judicial integrity in Malaysia.

[9] The AGC must at all times ensure that the delicate balance between its prosecutorial powers and its role as the advisor of the government of the day, can be struck. I trust that the AGC will continue to act with impartiality and integrity in upholding the rule of law, and ultimately, in safeguarding judicial independence in Malaysia.

[10] Next, the Malaysian Bar. The Malaysian Bar is a statutory creation, and by virtue of section 42(1)(a) of the Legal Profession Act 1976, one of its purposes is to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour.

[11] I am proud to have been associated with the Malaysian Bar in the early days of my legal practice. I was the Secretary of the Terengganu Bar Committee at the height of the judicial crisis in 1988 and my car was one of the few in the whole State of Terengganu with a sticker captioned "*Tabik Hormat Untuk Lima Orang Hakim*".

[12] I take note that some members of the Bar are very fond of walking. While walking is certainly good for your health, my unsolicited view is, please do it sparingly.

[13] While we are on the topic of walking, I am happy to say that I have participated in the KL Bar Run for the past two years. While I am not particularly proud of my running record, I endeavour to improve it at next year's event, with more participation from the Bench. Events such as these should be encouraged, as they strengthen the

relationship between the Bench and the Bar. After all, it is far easier for us to reach out to each other and speak on matters of importance, once we've interacted while wearing t-shirts and sweat pants.

[14] The Judiciary will continue working alongside the Bar and the AGC in upholding justice. In my working visits to the states in the next few months, I will continue my engagement with these stakeholders. I am particularly excited to meet the Young Lawyers Committees of the State Bars. I say so because I am committed to see the improvement of the standards of advocacy amongst young lawyers in our courts. Continuing legal education has always had a special place in my heart – having taught at the law schools in Universiti Teknologi MARA (UiTM) and Universiti Sultan Zainal Abidin (UniSZA).

[15] Finally, the most important player at the forefront of judicial independence is obvious – it is the leadership within the Judiciary itself. For this, I am grateful for the path set by Chief Justices before myself, and particularly so the Chief Justices who have led the Malaysian Judiciary these past 15 years. These leaders of the Judiciary have collectively made great strides, putting in place institutional and procedural reforms, improving the efficiency of the Judiciary, enhancing access to justice, and placing emphasis on the need for a transparent and independent Judiciary.

[16] My predecessors have led with utmost integrity, and now the baton has been passed at a most pivotal time, with the country watching closely. I stand on the shoulders of giants, and I can only pray that Allah SWT will guide me in the same way He has guided them.

[17] I would also like to spend a few minutes to express my profound gratitude to those who have shaped my past.

[18] By an accident of history, my legal and judicial career is shaped by two Wan Adnans. The first one is the late Tan Sri Wan Adnan bin Ismail, with whom I did my pupillage in 1986, in Kuala Terengganu. Tan Sri Wan Adnan, as we all know, was later appointed as the President of the Court of Appeal. I can still vividly recall his advice to me on my first day of chambering. He said, *"As a lawyer you must love the law, be passionate about it and embrace it. Be honest, since there is no room for intellectual dishonesty in the course of upholding the interest of your client"*.

[19] The second is Dato' Wan Adnan bin Muhammad, my first cousin, who is a former Court of Appeal judge. I am happy to note that he

is here today. When I informed him of my impending elevation as a judicial commissioner almost 10 years ago, his advice to me was very simple. He said that whenever I make a decision, I must remember that the choices I make will echo far beyond the confines of my chambers. In the end, we are ultimately answerable to our Creator.

[20] It is with their guidance that I continue my judicial path.

[21] With this, let me reiterate my commitment to uphold the independence of the Judiciary – and let it be known that it must be protected at all costs, lest the very fabric of a just society be severely undermined. When all avenues of recourse are closed, the rakyat and even the government will look to the courts for an impartial resolution of their disputes. To my brother and sister judges, let us not fail them.

[22] My fellow brother and sister judges, whether you are a Federal Court judge, a Court of Appeal judge, a High Court judge or a judicial commissioner, I would like to stress that we are all equals – ranked *pari passu*. I am what the English lawyers would refer to as the *primus inter pares*, the first amongst equals.

[23] I am sitting in this chair not because I am the best. Far from it. I was not born great, nor have I achieved greatness. Instead, what I have is simply the responsibility of leadership entrusted to me.

[24] Leadership is about *taklif*, which reflects a heavy trust or *amanah* and serious accountability. It is not about *tashrif* or privilege. While it is indeed an honour to serve as judges – let us not forget, even for a moment, the immense duties and accountability that come with it. This is an *amanah* which we have to hold steadfastly in the discharge of our judicial duty.

[25] As a judge, it is impossible to please everyone. In every decision we give, at least one party (and sometimes both parties) will not be satisfied with our decision. That is only to be expected. But in our system, there are avenues for an aggrieved party to take the next course of action. Whatever our decision is, lest we forget, we must ensure that the losing party walks out of our courtrooms feeling satisfied that he was given the right to be heard, to present his evidence and be given his day. Do not shut them out.

[26] In this agenda of reform, I would like to see a Judiciary that consistently improves its delivery system. In 2011, the World Bank made a recommendation for countries facing judicial backlog to take

note of and study the reforms that Malaysia made. In short, we were the trendsetter and became an example for the world.

[27] As they say, justice delayed is justice denied. I am aware of litigants who come to the courts seeking justice, but are dissatisfied that it takes years for the matter to be resolved. To them, let me say this: I hear you. Together with my brother and sister judges, we will work together to resolve the backlog of cases throughout the country. To this end, I am happy to inform you that we are working with the government on increasing the number of courtrooms and appointing additional judicial commissioners.

[28] In order to reduce the backlog of cases drastically, the Judiciary will assign circuit judges and judicial commissioners in various stations to hear ageing cases and dispose them within a specified period. We hope that this would ease the burden of existing judges and judicial commissioners, who can then concentrate on existing cases.

[29] To further expand public access to justice, the Judiciary has introduced mobile courts, bringing legal services directly to remote communities, particularly in Sabah and Sarawak. These mobile units, equipped as courtrooms, along with a team lead by a magistrate, handle matters such as birth registrations, minor offences, and legal documentation on the ground. I am pleased to inform that we are planning to introduce the same service to the Peninsular of Malaysia.

[30] Further, there is also a need to form more specialised divisions and sub-divisions of the High Court, especially at the Kuala Lumpur Court Complex. We will explore this, in order to expose our judges to more complex areas of the law and therefore enhance their expertise in these areas. There is also the need to continually enhance the standards of the Commercial Division of the High Court in Kuala Lumpur, to maintain the confidence of investors, whose disputes will be heard there.

[31] Circuit sittings of the Federal Court and the Court of Appeal across Peninsular Malaysia will also be revived. This move will allow greater access to proceedings of the apex courts, to both litigants and lawyers outside the Klang Valley.

[32] Finally, there is a more urgent need than ever, for judges to embrace fast-paced technological developments, which is the epicentre of the human experience today. COVID-19 had accelerated the use of technology in businesses and in our daily lives, and consequently in courts around

the world. The adoption of technology in our courts will continue, as it enhances the efficiency of the court system and allows better access to justice. The Judiciary will closely follow technological developments, and in particular, the impact of the evolution of artificial intelligence. We will ensure that our judges are sufficiently equipped not only to use technology in courts, but also to manage issues relating to technology.

[33] I am not going to promise any miracles. But these are the reforms that the Judiciary will immediately take to improve our delivery system. Let us be a towering example on the world stage.

[34] One final word. One of the most influential contributors to the principle that power must not be concentrated in one person or institution, but rather divided among different branches of government to prevent tyranny and protect liberty was the French philosopher, Montesquieu. In *The Spirit of the Laws,* he wrote, *"There is no liberty if the judiciary power be not separated from the legislative and executive."*

[35] I have had a long and varied career. I have served in all three branches of government. I cannot erase my history, political or otherwise. Nor do I want to. That is who I am. But as I assume this most solemn *amanah* and for as long as I occupy this chair, I give you my unconditional pledge, in the name of my Creator, *Bismillahhirahmanirrahim*, that I will vigorously protect and relentlessly safeguard the independence of our branch of government with every fibre of my being.

[36] And now let us look forward to the future of our Judiciary. One that is independent, resilient, efficient, learned and future-proof. Let us do this for our beloved country. To my fellow brother and sister judges, to the judicial officers throughout the country, to Mr Attorney and his able officers at the AGC, to the Malaysian Bar, the Sabah Law Society, the Advocates Association of Sarawak and other stakeholders, let us chart this future together by working *with* me.

[37] I pledge to do my level best towards the betterment of the Malaysian Judiciary and its independence. Let there be a strong message of the independence of the Judiciary, which shall continue to be loud and clear, echoing not just through the halls of the Palace of Justice and other courthouses but also through all corners of our society, and all the corridors of power in our country.

Thank you very much.

Beyond Boundaries: The Rise of Asia in Global Dispute Resolution*

by

*Justice Tan Sri Datuk Nallini Pathmanathan***

[1] It is a privilege and a pleasure to be asked to address this prominent and influential assembly of judges, lawyers, arbitrators and law makers from Asia. This is particularly so in light of the theme of this summit, namely, the evolving growth and rise of Asia in global, and not solely regional, dispute resolution.

Introduction

Beyond boundaries: Literally and conceptually

[2] The summit is fittingly titled "*Beyond Boundaries: The Rise of Asia in Global Dispute Resolution*".

"Literally"

[3] Taken literally, this theme invites alternative dispute resolution users and practitioners, particularly Asian practitioners in this field, to extend their reach beyond the physical boundaries of their national borders, to participate considerably more than they do at present in cross-border or transnational disputes, with particular focus on Asia.

[4] This need is enhanced by the rapid development and evolution of international law in the field of commerce that transcends national boundaries and encompasses complex cross-border commercial transactions and insolvency which require participation from all parts of the globe.

"Conceptually"

[5] Turning back to the opening words of the title – "*Beyond Boundaries*" – taken conceptually, the theme recognises that there *are*

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* Keynote address delivered at the Asian International Arbitration Centre on July 26, 2024.

** Judge of the Federal Court of Malaysia.

no limits or confines as to how the expansion of Asia in the global dispute resolution field may be achieved. This opens the door to a myriad ways in which the countries of Asia may promote and enhance dispute resolution.

[6] It has been globally acknowledged that Asia is an economic power house. To put this in perspective, Asia is home to 55% of the global consumer class. In the next 10 years, Asian nations will, most likely, maintain their status as the fastest-growing consumer markets globally. By 2030, China, India and Indonesia together are expected to welcome more than 830 million new consumers. With growing populations and increasing incomes driving demand, consumer spending is projected to surge, reaching US$30.4 trillion by 2030.[1]

[7] As the economic focus shifts to Asia, we should expect to see:

- Asian firms expanding to extend their operations globally.
- Existing global firms extending their operations into Asia
- Far greater cross-border commercial activity involving Asian entities, which will give rise to international disputes.
- The need for effective and dependable dispute resolution services to settle these conflicts

[8] Reverting to the theme of "*Beyond Boundaries*" and the concept of a lack of limitation ensconced in that theme, I would like to ask the audience this morning – is there a need to re-assess how dispute resolution should be dealt with? Do we presently employ ***the*** ideal system that provides the commercial world and the men of commerce the best mode of dispute resolution? Is a replication of the current systems that subsist, the best way to go forward in terms of alternative dispute resolution? Is there a better way of meeting the needs of commerce in this new era?

[9] It is essential that Asia comprises a core element, or at the very least, is represented proportionately globally, both in terms of the evolution of international commercial law, as well as alternative

1 "Why global businesses look to Asia for opportunities", available at < https://www.eastspring.com/hk/insights/thought-leadership/why-global-businesses-look-to-asia-for-opportunities>. (accessed July 4, 2024).

dispute resolution. This is so in view of its size, diversity, intellectual proficiency and significance commercially, both in the present and the future. The need for this is all the more important, given that globally, legal dispute resolution is not an even playing field.

[10] For the better part of the modern era, we have lived within a system of international commercial law which is formulated and practised in a way that is based almost exclusively on the norms of the Global North. I say this not as a matter of complaint, criticism or grievance, but as a matter of fact. This is so because of history. Such influence is largely attributable to the colonisation of large parts of Asia, save for China, over the last half of the millennium. During this period, the Global North exerted a great deal of influence on the political and economic systems of countries that were colonised. As a result, the long existing conventional systems of law relating to commerce, unique to those countries, were displaced and replaced by laws premised on trade practices and the laws of the Global North.

The Western model and Asian values

[11] Today, the creation of legal norms and standards is still dominated largely by countries from the Global North. The dispute resolution mechanisms at the international level such as the Permanent Court of Arbitration, the World Trade Organisation, the International Court of Justice, and more, are primarily developed with the jurisprudence of the Global North. The way we operate at present is largely based on the Westphalian concept of national boundaries and sovereignty, although such concepts are now having to give way to transnational and cross-border law, given that national markets are no longer segmented. There is a growing need to transcend national boundaries. With ongoing globalisation this need is only going to increase exponentially.

[12] The model of dispute resolution in place now, while very effective in its own context, may not necessarily align with the philosophical foundations of Asia. The adversarial nature of dispute resolution is the bedrock of the legal system of the Global North, which was then imposed on Asia and Africa. Asia however, traditionally values harmony, consensus building, and preserving relationships.

History of dispute resolution in Asia

[13] Where Asia and the Global North are concerned, the concepts of individual versus collective identity have shaped distinct inclinations

towards adversarial or mediated approaches to resolving disputes.[2] So to term mediation, arbitration, conciliation or negotiation as alternative dispute resolution in Asia can be a little imprecise because their history actually utilised these mechanisms in place of, and to preclude, if possible, litigation.

History of dispute resolution in China[3]

[14] Chinese traditional society, which is heavily influenced by Confucianism, prefers "no litigation". This is because again historically, litigation is perceived as undesirable, disgraceful and abnormal and was to be eliminated in an ideal society. Such an anti-litigation stance can be traced back to the root of the Confucianism value system.

[15] In the relationship-oriented theoretical framework, Confucius paid special attention to the significance of ethics, morality and virtue building for a person to become a superior man. These were broader, stricter and more comprehensive than legal requirements – no qualified superior man is satisfied with only complying with less rigorous legal requirements. Once people transform themselves into superior men, society will be in harmony and peace, and disputes in society will become less and less. (Therefore, less or no litigation is a necessary condition for society to become a harmonious and ideal one.)

[16] Emperors and government officials considered diminishing litigation as part of their governing goals. Thus, the amount of litigation served as an important yardstick to evaluate the political performance of the local officials.

2 Shahla F Ali, "Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West" (Summer 2009) 28(4) *Review of Litigation* 791–844 at 796, citing a study by Kaiping Peng which observed that a strong collective identity within Asian culture has influenced a preference for informal procedures, such as mediation and bargaining, because of the belief that such methods reduce animosity.

3 Institute of Law, Chinese Academy of Social Science, Beijing (ed), "Dispute Resolution Process in China", IDE Asian Law Series No. 15, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO) (March 2002), at pp 43–44.

History of dispute resolution in India[4]

Ancient Vedic period

[17] The resolution of disputes in India can be traced back to the ancient Vedic period, when texts such as the Vedas and the Dharmashastras, among others, underlined the importance of resolving disputes through negotiation, mediation, and arbitration. Local communities would appoint impartial elders or important members to mediate disputes, with an emphasis on fairness, equity, and the preservation of community ties.

Maurya and Gupta empires

[18] During the Maurya and Gupta empires (321 BCE to 550 CE), royal courts played a vital role in resolving conflicts through arbitration and mediation. To ensure a fair verdict, the courts deployed officers known as "dharmasthas" or "amatyas" to help resolve disputes by following Dharma (righteousness) principles.

During British rule

[19] In the 18th and 19th centuries, formal legal systems were established under British colonial administration, side stepping the ancient modes of dispute resolution entrenched in Indian society. This eventually had the effect of substantially displacing the indigenous/autochthonous dispute resolution systems.

After independence

[20] After India's independence in 1947, there was renewed interest in the original practices relating to dispute resolution. The drafters of the Indian Constitution realised the significance of such dispute resolution and included Article 51(c) as a key element of state policy, urging the government to promote international conflict resolution through arbitration.

4 Abhay Jaiswal, "Historical Evolution of ADR in India and Emerging Trends in ADR in Today's Corporate World" (2023) 1(2) *Legal Upanishad Journal* 88 at 89–90.

[21] In Indonesia and Malaysia, there is the practice of "musyawarah" which is a consensual dispute resolution process where parties are asked to compromise their interests to seek an amicable settlement.[5]

[22] The aforementioned examples show that mediation is not something alien to Asia, but an autochthonous, rather than an "alternative" dispute resolution process.[6]

[23] Should our focus then shift from replicating adversarial type templates in Asian alternative dispute resolution institutions, to designing alternative dispute institutions or systems that genuinely meet the needs of the commercial world, particularly in the Asian context?

[24] If so, this would require realigning our goals to meet the needs of commerce, rather than allowing the legal megalith that has now emerged from years of litigation (and arbitration as it has evolved today) to continue to delay and defeat the needs of the commercial world. Adherence to the rule of law requires that undue delay and complexification should be deprecated, and removed from the system.

[25] Before progress can be made in this direction however, there is a necessity for a change in the mindset of the community and users, in relation to the law and accordingly alternative dispute resolution. That starts with freeing our minds of the rigid framework of adjudication that we now recognise as the sole means of effecting resolution.

Decolonising the mind: Embracing cultural diversity

[26] As we contemplate the future of alternative dispute resolution ("ADR") in Asia, we should confront the legacy of colonialism that continues to influence our legal and judicial systems quite considerably. I must say at once that I am not advocating the throwing out of the systems and methods of adjudication premised for example on the common law system we inherited from the British, which promotes a balanced and logical mode of developing the law, and which ensures

5 Stephanie P Stobbe (ed), *Conflict Resolution in Asia – Mediation and Other Cultural Models* (Lexington Books, 2018), p 14.

6 Kenny Yang, "Towards Cross-Cultural Fluency in Mediation Standards" (2017) 36(1) *The University of Tasmania Law Review* 69–86 at 71.

a collation of judicial thought which serves to preserve the basis for the evolution of the law throughout the centuries.

[27] What decolonising the mind involves however, is recognising and rectifying biases inherited from foreign legal traditions. It requires us to free ourselves from the notion that there is only one correct way of achieving resolution of a dispute – namely through the adversarial mode of adjudication. We need to open our minds to the real significance of negotiation, mediation and conciliation. As these modes of resolution are rooted in Asian culture, philosophy and custom, they ought to be leveraged as a strength in designing ADR frameworks that are authentically suited to meet the preferences of the Asian diaspora.

[28] Embracing diversity *means* promoting inclusivity in the modes of resolving disputes, the selection of an arbitrator/adjudicator/mediator, the genuine accommodation of multiple languages and cultural norms, and ensuring equitable access to justice for all parties involved in disputes. Incorporating these elements in the ADR system would be a giant step in genuinely accepting diversity.

ADR in Asia

[29] The emphasis, to my mind, should be on empowering the parties involved in disputes, allowing them to shape the resolution process according to their cultural and business imperatives. This party- or consumer-centric approach requires a reconsideration of the very structure and functioning of alternative dispute resolution centres. Questions to be considered include, what are the unique needs of Asia? How can the current systems be innovated and alternatives offered? What are the modes of resolution that can be introduced which will resonate with the values and traditions of the world of commerce in this region?

A further change of perspective from being "legal-centric" to commerce-centric

[30] The systems in place today, for alternative dispute resolution, as I see it, revolve around the practice of law and are legal-centric, both procedurally and substantively. This is true, particularly in relation to arbitration.

[31] This in turn has impinged on, and seeped into the ADR system, even with respect to mediation or conciliation, certainly in Malaysia. Only court-annexed mediation appears to work.

[32] This state of affairs has been favourable for the actors in the legal world, as intricate and infinite court processes, delving into the minutiae of points of law take centre stage and require years for resolution, be it in the courts or arbitration. Arbitration, far too often, comes back to the courts. Speed, flexibility and finality are lost in the mire of legal processes.

[33] Complexification, a term which has been explored extensively by the Chief Justice of Singapore, CJ Sundaresh Menon, has become the bane of both litigation and arbitration. This has resulted in burgeoning fees for the actors in the litigation and arbitration world. However, on the other side of the coin, these protracted legal processes have irrevocably hampered the efficacy of commercial transactions.

[34] The touchstone of commerce is speed, efficiency and certainty. Those fundamental indicia however have been swallowed up by the colossal machinery comprising the dispute resolution system, and the complexification of the same, by the increasing burden of legal issues brought into play in the resolution of commercial disputes.

[35] Surely the time has come to reorient our focus back to the basics of how and why dispute resolution mechanisms exist. The fundamental bulwark of successful commerce is the need of the men of commerce. Put another way, commerce is the precursor to commercial law, not the other way round.

[36] Therefore, commercial law and its adjudication should not pay lip service to the essentials of speed, efficiency and certainty, but ensure that the necessities of commerce are fully met. This means that attention should be accorded primarily to the men of commerce, or the commercial establishments who are the primary engines of wealth creation. It is they who are directly impacted by the length and complexity of legal proceedings. It is they who should have a pivotal role in shaping the alternative dispute resolution process.

This shift demands a departure from rigid institutional frameworks to more flexible, party-driven approaches.

[37] Men of commerce should be defining how commerce is best served, as opposed to the law stifling and stymieing the progress of commerce and economics. And in the commercial world the wish list would be for disputes to be resolved in the following manner:

1. Fast;
2. Fair; and
3. Final.

[38] These three characteristics, or the 3Fs as I call them, comprise the hallmark of what every commercial dispute resolution institution should strive for. The first two characteristics are not as difficult to achieve as the last. For finality to prevail, acceptance on the part of the disputants is core. It is in this context that the dispute resolution mechanisms of negotiation, conciliation and mediation are so significant, yet underrated. These mechanisms are ideally suited to meet that elusive yet all important requirement of finality.

[39] The systems of litigation and arbitration fall short because the lack of finality allows for the dispute to be reviewed and reconsidered at various stages in the courts. While that may be inevitable in complex matters, the 3Fs should circumscribe the process and afford the parties a degree of certainty in terms of time and outcome.

Embracing ADR procedures as *the* means of resolving disputes requires a change in mindset

[40] It is imperative for us to take a step back, retain all that is still relevant from our existing systems, and infuse the system with contemporary perspectives that align with the needs of parties.

[41] As we stand at the threshold of a new era, it is imperative that we critically examine our current practices and chart a course that is effective, competitive and aligns with the unique cultural, economic and philosophical underpinnings of this region. I am confident that this proactive approach will go a long way towards ensuring that

our ADR systems remain responsive to the needs of our business communities.

[42] This conference as is apparent from the diverse, important and interesting institutions and persons involved from across Asia, certainly offers an invaluable opportunity to explore how ADR mechanisms can be reshaped to better manage and resolve conflicts in our region.

Thank you.

Thriving in the Age of AI: Moving Forward in the Present and Future*

by

*Justice Tan Sri Datuk Nallini Pathmanathan***

Introduction

[1] Today, I am attempting to speak on artificial intelligence ("AI") notwithstanding the fact that I am a judge. As a judge, I am far more accustomed to dealing with legal issues. My expertise, such as it is, lies in construing statutes and case-law – not algorithms. So, when it comes to AI, I must confess that I feel like a medieval monk or Hang Tuah trying to operate a smartphone. Notwithstanding this, I am going to attempt to have a stab at explaining neural networks, and a variety of other topics – in short, my idea of the way forward.

AI

[2] The core of our discussion this evening centres on the integration of AI in the public dispute resolution process, and its viability, benefits and risks. This is an exciting and relatively new aspect of the evolution of the law. But with it comes the darker side of AI – will it take control of our lives? Will it replace our work, more particularly the ethos and philosophy of our work? Will the ethics and basic premise of the law be supplanted by AI?

[3] That is one aspect that I would like to reflect on.

The concept of a legal singularity[1]

[4] Another area that I would like to offer for consideration is the concept of "legal singularity". This concept is the brainchild of a law professor, Benjamin Alarie from the University of Toronto, Faculty

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** Judge of the Federal Court of Malaysia.

1 Abdi Aidid and Benjamin Alarie, *The Legal Singularity – How Artificial Intelligence Can Make Law Radically Better* (University of Toronto Press, 2023), torontopress.com (ISBN 978-1-4875-2941-3).

of Law together with his academic colleagues, Anthony Niblett and Albert Yoon.

Bridging the gap between the sciences and the humanities

[5] Thirdly, I shall touch on bridging the gap between the sciences and the humanities – including the law for a greater appreciation of AI. And then go on to the evolving of legal education, the importance of AI in relation to access to justice, and legal practice in the age of AI. From there on to AI ethics, regulation and governance. Essentially, the way forward – as I see it.

[6] I should first however say that a considerable amount, if not everything I say is hearsay, gleaned from the writings of computer scientists and specialists in the field of AI and the law. Add to that a good deal of "crystal-ball gazing" and you have a perfect "masala" for a possible or plausible path ahead. Or not.

How will new technologies, specifically AI, enhance or alter the operations of the law?

[7] How will new technologies, specifically AI enhance or alter the operations of the law? Before we can go into that question, I believe it is important for us as lawyers, to appreciate to some degree how AI works or functions, so we do not simply use a program, with no comprehension whatsoever as to how or why it is able to do what it does. So, I shall start with that.

Definition of AI

[8] A common fear is that AI will supersede and make us redundant. The fear grows daily as new applications and abilities are launched almost exponentially. It seems impossible to keep up with the new advances in technology. This brings to the fore, a fear that I have seen in many jurisdictions: How do I remain relevant?

[9] To answer the "darker" aspects of AI and whether they will render us obsolete, I believe that one needs to comprehend how AI functions. That is something that we rarely pause to think about. Unfortunately, in the course of the 20th and 21st centuries, education has split the study of the humanities and arts from the quantitative sciences. That split or gap has to be bridged because the lawyer of today and tomorrow needs to comprehend and possibly, master AI

which requires, at the very least, a basic understanding of computer science. That will preclude a "blind spot", so to speak, in the law of the future which is likely to include AI as an intrinsic component of the practice of law. Now, bridging that gap would be intelligence. I will come back to this later on.

[10] Reverting to how AI works, as persons trained in the law, a logical starting point is a definition. However, AI is notoriously difficult to define. One of the simplest is an early definition by John McCarthy in 1955 where he explained AI as "… *making a machine behave in ways that would be called intelligent …*".[2]

[11] I also liked this definition by Kenneth Wenger. He is the author of the book *Is the Algorithm plotting against us?*, and he defines AI thus: "*… a broaddiscipline in computer science which encompasses many areas of research such* ***that many algorithms fall within its definition***".[3]

[12] And further on: "*We are referring to* ***a specific class of AI algorithms: artificial neural networks***."[4]

Artificial neural networks[5]

[13] Artificial neural networks are the most popular and successful algorithm in use today. For example, they are the driving force behind Amazon's Alexa, Google Assistant, robotics and self-driving cars.[6]

[14] Which brings us to the next question – what are *artificial neural networks*? *The term leads one to think of the brain. Do they really work like neurons in our brain? To answer this question, we have to conceptualise and comprehend the nature of artificial neural networks. And that in turn starts with the understanding that* artificial neural networks like our brains start with the concept of a single cell. Complex networks are derived

2 John McCarthy *et al*, "AProposal for the Dartmouth Summer Research Project on Artificial Intelligence", August 31, 1955, available at https://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html.

3 KennethWenger, Is theAlgorithm Plotting Against Us? 2023Working Fires Foundation,1st edn, Library of Congress Control No. 2022947822 (ISBN 978-1-959632-01-6).

4 See n 2 above, Introduction: Living with Lions, p 3.

5 Varun Maheshwari and Arindam Mishra, "The Future of International Arbitration in the Age of Artificial Intelligence", quoting in turn from Ajay Agrawal, Joshua Gans and Avi Goldfarb, *Prediction Machines* (HBR, 2018), pp 9-11.

6 See n 2 above, p 3.

from that single cell and these networks assist us in understanding and analysing data. We use these networks to classify images and recognise objects for example.

[15] Broken down to its elements, the artificial neural network has been programmed using a complex algorithm by modelling the biological neural network of the human.[7] It is fed with complex and numerous amounts of input per unit time that exceed the amount of input an average human could intake and process, with even a remotely comparable level of efficiency.

[16] The edge this gives the artificial model of the human brain is essentially the ability to yield a larger volume of rational output per unit input, in a way that the average human brain is unable to. The artificial neural network model can be said to function infinitesimally closely to the human brain.

[17] What is crucial to be borne in mind is that AI (in this case, we are using the artificial neural network as the example) has the edge over the average human brain *exclusively in the context of rational output efficiency*.[8] This is done by the use of mathematical operators known as logic gates to mimic the operation of the biological neural network in humans. Whereas the human or biological brain functions differently – through biological neurons which utilise synapses, neurotransmitters and importantly whose cognitive ability is linked to sensory input, emotions and motor functions. It is the result of an active learning ability which is a result of supervised or teaching combined with self-exploration and reinforcement learning from trial and error. The human brain continuously rewires based on experience – this is called neuroplasticity and general intelligence. Also interestingly, it is energy-efficient.

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7 See n 2 above, Chapter 1, Polarization and its Consequences.

8 How this is done is by the use of mathematical operators known as logic gates to mimic the operation of the biological neural network in humans. There are two types of inputs 0 and 1. The two inputs can function in multiple forms, namely, 0 and 1, 0 and 0, 1 and 1 and the output yield by multiplying the magnitude of the two put values. Then the output value of 0 corresponds to no and the output value of 1 corresponds to yes. The yes and the no output would correspond in turn to a decision or decisions in the process of determining what the next answer would be.

[18] This is to be compared to artificial neural networks where there is no physical embodiment – it is purely text/data driven. There is no true understanding as it operates on correlations, not causation, at least at present. Outside of its training data, it struggles with tasks.

[19] Notwithstanding this, the feature of being able to yield a large rational output compared to the human brain is strongly desirable in all lines of work.

[20] As such, these artificial neural network algorithms are powerful. And with that power comes deep distrust or concern from society – in that, if they can achieve so much, what else can such an artificial neural network do? What is it thinking? Will it develop awareness and control me?

[21] That sort of panic is driven by the media, science fiction and in relation to the law – a real dread of AI taking over the roles of lawyers, judges and other professionals.

[22] While AI may have the edge over the human brain in terms of rational output efficiency, it ultimately falls, at least presently, in the realm of *objectivity* which deals exclusively with what is correct and what is incorrect. However, the reality of human experience encompasses not just objectivity (rationality in the course of arriving at a correct or incorrect answer), *but also subjectivity and consciousness, which in the context of humans and relatively evolved organisms, is a concept associated with the mind, and deals with what is right and what is wrong*.

[23] It is distinct from (albeit potentially associated with) the brain and the rational process. The fundamental missing component in AI is the *potential inability to create models of the subjective experience of right and wrong*.

[24] And why is that? It is because the notions of right and wrong are evolved human perceptions, that do not exist in the tangible sense the way notions of rational and irrational do. The tangible nature of the ideas of rationality and irrationality are the basis on which AI models are designed, and as such, *artificial models fall short in the category of modelling the subjective human experience*.

[25] The idea of the law and justice is not *just* considering facts objectively; it is an intangible sensibility that allows humans to consider both the rational and subjective elements before arriving at

judgments. AI or artificial neural network algorithms lack the human-to-human connection intrinsic to the legal process. Justice requires a human element which is unique. And that is something that AI cannot replicate. It simply cannot engage in this justice.[9] At least, not yet.

[26] Put differently, and as stated by John Linarelli,[10] AI is not self-conscious; it is not a sentient being. It operates based on human-written instructions. *There is a drastic difference between human intention and the intention programmed into code for AI to perform*. Within the realms of human intention, there is an aspect of intentionality that is the ability to plan and engage in shared intentions with others.

Large language models (LLMs) and machine learning

[27] But what about generative AI or machine learning? Most predictive analysis is premised on machine learning. Machine learning has been defined as early as the 1950s as "the field of study that gives computers the ability to learn without explicitly being programmed."

[28] Machine learning refers to computer algorithms capable of acquiring knowledge from past experiences and enhancing their performance as they progress. Machine learning algorithms autonomously generate models or rules without explicit programming. They have the capability to modify, extract and refine algorithms based on the data they analyse.[11] On an almost daily basis, we see new generative AI with cognitive-like abilities being launched for use. And they are quite amazing.

[29] Some may therefore argue that the outcome created by generative AI is very different from the initial program, hence self-reliant and therefore conscious. *However, it is self-learning rather than self-consciousness*.

[30] It is important to appreciate that the term "learning" in this context is not equivalent to the cognitive process commonly associated with human learning. It refers to a "*comparable, operational understanding of learning*."

9 The 2023 Sir Francis Burt Oration, delivered on November 21, 2023.
10 Vice Dean and Professor of Law at the University of Pittsburgh School of Law.
11 See n 4 above.

[31] That distinction is essential, as AI's ability to self-learn does not equate to self-awareness, which involves human traits like emotions and intentionality. Therefore, AI remains a great innovation designed to assist human decision-making.

How machine learning works

[32] How does machine learning work? As I understand it, by the use of training, via data sets. You start with the procuring of data, and in the context of the law, it would be clean data in relation to legal matters, and you would supply the data. Then programmers choose a machine learning model to use and feed the data in. Then the magic happens. This is where neural networks come into play. They are the class of algorithms which work together with the data supplied, to enable intelligent machine learning.

[33] The computer, by use of these neural networks, *trains itself to find patterns or make predictions*. This form of intelligent learning is also the way *deep machine learning* occurs. You have more nodes or neural networks for the processing function. (I understand these neural networks can be stacked up quite considerably into large networks.)

[34] The intelligent or unique feature of machine learning is that the process enables the acquisition of knowledge from past experiences. This enhances the machine learning process as it progresses. These algorithms also have the capacity to modify, extract and define algorithms based on the data they analyse. It is a form of self-learning.

Supervised machine learning

[35] There is supervised machine learning in that the machine learning models are trained with labelled specific data sets which allows for learning and growing accuracy. Unsupervised machine learning allows a program to look for patterns in unlabeled data. This may result in output which is not what the person was looking for or weird or misleading results. So the courts, for example, I think, would necessarily require supervised learning data to enable accuracy. This is time-consuming and expensive.

Real-life application: Potential use

[36] How would this be used by an adjudicator in dealing with a real-life say commercial dispute? AI can be used in *decision-making* in terms of producing recommendations.

[37] First, the relevant facts of the dispute would be uploaded into the system. AI is used to analyse the evidence and apply the relevant legal principles to propose a resolution. Based on the size and sophistication of the database that is available, AI would then produce not necessarily one result but a series of possible outcomes.

[38] The human judge would then use this to test his own independent judgment or review the recommendation to improve or rectify his judgment. This clearly is facilitative and not a substitute for the human analysis which is the core of a judgment and includes both objective as well as subjective results.

[39] Again, this is because the manner in which it works would entail identifying and matching up similar fact patterns in prior cases. It would also give the adjudicator the outline or summarisation of the rationale for those outcomes based on the reasoning in the prior cases. *But that is not because the AI has undertaken any form of cognitive reasoning or decision making itself. It has identified and matched – rather like pattern matching*.

[40] The other mode or technique of machine learning is *natural language processing*. It uses machine learning to enable the computer to understand and communicate using human language. It is trained on human language and then anticipates the next word or phrase that should follow in respect of any given problem. It functions not only on text but these days on context too.

[41] With natural language processing, it is again, in essence, a matching process but using natural language. Machine learning trains computers to identify patterns in data generally, while *natural language processing focuses on patterns in language specifically*.

Current status of reasoning abilities in LLMs: Foundation models[12]

[42] I have talked about how LLMs function essentially by a matching up of visual images or objects and alternatively vide natural language processing. And that cognitive reasoning is not how these LLMs work. However, the most recent models appear to have some reasoning ability based on how they have been trained and the sources of

12 See Jiankai Sun, *et al*, "A Survey of Reasoning with Foundation Models", *ArXiv* (2023), available at https://arxiv.org/pdf/2312.11562.

material available to them. Again, this "cognitive ability" is a result of instructions and training on data.

[43] These models are called foundation models and are a new paradigm in AI system development. AI was previously trained on task-specific data to perform a narrow range of functions. Whereas foundation models are trained on a broad data set that can be fine-tuned and adapted to perform a wide variety of tasks. But again, the ability to reason is a result of a data base and training, after which the LLMs self-learn.

[44] However, this ability to seemingly replicate cognitive functioning is not easy. Problems include:

> *Bias*: Because foundation models stem from only a core few technologies, inherent biases due to social or moral issues in those few models might spread through every AI application.
>
> *System*: Computer systems are a key bottleneck for scaling model size and data quantity. Training foundation models might require a prohibitively large amount of memory. The training is expensive and computationally intensive.
>
> *Data availability*: Foundation models need access to large amounts of training data to function. If that data is cut off or restricted, they do not have the fuel to function. Various governments, companies and research entities do not release all the information that they possess, resulting in an incomplete data base from which the LLM is to learn.
>
> *Security*: Foundation models represent a single point of failure, which makes them a viable target for cyberattacks.
>
> *Environment*: It takes a large environmental toll to train and run large foundation models, like GPT-4.

[45] The range of reasoning being explored is in itself amazingly varied, ranging from:

> *Common sense reasoning* – which involves the application of intuitive knowledge about everyday situations which humans implicitly possess;
>
> *Mathematical reasoning* – which deals with problem solving in algebra, geometry, theorem proving and quantitative analysis;

Logical reasoning – the process of making deductions through formal logic constructs like propositional and predicate logic;

Causal reasoning – explains cause-effect relationships between events, actions or variables;

Multimodal reasoning – which is reasoning across diverse data types like text, images, audio and video to enable enhanced understanding;

Visual reasoning – requires analysing and manipulating visual inputs like images and video to draw inferences;

Defeasible reasoning – which appeared very interesting as it deals with how conclusions can be overturned or revised based on new evidence or information; allows for the handling of uncertainty and incomplete knowledge;

Counterfactual reasoning – which considers hypothetical or alternative scenarios and their potential outcomes, causal understanding and decision making;

Theory of mind ("TOM") reasoning – which involves attributing mental states like beliefs, intentions and emotions to others; enables interpreting and predicting behaviour – there is speculation that some models may have developed TOM abilities;

Long chain reasoning – which connects and processes complex information across extended sequences and is vital for tasks like planning, decision making and answering questions.

The reality of limitations in these foundation models

[46] The current limitations in reasoning abilities is real. The decision-making processes of these models lack transparency and can manifest unanticipated behaviours. Models face issues with generating fabricated information unsupported by evidence – hallucinations especially when reasoning about unfamiliar situations beyond their training data. So that has to be dealt with. Robust testing protocols are vital for systematically evaluating reasoning capacity on diverse novel examples while at the same time avoiding dataset biases.

Black box

[47] A major issue with certain machine learning models is the "black box" problem. The "black box" issue refers to difficulty in

understanding why an AI program or system produces a specific result.[13]

[48] In both social and legal settings, there is typically an expectation that decision-makers should be able to explain their reasoning, especially when the decisions have significant social consequences. Judges and officials, for example, are often required to justify their decisions, sometimes verbally. A similar expectation applies to computer programs used in or replacing legal work.[14]

[49] The lack of transparency in AI systems, especially large language models (LLMs), presents a considerable challenge. Even when an LLM is asked to provide more detailed or transparent answers, the internal processes of the model remain unclear. Many machine learning models, especially neural networks, are complex, with numerous layers and parameters, making it difficult to interpret how they process information, despite their ability to make accurate predictions.

[50] This lack of clarity complicates regulatory efforts. Enacting regulations for these technologies is a complex undertaking: regulations might be enacted prematurely without fully considering the evolving nature of these systems, or they may come too late, i.e. after AI has already been integrated into judicial processes. Developing appropriate policies and managing the related data will not be easy.[15]

Prioritising safe development

[51] As stated by numerous authors with the rate of evolution of these foundation models, particularly in respect of more complex reasoning functions, it is important that the industry (and in relation to the law is the particular courts in question) anticipate and control risks through audits, monitoring for unintended behaviour and fail-safe mechanisms. The incorporation of ethical considerations throughout the development lifecycle from data curation to deployment is the

13 A Pore˛bski, "27: Machine learning and law" in *Research Handbook on Law and Technology*, (Cheltenham, UK: Edward Elgar Publishing, 2023), available at https://doi.org/10.4337/9781803921327.00037.

14 Rachel Beithon and Jonathan Germann, "AI Diversity and the Future of 'Fair' Legal AI" (2024) 40 GA ST UL Rev 863 at 868, available at https://readingroom.law.gsu.edu/gsulr/vol40/iss4/7.

15 *Ibid*.

best way, as I understand it, to enhance trustworthiness. This is where governance frameworks for model oversight may prove beneficial for risk management as systems grow more autonomous.

Conclusion on AI

[52] In summary, therefore, while AI has the edge over the human brain in terms of rational output efficiency, it fails, at least at present to incorporate subjectivity and consciousness, which in the context of humans, is a concept associated with the mind and deals with what is right and what is wrong. It is not equivalent to the cognitive process commonly associated with human learning or thinking, in the manner in which humans think cognitively and biologically. I explained this earlier. There is no consciousness or sentience involved.

[53] That distinction is essential, as AI's ability to self-learn does not equate to self-awareness, which involves human traits like emotions and intentionality. Therefore, AI remains a great innovation designed to assist human decision-making.

[54] The fear of AI taking control of law and justice is, in my view, *un*warranted, at least presently, as emotion and human experience play just as significant a role in human decision making in the law, inasmuch as rationality does, in terms of its impact on the pattern of decision making in law and justice.

[55] As science presently does not even have a full theory of consciousness, the probability of AI being "aware" in the context of consciousness or transcending the human mind in relation to justice and the law is, to my mind, a matter for the future.

[56] There are more important questions to come to grips with at present, such as law enforcement in the AI world, levels of success of algorithms in terms of research and use in the law, and how AI can be used to garner access to justice.

[57] With regard to AI in its present incarnation – I understand the position to be very much akin to the position of an agnostic. One simply does not know the future. However, whatever that outcome may be, it is something that appears to be very much in the future. And in the context of what we need to do presently –we need to develop AI in a manner that is beneficial to mankind – be it from the aspects of technology, the law or economics, with due regard to its

limitations.[16] But as someone who does not possess sufficient expertise in the area, it is important to consider the converse – namely that AI may well overwhelm us.

[58] As stated by Nick Bostrom in his 2014 book on superintelligence:[17]

> We cannot predict exactly how the technology will develop or on what timeline. Nevertheless, we must plan for the *possibility* that machines will far exceed the human capacity in the real world. What then?

The concept of a legal singularity

[59] That brings us to the concept of the "legal singularity".

[60] This concept is the brain child of academicians in Canada at the University of Toronto, namely Benjamin Alarie from the University of Toronto, Faculty of Law together with his academic colleagues, Anthony Niblett and Albert Yoon.[18]

[61] When we talk about *the singularity in AI*, we are describing a point in the future where machines not only match but substantially exceed human intelligence, starting a cycle of self-perpetuating technological evolution. The theory suggests that such advancements could evolve at a pace so rapid that humans would be unable to foresee, mitigate or halt the process.

[62] What then is the *legal singularity*? Quite the opposite of the concept of the singularity in AI.

[63] It is an aspirational or utopian concept of the law that envisages a stable and complete legal order, capable of addressing and resolving practically all types of legal uncertainty in real time and on demand.

[64] Today's innovations have not adequately met the needs of humanity/society as it has evolved, both domestically and globally.[19]

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16 See Stuart Russell, *Human Compatible: Artificial Intelligence and the Problem of Control* (Viking, 2019).

17 See Nick Bostrom, *Supreintelligence: Paths, Dangers, Strategies* (Oxford: Oxford University Press, 2014) (Bostrom, Superintelligence).

18 See n 1 above.

19 Abit like Zeno's Paradox one would seemingly reach it but as you get nearer there remains a distance to be reached – meaning it is an infinite exercise.

[65] The concept or philosophy of the "legal singularity" is "the idea that law will reach functional completeness, in the sense that practically any legal question will have an instantaneous and just resolution."[20] It therefore controls or contains the possibility of the chaos and harm ensuing as a result of AI overwhelming us.

[66] The legal singularity is, in my view, the AI equivalent of the rule of law. It should serve as a guiding principle for the evolution of AI in the law. It serves to ensure that the progress of AI proceeds on the basis of benefiting mankind rather than creating or allowing for the inflicting of harm.

How is this concept of legal singularity to be achieved?

[67] The reality is that advances in the fields of AI and technology, while unseating and questioning our existing practices, hold the promise of the reconstruction of more effective legal infrastructure that is required to meet society's needs today.

[68] As I stated at the outset, our current institutions and legal processes are not often not "fit for purpose". Laws are unduly complex, legal procedures are bewildering to the layman (if not lawyers), unnecessarily cumbersome, and clog up the legal system. Lawyers are too expensive. Legal doctrine is often far behind the modern world – simply outdated. And far too often, this results in outcomes that are unfair and unjust.[21]

[69] This is where AI and technology come in. These tools enable us to construct the "responsive legal infrastructure" that is deeply needed. This concept envisages a stage where law will reach "*functional completeness in the sense that practically any legal question will have an instantaneous and just resolution*". This means that the law will be knowable or known with a high degree of practical certainty for a great deal of human activity. This may be done through legal prediction. And AI makes the availability of legal prediction possible and to a considerable extent, with time, accurate.

[70] At present, one must generally go to court to get a definitive ruling from a judge after a great deal of legal research through lawyers.

20 See n 1 above, p 5.
21 See n 1 above, p 4.

The expense is immense. But the new tools that are emerging allow a lot of this work to be computed. The legal material we utilise, such as case-law, contracts, statutes, treaties and regulations, comprise training data for prediction algorithms which can synthesise and provide predictions of how the law would apply to a novel set of circumstances.

[71] This will enable lawyers to provide legal advice far more quickly at a lower cost and with a degree of accuracy and certainty. For instance, I read that AI is capable of drafting five non-disclosure agreements (NDAs) in 26 seconds, apparently with an accuracy of 94.55% as compared to lawyers who typically require at least an hour and achieve an average accuracy of 84.84%.[22] For judges, it allows them to hand down decisions more quickly with higher legal accuracy. And for the citizen, it enables the resolution of their disputes quickly, inexpensively and accurately. All this is primarily due to the ability of AI's artificial neural networks to function more efficiently and at a rate that exceeds human capacity. Such tools, like Co-Pilot and Harvey, are already in use in the market. As we are continuously looking for better ways to resolve old problems, the use of such tools will be widespread.

[72] Coming back to the utopian concept of legal singularity – it is in this sense that the legal singularity will evolve and be able to accommodate the legal needs of a greater segment of society. In Malaysia, that means providing access to justice to some 70% of the population.[23] Ultimately, one can see that this is consonant with, and meets the highest aspirations of the rule of law. It will assist in providing access to justice and contribute towards ensuring that justice will prevail. Disputes will ideally be resolved justly in the best interests of society. The powerful can be held more accountable and the weaker parts of the populace will be protected.[24]

[73] Admittedly, these are more esoteric and philosophical/theoretical aspects of AI, which I hope can be integrated into the more practical

22 "Artificial Intelligence vs Human in the Legal Profession – AI vs Legal Profession", *Lrz.legal* (May 2018), available at https://lrz.legal/images/pdf/Artificial-Intelligence_vs_Human_In_The_Legal_Profession.pdf.

23 Myestimation and therefore very much a "guestimation". The reason being the inability to afford legal fees.

24 See n 1 above, p 10.

aspects of the area in relation to the law. It is after all the underlying foundations of the law, and the need for adherence to the rule of law, that comprise an essential aspect of how we incorporate AI into the working of the law.

Access to justice

[74] Perhaps one of the most important areas where AI can be used to elevate the lives of Malaysians, particularly the mid-level and poor, is in relation to access to justice.

[75] The starting point in Malaysia is that the courts have recognised the right of access to justice as a fundamental right under Article 5 of the Federal Constitution,[25] i.e. the right to life.

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

(a) firstly, recognises that a legal issue is involved, or has access to someone who can identify, for his benefit, that a legal issue is involved;

(b) secondly, is able to obtain timely and affordable access to the level of legal help required, to put forward his case correctly and adequately;

(c) thirdly, gets a fair hearing before an impartial and educated adjudicator, so as to obtain a fair result and remedy to his problem;

(d) fourthly, is able to make the result and remedy a reality, which means the ability to enforce or obtain the benefit of the remedy in a timely manner.

[77] With that definition, it is a harsh truth that large segments of our population, as is the case in many other countries, do not enjoy ready access to justice. I estimate that as much as 70% of the population does not have access to justice largely because they cannot afford it and also because they do not know how to access it.

[78] As Jeremy Corbyn[26] said of his country: "*Legal aid ... is fundamental to giving everybody in this country access to justice*".

25 *PP v Gan Boon Aun* [2017] 3 AMR 164; [2017] 4 CLJ 41, FC, para [13].

26 A British politician. Statement made at the parliamentary debate. See *Hansard* of December 14, 2010.

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

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

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

[81] As I said earlier – the AI equivalent of the rule of law is the legal singularity and access to justice comprises a core component of it. In the digital age, the need for innovation and adaptation to AI has become inevitable. When one speaks of innovation, i.e. creation and adaptation – one has to envisage and consider new methods of working so as to resolve perennial problems, like access to justice. One also has to accept the concept of "Exnovation" – a term which is used to describe the process of actively discarding outdated, inefficient or harmful technologies, practices and norms. That goes hand-in-hand with actively unlearning ingrained beliefs, attitudes or behaviours that may have underestimated transformative potential to advance sustainability.[27]

[82] Allow me to project on an idealistic basis to the future of an AI-driven environment which facilitates access to justice: Today, more people have access to a smartphone than ever before – be it in remote or urban areas. Let us consider a person with a grievance who lives in a rural area. He should be able to communicate his problem, say a dispute with his landlord by use of an app on his smartphone, which

27 As Charles Darwin put it "To kill an error is as good a service, and sometimes better than the establishment of a new truth or fact."

uses an AI chatbot to answer his initial queries and identify that it is a legal problem. A template requiring details of the incident or problem would then be made available and he could fill in the details. Then the AI could refer the problem or dispute as distilled to a relevant central body that deals with legal disputes and provides legal assistance by way of AI. The legal AI should be able to draft pleadings or offer advice and an assessment of success. This will assist the complainant to have access to legal advice.

[83] The AI would ideally assist in e-filing a claim in court and effecting service. Everything would be done digitally in terms of preparation for a hearing online. This would work with simple contracts and consumer claims which are normally dealt with without the presence of a lawyer. It would be very useful for road traffic accidents too. Adjudication could then be carried out by a tribunal or court and the hearing could even be online.

[84] The point is that a person who would never have had access to court is enabled to do so. This is important because it enables the complainant, who, for example, works on a daily rated basis, to file a claim with minimum disruption to his earning capacity and to only be present in court, if necessary, or to be on screen when his case is being adjudicated. This ideally should be in the blueprint for the government to pursue to facilitate access to justice for the population at large.

[85] Adequate legal aid centres should be established strategically throughout the nation to deal with such problems for those who are not technologically savvy, to assist them in relation to the lodging or filing of cases, etc.

[86] Now, without AI, the budget would have been prohibitive but with the use of AI, the initial investment will be high but in the long run the cost and the benefit will be tremendous. It will eventually reduce the number of physical facilities and persons required to provide such access to justice.

[87] What is needed from all stakeholders in their quest for an ideal system of access to justice is to comprehend and accept that AI provides a new and exciting way in which to facilitate access to justice.

[88] After all, as stakeholders in the justice system/lawyers, in one form or another, we have a duty, both professional and honourable

(a most unfashionable word these days) to serve the needs of all segments of our society, the poor, the rich, the under-represented, the popular, the unpopular, the wronged and those who wrong, without discrimination but in accordance with our laws, our code of ethics, to ensure that all of society enjoys equal access to justice, not just a favoured few.

Legal education

[89] As Susskind put it, *people want justice, not lawyers*.[28]

[90] Perhaps the focus for both legal professionals and law schools should be on how to achieve justice, rather than simply producing lawyers.

[91] The need to weave the fundamental importance of access to justice in the legal curriculum cannot be overstated. However, access to justice is not sufficiently emphasised. Why?

[92] The answer lies in the manner in which a profession in the law has changed in the last 50-odd years or so, largely due to globalisation. Globalisation has greatly facilitated the legal profession. But it has also altered the structure of the law and its manner of practice by its professionals.[29]

[93] The reality is that business has become a colossal power. It is internationalised in countries throughout the world, while power is concentrated in specific regions. The eighties onwards saw a huge expansion of these transnational corporations. They are virtually like private sector states – making their own transnational regulations, modes of operation, and new fora for litigation, arbitration, etc.[30]

[94] These transnational corporate superstructures took along with them their big corporate law firms, largely Anglo-American, which accordingly also metamorphosed to accommodate their clients' needs.

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28 Richard Susskind delivering a talk on the future of Justice and Technology to the American Bar Association in September 2020.

29 Richard L Abel, Ole Hammerslev and Hilary Sommerlad, *Lawyers in 21st Century Societies Volume 1: National Reports* (Hart Publishing, Bloomsbury Publishing plc, 2020).

30 Richard K Sherwin, Neal Feigenson and Christina Spiesel, "Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law" (2006) 12(2) BUJ Sci & Tech L 227–228.

Legal firms across the globe accordingly expanded *along similar lines*, to ensure survival and to boost their earnings and status.

[95] Together with this alteration in structure, geography and culture, and the interdependence of these corporate law firms, both domestic and transnational, on their clients, there was a gradual dismantling of the more traditional structure and practice of the law.

[96] This diluted the *law firms' characteristic national identity and embeddedness domestically. What was initially, in the 19th and early 20th centuries, a profession which was connected closely to state theory, political values and a specific ideology which focused largely on comprising the cement between the state, society and citizen, changed, to assume the needs of the modern globalised society*. Along with this change, came the reality that *the concept of access to justice in the practice of the law, became less important*.

[97] Maximisation of profits became key, which left little or no time for *pro bono* work or other contributions to society. *The DNA of the professional lawyer and law firms were effectively altered*.[31]

[98] In this business-like model of the practice of the law, the lines between legal professionalism and commerce were encouraged to be blurred. And it had its consequences on the expected standards of ethicality of the profession.

[99] And that is where we are today.

[100] *There is accordingly far less recognition of the intellectual, moral and cultural authority of lawyers, and the profession as a whole, which they once enjoyed.*

[101] *I am not saying that globalisation or earning very comfortably from the profession is wrong. What I am saying is that it cannot be at the expense of the complete erosion of the fundamental building blocks of the profession. And those foundational aspects lie in the importance of comprehending the composite nature of the law, which has room for concepts like equal access to justice and the profession's responsibilities to society as a whole.*

31 Justice Nallini Pathmanathan, "Law and Legal Practice in The Post-Pandemic Era – Opportunities, Solutions and Innovations" (2022) 6 CRELDA Journal 4–23.

[102] And that is perhaps the crux of legal education that should underpin any understanding or practice of the law. That is a value that has to be embedded in the teaching of the law, and law schools perhaps comprise the most important starting point. To instill the notion that while the law enables the pursuit of economic prosperity, legal education can teach that there is a need to be mindful of, and comprehend the need to address economic inequality. This translates to the need to facilitate access to justice.

AI and legal education

[103] When speaking of the future of the law and legal practice in the 21st century, it is a well-known truth that we are in the midst of a truly transformative time in the era of the law as we know it. Digitalisation has touched on how we work in terms of strategy, structure, work processes, capabilities, and culture.[32] The greater future challenge for the law and education in the law, lies in how substantive law is to evolve in the digitalisation and AI age, as must the actors who operate in the field.

[104] How the rule of law or the legal singularity is adhered to, must accordingly be adapted to meet the needs of this era. The theory and teaching of law should also adapt to these altered conditions. Such change should be made at a philosophical level in terms of exnovation as well as innovation, not merely by a superficial compliance with the technological aspects of the digital era.

[105] For those of you who are students here today, that will be like a duck taking to water as you are all children of the AI age. You were born into it and it is second nature to you. As such, you are in a position to fashion and create the future of the law and the path it takes. It is important that you take it in the right direction. And for those who are in practice or who deal with the law, it is a matter of adapting and acquiring a new skill set, which will improve your life immeasurably.

[106] By way of example, data and AI are becoming central to economic activity and thereby the law. Digital currency has developed rapidly, with central banks investing in research on regulation and

32 Jungwoo Lee and Spring H Han (eds), *The Future of Service Post COVID-19 Pandemic, Volume 1* (Springer).

utilisation of cryptocurrency. *The law and legal education will have to evolve to meet these new areas which are crucial to daily life*.

[107] The rise of the Platform Economy which involves the digitalisation of products, services and business processes in sectors such as transportation, accommodation, retail, and banking sectors is yet another example. We live with it on a daily basis but we do not really understand how it works.

[108] *Legal education will require updating to bring it in line with current technological advancements, in particular AI*.

[109] Digitalisation also means that the performance of routine and lower-level tasks will increasingly be assisted by, or even eventually replaced by technology, forcing lawyers to hone their skills in the important higher-level criteria of understanding, applying, analysing, evaluating and creating solutions for their clients.

[110] To meet these changes, legal education will also have to shift its format, content and thrust. In order to enhance these skills, particularly intellectual engagement, the ideal learning environment should mimic the complexity of real-world tasks and work that will later be performed by students. Legal education ought to change to meet this need. Meaning a more practical approach might be appropriate. More like a true apprenticeship.

[111] So, how is this to be addressed? By ensuring that tertiary education *does* change to allow law students to meet these new challenges. That is not easy but it has to be done.

[112] The strict division between law and technology ought to be dissolved and law students need to be competent with, and comprehend AI to the extent necessary to meet their clients' needs. They need to understand their client who might be, for example, programmers creating apps for a variety of functions. Equally, they need to be able to liaise with and comprehend the clients who will be marketing these apps. So the ability to comprehend your client's needs, wants and hopes to achieve their goal, will equip you with the necessary skills to survive as a lawyer.

[113] Equally important to legal education is the recognition that lawyers should acquire AI skills in the course of their study so that

they become useful partners in the new businesses that AI will generate in the future. *The lawyers need to come into the development process rather than being called in when there is a legal issue that arises or when there is a failure in the system resulting in liability. The latter would be too late as the lawyer's role would then be like a fire-fighter with limited abilities to assist. When a lawyer comes on board early on in the development process he will be able to anticipate problems and work together with the client to address some of these problems. In short, the law ought to assist/facilitate the development rather than being a remedy of final resort. Law schools will have to review their curricula to accommodate these new needs brought about by AI. If I may draw an analogy, when you bake a cake you add the sugar in the batter prior to baking the cake. If you tried to add the sugar after baking the cake it would be too late – it wouldn't be cake. In like manner, the AI and the law have to be integrated from the outset.*

Teaching methods

[114] AI is of considerable use in relation to actual teaching methods. I would like to demonstrate a simple example of the use of AI in this sense. It could be background listening, pre-lecture listening or part of a lecture.

[115] Ms Sheryll Stothard, Lecturer (Law & Literature), University of Malaya, has used AI to create a podcast. What AI has done with the podcast she created is to pare down a weighty legal issue relating to the lifting of the corporate veil in two complex judgments to a podcast in a relatable way. The two cases were uploaded and the AI was prompted to generate the podcast. This podcast shows how AI can be used to facilitate teaching. The AI summarised the two cases and extracted the important legal principles, ending with a takeaway for the listeners.

[116] This would assist teachers not only law lecturers as it would shorten preparation time. This is also a creative teaching mode that moves with the times – the younger generation is more accustomed to listening to podcasts and social media videos. This is also arguably a more efficient way of learning as AI has assisted in summarising the important points faster than reading the case would do. However, it would merely be a teaser, requiring the student, hopefully, to actually read the cases.

New job opportunities with AI

[117] Earlier on, I was speaking about the fear of becoming redundant or obsolete. However, while AI is likely to take over certain routine, mundane tasks and even some low-level cognitive tasks, it should create far more job opportunities for the coming generations. In this context, a survey by Thomson Reuters found that 67% of professionals predicted that the emergence of generative AI will be a transformational or high-impact change to their industries over the next five years. And this is seen in the large number of new positions arising in this field. This includes:

(i) AI compliance officer;

(ii) Legal data scientist;

(iii) AI ethics consultant or AI policy advisor;

(iv) AI legal tech developer;

(v) AI litigation support specialist;

(vi) AI legal strategy consultant; and

(vii) AI-powered regulatory analyst.

[118] All that I have said underscores the importance of bridging the relationship between the humanities including law, on the one hand and the sciences on the other. If I might take from an old lecture which dates back to 1959 but remains relevant to this unnecessary dichotomy. It is called *The Two Cultures and The Scientific Revolution*[33] and if I might quote:

> Two polar groups … Literary intellectuals at one pole – at the other scientists … Between the two a gulf of mutual incomprehension – sometimes (particularly among the young) hostility and dislike but most of all a lack of understanding. They have a curious distorted image of each other. Their attitudes are so different that even on the level of emotion, they can't find common ground. …

33 CP Snow, The Rede Lecture (New York: Cambridge University Press, 1961).

[119] That is still largely true today. And regrettably, our system of education, particularly at the secondary and tertiary levels, reinforces this division even more.

[120] The field of AI is rooted in technological and scientific advances while the law is deeply grounded in the humanities, ethics, justice and societal values. The intersection of these two areas highlights the need for collaboration and understanding across disciplines. Without it, there is a risk of creating real frameworks that fail to account for the complexities of AI or developing AI systems that operate in ways misaligned with societal norms.

[121] In real terms, scientists and technologists need guidance from philosophers, ethicists and legal experts to build AI systems that align with human values. Conversely, professionals in the humanities including lawyers must engage with technical concepts to ensure that they understand the capabilities and limitations of AI. It allows for a dialogue between the two cultures in order to merge technical expertise with ethical reasoning to navigate AI's impact responsibly. The two cultures come together to shape technology that serves humanity.

Where/How AI can assist lawyers and the court

[122] Moving on to how AI does or can potentially assist lawyers and the court:

Pre-hearing assistance

1.1 Document review and management

- *Contract analysis*: extract key clauses, focusing on potential issues.
- *Summarising key documents*: AI summarises affidavits, and pleadings to identify key points, including arbitrability and public policy concerns.

1.2 Legal research

- *Case law research*: AI identifies relevant case law on the issue at hand.
- *Jurisdictional analysis*: AI compares the law in different jurisdictions to assess the issues arising in the case.

1.3 Automated risk analysis

- AI generates a risk analysis to assess the likelihood of success in the claim or application.

During the hearing

Some of these tools are not available yet, but it is hoped that AI will evolve that way.

2.1 Document and evidence organisation

- *Manage evidence*
- *Visualise key points*: AI generates visual aids (e.g., timelines) to illustrate key events and the legal timeline. This would be particularly useful for a complete chronology encompassing the events in relation to both or all the parties.

2.2 Legal strategy and scenario simulation

- *Impact*: AI simulates the impact of decisions on the state of the law.
- *Predictions*: AI predicts court rulings based on past cases.

2.3 Real-time case analysis

- *Analyse arguments*: AI flags inconsistencies in the parties' arguments.
- *Monitor legal precedents*: AI suggests relevant legal precedents in real-time based on ongoing oral arguments.

Post-trial (judgment writing)

3.1 Assisting in structuring the judgment

- *Automated drafting*: AI suggests a judgment structure, covering the facts and legal issues arising in the matter.

3.2 Precedent and legal reference checking

- AI suggests relevant case law.
- AI checks references to ensure citations are accurate and aligned with legal precedents.

Areas where AI cannot assist

[123] The reality is that AI cannot, certainly at this juncture, actively assist counsel/the advocate mid-submission. For example, when a judge asks counsel a question and they are to respond almost immediately, then it would not be tenable to ask for time to seek an answer on AI. Even if counsel tried, it would likely be met with a very negative reaction. Even if counsel did it, they would have to check the answer – verification is crucial as hallucinations are real. Even if an assistant were to seek assistance from AI, it ought not to be anything more than a guide which needs verification.

[124] So advocacy is safe. And it underscores the importance of an advocate knowing his case intimately well. AI therefore facilitates an advocate's craft, but does not replace it. Similarly, with judges, it facilitates our work but cannot replace it – certainly at this juncture. So AI is still a tool and needs to be wielded skillfully by advocates in putting forward their case.

Ethics

[125] The benefits of using AI are undeniable, but this has to be balanced against ethical concerns.

[126] Currently, there is a fear of AI being the *de facto* judge of the case, undermining confidence in the adjudication process. AI becomes the effective adjudicator with the human adjudicator taking on a lesser role. While that may be far from the truth, it is imperative that an adjudicator consider any such AI recommendation, and then utilise his own mind and discretion to determine what weight is to be accorded to the AI answer. This examination and verification ensures that AI is a facilitatory tool rather than the adjudicator. This can be ensconced in guidelines and rules in relation to the use of AI in a court.

[127] A judge also ought to be transparent with regard to his/her use of AI. It is only fair to parties to know what the judge relied on in coming to the court's decision as they may wish to challenge the output of the AI. This might involve disclosure of the question(s) and the prompt. This too ought to be the subject matter of guidelines and rules.

[128] Once regulations or guidelines in relation to: (i) the scope or limits on the use of AI, and (ii) the transparency of the process are

available, many fears would be assuaged. With the type and scope of AI being used specified (and possibly the prompts or commands used being disclosed), all parties will be able to check on its use and ascertain the extent to which the AI response has been adopted. And similarly with transparency. When such limits are put in place, parties would be assured that the judge is using the AI to streamline and summarise documents and the law and perhaps receive recommendations as to the correct outcome, but the decision at the end of the day is that of the judge. This is of equal importance in relation to counsel, who should emulate and ensure a similar degree of integrity.

The importance of regulation

[129] Regulation is key to ensuring that abuse of AI even in the field of law does not go unchecked or increase exponentially. It is already doing so in other fields. Going forward, the international dispute resolution community should draw up guidelines on how to responsibly use AI to address the above concerns. This has been undertaken in courts in several jurisdictions – Singapore, New South Wales, Europe, United Kingdom to name some.

[130] It is proposed ideally, at some point, a global benchmark be used across different jurisdictions for uniformity. The essence of the guidelines would be the same; there should not be differences depending on the jurisdiction and if at all, these should ideally be negligible.

AI and the environment: Mindfulness

[131] We have discussed the positive impact that AI has on the law and its benefits. However, it is important to understand that there are negative aspects to the use and overuse of AI.

[132] Firstly, AI is being integrated into decision-making processes across many fields – medical, educational and governance. From the United Nations Environment Programme (UNEP) report "Navigating New Horizons – A global foresight report on planetary health and human wellbeing" (2024),[34] it is noted that over 60 nations have developed national strategies for AI in order to reshape economic development and social welfare.

34 See https://www.unep.org/resources/global-foresight-report.

[133] However, it is also pointed out that a proliferation of AI also propagates existing inequalities, especially for women, minorities and people from low-income backgrounds. This is largely due to the potential biases in the training data which often does not adequately represent women and communities from the Global South.

[134] For example, a bank may use an AI program to determine whether to give out loans based on criteria built into the program. The criteria may exclude certain categories of women, or persons from poorer backgrounds or from certainracial backgrounds. These are internalised biases. And the use of such a program will disadvantage a large segment of society who are precisely the ones who need these loans and could repay these loans. So the training data is vital – to ensure that it does not reflect the current human biases that subsist in relation to the giving out of loans. That is in relation to the reality of bias in programmes. It underscores the importance of creating our own clean data bases.

[135] Turning to the environment, the production of chips which are one of the building blocks of AI have great implications for the environment which are complex and multifaceted. The potential implications for increased demand for both critical minerals and rare earth elements as well as water resources to meet new data centre demands, require careful consideration.

[136] Pared down to an individual level, it is important that we are mindful of our use of AI. Certain tasks that do not require AI in any real sense ought to be done by humans. For example, writing an email taking a few minutes might not warrant the use of AI. This is simply laziness. Comprehending the use of AI on the environment will make us more mindful and require a consideration of the need to use it, against the toll on the environment. And an over reliance on AI will stymie creativity.

Steps to be taken in relation to equipping the nation for the digital age

[137] The reality is that many of our laws are old, although reform is now on the agenda. For example, our Contracts Act is 1950 as is the Evidence Act which is also 1950. The Penal Code has been in force since 1976 although revised last in 1997. When they were drafted there was no conception of the sort of technological advances that would emerge. These laws are envisaged primarily for the physical world and not the digital world.

[138] The reality is that today we utilise these Acts to deal with problems arising in the digital age. The judges and lawyers are constrained to envisage how digital type contracts or cybercrime fits into the framework of these older laws. Life would be considerably improved if these acts are updated to meet the digital age. Many other jurisdictions have done so, and it facilitates investigation and enforcement of such legal problems be it civil or criminal. There is an urgent need for these new laws to be put in place. Whether this is done via new Acts or by way of revising the older Acts is for Parliament to determine.

[139] In a book entitled *Digital Revolution – New Challenges for Law (Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies)* edited by Alberto De Franceschi and Reiner Schulze,[35] the authors recognise that one of the questions arising from the use of AI is determination of where liability might lie. Some examples given are of relatively harmless situations where an autonomous lawnmower experiences a software error and moves past the pre-determined border of the area it was to function within, and mistakenly mows down the neighbour's begonias. Compare this with a serious and potentially life-endangering situation where self-driving vehicles fail to respond to traffic resulting in accidents, and a drastic situation where defective AI such as self-learning medical AI causes an epidemic.We need to amend our laws and regulations to deal with these situations, as the authors suggest that not only should we seek to prevent such risks from arising, but also provide guidance on liability as well as ensuring suitable compensation for losses.

[140] It is in this context that lawmakers and policymakers need to discuss how to attribute liability for risks from the use of AI and autonomous systems. Take the issue of a malfunctioning self-driving car which causes an accident injuring the passengers. If the brakes of the car failed, it could be the manufacturer of the car that is liable. If the self-driving system malfunctioned and the car could not recognise the flow of traffic and drove against traffic, the developer of the software for the self-driving system may be liable. If a pothole emerges on a road which was previously smooth, thus not being a

35 As Chairs of the European Law Institute (ELI) Digital Law Special Interest Group (SIG), published by Verlag CH Beck oHG & Nomos Verlagsgesellschaft mbH & Co KG (2019), pp 10–11.

hazard programmed into the map of road, and the self-driving car failed to swerve to avoid it, where does liability lie? Is it the fault of the local authorities for failing to patch the hole? Is it the software developer's fault for not ensuring the map of the road is updated in real-time? We may also need to consider apportionment of liability in the situation where the human driver of the self-driving car had an opportunity to intervene to correct the path of the car to avoid the pothole, but did not do so because he was texting while driving and thus did see the pothole on the road.

People

[141] In this context, it is important that the persons involved in amending or bringing in new laws comprehend the technological advances that they are seeking to meet and that the law needs to cater for. This is an education in itself. It is necessitated again, as I said earlier, by reason of the compartmentalisation between the sciences and the humanities. Therefore, it is imperative that they work with persons with the requisite technological background and AI expertise to explain concepts and the practical application of the types of problems that might arise. This, in turn, means that the specific expertise required encompasses both law and AI. So, education will have to amalgamate both the law and AI.

[142] A recent article from April 20, 2025 reports on the United Arab Emirates' ("UAE") proposal to allow AI to write the laws. Apparently, it will accelerate the process by up to 70%. This has attracted positive responses but also many detractors who point to the hallucinations and mistakes that are currently prevalent in the use of AI in this manner. More interestingly, perhaps, the UAE authorities intend to use AI to track the daily impact of laws on people and the economy, suggesting updates to legislation informed by national and global data. That way, the efficacy of the laws is being reviewed continuously to meet the needs of the people. Therefore, writing laws to meet the developments in AI cannot be overemphasised.

Where would a lack of reform place us?

[143] The reality is that investment is directly tied to the laws available in this jurisdiction to protect investors' assets and the recoverability of the same. The latter relates to enforceability. Where the laws of a country are digitally advanced and provide a proper basis for

recoverability and enforceability, the more likely it is that investors will be attracted, because they feel secure about their investment, knowing that there are laws which protect them and allow for recovery and enforceability. There is therefore a crying need to enact new laws or amend the existing laws to meet the digital age.

Conclusion

[144] AI is very much here to stay. Making sure that our legal systems and legal institutions continue to function the way we in human society would want them to do, is an important aspect of aligning society and the law with the superintelligence of AI. If we can harness technology and AI to improve the capacity and capabilities of legal institutions to meet the manner in which technologies are moving exponentially, together with the conflicts and problems they bring, we then have the possibility and hopefully probability, of controlling or at least envisaging and shaping the evolution of the law – or the legal singularity as defined.

[145] We can only hope that the law will tend in that direction. Otherwise, the fears of being unable to cope with the superintelligence of AI systems not only in the legal fields but also the technological and economic fields will be simply beyond the scope or ken of mankind. Whether this be achieved via the limitation or containment of the capabilities of a super intelligence, or by way of controlling the motivation or selection of solutions by such AI – this will assuage the concern of the potential of adverse outcomes for humanity. As so aptly written by Stuart Russell, the importance of developing "provably beneficial" AI cannot be over emphasised.

[146] I could not have prepared this paper without the invaluable assistance of my registrar, Ms Chang Lisia; Dr Jasmine Begum, Director of Legal, Corporate & Government Affairs, Microsoft ASEAN and New Markets; Ms Gaythri Raman, Managing Director of LexisNexis Southeast Asia; Ms Sheryll Stothard, Lecturer (Law & Literature), University of Malaya and Mr Aran Pasupathy.

Thank you.

Section 37 of the Civil Law Act*

by

*Justice Judith Prakash***

Good morning Dr Charmian Heah and members of the organising committee, ladies and gentlemen.

My talk this morning has five sections. First, the introduction. Secondly, I talk about *Bolam*[1] and *Bolitho*.[2] Then I move on to the development of a different rule for advice. Fourthly, I discuss *Hii Chii Kok*[3] and the fifth and last section deals with section 37 of the Civil Law Act.

Introduction

[1] Some eight years ago in October 2016, I was one of the three judges of the Singapore Court of Appeal who heard the appeal arising from a claim brought by Mr Hii Chii Kok against two defendants. The first was Dr Lucien London Ooi and the second was the National Cancer Centre. The case attracted a lot of attention from the medical community, not only doctors but also hospitals and other bodies concerned with the practice of medicine in Singapore. Indeed, the Attorney-General deemed the issues involved in the case of such public interest that it made submissions in court which were prepared in consultation with the Ministry of Law and the Ministry of Health.

[2] When the *Hii Chii Kok* decision was released in May 2017, I think it is fair to say that a large section of the medical community was not happy with the test which the court laid down in relation to doctors' duty to advise their patients and ensure that the patients gave informed consent to whatever treatment had been proposed. This unhappiness resulted in the formation of a Workgroup by the Ministry of Health in March 2019 to review the taking of informed

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* Speech delivered at the Annual National Medicolegal Seminar 2024 on October 19, 2024.

** Judge of the Supreme Court of Singapore.

1 *Bolam v Friern Hospital Management Committee* [1957] WLR 582.

2 *Bolitho v City and Hackney Health Authority* [1998] AC 232.

3 *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38.

consent. The Workgroup made its recommendations in November that year. The first recommendation was that a clear legal standard should be provided for medical professionals' duty to advise, one which is patient-centric but ultimately based on the opinion of a responsible body of doctors. The government accepted this recommendation and procured the passing of section 37 of the Civil Law Act. This section was intended to modify the legal propositions set out in *Hii Chii Kok* and to provide a standard of duty that was more acceptable to the medical profession.

[3] I think all of you have been given copies of section 37. You may have tried to read the section this morning or previously. It is in my view rather difficult to understand especially if you do not know the legal background against which it was passed. Further, some things about how it will work in practice are not quite clear as it has not yet been tested in court. I will do my best, however, to cast some light on the section in the course of this talk. But to do so I need to go back some decades and discuss the law applied to deciding if a doctor had been negligent.

Bolam and *Bolitho*

[4] I will be using the words *Bolam* and *Bolitho* a lot in this part of the talk. They refer to two important cases stating the law that courts need to apply when they come to decide whether a doctor or other medical professional has been negligent in carrying out her professional duties. In relation to doctors, any one or more of three aspects of those duties could be challenged by the patient. These aspects are first, diagnosis; secondly, treatment; and thirdly, advising the patient. A doctor may face claims of negligence in respect of any one or more of those areas.

[5] Coming back to *Bolam*, it is a case that was decided decades ago, in 1956, to be precise. Its full name is *Bolam v Friern Hospital Management Committee*.[4] What happened there was that Mr Bolam who suffered from depression admitted himself to the defendant's mental hospital for treatment. His doctor decided to treat the condition by administering electro convulsive therapy or ECT. Mr Bolam was not given any muscle relaxant drugs or placed under manual restraint before the ECT was applied. Unfortunately, during the course of treatment, Mr Bolam

4 [1957] WLR 582.

suffered from violent muscular spasms and contractions. His pelvis was fractured. Subsequently he claimed damages from the hospital alleging that it was negligent in three ways.

[6] The first was that it had failed to administer any muscle relaxant drug prior to the passing of the current through his brain. Secondly, it had failed to provide at least some form of manual restraint beyond supporting his chin and holding his shoulders. And thirdly, in failing to warn him of the risks of the treatment. Therefore, Mr Bolam was challenging two aspects of his care – the way in which the treatment was administered and the advice or lack of it.

[7] At the trial, several doctors were called as expert witnesses by both sides to give evidence as to the different techniques which they adopted when giving ECT treatment. Some used relaxant drugs, some restraining sheets and some manual control, but all agreed that there was a firm body of medical opinion opposed to the use of relaxant drugs, and also that a number of competent practitioners considered that the less manual restraint there was, the less was the risk of fracture. In relation to risk, it was the practice of the hospital's doctors not to warn their patients of the risks of the treatment which they believed to be very small, unless asked. If asked they said there was a very slight risk. One psychiatrist, who gave evidence for Mr Bolam, considered it would not be right not to warn the patient of the risks of the treatment.

The Bolam test

[8] The trial of the *Bolam* case actually took place before a jury who had to decide on the facts whether the hospital had been negligent in the way it carried out the ECT procedure or in not advising Mr Bolam of the risks involved. But the presiding judge had to advise the jury of the standard they had to apply to ascertaining when a doctor was negligent. It is the advice Justice McNair gave that has become famous as the *Bolam* test.

[9] He said that in the ordinary case which did not involve any special skill, negligence means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man would not do in the circumstances. And this reasonable man is the ordinary person in the street. But where you get a situation which involves the use of some special skill or competence, then you do not use the ordinary person as a measure since he does not have

this special skill or competence. Instead, the test is the standard of the ordinary skilled person exercising and professing to have that special skill. A person need not possess the highest expert skill; it is sufficient if he exercises the ordinary skill of an ordinary competent person exercising that particular skill.

[10] He added that, in the case of medical practitioners, negligence means a failure to act in accordance with the standards of reasonably competent medical practitioners at the time. A doctor is not negligent if he is acting in accordance with a practice accepted as proper by a responsible body of medical persons skilled in that area merely because there is a body of opinion which would take a contrary view.

[11] After receiving this advice, the jury took only 40 minutes to decide that the hospital had not been negligent in its treatment of Mr Bolam.

[12] You would have realised that Justice McNair articulated only one standard by which the actions or inactions of medical practitioners could be judged. The *Bolam* test applied equally to the treatment administered and to the decision not to advise the patient on possible risks. It would be up to the doctor to decide whether the risk was too small to be worth mentioning or whether it should not be mentioned because if the patient knew the risk he might refuse treatment. In fact, the experts for the hospital had testified that they would not mention slight risks unless the patient asked for fear of dissuading a mentally distressed patient from undergoing what they believed was the most effective treatment for his condition.

[13] The *Bolam* test refined, in the case of medical persons, the standard of "the ordinary skilled man exercising and professing to have that special skill" which applies in other contexts. As our Chief Justice noted in the *Hii Chii Kok* case (at [55]), the general professional standard of care does not guide the court on how to deal with the reality that in a medical context it will often be impossible to identify a single professional consensus on the correct course that should have been taken. He further noted (at [56]) that: "A balance has to be found between the need to respect the diversity of views within the profession and the need to hold members of that profession responsible for their acts. Justice McNair recognised [in *Bolam*] that on any given matter of professional skill or knowledge there was bound to be a range of acceptable, though divergent, views as well as an array of views which fell outside the acceptable range. Thus, to avoid liability a defendant

would have to show that there were other competent members of his profession who agreed with him but could not be expected to show that all his fellows agreed with him".

The Sidaway suggestion

[14] From 1956 up to 2015, the *Bolam* test continued to be used in Singapore and English courts to determine whether medical practitioners had breached acceptable standards in the care of their patients. There was a modification of the test in 1998 by the case of *Bolitho v City and Hackney Health Authority*[5] which became known as the *Bolitho* addendum. Before I discuss that, a brief mention of a case decided in 1985 by the highest English court, the House of Lords may be useful.

[15] The case of *Sidaway v Board of Governors of the Bethlehem Royal Hospital and others*[6] involved a patient who had undergone spinal surgery to ameliorate recurrent pain in her neck. The operation carried an inherent material risk of damage to the spinal column and the nerve roots. In consequence of the operation, the patient, Mrs Sidaway, was severely disabled. She claimed damages from the hospital on the basis that the surgeon had, negligently, not disclosed or explained to her the risks inherent in, or special to the operation, which he had advised. Her claim was dismissed. The trial judge found that while the surgeon had told Mrs Sidaway of the possibility of disturbing a nerve root and the consequences, he did not refer to the danger of damage to the spinal cord. The judge held that in refraining from giving this advice, the doctor was following a practice which in 1974 would have been accepted as proper by a responsible body of skilled and experienced neurosurgeons. Therefore, notwithstanding that other doctors took a different view, under the *Bolam* test, the claim failed.

[16] Mrs Sidaway appealed right up to the highest court, the House of Lords, where she failed again. But while four out of the five judges in the House of Lords had no difficulty stating that the *Bolam* test applied to the situation, one well respected judge, Lord Scarman, expressed doubt on the point which he said was a novel one – it was whether a law of informed consent should be recognised and developed by the English courts. He thought the *Bolam* test did not cover the situation

5 [1998] AC 232.
6 [1985] 1 AC 871.

because the doctor had not lacked care for his patient and had used his skill in recommending and carrying out the treatment. But the doctor might have overlooked or disregarded his patient's right to determine for herself whether or not to have the operation. Secondly, did he fail to provide her with the information to make a prudent decision? And did this matter? After considering the law in other countries, Lord Scarman concluded that in a medical negligence case where the issue is regarding the advice and information given, the court is concerned primarily with the patient's rights. He said: "The doctor's duty arises from the patient's rights". He concluded:

> I think English law must recognise a duty of the doctor to warn his patient of risk inherent in the treatment which he is proposing; and, especially so, if the treatment be surgery. The critical limitation is that the duty is confined to material risk. The test of materiality is whether in the circumstances of the particular case the court is satisfied that a reasonable person in the patient's position would be likely to attach significance to the risk. Even if the risk be material, the doctor will not be liable if upon a reasonable assessment of his patient's condition he takes the view that a warning would be detrimental to his patient's health.

[17] Thus, Lord Scarman was putting the patient at the centre of the enquiry whilst the *Bolam* test was clearly doctor-centric. Lord Scarman's views in 1985 were ahead of his time. His views did not find favour with other judges so the *Bolam* test continued to apply to all aspects of medical practice for a few further decades. However, in 1998, what became known as the *Bolitho* addendum was adopted as a modification of the *Bolam* test.

The Bolitho addendum

[18] *Bolitho v City and Hackney Health Authority*,[7] is not a case of advice but of a failure to give treatment. It is a sad case because what happened was that a two-year-old child was admitted to hospital with respiratory difficulties. The child had a couple of episodes of respiratory difficulty and the nurse called the assigned doctor. The doctor did not attend and sometime after the second episode the child collapsed from failure of his respiratory system and sustained severe

7 [1998] AC 232.

brain damage. The parents sued. They alleged the child should have been intubated and that would have prevented the collapse. The court found that the doctor's failure to attend the child was a breach of duty. But she had testified that if she had seen him she would not have intubated him and asserted a decision not to intubate was not negligent. The judge applied the *Bolam* test and held that since an expert in paediatric respiratory medicine had given the opinion that, on the symptoms presented by the child, intubation would not have been appropriate, a decision by the doctor not to intubate would have been in accordance with a responsible body of professional opinion. So the defendant hospital succeeded in its defence. Basically it was held that the child's injury had not resulted from the doctor's neglect to attend.

[19] The case is important because although the House of Lords rejected an appeal, it put a gloss on to the *Bolam* test. It stated that in applying the test, the court had to be satisfied that the exponents of a body of professional opinion relied on had demonstrated that the opinion had a logical basis and in particular had directed their minds where appropriate to the question of comparative risks and benefits and had reached a defensible conclusion. Further, if it had been demonstrated that the professional opinion was incapable of withstanding logical analysis, the judge was entitled to hold that it could not provide the benchmark by reference to which the doctor's conduct was to be assessed. As CJ Menon explained it in *Hii Chii Kok* (at [76]), the *Bolitho* addendum consists of a two-stage inquiry. The first is whether the experts holding their opinion had directed their minds to the comparative risks and benefits relating to the matter; and second, whether the opinion was defensible (meaning that it was internally consistent and did not contradict proven extrinsic facts relevant to the matter).

[20] Today, the *Bolam* test read with the *Bolitho* addendum governs a doctor's interaction with her patient in relation to diagnosis and treatment. Singapore's adoption of this position was confirmed by our Court of Appeal in 2002 in the case of *Khoo James v Gunapathy d/o Muniandy*.[8] But in 2016, *Hii Chii Kok* put a different rule in place for the disclosure of risk and other advice.

8 [2002] 1 SLR(R) 1024.

Development of a different rule for advice

[21] You remember my discussion of *Sidaway* a few minutes ago. Well, although the English and Singapore courts did not take up Lord Scarman's views for many years, other common law countries adopted a different approach. The doctrine of "informed consent" was developed in the United States ("US") based on four propositions:

(a) The first is the concept that every adult human being in full possession of her mental faculties has a right to determine what is to be done with her own body.

(b) Secondly, consent is the informed exercise of a choice and that means the patient must be given an opportunity to evaluate knowledgeably the options available and the possible risks.

(c) Thirdly, this means the doctor must disclose material risks, what is material being what a reasonable person in the patient's position as known to the doctor would be likely to think significant.

(d) Finally, the doctor has the right to withhold the information if on a reasonable medical assessment, she judges that disclosure would pose a serious threat of psychological detriment to the patient.

[22] These propositions come from the US case of *Canterbury v Spence*.[9] This was a patient-centric approach followed in Canada and Australia which adopted standards which would require disclosure of risks and alternatives to the patient with the patient's viewpoint also being accommodated.

[23] Then in 2014, the United Kingdom ("UK") Supreme Court which had taken over from the House of Lords as the highest judicial authority in the UK decided that there was, to quote: "a fundamental distinction between on the one hand, the doctor's role when considering possible investigatory or treatment options and, on the other her role in discussing with the patient any recommended treatment and possible alternatives and the risks of injury that may be involved". This was said in the case of *Montgomery v Lanarkshire Health Board*[10]

9 919720 464F 2d 772.
10 [2015] UKSC 11.

which went on to reject the *Bolam/Bolitho* formulation as the standard to be applied to cases of medical advice and discussion of risk and put forward a new standard for these cases. I will leave it to Professor Kumaralingam to discuss *Montgomery* in more detail and move on to *Hii Chii Kok*.

Hii Chii Kok

[24] I know it has taken me a while to get to *Hii Chii Kok* but I thought it important to set out the background so that all of you can appreciate the great change in approach which this decision brought about.

[25] The very basic facts of the case were that after undergoing various tests and speaking with doctors at some length, Mr Hii decided to undergo a complicated operation on his pancreas which subsequently turned out to be unwarranted. Not only that but, as a result of the procedure, properly undertaken though it was, he suffered a number of complications and had to undergo further operations. Subsequently, he sued the doctor and the National Cancer Centre for negligent diagnosis and negligent advice. He was not successful. The trial judge applied the *Bolam/Bothitho* test as well as the *Montgomery* test and found no breach of duty in either case. Mr Hii's appeal gave the Court of Appeal the chance to consider whether, in an allegation of negligent advice, Singapore courts should change their approach.

[26] As you all know, the court came up with a new test by which to measure whether a medical professional had breached her duty in relation to advice. This test involves a three-stage enquiry (*Hii Chii Kok* at [131]–[134]):

(a) At the first stage, the patient must identify the exact nature of the information that she alleges was not given to her and establish why it would be regarded as relevant and material. The information which doctors ought to disclose is:

(i) Information that would be relevant and material to a reasonable patient situated in the particular patient's position; or

(ii) Information that the doctor knows would be relevant to the patient in question.

(b) If the court is satisfied that that the information is relevant and material, it will proceed to the second stage of the test which is to determine whether the doctor was in possession of the information and if not, why not. Was it because the doctor did not conduct the procedure which would have discovered the information or because he lacked knowledge of a particular risk or alternative treatments? Whether the lack of information resulted from culpable negligence would be judged using *Bolam*/*Bolitho*.

(c) If the doctor does have the information, then the court will proceed to the third stage which is to determine why the doctor withheld the information from the patient and whether the withholding was justified.

[27] The radical part of the new test was that it omitted *Bolam*/*Bolito* for the first stage enquiry and focused instead on the patient. Why did the court do this? The reasons are clearly laid out in the judgment. They are:

(a) (at [113]) Society here now appreciates that the patient is not a passive recipient of care but an active participant in whom rests the power to decide what course to pursue in relation to her own health and body.

(b) (at [114]) Modern medical ethics takes as one of its primary norms respect for autonomy, meaning the decision-making capacities of autonomous persons.

(c) (at [116]) Over the past years, other jurisdictions have increasingly recognised the need to treat patient autonomy seriously and increased disclosure was expected so that the patient's input could be accommodated.

(d) (at [118]) Professional practice in Singapore has undergone the same transformation. The Singapore Medical Council's Ethical Code and Guidelines 2016 Edition makes respect for autonomy an imperative.

(e) (at [120]) The nature of the doctor-patient relationship has evolved together with the level of education and access to knowledge of the ordinary Singaporean.

(f) The *Bolam* test by design does not allow any room for the patient's perspective. This is because it would measure the sufficiency of the information furnished to the patient by reference to the views of a responsible body of doctors. It would not take account of what the patient would reasonably regard as material to the decision to be made.

Section 37 of the Civil Law Act

[28] As I mentioned earlier, the decision in *Hii Chii Kok* upset the medical community and thereafter section 37 of the Civil Law Act was passed to deal with their concerns. As far as I am aware this section has not yet been considered in any legal proceedings and therefore the interplay between it and *Hii Chii Kok* has not been legally investigated.

[29] Let us look at section 37 and see what it purports to do. It may be helpful if you pick up the handout and read it with me.

[30] First, there is the heading of the section. This is "Standard of care for medical advice". That is very clear – the legislation that follows is intended to set the rules in relation to advice. Secondly, the section uses the term "medical professional" which is defined to mean medical practitioners and dentists duly registered under the relevant legislation. For brevity I will simply continue to say "doctors".

[31] The first three subsections of section 37 are the ones that are most important in relation to the standard of care. The standard of care is set out in subsection (1) and it has two limbs. These prescribe conjunctive requirements that must be satisfied for a doctor to meet the standard of care in relation to the provision of medical advice to a patient. The first requirement is that the manner in which the doctor acts when she gives the medical advice must be accepted by a respectable body of medical opinion as reasonable professional practice. This is called the peer professional opinion. This requirement is in fact a reinstatement of the *Bolam* test.

[32] The second limb provides that the peer professional opinion relied on must be logical. So here we have a reinstatement of the *Bolitho* addendum. You, of course, remember that in *Hii Chii Kok* the court rejected the *Bolam* test and *Bolitho* addendum as having any relevance to the provision of advice. So you would think that section 37 has brought back the pre-*Hii Chii Kok* legal position.

[33] But, and this is a big but, section 37 does not end there. It goes on to subsection (2) and makes it plain that subsection (1) is subject to subsection (2). Therefore, you cannot apply the standard in subsection (1) unless you also satisfy subsection (2). So what does subsection (2) provide?

[34] Subsection (2) sets out additional conditions that a peer professional opinion must meet for the court to accept it as justifying the doctor's actions. These conditions are as follows:

(a) The peer professional opinion must require the healthcare professional to have given to the patient two types of information. The first is information that a patient in the same circumstances as the patient would reasonably require to make an informed decision about whether to undergo treatment or follow a piece of medical advice. The second is information that a healthcare professional knows or ought reasonably to know is material to the particular patient for the purpose of making an informed decision.

(b) The peer professional opinion can support the non-provision of information to the patient only when there is reasonable justification for that.

[35] What this means is that the peer professional opinion must say that the doctor has given her patient information that a patient in the same situation would need to make an informed decision. And not only that but also information that the doctor knows the particular patient would want for the purpose of making a decision on treatment or advice.

[36] In prescribing these conditions and referring to a patient in the same circumstances as the particular patient who has brought the claim, section 37(2) in effect re-inserts elements of *Hii Chii Kok* into the standard of care. As Professor Low Kee Yang noted in his article: "Recalibrating a Doctor's Duty to Advise: Section 37 of the Civil Law Act",[11] when the Bill providing for the insertion of section 37 was passed, it contained an Explanatory Statement that the common law

11 *Singapore Law Gazette*, November 2020.

to the extent that it is not inconsistent with section 37 would continue to apply. And the common law is the case law as developed by judges.

[37] Thus, following *Hii Chii Kok*, the peer professional opinion would have to take account of whether the following broad types of material information were disclosed:

(a) The doctor's diagnosis of the patient's condition;

(b) The prognosis of that condition with and without medical treatment;

(c) The nature of the proposed treatment;

(d) The risks of the proposed treatment; and

(e) The alternatives to the proposed treatment and the advantages and the risks of those alternatives.

And the assessment of materiality takes into account factors such as:

(f) Magnitude of risk;

(g) Nature of risk;

(h) Effect upon the life of the patient;

(i) Importance to the particular patient of the benefits sought to be achieved by the patient;

(j) Alternative treatments and their risks to that patient; and

(k) Characteristics of the particular patient.

Likewise, the legal expectation is still that the information which the doctor provides should be comprehensible and should facilitate understanding.

[38] The question of what is material for a particular patient is a very fact-sensitive one so it is difficult to give examples beyond broad categories. But the courts do take a commonsense approach. Small risks of very minor injuries or side effects need not be disclosed. And even some more serious consequences where the risk is very small need not be mentioned. I came across a case where a woman who had

sight in only one eye went through a procedure on the sighted eye which left her totally blind. The doctor was held not to be negligent in not informing her that there was a one in 14 chance of this outcome.

[39] Dealing with the situations in which the doctor is justified in proceeding without giving advice, there are some illustrations in section 37(2)(b). These are quite obvious ones – unconscious patients or those who are otherwise not mentally competent. Or patients who are fully aware of the information to the doctor's knowledge. But illustration (c) recognises the changed doctor-patient relationship in that if the doctor thinks giving the patient the information would dissuade her from taking a treatment she needs, the section says expressly that that is not a good reason for withholding it. So the section recognises the patient's autonomy in a way that *Bolam*/*Bolitho* does not.

[40] Subsection (3) tries to help define in what situations the information which is complained about as having been wrongly withheld was material information which should have been disclosed. It says that material information would be based on any specific concern or query that the patient has in relation to the treatment or medical advice which:

(a) the patient expressly tells the healthcare professional about; or

(b) the patient does not expressly communicate to the doctor but which ought to be apparent from the patient's medical record that the doctor has reasonable access to and ought reasonably to review.

[41] The second requirement throws up questions. One issue is how far back in the records should a doctor search? What time frame would be reasonable for her to delve into? This is a particular concern for doctors who work in hospitals or practices with many departments which could have treated the patient for various conditions over several years. But quite apart from that, the doctors giving the peer professional opinion would not be in a position to know everything the patient conveyed to the doctor particularly if the doctor's records are not fully detailed. So, their opinion may be based on inadequate information or assumptions and therefore not be helpful. The illustration to limb (b) helps indicate the problem. It states that the medical notes disclosed

that the patient had repeatedly asked about dry skin. So that is full documentation. But how often is documentation full? Even if the patient repeats this concern on every visit, the doctor may not think it necessary to document the repetition. In that situation, the treating doctor (and the peers in due course) may not be able to discern how big a concern this is for the patient and may not think it necessary to advise the patient on the possibility of dry skin.

[42] I think there is another difficulty which perhaps undermines the usefulness to doctors of the reinsertion of the *Bolam*/*Bolitho* test. The reason why the test was developed in the first place was that judges were acutely aware of their ignorance of medical matters. On such matters they were content to be guided by respectable medical opinion as long as it was logical in the *Bolitho* sense. The requirement in section 37(1)(b) that the peer medical opinion should be logical when applied to advice, in my view, perhaps opens up the inquiry rather beyond the medical views.

[43] Courts are regularly asked to decide whether in particular situations persons should be given information. To decide the question, courts apply the test of the reasonable person in the position of the person asking for advice. Determining how a reasonable person would react or what she needs is the court's bread and butter. And this test would also be applied to determine if an opinion on the provision of advice is logical or not. Medical science does not come into such an assessment – it provides the relevant background facts but in the final analysis there is a judgment to be made as to what a reasonable ordinary person would have needed to know. And further if the particular person before the court had some special requirement, it is for the judge to decide whether that requirement was made known to the doctor and, if so, whether an opinion from other doctors that the non-provision of the advice to that particular patient was correct, is a logical peer professional opinion.

[44] As you all know, once the genie is out of the bottle it is impossible to force it back in. In this context the "genie" is the evolved doctor-patient relationship which has developed out of better education and access to information and the greater importance our society now gives to patient autonomy. The court in *Hii Chii Kok* rejected *Bolam*/*Bolitho* as not fit for purpose in relation to medical advice. Although

some doctors may think that section 37 works to restore the earlier position, what it in fact does in my view is introduce a hybrid situation. As the cases come before the courts and section 37 is examined with the court's forensic eye, the eventual landing may turn out to be little different from *Hii Chii Kok*.

Cause and Effect: The Use and Misuse of a Court of Appeal

by

*The Honourable Justice Conrad Seagroatt**

[1] In some jurisdictions the Court of Appeal is the final court of deliberation and therefore should attract the highest level of jurisprudential argument from advocates for all parties concerned.

[2] In such instances the court does in fact benefit in that respect, as it should, but in others it does not always do so perhaps because of the existence of a higher Court of Final Appeal or Supreme Court of Appeal. Where such a higher appellate court exists, the initial Court of Appeal is often regarded and treated by advocates, as if it were the first stage of the appeal process in which one or more parties is free to ventilate the arguments already dealt with at first instance, thereby seeking to treat the appellate court as a court of original trial.

The notion of "appeal"

[3] The word "appeal" has a variety of meanings depending on the context in which it is used. In litigation, civil and criminal, it has a more exact meaning as being a challenge to the correctness of a decision by the lower court, though experience across the ages has revealed that lawyers have, and continue to use, the right of appeal as a roving expedition in reviewing the initial decision in every possible respect.

[4] It has, as a consequence, required the higher or appellate court to exercise a firm, strict control of appellate proceedings to protect the jurisdiction of the trial court which hears evidence, sees witnesses and records the interchanges of argument between the parties.

[5] Judges are required to be proactive at first instance as well as at the appellate level. It is frequently shown that parties who embark on an appeal, shower the higher court with vast reams of paper in the form

* Judicial Commissioner of Appeal of the Supreme Court of Brunei Darussalam.

of decisions or cases which they seek to use as support for the grounds of appeal. The preliminary submissions on paper supporting their arguments are, again frequently extensive, often repetitive, in some cases irrelevant and make for tedious reading. They also generate inflated costs which need to be curbed. Appeal courts have had therefore, to lay down limits to the length of such submissions as well as other strict directions.

[6] In the judicial context therefore, an appeal is a challenge, requiring mental discipline, control, abidance by convention and rules, effective economy and skill. Failure by advocates to exercise these constraints, I have termed "appellate psychosis."

[7] Almost invariably such misuse of a tribunal is at the instance of a losing party in the criminal or civil suit. When that occurs it indicates that the appealing party's advocate is failing to exercise the essential discipline of his profession and observe the true function of the appellate court.

[8] Therefore it needs to be restated firmly, as many such courts find it necessary to do at the material time, that they are not courts of trial or retrial, and to treat them as if they are or were such, is an irresponsible and time and cost-wasting exercise which shows that the advocate has little regard for or rational understanding of the remit of the appellate court.

[9] Only in exceptional cases will a Court of Appeal order retrial. It is not necessary to give examples of such as each will turn on special circumstances. The court however will not entertain an argument which, in effect, is directed to persuading it to upset findings of fact by the original trial judge who has seen, heard and evaluated the witnesses called before him, unless there can be demonstrated that the trial judge's findings are inconsistent with the evidence heard and accepted by him. In other words, his decision is perverse. Whether such a circumstance justifies ordering a retrial must depend on a careful examination of all the implications of the case.

The onus upon the Court of Appeal

[10] It is important that judgments emanating from an appellate court are concise, straightforward, economic in time and content and make the parameters clear beyond question.

[11] The same strictive or requirement applies to judgments at first instance, though of course a more detailed review of the evidence

and assessment of the credibility of witnesses inevitably makes the judgment a longer, more comprehensive review.

[12] Regrettably there have been instances in which a Court of Appeal judgment has in its formulation, spent too much time in regurgitating the facts and evidence on which the trial judge has made clear, unequivocal and unassailable findings which cannot sensibly be disputed. The very fact that the appellate judgment has, on some occasions, contained so much of the content which is beyond question, and seemingly anguished over it to no good purpose, has encouraged one or more parties to argue in the future against a trial judge's findings, without reason, but relying on a judgment which has overlooked the appeal court's remit.

[13] I have deliberately refrained in this article, from identifying specific cases or judgments, illustrating the foregoing, though they exist clearly enough. Furthermore I have tried to avoid a didactic approach on the basis that sometimes "Homer nods" and some advocates can be seductive in their attractive approach and can open an irrelevant line of argument where a particular judge shows a special interest in it, which needs to be blocked with sufficient firmness, and quickly.

[14] Most judgments from a Court of Appeal of three members are delivered or handed down as judgments of the court, though often read, when delivered, by the member of the court who has been designated as having prime responsibility. But of necessity, all members have contributed to it and bear responsibility for it to ensure that the rational and legalistic approach of the court is properly and strictly adhered to.

[15] On occasions simple pressure of time results in a degree of deviation or expansion which, in ideal circumstances, should not slip through. No two judges have identical approaches or formats.

The need for case management

[16] It is not possible for an effective, efficient Court of Appeal to achieve fair and economic results without a strong case management process. In any event the judicial progress relies upon that stage to have achieved identical benefits for the trial judge at first instance.

[17] Management means by and for the courts' progressive and efficient system – not by and for the lawyers. The public is the intended direct beneficiary of this approach. Too often in the past, in

some jurisdictions, the lawyers have achieved, between themselves and for their own benefit, a trial structure which ignores necessary constraints of time and cost, which are inextricably linked, and by the same token ignores in effect, the interests of their respective clients.

[18] When the lawyers for the parties have applied their minds to the prime considerations *viz.* the clear identification of the real issues, the need for economy of time and cost, the existence of any outstanding practical problems to be resolved before trial, then their contribution to the management of the case will be welcomed as well as expected. Too often however this pre-trial stage has been a minor preliminary skirmish with little thought for the judicial need for a well prepared, controlled trial with the foregoing priorities.

[19] In first instance cases the case-managing judge should be the designated trial judge, and in the appellate programme it should be one of the three designated appeal court judges. The final preparatory decisions will require compliance on the part of the lawyers, if necessary to be enforced by effective time and cost sanctions.

[20] In relation to the submission of authorities, a form of discipline has to be imposed requiring a short, simple statement of the point of argument to which the particular case (or extract from the case) relates or supports to be included in the written submissions. Failure to comply with such strictures will inevitably lead to a greater degree of pro-activity in order to avoid the resultant wastage of time and expense.

[21] One suspects that the quantity of paper generated by indiscriminate research of "similar" cases has been used as a yardstick or criterion for the inflated level of costs claimed against the unsuccessful party, or, perhaps more often, against the hapless client.

[22] In extreme cases the appellate court has inherent power, which it should use more often, to impose cost sanctions in order to disallow, for example, a percentages of fees on a hearing, including preparation time, of one party, or another, or both, or all.

A cautionary tale

[23] A Court of Appeal is not proof against a breach of its own criteria or "*raison d'etre*", hence, in some jurisdictions, the need to be able to review its decisions where good cause exists, but it does not always happen that a bad decision is reviewed, let alone successfully reviewed.

[24] Some decades ago when I was conducting in another jurisdiction a trial of a man accused of raping a woman, the level-headed jury unanimously convicted the defendant who appealed against his conviction to the Court of Appeal. The court was composed of three men, well-versed in the law, two of whom were leading senior men in their profession, and the third only marginally less worldly in his overall experience. The court allowed the appeal by majority of two to one. The grounds given in the leading judgment were principally a chauvinistic rejection of the victim's evidence. The case against the defendant was that he had followed the woman home into a block of flats, attacked and raped her on the concrete staircase, and that her cries for help went unanswered until the defendant ran off. A neighbour from a flat finally came onto the staircase and found her in distress. The majority of the appeal court did not believe her version, thought that she may have consented, and opined that her vocal protestations would have been heard if they were genuine. The two judges ignored the basic tenets of a Court of Appeal. The dissenting judge paid proper attention to the duty of the court, found that there was no good reason to take a different view from the jury, and that their finding of guilt was not at all perverse and should stand. His observations were the epitome of common sense. There was no appeal from that decision to the higher court but it was generally regarded as an injustice and perverse, as it clearly was.

[25] This was not a case of "Homer nodding." Homer would have done justice. It was one of those rare cases of judicial aberration which in this day and age would not have seen the light of day or, if it had, would have been corrected/prevented by exponents and guardians of a higher Court of Appeal and a humane society.

The Court of Appeal as overseer

[26] In certain jurisdictions the Court of Appeal finds itself having to undertake a number of roles in addition to its primary function. These are essential to the exercise of justice in the fullest sense of the word.

[27] In these countries the prosecution service is established and funded as a department of state with all access to material, necessary for the proper presentation of a case to the courts. But there is no institution or service comparable to this existing for the benefit of defendants, nor any budgeting funding available for the representation of those on the other side of what should be an equation.

[28] Of course, a legal profession exists for those who can afford to pay for representation through the courts system, but very few have the means with which to secure that balancing measure. The overwhelming majority of the defendants/appellants in some courts are unrepresented. Occasionally family members can provide the wherewithal for perhaps, at best, legal representation in the early stages, and sometimes the legal profession undertakes legal services on a pro bono basis, but the examples are rare. Unless a government funded legal aid system exists, this significant gap in the legal system will continue to provide a somewhat lopsided result. It prevents the establishment of the ideal means of justice for all men and women.

[29] A consequence of this is that the prosecution service is not properly tested since its ethos is limited to prosecuting on behalf of the state. The prosecutor has a duty to the courts as well as to the defendants, to ensure that it discloses any material which *may* assist the defence. It is obliged to inform the courts of all features of a defendant and the case he faces, so that the court can do justice from a full picture of all the relevant circumstances. It is for the court to decide what is relevant *NOT* for the prosecutor, whose view maybe blinkered in his desire to maintain the strength or integrity of his case. If and when the prosecution fails in this duty, it is a threat to justice.

[30] A significant example of such fundamental failures, and there are several others, is the deficiency in the preparation of cases involving sexual abuse of women and children. In almost every case the victim will have received, and probably continue to receive, some psychological assessment and welfare monitoring to assist the victim in the serious problems with which they have to cope following the trauma of their experience. In most cases, the prosecution neglects to obtain this essential information, in the form of reports, not inadequate word of mouth, to enable the courts to have as clear a picture as possible of the ambit of the effects of the trauma on the lives of the victims. Those effects can be lifelong and catastrophic. It is imperative that such information be provided by the prosecution. Its duty is obvious. It can call upon the support of the courts to this end if it meets any obstacle.

[31] Experience has shown that a court has frequently had to call the prosecution to account in respect of serious omissions, defective submissions lacking support, and failure to communicate important material to a defendant which is relevant to his case. In other words

the court itself, in order to do justice, has to enforce the ethos of a prosecution service to ensure that the scales of justice are balanced. In many cases the prosecution's neglect and simple ignorance also cause much waste of time and consequent waste of money.

[32] Until the training of prosecutors succeeds in instilling permanently the ethos of the concept and duty of fairness, amongst other things, and the state provides a proper legal service for defendants, the adversarial system of trial and appeal will be heavily one-sided and the judicial body will be forced, as best it can, to level the playing field and protect society in a number of ways. Any court of trial or appeal will find that unless it acts *pro-actively*, in a number of respects, its burdens will increase and its own self-confidence be attacked.

[33] That would constitute a considerable threat to the legal system overall.

Divortium Sine Culpa: A Critical Examination of the No-Fault Principle in Divorce

by

*Justice Datin Paduka Evrol Mariette Peters**

Abstract

[1] The fault principle in family law, especially in divorce proceedings, requires one party to prove that the other is to blame for the breakdown of the marriage, typically through acts such as adultery, unreasonable behaviour, or cruelty, in order to be granted a divorce. This article examines the fault principle in Malaysian civil divorce law and the extent to which the Law Reform (Marriage and Divorce) Act 1976 ("LRA 1976") has introduced no-fault elements. It explores the historical background, key statutory provisions, and policy considerations, while critically assessing the ongoing relevance of fault-based divorce and the potential shift toward a no-fault system in line with global developments.

Divortium cum culpa versus *divortium sine culpa*

[2] Historically, divorce was governed by the fault principle, also referred to as *divortium cum culpa, which* literally means "divorce with fault". This principle was rooted in the belief that marriage is not merely a contract, but a moral and legal covenant. Therefore, its dissolution could only be justified by a serious breach of marital obligations. Under this approach, the spouse seeking a divorce had to establish that the other party was guilty of a specific matrimonial offence, such as adultery, cruelty, desertion, or unreasonable behaviour. The underlying premise was one of moral accountability, namely, that a marriage could be ended only if one party was demonstrably at fault.

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[3] In addition to moral reasoning, the fault principle also served broader social and policy objectives. Divorce was viewed as a disruption to the social order and was to be discouraged unless absolutely necessary, as "marriage was viewed as a religious contract between two spouses, and therefore, the exclusive right to grant a divorce was reserved only for ecclesiastical courts."[1] By requiring proof of fault, the law aimed to deter misconduct within marriage and prevent frivolous or impulsive divorces. It was a way of upholding certain social norms and reinforcing the seriousness of marital obligations.[2]

[4] From a legal standpoint, the fault principle was shaped by the common law tradition, particularly English law, which heavily influenced many former British colonies, including Malaysia. Under English common law, divorce was not originally a legal right but an exceptional remedy granted only upon proof of wrongdoing. This legal framework was later adopted into statutory law in various jurisdictions, and its legacy persists today, especially in legal systems that retain fault-based grounds for divorce alongside modern reforms.

[5] Although religious beliefs, particularly Christian doctrines, influenced the early development of divorce law in Western societies, the fault principle could not be said to be based solely on the Bible. Christian teachings, such as belief in the sanctity and permanence of marriage, certainly influenced the moral tone of early divorce laws.[3] However, similar concepts of fault and blame exist in other religious systems as well, such as Islamic and Hindu traditions. This is indicative that the fault principle evolved from a combination of religious, cultural, legal, and policy considerations, rather than from a single religious source.

[6] Modern conceptions, however, view marriage as a civil contract founded on mutual consent and shared responsibilities. As with any

1 JD Sumner Jr, "The South Carolina Divorce Act of 1949", (1951) 3 SCL Rev 254.

2 India A Butler, "'Fault' in Divorce: Its History and Current Role (and a Recommendation for the Future)" (2025) 37 *Journal of the American Academy of Matrimonial Lawyers* 439.

3 See Matthew 19:6 – "*What God has joined together, let no one separate" and 19:9 – "Anyone who divorces his wife, except for sexual immorality, and marries another woman commits adultery." Also s*ee, for example, Catholic countries like the Philippines and Vatican City, where divorce is not legally permitted. In such jurisdictions, the available legal remedies are limited to judicial separation and annulment.

contract, it should be capable of termination when it no longer serves its purpose or when both parties mutually decide to separate. This perspective is reflected in the growing prevalence of marital agreements, such as prenuptial, postnuptial, and settlement agreements.[4]

[7] In this light, requiring proof of fault may be outdated and unnecessarily adversarial. It fails to recognise that relationships may break down without blame, and that the law should support dignified, cooperative exits. The fault-based approach instead encourages blame-shifting and prolonged litigation. Spouses are often forced to allege misconduct, such as cruelty or desertion, just to satisfy legal requirements, fuelling bitterness and conflict. A no-fault divorce model may better support child welfare by reducing conflict and promoting cooperative parenting.

[8] Additionally, the fault principle tends to reinforce gender inequalities, and as such, may run afoul of the Federal Constitution.[5] Women, particularly in cases of domestic violence or adultery, have historically struggled to meet evidentiary thresholds. The legal system's patriarchal underpinnings have made divorce especially difficult for them. In contrast, a no-fault regime aligns with principles of fairness, autonomy, and dignity by granting all individuals equal and accessible pathways to divorce, without discrimination or unnecessary hardship.

[9] In summary, the fault principle is a product of multiple historical influences, which include moral norms, social policy, legal tradition, and religious values. While it once served to uphold the sanctity of marriage and deter marital misconduct, it has increasingly been criticised in modern legal thought for being adversarial, outdated, and unhelpful in resolving marital breakdowns constructively and productively.

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4 In Malaysia, marital agreements are acknowledged by s 56 of the LRA 1976. See also cases of *Lim Thian Kiat v Teresa Haesook Lim Nee Teresa Haesook Dean & Anor* [1997] 5 CLJ 358 and *HLC v PTL* [2024] 5 CLJ 117.

5 See Article 8(2) of the Federal Constitution which states that "… there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

Divorces under the Law Reform (Marriage and Divorce) Act 1976

[10] Marriages and their dissolution in Malaysia are governed by distinct legal regimes, namely, Syariah law for Muslims,[6] and statutory civil law for non-Muslims under the LRA 1976,[7] which came into force on March 1, 1982.[8]

[11] Prior to the coming into force of the LRA 1976, the legal framework governing non-Muslim marriages and divorces in Malaysia was fragmented and inconsistent. There was no single, codified statute applicable to all non-Muslims. Instead, the courts relied on a combination of English common law and equity, statutes of general application, such as those in force in England prior to April 7, 1956 under the Civil Law Act 1956,[9] and a variety of customary and religious laws specific to different ethnic communities. These included Chinese customary practices,[10] Hindu personal laws, Sikh traditions, provisions from Ordinances like the Civil Marriage Ordinance 1952[11] and Christian Marriage Ordinance 1956[12] and Sabah and Sarawak native laws.

[12] The lack of uniformity led to confusion and inconsistency, particularly in situations involving mixed marriages[13] or where parties were subject to different customs.[14] Disputes over marriage validity, divorce procedures, maintenance, child custody, and inheritance

6 For Muslims in Malaysia, a uniform statute does not apply across the board, as Islamic family laws are state-based and vary from one state to another. This article confines its analysis to non-Muslim marriages, as governed under civil law.

7 Act 164. The LRA 1976 is modelled on the English Matrimonial Causes Act 1973 with certain modifications to suit local customs and religion.

8 PU (B) 73/1982. See Ahmad Ibrahim, "The Law Reform (Marriage and Divorce) Bill, 1976" (1975) 2(2) Dec *Journal of Malaysian and Comparative Law*.

9 Act 67.

10 *Re Loh Toh Met, Decd Kong Lai Fong & Ors v Loh Peng Heng* [1961] 1 MLJ 234; *Yeap Leong Huat v Yeap Leong Soon & Anor and Another Application* [1989] 3 MLJ 157.

11 No. 44 of 1952.

12 No. 33 of 1956. See also Ahmad Ibrahim, "Developments in the Marriage Laws in Malaysia and Singapore" (1970) 12(2) *Malaya Law Review* 257 and Noor Aziah Mohd Awal, "Family Laws in Malaysia: Past, Present and the Future" (2007) *The International Survey of Family Law* 181.

13 *Re Abraham Penhas, Deceased* [1950] 1 MLJ 104.

14 *Chia Teck Leong & 4 Ors v Estate and Trust Agencies (1927) Ltd* [1939] 1 MLJ 118; *Re Ding Do Ca, decd* [1966] 2 MLJ 220.

often fell into legal grey areas, leaving many, especially women and children, without adequate legal protection or remedies.

[13] The LRA 1976 was considered a breakthrough in family law practice, as it introduced a unified legal framework for non-Muslim marriages and divorces in Malaysia, replacing a patchwork of disparate laws that had previously governed family matters

[14] The key objectives of the LRA 1976 are to ensure that all marriages are registered accordingly,[15] to make monogamy compulsory,[16] and to provide clear legal procedure for divorce based on the main ground of irretrievable breakdown of marriage.[17] Additionally, the LRA 1976 sought to codify the rights and obligations of spouses in relation to spousal[18] and child maintenance,[19] guardianship and custody,[20] and the division of matrimonial property.[21]

Mutual consent

[15] With respect to divorce,[22] the LRA 1976 represents a significant departure from the older, fault-based system, moving instead towards focusing on the irretrievable breakdown of marriage as the central ground for dissolution.

[16] With the introduction of the LRA 1976, we now have divorce based on mutual consent pursuant to section 52, which reads:

> 52. *Dissolution by mutual consent*
>
> *If husband and wife mutually agree* that their marriage should be dissolved *they may after the expiration of two years from the date of their marriage present a joint petition accordingly* and the court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any,

15 LRA 1976, ss 4, 25 and Part IV (ss 27–34).
16 Ibid, ss 5–7.
17 Ibid, Part VI (ss 47–75).
18 Ibid, ss 77–86.
19 Ibid, ss 92–99.
20 Ibid, ss 87–91.
21 Ibid, s 76.
22 This article discusses the no-fault principle solely in the context of divorce proceedings, excluding its application to judicial separation or annulment of marriage.

> of the marriage, and may attach such conditions to the decree of divorce as it thinks fit.
>
> (Emphasis added.)

[17] The introduction of dissolution by mutual consent, executed by filing a joint petition for divorce,[23] represents a significant shift in the landscape of matrimonial law. It is widely seen as a progressive development because it allows couples to end their marriage amicably, without the need to attribute blame or prove misconduct by either party. The rationale for section 52 of the LRA 1976 is explained in the *Hansard* records for parliamentary proceedings on November 5, 1975 as follows:

> The rationale of this provision, Sir, is that where a couple mutually agree that it is in their best interests that their marriage should be dissolved, *they should be allowed to do so quietly without recrimination and unnecessary publicity*. In granting this remedy the court's power is discretionary and it will have to be satisfied that the parties had freely agreed to this remedy and consent of one party was not obtained by fraud or by force.
>
> (Emphasis added.)

[18] One of the key procedural requirements for filing a joint petition is that the parties must have been married for at least two years.[24] This minimum duration serves as a safeguard to discourage hasty divorces and to uphold the seriousness of the marital commitment. It reflects the Legislature's intent to strike a balance between facilitating consensual separation and preserving the sanctity of marriage. Overall, the availability of joint petitions provides a more humane and efficient alternative to adversarial, fault-based divorce proceedings.[25]

[19] The table below presents a comparison between joint petitions filed by mutual consent and single contested petitions over the past seven years at the High Court of Malaya at Kuala Lumpur (Family

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23 On the contents of a joint petition, see Divorce and Matrimonial Proceedings Rules 1980, Sch 3, Form 3.

24 LRA 1976, ss 50 and 52.

25 See *Re Divorce Petitions Nos 18, 20, & 24 of 1983* [1984] 2 MLJ 158; *Sim Kim Ong v Goh Phaik Sooi* [1976] 1 MLJ 232; *Sivanesan v Shymala* [1986] 1 MLJ 400 and *Ching Seng Woah v Lim Shook Lin* [1997] 1 CLJ 375.

Division).[26] It underscores the clear and prevailing trend of divorces being initiated by mutual consent, which occur at a rate three times higher than those filed through single petitions.

Year	Joint petitions	Single petitions
2018	2049 (77%)	614 (23%)
2019	2195 (74%)	759 (26%)
2020	1444 (72%)	560 (28%)
2021	1700 (74%)	602 (26%)
2022	2208 (75%)	733 (25%)
2023	2185 (77%)	651 (23%)
2024	2450 (80%)	617 (20%)

Number of divorce cases registered at the High Court of Malaya at Kuala Lumpur (Family Division)

Conversion to Islam

[20] The further ground for divorce which appears to also be based on the no-fault principle is provided for in section 51 of the LRA 1976. The provision reads:

> 51. *Dissolution on ground of conversion to Islam*
>
> (1) Where one party to a marriage has converted to Islam –
>
> (a) either party may petition for a divorce under this section or section 53; or
>
> (b) both parties may petition for a divorce under section 52.

[21] Although conversion to Islam is not considered "fault" in a moral or legal sense, it still functions as the act that causes the breakdown of the union. This differs from a true no-fault system, where the grounds for divorce are based on mutual incompatibility or irretrievable breakdown, without linking it to any particular act or event.

[22] Additionally, even if the divorce is granted without proof of fault, disputes may still arise during the ancillary proceedings, such as

26 Family disputes are heard by general civil courts, except in Kuala Lumpur and Shah Alam, where one specific civil court each has been designated to hear family disputes.

custody,[27] maintenance, and division of matrimonial property.[28] These proceedings may involve arguments about conduct and responsibility, thereby indirectly reintroducing fault-based considerations into the overall divorce process.

[23] In conclusion, while divorce following conversion to Islam incorporates certain elements that resemble a no-fault approach, particularly the notion that conversion cannot be treated as a matrimonial fault attributable to the convert, it nonetheless falls short of being a true no-fault ground. This is because the right to seek divorce in such cases is conditional, asymmetrical in its availability (being limited to the non-converting spouse), and ultimately triggered by a specific event, the act of conversion, rather than by the mutual recognition or objective determination that the marriage has broken down irretrievably. As such, it remains an event-based ground rather than one rooted in the general and neutral breakdown of the marital relationship.

Living apart for continuous two years

[24] Another ground for divorce that may be seen as reflecting the no-fault principle is found in section 54(1)(d) of the LRA 1976, which allows for divorce where the parties have lived apart continuously for at least two years. The provision reads:

> 54. *Proof of breakdown*
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say –
>
> …
>
> *(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition*.

(Emphasis added.)

27 *Loh Siew Hong v Nagahswaran Muniandy & Anor* [2022] 8 CLJ 933.
28 *HAL v HAS* [2024] 7 CLJ 373. See also LRA 1976, s 51(2).

[25] Although this ground may seem to embody the no-fault principle, as it does not require proof of matrimonial misconduct by either party, it is, in reality, a limited and conditional application of the concept. For instance, one spouse may contest the alleged separation or claim that the parties continued to reside under the same roof, despite emotional estrangement.[29] In such situations, the court must assess the nature and extent of the separation, which inevitably introduces subjective considerations and may even give rise to fault-based arguments within the proceedings.[30]

Presumption of death

[26] Closely linked to the ground of divorce based on a two-year separation, is divorce based on the presumption of death where one spouse is presumed dead after he or she has gone missing for a period of seven years. This is provided for in section 63 of the LRA 1976, which reads:

> 63. *Proceedings for decree nisi of presumption of death and divorce*
>
> (1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may *present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved*, and the court, if satisfied that such reasonable grounds exist, may make a decree *nisi* of presumption of death and of divorce.
>
> (2) In any such proceedings the fact *that for a period of seven years upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time*, shall be evidence that he or she is dead until the contrary is proved.
>
> (3) Sections 61 and 62 shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively.
>
> (Emphasis added.)

[27] Divorce on the ground of presumption of death arises when one spouse has been missing for an extended period, typically seven years, and is legally presumed dead. Under section 63 of the LRA 1976 and

29 *VKR v NNT* [2022] 10 MLJ 81.
30 *PKR v KDS* [2024] 7 MLJ 375.

section 108 of the Evidence Act 1950, if a person has not been heard from by those who would normally be in contact with them, and their whereabouts remain unknown despite reasonable efforts to trace them, the court may presume them to be dead. In such circumstances, the remaining spouse may petition for a divorce, seeking legal closure to a marriage that can no longer function in practical terms. The court will require credible evidence that the disappearance was genuine, prolonged, and unexplained.

[28] Although this ground does not require proof of matrimonial fault, it is not considered a true no-fault divorce**.** Unlike mutual consent, which focuses on the state of the relationship, divorce based on presumption of death is event-based, triggered by the disappearance of a spouse, not by the voluntary or mutual decision to end the marriage. It is a procedural mechanism to resolve legal limbo, rather than a reflection of marital failure or incompatibility. Thus, while fault is absent, the rationale and nature of this ground set it apart from the no-fault divorce model.

[29] It appears, therefore, that the grounds of living apart continuously for two years, conversion to Islam and presumption of death are merely quasi no-fault principle grounds for divorce.

Divorce based on irretrievable breakdown of marriage

[30] Despite this apparent move away from fault as seen in divorce by mutual consent and to some extent divorce by living apart for a continuous two-year period, conversion to Islam and presumption of death, the LRA 1976 has retained several of the traditional fault-based elements. For example, adultery,[31] unreasonable behaviour,[32]

31 Under s 54(1)(a), a petitioner may seek divorce if the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. The fault here is dual: proof of adultery and emotional/psychological impact on the petitioner. Courts require clear evidence of the adulterous act, often supported by circumstantial evidence or admissions. The high burden of proof often discourages parties from relying on this ground unless overwhelming evidence exists.

32 Section 54(1)(b) allows a petitioner to allege that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with them. This is the most frequently cited ground in fault-based divorces, encompassing a wide range of conduct including violence, verbal abuse, substance abuse, and neglect. The courts apply a subjective-objective test, considering both the specific circumstances of the marriage and societal standards of reasonableness.

and desertion[33] are still recognised as proof of irretrievable breakdown under section 54(1)(a) to (c) of the LRA 1976. Section 54 of the LRA 1976 reads:

> 54. *Proof of breakdown*
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say –
>
> (a) that the respondent has committed *adultery* and the petitioner finds it intolerable to live with the respondent;
>
> (b) that the respondent *has behaved in such a way* that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has *deserted the petitioner* for a continuous period of at least two years immediately preceding the presentation of the petition;
>
> …
>
> (Emphasis added.)

[31] Parties are often incentivised to allege fault where possible, particularly to gain a more favourable outcome in contested divorces, as evident in section 78 of the LRA 1976, where the fault principle is a factor to consider in assessing spousal maintenance. The provision reads:

> 78. *Assessment of maintenance*
>
> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the

33 Under s 54(1)(c), desertion occurs when one party has abandoned the other for a continuous period of at least two years. The petitioner must prove a unilateral act of abandonment without justification or consent. The courts often require detailed factual evidence of intention and conduct, distinguishing it from mutual separation.

case may be, *but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage*.

(Emphasis added.)

[32] The adoption of "irretrievable breakdown" in the LRA 1976 as the formal ground for divorce, therefore, has been described as a shift towards modernisation, while still maintaining the moral judgments and legal consequences associated with fault-based divorce.[34]

Arguments for retaining fault factors in divorce laws

[33] Opponents of no-fault divorce often fear that removing the need to prove fault will weaken traditional family values and encourage premature separations. This concern is particularly strong among conservative groups, who view the fault principle as a safeguard against moral decline and rising divorce rates. Consequently, reform efforts must navigate not just legal considerations, but also broader societal anxieties about preserving family cohesion.[35]

[34] Proponents of the fault principle also argue that in reality, fault-based divorce requires the "innocent" spouse to file for divorce, and in most cases, it would be the wife. Even when she did not start the process, her cooperation often had to be encouraged with financial incentives. No-fault divorce disrupts this system of negotiation, and this change may end up having serious negative consequences for divorced women.[36]

[35] Even in the United States, there are arguments in retaining the fault principle in divorce law. "Fault factors in contemporary American divorce law still do serve a legitimate purpose and function for three reasons. First, other no-fault laws such as workers compensation, automobile insurance, and strict liability torts have incorporated

34 See Ishak Mohd Sharif, "Divorce Under the Law Reform (Marriage and Divorce) Act 1976 – An Analysis of its Rationales", available at https://ir.uitm.edu.my/id/eprint/1333/.

35 Frederick Daniel Amara, "Fault-Based Divorce Laws versus No-Fault Divorce Proceedings: A Dynamic Shift in Family Law" (June 4, 2024), available at SSRN: https://ssrn.com/abstract=4920239 or http://dx.doi.org/10.2139/ssrn.4920239.

36 See Rishi Kumar, "An Economic Critique of No-Fault Divorce Laws" (March 19, 2022), available at SSRN: https://ssrn.com/abstract=4081378 or http://dx.doi.org/10.2139/ssrn.4081378.

fault-based remedies within their no-fault statutory framework for serious and egregious conduct, and American divorce law should continue to do the same. Second, a substantial number of states continue to recognise and use a number of fault-based statutory factors on divorce for determining spousal support and the division of marital property, and state courts have generally applied these fault-based statutory remedies in a responsible manner. Finally, alternative tort or criminal law remedies for serious and egregious marital misconduct have proven to be inadequate in theory and practice".[37]

[36] While the LRA 1976 governs non-Muslim marriages, proposals for a purely no-fault divorce system must consider the diverse values of ethnic groups such as the Chinese, Indian, and indigenous communities. For many non-Muslims, marriage is still very much more than a legal contract – it is a sacred, lifelong commitment reinforced by tradition and religion. In this context, fault-based divorce is seen as a way to uphold moral accountability and deter frivolous separations, while a no-fault system may be perceived as too permissive and undermining the seriousness of marriage.

Conclusion

[37] In the final analysis, the divorce process in Malaysia is varied based on the following table:

No-Fault	**Quasi No-Fault**	**Fault**
Mutual consent	Conversion to Islam	Adultery
	Two years living apart	Unreasonable behaviour
	Presumption of death	Desertion

[38] It appears, therefore, that the fault principle continues to play a central role in Malaysian civil divorce law, imposing an adversarial framework that often exacerbates conflict and hardship. Looking at the issue holistically, there are ultimately more compelling arguments in favour of the no-fault divorce principle than against it.

37 Peter N Swisher, "Marriage and Some Troubling Issues With No-Fault Divorce" (2005) *Regent University Law Review* 242.

[39] Divorce law is increasingly evolving toward models of therapeutic jurisprudence[38] and collaborative justice,[39] which prioritise the emotional well-being of parties, encourage amicable resolution, and reduce adversarial conflict – particularly where children are involved. These approaches view the legal process not merely as a mechanism for dispute resolution, but as a potential tool for healing and reducing long-term psychological harm. In this context, the fault principle is in direct contradiction to these modern trends.[40]

[40] By fostering blame, moral judgment, and confrontation, fault-based divorce entrenches hostility and undermines the possibility of constructive dialogue or post-divorce cooperation, especially in matters such as custody and co-parenting. As legal systems globally move toward less adversarial, more humane models of family justice, the continued reliance on fault-based grounds appears increasingly outdated and incompatible. In short, the future of divorce law lies in reconciliation, dignity, and support – not accusation and recrimination, and the fault principle has little place in that future.

38 On October 21, 2024, the Family Justice Courts ("FJC") of Singapore officially launched the Therapeutic Justice Model (TJ Model). First adopted in 2020 as the FJC's guiding "lens of care," therapeutic justice focuses on supporting families in coming to terms with the past while empowering them to work towards the best possible future.

39 Collaborative law in Malaysia is a form of dispute resolution where parties work together with their lawyers to reach a mutual agreement outside of court.

40 Several countries have embraced the principle of no-fault divorce. In the United States, this began with California's Family Law Act of 1969, which allowed couples to divorce without having to prove fault by either party. Canada followed suit with the introduction of the Divorce Act in 1968, making no-fault divorce legally available. In Australia, the no-fault approach was established through the Family Law Act 1975. Most recently, the United Kingdom adopted the no-fault divorce model on April 6, 2022, through the Divorce, Dissolution and Separation Act 2020, enabling couples to end their marriage without the need to assign blame.

The No-Fault Divorce in English Law

by

*Her Honour Judge Madeleine Reardon**

"They had to go to Brighton, because Brighton was the proper place for adultery. It was traditional, respectable, and convenient for the detectives."

AP Herbert, *Holy Deadlock* (1934)

Introduction

[1] AP (Alan Patrick) Herbert was an author, playwright, Member of Parliament and law reformer who campaigned for social change, particularly in the area of marriage and divorce. When his novel *Holy Deadlock* was published in 1934 the only ground for a divorce in England and Wales was adultery; and the court required corroborative proof. Hence the phenomenon of "hotel divorces", where a husband would gallantly spend a few nights in a seaside hotel in the company of a female accomplice, generating "evidence" for a private detective to collect and put before the court.

[2] Herbert's *Times* obituary said that he had done "more than any man of his day to add to the gaiety of the nation". From the sounds of things, his contribution to the reform of the divorce laws was only one aspect of a rich and varied life.

[3] The novel and Herbert's campaigning sparked debate, and ultimately led to the Matrimonial Causes Act 1937. The new law introduced further grounds for divorce: cruelty, desertion and incurable insanity. However it would be a further three decades before Parliament was prepared to dip a tentative toe into the waters of a "no-fault" divorce.

The "modern" law (1969–2022)

[4] The next significant development in divorce law was the Divorce Reform Act 1969, whose provisions were subsequently transported

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into the Matrimonial Causes Act 1973. Between 1969 and 2022 the sole ground for a divorce in England and Wales was the irretrievable breakdown of the marriage. In order to evidence that ground, a petitioner had to rely on one of five facts: adultery on the part of the respondent;[1] behaviour on the part of the respondent that would make it unreasonable for the petitioner to be expected to live with them (usually shortened, conveniently if a little inaccurately, to "unreasonable behaviour"); desertion; two years' separation with the respondent's consent; or five years' separation without it. If one of those facts was established, the court was obliged to grant a decree unless it was satisfied that the marriage had not in fact broken down irretrievably. There was, however, no requirement for a causal link between the fact established and the breakdown of the marriage.[2]

[5] So although from 1969 onwards the "no-fault divorce" existed in theory, anyone wanting to avoid making an allegation of some sort against their spouse would have to wait two years, if the spouse was prepared to consent to a divorce, or five years if they were not. It is worth remembering, of course, that the two-year or five-year period, as the case might be, was the period which had to elapse before a petition could be submitted to the court; thereafter there was a further wait for a decree, the extent of which depended on how speedy both the respondent and the court were in performing their own parts in the system.

Attempts at reform

[6] In 1988 the Law Commission published "Facing the Future: A Discussion Paper on the Ground for Divorce", following in 1990 by "The Ground for Divorce" (Law Com No. 192) in which it set out proposals for divorce law reform. The Commission identified widespread dissatisfaction with the substantive law and the way it operated. Parties felt compelled to exaggerate (or even fabricate)

1 For reasons probably best left buried in the mists of time, the Civil Partnership Act 2004 and the Marriage (Same Sex Couples) Act 2013 adopted different approaches to the issue of adultery in same-sex relationship breakdown. Otherwise those Acts mirrored the Matrimonial Causes Act 1973.

2 *Stevens v Stevens* [1979] 1 WLR 885. Mrs Stevens' first petition was dismissed on the basis that it was her behaviour, not her husband's, which was unreasonable. Fortunately for both parties, a second petition succeeded on the basis that by then the husband was also behaving badly, although the marriage breakdown had occurred before he started doing so.

behaviour allegations in order to obtain a divorce, and the law pretended that the court was conducting an inquiry into the facts when in reality it was doing no such thing. The Commission considered three possible models for reform, ultimately proposing a "consideration and reflection" model which would permit a decree to be granted on the basis of a sworn statement (sole or joint) that the marriage had broken down, followed by a 12-month period after which either party could obtain a divorce upon confirmation that they considered the breakdown to be irreparable.

[7] In response, the then government enacted Part II of the Family Law Act 1996, which created a divorce regime based on a sole ground of irretrievable breakdown, with no requirement to establish fault. However the procedure set out in the new Act was complex, requiring the spouses to attend mandatory information meetings within a cooling-off period after the divorce process was initiated. A pilot scheme was set up and ran from 1997 to 2000, but after evaluation the new Labour Government concluded that the provisions of Part II were unworkable in practice. The provisions were ultimately repealed, with no replacement.

[8] The debate which followed the Law Commission's report had focused on the extent to which the proposal to remove allegations of fault from divorce petitions might undermine the institution of marriage, and it was for that reason that the procedural safeguards in Part II of the Family Law Act 1996 were included. In fact, those safeguards which were intended to rescue failing marriages did nothing of the sort: the evaluation report concluded that the information meetings "came too late to save marriages and tended to incline those who were uncertain about their marriages towards divorce". Twenty years later, the Nuffield research findings in 2017 (below) suggested that the decision to end a marriage was rarely taken lightly, and that marriage was highly valued, both as a relationship and as an institution.

[9] The next 20 years saw an increasing chorus of voices calling for change, perhaps most prominent amongst them that of Sir James Munby, President of the Family Division from 2013 to 2018, who was a tireless advocate for reform.[3]

3 See e.g. Sir James Munby, "Changing Families: Family Law Yesterday, Today and Tomorrow" (March 20, 2018).

The 2017 Nuffield Foundation report

[10] In 2015 the Nuffield Foundation funded a project undertaken by a team led by Professor Liz Trinder of Exeter University to explore how divorce law was working in practice, and to inform debate about whether and how the law might be reformed. The report, entitled "Finding Fault? Divorce Law and Practice in England and Wales", was published in 2017.

[11] The authors carried out a national opinion survey, analysed a selection of court files, and conducted face-to-face interviews with people going through a divorce and focus groups with practitioners. They also observed judges and legal advisers doing the "boxwork" exercise of granting a certificate of entitlement to a decree. They were scrupulously polite about their observations, but made it clear that they saw minimal evidence of any meaningful judicial investigation into the behaviour facts alleged in petitions. In some cases, where both spouses had petitioned, the court was prepared to accept what the Nuffield authors described as "parallel [read: mutually exclusive] truths".

[12] Seventy-one percent of respondents to the national survey thought, as a matter of principle, that fault should remain a feature of divorce law. However the qualitative interviews presented a more nuanced picture. Interviewees identified both a gaming of the system and what the authors described as a "stretching of the truth": behaviour was exaggerated, adultery falsely claimed and admitted, and separation dates massaged. The common – and entirely well intentioned – practice amongst solicitors of seeking to agree behaviour particulars prior to submitting a petition led to an approach that was pragmatic rather than principled. Unrepresented parties, unaware of the rules of the game, would sometimes present an honest petition (at least from their perspective), only to be baffled by a process which offered no real scope for the allegations to be answered and determined.

[13] Perhaps of most interest to this readership, the Nuffield study included a comparative law reform study of 13 European and North American jurisdictions. The authors observed that the jurisdiction of England and Wales was out of step with most international jurisdictions in the percentage of divorces based on fault, where that ground was available. Sixty percent of divorce petitions in England and Wales were

based on fault: 10 times that of any of the other jurisdictions surveyed (France at 6.9% and Scotland at 6% were the next closest). Importantly, there was no reliable link in any of the surveyed jurisdictions between divorce rates and the approach taken by the law to fault in divorce.

[14] The Nuffield study also found that despite the prevalence of domestic abuse not having shifted significantly since the early 1980s, the proportion of behaviour petitions alleging violence reduced over that period from 64% to 15%. The obvious explanation, the authors thought, was that petitioners would not plead behaviour that was unlikely to be accepted by the respondent because that would lead to the distressing and almost always fruitless charade of a defended divorce.

[15] The authors concluded: "The study shows that we already have something tantamount to immediate unilateral divorce 'on demand', but masked by an often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state." In formulating recommendations they took the obvious next step: a proposal for divorce to be available on the initial application of one or both parties, finalised by one or both parties after a minimum waiting or "cooling-off" period (a "notification model").

Owens v Owens[4]

[16] A timely illustration of the problems identified in the Nuffield study came along while that report was in preparation. Mrs Owens wanted a divorce. Her husband did not. She relied on particulars of behaviour which, the first instance judge found, were insufficient for him to conclude that it would be unreasonable to expect her to live with him. The judge did find, however, that the marriage had irretrievably broken down. The first instance refusal of Mrs Owens' divorce petition, which was inevitable on the law as it applied to the facts found by the judge, was upheld by the Court of Appeal, and then by the Supreme Court.

[17] The case attracted considerable media interest, as well as public sympathy for a woman stuck in a "loveless marriage". Mrs Owens was, however, luckier than most, in that her financial circumstances

4 [2018] UKSC 41.

meant that she was at least able to establish a separate home for herself without requiring the court first to adjudicate on the division of the parties' assets.

The Divorce, Dissolution and Separation Act 2020

[18] The combination of the Nuffield report and the public response to *Owens* gave prominence to the state of divorce law in England and Wales, and in 2019 the then government introduced the Divorce, Dissolution and Separation Bill. The Act received Royal Assent in June 2020 and the new provisions came into force on April 6, 2022.

[19] The legal framework for a divorce under the new Act is very much based on the Nuffield recommendations. A divorce can be initiated by one spouse (a sole application) or both (a joint application). An application for a conditional order may then be made, again by one or both spouses, after 20 weeks; and an application for a final order six weeks after that. There is no longer any requirement for "particulars": the applicant spouse or spouses must simply confirm in a statement that the marriage has broken down irretrievably, and the court must accept the statement as conclusive evidence of breakdown, and make the order.

[20] The effect of the new law is to do away entirely with the concept of a defended divorce. The only basis on which a spouse can now avoid being divorced against his or her will is by contesting jurisdiction. It would be interesting to know if this, combined with the effects of Brexit (it is now possible, where it was not before, to argue *forum non conveniens* in cases where an EU Member State also has jurisdiction), has led to an increase in jurisdiction disputes. It is probably too early to say.

Changes to procedure

[21] Historically, the corroborative evidence required to substantiate an adultery-based petition was adduced in open court. The Brighton detective would appear, fresh off the train, in the witness box at Somerset House armed with his notebook and the lipstick-stained teacup. By the second half of the century the process had been streamlined and oral evidence was no longer required, but even undefended divorces required a court hearing – something that the

parties often found both unnerving and humiliating. In 1973 the "special procedure" was introduced, and extended to all undefended divorces in 1977. The registrar – subsequently District Judge – would consider the petition and supporting affidavit in private and without attendance, and would issue a certificate if satisfied that the contents of the petition had been proved. The certificate then paved the way for a decree *nisi* to be pronounced later in open court.

[22] The changes to substantive law on divorce in 2022 coincided with the reform of the divorce process which was taking place as part of a wider digitalisation of court applications. From 2018 onwards divorce applications began to be issued online, and the vast majority are now dealt with at the National Courts and Tribunals Service Centre. There are obvious risks in a purely online process, including risks of impersonation or coercion, but so far there have been few reported instances of fraud.

[23] The reform of the process also provided an opportunity to get rid of the archaic language formerly used in divorce law. "Petition" became application, "decree absolute" a final order, and the parties applicant and respondent – a change originally recommended by the Law Commission back in 1990.

Comparisons, conclusions and the future

[24] Justice Peters' fascinating article demonstrates the cross-fertilisation of ideas over time across different jurisdictions in the area of divorce law. Malaysia and England and Wales have at times moved in parallel; at other points one or the other has leapt ahead (it was interesting to see that a no-fault divorce by mutual consent became available in Malaysia as long ago as 1982).

[25] Historically at least, moral principles and religious beliefs have played a key part in the development of divorce law, in most if not all jurisdictions. As Justice Peters points out, in both Malaysia and England and Wales the roots of the current law lie in the concept of a "matrimonial offence" as the sole basis for dissolving a tie which is otherwise expected to endure for life. Having said that, after the Church of England officially abandoned the concept, in 1966, it was a group led by the then Archbishop of Canterbury which led calls for law reform, and in particular for irretrievable breakdown rather than

fault as a sole ground for divorce.[5] At that point it was Parliament and not the Church which lagged behind.

[26] In England, with its established Church, civil and ecclesiastical law have always been aligned. An alternative approach, adopted by several other jurisdictions (including Malaysia), is to offer different legal frameworks for different religious and cultural groups. Where I sit in East London we regularly encounter divorces which have taken place in South Asia, and have thus acquired a working knowledge of the various Marriage Acts and Ordinances available to Muslims, Hindus, Christians and other religious groups in India, Bangladesh and Pakistan. As the population of the UK continues to diversify, it may be that in future there is a growing appetite for the recognition of religious divorce in England; although the most recent independent review on the topic made a firm recommendation to the contrary.[6]

[27] In my first two decades practising in family law in England and Wales, received wisdom suggested that there were significant political and public opinion barriers to the introduction of a no-fault divorce. No lawyer thought the system made sense, but reform was thought to be in the "too difficult" box. Looking back, I am not sure that this was correct. The Divorce, Dissolution and Separation Bill went through with cross-party support and passed swiftly, the only delays being caused by the 2019 election and then the pandemic. A reading of *Hansard* suggests that the debates were thinly-attended and pretty bland. Of course social change does not happen at an even pace, and some legal reforms are driven by a sudden and significant shift in public opinion. I suspect however that future legal historians will look back at the decades when England and Wales was far out of step with other comparable jurisdictions on this issue, and wonder why it took us so long.

5 The Archbishop's Group on Divorce, *Putting Asunder: A Divorce Law for Contemporary Society* (1966).

6 Home Office, "The Independent Review into the Application of Sharia Law in England and Wales" (2018).

Stateless Children and their Rights to Citizenship

by

*Justice Dato' Nadzarin bin Wok Nordin**

Who are stateless persons

[1] The basic human rights for every living person encompasses the fundamental right to life, the right to food, education, work, health, and liberty. Unfortunately, these essential basic rights are in reality not afforded to each and every human being on this earth.

[2] According to the Human Rights Commission of Malaysia (SUHAKAM), the classification of "stateless" without any identity and identification is an infringement of Article 8 of the United Nations Convention on the Rights of the Child (UNCRC).[1]

[3] The write up herein on statelessness and the child's right to citizenship is not so much of a discourse nor is it a comprehensive overview of statelessness in Malaysia but it is at best, my own attempt on a research paper with the aim to highlight such basic rights which relates to stateless persons, with particular emphasis on the child's right to citizenship which includes such basic rights of education and healthcare in Malaysia, viewed through the prism of our Federal Constitution ("FC").

[4] Based on a paper by Jamie Chai Yun Liew, an associate professor at the Faculty of Law, University of Ottawa, in 2019 entitled "Homegrown Statelessness in Malaysia and the Promise of the Principle of Genuine and Effective Links" based on an article from a qualitative survey of case law, lawyers, non-governmental organisations ("NGOs") and stateless persons on who is stateless in Malaysia, the survey indicated six categories of stateless persons: (1) persons with long standing residence since pre-independence and their descendants; (2) people who lack documentation; (3) abandoned children or "foundlings" and adopted children; (4) children of mixed marriages or alternative

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1 https://suhakam.org.my/portfolio /stateless-children/.

families and cases where children are born out of wedlock or before a marriage was registered; (5) indigenous persons; and (6) refugees or children of migrant workers.

[5] From a very recent article in *The Star* entitled "Born into a state of hardship,"[2] it was stated "*Despite being born and bred in Malaysia, several people of different walks of life have found themselves in limbo due to the lack of personal documents*", and the article documents a case involving an individual male who was born to a Malaysian father and Filipino mother in Lahad Datu, Sabah who had to appeal to continue his secondary education and enrolled into Form 1 a year later. He was also asked to resign from a company he worked at because he could not sign up for the Employees Provident Fund ("EPF") and SOCSO accounts without an identity card ("IC") and has since been taking up odd jobs including as a cleaner and plumber. The said article also highlighted the case of Suki Wong Pei Yee a 12-year-old girl who had made headlines caring for her stroke-stricken single father following the death of her Vietnamese mother who had yet to get her citizenship. She is stateless as her parents' marriage was not officially registered. Her father, now aged 59, had stated, "*I believe education is the most important thing. I just hope I can witness her graduation.*"

[6] Another individual in the same article had stated that he had been trying for 33 years before he obtained his citizenship in 2020. This individual had expressed "*I was born in Malaysia but just because I did not have a family, I could not prove anything*" as he was abandoned as a child and grew up in shelters.

[7] It is clear that stateless persons have difficulty in even obtaining the most basic of rights such as education and healthcare. In Malaysia the "stateless" are prevented from rights to inter alia benefits of EPF and SOCSO which are available to Malaysian citizens, but also have difficulty or are unable to even open bank accounts, obtain jobs, get or find a place to stay due to a lack of documentation and their legal status or lack of legal status.

[8] A stateless person, as a result of the lack of documentation to recognise his or her existence and legal persona, will no doubt also

2 January 11, 2024. Report by Tarrence Tan, Junaid Ibrahim, Ragananthini Vethasalam and Teh Atihra Yusof.

not be entitled to the privilege of having a passport which would restrict the said individual from traveling abroad.

[9] There are a myriad of circumstances and scenarios as to why individuals are stateless but what is most glaring is that they are, in most cases, totally innocent and not to be faulted in their lack of or more precisely the absence of any legal recognition by the state.

[10] Malaysia does not have any laws which recognise stateless persons but guidance can be obtained from Article 1(1) of the Convention Relating to the Status of Stateless Persons which was adopted on September 28, 1954 and entered into force on June 6, 1960 by the United Nations Human Rights ("UNHR") Commission which establishes a framework for the international protection of stateless persons.

[11] This Convention defines a "stateless person" as someone "who is not considered as a national by any State under operation of its law" and includes undocumented persons, who are individuals who have not registered their birth or their identification information is not recorded by the state and persons of undetermined nationality being individuals who have no proof of any nationality and includes individuals who are treated by the authorities as having links to another state. Such links can occur by way of birth, marriage or residence.

[12] The Convention provides minimum standards with respect to freedom of religion and education of children, the right of association, the right to employment and to housing, and it provides that stateless persons are to enjoy, at a minimum, the same treatment as other non-nationals.

[13] Obvious to say, it is a sad fact that those without the necessary documentation and which are then deemed stateless are exposed to the inequalities in the laws and policies and the lack of legal protection of the state, despite the fact that these persons may have significant and stable ties (through birth, long term residence etc.) in this country. These categories of individuals are often described as statelessness *in situ* by the scholars.[3]

3 Jamie Chai Yun Liew, "Homegrown statelessness in Malaysia and the promise of the principle of genuine and effective links" (2019) 1(1) Statelessness & Citizenship Review 95–135, available at https://search.informit.org/doi/10.3316/informit.664222491848631.

Statistics

[14] It is known that millions of people around the world continue to face serious difficulties because they are stateless. In Malaysia itself, it is estimated based on an online *Malay Mail* interview[4] that:

> Development of Human Resources for Rural Areas (DHRRA) told *Malay Mail* it has identified over 16,000 genuinely stateless persons in Peninsular Malaysia from 2016 to June 2023.
>
> Out of about 16,392 verified stateless cases registered with DHRRA, an estimated 7,000 have now been recognised as Malaysians, while the remaining 9,392 are still stateless.
>
> Of the 9,392, the biggest proportion is childhood statelessness at 8,223 persons (which covers children born out of wedlock in Malaysia and children adopted by Malaysians); followed by 1,003 under the pre-independence stateless category (those who arrived or were born here even before Malaya's independence in 1957 but are denied citizenship); and 166 cases involving babies or children who were born here but abandoned by their biological parents.

[15] Unofficial numbers of stateless persons are of course almost impossible to predict but there are estimated to be at least 183,000 refugee-status-seekers and asylum-seekers in Malaysia, according to the United States (US) Department of State in their 2023 Trafficking in Persons Report on Malaysia.

[16] The categories of stateless people in Malaysia include children born out of wedlock to a Malaysian father, stateless children adopted by Malaysian parents, abandoned children without documents to prove their nationalities, and families with generations of stateless children born in Malaysia.

[17] Based on an article entitled "Stateless Children in the East-Asian Region and the Judicial Response from Malaysia"[5] the Welfare Society Malaysia had estimated that in 2017 there were 290,000 children in Malaysia who were stateless and 60,000 of them were without a birth certificate.

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4 Dated July 23, 2023.

5 Ephranella Cooray, Manique Apsara, Multimedia University Online Library (2019).

[18] Whilst according to an Al Jazeera report entitled "Malaysia's Stateless Children in Legal Limbo",[6] there are an estimated 150,000 stateless children in Malaysia, many of which are from the remote communities in the peninsula's jungle interior or across the sea in Borneo. Others are the children of refugees or migrants, and still more are ethnic Indians whose battle to prove they are Malaysians can be traced back to Malaya's independence from Britain in the late 1950s. The report further states: "Stateless children, through no fault of their own, inherit circumstances that limit their potential," according to UNICEF's website. "They are born, live and, unless they can resolve their situation, die as almost invisible people."

[19] This has resulted in a cycle of generational statelessness, and based on another feature entitled "Documenting the Undocumented: The Struggle for a Legal Identity"[7] it is stated that "With no proper access to information and resources, families are left with no legal identity – lives lived under the radar not by choice but due to xenophobia, lack of action and governmental inattentiveness."

Citizenship to stateless children

[20] Citizenship may be acquired in one of two ways, with the first method known as the *jus soli* principle. The *jus soli* principle relates to the acquisition of citizenship according to the territory of a person's birth, whereas the second principle is known as the *jus sanguinis* principle where a person's citizenship is determined according to a person's descent. See *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia*[8] where the said principles were explained as follows:

> By the late nineteenth century, international law recognised two well established rules for acquiring nationality by birth: *jus soli* and *jus sanguinis* (The *Australian Legal Dictionary* (1997) defines *jus soli* to mean: "a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place" and defines *jus sanguinis* to mean: "a right

6 Kate Mayberry (July 16, 2014).
7 Aime Marisa, "Documenting the Undocumented: The Struggle for a Legal Identity", available at https://newnaratif.com/documenting-the-undocumented/.
8 [2016] 7 MLJ 717 at 747.

of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth").

[21] Citizenship denotes allegiance as well as a sense of belonging to a country.[9] A child that does not have citizenship of any country is then deemed stateless, a foreigner and an alien and does not enjoy the benefits conferred to citizens of a country.

[22] Malaysia is however not a signatory to the United Nations (UN) conventions relating to statelessness, but it has adopted the UNCRC – albeit with some reservations – which gives all children the right to a legal identity.

[23] The UNCRC, which was adopted in 1995 by Malaysia, is an important agreement by countries who have promised to protect children's rights and explains that children are any person under the age of 18 years, their rights, and the responsibilities of governments.[10] This has led to the introduction of the Child Act 2001[11] which received the Royal Assent on February 15, 2001 and came into force from August 1, 2002.[12] It is to be noted that article 7 of the UNCRC provides that "*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality , and, as far as possible, the right to know and be cared for by his or her parents*."

[24] One other category of children which this article wishes to address is the issue of citizenship to either one parent of Malaysian citizenship only and the legal rights and difficulties that the child may face in Malaysia.

[25] In Malaysia, the substantive law relating to citizenship is embodied in the FC. Children who are born in the Federation of Malaya before the August 31, 1957, i.e. the National Independence Day of Malaysia, are granted citizenship if they make an application to do so and satisfy the requirement as provided for in Article 16 of the FC which states that:

9 Vivien JH Chen, "Stateless and Abandoned: The Foundling in Malaysia" (2003) 30 *Journal of Malaysian and Comparative Law* 119.

10 www.unicef.org/child-rights-convention.

11 Act 611.

12 PU(B) 229/2002.

Subject to Article 18, any person of or over the age of eighteen years who was born in the Federation before Merdeka Day is entitled, upon making application to the Federal Government, to be registered as a citizen if he satisfies the Federal Government:

(a) that he has resided in the Federation during the seven years immediately preceding the date of the application, for periods amounting in the aggregate to not less than five years;

(b) that he intends to do so permanently;

(c) that he is of good character; and

(d) that he has an elementary knowledge of the Malay language.

[26] For the sake of completeness, Article 18 of the FC provides for the general provisions as to registration. The said Article provides:

(1) No person of or over the age of eighteen years shall be registered as a citizen under this Constitution until he has taken the oath set out in the First Schedule.

(2) Except with the approval of the Federal Government, no person who has renounced or has been deprived of citizenship under this Constitution or who has renounced or has been deprived of federal citizenship or citizenship of the Federation before Merdeka Day under the Federation of Malaya Agreement 1948 shall be registered as a citizen under this Constitution.

(3) A person registered as a citizen under this Constitution shall be a citizen by registration from the day on which he is so registered.

[27] Despite Article 16 of the FC, there are however still people, mostly from those who are uninformed, unaware, illiterate and/or uneducated that have failed to register their marriages and the birth of their children with such failure coming from amongst others, the lack of, or insufficient evidence of pre-independence records which affect their citizenship application, with some, sadly, not even understanding the concept of statelessness.

[28] In March 2016, the Deputy Prime Minister, Datuk Seri Dr Ahmad Zahid Hamidi informed the Dewan Rakyat[13] that more than 17,000

13 *New Straits Times* Online (March 21, 2016).

marriages between Malaysian men and female China nationals were unregistered between 2011 and 2015. This of course raises concerns on the citizenship status of their offspring.

[29] According to a *Malay Mail* article,[14] on June 15, 2023, the Home Ministry said the "National Registration Department ("NRD") will only record the status of whether an individual is a citizen or non-citizen based on that individual's biological parents' marriage status and citizenship status at the time of birth. In relation to that, the NRD does not record individuals who do not have citizenship (stateless) and the NRD does not have information about the total number of children who have no citizenship (stateless)."

[30] Based on SUHAKAM's website,[15] there are three main reasons why stateless children exist in Malaysia. First, due to irregularity of marriage which leads to unregistered births (discrimination on children born out of wedlock); second, on the issue of inconsistency of procedures at the NRD at the district and state level; and third, the laws referred for the subject-matter, i.e. the FC and the Adoption Act 1952, are needed to be reformed.

[31] There are thus many among the stateless in our country who are born and who have lived here all their lives just like any regular Malaysian but are nevertheless stateless due to", the lack of, or absence of documents to legalise or recognise these individuals as citizens under the law. In an article entitled "Protecting the Children's Right to Nationality in Malaysia: An Appraisal,[16] the authors from the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University, Malaysia commented that "*Though there are numerous reasons for statelessness, most people without citizenship in Malaysia fall under the category of those who failed to register their birth under Malaysian law. The effect of non-registration of birth leads to a person being stateless.*".

14 Dated July 11, 2023.

15 https://suhakam.org.my/portfolio/stateless-children/.

16 Roslina Che Soh @ Yusoff, Nor Hafizah Mohd Badrol Afandi, Noraini Md Hashim and Nora Abdul Hak, "Protecting the Children's Right to Nationality in Malaysia: An Appraisal" (2019) 9(6) *International Journal of Academic Research in Business and Social Sciences* 358.

Gender inequality and the proposed amendment of Federal Constitution

[32] The government has said that the citizenship laws may be amended including proposing granting citizenship by operation of law through registration.

[33] The Malaysian Government has recently pledged to "eradicate discrimination against women in Malaysia and overcome the shortcomings of citizenship provisions".

[34] This has come about as at present, according to the provisions on Malaysia's citizenship laws under the FC, only children born overseas to Malaysian fathers are granted citizenship automatically. A Malaysian woman with a foreign spouse who gives birth outside of Malaysia would not be able to automatically pass on her citizenship to her children.

[35] Article 15 of the FC however provides:

> (2) Subject to Article 18, the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian.

[36] The granting of the citizenship under Article 15 is however subject to the several conditions including the requirement for both parents to jointly submit the application before the consulate officer within a year and the wide discretion given to the Minister of Home Affairs. With respect I agree with the author[17] who states that this Article is not as powerful as gaining citizenship by operation of law.

[37] There is also Article 15A of the FC which reads:

> Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.

[38] Article 15A was inserted into the FC by clause 4 of the Constitution (Amendment) Act 1962. Pursuant to the above Article, the Federal Government may if it considers that there are special circumstances cause any person under the age of 21 to be registered as a citizen.

17 See n 3 above.

Thus, Article 15A provides for a special power to register children under the age of 21 and in essence, Article 15A provides for citizenship by registration without reference to the requirement of birth within Malaysia or the citizenship of parents. Nevertheless unlike the other provisions relating to citizenship in the FC, there are few details specified as to the qualifications a person must possess in order to acquire citizenship under this Article.[18]

[39] As for children born out of wedlock (i.e. where there is no legal marriage registration), the provision under section 17 of the Second Schedule, Part II, to the FC does not allow men to transfer nationality to their children if the child is born out of legally recognised marriage. It is a constitutional provision that states children born to unmarried couples would take on the mother's nationality but this is only possible if the mother holds a citizenship and is able to pass on the citizenship to the child. The incident of children rendered statelessness due to the said provisions became prevalent when the Law Reform (Marriage and Divorce) Act 1976 came into force on March 1, 1982. This law, which is only applicable to non-Muslims, renders all customary or cultural marriages and other marriages conducted according to Chinese or Hindu rites after March 1, 1982 which are not registered as invalid.[19]

[40] One proposed amendment of the FC would automatically grant citizenship to children born overseas to Malaysian mothers who are married to foreigners whilst five other proposed amendments to the Second Schedule to the FC would, they say, create a large pool of stateless children. Under one such amendment, abandoned babies and children will no longer be entitled to automatic citizenship, according to the opponents, who call the move "regressive".

[41] In summary, the Malaysian Government's proposed amendments to citizenship laws in the FC (according to civil society) which are said to be regressive are as follows:

(i) Constitutional provision: Section 1(a), Part II of Second Schedule

Proposed amendment: To delete the words "permanently resident".

Effect: Children born to Malaysian permanent residents will no longer have access to automatic citizenship.

18 See n 5 above, at p 123.

19 Bathmaloshanee M (researcher), Maalini Ramalo and Saravanan M Sinapan (contributors), "Statelessness in Malaysia", report prepared by DHRRA Malaysia.

(ii) Constitutional provision: Section 1, Part II of Second Schedule

Proposed amendment: To amend citizenship by "operation of law" to citizenship by "registration"; repeal section 2(3).

Effect: Removing the safety net for Malaysia-born stateless children of vulnerable groups.

(iii) Constitutional provision: Article 26(2)

Proposed amendment: To replace the words "date of the marriage" with "date of obtaining citizenship".

Effect: Placing foreign wives at risk of citizenship deprivation and statelessness.

(iv) Constitutional provision: Article 15A

Proposed amendment: Amend and reduce the age limit from "twenty-one years" to "eighteen years" for the purpose of citizenship registration.

Effect: Reducing the time frame for stateless children's citizenship applications.

The courts and statelessness

[42] In the same article mentioned earlier entitled "Born into a state of hardship", one of the interviewees had mentioned that "*It took me two years to finally get the red IC under the term of an adopted child. It was the Courts that approved the adoption and eventually gave me a red IC …*".

[43] According to a *Malay Mail* online article under the heading of "Malaysia's regressive citizenship amendments risk giving 'Little Napoleons' power to decide who gets to be a Malaysian, lawyer says",[20] it was reported that Sharmila Sekaran, a lawyer and child advocate with the child rights advocacy group Voice of Children, said the planned regressive amendments to the FC include a proposed move to change "citizenship by operation of law" to "citizenship by registration" for certain categories, i.e. the government will be the one deciding if the child should be registered as a Malaysian citizen, which according to Sharmila it would then be taken out of the hands of the law and put

20 Dated January 23, 2024.

into the hands of unseen faces as "we do not know who these people are, who are approving or not approving".

[44] I will now refer to some of the cases in our jurisdiction in a chronological order which might assist and provide guidance on how the courts have decided on the issue of stateless children and their rights to citizenship based on the existing laws in Malaysia.

[45] In *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia*,[21] the High Court had to decide: (i) whether the child qualified to be a citizen by operation of law; (ii) whether an adoption order suffices to qualify an adoptive child as citizen by operation of law under Article 14(1)(b) of the FC; and (iii) whether a writ of mandamus can be issued against the respondent to register the child as citizen resulting in the adoption order based on the following facts. The applicant, a Malaysian citizen, had a relationship with a Thai lady ("Ngamta") which cumulated in an unregistered marriage between them in Thailand. The marriage was neither registered in Thailand nor in Malaysia and a child named was born in Malaysia out of that relationship. His birth certificate stated him as "bukan warganegara". He was however at all times under the care of his biological father, the applicant and his grandmother in Kuala Lumpur. The relationship between the applicant and Ngamta broke down and she returned to Thailand, voluntarily relinquished her parental rights over the child to the applicant.

[46] The applicant then applied and obtained an adoption order of the child pursuant to the Adoption Act 1952. Thereafter, the applicant applied to the National Registration Department for a new birth certificate to be issued to the child. A new certificate was issued to the child with his citizenship status as "bukan warganegara".

[47] The applicant therefore commenced the present judicial review application seeking for an order of certiorari to quash the decision of the respondent. The application also sought for a declaration that the child was a citizen by operation of law following the adoption order made under the Adoption Act 1952.

21 [2012] 9 MLJ 573.

[48] The learned judge here had then held:

> [11] *It is clearly under the above provisions (i.e.* Matters relating to issues on citizenship are stipulated under Part III of the Federal Constitution and art 14(1)(b) read together with the Second Schedule Part II s 1(a)) *as submitted by learned federal counsel that before a person can become a citizen by operation of law, at least one parent must be a citizen or a permanent resident, at the time of his birth. It is not disputed that at the time this child was born, the parent was not lawfully married under any written law. Learned federal counsel contended that the word "parent" cannot refer to a father of an illegitimate child. She relied on the definition of "parent" in the Stroud's Judicial Dictionary of Words and Phrases (7th Ed), which says that the word "parent" cannot include a father of an illegitimate child. This definition was also based on the decision by Lord Denning MR in Re M (An infant) [1995] 2 QB 479. In the case of Shamda Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor [2004] CLJ 416 the court relied on Black's Law Dictionary Abridged (6th Ed), which defines parent as "the lawful father and mother of the person". Thus from all these definitions it is clear that the word "parent" in art 14 refer to a lawful parent in a recognised marriage in the Federation.*
>
> [12] It *is quite clear from the provisions cited that, before a person can be qualified as a citizen by operation of law, he must be born to a lawful parent under the said art 14. Since there is no specific definition of the word "parent" in the Federal Constitution, the dictionary meaning cited would have to be resorted to. The dictionary meaning of the word "parent" must therefore refer to lawful parent. Hence I agree with the contention of learned federal counsel that the word "parent" in art 14 must refer to lawful parent. I have no hesitation to agree with learned federal counsel that the child here cannot qualify as a citizen by operation of law because he was not born to a lawful parent.*
>
> …
>
> [17] *First to recapitulate the legal position, it is clear that this child was not born to a lawful parent and hence cannot be a citizen by operation of law under art 14 as discussed earlier. Article 14(1) must be read together with Second Schedule Part II s 1(a) which states:*
>
> (1) *Subject to the provisions of Part III of this Constitution the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:*

(a) *every person born within the Federation of whose parents one at least is at the time of his birth either a citizen or permanently resident in the Federation;*

(b) …

[18] *The above provisions are clear that, to be a citizen by operation of law under art 14, a person must be born within Federation and at the time of his birth, his either parent is a citizen or a permanent resident. If we examine art 14 read together with Second Schedule Part II s 1(a) carefully, it is clear that to qualify as a citizen by operation of law a person must be born within the Federation to parents, one at least is at the time of his birth either a citizen or permanently resident in the Federation. There is no doubt that at the time of his birth Foo Shi Wen was not born to a lawful parent. Since at birth he was not born to a lawful parent he did not qualify to be a citizen by operation of law. The emphasis of the requirement under art 14 has to be placed on his birth status because art 14 clearly refer to the fulfilment of the requisite conditions at the time of his birth. It cannot be disputed that his birth status does not qualify.*

…

[23] *In the same light art 14 also does not make specific reference as to whether an adopted child can be treated as being born to a lawful parent for the purpose of art 14. Thus it would be inappropriate to infer or imply that an adoption order also deems an adopted child to be a natural child for purpose of citizenship when both the Adoption Act and the constitutional provisions are silent on the same. it is my considered view that, the adoption order in this case therefore cannot be read to affect the citizenship of the adopted child, in absence of clear written provision in the law.*

[49] Next is the case of *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*[22] where the court held:

[5] … there are four ways of acquisition of citizenship, by operation of law under Article 14 of the FC, by registration under Article 15, 15A, 16, 16A, and 18, by naturalization under Article 19 and by incorporation of territory under Article 22 (see *Part III of the FC*). …

22 [2015] MLJU 2059.

[6] Article 14 of the FC must be read together with Part II of the Second Schedule of the FC and that based on Article 14(1)(b) of the FC, read together with Part II of the Second Schedule, there are five ways for a person who were born on or after Malaysia Day can become citizen by operation of law (see Part II [Article 14 (1) (b)] of Second Schedule paragraph 1(a), (b), (c), (d) and (e)).

…

[17] … The Convention Relating to the Status of Stateless Persons defines stateless persons as person who is not considered as a national by any State under the operation of its law.

[18] It is to be noted that Malaysia has not ratified the above-mentioned Convention. Therefore, the convention can be used only as a guide to classify the types of persons who may be categorized as stateless person *de jure*, *de facto* or otherwise.

[19] … "Universal Declaration of Human Rights" ("UDHR"), and that the Courts have legal duty to abide by this UDHR which is binding.

[20] As the UDHR is merely a declaration, it is not a legally binding document for this Court to give effect. The UDHR is applicable in Malaysia only to the extent that it is not inconsistent with the FC. The provisions of the UDHR must be read together with section 4(4) Human Rights Commission of Malaysia Act 1999 (Act 597) …

[46] Section 9 of the Adoption Act merely covers issues pertaining to the maintenance, education, welfare and property of the child. However, section 9 made no mention pertaining to the citizenship of the child upon his adoption pursuant to an adoption order. On the issue of citizenship, I am of the view that no matter how far one were to stretch the effects of the provision of section 9 of the Adoption Act 1952, one will not be able to interpret section 9 of the Adoption Act 1952 as the section which confers citizenship on the adopted child.

[50] A similar decision was made by the High Court in *Yu Sheng Meng (A Child Represent By His Litigator, Yu Meng Queng) v Ketua Pengarah*

Pendaftaran Negara & Ors[23] which held that a child's citizenship follows the mother's and not the father's.

[51] The Court of Appeal in *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*[24] stated, amongst others, that for the requirement of *jus sanguinis* in section 1(e) of Part II of the Second Schedule to the FC to be read with Article 14(1)(b) of the FC (to obtain citizenship by operation of law) to apply, the burden of proof was on the appellants to establish a prima facie case on the balance of probabilities that the second appellant, "was not born a citizen of any country".

[52] In this case, the only available documentary evidence, i.e. the second appellant's birth certificate, contained no information pertaining to the biological parents and the relevant particulars were endorsed with "Maklumat Tidak Diperolehi". Since the identity of the child's lawful and biological parents were unknown, it was not possible to determine the lineage of the second appellant that would enable the second appellant to be conferred citizenship by lineage, i.e. *jus sanguinis*. Thus, the second appellant had not fulfilled the requirement to be a citizen by operation of law within the meaning of section 1(e) of Part II of the Second Schedule to the FC.

[53] Here the Court of Appeal had also held that "… *the second appellant would need to satisfy both the requirements of jus soli and jus sanguinis in order to fulfil the requirements of art 14(1)(b) and para 1(e) of Part II, Second Schedule of the Federal Constitution (refer to Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia [2016] 7 MLJ 717)*."

[54] The facts of the case concerned a Malaysian citizen and one Lim Lee Chiew who were the adopted parents of the second appellant who was a minor born on September 28, 1998 at a Poliklinik at Taman Dato' Ahmad Razali Ampang and who was, at the time of the birth of the second appellant, issued a birth certificate with the particulars of the adopted parents stated as the biological parents of the second appellant. Both the adopted parents had never disclosed the fact that they were not the biological parents of the second appellant

23 [2016] 7 MLJ 628.
24 [2017] 5 MLJ 662.

or that they had taken the second appellant. On discovery that the adopted parents of the second appellant had breached the relevant law in obtaining the second appellant's birth certificate, the Ketua Pengarah Pendaftaran Negara revoked the said birth certificate and issued another birth certificate to reflect the facts surrounding the birth of the second appellant. As there was no information obtained with regard to the biological parents of the second appellant, the new birth certificate contained no information pertaining to the biological parents and the relevant particulars were endorsed with "Maklumat Tidak Diperolehi".

[55] Both the first appellant and his wife were asked to apply for an adoption order under the Adoption Act 1952, which order was granted on June 4, 2012 and on June 21, 2012, the appellants applied for citizenship by registration under Article 15A of the FC but the same was rejected by the first respondent. Hence, the appellant applied for judicial review which was filed in the High Court seeking various reliefs.

[56] Next there is the case of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)*[25] where the Court of Appeal held that an adoption order issued under the Adoption Act 1952 did not confer Malaysian citizenship on an adopted child even though one of his adoptive parents was a Malaysian citizen or a person permanently resident in Malaysia by operation of law within the contemplation and ambit of Article 14(1)(b) read with section 1(a) of Part II of the Second Schedule to the FC. To be a Malaysian citizen by operation of law under Article 14(1)(b) read with section 1(a) of Part II of the Second Schedule to the FC, the person must be born in Malaysia and one of his biological parents must, at the time of the person's birth, be either a Malaysian citizen or a person who was permanently resident in Malaysia. In the instant appeal, the respondents were held not to have fulfilled the crucial biological, or the *jus sanguinis*, criterion as envisaged under the said Article.

25 [2017] 3 MLJ 308.

[57] The High Court in *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*[26] has held that the Universal Declaration of Human Rights ('the UDHR') is merely a declaration, thus it was not a legally binding document for the court to give effect. The UDHR is applicable in Malaysia only to the extent that it is not inconsistent with the FC. Further, international treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law. In the circumstances, the applicant had failed to satisfy the court that the relevant treaty and/or convention had been adopted by way of a specific Act. In this case, the court held that there was no evidence to show that these international human rights conventions were applicable to the factual matrix of the case to allow the said application under Article 14(1)(b) of the Constitution read together with section 1(e) Part II, Second Schedule to the Constitution

[58] The Court of Appeal decision in *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors*[27] reflects the decision in upholding a child as a citizen by operation of law under Article 14(1)(b) which is read with section 1(a) of Part II of the Second Schedule to the FC where one of the parents at the time of the birth of the child in question was either a citizen or a permanent resident, as it was an uncontroverted and an admitted fact that as the first respondent was (a) the biological father of the appellant, (b) the father and parent of the appellant, and (c) a citizen of Malaysia at the time of the appellant's birth, the terms of Article 14(1)(b) read with section 1(a) of Part II of the Second Schedule were met. The fact that the appellant's biological parents were not married to each other at the time of the appellant's birth did not alter or diminish their capacities as parents of the appellant

[59] In *Registrar of Birth and Death v Pang Wee See & Anor*,[28] the Court of Appeal had stated that an adoption order issued under the Adoption Act 1952 does not confer Malaysian citizenship to an adopted child although one of his adoptive parents is a Malaysian citizen or a person permanently resident in Malaysia by operation of law, within the

26 [2017] 8 MLJ 122.
27 [2018] 1 MLJ 307.
28 [2017] 7 CLJ 33.

contemplation and ambit of Article 14(1)(b) read with section 1(a) of Part II of the Second Schedule to the FC. To be a Malaysian citizen by operation of law under the provisions of Article 14(1)(b) read with section 1(a) of Part II of the Second Schedule to the FC, the person must be born in Malaysia and one of his biological parents is at the time of his birth, either a Malaysian citizen or a person who is permanently resident in Malaysia.

[60] In *Chan Tai Ern Bermillo (Seorang Di Bawah Umur Dan Membawa Tindakan Ini Melalui Bapa Yang Sah Serta Sahabat Wakilnya Plaintf Kedua) & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors*,[29] the Federal Court had to determine: (a) whether a child born out of wedlock could be regarded as a legitimate child for the purpose of Article 14(1)(b) of the FC, once his parents marry each other after he was born, hence section 17 of Part III of the Second Schedule was not applicable ("the first question"); and (b) whether a child who had obtained a foreign citizenship was deprived of Malaysian citizenship ("the second question").

[61] In this case, there was an appeal against the decision of the trial court in dismissing the appellants' originating summons for a declaration that the first appellant was a citizen of Malaysia pursuant to Article 14(1)(b) of the FC or under Article 15(2) of the FC. The second appellant, a citizen of Malaysia was the biological father of the first appellant whereas the first appellant's mother was a citizen of the Republic of the Philippines. The first appellant was born on September 27, 2010 in the Philippines, but his biological parents only legally registered their marriage in Malaysia on February 22, 2011.

[62] Here the Federal Court held, amongst others, that:

(i) the child was born out of wedlock, and thus was illegitimate at the time of his birth. Section 17 of Part III of the Second Schedule specifically stipulated that "father" in relation to a person who was illegitimate referred to his mother. As the mother of the first appellant was a citizen of the Republic of the Philippines, hence one of the qualifications of the citizenship by operation of law that the father, in this case, the mother, was a Malaysian citizen

29 [2020] 3 MLJ 634.

at the time of the first appellant's birth, by plain reading of the provisions of the FC, had not been fulfilled.

(ii) The wording of section 1(b) of Part II of the Second Schedule was very clear. It talked about every person born outside the Federation "whose father as at the time of the birth a citizen". The emphasis was "at the time of the child's birth". Legitimacy of the child under sections 3 and 4 of the Legitimacy Act 1961 ("the LA 1961") could not be retrospective as s 4 of the same clearly stated that the child was rendered legitimate "from the prescribed date or from the date of the marriage, whichever is the later". It means the child was only deemed legitimate on the date of the marriage of his parents and not from the date of his birth.

[63] In another Federal Court decision of *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors ("CTEB & Anor")* [30] where the first appellant was a minor male who was born in the Republic of Philippines and was born out of wedlock (approximately four months before the marriage took place). Here the second appellant is the first appellant's father (and litigation representative) and was at all material times a Malaysian citizen who was born in Alor Setar, Kedah on March 13, 1965. It was also undisputed that the first appellant was subsequently legitimated under section 4 of the Legitimacy Act 1961 ("LA 1961").

[64] The appellants had, inter alia, sought a declaration that the first appellant was a citizen of Malaysia by operation of law pursuant to Article 14(1)(b) read with section 1(b) of Part II of the Second Schedule to the FC. From the lengthy grounds it was, inter alia, held that the word "father" in section 1(b) of Part II of the Second Schedule and anywhere else relevant to the context of the appeal ought to be construed as meaning "biological father". Thus, the legitimacy status of any person claiming citizenship under Article 14(1)(b) read together with Part II is an irrelevant factor in cases where paternity is known and the said biological father is a citizen of Malaysia and has met the rest of the requirements of section 1(b) of Part II.

30 [2021] MLJU 887.

[65] In short the answers to the questions posed to the Federal Court which were ultimately relevant are as follows:

Question 2

Whether the words "born outside the Federation" in Part II Section 1(b) of the Second Schedule to the Federal Constitution can be properly read as requiring that the child not hold any other citizenship and/or passport or be stateless to qualify for Malaysian citizenship by operation of law?

Answer

Negative. So long as the elements of paragraph (b) of Section 1 of Part II are satisfied, the child is qualified for Malaysian citizenship by operation of law.

Question 3

Whether the fact that the biological parents of the child who were not married to each other at the time of the child's birth but subsequently marry, disqualifies the child from acquiring a Malaysian citizenship by operation of law pursuant to Article 14(1)(b) and Part II Section 1(b) of the Second Schedule of the Federal Constitution?

Answer

Negative. It is my judgment that the legitimacy status of any person claiming to be entitled to citizenship by operation of law is irrelevant in cases where the identity of the biological father is known or has been established. This is the embodiment of the principle of *jus sanguinis* embedded in section 1(b) of Part II.

[66] In 2022, the Federal Court in *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia*[31] had the opportunity, once again, to decide on the question of the entitlement of a child, who was abandoned at birth and later adopted, to Malaysian citizenship by operation of law.

31 [2022] 1 MLJ 71.

[67] In this case, the appellants, in addition to being joint litigation representatives, were the adoptive parents of CYM ("the child"). The appellants had, in the High Court, filed an application for judicial review against the respondent seeking, inter alia, a declaratory order that the child was born in Malaysia and was a Malaysian citizen by operation of law, pursuant to Article 14(1)(b) read with sections 1(e) and 2(3) of Part II of the Second Schedule to the FC. In support of their application, the appellants argued that: (a) since the child was an abandoned child, there was no proof that he was a citizen of any other country, entitling him to citizenship under section 1(e); (b) the word "parents" in section 1(a) of Part II of the Second Schedule to the FC ought to be construed liberally to include adoptive parents; and (c) the provisions of the Adoption Act 1952, which confer full legal rights on adoptive parents and extinguish all legal connection to the biological parents, ought to be read into section 1(a) of Part II of the Second Schedule to the FC. The fulcrum of the judicial review application in this case was the decision of the respondent to issue a birth certificate ("third birth certificate") to the child stating that the child was not a citizen of Malaysia.

[68] For clarity, section 19B of Part III of the Second Schedule to the FC states:

> 19B. For the purposes of Part I and II of this Schedule any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth.

[69] Here the Federal Court held:

(a) Section 1(a) of Part II very clearly adopted the concepts of *jus soli* (citizenship based on birthplace) and *jus sanguinis* (citizenship based on blood relation). Section 19B in turn contained two presumptions – one of which related to *jus sanguinis*. The operative words in section 19B of Part III are "any newborn child found exposed in any place". This section covers newborn children who were left and discovered in a place without any trace of their biological parents. Judicial notice was taken on the harsh realities of life: this included newborn children left abandoned near dumpsites, baby hatches, public or school toilets, places of

worship and so on. A literal meaning of "exposed" suggested a newborn child who was "discovered" exposed at any of these locations.

(b) The answer to that assertion was that the follow up words in section 19B are contained in the phrase "until the contrary is shown". Meaning, any person who claimed that the child was not "found exposed" or otherwise abandoned by the mother as the case may be, bore the burden of showing the identity of the mother and more importantly, that the mother was not permanently resident at the place of the finding. On the facts, there was no evidence to suggest that the appellants were lying about the fact of abandonment. Given that the child was born in the said hospital, surely the respondent had the means to verify from the hospital's admission records, the identity of the child's biological mother, if not the father. Therefore, as the record stood, the respondent had not been able to discharge that burden. No affidavit was deposed nor a modicum of evidence adduced to suggest that the narrative provided by the appellants was inherently incredible or even false or untrue. Therefore, the respondent had not been able to discharge that burden.

(c) Once it was shown or averred that a new born child is "found exposed", or abandoned, two things were presumed: (a) the child was born to a mother who was permanently resident at the place where the finding was made (*jus sanguinis* presumption); and (b) the date of the finding was taken as the date of the birth. Once section 19B was invoked, any party challenging any of these presumptions must either show that: (i) the child was not born of a mother permanently resident at the place where the new born child was found; or (ii) the date of the finding was not the date of the birth. The presumption, once it applied, automatically served to complete the *jus sanguinis* (parenthood) aspect of section 1(a) unless anyone claiming to the contrary could prove otherwise.

Summary of case laws

[70] With respect, the takeaway from the above cases, is that:

(i) It would appear from the majority of the cases referred to that the burden of proving statelessness is placed on the claimants

applying for citizenship and that all available remedies must be explored before an application for citizenship can be claimed.

(ii) The court would have to examine the factual matrix of each case.

(iii) The burden is on the applicants to show to the court that the child was not born a citizen of any country.

(iv) Section 9 of the Adoption Act 1952, does not confer citizenship on an adopted child.

(v) Section 17 of Part III of the Second Schedule to the FC, has been interpreted to mean that in a case of an illegitimate child, the word "parent" refers to his mother and not the biological father.

(vi) The word "parent" in Article 14 refers to a lawful parent in a recognised marriage in the Federation.

(vii) Section 4 of the LA 1961 is not retrospective and means that a child is only deemed legitimate on the date of the marriage of his parents and not from the date of his birth.

(viii) There is a requirement to assess whether a stateless person has explored obtaining alternative citizenship.

(ix) Article 14(1)(b) of the FC encapsulates the requirement of citizenship by *jus soli* i.e. place of birth; while section 1(e) of Part II of the Second Schedule to the FC ("not born a citizen of any country") encapsulates the requirement of citizenship by *jus sanguinis* i.e. by blood or lineage.

(x) To be a Malaysian citizen by operation of law under Article 14(1)(b) read with section 1(a) of Part II of the Second Schedule to the FC, the person must be born in Malaysia and one of his biological parents must, at the time of the person's birth, be either a Malaysian citizen or a person who was permanently resident in Malaysia.

(xi) A child born out of wedlock previously could not be regarded as a legitimate child for the purpose of Article 14(1)(b) of the FC but the Federal Court decision of *CTEB & Anor* has now stated

otherwise, i.e. that the legitimacy status of any person claiming to be entitled to citizenship by operation of law is irrelevant in cases where the identity of the biological father is known or has been established.

(xii) Malaysian citizenship is not conferred on an adopted child even though one of his adoptive parents is a Malaysian citizen or a person permanently resident in Malaysia by operation of law, within the contemplation and ambit of Article 14(1)(b) read with section 1(a) of Part II of the Second Schedule to the FC.

(xiii) Section 1(a) of Part II adopts the concepts of *jus soli* (citizenship based on birthplace) and *jus sanguinis* (citizenship based on blood relation).

(xiv) Section 19B of Part III contains two presumptions – one of which related to *jus sanguinis*. The operative words in section 19B are "any newborn child found exposed in any place". This section covers newborn children who were left and discovered in a place without any trace of their biological parents. The follow up words in section 19B are contained in the phrase "until the contrary is shown". Meaning, any person who claimed that the child was not "found exposed" or otherwise abandoned by the mother as the case may be, bore the burden of showing the identity of the mother and more importantly, that the mother was not permanently resident at the place of the finding.

(xv) Following from the above, once a newborn child is "found exposed", or abandoned, two things are presumed: (a) the child was born to a mother who was permanently resident at the place where the finding was made (*jus sanguinis* presumption); and (b) the date of the finding is taken as the date of the birth.

(xvi) The UDHR is merely a declaration, thus it is not a legally binding document for the court to give effect and that international treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law.

Conclusion

[71] To surmise, there must be clear and inclusive citizenship laws that prevent statelessness. The current laws have to be reviewed and amended to prevent impacts of discriminatory nationality laws and statelessness as well as a standard procedure in handling the hurdles of applying for citizenship. There must also be a common and consistent standard operating procedures on citizenship applications and the issue of statelessness must be seen in the context of the realities on the ground. It is hoped that the authorities should do more data gathering and studies before deciding to make the proposed amendments to the FC.

[72] From the numerous articles and data provided, it is clear that stateless persons are not necessarily migrants or refugees of foreigners who have no documents but can, and do cover, undocumented children born in Malaysia who may have never left the country, who through no fault of their own have been abandoned at birth and whose parents are unknown. Without doubt there is a correlation between statelessness and the absence of legal identification documents. As aptly put by Datuk Dr Hartini Zainuddin, a child's rights activist and co-founder of Yayasan Chow Kit, in the same article mentioned,[32] "... *whether you choose to acknowledge them or try to wave a magic wand and make the numbers disappear, they are still here*."

[73] The risks of stateless children being discriminated, humiliated, exploited and abused are all too obvious. It cannot be understated that there are also numerous challenges and struggles faced by those who are stateless as they have to live with the uncertainties of their future all their lives. They are often portrayed as threats and even viewed as a national security issue.

[74] It is hoped that more advocacy and awareness programmes are put in place by not only the various NGOs but also the authorities concerned to create a better understanding and awareness of the issue of statelessness and the possible actions to address this issue especially

32 *Malay Mail* online, "Malaysia's regressive citizenship amendments risk giving 'Little Napoleons' power to decide who gets to be a Malaysian, lawyer says" (January 23, 2024).

with regard to resolving the documentation and issues pertaining to stateless children. The reality of the actual situation with regard to statelessness must be addressed.

[75] At the time of writing this article, I have been made aware that our apex court has set of June 25, 2024 on the issue of citizenship of children born abroad to Malaysian mothers married to foreign men. This of course will be of immense help to determine the direction this country will take on the issues raised herein, although it must be said that the apex court in Malaysia have now recently recognised that citizenship comprises a fundamental aspect of nationhood and that fundamental rights and provisions as enshrined in the FC must be construed as broadly as possible while provisions which limit those rights must be construed as narrowly as possible.[33]

[76] It can be seen from this article that the stateless children have no legal identity and may forever be in the dark abyss of the laws. The government of the day and indeed Parliament holds the power as well as the ability to reform and rectify any injustice which these stateless people have long endured. It is truly hoped that much will be done particularly in respect of the improvement to relevant laws and framework on nationality as well as birth registration, to say the least, to ensure that the "faceless" do not remain unrecognised and undocumented for much longer. This must of course be followed by proper and comprehensive policies for the implementation of such laws so as not to render the laws to be incohesive and impractical.

[77] There must be some light at the end of the tunnel so that those affected especially the rights of the children and the children themselves are not kept or swept hidden away in some dark corner of the fringes of our society. The privilege of obtaining a Malaysian citizenship for such children who are stateless must be seriously considered. They deserve their legal identity and to be legally recognised, and at the very least their basic legal rights afforded to them as well as to be given a fair chance to become citizens of the only nation they call home which they may have resided in all their lives and in which they may breathe their last breath as well. Stateless

33 See https://www.astroawani.com/berita-malaysia/kes-kewarganegaraan-anak-lahir-di-luar-negara-oleh-ibu-rakyat-malaysia-capai-penyelesaian-511866.

persons and in particular the stateless children are often marginalised and suffer in poverty.

[78] No doubt that strong political will is required to address these issues taking into account social, political and economic reasons so that the laws can be properly formulated or amended to curtail statelessness especially amongst children. All children have a right to a legal identity.

Exemplary Damages and Custodial Deaths: Recent Developments

by

*Justice Alice Loke Yee Ching**

Introduction

[1] *Ubi jus ibi remedium* is a Latin legal maxim that translates to "where there is a right, there is a remedy." One of the earliest pronouncements of the doctrine was in *Othman & Anor v Mek*,[1] where the Federal Court held:

> ... it is the duty of the courts to exercise the utmost diligence in applying the maxim *jus ibi remedium*, so that justice shall be done, unless we are strictly constrained by law to uphold any decision which results in injustice.

[2] The courts have, where it is appropriate in law, applied the maxim to grant the necessary reliefs as meets the justice of the case. This stems from a disinclination to leave a party bereft of any remedy for the wrong suffered, but to mould the reliefs which would meet the ends of justice.[2]

[3] The law governing the award of damages for personal injuries causing death is housed in sections 7 and 8 of the Civil Law Act 1956 ("CLA 1956"). Judicial thinking has not always concurred on the application and scope of these statutory provisions as new and complex situations arise for its determination, particularly custodial deaths.

[4] Justice Nallini, FCJ in *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l*

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* Judge of the High Court in Malaya.

1 [1972] 2 MLJ 158.

2 See *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.

Perumal, deceased) & Anor[3] decried custodial deaths as the most reprehensible of wrongs in a civilised society. This article proposes to discuss the approach the courts have taken in awarding damages in instances of custodial deaths and deaths resulting from wrongful acts of enforcement officers, particularly the award of exemplary damages. There has been considerable divergent views on the question whether the remedies provided in sections 7 and 8 of the CLA 1956 is exhaustive in all instances of death, regardless of the manner death is caused.

Common law position and the legislative reforms

[5] Death, apart from the attendant emotions that follow, can give rise to pecuniary deprivations to the dependants. In common law, until the changes brought about by legislation, death did not give rise to any civil remedy. If death results from the wrongful actions of a third party, the consequences lay in the domain of criminal law.

[6] This position was premised on two principles. The first is that death cannot be complained of as an injury. The killing of a person is not a ground for an action for damages. The second is the maxim, *actio personalis moritur cum persona* – any surviving cause of action is buried with the deceased.

[7] The harshness of the law was mitigated by legislative reforms, changing significantly the common law position in two ways. The Fatal Accidents Act 1846 (or commonly known as Lord Campbell's Act) introduced a new cause of action in favour of certain dependants of the deceased person. The second piece of legislation, the Law Reform (Miscellaneous Provisions) Act 1934 provided for the cause of action to survive beyond the death of the deceased, by allowing it to vest in his estate.

Sections 7 and 8 of the Civil Law Act 1956

[8] The legal developments in England allowing for the recovery of damages for personal injuries resulting in death, were incorporated into the CLA 1956. Sections 7 and 8 introduced the statutory cause of action for dependants and the estate respectively, allowing for damages to be claimed for their benefit.

3 [2021] 3 MLJ 365.

[9] The recognition that the common law position had changed with legislation in Malaysia was succinctly stated by Salleh Abbas FJ (as he then was) in *Sambu Pernas Construction & Anor v Pitchakkaran*:[4]

> At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore, no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough C.J. in *Baker v Bolton* (1808) 1 Camp 493 ruled that "in a civil court the death of a human being could not be complained of as an injury." The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: *"actio personalis moritur cum persona"*. The first principle which regarded death as not giving rise to any cause of action was rectified by section 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in sections 7 and 8 of our Civil Law Act, 1956.
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> Had it not been for sections 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular section 7, his case must stand and fall on the basis of these sections.

[10] Section 7 allows the statutory dependants to claim for pecuniary losses consequent upon the death of the deceased. They are essentially loss of support in the form of earnings of the deceased, funeral expenses, a fixed sum for bereavement and reasonable expenses incurred following the deceased's death. Section 8 on the other hand allows the estate to step into the shoes of the deceased to claim in respect of any cause of action which the deceased could have claimed, but for his death.

[11] Thus, where the event of death once denied any claim to be made arising from it, has now changed with sections 7 and 8.

4 [1982] 1 MLJ 269.

Recent developments challenging the scope and application of sections 7 and 8

[12] In recent years, the instances of death in custody has been disquieting. Public outcry in respect of such deaths has been heard, leading to the establishment of a non-governmental organisation such as Eliminating Deaths and Abuse in Custody Together, or EDICT as is commonly known. In 2022, the Home Ministry announced that all cases of death in police custody will be investigated by the Criminal Investigation Unit on Deaths in Custody under the Bukit Aman Integrity and Standard Compliance Department. Claims arising from custodial deaths have been filed in the courts, by dependants of the deceased. There is also a notable increase in suits filed alleging use of excessive force by police officers in the exercise of their public duties resulting in death. Invariably, in all these cases, a claim for aggravated and exemplary damages is sought against the tortfeasors.

[13] Unlike other heads of damages which serve to compensate the victim of tort, exemplary damages are awarded when there is oppressive, arbitrary or unconstitutional conduct by the servants of the government.[5] Aggravated damages on the other hand, is a redress where the injury to the claimant's feelings is increased by the flagrancy, malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour.

[14] Exemplary damages are expressly excluded in an estate claim under section 8, whereas section 7 is silent as to the award of both exemplary and aggravated damages.

[15] New situations call for new approaches to be taken by the courts if the principle of *ubi jus ibi remedium* is to have any meaning. As a result of the suits that have been filed, the previously held views as to the scope of sections 7 and 8 were tested.

[16] In *Mariayee & Anor v Mohamed Nasir & Anor*,[6] the plaintiffs were the administrators of the estate of Abel John the deceased, who was riding a motorcycle when he was shot and killed by the police at a road block after failing to stop when ordered to do so. The claim was made for the benefit of his dependants under section 7 of the CLA

5 See *Rookes v Barnard & Ors* [1964] AC 1129.
6 [1985] 1 MLJ 427.

1956. In view of the circumstances in which he was shot, a claim was brought for exemplary damages. The Federal Court was of the view that such damages were not recoverable in a dependency claim. It held:

> Section 8(2)(a) of the Civil Law Act 1956 enacts that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any exemplary damages. There is no reason, in our opinion, why this provision should not be extended to cover a claim made for and on behalf of the dependants of the deceased.

[17] This position held sway until the 21st century when inroads were made in several cases where the courts did not hesitate to award aggravated and exemplary damages notwithstanding that the suits were brought under sections 7 and 8. The circumstances in which the deceased died were compelling factors.

[18] In *Suzana bt Md Aris (claiming as administrator of the estate and a dependant of Mohd Anuar bin Sharip, deceased) v DSP Ishak bin Hussain & Ors ("Suzana bt Md Aris")*,[7] a claim in negligence was brought by the wife and children of the deceased. The deceased was found to have vomited blood and it was doubtful whether medical attention was given to him at the material time. The court held the defendants to be in breach of their duty of care when appropriate medical care failed to be extended to the deceased whilst he was in their custody.

[19] The learned judge found no legal impediment in sections 7 and 8 to allow an award of RM500,000 as exemplary damages. It was held:

> In a case where a person in police custody is deprived of medical attention and assistance, that person is deprived of his life while his liberty is being deprived by law in the case of a lawful arrest and detention. It is all the sadder when a person is being deprived of both liberty and life even before he is charged for an offence, tried and convicted. Even then it is in the most serious of crime that a person is deprived of his life in accordance with the law.

[20] The award of exemplary damages was also termed as vindicatory damages by the High Court, to affirm the existence of the deceased's right to life which had been violated, by providing compensation.

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7 [2011] 1 MLJ 107.

[21] This approach to awarding damages outside the statutory provisions of sections 7 and 8 was also taken in *Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan* ("*Ghaur Chandram*").[8] The deceased was detained under a remand order in the Sungei Buloh prison. A fight broke out among the detainees whilst receiving their food ration for the day. The deceased was beaten, and died from his injuries.

[22] The father of the deceased brought a dependency and estate claim against the prison authorities. The High Court made an award of RM100,000 for general damages. In an appeal by the government against such award on the grounds that section 7 makes no provision for such an award, the Court of Appeal nonetheless upheld the award. The court was of the view that the plaintiff ought to be awarded damages for pain and suffering for the grief and emotional pain consequent upon being deprived of the love and companionship of his son. The court expressed that such an award is independent of the loss of support awarded to the plaintiff in a dependency claim under section 7.

[23] The above case illustrates the readiness of the Court of Appeal to make an award notwithstanding that it was outside the ambit of section 7, when warranted by the factual situation. On appeal to the Federal Court however, the decision was reversed.[9] More will be said about the Federal Court decision later.

[24] Following the decision of *Suzana bt Md Aris* as aforementioned, another High Court in *N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors* ("*Kugan*")[10] had no hesitation to award exemplary damages without considering itself limited by the statutory provisions of sections 7 and 8.

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8 [2016] 3 CLJ 210.

9 See *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.

10 [2014] 8 MLJ 625, HC.

[25] The facts in Kugan's case were horrific. The deceased was detained on suspicion of having stolen a motor car. He was kept in the police lock up for six days until his death. The body of the deceased bore extensive marks of beating and other severe physical trauma. Two post-mortems were conducted. The first autopsy found 22 categories of external wounds on the deceased and the cause of death was stated as "*pulmonary edema*" which was related to "*an abnormal build-up of fluid in the air sacs of the lungs, which leads to shortness of breath*".

[26] Relying on the first autopsy findings, the then Inspector General of Police gave a press statement stating that the deceased had died from water in the lungs. The truth of the press statement was disputed, and the plaintiff alleged a cover up. The doctor who performed the first autopsy was subsequently found guilty of professional misconduct in the preparation of the first autopsy report by the Malaysian Medical Council. He was reprimanded.

[27] Refusing to accept the findings of the first post mortem, a second post mortem was commissioned by the family of the deceased. The autopsy found that the injuries suffered by the deceased turned out to be more extensive with 45 categories of external injuries and a wide range of internal injuries. It concluded that the cause of death of the deceased was acute renal failure due to rhabdomyolysis caused by blunt trauma to skeletal muscles. The muscle injuries were found to have been committed by one of the defendants. He was charged and convicted of causing grievous hurt to the deceased.

[28] The mother of the deceased sued for aggravated, exemplary, vindicatory and special damages, premised on the tort of negligence, breach of statutory duties for unlawfully causing the death of the deceased, misfeasance of the public office, assault and battery and false imprisonment.

[29] The High Court found the deceased to have been brutally assaulted and tortured. In a scathing judgment censuring the acts of the tortfeasors, the High Court held that the appalling circumstances in which the deceased died was tantamount to a violation of his constitutional right to life. Granting remedies in such instances was consonant with the rule of law. There was no legal impediment to awarding exemplary damages.

[30] The rationale for allowing exemplary damages of RM300,000 are as below:

> The court's discretion should not be limited to s 8 of the Civil Law Act 1956 as this court must be able to apply common law on the factual matrix in the present case to award exemplary damages. As stated above, exemplary damages, are given in cases of "conscious wrongdoing in contumelious disregard of another's rights" which has been described as vindictive, retributory, punitive.
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> …
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> In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct.
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> …
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> If police officers in a police station act mercilessly, torture and cause death to detainees while under detention in lockup or police station, the defendants should be ordered to pay exemplary damages to the claimant or the family members for the deprivation of life of the deceased at the hands of the police officers. Custodial death is perhaps one of the worst crime in a civilized society governed by the rule of law. If police officers become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself. No civilized nation can permit that to happen as the safety of the people is the supreme law. (*Salus popoli supreme/ lex* – the Latin maxim). Public policy demands that police officers who are found guilty and responsible for death in police custody should be ordered to pay exemplary damages. The action of police officers who are involved in interrogation must be right, just and fair as using any form of torture for extorting any kind of information or confession would neither be right nor just or fair, and must be viewed with contempt for being in violation of art 5 of the Federal Constitution. The quantum of exemplary damages will, of course, depend on the peculiar facts of the case and there can be no "straight jacket formula".
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> …
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> The function of the law is to enable rights or grievances to be vindicated and of course and naturally to provide remedies whenever a tortious act is committed on them.

[31] On appeal to the Court of Appeal, the award of exemplary damages and the basis for such an award, was upheld.[11] The Court of Appeal found no preclusion to making an award for exemplary damages where there is a breach of constitutional right to life and liberty under Articles 5 and 8 of the Federal Constitution.

[32] The fact that a suit was brought under section 8 of the CLA which clearly prohibits the award of exemplary damages did not present any legal hurdle. The Court of Appeal's views were as follows:

> Both articles of the Federal Constitution speak for themselves and need no further explanation from us. The basic premise of these articles is universal and that is every human life is sacred and every citizen of this country, including suspects of crimes or convicted criminals, is expected to be treated with human decency during their detention and the protection of the law. In the context of this case, a person's life was deprived of or taken away not in accordance with law as commanded by the Federal Constitution but by means which did not fit any semblance of human decency.
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> …
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> We find that where there is a breach of a Constitutional right by a public authority, s 8(2) of the Civil Law Act does not apply and the courts cannot be barred from awarding exemplary damages. Our view is fortified by the fact that in 1956, the year in which the Civil Law Act was legislated, there was no Federal Constitution.
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> …
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> We further say that the public tort of public misfeasance had not been developed yet in 1956 and it can be said that when the Civil Law Act was enacted, it was only in respect of private tortious actions. Hence, we are of the view that s 8 of the Civil Law Act only applies to private torts in so far as the prohibition of awarding exemplary damages.

[33] A further reason was given by the Court of Appeal to justify its refusal to observe the bar in section 8. Exemplary damages are prohibited only when the claim involves "private torts". Tortious claims against public authorities or persons exercising public duties

11 See *Datuk Seri Khalid Abu Bakar & Ors v N Indra P Nallathamby (The Administrator of The Estate and Dependant of Kugan a/l Ananthan, deceased) & Another Appeal* [2015] 1 MLJ 353.

and functions do not fall within its purview. Interestingly, section 8 makes no distinction between a private law cause of action and that which is public in nature.

[34] The same approach was taken by the Court of Appeal in *Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors* ("*Nurasmira*").[12] Whilst patrolling Section 13 Shah Alam, the defendants noticed two cars travelling together in a suspicious manner. The deceased was in one of the cars together with three others. The two vehicles were ordered to stop. The police were shot at and the defendants returned fire. All the persons in the car including the deceased were killed.

[35] The plaintiffs brought an action under sections 7 and 8 of the CLA. 1956 seeking aggravated and exemplary damages. The High Court dismissed the claim as liability was not established, on the evidence. On appeal, the Court of Appeal reversed the decision and proceeded to award damages for loss of support claimed under section 7. In addition, it also awarded exemplary damages of RM300,000.

[36] The Court of Appeal affirmed its previous views in *Kugan*. The compensation in sections 7 and 8 are essentially remedies in private law causes of action. It has no application when there is a breach of fundamental rights in public law actions. It justified the award of exemplary damages as follows:

> Sections 7 and 8 of the Civil Law Act have everything to do with common law cause of action, in essence tort, and comes within the jurisprudence of private law remedy. And s 8(2) does not pave way for a claim of exemplary damages. When a complaint is related to breach of fundamental guarantee under the Federal Constitution, it attracts public law relief and there are a number of authorities to support the proposition that exemplary damages is permissible.
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> …
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> From the reading of Indian Supreme Court decision as well as the House of Lords (PC) decision in *Ashley*'s, it is trite that courts as guardian of the Constitution are bound to arrest any form of breach of fundamental guarantees by providing exemplary damages as a tool for relief which has been extracted and extended from the

12 [2015] 3 MLJ 105.

decision in *Rookes v Barnard*. In consequence, a bar to claim exemplary damages under Civil Law Act in private law remedy will not apply in the arena of public law relief as well as remedy.

[37] The decisions of the Court of Appeal in *Kugan* and *Nurasmira* were appealed to the Federal Court. The issue brought for the determination of the Federal Court, broadly stated was whether in a claim brought under section 8 an award of exemplary damages can be made, in the face of an express prohibition in the provision. *Ghaur Chandram* was also appealed on the ground that section 7 being a dependency claim, does not permit an award for pain and suffering to the dependants. Only damages stipulated therein is allowed. All the three appeals were directed to be heard together.

[38] Meanwhile, another custodial death case fell to be determined by the Kuala Lumpur High Court. In *Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors* ("*Selvi*")[13] the deceased was detained by the police on suspicion of being involved in the kidnapping of a new born baby. The deceased was later found dead in his cell. A post-mortem showed that the cause of death was hypertensive heart disease. An inquest found that Chandran died of hypertensive heart disease and that his custodians had not only denied him of his daily medication for a pre-existing medical condition but also of food, drink, sleep and medical treatment. The plaintiffs contended that the deceased died as a result of the neglect on the part of the police and premised their claim under sections 7 and 8 for special damages, bereavement, loss of dependency, general and aggravated/exemplary damages.

[39] The High Court found the defendants liable in both negligence and public misfeasance in failing to send the deceased to the hospital for treatment. Relying on the Court of Appeal's decision in *Kugan* and *Nurasmira*, the High Court held that based on the current state of the law, exemplary damages are permissible where public misfeasance and violation of constitutional rights have been established. It further held that if the facts support a claim for exemplary damages, then there is no legal impediment in awarding exemplary damages. RM200,000 was awarded as exemplary damages.

13 [2017] 9 MLJ 300.

[40] The Federal Court then delivered its decision for *Ghaur Chandram*, *Nurasmira* and *Kugan*. It was a majority decision, with one dissenting view from a panel comprising five judges.

[41] The Federal Court held that the clear provisions of sections 7 and 8 must be given effect to in a claim made under these provisions in the event of death caused by the tortfeasor. Bearing in mind the legislative history in which these provisions were enacted, which was to mitigate the harshness of the common law position, the remedies available lay only within the express provision of the law.

[42] In answering the question whether a claim for pain and suffering can be brought by the dependants of *Ghaur Chandram*, the majority judgment held:

> In other words, as the right of the dependants of a deceased person and the estate of a deceased person to claim for damages is conferred by statute, that claim must be determined strictly within the confines of the statute.
>
> As s 7 of the CLA is a provision enabling the specified dependants of a deceased person who came by his death due to the wrongful act, neglect or default of another to claim for damages in their own right to compensate them for loss of support due to such death, a claim for the pain and suffering of the specified dependants (or even of the deceased person himself) is certainly beyond the purview of the section.

[43] The Federal Court also set aside the award of exemplary damages made in *Kugan* and *Nurasmira*. The principal reason for disallowing the award for exemplary damages was as follows:

> As was explained by this court in *Sambu Pernas,* causes of action vested in a person survive his death solely due to s 8 of the CLA. Such survival is subject to the conditions set out in that section, one of which is that damages which can be awarded for the benefit of the estate of such deceased person cannot include exemplary damages. As was also stated in *Sambu Pernas*, the claim of a person claiming on behalf of the estate of a deceased person under s 8 must "stand and fall" on the basis of that section.

[44] The minority decision is worth mentioning for the robust stand it took in instances where death resulted from a violation of one's constitutional right. Justice Zainun Ali FCJ held:

My view is that the said section has no application at all to cases particularly those involving custodial deaths for the following reasons:

(a) the CLA, vide ss 7 and 8 deal with "fatal accidents" as a consequence of wrongful acts or omissions and prescribe the types and limits of compensation payable for the death of the deceased to the estate. It deals with private tort actions. Perhaps more pertinently, it deals with deaths arising by way of "accidents". It does not deal with instances where an individual is killed while in protective custody – since such deaths do not fall within the definition of "accidents";

(b) the CLA deals with private tort actions. A custodial death (apart from giving rise to criminal repercussions) encompass a public law element;

(c) the CLA was brought into force prior to the Federal Constitution and cannot be utilised to construe or limit fundamental rights set out in the Federal Constitution; and

(d) it is not applicable to constitutional torts – which is what custodial death cases actually amount to.

[45] Her Ladyship found it incongruous where if the victim of a tort dies, the tortfeasor escapes liability for exemplary damages, but if he survives, the wrongdoer can be liable. She commented:

> Quite apart from that, if Section 8(2) of the Civil Law Act 1956 is read to prohibit exemplary damages for breaches of constitutional rights and public misfeasance causing death, we are faced with a bizarre situation. The worst possible case, ie death, would entitle the wrongdoer to escape liability for exemplary damages. In other words, the law would appear to be sending an outrageous message to those who disregard constitutional right to life – *it is better to kill then to just injure*. This goes directly against the rationale for maintaining exemplary damages.

[46] She thus took the view that the constitutional right to life entrenched in Article 5 thus prevails over any provision of law which restricts the remedy to be given where the right is violated.

[47] Clearly, the minority decision agreed with the unanimous decisions of the Court of Appeal in *Kugan* and *Nurasmira*.

[48] Soon after the Federal Court's decision, the *Selvi* appeal was heard in the Court of Appeal.[14] However, the award of exemplary damages in an estate claim was not dealt with as the entitlement to the award was not the subject of the appeal before the court. The government's appeal was only on the quantum awarded for exemplary damages.

[49] The government then appealed the *Selvi* decision to the Federal Court, after having successfully obtained leave on the question whether section 8(2) is an absolute bar to the award of exemplary damages. The corollary is that exemplary damages is prohibited regardless of the circumstances in which death is caused.

[50] By a majority of 4:1, the Federal Court answered the question in the affirmative. It held that the prohibition as to exemplary damages is not unique to Malaysia as the same exists in other jurisdictions such as the United Kingdom, Singapore, Australia and New Zealand.

[51] The Federal Court arrived at its decision by adopting a statutory interpretation approach to the issue. In dealing with the argument that the CLA 1956 is a pre-Merdeka law enacted before the Federal Constitution, the Federal Court found no conflict to warrant exercising its powers of modification pursuant to Article 160(2) of the Federal Constitution. Instead it held that the express words of the statute providing for the prohibition against exemplary damages must be given effect to.

[52] The reasoning of the Federal Court was this:

> Stating the obvious, our task in this appeal is simple enough, which is, interpreting s 8(2) whose words are plain and unambiguous. The process of that interpretation, however is not equally so, for as elucidated by Zainun Ali, FCJ in *Kugan*'s case, our CLA is a pre-Merdeka law, which means that constitutional right to life under art 5(1) of the Federal Constitution was not in the contemplation of the legislature when the CLA, specifically when s 8(2) was enacted. Nevertheless, the legal principle governing statutory interpretation is well settled in that where the words of the statute is clear and unambiguous, the court must give effect to its natural and ordinary meaning. The often quoted statement of Lord Reid in *Pinner v*

14 See *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (administrator of the estate and dependant of Chandran a/l Perumal, deceased) & Anor* [2018] 4 MLJ 133.

Everett [1969] 1 WLR 1266 at p 1273 on that principle is reproduced below:

> *"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of the word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."*

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

> *"The plaintiff must himself have been the victim of the conduct of the defendant which merits punishment*: he can only profit from the windfall if the wind was blowing his way." (Emphasis added.)

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

[53] Thus, the majority decision in *Kugan*'s case was re-affirmed. However, the Federal Court did not leave the plaintiff without any recourse. It examined the authorities which have enunciated the legal principles for an award of aggravated damages and concluded thus:

> What Lord Neuberger said in *Ashley*'s case at p 996 para 102 is equally instructive on this point and is reproduced below:
>
> "[102] *Aggravated damages are awarded for* ***feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed****, or in which its aftermath was subsequently handled by the defendant. (Emphasis added.)*

> In this case, there is no denying the exacerbation of the above-mentioned feelings by the very fact that the deceased had died due to the inaction of the ones who were there to enforce the law."

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

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

[54] The minority decision however, took the same approach as the minority judgment in *Kugan*. Justice Nallini, FCJ affirmed the sanctity of human life guaranteed in Article 5 of the Federal Constitution. This right cannot be denied even if a person is in custody. It was untenable in instances of custodial deaths that there is no remedy in a civil suit except for the provisions of sections 7 and 8. In allowing the claim for exemplary damages, she gave her reasons as follows:

> although exemplary damages are not available to Chandran's estate under this private law cause of action framed in tort under ss 7 and 8 CLA, such damages are available on the present factual matrix, to his estate under his claim premised on the infringement of his constitutional right to life under art 5(1) of the FC. The latter claim is a public law claim based on the FC and for which redress is available under the provisions of the CJA;
>
> …
>
> there is redress available for the infringement of a fundamental right under art 5(1) of the FC. It is expressly detailed under Schedule 1 to para 25 of the Courts of Judicature Act 1964 which stipulates that

the remedies set out there are for, inter alia, the purpose of enforcing fundamental rights under Part II of the FC.

Comments

[55] It cannot be disputed that custodial deaths or death from excessive use of enforcement powers is anathema to a civil society which upholds the rule of law. The approach of the courts albeit decisions awarding exemplary damages notwithstanding the restriction and prohibition in sections 7 and 8 is testimony to the courts upholding the *ubi jus ibi remedium* principle by providing redress.

[56] The approach however, raises some questions. The legislative history of sections 7 and 8 cannot be overlooked as it was enacted to overcome the common law position where death does not afford a civil remedy. Therefore, where the written law now gives a remedy of damages, it must fall strictly within the parameters of the statute.

[57] To draw a distinction between a private law remedy and a public law remedy may result in giving the provisions of sections 7 and 8 a strained interpretation which Parliament did not intend. Consequently, it may invite the criticism that the courts are overstepping into the legislative realm.

[58] The operative words in section 7 cannot be ignored as the provision applies "… *although the death has been caused under such circumstances as amount in law to an offence under the Penal Code*." It is therefore arguable that the wordings adopted suggests that even in instances where death results from the wrongful and illegal acts, the recourse lies within the four walls of the provision, and no other.

[59] The anomaly in the provisions of sections 7 and 8 cannot be overlooked. A victim of a tort can claim exemplary damages if the factual matrix for the claim falls within the situation in *Rookes v Barnard*.[15] However, if he dies, his estate is barred from claiming. The comment of Zainun Ali FCJ that the position is somewhat bizarre is justified. On the other hand, the views of the majority judgment in *Kugan* that the purpose of exemplary damages is not to compensate but to punish, and hence an estate cannot be awarded such damages, is equally cogent.

15 See n 5 above.

[60] Although sections 7 and 8 have been amended since it came into force, the amendments were merely to allow a higher quantum claimable by the dependants and the estate. The minority judgment in *Kugan* viewed the CLA 1956 to pre-date the Federal Constitution, and hence the prohibition to awarding exemplary damages is inconsistent with the right to life in Article 5. The minority judgment in *Selvi* held that the court has power to fashion remedies to grant justice pursuant to paragraph 1 of the Schedule to the Courts of Judicature Act 1964 for the purpose of enforcing rights conferred by Part II of the Federal Constitution.

[61] Unlike other jurisdictions where the respective Constitution expressly allows for redress for the violation of its provisions, the Federal Constitution does not have similar provisions. The question one may ask is whether the minority judgment is implicitly recognising a new cause of action in custodial death cases where the damages to be awarded are not confined to sections 7 and 8, if the death results from a breach of right to life.

Conclusion

[62] The decisions of the Federal Court and the Court of Appeal in *Kugan* and *Selvi* show that there are views on both sides of the divide as to the ambit of sections 7 and 8 and its application in custodial deaths. As society evolves, the function of the law to provide redress must be preserved. It is therefore timely to embark on a review of the statutory provisions of sections 7 and 8 and to consider if legislative intervention can better serve the ends of justice.

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