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Law and Legal Practice in The Post-Pandemic Era - Opportunities, Solutions and Innovations

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1. Introduction

Good afternoon. Professor Michael Driscoll, the Vice Chancellor and President of Taylor's University, Mr Kalidas Krishnan, President of the Bar Council of Malaysia, Professor Khong Kok Wei, Executive Dean, Faculty of Business and Law of Taylor's University, Associate Professor Dr Harmahinder Singh, Head of Taylor's Law School and Chairperson of the Conference, senior members of the legal profession and academia, and in particular the students of Taylor's University who are our future.

It gives me considerable pleasure to address you this afternoon[*].

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 digital revolution, whether we like it or not. The effects of this revolution on technology, the economy and society as a whole has naturally affected the law. Its effects span not only private law but also public law and criminal law. Traditionally, the law has always followed significant changes in mind and culture. Our entry into the digital age is no different. The law too must adapt to the digital age, as must the actors who operate in the field.

How the rule of law is adhered to must accordingly be adapted to meet the needs of this era. The theory and teaching of law must also adapt to these altered conditions. Such change should be made at a philosophical level, not merely by a superficial compliance with the technological aspects of the digital era. What this requires of us is a paradigm shift in the way we define, construe and disseminate the law. What we need to achieve is a paradigm shift in the way we think about how legal meanings are made, disseminated, and construed.[1] For students, that will be like a duck taking to water as you are all children of the digital age. You were born into it and it is second nature to you. So, the important message is this - those of us who are older struggle, but you won't and you are in a position to fashion and create the future of the law and the path it takes.

[*] Based on the Keynote Address for Taylor's International Conference on the Future of Law and Legal Practice 2021, 26-27 October 2021, Malaysia.

[1] 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) B.U.J Sci & Tech L., 227-228.

With this in mind, I propose in this address to cover three somewhat distinct areas:

(i) firstly, globalisation, the law and lawyers in this digital and pandemic-driven time,

(ii) secondly, virtual courts, and

(iii) thirdly, how the digital revolution will bring changes to substantive law, the profession and the practice of law as a whole.

2. Globalization and Neoliberalism - Lawyers in the New World Order

To start off, I would like all of you to ask of yourselves this fundamental question: Why have you chosen to read Law? Just think about this for half a minute.

One of the fundamental reasons is likely to be the need to earn a good living. And one other might be an overwhelming need to ensure the prevalence of fairness in society. Contrary to popular belief, these two reasons are not mutually exclusive. And I shall not be so presumptuous as to assume that any of you prefer one exclusively over the other.

Bearing this in mind, what does the law in the 21st century demand of you in order for you to effectively marry these two goals?

I propose to discuss this topic by examining the traditionally held concept of a lawyer in the early to the mid-20th century, compared with the evolution of that role through the rest of the 20th and into the 21st century.

We inherited our current system of law from the British during colonial times, and to that extent we adopted the classical Western view of law as a fundamental bulwark/discourse through which "… rational authority, social solidarity and the moral foundations of society are articulated."[2] That left us with a divergence between our pre-colonial plural systems of law, and our present essentially secular system.

Our development of modernity in the law, including our adaptation of the Parliamentary Westminster system of governance as provided for in our Federal Constitution, was shaped largely by the colonial experience.

[2] Richard L. Abel, Ole Hammerslev and Hilary Sommerlad, '*Lawyers in 21st Century Societies Volume 1: National Reports*' Hart Publishing, Bloomsbury Publishing PLC 2020.

Given that our system of governance is premised on a constitutional framework, there was and continues to be an inextricable relationship between the profession and the development of modernity and governance in our country and society.

In this context the legal profession was assigned a central role in the construction of modern society.[3] In view of this central role, the training of lawyers comprised and still does, the teaching of systematic and rational knowledge and analysis, political neutrality, social detachment as well as the distinctive ethical code essential to a profession. Added to this was the ethos of service, all of which require a lengthy period of training. It is supposed to inculcate a value system along with the requirements of an intellectual education.

As a consequence of this mode of training during the earlier parts of the last century, the moral, cultural and intellectual authority of lawyers became a distinctive and important feature, granting them considerable autonomy in their thinking and ability to pursue social justice. Those were the key tenets/features of the legal profession from independence until the mid-80's and 90's. However, it must be said that there was, and even now, no real appreciation or consideration given to our pre-colonial plural systems of law which co-existed harmoniously prior to British rule.

The evolution of the legal profession was and continues to be heavily influenced by, amongst other things, globalization. I highlight globalization because it has influenced the evolution of the profession far more than any other factor. Why do I say this? This is because the law has been essential for the purposes of sustaining globalization.[4]

Globalization, which I shall attempt to define in a minute, brought with it changes to the world order and consequently the manner in which lawyers function. This in turn altered the prior role of lawyers as being professionals in a national domestic setting to being lawyers in a pseudo-international,[5] economically borderless setting.

Quoting from Chief Justice Sundaresh Menon in his paper on 'Justice in a Globalised Age' delivered last month:[6]

[3] Ibid.

[4] Sundaresh Menon, Honourable Chief Justice of Singapore, 'Justice in a Globalised Age' (Speech at the Judicial Roundtable Conference on International Commercial Dispute Resolution, 26 September 2021).

[5] Pseudo-international because while it appears to be like an international setting, in actuality these lawyers function within a national framework amongst numerous other national frameworks.

[6] Sundaresh Menon (n 4) 3.

> " … the term (i.e. globalization) has been used to mean many different things to different people, but most definitions converge on the central idea that it refers to a growing interconnectedness and interdependence across the world in various spheres - whether economic, social or cultural - and at an inter-nation level as well as between individuals, businesses and communities."

This has never been proved more true than with the pandemic which has illustrated amply the effect and consequences our actions can have for distant nations.

The function of the law in globalization has been to afford a structure and order to the evolving scope of relationships between international entities, persons, communities and nations. This has been particularly prevalent in the context of transnational trade and commerce.

3. The Positives of Globalisation in Relation to the Law and Legal Professionals

Undeniably, global economic prosperity has been greatly advanced by globalization as greater trade opportunities and economic liberalization has allowed for greater capital and resource mobility. The law has played an important role in that it facilitated and structured a transnational marketplace enabling commercial relationships on a cross-border basis with relative ease. Inter-se nations, the international law of obligations and Conventions like the United Nations ('UN') Convention on Contracts for the International Sale of Goods and the World Trade Organisation ('WTO')'s General Agreement on Tariffs and Trade are two well-known examples.

Equally the law expanded to allow for the resolution of international commercial disputes in fora which were neutral, with procedural flexibility, accommodating a need that domestic and national courts could not. The success of such features is evident from The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the 'New York Convention'), the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration as well as International Institute for the Unification of Private Law ('UNIDROIT') and the less popular but efficacious Convention of 30 June 2005 on Choice of Court Agreements (commonly known as the 'Hague Convention on Choice of Courts Agreements 2005'), etc., all of which have gained considerable ground. To that extent transnational commerce which is the bedrock of globalization has been eased by the law and legal professionals.

We have seen the evolution of attempts to harmonize and converge laws even in a judicial context to allow national courts to take a more common approach to commercial issues. This in

turn is geared towards enabling a greater degree of stability and finality for any person from any jurisdiction to embark on international commerce.

On the substantive law front too, the law has sought to support and play the role of handmaid of commerce.[7] This includes a more universalist approach in relation to cross-border insolvency, the development of competition law to guard against monopolies and the age-old concept of the separate legal personality.

In short, these triumphs of the law in relation to globalization adhere to the Rule of Law and enhanced the function and purpose of the legal profession. This is to be lauded.

4. The Adverse Effects of Globalization on the Legal Profession

But alas, the story is not all rainbows and unicorns.

The obverse is that in as much as the law has facilitated globalization, globalization has also altered the structure of the law and its manner of practice by its professionals. Essentially, the law and its institutions have altered substantively to meet the changing needs of the people whom they serve, while being shaped by the influence of the rest of the globalised world.[8]

How has this come about? Essentially business has become a colossal power. It is both internationalized in countries throughout the world, while power is concentrated in specific regions. Coupled with this was the deregulation of financial markets, a cornerstone of free market capitalism, which led to an exponential growth in the equity, and thus the bargaining power of transnational corporations. Ancillary to these transnational powerhouses are the clusters of producers, technological infrastructures and institutional networks.[9] Taken as a whole, they comprise virtually private sector states - making their own transnational regulations, modes of operation, and new fora for litigation, arbitration etc. Along with this, these transnational corporate superstructures took along with them their large corporate law firms, largely Anglo-American, which accordingly also metamorphosed to accommodate their clients' needs.

Firms across the globe accordingly expanded along similar lines, to ensure survival and to boost their earnings and status. Together with this alteration in structure, geography and culture, and the interdependence of these corporate law firms, both domestic and transnational, on their

[7] Lord Bingham of Cornhill, 'The Law as the Handmaid of Commerce', The Sixteenth Sultan Azlan Shah Lecture, 5 September 2001.
[8] Richard L Abel and others (n 2) 2.
[9] Richard K. Sherwin, Neal Feigenson and Christina Spiesel (n 1) 232.

clients, there was a gradual dismantling of the more traditional structure and practice of the law. This diluted the law firms' characteristic, national identity and embeddedness domestically. This was done subtly and very often not recognized because all players were focused on improving their respective economic interests and maximising profits, exponentially if necessary. In that way the DNA of the professional lawyers and law firms were effectively altered.

In order to grow profits and enhance performance economically, there was a tendency to adopt an international corporate culture which resulted to some extent in denationalization. But what is important to appreciate is that such alterations in the value systems and modes of functioning were initiated, orchestrated and monitored by these transnational corporations and their legal advisors, rather than by any domestic or national considerations. The net effect, viewed from a bird's-eye perspective, is that of distinct national and geographical entities, economies and institutions being reconfigured to meet the needs of global corporates or global capital.

To this end, as stated at the outset, 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 globalized society. The extent of the shift of focus from professionalism to making the law a business, is evident from numerous papers written between 2012 onwards where leading law schools particularly in the more developed nations have extolled the virtues of adopting a more business-like model in relation to the practice of law. The lines between legal professionalism and commerce were encouraged to be blurred. This approach diminished and detracted from the more traditional concepts of avoiding conflict of interest positions, requirements of disclosure, anti-collusion etc. This was a clear move away from the expected ethicality of the profession. It compromised to some extent the autonomy that the profession initially professed in preserving their professional independence.

The profession today, apart from having increased exponentially in terms of size, has become a more fragmented, multiform and decentred profession, to enable the maximization of profit. In the course of doing so, it has necessarily lost some of the ideals that were central to its function as an important agent, instrumental in the formation of the constituent powers of the state. The function of the profession as the role of the agent between the state and civil society was eroded. The provision of domestic legal services became infused with the commercial and entrepreneurial philosophy characteristic of international corporate firms, thereby enhancing and legitimizing the concepts of commercialised and corporate professionalism. And that is where we are today. As a consequence, there is far less recognition of the intellectual, moral and cultural authority of lawyers, and the profession as a whole, which they once enjoyed. To put it another way, lawyers should uphold the fabric of the law in the course of their practice on an

everyday basis, rather than seeing the law as a means to achieve small scale victories for one's client motivated by the need to win at all costs. That is not what the practice of law prescribes and not what society needs from lawyers.

One of my eternal regrets is that I neither saw nor recognized this change and accepted unquestioningly the ethos of globalization and its effects at the time. This was when I was still in legal practice prior to joining the Judiciary. I failed to appreciate or understand the effects it had on the fundamental principles of the profession.

I am not saying that earning very comfortably from the profession is wrong. Rather, 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. Rather than to any one segment of society or client with complete disregard to the needs of the remaining segments of society or the nation as a whole.

The solution, I suggest, lies in continuing with globalisation but being cognizant of its limits. What are those limits? Those limits lie in comprehending that trade and legal infrastructure cannot be utilized to create unsustainable levels of consumption and affluence.

This comes from the recognition that there can be no maximal exploitation of global resources without restraint. We can continue to pursue economic prosperity but ensure that it is sustainable development which ensures that we remain responsive to threats to collective humanity. This means being mindful of the need for the preservation of the environment, protect against threats posed by climate change and importantly, comprehending the importance of addressing economic inequality.

The last is of particular significance to the profession and the law. It is borne out by the World Inequality Report 2018 which stipulated that between 1980 and 2016, income inequality had increased sharply in nearly all world regions. Although economic growth increased across all income groups, the global top 1% of earners procured twice as much of the growth in global income as the poorest 50%.[10] It is evident that there was no equity in the distribution of the wealth generated by globalization. Drawing a corollary with the profession and the law, it should be recognized that a philosophy that seeks profit without limit is untenable in this day and age. We need to be cognizant of this reality. Perhaps the answer lies in greater distribution of wealth

[10] Sundaresh Menon (n 4) 3.

and a genuine attempt to facilitate access to justice for the 80% or more of the general population in this country who have no such access.

5. The Pandemic and the Need to Re-Assess the Needs and Functions of the Profession

But now let me turn to the unicorn bit. You as legal professionals, from a younger and different generation, offer great hope. You are, after all, the Greta Thunberg generation. Studies and analyses bear out the fact that younger generations are generally more attuned and sensitive to the need for equality, labour rights, the environment and gender parity.

Without placing too heavy a burden on you, the hope to restore the DNA of the profession lies with you. If you can incorporate the factors I just made reference to, in the course of your practice, and if you can persuade your superiors and peers to factor in these realities, there is every hope for a resurgence in social justice and affording access to justice on a more equitable basis. And that surely must reflect the true meaning of the Rule of Law.

6. Virtual Courts - Delivering Justice During the Pandemic and the Future Use of Technology

Now let me move on to a more practical aspect of the recent pandemic and its practical and real-life effect on the Courts. That takes the form of virtual courts which is very contemporary and significant for those entering practice. I have spoken about this in various fora, and I am reinforcing the same message here.

Essentially, “We went from being the Flintstones to the Jetsons in 9 months.” (Dan Schulman, PayPal)

I think that quote accurately describes how the courts adapted to technology simply by reason of the pandemic.

And that is because the pandemic brought along with it the need to ensure access to justice. Courts throughout the world were catapulted from a state of relative complacency in terms of their existing operational systems, to transforming overnight to meet the new pandemic driven environment. That new environment precluded functioning in person, in the seemingly safe sanctity of our courtrooms. This demanded a change in our mindset and the way in which we have dispensed justice, namely in person, for at least the last 150 years or so in Malaysia, and considerably longer, for example, in the United Kingdom.

The pandemic has taught us what would, in probability, have taken us at least a decade to accept without the pandemic, that effective access to justice can be achieved digitally, in some instances arguably more so.

Why do I say so? As we go in and out of phases of being in lockdown and then released, we have shuttled between digital and physical hearings at the behest of the virus. Surely it is now time, to reflect on and perhaps accept that this medium of court hearings, namely remote or virtual hearings, are here to stay, even if and when the pandemic is under control.

As Albert Einstein famously said, 'The measure of intelligence is the ability to change'.

We should recognize that we are on the cusp of an evolution in terms of how justice is administered, and how access to justice is maintained and enhanced. The first hurdle (which has been amply pointed out by renowned writers such as Susskind) is the need for the actors in the field of law, i.e. lawyers and judges, to be open to changes in the concepts, as well as the manner of providing a system of justice that affords true access to the litigants. In short, a change in mindset.

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

We look to phrases like the majesty of the law, we look to our courtrooms, our robes, where we sit, to rue and disparage the new paradigm shift to the virtual courtroom. The question however is whether the traditional mode of conduct of dispute resolution the only acceptable means of achieving justice?

Do these factors comprise the essential elements of justice, the administration of justice or access to justice?

7. The Rule of Law and Virtual Courts

I suggest not. To my mind, **the test to be adopted in ascertaining whether justice is jeopardized, is analysing whether such changes would endanger the core elements of justice and its administration as envisaged under the Rule of Law.**

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

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

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

(i) **open Justice** may be ensured in the form of livestreaming from the courts, or giving access to persons who wish to observe proceedings, apart from the litigants themselves,

(ii) **equal access by all parties**, equal treatment of and respect for participants – which means all participants enjoy an equal level of accessibility, security without undue inconvenience or cost[11],

(iii) **compliance with the rules of natural justice**, meaning that parties have, for example, access to legal advice and evidence, records and documents utilized throughout the court process,

(iv) **an independent legal profession** that is equipped to cope with the new medium and able to provide advice to ordinary citizens at a level which is sufficient to be useful to a technologically advanced society at a cost that is not unduly prohibitive, and

(v) **an independent judiciary** which is also conversant with functioning in a paperless virtual medium.

The question is whether these indicia are met in a virtual medium. The answer is yes. The use of remote technology **does** afford the opportunity to litigants and their counsel to meet these conditions that comprise the heart of procedural fairness, and thereby the **Rule of Law**.

Early reports and even critics today object to, and criticize the use of remote hearings, and its impact on fairness. Such criticism ranges from matters like the difficulty in engaging in the proceedings, assessing demeanour, feelings of alienation, distorted gestures, and a generally weaker standard of communication, which affects the assessment of evidence etc. Difficulties in taking instructions remotely, difficulty of rapport building between counsel and the Bench or

[11] Michael Legg and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) University of New South Wales Law Journal, 126.

counsel and their clients has resulted in reports that virtual hearings cannot meet the standards achieved in a physical hearing. The reality however is that there is little empirical or scientific data to support these grievances.

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

(i) the use of technology **actually increases access to justice** - the reality is that many citizens do have access to technology and are relatively well versed and comfortable with it and therefore prefer some distance from the courtroom and the judge. The courtroom is often far more daunting than a remote hearing,

(ii) the use of good quality technology eases a great many of the initial complaints –it is arguable that there is, in actuality, a better opportunity to assess a witness's demeanour and credibility as the camera is able to focus more closely on a witness than in a traditional courtroom where the Judge is farther away, as are counsel. For myself at the appellate level, I have found it to be so, as counsel often respond to a facial or physical reaction to a particular argument which has not been expressly articulated, by referring to it. Such is the power of technology which must equally be applicable when a judge is observing a witness,

(iii) 'tricks' such as breakdowns disrupting an important point in cross-examination are recognised as attempts to avoid a question, and

(iv) the use of audiovisual links is a great levelling tool. It enhances confidence and reduces anxiety and tension for counsel and litigants, particularly litigants in person. As for the majesty of the law, that lies in the ability of a litigant to have his grievance heard and effective redress given within a reasonable time. Less so in the formality of procedure and form.

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

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

8. The Need to Use Technology to Increase Access to Justice for the General Population

Once it is accepted that the use of remote hearings does not jeopardize the **Rule of Law**, the need for innovation and use of the new medium becomes inevitable. Its greatest use perhaps is its potential to resolve that perennial problem of access to justice.[12]

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

Although we do have Legal Aid Schemes in principle, the largest being the schemes funded by the Government and the Bar, the bleak reality is that these schemes are often 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. This is where technology is pivotal to enable access to justice.

Today, more people have access to a smart phone than ever before - be it in remote or urban areas. This form of access can only increase as we move into a digital era. And such access cuts across the economic divide. In the future with the increased use of digital technology and artificial intelligence, we hope that technology will afford a basis for access to justice for those large segments of the population who have none presently, such that they are afforded an opportunity to be heard and are able to procure a remedy for their particular grievance.

9. Substantive Law - The Future

However, the digital evolution does not stop there. What about the future of substantive law in this digital age? Again, you are all on the cusp of a truly transformative age. Digital transformation in substantive law is a reality. It would be a mistake to think that digitalization comprises a mere shift from a bricks and mortar courtroom to a virtual medium. It is considerably more than that.

[12] 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:

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

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

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

(iv) 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.

Digitalisation has touched on how we work in terms of strategy, structure, work processes, capabilities, and culture.[13] The greater future challenge for the law and the courts therefore lies in how substantive law is to evolve so as to take its rightful role in digital society.

The economic world outside the courts has and continues to evolve into a digital revolution, where data is becoming central to economic activity. Digital currency is another area which has and is developing rapidly, with central banks investing in research on regulation and utilization of cryptocurrency which will significantly alter the manner in which business transactions are carried out. The law will have to evolve to meet these new means of trade.

The rise of the Platform Economy which involves the digitalization of products, services and business processes in sectors such as transportation, accommodation, retail, and banking sectors is yet another example.

The courts will increasingly have to deal with new forms of evidence and admissibility disputes created by emerging technologies, such as geolocational data, facial recognition evidence, social media evidence, and genetics evidence, to name a few.[14] Consequently, one would expect interlocutory applications and court proceedings which involve such evidence to be become more complex, technical, and commonplace.[15] Our laws will require updating to bring them in line with current technological advancements.

In matters relating to proof, the courts may be asked to determine if documents have been digitally altered. From recent developments, metadata and blockchain data (material that was supposedly unalterable) has been found to be editable like other forms of data.[16]

To compound matters, the digital age pays no heed to borders nor national legal frameworks. To that end, national solutions which work within a particular domestic environment may not satisfy cross-border requirements and the risks of the digital world.

[13] Jungwoo Lee and Spring H Han, *The Future of Service Post-COVID-19 Pandemic Volume 1: Rapid Adoption of Digital Service Technology* (Springer Link, 2021).

[14] n/a, 'Report and Recommendations of The Future Trials Working Group' (*Nycourts.gov*, 2021) <https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf> accessed 6 May 2022.

[15] Ibid.

[16] 'AI in the Classroom: How Artificial Intelligence is Changing Law Students' Day-To-Day Lives - IE Driving Innovation' (*IE University*, 2022) <https://drivinginnovation.ie.edu/ai-in-the-classroom-how-artificial-intelligence-is-changing-law-students-day-to-day-lives/> accessed 6 May 2022.

10. The Lawyer in the Age of Digitalisation

All this necessarily leads to the re-definition of the role of lawyers, given the emergence of more sophisticated, AI-driven technology and applications. Does that mean that in the future, the need for lawyers will abate? Will the profession slowly become extinct?

That to me does not appear to be an accurate prediction. In point of fact, it is inevitable that the legal profession and its dynamics will change to meet the needs of a digitalized world. While AI may reduce the number of lawyers required for a particular task and alter the nature of some of the work done by lawyers, law students of the future can be rest assured that they can still have a legal career ahead of them - but perhaps in partnership with a machine.[17]

There are several possibilities about how the legal profession and legal education will evolve, premised on the need for adaptation to digitalization, as well as the new character of globalization I have sought to visualize. It is therefore pertinent to ask what will be the core tasks of tomorrow's legal practitioners? How must law schools and legal education be transformed so as to qualify law students to work in this dynamically evolving environment?[18]

The first and arguably most obvious point which most lawyers don't see or consider, as Susskind says, is that people want justice, not lawyers.[19] So the question/issue for both legal professionals and law schools should be, 'How can we utilize technology to provide justice?'

This requires a major change in the mindset of the profession as a whole including the educational arm.

Once technology is accepted as a tool or structure that is permanent a few consequences follow.

Automatization is likely to affect the most routine aspects of legal labour if it can be termed as such. In effect this means that routine tasks are likely to be outsourced to machines. Those might be tasks generally performed by paralegals, young lawyers or even in back offices in other jurisdictions. Such automatization affects the legal profession if it is argued that the carrying out of that job function falls within the sole monopoly of a legally trained lawyer. Let us take an example. Automated tax declarations for example may well reduce the need for tax advice from

[17] Ibid.

[18] Werner Schäfke-Zell and Ida Helene Asmussen, 'The Legal Profession in the Age of Digitalisation' (*Utrecht Law Review*, 2022) <https://www.utrechtlawreview.org/articles/10.36633/ulr.454/> accessed 6 May 2022.

[19] Richard Susskin, Chair of the Advisory Board and a Visiting Professor at the OII, 'Online Courts and the Future of Justice' (Speech to the American Bar Association, September 2020).

legal professionals. In like vein automated data processing agreement generators are also likely to reduce the need for advice on data protection from legal experts. On the dispute resolution front, basic pleadings, basic research may all become automated.

What does that mean for lawyers? It means that they will have to provide higher level competencies to survive. And the question that follows is what are these higher-level competencies? Competency has been measured in The Revised Bloom's Taxonomy starting from the lowest to the highest type of competency: 'Remembering, Understanding, Applying, Analysing, Evaluating and Creating.'

Regrettably, our system of education focuses a great deal on rote learning which means the focus is on the lowest level of competency. That is not to downplay the importance of remembering. It is essential for the efficient provision of correct legal advice. However, it may not be sufficient for higher-levels of legal tasks such as the application of the relevant law which is essential in practice or in public administration. Here both understanding and application become the focus. When put together to provide a solution to a problem you have utilized analysis, evaluation and creation. The solution has been created. A legal decision has been made. That falls within the purview of the trained lawyer and is unlikely to be supplanted by technology in the near future.

In the provision of this form of legal service two other unassailable factors come into play which cannot be performed by technology or AI, at least as yet, and for some time to come: the elements of discretion and trust. These core values cannot be replicated by technology, and to that extent, differentiate a lawyer providing a solution for a client, from a person with a legal problem procuring the answer by the use of technology.

So, when applied to our question, the answer would appear to be that digitalization 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. Legal education will also have to shift its format, content and thrust towards meeting the age of digitalization. It has been suggested, and this is not new, that 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. The real world does not deal solely with a principle of for example pure contract or tort law in vacuo. A lawyer will be required in a real-life situation to listen to a problem, which will not of itself immediately present itself as a contractual or tortious issue, and then go on to comprehend the problem, identify and then analyse the issues, identify the correct law, apply it, and after that find ways to resolve the client's problem within the law and ethically. This will be followed by writing the

advice, drafting the necessary pleadings or agreement as may be necessary and then dealing with the rules that regulate the particular area, long before arguing the issue in court, or negotiating an agreement or settlement with the opposing side. In short, variation and complexity are required to be an intrinsic part of teaching and learning activities in the curriculum.

It has also been suggested that the digitalization of simpler or more routine legal tasks may comprise a new area of expansion for members of the legal profession in conjunction with information technology experts. Legal tech start-ups by which individual lawyers in small firms and single practices could offer these routinised services at a cheaper rate and more efficiently than their larger counterparts. These legal tech start-ups will, it is predicted, usurp the smaller practices not so much by replacing them, but rather by utilizing these lawyers' services to provide platforms for the carrying out of routine tasks at cheaper rates. Success in this area of marriage between information technology and the law in providing immediate and cheaper basic services commoditizes the law as a service. In order to ensure that quality is maintained, there can be regulation:

(i) by the use of legalised and high quality technology,

(ii) the credentialization of manufacturers or suppliers of such legal technology, and

(iii) thirdly, by controlling the training of such manufacturers and suppliers through accreditation, namely by control over tertiary education institutions and their study programmes. In this manner control over the technological advancement of the supply of legal services can be controlled and maintained within the sphere of the legal profession.

This means that legal education can and should accommodate the advancement of technology by educating and training the persons who create, build and use legal tech. As such, there will be a convergence between IT and the law which can take the shape of IT specialists with knowledge of the law. And such new modules should not take the form of a superficial marriage of IT and the law, but rather a new subject about how automated digitalized jurisprudence can be utilised to regulate society.

In light of what I said earlier about the importance of the human element in the performance of higher level complex legal work, the importance and potential of alternative dispute resolution ('ADR') comes to the fore. The reality is that there is great room for expansion into mediation, conciliation and negotiation, all of which are new services. These forms of dispute resolution, which are not taken sufficiently seriously at present, serve to expand the market for existing practices and enhance their existing services.

As lower level legal tasks begin to taken over by paralegals and technology, the importance of developing skills in the art of mediation and conciliation take on a new significance. This is

particularly true in relation to international legal practice and dispute resolution, given the legal pluralities that have to be contended with. The reality is that in the ASEAN region, particularly China, aggressive court-based litigation and even arbitration are not ideal. The Asian philosophy and legal ethic, which has not really been accorded much consideration, given our predilection for the Western based system of law and politics has downplayed if not ignored the ethos of the region. Mediation for example is a highly valued skill and given the population of the region, there is clearly a huge market, particularly given the growth of the Belt and Road initiative. As I comprehend it even newer forms such as conflict prevention are areas that are expanding the field of ADR. So, these different forms of dispute resolution should perhaps comprise a part of the learning and training of young legal professionals from the outset of their education. The single factor that underscores these newer areas is the human factor involved. These modes of dispute resolution require empathy, intelligence, reasoning and reaction which need to be combined in various measures to achieve success.

Neither technology nor AI can easily supplant such a range of complex abilities.

Ancillary or even perhaps central to the study of these modes of dispute resolution which require such a combination of competencies warrants the inclusion of courses on legal philosophy, legal sociology and more esoteric subjects with the focus being on the need and competence to serve society in a globalised world. It requires law schools to take the difficult step of not simply teaching legal interpretation and the application of the law in the spirit of a technical skill but to comprehend and accept the law as a subject which encompasses various social and political areas and relation. While retaining the core elements of textual interpretation, argument and communication, it is possible to widen and transform legal education to incorporate these other elements. In a nutshell with new forms of ADR being the preference of the client field, it makes sense to ensure that law students' training now supplements the already saturated fields of litigation to meet the needs of a fast-evolving digitalising society.

A third aspect of ensuring continuity for the legal profession and the services it provides is to revert back to the philosophical underpinnings of the Rule of Law and the need for lawyers to practice and adhere to its spirit. Lawyers are the guardians of the rule of law and serve as a cohesive force in society through managing conflict. They do so by analysing, rationalizing and breaking down the conflict and redefining it as a legal problem. The propagation of this ethos and image greatly enhances the value of legal services. And this does not necessarily come solely from serving the state or the public directly. It is important that society sees legal professionals as such in order to assign their services a high value.

As I stated at the outset, the decades old vision and respect for a lawyer as a form of noble legal statesman has been replaced by that of the commercial lawyer who charges exorbitant amounts for work that does not necessarily appear to warrant the value placed on it by the profession themselves. The transformation was fuelled to a large extent by the need to control and capture the legal market followed by the projection of the law through excessive legalese suggestive of the fact that the law is inaccessible generally as it is dependent upon exclusive, obscure knowledge and intractable precedents all of which falls within the sole purview and monopoly of the lawyer. That image has to be revisited and transformed by reintroducing the earlier one of the lawyer statesman who is at once knowledgeable yet altruistic, au fait with modern technology and able to provide services in accordance with the needs of the legal world today, both domestically and internationally, at a fee which is not exorbitant.

Legal training and education should note the gap between the bread and butter need for knowledge of the law and its application and the need for lawyers to be trained to comprehend their role in society as comprising guardians of the rule of law and perhaps consider introducing or placing emphasis on ethics and moral virtues. This can take the form of legal clinics, apart from courses on ethics which are contextualized to reflect the common dilemmas faced by our society today. All this will go a long way towards increasing the trust of the public in the legal system and the legal profession.

11. Conclusion

In conclusion, I turn back to the Covid-19 pandemic. Despite the grave debilitation that the pandemic has wrought, it has, ironically enough, induced us to re-examine and accept the potential of, and need for a transformation in the means of administering and enabling access to justice. This is important both domestically and internationally, particularly as borders are becoming increasingly fluid, most notably in the area of trade. It has also dragged the legal world, kicking and screaming, into accepting the reality of the digital economy and the need to evolve to meet its needs.

A second aspect of the digital age is the fact that it affords greater opportunity for equality. Today in the digital world there is exposure to a diversity of goods and services in a way that transcends geographical borders. Equally it allows for the expression of a plurality of views and opinions which promotes understanding and better cohesion, particularly in transnational matters.

The creation and expansion of digital platforms no longer allows for a monopoly on thought, impressions, intellectual discourse and the law. There is no monopoly on the setting of standards. Technology and the e-platform allows for inclusiveness amongst the nations. Technology is a

great equalizer in that there is opportunity for a more level playing field globally. To that end, it promotes a more rational definition to the rule of law, that is not unique to any one cultural perspective, but is relevant and coherent from an international perspective.

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Unifying the Limitation Statutes in Malaysia

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Abstract
When Malaysia was formed in 1963, the *Malaysia Act 1963* extended the laws of the former Federation of Malaya to Sabah and Sarawak. Be that as it may, many laws remain different between East and West Malaysia. One such law is limitation: the *Limitation Act 1953* applies in West Malaysia only, the *Limitation Ordinance (Sabah Cap. 72)* applies in Sabah and the *Limitation Ordinance (Sarawak Cap. 49)*applies in Sarawak. The existence of these different statutes on the same subject matter may potentially lead to confusion and inconsistencies in the judicial and legal system in Malaysia, and hardship and injustice to litigants. This article seeks to analyse the similarities and differences in the various limitation statues in West and East Malaysia, with a view to answering the question as to whether there can only be one limitation statute that applies throughout Malaysia, with recognized, modern, relevant and legally enforceable causes of action with realistic limitation periods, bearing in mind the special interests and safeguards afforded to Sabah and Sarawak when Malaysia was formed.

Keywords: Limitation - Causes of action.

1. Introduction

When Malaysia was formed in 1963, the Malaysia Act 1963 extended the laws of the former Federation of Malaya to Sabah and Sarawak. Be that as it may, many laws remain different between East and West Malaysia. One such law is limitation: the Limitation Act 1953 applies in

West Malaysia only,[20] the Limitation Ordinance (Sabah Cap. 72) applies in Sabah and the Limitation Ordinance (Sarawak Cap. 49)[21] applies in Sarawak. The existence of these different statutes on the same subject matter may potentially lead to confusion and inconsistencies in the judicial and legal system in Malaysia, and hardship and injustice to litigants. For example, the Limitation Act 1953 only applies to West Malaysia, whereas the Limitation Ordinances in Sabah and Sarawak apply to all suits instituted in Sabah[22] and Sarawak[23] respectively, notwithstanding that a contract may have been entered into outside these States.[24] If a suit was instituted in Sabah because the cause of action and facts of the case arose in Sabah, the pleadings would have contained parts of the Limitation Ordinance of Sabah. However, if for *forum non conveniens* reasons (for example, if all the defendants and witnesses reside in Kuala Lumpur) the case is dismissed and a new suit is to be instituted in the High Court in Malaya (due to the inability to transfer cases between the High Court in Malaya and the High Court in Sabah and Sarawak),[25] the entire pleadings would have to be changed to now refer to the Limitation Act 1953. This is notwithstanding that the cause of action and facts of the case arose in Sabah. In such a situation, the brief may have to also be transferred to an advocate and solicitor from West Malaysia, if the original advocate from Sabah is not an advocate and solicitor of the High Court in Malaya.

2. Limitation Periods

The policy of statutes of limitation is based on the theory that after a long delay, the law presumes that all claims and demands have been satisfied, paid for and settled (*Hamid, 2006*). The idea is to encourage promptitude in the prosecution of remedies, based on the maxim *vigilantibus, non dormientibus jura subveniunt* i.e. the law aids the vigilant and not those who slumber. The different limitation statutes in force in Malaysia at present are:

(i) West Malaysia - Limitation Act 1953,
(ii) Sabah - Limitation Ordinance (Cap 72), and
(iii) Sarawak - Limitation Ordinance (Cap 49).

In West Malaysia, the Limitation Act 1953 applies to both court actions and arbitrations.[26] The defence of limitation must be specifically pleaded.[27] The limitation period for actions founded in

[20] Limitation Act 1953, section 1(2).
[21] This was enacted on 1 January 1959 and was declared a Federal Law in 1965 vide F.L.N. 200 of 1965.
[22] Limitation Ordinance of Sabah, section 10(1).
[23] Limitation Ordinance of Sarawak, section 10(1).
[24] Limitation Ordinances of Sabah and Sarawak, section 10(2).
[25] *Fung Beng Tiat v Marid Construction Co.* [1996] 2 MLJ 413; *The Board of Trustees Of The Sabah Foundation & Anor v The Board Of Trustees of Syed Kechik Foundation & Ors* [1999] 1 MLJ 257; *Syed Salam Albukhary & Ors (Discovery Defendants)* [2009] 1 LNS 799.
[26] Limitation Act 1953, sections 3 and 30.
[27] Limitation Act 1953, section 4.

contract or tort, to enforce a recognisance, to enforce an award, to recover a sum recoverable under any written law (other than a penalty or forfeiture) and for an account is six years from the date the cause of action accrued.[28] An action to enforce a judgment cannot be brought after twelve years of the judgment, and interest on the judgment cannot be recovered after six years from the due date of the interest.[29] An action to recover any civil penalty or forfeiture cannot be brought more than one year from the date the cause of action accrued.[30] The limitation period for the conversion or wrongful detention of a chattel is six years from the accrual of the cause of action.[31] Actions pertaining to revenue matters against a Collector, officer of revenue, the State or Federal Government must be brought within one year of the action taken by the latter bodies.[32] The limitation period to recover land is twelve years from the date of accrual of the cause of action,[33] whereas for recovery of rent it is six years.[34] Regarding the limitation to recover money secured by a mortgage or charge, or to recover proceeds of the sale of land or personal property, an action (including foreclosure proceedings) shall be brought before the expiration of twelve years.[35] However, for the recovery of arrears of interest or damages for such arrears payable in respect of any sum of money secured by a mortgage or charge payable in respect of the proceeds of the sale of land, the limitation period is six years.

There is no limitation period by a beneficiary for breach of trust involving fraud and recovery of trust property converted to the trustee's use,[36] but for every other action for breach of trust and recovery of trust property, the limitation period is six years.[37] Any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought before the expiration of twelve years[38] but the arrears of interest or damages for such arrears for any legacy of a deceased person must be brought within six years.[39] The Act also provides for the extension of the limitation period in certain circumstances, for example in cases of disability,[40] where a debtor administers the estate of his creditor,[41] acknowledgements and part payments[42] and in cases of fraud or mistake.[43]

[28] Limitation Act 1953, sections 6(1) and (2).
[29] Limitation Act 1953, section 6(3).
[30] Limitation Act 1953, section 6(4).
[31] Limitation Act 1953, section 7(1).
[32] Limitation Act 1953, section 8.
[33] Limitation Act 1953, section 9(1).
[34] Limitation Act 1953, section 20.
[35] Limitation Act 1953, sections 21(1) and (2).
[36] Limitation Act 1953, section 22(1).
[37] Limitation Act 1953, section 22(2).
[38] Limitation Act 1953, section 23.
[39] Ibid.
[40] Limitation Act 1953, section 24.
[41] Limitation Act 1953, section 25.
[42] Limitation Act 1953, sections 26 to 28.
[43] Limitation Act 1953, section 29.

In Sabah and Sarawak, the Limitation Ordinances apply to all suits instituted in Sabah[44] and Sarawak[45] respectively, notwithstanding that a contract may have been entered into outside these States.[46] Just like in West Malaysia, the defence of limitation must be specifically pleaded.[47] The Ordinances have similar provisions for the extension of the limitation period in certain circumstances, for example in cases of disability,[48] where a debtor administers the estate of his creditor,[49] acknowledgements and part payments[50] and in cases of fraud.[51] Where no period of limitation is specifically provided for, the limitation period is 6 years,[52] and to establish a periodically recurring right the limitation period is 12 years.[53]

With regard to the period of limitation itself, the Ordinances provide for the period of limitation for 115 separate causes of action, and these are set out in the respective Schedules with limitation periods ranging from one year to sixty years. Of these 115 causes of action, many can properly be grouped under the wider categories of causes of action such as contract, tort, recovery of immovable property, etc. For contracts especially, the Contracts Act 1950 was made applicable to Sabah and Sarawak as at 1 July 1974[54] and therefore both oral and written contracts should be treated equally with only one period of limitation applicable and not different periods of limitation depending on different types of contracts. Despite listing 115 different causes of action, the Limitation Ordinances of Sabah and Sarawak do not provide for the limitation period for breach of trust cases where fraud is involved. In West Malaysia there is no limitation for this cause of action; in Sabah and Sarawak there is a period of limitation of three years for breach of trust. It then becomes questionable whether the three years is also applicable to breach of trust cases involving fraud, or whether the limitation period is six years since this cause of action is not specifically mentioned out of the 115 listed causes of action. Table 2 is a list of all the causes of action listed under the Limitation Ordinances of Sabah and Sarawak which can properly be categorised under wider headings of causes of action.

[44] Limitation Ordinance of Sarawak (n 23).
[45] Limitation Ordinance of Sarawak (n 23).
[46] Limitation Ordinance of Sarawak (n 23).
[47] Limitation Ordinances of Sabah and Sarawak, section 3.
[48] Limitation Ordinances of Sabah and Sarawak, sections 6 to 8.
[49] Limitation Ordinances of Sabah and Sarawak, section 9.
[50] Limitation Ordinances of Sabah and Sarawak, sections 19-21 and 23.
[51] Limitation Ordinances of Sabah and Sarawak, section 18.
[52] Schedule of the Limitation Ordinances of Sabah and Sarawak, item 97.
[53] Schedule of the Limitation Ordinances of Sabah and Sarawak, item 100.
[54] Contracts (Malay States) (Amendment and Extension) Act 1974 (Act A239).

Table 2: Causes of Action under the Limitation Statutes in Sabah and Sarawak

Categories of causes of action	Causes of action in Sabah and Sarawak	Limitation period	Schedule to the Limitation Ordinance of Sabah	Schedule to the Limitation Ordinance of Sarawak
Contract	For the wages of a household servant, artisan or a labourer	1 year	Item 2	Item 2
	For the price of food or drink sold by the keeper of a hotel, tavern or lodging house	1 year	Item 3	Item 3
	For the price of lodging	1 year	Item 4	Item 4
	Against a carrier for compensation for losing or injuring goods or delay in delivery of goods	2 years	Items 17 and 18	Items 16 and 17
	For the hire of animals, vehicles, boats or household furniture	3 years	Item 21	Item 20
	For all matters relating to goods sold and delivered	3 years	Items 22-25	Items 21-24
	For the price of trees or growing crops sold, where no fixed period of credit is agreed upon	3 years	Item 26	Item 25
	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment	3 years	Item 27	Item 26
	For compensation for injury caused by an injunction wrongfully obtained[55]	3 years	Item 33	Item 32
	By a ward who has attained majority, to set aside a sale by his guardian	3 years	Item 35	Item 34
	For all money lending transactions	3 years	Items 39-46	Items 38-45
	For compensation for breach of promise	3 years	Item 47	Item 46

[55] Rules of Court 2012, Ord 29, rule 1 and Form 53.

Categories of causes of action	Causes of action in Sabah and Sarawak	Limitation period	Schedule to the Limitation Ordinance of Sabah	Schedule to the Limitation Ordinance of Sarawak
Contract (continued)	For actions involving bonds, bills of exchange and promissory notes	3 years	Items 48-62	Items 47-61
	By a surety against the principal debtor or a co-surety	3 years	Items 63-64	Items 62-63
	Upon a contract to indemnify	3 years	Item 65	Item 64
	By an advocate for his costs	3 years	Item 66	Item 65
	For the balance due on a mutual, open and current account	3 years	Item 67	Item 66
	Insurance claims and premiums	3 years	Items 68-69	Items 67-68
	Against a factor for an account	3 years	Item 70	Item 69
	By a principal against his agent for moveable property received and not accounted for	3 years	Item 71	Item 70
	For property which the plaintiff has conveyed while insane	3 years	Item 76	Item 75
	For money paid upon an existing consideration which afterwards fails	3 years	Item 79	Item 78
	For contribution under a joint decree or joint estate against co-sharers	3 years	Item 81	Item 80
	By co-trustee for a contribution claim	3 years	Item 82	Item 81
	For seaman's wages	3 years	Item 83	Item 82
	For wages not expressly provided for	3 years	Item 84	Item 83
	By a mortgagor or chargor after mortgage or charge is satisfied, to recover surplus received by mortgagee or charge	3 years	Item 85	Item 84
	For an account and share of profits of a dissolved partnership	3 years	Item 86	Item 85

Categories of causes of action	Causes of action in Sabah and Sarawak	Limitation period	Schedule to the Limitation Ordinance of Sabah	Schedule to the Limitation Ordinance of Sarawak
Contract (continued)	By a lessor for the value of trees cut down by lessee contrary to lease terms	3 years	Item 87	Item 86
	For profits of immovable property belonging to plaintiff wrongfully received by defendant	3 years	Item 88	Item 87
	By a vendor of immovable property to enforce lien for unpaid purchase money	3 years	Item 90	Item 88
	For a call by a company	3 years	Item 91	Item 89
	For specific performance and rescission of a contract	3 years	Items 91-93	Items 90-91
	For compensation for breach of oral contract	3 years	Item 94	Item 93
	For compensation for breach of written contract	6 years	Item 95	Item 94
Tort	For compensation for false imprisonment and malicious prosecution	1 year	Items 8 and 10	Items 8 and 9
	For compensation for libel and slander	1 year	Items 11 and 12	Items 10 and 11
	For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter	1 year	Item 13	Item 12
	For compensation for inducing a person to break a contract with the plaintiff[56]	1 year	Item 14	Item 13
	For compensation for an illegal, irregular or excessive distress	1 year	Item 15	Item 14
	For compensation for wrongful seizure of movable property under legal process	1 year	Item 16	Item 15

[56] Michael A. Jones, Anthony M Dugdale, Mark Simpson (ed), *Clerk & Lindsell on Torts* (22nd edn, Sweet & Maxwell 2017).

Categories of causes of action	Causes of action in Sabah and Sarawak	Limitation period	Schedule to the Limitation Ordinance of Sabah	Schedule to the Limitation Ordinance of Sarawak
Tort (continued)	Against a carrier for compensation for losing or injuring goods or delay in delivery of goods	2 years	Items 17 and 18	Items 16 and 17
	For compensation for malfeasance, misfeasance, nonfeasance independent of contract	2 years	Item 20	Item 19
	For compensation for obstructing or diverting a way or water course	3 years	Items 28-29	Items 27-28
	For compensation for trespass on immovable property	3 years	Item 30	Item 29
	For compensation for infringing copyright or any other exclusive privilege	3 years in Sabah; 6 years in Sarawak	Item 31	Item 96
	To restrain waste	3 years	Item 32	Item 31
	To compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets	3 years	Item 34	Item 33
	By principals against agents for neglect or misconduct	3 years	Item 72	Item 71
	For compensation for injury to the person	3 years	Item 94A	Item 92
Action against judgment	Foreign judgment	6 years for Sabah	Item 96	
	Judgment obtained in Sabah / Sarawak	12 years	Item 98	Item 98
Conversion or unlawful detention	Against one who, having a right to use property for specific purposes, perverts it to other purposes	2 years	Item 19	Item 18
	By any person bound by an order respecting the possession	3 years	Item 36	Item 35

Categories of causes of action	Causes of action in Sabah and Sarawak	Limitation period	Schedule to the Limitation Ordinance of Sabah	Schedule to the Limitation Ordinance of Sarawak
Conversion or unlawful detention (continued)	For moveable property lost, acquired by theft, dishonest misappropriation, conversion or detention	3 years	Item 37	Item 36
	Wrongfully taking, injuring or detaining moveable property	3 years	Item 38	Item 37
	To recover moveable property conveyed or bequeathed in trust, deposited or pawned and afterwards bought from the trustee, depository or pawnee for valuable consideration	12 years	Item 102	Item 102
	Against a depositee or pawnee to recover moveable property deposited or pawned	30 years	Item 113	Item 113
Recovery of land	For land bequeathed in trust, mortgaged or charged and afterwards purchased from the trustee, mortgagee or chargee for valuable consideration	12 years	Item 103	Item 103
	By mortgagee or chargee for possession of land	12 years	Item 104	Item 104
	By a purchaser at a private sale when vendor was out of possession at the time of sale	12 years	Item 105	Item 105
	By a purchaser at a sale in execution of an order, when judgment debtor was out of possession at the time of sale	12 years	Item 106	Item 106
	By a purchaser at a sale in execution of an order, when judgment debtor was in possession at the time of sale	12 years	Item 107	Item 107
	By a landlord to recover possession from tenant	12 years	Item 108	Item 108
	By a remainder-man or reversioner other than a landlord or devisee for possession	12 years	Item 109	Item 109

Categories of causes of action	Causes of action in Sabah and Sarawak	Limitation period	Schedule to the Limitation Ordinance of Sabah	Schedule to the Limitation Ordinance of Sarawak
Recovery of land (continued)	For possession when the plaintiff, while in possession of the land, has been dispossessed or has discontinued the possession	12 years	Item 110	Item 110
	For possession when plaintiff has become entitled by reason of forfeiture or breach of condition	12 years	Item 111	Item 111
	For possession or any interest therein not specifically provided for	12 years	Item 112	Item 112
	Against a mortgagee or chargee, to redeem or recover possession of land mortgaged or charged	60 years	Item 115	Item 115
Recovery of money secured upon immoveable property	To enforce payment of money charged upon immoveable property	12 years	Item 101	Item 101
	By a mortgagee or chargee for foreclosure or sale	60 years	Item 114	Item 114
Fraud / Mistake	To cancel or set aside an instrument not otherwise provided for	3 years	Item 73	Item 72
	To declare the forgery of an instrument	3 years	Item 75	Item 74
	To set aside decree obtained by fraud	3 years	Item 77	Item 76
	For relief on the ground of mistake	3 years	Item 78	Item 77
Breach of trust	To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust	3 years	Item 80	Item 79

There are some similarities in the period of limitation between West and East Malaysia. These include action for breach of a written contract which is six years, action against judgment (excluding foreign judgments) which is twelve years, recovery of penalty or forfeiture under written law which is one year, action in respect of revenue matters which is one year, action for recovery of rent which is six years and claims on or to the personal estate of a deceased person, whether under a will or intestacy which is twelve years. A summary of the description of the cause of action and the period of limitation which are similar across the respective jurisdictions is provided in Table 3.

Table 3: Causes of Action with Similar Limitation Periods in West Malaysia, Sabah and Sarawak

Cause of action	West Malaysia	Sabah	Sarawak
Breach of contract	6 years[57]	6 years for breach of contract in writing[58]	6 years for breach of contract in writing[59]
Action against judgment	12 years[60]	12 years (except foreign judgment)[61]	12 years[62]
Recovery of penalty or forfeiture under written law	1 year[63]	1 year[64]	1 year[65]
Action in respect of revenue matters	1 year[66]	1 year[67]	1 year[68]
Recovery of rent	6 years[69]	6 years[70]	6 years[71]
Recovery of money secured upon immoveable property	12 years[72]	12 years (except by mortgagee or chargee)[73]	12 years

[57] Limitation Act 1953, section 6(1)(a).
[58] Schedule of the Limitation Ordinance of Sabah, item 95.
[59] Schedule of the Limitation Ordinance of Sarawak, item 94.
[60] Limitation Act 1953, section 6(3).
[61] Schedule of the Limitation Ordinance of Sabah, items 96 and 98.
[62] Schedule of the Limitation Ordinance of Sarawak, item 98.
[63] Limitation Act 1953, section 6(4).
[64] Schedule of the Limitation Ordinance of Sabah, item 1.
[65] Schedule of the Limitation Ordinance of Sarawak, item 1.
[66] Limitation Act 1953, section 8.
[67] Schedule of the Limitation Ordinance of Sabah, items 5, 6 and 7.
[68] Schedule of the Limitation Ordinance of Sarawak, items 5, 6 and 7.
[69] Limitation Act 1953, section 20.
[70] Schedule of the Limitation Ordinance of Sabah, item 95A.
[71] Schedule of the Limitation Ordinance of Sarawak, item 95.
[72] Limitation Act 1953, section 21.
[73] Schedule of the Limitation Ordinance of Sabah, item 114.

			(except by mortgagee or chargee)[74]
Claims on or to the personal estate of a deceased person, whether under a will or intestacy	12 years[75]	12 years[76]	12 years[77]

3. The Position in Sabah and Sarawak

It is important to note that in attempting to unify the limitation statutes in Malaysia, the legislation peculiar to Sabah and Sarawak would also be involved. Therefore, it is necessary to consider whether such a unification exercise would be contrary to the special interests and safeguards afforded to Sabah and Sarawak.

On 9 July 1963, the Malaysia Agreement was signed in London by the British government, the Malayan government, Sarawak, Sabah and Singapore for the formation of Malaysia. The Agreement included the special interests and safeguards for Sabah and Sarawak.[78] In accordance with Section 66 of the Malaysia Act 1963, Part XIIA was inserted into the Federal Constitution to provide for additional protection for the States of Sabah and Sarawak. These included, among others, Article 161 which provided for the continued use of English in court proceedings unless otherwise approved by Legislatures of the States of Sabah and Sarawak,[79] Article 161B which provided for the restriction to non-residents of the right to practise before the courts in the States of Sabah and Sarawak unless otherwise adopted by the Legislatures of the States of Sabah or Sarawak,[80] and Article 161E which provided, among others, that no amendments could be made to the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court, and the immigration powers given to Sabah and Sarawak to control the right of entry and residence in the States, without the consent of the Yang di-Pertua Negeri of those States respectively.[81]

[74] Schedule of the Limitation Ordinance of Sarawak, item 114.
[75] Limitation Act 1953, section 23.
[76] Schedule of the Limitation Ordinance of Sabah, item 99.
[77] Schedule of the Limitation Ordinance of Sarawak, item 99.
[78] Malaysia Agreement, article VIII.
[79] Federal Constitution, article 161(3).
[80] Federal Constitution, article 161B(1).
[81] Federal Constitution, articles 161E(2) and (4).

In addition, List IIA was also added to the Ninth Schedule of the Federal Constitution, being the Supplement to the State List for Sabah and Sarawak. The distribution of legislative powers between the Federal and State levels is provided for in Chapter 1 of Part VI of the Federal Constitution. Parliament has the power to legislate at the Federal level.[82] The Legislature of a State has the power to legislate at the State level.[83] In the event of an inconsistency between Federal law and State law, the Federal law shall prevail.[84] The Legislature of a State has residual powers to make laws on matters not enumerated in any Lists in the Ninth Schedule.[85] Parliament does, however, have the power to make laws in respect of any matter enumerated in the State List in certain situations[86] as well as to authorise the Legislature of a State to make laws in respect of matters enumerated in the Federal List.[87]

Although States have the power to legislate on matters contained in the State and Concurrent Lists,[88] such powers are subject to Article 81 which empowers the executive authority of every State to ensure that they comply with any Federal law that applies to that State. This is consistent with Article 75 which upholds the supremacy of Federal over State laws. Arguably, Article 75 would only apply where State law is passed after the Federal law, otherwise Parliament may indirectly nullify or repeal State laws by passing a new Federal law which is inconsistent with existing State law (Fong, 2016).

Article 76(1) gives power to Parliament to make laws with respect to any matter enumerated in the State List, for among others, the purpose of promoting uniformity of the laws of two or more States[89] or if so requested by the legislative assembly of any State.[90] In such cases, the legislation shall only come into operation when adopted by a law passed by the Legislature of the State, where it shall become State and not Federal law.[91] The Federal Court had occasion to consider the power of Parliament to pass laws for purposes of promoting uniformity of laws in the case of *East Union (Malaya) Sdn Bhd v Government of Johore & Anor.*[92] In this case, it was held that Article 76(4) authorised Parliament to legislate on a state matter " … for the purpose only of

[82] Articles 73(a) and 74(1), read together with List 1 (Federal List) or List 3 (Concurrent List) in the Ninth Schedule of the Federal Constitution.
[83] Articles 73(b) and 74(2), read together with List 2 (State List) or List 3 (Concurrent List) in the Ninth Schedule of the Federal Constitution.
[84] Federal Constitution, article 75.
[85] Federal Constitution, article 77.
[86] Federal Constitution, article 76.
[87] Federal Constitution, article 76A; Electricity Ordinance 2007 (Cap 50) in Sarawak.
[88] Federal Constitution, articles 73 and 74(2).
[89] Federal Constitution, article 76(1)(b).
[90] Federal Constitution, article 76(1)(c).
[91] Federal Constitution, article 76(3).
[92] [1981] 1 MLJ 151 (Tun Suffian LP).

ensuring uniformity of law and policy … "[93] and also where there is already uniformity, for example in cases where Parliament wishes to replace one uniform law with another more updated uniform law, or where Parliament wishes to " … re-enact and consolidate the already uniform laws to be found in the various state enactments, in order to secure a uniform policy and application of such law … ".[94] The Federal Court also laid down the test to be applied in construing whether a law passed pursuant to Article 76(4) is constitutional:[95]

> "In our judgment, the sole test is simply this: does the impugned provision enacted by Parliament ensure uniformity of law and policy? If it does, it is constitutional, regardless of the position previously. If it does not, it is unconstitutional."

Although the case mentioned above concerned Article 76(4) of the Federal Constitution, it is submitted that the principles enunciated in this case may equally apply to Article 76(1)(b) of the Federal Constitution.

By virtue of Article 77 of the Federal Constitution, residual legislative power i.e. matters not enumerated in any of the Lists in the Ninth Schedule, falls within the competence of a State Legislature. Under Article 161E of the Federal Constitution, any amendments to be made on matters with respect to which the Legislature of the State may (or Parliament may not) make laws, requires two-thirds majority and the consent of the Yang di-Pertua Negeri of the States of Sabah and Sarawak. One example of the utilization of Article 77 is water, where Parliament amended the Legislative List in the Federal Constitution and removed water supplies from the State List (excluding Sabah and Sarawak), and then inserting the same in the Concurrent List. Thereafter, the Federal Government established a Water Services Commission[96] and Parliament passed the Water Services Industry Act 2006 which increased federal regulation over water at least in West Malaysia.[97] Another example is tourism. Prior to 1994, tourism was a residual matter which therefore fell within the purview of the State Legislature. However, in 1994, Parliament amended the Federal List and included Tourism as a federal matter vide the Constitution (Amendment) Act 1994.[98] This was done without the consent of the Yang di-Pertua Negeri of Sabah and Sarawak. The Federal Government now wants to introduce 'tourism tax' at the federal level, which has attracted the ire of at least the Sarawak Government who says that

[93] Ibid 154.
[94] *East Union (Malaya) Sdn Bhd* (n 92).
[95] *East Union (Malaya) Sdn Bhd* (n 92) 155.
[96] National Water Services Commission Act 2006.
[97] Water Services Industry Act 2006; Ang Hean Leng & Amanda Whiting, 'Federalism and Legal Unification: Comparative Perspectives on Law and Justice' in Daniel Halberstam and Matthias W. Reimann (ed), *Federalism and Legal Unification in Malaysia*, vol 28 (Springer, Dordrecht 2013) 295, 307
[98] Act A885.

listing 'tourism' under the Federal List without the consent of the State Governments of Sabah and Sarawak goes against the spirit of the Malaysia Agreement 1963.[99] These examples show that the federal government has stepped in and taken control of situations where it feels that the matter is better off governed at federal rather than at state level.

Then there is the extension of laws. As mentioned before, the Malaysia Act 1963 provides for the extension of laws of the former Federation of Malaya to the Borneo States,[100] and the present laws of the Borneo States (i.e. all laws in force in the Borneo States prior to 16 September 1963) were treated as federal laws.[101] This was a useful and expeditious method of providing, without having to take up the time of Parliament, a single set of laws that applied throughout Malaysia[102]. Section 74 of the Malaysia Act 1963 empowers the Yang di-Pertuan Agong to make orders modifying (including amending, adapting or repealing[103]) any present law over which Parliament has power.[104] The Yang di-Pertuan Agong is also empowered to make orders extending to Sabah and Sarawak any present laws of the Federation, or to declare any State law of Sabah and Sarawak to be federal law, but not to modify such state law.[105] However, such orders must be made with the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak.[106] The Yang di-Pertuan Agong's powers under Section 74 of the Malaysia Act 1963 continues until the end of August 1965 and thereafter till Parliament otherwise provides.[107] To date, Parliament has not "otherwise provided"; therefore this power still exists and may be utilized for purposes of harmonizing the laws between East and West Malaysia. An example of the extension and

[99] n/a, 'State against new federal tourism tax' *Borneo Post Online*, (Sibu, 8 June 2017) <http://www.theborneopost.com/2017/06/08/state-against-new-federal-tourism-tax/> accessed 17 January 2022; Desmond Davidson, 'Will we see any tourism tax money, asks Sarawak minister' *The Malaysian Insight* (Sarawak, 8 June 2017) <https://www.themalaysianinsight.com/s/4604/> accessed 17 January 2022; Sulok Tawie, 'Sarawak Cabinet to decide on federal tourism tax' *The Malay Mail Online* (Kuching, 12 June 2017) <http://www.themalaymailonline.com/malaysia/article/sarawak-cabinet-to-decide-on-federal-tourism-tax#T86iORp8YDcoMfz0.97> accessed 17 January 2022; FMT Reporters, 'State to decide action on tourism tax soon, says Sarawak Minister' *Free Malaysia Today* (Petaling Jaya, 12 June 2017) <http://www.freemalaysiatoday.com/category/nation/2017/06/12/state-to-decide-action-on-tourism-tax-soon-says-swak-minister/> accessed 17 January 2022; Nawar Firdaws, 'Like it or not, Sarawak subject to tourism tax, says state minister' *Free Malaysia Today* (Petaling Jaya, 14 June 2017) <http://www.freemalaysiatoday.com/category/nation/2017/06/14/like-it-or-not-sarawak-subject-to-tourism-tax-says-state-minister/> accessed 17 January 2022.

[100] Malaysia Act 1963, sections 73(1) and (2).

[101] Malaysia Act 1963, section 73(3); See also the list of laws in Sabah and Sarawak declared as federal laws in Appendix B.

[102] D.B.W Good, 'Problems of harmonizing the laws in the Malaysian Federation' in Suffian M, Lee, H.P. & Trindade, F.A. (ed) The Constitution of Malaysia, Its Development: 1957-1977 (OUP 1979).

[103] Malaysia Act 1963, section 74(10).

[104] Malaysia Act 1963, section 74(1).

[105] Malaysia Act 1963, section 74(2).

[106] Ibid.

[107] Malaysia Act 1963 (n 100), section 74(8).

modification of laws from West to East Malaysia pursuant to Section 74(2) of the Malaysia Act 1963 is the Subordinate Courts Act 1948 which was extended to East Malaysia with effect from 1 June 1981.

Currently, the Law Revision and Law Reform Division of the Attorney-General's Chambers is responsible to ensure that every Malaysian law is " … up to date, accurate and in tandem with current needs".[108] The Division's main functions are to "reprint laws in both the national and English language, publish revised texts of laws, extend Federal laws to Sabah and Sarawak and the Federal Territories, translate English texts of pre-1967 laws to the national language, review archaic and obsolete laws, and modernize laws to be in tandem with the changing needs of society".[109] The Extension Unit within the Law Revision and Law Reform Division of the Attorney-General's Chambers has the responsibility of extending and/or modifying federal laws to, among others, the States of Sabah and Sarawak pursuant to Section 74 of the Malaysia Act 1963. The main purpose of the task is to ensure uniformity of federal laws in its application throughout Malaysia.[110] The extension exercise is carried out upon request from the States of Sabah and Sarawak or from ministries or agencies concerned or on the Law Revision and Law Reform Division's own initiative.[111] For example, the State of Sarawak requested for the Innkeepers Act 1952 (Act 248) to be extended to it since there was no specific law for the administration of the hotel industry in Sarawak. Act 248 was then gazetted in 2011 under the Ministers of Federal Government (Amendment) Order 2011[112] and thereafter the extension and modification orders were completed and submitted to the Ministry.[113]

4. One Limitation Statute Across Malaysia

As set out extensively earlier, there are already some similarities on the general principles of limitation, as well as on the period of limitation for some causes of action across the three jurisdictions. In Sabah and Sarawak, many of the causes of action can properly be categorized under the wider cause of action of contract, tort, recovery of immovable property etc. For

[108] Law Division and Law Reform Division, 'Role and Responsibility of the Sector', (*Attorney-General's Chambers*) <http://www.agc.gov.my/agcportal/index.php?r=portal2/left&menu_id=bjBCTG11Z3Q1TmljQThGRlkxUWxwdz09> accessed 17 January 2022.
[109] Ibid.
[110] Human Rights Commission of Malaysia, *Attorney-General Chambers Malaysia Bi-Annual Rep* [2011] SUHAKAM 126.
[111] Ibid 127.
[112] P.U. (A) 43/2011.
[113] Ibid.

example, a claim for compensation for false imprisonment,[114] malicious prosecution,[115] libel[116] and slander[117] are all claims under the wider cause of action of tort. Notwithstanding this, the separate causes of action have different limitation periods ranging from one to sixty years.[118] There are some causes of action that are outdated and may no longer be relevant in today's modern world, for example compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter,[119] to restrain waste[120] and seaman's wages.[121]

With particular regard to limitation statutes, it is of vital importance to note that one of the items on the Federal List is civil and criminal law and procedure and the administration of justice[122] as well as education.[123] This includes, among others, the constitution and organization of all courts other than Syariah Courts, the jurisdiction and powers of all such courts, remuneration and privileges of judges, persons entitled to practise before the courts, and the subject matter of civil and criminal law such as contracts, evidence, interpretation of federal law, limitation, actionable wrongs, property, etc. Therefore, the statutes of limitation may well be reviewed by the Law Revision and Law Reform Division of the Attorney-General's Chambers whose duty is, among others, " … to review archaic and obsolete laws, and modernize laws … ".[124] This is because firstly, these matters fall squarely under " … civil and criminal law and procedure and the administration of justice … ".[125] Secondly, these laws have general application for purposes of administration of justice and legal practice in Malaysia, and do not contain any 'sensitive' provisions such as constitutional safeguards or peculiar application to the states of Sabah and Sarawak. Therefore, these laws may be reviewed by the Federal Government (in particular, the Law Revision and Law Reform Division of the Attorney-General's Chambers) for purposes of unification without any encumbrances or negative repercussions.

[114] Schedule of the Limitation Ordinances of Sabah and Sarawak, item 8.
[115] Schedule of the Limitation Ordinance of Sabah, item 10; Schedule of the Limitation Ordinance of Sarawak, item 9.
[116] Schedule of the Limitation Ordinance of Sabah, item 11; Schedule of the Limitation Ordinance of Sarawak, item 10.
[117] Schedule of the Limitation Ordinance of Sabah, item 10; Schedule of the Limitation Ordinance of Sarawak, item 9.
[118] Schedule of the Limitation Ordinances of Sabah and Sarawak, item 114.
[119] Schedule of the Limitation Ordinance of Sabah, item 13; Schedule of the Limitation Ordinance of Sarawak, item 12.
[120] Schedule of the Limitation Ordinance of Sabah, item 32; Schedule of the Limitation Ordinance of Sarawak, item 31.
[121] Schedule of the Limitation Ordinance of Sabah, item 83; Schedule of the Limitation Ordinance of Sarawak, item 82.
[122] Ninth Schedule to the Federal Constitution, item 4 of List I.
[123] Ninth Schedule to the Federal Constitution, item 13 of List I.
[124] Law Division and Law Reform Division (n 108).
[125] Ninth Schedule to the Federal Constitution, item 4 of List I.

That being the case, it is submitted that any exercise undertaken to unify and modernize these laws will not affect any of the constitutional safeguards afforded to Sabah and Sarawak. Any amendments, modification, consolidation or repeal of any of these legislations may be passed with a simple majority in both Houses of Parliament pursuant to Article 159(4)(b) of the Federal Constitution as these legislations are ordinary law within the ambit of Parliament's legislative powers.

The unification of the limitation legislation is therefore possible for the whole of Malaysia, albeit a more simple, straightforward and modern legislation with more realistic limitation timelines that appeals to a more effective administration of justice.

5. Conclusion

Consolidated laws on limitation which apply uniformly across Malaysia may be beneficial to the judicial and legal system as a whole as it is not only convenient but also promotes consistency and reduces confusion. It is therefore recommended that there be only one limitation statute that applies throughout Malaysia, with recognized, modern, relevant and legally enforceable causes of action with realistic limitation periods. Such a limitation statute would only serve to lessen the confusion in the legal fraternity as to which limitation statute applies, particularly in cross-border transactions which would certainly appeal to the international community, especially foreign investors in Malaysia who would have more confidence in our judicial and legal system. These are features which conform to the ideal concepts of the rule of law and the doctrine of *stare decisis*, the hallmarks of an ideal judicial and legal system.

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Indonesia Constitutional Court: The Guardians of Democracy in the Pandemic Era

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Abstract

General elections, which are carried out honestly, fairly, consistently and continuously, are efforts to maintain a democratic climate in every country. As a country that upholds democracy, Indonesia always strives to carry out general elections in an honest, fair, consistent and continuous manner every five years, as mandated by the constitution. In spite of the Coronavirus Disease 2019 (COVID-19) pandemic, Indonesia had conducted regional head elections, namely the election of governors in 9 provinces and of regents/mayors in 261 districts/cities. As the state institution guards the constitution and democracy, the Constitutional Court is obliged to resolve and manage general election disputes even during the pandemic. This paper examines the strategy and management of the Constitutional Court in handling general election dispute cases to regions during the pandemic period while maintaining the independence and impartiality of the Constitutional Court institutions. This study uses primary and secondary data, including the Indonesian Constitution, the regional election law, and other regulations related to handling regional head elections during a pandemic. This study also compares government policies related to handling regional head elections during a pandemic in Indonesia and other countries, especially regarding the rights of the people to still be able to come to Court during a pandemic. Existing data and legal materials related to handling general election disputes during a pandemic are compared and analysed in full and in detail. It is concluded that the management of case admissions and trial management using ICT technology has proven to be effective in minimising the gathering of people so that the Constitutional Court does not become a cluster of coronavirus transmission.

Keywords: Constitutional Court, Dispute Election, Coronavirus, Constitution.

1. Introduction

Since the Indonesian government first announced that there were Indonesian people who were positive for the coronavirus, there had not been a face of concern from the public that the virus would spread quickly at the time. On March 2, 2020, President Jokowi announced that two Indonesian citizens had tested positive for the coronavirus.[126] This matter was then followed up and handled by the Minister of Health by the health protocol for handling the coronavirus, which is a continuation of the WHO protocol. The coronavirus pandemic that has hit parts of the world today has become a new problem for all citizens.[127] Each country is trying to close the area for the COVID-19 virus by closing the space for virus carriers. There are several ways to limit the movement of people, so they do not get infected with the COVID-19 virus. Nevertheless, thousands of people worldwide have become victims, and we never know when this pandemic will end.

Every country is trying to survive against the coronavirus by making an effort to protect its citizens. China, as the country that was first infected, after knowing the number of fatalities due to this coronavirus, finally imposed a state of emergency by closing Wuhan City (lockdown) so that people in Wuhan City could not leave Wuhan City and vice versa, people from outside Wuhan City also cannot enter Wuhan City. All modes of transportation in Wuhan City were closed, and people were forced to stay at home. The lockdown was carried out to close the area against the spread of the virus.[128]

Various countries then imitated the regulations carried out by the Chinese government in various parts of the world. However, by looking at the conditions of the people, each country has different regulations regarding the implementation of this lockdown, so some enforce a total lockdown as in Wuhan City. On the other hand, some countries impose a partial lockdown.[129]

As a country that upholds the constitution, Indonesia has regulated that in a state of emergency, the President has a role in determining the conditions and consequences as stipulated in Article

[126] n/a, 'Jokowi Umumkan Dua WNI Positif Corona di Indonesia' (*CNN Indonesia*, 2 March 2020) <https://www.cnnindonesia.com/nasional/20200302111534-20-479660/jokowi-umumkan-dua-wni-positif-corona-di-indonesia> accessed 13 October 2021.

[127] Hani Adhani, 'Constitutional Court of the Republic of Indonesia' [2020] 3(1) INSLA e-Proceeding, 609 <https://insla.usim.edu.my/index.php/eproceeding/article/download/52/77/197> accessed 11 January 2021.

[128] Hani Adhani, 'Belajar Dari Film Dokumenter "The Lockdown: One Month in Wuhan"' (*Kumparan*, 23 March 2020) <https://kumparan.com/hani-adhani/belajar-dari-film-dokumenter-the-lockdown-one-month-in-wuhan-1t56qC1kjUq> accessed 19 August 2020.

[129] Arief Ikhsanudin, 'Pemerintah Kaji Kemungkinan Penerapan Lockdown Parsial' (*DetikNews*, 28 March 2020) <https://news.detik.com/berita/d-4956303/pemerintah-kaji-kemungkinan-penerapan-lockdown-parsial> accessed 19 August 2020.

12 of the Constitution, which states, "The President declares a state of emergency. The conditions and consequences of the state of emergency are determined by law … ".[130] Furthermore, in relation to efforts to tackle the coronavirus pandemic, Indonesia enacted Law Number 6/2018 concerning Health Quarantine promulgated on August 8, 2018. Regarding the law, the government can take steps as follows regulated in Article 4, " … responsible for protecting public health from diseases and Public Health Risk Factors that can cause Public Health Emergency through the implementation of Health Quarantine … ".[131] In this regard, the President has issued several regulations, including establishing the status of a public health emergency (Presidential Decree No. 11/2020) and issuing a regulation on Large-Scale Social Restrictions in the Context of Accelerating the Handling of COVID-19 (Government Regulation 21/2020).[132]

However, problems arise in implementing regional head elections that will elect regents, mayors and governors in September 2020. By looking at the conventional pattern of regional head elections, the implementation of regional elections will have the potential to be a medium for the spread of the COVID-19 virus. This concern became the main reason for President Joko Widodo to issue a government regulation in lieu of the law (Perpu) regarding the implementation of regional head elections, namely to postpone the implementation of the election, which was initially held in September 2020 and was postponed to December 2020.

The main reasons for the enactment of the Perpu are as follows: [133]

(i) in 2020, the world experienced a catastrophic COVID-19 pandemic. The spread of COVID-19, which has been declared a pandemic by the World Health Organization (WHO) in most countries worldwide, including Indonesia, has caused many fatalities, shown an increase from time to time and has been declared a national disaster,

(ii) in the context of overcoming the spread of COVID-19 as a national disaster, extraordinary policies and steps need to be taken both at the central and regional levels, including the need to postpone the stages of holding simultaneous regional head elections in 2020 so that the regional head elections can continue to take place in a democratic and quality manner and to maintain domestic political stability,

(iii) in addition to the reasons mentioned above, there are considerations regarding the compelling urgency by the Constitutional Court Decision Number 138/PUU-Vlll2OO9, which contains the requirements for the need for a Government Regulation in Lieu of Law if 1). The existence of circumstances, namely an urgent need to resolve legal issues quickly

[130] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 2002 1, see Article 12.

[131] See article 4 'UU No. 6 Tahun 2018 Tentang Kekarantinaan Kesehatan [JDIH BPK RI]' <https://peraturan.bpk.go.id/Home/Details/90037/uu-no-6-tahun-2018> accessed 18 August 2020.

[132] n/a, 'Regulasi | Gugus Tugas Percepatan Penanganan COVID-19' (*Indonesian Government*) <https://covid19.go.id/p/regulasi> accessed 18 August 2020.

[133] Perpu COVID-19 2020 2.

based on the Act; 2). The mandatory law does not yet exist so that there is a legal vacuum or there is a law, but it is not sufficient; 3). The legal vacuum cannot be overcome by making laws in the usual procedure because it will take quite a long time while the urgent situation requires certainty to be resolved, and

(iv) based on the previous matters, in a compelling urgency, by the provisions of Article 22 paragraph (1) of the constitution, the President has the authority to stipulate a Government Regulation in Lieu of Law concerning the Third Amendment to Law Number 1/2020 concerning Stipulation of a Government Regulation in Lieu of Law Number 1/2014 concerning the Election of Governors, Regents, and Mayors to become a law.

The problem of implementing regional head elections during the COVID-19 pandemic stops at the time of its implementation and post-implementation, namely if there is an election dispute. The law on regional elections has stipulated that election disputes can be submitted to the Constitutional Court three days after announcing the determination by the general election commission. There are concerns that the regional head election dispute trial held at the Constitutional Court building can also become a medium for the transmission of COVID-19. With the number of simultaneous regional elections in 270 regions in Indonesia, covering 9 provinces, 224 regencies, and 37 cities, the potential for regional election disputes that will become cases in the Constitutional Court is also enormous.[134] Furthermore, it has the potential to make the Constitutional Court building a medium for the transmission of the COVID-19 virus.

Therefore, as one of the courts with a mission to become a modern and reliable court, the Constitutional Court is trying its best to close the area to avoid COVID-19 transmission during election disputes, by using an e-court system combined with limited trial evidence regulations in the Constitutional Court.[135]

2. Literature Review

The Constitutional Court as a reformed state institution has the authority regulated in the Indonesian Constitution (UUD 1945), namely in Article 24C of the Indonesian Constitution, which states as follows: [136] (1) The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine laws against the constitution. Basis, to decide on

[134] n/a, 'Berikut Daftar 270 Daerah Yang Gelar Pilkada Serentak 9 Desember 2020 Halaman All' (*Kompas.com*, 5 December 2020) <https://www.kompas.com/tren/read/2020/12/05/193100165/berikut-daftar-270-daerah-yang-gelar-pilkada-serentak-9-desember-2020?page=all> accessed 13 October 2021.

[135] Glery Lazuardi, 'MK Lakukan Persiapan Penanganan Sengketa Hasil Pilkada 2020' (*Tribunnews.com*, 17 July 2020) <https://www.tribunnews.com/nasional/2020/07/17/mk-lakukan-persiapan-penanganan-sengketa-hasil-pilkada-2020> accessed 30 September 2021.

[136] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, see article 24C.

disputes over the authority of state institutions whose authority is granted by the constitution, to decide on the dissolution of political parties, and to decide on disputes regarding the results of the general election. (2) The Constitutional Court is obliged to decide on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the constitution.

As written in Article 24C of the Indonesian Constitution, one of the constitutional powers is to decide disputes over general election results.[137] However, in its development, general elections have developed meanings that are not only identical with legislative elections and presidential elections as regulated in the constitution, but also regional head elections, which at the time of discussing constitutional amendments have not yet confirmed the authority to handle regional head election disputes which the Supreme Court initially handled.[138]

The transfer of authority from the Supreme Court to the Constitutional Court is based on Article 236C of Law Number 12/2008 concerning the Second Amendment to Law Number 32/2004 concerning Regional Government. In Article 236C of Law Number 12/2008, it is stated that, "The handling of disputes over the results of the election of regional heads and deputy regional heads by the Supreme Court is transferred to the Constitutional Court no later than 18 (eighteen) months from the promulgation of this Law".[139] According to Daniel Yusmic, the handling of election disputes by the Constitutional Court is very helpful in accelerating the settlement of regional election disputes. There is no more conflict and uncertainty due to unclear processes. However, the legal process must be genuinely valid and supported by facts and not manipulation. These improvements need to be appreciated as a form of improvement in the legal structure in Indonesia.[140]

The transfer of the handling of regional election disputes from the Supreme Court to the Constitutional Court was finally determined on November 1, 2008, which was marked by the signing of the minutes of the transfer of regional election disputes between the chairman of the Constitutional Court and the chairman of the Supreme Court. According to Mahfud MD, the election disputes submitted to the Constitutional Court only concern the vote count results. At

[137] Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, *Naskah Komprehensif Perubahan UUD 1945 - Buku V* (Sekretriat Jenderal Mahkamah Konstitusi RI 2010).
[138] Hani Adhani, *Sengketa Pilkada: Penyelesian Dari Mahkamah Agung Ke Mahkamah Konstitusi* (Rajagrafindo Persada 2019).
[139] Bambang Sutiyoso, 'Pembentukan Mahkamah Konstitusi Sebagai Pelaku Kekuasaan Kehakiman Di Indonesia' (2010) Jurnal Konstitusi 7.
[140] Adhani (n 138).

the same time, the voting process rests with the Election Supervisory Body (Bawaslu), which can take them to the Criminal Court.[141]

In its journey, the authority of the Constitutional Court to handle regional election disputes has been maintained until this day. However, in its decision, the Constitutional Court had decided that the regional elections were not part of the electoral regime but the regional government regime. Therefore, according to Patrialis, the Constitutional Court has decided that the regional elections (Pilkada) are not an election regime based on Article 22E of the Constitution. At the same time, the Pilkada is regulated in Article 18 paragraph (4) of the constitution. Therefore, it is entirely left to the legislators whether the election dispute will remain the authority of the Constitutional Court or other institutions.[142]

The decision became a stimulus for lawmakers to form a particular institution to handle regional election disputes so that regional election disputes are no longer the authority of the Constitutional Court as stipulated in Article 157 paragraphs (1), (2) and (3) of Law Number 10/2016 which states as follows: [143]

(i) disputes of election results are examined and tried by a particular judicial body,
(ii) as referred to in paragraph (i), the particular judicial body is established before implementing the simultaneous national elections, and
(iii) disputes over the determination of votes in the final stage of the election results are examined and tried by the Constitutional Court until a particular judicial body is established.

While the formation of a special election court is the homework of lawmakers, it is not clear when it will be formed. In the end, the Constitutional Court will continue to play a role in adjudicating regional election disputes until 2024. With that, according to the Constitutional and Democracy Researcher (KoDe) Initiative, Viola Reininda, establishing a special election court as stated in Law 10/2016 concerning regional elections is no longer relevant. This is because in its development, the Constitutional Court has issued a decision Number 55/2019 concerning the simultaneous examination of elections and local elections.[144]

[141] Ibid, 92-93.
[142] n/a, 'MK Sebut Pilkada Bukan Rezim Pemilu' (*Mahkamah Konstitusi Republik Indonesia*, 29 January 2015) <https://www.mkri.id/index.php?page=web.Berita&id=10565> accessed 13 October 2021.
[143] Undang-Undang Republik Indonesia Nomor 10 Tahun 2016 Tentang Pemilihan Gubernur, Bupati, Dan Walikota 2016 (JDIH BPK RI) 70, Article 157.
[144] Febrianto Adi Saputro, 'Pembentukan Badan Peradilan Khusus Pemilu Tak Lagi Relevan' (*Republika Online*, 29 August 2021) <https://www.republika.co.id/berita/qylj7v428/pembentukan-badan-peradilan-khusus-pemilu-tak-lagi-relevan> accessed 13 October 2021.

3. Research Methodology

This study uses secondary data from literature studies such as the Indonesian Constitution, the regional election law, and other regulations related to handling regional head elections during a pandemic. Thus, the data collection technique in this paper is a literature study conducted by studying the laws on regional head elections, books, papers, and journals related to regional head elections.

This study also compares government policies related to handling regional head elections during a pandemic in Indonesia and other countries, especially regarding the rights of the people to still be able to come to Court during a pandemic. Existing data and legal materials related to handling general election disputes during a pandemic are compared and analysed in full and in detail based on the research objectives. In addition, data analysis is carried out in the qualitative analysis of data that describes the pattern of handling disputes in Court during a pandemic at the Constitutional Court.

4. Health Emergency Regulations

Each country's policy to impose a state of emergency is usually specifically regulated in each country's constitution as the highest law. For example, China has set up an emergency mechanism in their constitution. Thus, the President becomes the fulcrum of authority to decide on a state of emergency in the entire country or the province.[145] Likewise, the Muslim-majority country in Europe, namely Turkey, also rigidly regulates the state of emergency in the event of a pandemic. In the Turkish constitution, the authority to establish a state of emergency is also in the hands of the President.[146] The same thing happens in Malaysia, wherein a state of emergency is the King and Prime Minister's prerogative, as mentioned in the Malaysian constitution.[147]

As one of the countries with a modern constitution, namely a constitution that protects human rights, Indonesia also clearly regulates the rules for the state of emergency. Article 12 Indonesian Constitution (UUD 1945) states, "The President declares a state of emergency. The conditions and consequences of the state of emergency are determined by law".[148] Furthermore, related to efforts to tackle the coronavirus, Indonesia has a Law Number 6/2018 concerning Health Quarantine promulgated on August 8, 2018. Regarding the law, the steps that the Indonesian

[145] Constitution of the People's Republic of China, Article 80 <http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372966.htm> accessed 13 October 2021.
[146] Constitution of the Republic of Turkey 2018, see article 119.
[147] Federal Constitution of Malaysia, see Article 150 about emergency proclamation.
[148] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, see article 12.

government can take are as follows, which is regulated in Article 4 of the Law on Health Quarantine, namely " … responsible for protecting public health from diseases and/or Public Health Risk Factors that have the potential to cause Public Health Emergency through the implementation of Health Quarantine". In this regard, the President has issued several regulations, including establishing the status of a public health emergency (Kepres 11/2020) and issuing regulations on Large-Scale Social Restrictions in the Context of Accelerating the Handling of COVID-19 (PP 21/2020).[149]

In addition, as an effort to close the area for the spread of the COVID-19 virus, the government represented by the relevant Ministries and Regional Governments also makes regulations and legal rules with the aim that the community can fight together or at least avoid the spread of the coronavirus. These regulations are in the form of government regulations, decrees, circulars, protocols, and also recommendations, such as the Governor's Regulation on Guidelines for Large-Scale Social Restrictions (PSBB),[150] the Minister of Health Regulation on the use of masks and handwashing facilities with soap, the Decree of the Minister of Health on the Determination of Large-Scale Social Restrictions in various regions in Indonesia, Letter Order of the Minister of Industry concerning Guidelines for Submitting Applications for Permits for the Implementation of Industrial Activities During Public Health Emergencies, Regulation of the Minister of Transportation concerning Transportation Control, many protocols and recommendations that the government central government has made, regional governments, ministries and also state institutions to break the chain of the spread of the coronavirus.[151]

5. Legal Assurance during Health Emergency

However, even though the government is trying to close the area for the movement of the virus, the facts that occur in society are different because these various regulations are not effective enough to dampen people's desire not to leave their homes. The public is ultimately divided into two views, namely those who follow the government's recommendations by implementing all existing regulations and recommendations. However, some people reject the existing regulations and do not follow the government's recommendations. The SRMC survey results related to the desire to go to their hometown (*pulang kampung*), that 31% of Jakarta residents still want to go

[149] Rakhmat Nur Hakim, 'Pembatasan Sosial Berskala Besar Berhak Batasi Orang Keluar Masuk Suatu Daerah' (*Kompas.com*, 1 April 2020) <https://nasional.kompas.com/read/2020/04/01/11054771/pembatasan-sosial-berskala-besar-berhak-batasi-orang-keluar-masuk-suatu> accessed 13 October 2021.
[150] Hani Adhani (n 127).
[151] n/a (n 132).

to their hometown amid this pandemic.[152] Even though we all understand that the effects of '*pulang kampung*' are dangerous for the entire community, some rules and regulations overlap and even contradict one another, confusing the public.

Unfortunately, amid the split between the two views of the community and the out-of-sync regulation, there is no concrete legal action taken by the people, community groups or NGOs to take legal action so that the government takes measurable, clear and firm steps. Let us look at the existing statutory products and have bound us as citizens. Potentially, these laws and regulations violate the constitutional rights of citizens as regulated in article 28D paragraph (1) Indonesia Constitution, which states, "Everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law".[153]

This legal certainty is the primary key in terms of law enforcement when this health emergency is enforced because it will have an impact on the violation of the constitutional rights of other citizens, such as the right to life, the right to get a job, the right to a healthy environment, the right to protection and security, and other fundamental rights of citizens as regulated in the Indonesian Constitution.

6. Regional Dispute Election at the Constitutional Court

Since the issuance of a Government Regulation in Lieu of Law regarding the implementation of simultaneous regional elections, which was initially scheduled for September 2020, which was later changed to December 2020, there has been concern that the implementation of the elections in 2020 will not run optimally, be unsafe, thus impacting the overall health risk of the community. Moreover, by looking at the standard level of community discipline, which is still below the average, the 'Pilkada' seems to impact more and more people infected with the coronavirus.[154]

The ranks of the 'Pilkada' organisers, namely the General Elections Commission and the General Elections Supervisory Body, are at the forefront to succeed in the democratic process in the regions to elect regional leaders during the pandemic. This is done by trying to erode the

[152] Barly Haliem, Sandy Baskoro, 'Hasil Survei: Di Tengah Pandemi Corona, 31% Warga DKI Tetap Ingin Mudik Lebaran' (*Kontan.co.id*, 18 April 2020) <https://nasional.kontan.co.id/news/hasil-survei-di-tengah-pandemi-corona-31-warga-dki-tetap-ingin-mudik-lebaran> accessed 13 October 2021.

[153] Hani Adhani, 'Menegakan Kepastian Hukum Di Tengah Wabah COVID-19' (*Kumparan*, 10 May 2020) <https://kumparan.com/hani-adhani/menegakan-kepastian-hukum-di-tengah-wabah-COVID-19-1tO2Qr5gAM7> accessed 11 January 2021.

[154] Radiordk, 'Polemik Pilkada Dan Penyelesaian Sengketa Di Tengah Pandemi' (*RDK FM UIN Jakarta*, 15 October 2020) <http://rdk.fidkom.uinjkt.ac.id/index.php/2020/10/15/polemik-pilkada-dan-penyelesaian-sengketa-di-tengah-pandemi/> accessed 13 October 2021.

occurrence of transmission carried out in various ways and methods, as well as by making various rules so that the ranks the organisers, the candidate pairs and their success teams, as well as the community-made maximum efforts by implementing health protocols so that the Pilkada did not become a massive virus transmission medium that would have an impact on public health at large.

However, the fact is that the existing patterns and methods are not maximal enough to close the room for the spread of the COVID-19 virus. This is evidenced by the many organisers who have also contracted the coronavirus. Moreover, candidate pairs of candidates and the successful candidate pairs are affected by the COVID-19 virus.[155] A pandemic due to COVID-19 that spreads rapidly in the community has led to regulations in implementing the 2020 simultaneous regional elections different from the previous elections.

The Constitutional Court as a judicial institution is given the task and responsibility, by law, to resolve the 2020 Pilkada disputes before establishing a special election court. Therefore, the Constitutional Court, which has just resolved the 2019 Election dispute, both the Legislative Election dispute and the Presidential Election dispute, is again preparing to be at the forefront of efforts to resolve the final voting results of the 2020 Regional Head Election. However, the Constitutional Court is also limited by the threshold for the difference in votes that have been regulated in the Regional Election Law with the maximum limit of the difference in votes between pairs of candidates starting from 2 per cent to 0.5 per cent, which adjusts to the population of each region as regulated in Article 158 Electoral Law.[156]

Although the Constitutional Court, as an institution that guards democracy and interpreters of the constitution, is a judicial institution that has a platform that is “modern and reliable” with its various E-Court technologies, there are still concerns from the public that this election dispute will also become a medium for the spread of the coronavirus. Moreover, with a relatively high positive rate of COVID-19 between September and December 2020, the shifting of the Pilkada process from the ranks of regional election organisers in various regions to the Constitutional Court seems to be a new scourge that will have the potential to become a new cluster of coronavirus transmission.[157]

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[155] n/a, ‘Bawaslu: Petugas KPPS Positif Corona Masih Tugas Di 1.172 TPS’ (*CNN Indonesia*, 9 December 2020) <https://www.cnnindonesia.com/nasional/20201209152553-32-580026/bawaslu-petugas-kpps-positif-corona-masih-tugas-di-1172-tps> accessed 13 October 2021.

[156] Glery Lazuardi, ‘MK Siap Menangani Sengketa Pilkada Di Tengah Pandemi COVID-19’ (*Tribunnews.com*, 20 June 2020) <https://www.tribunnews.com/pilkada-2020/2020/06/20/mk-siap-menangani-sengketa-pilkada-di-tengah-pandemi-COVID-19> accessed 13 October 2021.

[157] Maria Rosari Dwi Putri, ‘MK Siap Tangani Sengketa Hasil Pemilu’ (*ANTARA News*, 26 March 2019) <https://www.antaranews.com/berita/815694/mk-siap-tangani-sengketa-hasil-pemilu> accessed 13 October 2021.

7. Regulations of the Constitutional Court during Pandemic

The existence of COVID-19, which spreads rapidly in the community, has led to changes in regulations in terms of the implementation of the 2020 simultaneous regional elections, which are different from the previous elections. Related to this, the Constitutional Court, as a judicial institution that is given temporary duties and responsibilities by law to resolve 2020 Pilkada disputes before the establishment of a particular election judiciary, also seeks to prepare the management of regional election dispute handling, which is also different from the management of regional election dispute cases in a familiar atmosphere.[158]

Although the Constitutional Court, as a democratic guardian and interpreter of the constitution, is a judicial institution that has a "modern and reliable" platform with various E-Court technologies at its disposal, there are still concerns from all employees and also the public that the election disputes in the Constitutional Court during the period pandemic will also become a medium for the spread of the coronavirus. With the COVID-19 positive rate, which is relatively high, especially during the handling of regional election disputes, namely between September 2020 to March 2021, the shifting of the regional election dispute process from the ranks of the regional election organisers in various regions to the Constitutional Court seems to be a new scourge that will potentially become a threat and new cluster of coronavirus transmission.[159]

To close the area for the spread of the coronavirus, the Constitutional Court finally established a Constitutional Court Regulation (PMK) in the case of regional election disputes with the main focus on shifting the mechanism for receiving case files online and hearing cases online.[160] Although the PMK does not close the area for the public to continue coming to the Constitutional Court building, it is obligated to comply with stringent health protocols. Therefore, in practice, when the parties come to the Constitutional Court building, the Constitutional Court prepares a health protocol procedure that is not only strict but also closes the potential for the entry of the coronavirus by requiring the parties to swab-antigen, wear masks and face shields, gloves and

[158] 'Tangani Sengketa Pilkada, MK Tunda Perkara Pengujian UU - Kompas.Id' <https://www.kompas.id/baca/polhuk/2020/12/26/mk-fokus-tangani-sengketa-pilkada-pengujian-uu-ditangguhkan/> accessed 4 June 2021.

[159] Nicholas Ryan Aditya, 'Pilkada Berpotensi Tingkatkan Kasus COVID-19, Satgas Minta Dijalankan Sesuai PKPU' (*Kompas.com*, 8 December 2020) <https://nasional.kompas.com/read/2020/12/08/11115941/pilkada-berpotensi-tingkatkan-kasus-COVID-19-satgas-minta-dijalankan-sesuai> accessed 4 June 2021.

[160] Nano Tresna Arfana, 'MK Siapkan PMK Terbaru Hadapi Sengketa Pilkada Serentak' (*Mahkamah Konstitusi Republik Indonesia*, 4 November 2020) <https://www.mkri.id/index.php?page=web.Berita&id=16713> accessed 4 June 2021.

also ensure physical distancing.[161] Of course, this regulation is also applied to all employees and constitutional judges.

In addition, the regulation on the receipt of physical files brought by the parties to the case must first go through an anti-virus scanning process to ensure that the physical files brought by the parties are free from the coronavirus. Likewise, when the trial begins, the Constitutional Court applies a reasonably strict rule whereby the parties who will attend directly to the courtroom are only a maximum of 2 (two) people, who before entering the courtroom are also required to have an antigen swab explicitly prepared by the Constitutional Court. Finally, of course, the obligation to wear masks and face shields, gloves and maintain physical distance to accurately ensure that the parties present in the courtroom are entirely free of COVID-19.[162]

Another thing that the Constitutional Court is also quite strict about is the use of various anti-virus tools in the file receiving room and the courtroom, which is part of the Constitutional Court's effort to close the spread of the COVID-19 virus. Besides, spraying the courtroom is carried out repeatedly to ensure that the courtroom is completely sterile from the coronavirus. The trial mechanism that uses a hybrid system, namely limited physical attendance (2 people) and online attendance using an online media platform, makes the trial unique for the public to participate. This is proven by the number of people who watch the Constitutional Court trial live through the YouTube channel. The seriousness of the Constitutional Court to build a capable online trial system for all justice seekers in all corners of the country from Sabang to Merauke is a momentum to prove that the Constitutional Court can truly implement a 'new normal' atmosphere in carrying out its duties and responsibilities, as well as maintaining the consistency of being a modern and trusted court.[163]

Of course, we can imagine with the number of regional election dispute cases that went to the Registrar's Office of the Constitutional Court with a total of more than 130 cases, so if this time were not during a pandemic or under normal conditions, hundreds of people would attend the Constitutional Court building every day, namely the parties and the public who will come to the Constitutional Court building. However, due to the pandemic conditions, we can see the opposite with these stringent regulations. Therefore, at the start of the 2020 regional election dispute, the

[161] Administrator, 'Protokol Kesehatan Ketat Dalam Sidang Pilkada Perdana Di MK' (*Media Indonesia*, 26 January 2021) <https://mediaindonesia.com/galleries/detail_galleries/17303-protokol-kesehatan-ketat-dalam-sidang-pilkada-perdana-di-mk> accessed 4 June 2021.

[162] Mimi Kartika, 'Hakim MK Ingatkan Para Pihak Disiplin Protokol COVID-19' (*Republika Online*, 26 January 2021) <https://www.republika.co.id/berita/qnj7zb428/hakim-mk-ingatkan-para-pihak-disiplin-protokol-covid19> accessed 4 June 2021.

[163] Kautsar Widya Prabowo, 'Sidang Sengketa Pilkada Dimulai Di MK Dengan Protokol Kesehatan Ketat' (*Medcom.id*, 26 January 2021) <https://www.medcom.id/pilkada/news-pilkada/lKYw5zPb-sidang-sengketa-pilkada-dimulai-di-mk-dengan-protokol-kesehatan-ketat> accessed 4 June 2021.

Constitutional Court could force the parties to refrain from attending the Constitutional Court building. In addition, the parties are also forced to familiarise themselves with using technology (ICT) by submitting applications online,[164] attending an online trial, thus forcing the Constitutional Court to adapt by providing the best alternative media for online trials to seek substantive justice and efforts to maintain democracy even though it is carried out in cyberspace.

By looking at the description of how the Constitutional Court handled regional election cases during the pandemic, it provides a complete picture that the Constitutional Court has provided an excellent example of what and how the performance of the court apparatus should be in the new normal era.[165] What has been done by the Constitutional Court to maintain democracy during the pandemic with examples and concrete evidence of performance that is not only transparent but also effective and efficient so that in the end, a more dynamic and professional bureaucracy can be created as an effort to increase effectiveness and efficiency to support the performance of court services to society.

8. The Constitutional Court Trial during Pandemic

Quoted from the Indonesian Constitutional Court website, the Registrar's Office has received 140 applications for regional election dispute cases with details of 64 being done offline and 76 online with details as follows: governor 7 applications, regent 119 and city 14 applications. With the time limit for resolving cases limited by law, which is 45 days, the Constitutional Court handling the 2020 regional election dispute is like 'running but wearing a mask'.[166]

The Constitutional Court looks very carefully in hearing each regional election dispute case. The timing is also carefully calculated so that the judges are not too exhausted and the constitution judges are always physically fit. However, because there are only nine constitutional judges with an average age of over 60 years and many cases have a limited time for completion, there are concerns that the Constitutional Court will not complete its duties.

Since the regional election dispute case was registered on January 18, 2021, the Constitutional Court has divided the case into 3 (three) panels, with an average of each panel handling 44 cases with an even distribution of regions in the provinces, regencies and cities. With the average

[164] Danang Triatmojo, 'Sidang Sengketa Hasil Pilkada 2020, MK Gelar Secara Online Dan Offline Dengan Pembatasan' (*Tribunnews.com*, 26 January 2021) <https://www.tribunnews.com/nasional/2021/01/26/sidang-sengketa-hasil-pilkada-2020-mk-gelar-secara-online-dan-offline-dengan-pembatasan> accessed 4 June 2021.

[165] Utami Argawati, 'Arief Hidayat: Persidangan Virtual Pilihan Paling Realistis Di Masa Pandemi' (*Mahkamah Konstitusi Republik Indonesia*, 30 September 2020) <https://www.mkri.id/index.php?page=web.Berita&id=16623&menu=2> accessed 4 June 2021.

[166] Danang Triatmojo (n 39).

number of hearings being 3 times per case, at least more than 300 sessions have been convened during the implementation of the regional election dispute. If the trial is carried out with an average number of sessions between two and three hours, the average constitutional judge convenes for 900 hours or approximately 38 days.

Meanwhile, regarding decisions, the Constitutional Court has also made significant progress in terms of cases being granted, which amounted to 17 cases with the majority of cases being granted in part with orders for re-voting (PSU)[167] at several polling stations which, according to the Constitutional Court, are under consideration. Therefore, the law is proven that there has been a violation or fraud that violates the general principles of elections, namely direct, general, free, confidential, honest and fair (Luber Jurdil), as confirmed in Article 22E paragraph (1) of the constitution.

This further confirms that the Constitutional Court is not a "Calculator Court" and does not compromise on the existence of various frauds and/or violations that occurred during the Pilkada, which incidentally were proven to violate the constitution. In addition, this further emphasises that the Constitutional Court in making decisions is limited to the numbers of the vote count results, namely maintaining the dignity of democracy and the implementation of fair elections so that the purity of the people's voice is maintained by good.[168]

9. Conclusions and Recommendations

As a state institution born from the reform era, the Constitutional Court must continually update it with various conditions experienced by the community to maintain its constitutional rights unity.

The existence of a period of uncertainty, as currently experienced by all levels of the world community, must also increase the intuition and ammunition of the Constitutional Court to carry out various measurable innovations so that the constitutional rights of citizens as stated in the constitution can still be appropriately maintained.

The fact that the Constitutional Court has succeeded in building a 'new normal' culture when handling regional election disputes in 2020 should also continue seriously when handling cases

[167] Sania Mashabi, 'KPU Jadwalkan PSU Untuk 15 Daerah Pilkada 2020, Ini Jadwalnya... Halaman All' (*Kompas.com*, 31 March 2021) <https://nasional.kompas.com/read/2021/03/31/09054731/kpu-jadwalkan-psu-untuk-15-daerah-pilkada-2020-ini-jadwalnya?page=all> accessed 14 October 2021.

[168] Nano Tresna Arfana, 'Aswanto: MK Bukan Mahkamah Kalkulator' (*Mahkamah Konstitusi Republik Indonesia*, 6 November 2020) <https://www.mkri.id/index.php?page=web.Berita&id=16719> accessed 14 October 2021.

that are the primary authority, namely judicial review and another task. Admittedly, the Constitutional Court has carried out the pattern of work culture in the new normal era with various notes of shortcomings and inconsistencies, but this can be immediately overcome as long as all stakeholders of the Constitutional Court carry out a joint movement by prioritising the principle of freedom of expression and is also egalitarian.

In addition, more substantial efforts are needed by the Constitutional Court, which is directly exemplified by the leadership of the Constitutional Court to maintain the honour of the Constitutional Court, namely quality decisions. Judges who are representatives of the three state institutions must be more concerned with substantial matters and focus on resolving cases that require speed and accuracy that are above average in this era of uncertainty. Of course, the existence of the nine judges will continue to be supported by supporters, or back-benders who are not only professionals but are furthermore ready to face the era of uncertainty with various innovations and collaborations to achieve the vision and mission of the Constitutional Court and achieve justice for the people, nation and state. What has been done by the Constitutional Court in implementing the management of election disputes during the pandemic, which is quite successful, can be a reference for becoming a standard for other institutions in Indonesia and even throughout the world to realise the best performance for the community in 'the new normal era'.

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Slippery Slopes and Boiling Frogs: Is the Ethical Lawyer a Myth?

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Abstract
The well-being of a profession depends a lot on the favourable perception that it enjoys from all stakeholders, namely the public. As an 'association' which is self-regulating, it sets the respective ethical standards and ensures compliance through disciplinary measures. However, the conduct of members of the legal profession over the years have called into question the very basis of this 'honourable profession' due to the unethical behaviour of some members of this profession. Although errant lawyers constitute a small percentage of the total number of lawyers in Malaysia, they nonetheless can bring the profession into disrepute with a corresponding decline in respect for the legal profession. The aim of this paper is to examine the ethical conduct of members of the legal profession and to propose measures which can be adopted to arrest ethical lapses in the future.

Keywords: law, legal profession, ethics, lawyers, disciplinary.

1. Introduction

During the 14th convocation ceremony for the Certificate of Legal Practice (CLP) examination at the Putra World Trade Centre, His Royal Highness Sultan Dr. Nazrin Muizzuddin Shah urged those entering the legal profession to 'practice according to the highest code of ethics'.[169] His Royal Highness is not the first to exhort and remind members of the legal profession of their professional responsibility. Judges too have constantly reminded lawyers of their ethical obligations as can be seen from the following newspaper headlines: 'Judge gives lawyer dressing-

[169] n/a, 'Nazrin: Courts not for political antics' *The Star* (Kuala Lumpur, 6 February 2009) <http://www.thestar.com.my/news/nation/2009/02/06/nazrin-courts-not-for-political-antics/#K0yDHsKlsfeuiTFC.99> accessed 6 May 2017.

down over attire';[170] 'Heed the code of ethics, judge tells lawyers'[171] and 'Stop the Rot: Judge V.T. Singham slams poor calibre of lawyers'.[172]

These reminders are borne out of concern for the perceived deterioration of professional standards among members of the legal fraternity. In the past, these pronouncements were borne out of direct observations by members of the Bench and the legal community. But today, due to social media and easy accessibility of information, members of the public themselves can observe delinquency on the part of some members of the legal profession. For example, a short clip on a video sharing website shows a lawyer yelling, pushing and kicking a client kung-fu style, after persistent demands by the client about clarification pertaining to a sale and purchase agreement, infamously earning him the moniker of 'Hooligan Lawyer' on social media.[173]

Instances such as these are some examples of the decline of the lawyer's standard of professional conduct. Although errant lawyers constitute a small percentage of the 20,556 legal practitioners in Malaysia as at 2022,[174] they nonetheless can be a blot on the profession as a whole.[175] Countless initiatives such as an ethics course for chambering students have been proposed and implemented to arrest these ethical lapses although with mixed results. Such ethical lapses, if they can be called that, continue to plague the legal profession as can be seen from the disciplinary orders meted out against delinquent members of the profession yearly as can be seen in the table below based on the available data.[176]

[170] n/a, 'Judge gives lawyer dressing-down over attire' (*Malaysian Bar*, 10 September 2008) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/judge_gives_lawyer_dressing_down_over_attire.html> accessed 19 November 2016.

[171] n/a, 'Heed the code of ethics, judge tells lawyers' *The Star* (Kuantan, 9 March 2009) <http://www.thestar.com.my/news/community/2009/03/09/heed-the-code-of-ethics-judge-tells-lawyers/> accessed 19 November 2016.

[172] Brenda Lim, 'Stop the Rot: Judge V.T. Singham slams poor calibre of lawyers' (*Malaysian Bar*, 28 June 2007) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/stop_the_rot_judge_v.t._singham_slams_poor_calibre_of_lawyers.html> accessed 19 November 2016.

[173] Syahidi Tajuddin, 'Tan Hui Chuan: The Hooligan Lawyer Assaulting Client!' (24 June 2012) <https://www.youtube.com/watch?v=D3jj_QkQmO8> accessed 23 July 2017.

[174] n/a, 'General Statistics' (*Malaysian Bar*, 11 February 2022) <https://www.malaysianbar.org.my/article/about-us/malaysian-bar-and-bar-council/about-us/figures/general-statistics> accessed 20 March 2022.

[175] Ambiga Sreenevasan, 'The role of lawyers in the administration of justice' (*Malaysian Bar*, 5 November 2008) <http://www.malaysianbar.org.my/members_opinions_and_comments/the_role_of_lawyers_in_the_administration_of_justice.html> accessed 25 July 2017.

[176] n/a, 'Disciplinary Orders (May 2017)' (*Malaysian Bar*, 30 June 2017) <http://www.malaysianbar.org.my/disciplinary_orders/disciplinary_orders_may_2017.html> accessed 23 July 2017.

Month (2022)	Struck Off	Suspended	Fined	Reprimanded
January	1	1	2	-
February	-	-	2	1
March	2	-	2	-

Source: Bar Council Malaysia.[177]

This can be contrasted with the earlier month of December 2021 where 7 lawyers were struck off with 1 lawyer fined.[178] It thus begs the question - is the ethical lawyer a myth or are bad apples part of the mix, even in relation to a profession such as the Malaysian legal profession?

This article will first define ethics and the meaning of 'profession' in the legal context. Secondly, it will discuss the importance of ethics in the legal profession. Thirdly, it will examine the conduct of lawyers especially in court and the reaction of the Bench. Finally, it will advocate a greater role for law schools which can serve to complement the efforts of the Bar Council. It will conclude by reiterating the importance of ethics in ensuring a high standard of professional conduct in the context of the legal profession. Reference will be made to the professional rules of ethics in Malaysia where needed.

2. Ethics and the Legal Profession

Generations of lawyers have prided themselves as being 'members of a learned profession.'[179] The legal profession is regarded as 'one of the historic and learned professions along with the clergy and medicine which have been traditionally regarded as professions throughout the centuries.'[180] It has been defined as 'a calling requiring specialised knowledge and often long and intensive academic preparation.'[181] Their specialised knowledge has placed them at the forefront of key historical events. Of the fifty-two signers of the American Declaration of Independence, twenty-five were attorneys (lawyers), notable among them were Thomas Jefferson, Benjamin Franklin, and John Adams.[182] The first Prime Minister of Malaysia, Tunku Abdul Rahman Putra Al-

[177] n/a, 'Disciplinary Orders' (*Malaysian Bar*, n.d. 2022) <https://www.malaysianbar.org.my/members> accessed 26 July 2022.

[178] n/a, 'Disciplinary Orders (December 2021)' (*Malaysian Bar*, 25 January 2022) <https://www.malaysianbar.org.my/article/members/practice-management/disciplinary-matters/disciplinary-orders/disciplinary-orders-december-2021-> accessed 26 July 2022.

[179] Edward D Re, 'The Profession of the Law' (2000) 15 Journal of Civil Rights and Economic Development 109.

[180] Ibid 110.

[181] n/a, 'Definition of profession' (*Merriam-Webster*, n.d.) <https://www.merriam-webster.com/dictionary/profession> accessed 21 March 2022.

[182] Carl T Bogus, 'The Death of an Honorable Profession' (1996) 71(4) Indiana Law Journal 911.

Haj Tunku, who spearheaded Malaysia's fight for independence, was himself a lawyer, having been called to the English Bar at the Inner Temple in 1947.[183]

2.1 Definition of a Profession

A profession is regarded as distinct from a trade whose primary aim is 'personal gain'.[184] Dean Roscoe Pound, former dean of Harvard Law School and a leading scholar in twentieth-century legal thought, defined a profession as " … a group ... pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."[185] According to him, there were three essential ideas within a profession which were 'organisation, learning, and a spirit of public service.'[186] Roscoe Pound regarded the gaining of a livelihood as incidental to the tree core ideas.[187] He stressed that 'the primary or central purpose of a profession' is that it is 'practised in a spirit of public service.'[188] And he regarded one defining characteristic as that it was a 'learned profession.' The 'pursuit of a learned art', was what distinguished the profession 'from a calling or vocation or occupation.'[189]

2.2 Definition of Ethics in the context of the Legal Profession

The legal profession, as in all professions, is closely associated with high ethical standards. The word 'ethics' is derived from the Greek word ethos (character), and from the Latin word mores (customs).[190] In its general term, ethics is a moral philosophy which sets out standards of behaviour for the individual and society.[191]

However, ethics has a different construction in the legal context. Here ethics refers primarily to canons of behaviour also referred to as rules of professional conduct. These canons often assume a legal framework. They provide guidance for the conduct of the members of the legal profession especially in grey areas of legal practice and stipulate sanctions for those who are in breach such

[183] James Foong Cheng Yuen, ' Late bloomer with great timing' (*Aliran*, 30 August 2008) <https://m.aliran.com/2008-5/late-bloomer-with-great-timing/> accessed 21 March 2022.
[184] Roscoe Pound, 'What is a Profession - the Rise of the Legal Profession in Antiquity' (1944) 19 Notre Dame L Rev. 203.
[185] Ibid, 204.
[186] Ibid, 204.
[187] Ibid, 204.
[188] Ibid, 204.
[189] Ibid, 204.
[190] Cornell Law School, 'Ethics' (*Cornell Law School Legal Information Institute*, n.d.) <https://www.law.cornell.edu/wex/ethics> accessed 11 August 2017.
[191] BBC, 'Ethics: A general introduction' (*BBC*, n.d.) <http://www.bbc.co.uk/ethics/introduction/intro_1.shtml> accessed 11 August 2017.

as suspension from practice, fine or being barred. These canons are known as 'professional ethics' or *Rules of Professional Conduct*. The fundamental aim of these *Rules of Professional Conduct* is to maintain the dignity and integrity of the legal profession by setting standards of professional conduct. In Malaysia, the Legal Profession Act 1976 confers powers on the Bar Council to make rules[192] for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.[193] Amongst the rules pursuant to the Act are the Legal Profession (Practice & Etiquette) Rules 1978.

A breach of these rules by an advocate and solicitor constitutes 'misconduct'[194] and he or she may be liable to be struck off the Roll or suspended from practice for any period not exceeding five years, or ordered to pay a fine or be reprimanded or censured, as the case may be.[195]

3. Slippery Slopes and Boiling Frogs - Lawyers and Ethics

Over the years, lawyers have found themselves hogging the news for all manner of wrongdoings, regardless of seniority. There are many such instances but a *YouTube* video titled 'Lawyer threatening judge in Malaysia',[196] neatly substantiates the concerns of many Bench. The video shows a terse verbal exchange between a lawyer and a judge in an open court hearing:

> *Lawyer: I know I shouldn't be saying this but can we stop here.*
> *Judge: No, we finish with the cross.*
> *Lawyer: This is going to take quite sometime*
> *Judge: Never mind*
> *Lawyer: I don't care My Lady.* (slams pen on table). *Stopping here* (not audible) *My Lady. You do this to me. I cannot stand it.*
> *Judge: If you can't manage the case don't blame the court. There are other courts that sit.*
> (Lawyer talking over the Judge)
> *Lawyer: I have been here the whole day My Lady.*
> *Judge: You are not the only one. Others are here the whole day also.*
> *Lawyer: …* (not audible)
> *Judge: I am surprised that a senior counsel like you is behaving like this.*
> (Lawyer talking over the Judge)

[192] Accountant's Report Rules 1990; Legal Profession (Publicity) Rules 2001; Solicitors' Accounts (Deposit Interest) Rules 1990; Solicitors' Account Rules 1990 and Advocates and Solicitors (Issue of Sijil Annual) Rules 1978.
[193] Legal Profession Act 1976, section 76.
[194] Legal Profession Act 1976, section 94(3).
[195] Legal Profession Act 1976, section 94(2).
[196] June 6917, 'Malaysian lawyer threatening Judge' (21 March 2010) <https://www.youtube.com/watch?v=MBF0Me8VEDo> accessed 23 July 2017.

Lawyer: I am not able to take this kind of treatment
Judge: What treatment. We are just having a hearing
Lawyer: …. (not audible) *I don't know what to say. I am without lunch, without anything half an hour break.*
Judge: We had a break. Everybody had half a break.
(Lawyer talking over the Judge. Not audible)
Judge: That's not my problem. That's not my problem.
Lawyer: Ok ok My lady. I think we will stop here. Whatever you say, you can say. I am going to take this up.
Judge: Oh please do. You don't threaten me.
Lawyer: I am not threatening. I have got some right. Please respect that. From the word go Lady, I don't know what I did. I seem to be on the wrong side. (not audible)
Judge: …because you are asking… (not audible)
Judge: Can you please sit down. Can you please sit down?

There are other instances and other forms of wrongdoing. For example, in 2011, a senior lawyer, S. Kanawagi, 66, who had been in legal practice for 25 years, was sentenced to six years' jail and fined RM 80,000 for 'using two forged power of attorney documents and giving a false statement in court proceedings.'[197] In spite of knowing that the power of attorney document was forged, he nonetheless went on to use it at the High Court in Bangunan Sultan Abdul Samad.[198] And when brought to trial, the accused filed numerous applications to delay his trial.[199] "This case was tried before the same judge for 11 years. The accused has made many applications, tormenting others in this case …". The DPP S. Devanandan pointed out to the court in applying for a deterrent sentence.[200]

In 2003, the Advocates and Solicitors' Disciplinary Board found that two brothers, N. Pathmanabhan and N. Surendran had acted as advocates and solicitors in a land deal in 1998 even though they had not been admitted to the Bar at the time of the transaction.[201] They were

[197] n/a, 'Senior lawyer jailed and fined over forged papers' *The Star* (Kuala Lumpur, 1 June 2011) <https://www.thestar.com.my/news/nation/2011/06/01/senior-lawyer-jailed-and-fined-over-forged-papers> accessed 21 March 2022.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] n/a, 'Accused and brother no longer allowed to practise law' *Borneo Post* (Kuala Lumpur, 19 October 2010) <https://www.theborneopost.com/2010/10/19/accused-and-brother-no-longer-allowed-to-practise-law/> accessed 21 March 2022.

only admitted to the Bar in December 1999.[202] The Disciplinary Board moved to strike their names off the Roll of Advocates and Solicitors.[203] But more was to come.

N. Pathmanaban was again in the news albeit for a more serious matter when he and his employees were sentenced to death by the Shah Alam High Court on 25 May, 2013, after they were found guilty for the murders of cosmetics millionaire Datuk Sosilawati Lawiya, 47 and her three aides Bank officer Noorhisham Mohamad, 38; lawyer Ahmad Kamil Abdul Karim, 32; and Sosilawati's driver Kamaruddin Shamsuddin, 44.[204] Sosilawati and her aides had been reported missing after going to the accused's farm for a land deal.[205] High Court Judge Datuk Akhtar Tahir, in his judgement, took to task N. Pathmanabhan's role as a lawyer in the land transaction. He pointed out that in the property transaction, Pathmanabhan acted on behalf of Sosilawati as the seller and also the buyer, Datuk Abdul Rahman Pali, a prominent politician.[206] "The accused's actions were not only unethical but had also compromised his impartiality. He appeared for both Sosilawati and Rahman Palil in the same deal and by doing so, he was caught between the devil and the deep blue sea," the judge observed.[207] This, he said, had the effect of placing the lawyer in a difficult situation and he (Pathmanabhan) took the 'easy route of eliminating … Sosilawati, as he was unable to honour a cheque issued to her.'[208] The case highlights the predicaments lawyers may find themselves when they choose to ignore the rules of professional ethics. These rules are meant to clarify and to provide guidance to lawyers who find themselves in a situation which is likely to lead to conflicts of interest.

In most cases, the breach of the ethics rules may result in financial loss for the client which to some extent could be compensated by the Bar Council. But in some instances, the breach of the professional rules of ethics may result in the potential loss of an innocent life as can be seen in the case of *Yahya Hussein Mohsen Abdulrab v PP*.[209] In 2014, Yahya Hussein Mohsen Mohamed, a Yemeni, was found guilty of trafficking in drugs pursuant to the Dangerous Drugs Act 1952, section 39B(1)(a), when the Customs Officers at the Tawau Airport found a quantity of drugs in a bag he was carrying. He was sentenced to death by hanging, the only sentence under the

[202] Ibid.
[203] Ibid.
[204] Shanti Gunaratnam, 'Sosilawati murder: Ex-lawyer, two farmhands lose final bid to dismiss conviction, death sentence' *New Straits Times* (Putrajaya, 16 March 2017) <https://www.nst.com.my/news/2017/03/221320/sosilawati-murder-ex-lawyer-two-farmhands-lose-final-bid-dismiss-conviction> accessed 21 March 2022.
[205] Rita Jong, 'Banting Murders: N. Pathmanabhan, three farm hands gets death' (*Malaysian Bar*, 24 May 2013) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/banting-murders-n-pathmanabhan-three-farm-hands-gets-death> accessed 21 March 2022.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] [2020] 6 MLRA 325.

statute.[210] However, he appealed to the Court of Appeal claiming that he did not receive a fair trial as required by Article 5(1) of the Federal Constitution due to the incompetence of his lawyer. He had denied knowledge of the drugs in the bag and alleged that a person by the name of 'Mickey' had handled the bag but this line of defence was not pursued by his lawyer during trial. The Federal Court agreed with the Court of Appeal that the conduct of the counsel during trial had 'deprived the appellant of a fair trial resulting in a miscarriage of justice.'[211] It found that counsel's conduct in not raising certain issues vital for the defence such as the role of Mickey was 'flagrantly incompetent as a whole' as it denied the accused a credible defence in raising a reasonable doubt in the prosecution case.[212] Rahmat Hazlan, assisting senior lawyer Muhammad Shafee Abdullah at the appeal stage, told the court that Yahya's counsel at first instance was suffering from a serious illness which he did not divulge to his client.[213] While one can sympathise with the plight of the lawyer as he was unwell, the counsel's conduct was nonetheless a serious breach of ethics, especially so in a capital punishment offence. Had the defence not mounted a strong appeal, the appellant could have found himself facing the gallows. The case provides an important reminder of the existence of the rules of ethics. Firstly, the Legal Profession (Practice and Etiquette) Rules 1978, Rule 2-6 provides clear guidance to counsel on the acceptance of the brief. Rule 2 provides that 'an advocate and solicitor shall give advice on or accept any brief in the Courts in which he professes to practise at the proper professional fee dependent on the length and difficulty of the case' but 'special circumstances may justify his refusal, at his discretion, to accept a particular brief.' On the facts of the above case, defence counsel at first instance should have declined acceptance of the brief. Clearly, his illness would provide 'special circumstances' within the rules. Secondly, the Legal Profession (Practice and Etiquette) Rules 1978 under Rule 9 provides that 'an advocate and solicitor shall undertake defence fairly and honourably and to present every defence that the law permits.' On the facts of the case, this rule was also overlooked as counsel failed to raise pertinent matters of the defence which had been communicated to him by the accused person.

The quality and competence of lawyers have on occasion also attracted criticism from the Bench. High Court Judge Justice V.T. Singham observed that "there are still many who do not pay attention to the conditions set in the code of conduct[214] while some do not know about it at

[210] Ibid.
[211] V. Anbalagan, 'Yemeni escapes gallows after court rules he had an 'incompetent lawyer' (FMT, 13 July 2021) < https://www.freemalaysiatoday.com/category/nation/2021/07/13/yemeni-escapes-gallows-after-court-rules-he-had-an-incompetent-lawyer/> accessed 21 March 2022.
[212] *Yahya Hussein Mohsen Abdulrab* (n 209).
[213] Ibid.
[214] Legal Profession (Practice and Etiquette) Rules 1978.

all."[215] He highlighted concerns over lawyers who failed to address the court noting that "It is a rare occasion that I hear 'May it please Your Lordship'."[216] V.T. Singham's observation is not without merit. For example, a judge had complained that a young lawyer had addressed her as "Kak", short for *kakak* or elder sister, instead of the proper Yang Arif.[217] V.T. Singham also chided lawyers for not even bothering to address the court to introduce themselves or their opposing counsel before proceeding with a case.[218] He regretted that many lawyers did not use suitable legal jargons during court proceedings such as using 'him or her' or 'you' instead of 'learned friend' to the opponent.[219]

Such instances also occurred in the appellate courts. A young lawyer appeared before a panel of judges in the Court of Appeal without the required apparel. Court of Appeal judge Datuk Gopal Sri Ram offered the lawyer a hint by saying 'I can't hear you'. This is the judges' code for 'you are not properly attired'. Despite the hint, the lawyer continued addressing the court at which point His Lordship told her that she was not suitably attired. When enquired, the lawyer replied that she did not know about the requirement as she had not been told about it. The court later instructed another lawyer to take over the matter.[220]

It is not only in Malaysia that we have members of the legal profession acting in breach of the professional rules of ethics. In some common law jurisdictions, the conduct of some members of the legal profession have bordered on the bizarre. For example, an American lawyer was suspended for 15 months for accepting nude dances from a stripper as partial payment for the legal fees she owed him.[221] He was also charged with committing battery for inappropriately touching her during the dances.[222] In 2020, Michael Avenatti, who was put in the US national spotlight when he represented adult-film actress Stormy Daniels in her lawsuits against former President Donald J., was convicted for trying to extort more than US$20 million from the athletic

[215] n/a, 'Heed the code of ethics, judge tells lawyers' *The Star* (Kuantan, 9 March 2009) <http://www.thestar.com.my/news/community/2009/03/09/heed-the-code-of-ethics-judge-tells-lawyers/> accessed 19 November 2016.
[216] Brenda (n 172).
[217] Carolyn Hong, 'Ethics course for budding lawyers' *New Sunday Times* (Kuala Lumpur, 2 July 2000) 31.
[218] Brenda (n 172).
[219] *Yahya Hussein Mohsen Abdulrab* (n 209).
[220] n/a, 'Judge gives lawyer dressing-down over attire' (*Malaysian Bar*, 10 September 2008) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/judge_gives_lawyer_dressing_down_over_attire.html> accessed 19 November 2016.
[221] Debra Cassens Weiss, 'Lawyer's Nude-Dancing Fee Deal Gets Him Suspended' (*ABA Journal*, 19 September 2008) <http://www.abajournal.com/news/article/lawyers_nude_dancing_fee_deal_gets_him_suspended/> accessed 23 July 2017.
[222] Ibid.

giant Nike.[223] And in yet another case from the United States, a California lawyer was taken off a case when he sent an 'expletive-laden email to opposing counsel' telling him among other things to go 'eat a bowl of dicks.'[224] He merely brushed the conduct aside and attributed it to a 'negotiating tactic' when asked to explain his behaviour by the State Bar of California.[225]

And in the Watergate scandal, more than 20 of the most powerful lawyers in the United States, including 2 attorneys general, two White House counsel and an assistant attorney general were found guilty of a number of criminal offences such as 'obstruction of justice, lying to federal agents and Congress, and conspiring to violate the constitutional rights of citizens.'[226] Besides lowering the public's opinion of lawyers, it also 'transformed legal ethics into [a] primary concern of the profession'[227] and prompted the American Bar Association (hereafter referred to as ABA) to require all accredited law schools to provide instruction in professional responsibility pertaining to the duties, values, and responsibilities of the legal profession.[228]

It is of little surprise then, that the legal profession has often been viewed less favourably compared with many other professions. Data on the public perception of the legal profession is scant in Malaysia. But in the United States, an annual poll conducted by Gallup found that most Americans rated the honesty and ethics of nurses as the highest among a list of professions at 84%.[229] This was followed closely by the medical profession.[230] Only 22% thought that the members of the legal profession had high honesty and ethics, the lowest among the professions.[231] But to be fair, there are jurisdictions where the lawyer enjoys good favourability, such as in Germany. Here, legal practice is heavily regulated with 'lawyers officially described as an "organ of jurisdiction" ("Organ der Rechtspflege")' and not as 'private entrepreneurs

[223] Kevin Draper, 'Michael Avenatti Sentenced to Two and a Half Years in Nike Extortion Case' (*The New York Times*, 8 July 2021) <https://www.nytimes.com/2021/07/08/sports/michael-avenatti-prison-nike.html> accessed 21 March 2022.

[224] Gerald Sauer, 'INSIGHT: Attorneys Should Relearn Rules of Civility' (*Bloomberg Law*, 23 March 2020) < https://news.bloomberglaw.com/us-law-week/insight-attorneys-should-relearn-rules-of-civility> accessed 21 March 2022.

[225] Ibid.

[226] Mark Curriden, 'The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics' (*ABA Journal*, 1 June 2010) <http://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards/> accessed 10 August 2017.

[227] Tom Goldstein, 'Watergate Stirs New Look at Lawyers' Self-Policing' (*The New York Times*, 29 May 1974) <http://www.nytimes.com/1974/05/29/archives/watergate-stirs-new-look-at-lawyers-selfpolicing-watergate-is.html> accessed 10 August 2017.

[228] Jeffrey A Maine, 'Importance of ethics and morality in today's world' (2000) Stetson Law Review 1075, 1080.

[229] RJ Reinhart, ' Nurses Continue to Rate Highest in Honesty, Ethics' *Gallup* (Washington DC, 6 January 2022) <https://news.gallup.com/poll/274673/nurses-continue-rate-highest-honesty-ethics.aspx> accessed 22 March 2022.

[230] Ibid.

[231] Ibid.

operating in a competitive market.'[232] This divergence may have something to do with the legal system - in common law jurisdictions with an adversarial system, the lawyer tends to be less favoured but not so in jurisdictions with civil law which have an inquisitorial system.

4. Importance of Ethics to the Legal Profession

All professions prescribe codes of ethical conduct for its members. The legal professions' wide ranging professional codes of conduct lay down rules from handling client money to the lawyers conduct in a courtroom. These codes or rules of ethical behaviour serve four primary purposes in the context of the legal profession.

Firstly, such professional codes of ethical conduct promote the rule of law which is the very basis of a modern legal system. Lawyers are regarded as 'quintessential representatives, or ambassadors, of the rule of law so far as the general public are concerned.'[233] If lawyers do not follow and abide by these ethical principles, then the law will fall into disrepute.[234] Others will see little reason to follow legal rules when the very 'ambassadors' themselves do not follow these rules.

Secondly, due to the very nature of their profession, lawyers are placed in situations which can possibly lead to conflicts of interest. This is because a legal practitioner has a responsibility to the court, to fellow practitioners and to the client. These professional codes of conduct serve to promote ethical decision-making by providing guidance in such instances.

Thirdly, these ethical codes act as a minimum standard of appropriate behaviour in a professional context. Members who do not conform are subject to professional disciplinary action. In this way, it provides a common understanding of acceptable practice among its members.

Fourthly, by abiding in such Codes of conduct, members of the legal profession 'maintain the honour and dignity of the legal profession.'[235] This in turn inspires confidence in their services.

[232] Michael Asimov and 7 others, 'Perceptions of Lawyers - A Transnational Study of Student Views on the Image of Law and Lawyers' (2005) 12 International Journal of the Legal Profession 407.
[233] Lord Neuberger, 'Ethics and advocacy in the twenty-first century' (Speech delivered at the Lord Slynn Memorial Lecture, 15 June 2016) <https://www.supremecourt.uk/docs/speech-160615.pdf>accessed 27 July 2017.
[234] Peter MacFarlane, 'The Importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002) 6 Journal of South Pacific Law.
[235] FM Ibrahim Kalifulla, 'Legal Profession: Challenges and Prospects & The Art of Advocacy' (Speech delivered at the Inaugural Function of Redefining Legal Practice for Advocates – Generation Next (1-10 Years) Continuing Legal Education to young lawyers at the district level, organized by the Tamil Nadu Judicial Academy, 15 December 2013) <http://www.tnsja.tn.nic.in/Article/Legal%20Profession%20Challenges-FMIKJ.pdf>accessed 11 August 2017.

Society will view the lawyer with respect and is more willing to trust the lawyer with managing their affairs.

Sir Thomas Bingham stated that 'a profession's most valuable asset is its collective reputation and the confidence which inspires.'[236] The action of even one practitioner, such as being dishonest, 'reflects on the trustworthiness of all members of the profession'.[237]

It is therefore important for members of the legal profession to uphold themselves to the highest ethical standards of the profession. However, in practice, this is not always the case.

5. Reasons for Breach of Ethics

Members of the legal profession in Malaysia, as in other countries, have not escaped scrutiny over their conduct, especially in court. In 1994, a newspaper carried the headline "All's not well with the legal profession". It interviewed senior lawyers who often get to observe the conduct of young lawyers. Criminal lawyer, Jagjit Singh, had this to say: "The young ones don't know much about court decorum. I was stunned when a young lawyer in the Supreme Court[238] told the bench: 'Like that-ah? Ok lah, I'll go and ask my boss first."[239] A former Court of Appeal judge Syed Ahmad Helmy Ahmad cited cases of lawyers acting as money lenders to their clients.[240]

Judges have taken to reminding aspiring legal practitioners to 'study and adhere to all that was contained in the Legal Profession (Practice and Etiquette) Rules 1978,'[241] when admitting them to the Bar. Nonetheless the Bench continues to be exasperated with the integrity of lawyers appearing before it. This has prompted some judges to single and chastise the Bar Council for its perceived failure to maintain standards.

High Court judge Datuk V.T. Singham urged the Bar Council to look into the causes contributing to the deteriorating standards among the legal fraternity. His Lordship took offence at the lack of decorum of lawyers appearing before the court and warned that this will not reflect well on

[236] *Bolton v The Law Society* [1993] EWCA Civ 32, [1994] 1 WLR 512, [1994] 2 All ER 486, [1994] COD 295.
[237] Reid Mortensen, Francesca Bartlett and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge 2010).
[238] On 24 June 1994, as part of reforms, The Supreme Court was renamed The Federal Court-
Malaysia Justice System and National Police Handbook Volume 1 Strategic Information and Basic Regulations (International Business Publications, 2009) 66.
[239] Joceline Tan, 'All's not well with legal profession' *New Straits Times* (Kuala Lumpur, 27 April 1994) 12.
[240] V Anbalagan, 'Greed main cause why lawyers go astray' *FMT News* (Kuala Lumpur, 17 February 2017) <http://www.freemalaysiatoday.com/category/nation/2017/02/17/greed-main-cause-why-lawyers-go-astray/> accessed 10 August 2017.
[241] Brenda (n 172).

the legal profession.[242] And in 2008, Court of Appeal judge Datuk Gopal Sri Ram " … took the Bar Council to task for 'not doing anything' to address falling standards and respect for the court."[243] Judges in other jurisdictions also face similar issues and have adopted far more drastic measures. For example, in the United States, a federal judge in Texas ordered hundreds of U.S. Department of Justice lawyers to undergo ethics training for engaging in unethical conduct.[244] And in *R v Ekareib*,[245] the U.K. Court of Appeal took issue with the conduct of the defence barrister in a complex murder trial and referred him to the Bar Standards Board for disciplinary action.[246] Lord Thomas of Cwmgiedd chided Michael Wolkind QC for engaging in personal criticism of prosecutors during trial instead of raising it with the trial judge.[247] He was also alleged to have been involved in other work during the court trial.[248] The Court of Appeal expressed regret at the "… departure from proper standards of advocacy."[249]

Across various jurisdictions, there has been much literature on this deterioration in legal standards. There are two main reasons for this. One is because of the way law is practised today. Lawyers have come to treat their vocation as an easy path to riches. Chief Justice Rehnquist attributed the falling standards to the way law is practised today:[250]

> "The practice of law is today a business where once it was a profession ... Market capitalism has come to dominate the legal profession in a way that it did not a generation ago. Law firms, whether in 1956 or 1996 have always had to turn a profit if they were to stay in business. But today the profit motive seems to be writ large in a way that it was not in the past."

[242] Ibid.
[243] n/a, 'Judge gives lawyer dressing-down over attire' (*Malaysian Bar*, 10 September 2008) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/judge_gives_lawyer_dressing_down_over_attire.html> accessed 19 November 2016.
[244] Joe Palazzolo and Jacob Gersham, 'Furious Federal Judge Orders Justice Department Lawyers to Undergo Ethics Training' (*The Wall Street Journal*, 19 May 2016) <http://blogs.wsj.com/law/2016/05/19/furious-federal-judge-orders-justice-department-lawyers-to-undergo-ethics-training/> accessed 20 November 2016.
[245] [2015] EWCA Crim 1936.
[246] Owen Bowcott, 'Prominent barrister condemned over 'ill-judged' and 'patronising' behaviour' (*The Guardian*, 16 December 2015) <https://www.theguardian.com/law/2015/dec/16/prominent-barrister-michael-wolkind-qc-patronising-lord-chief-justice> accessed 25 November 2016.
[247] Ibid.
[248] Ibid.
[249] [2015] EWCA Crim 1936.
[250] The Hon Justice Michael Kirby, 'Legal Professional Ethics in Times of Change' (Speech delivered at the St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_stjames2.htm> accessed 22 March 2022.

The same point had also been echoed in Malaysia. In a speech at the Bar Council Ethics Lecture Programme, the Chief Justice of Malaysia reminded future lawyers that the legal profession was 'not the right place for people whose sole ambition is to make as much money as fast as possible.'[251] Such persons, he said, often 'bring disgrace to the profession' and urged those with such ambition to 'go into business.'[252]

Anthony Kronman argues that this has a lot to do with 'the conditions of practice, especially in the large firm sector of the profession' which has 'eroded the development of practical wisdom and civic-mindedness that characterised the ideal of the "lawyer-statesman" of the past.'[253]

The other reason for ethical oversight is the adversarial nature of trial. The lawyer's single-minded goal of serving the client's interests and winning the case opens the door to tweak the rules of professional conduct to achieve the said goal.

6. But then, we have Good Apples too

It would not be fair to cherry-pick and highlight the delinquent conduct of a small minority of lawyers and use it to paint the whole of the legal profession with the same brush. Members of the legal profession have on more than one occasion risen to the high standards of the profession though these are rather an exception than a norm. In this regard two cases come to mind, the first is Karpal Singh's defence of Anwar Ibrahim in the first sodomy case and the second is human rights lawyer N. Surendran's persistence in seeking accountability for the death of A. Kugan in police custody.

On 14 January, 2000, Karpal Singh was arrested and charged under section 4(1)(b) of the Sedition Act, 1948 (Act 15) for uttering seditious remarks during the sodomy trial of his client, Anwar Ibrahim, former Minister of Finance and Deputy Prime Minister of Malaysia.[254] On 10 September 1999, during open court proceedings of Anwar's sodomy trial, and in full view of the public and the gathered media, he had informed the court that lab reports of Anwar's urine sample showed

[251] Dato' Abdul Hamid bin Haji Mohamad, 'Advocacy and Decorum in Court, Professional Conduct of Counsel in and out of Court, Duties of Counsel' (Speech delivered at the Bar Council 2000 Ethics Lecture Programme, Kuala Lumpur, 30 May and 1 June 2000) <https://tunabdulhamid.me/2000/05/advocacy-decorum-in-court-professional-conduct-of-counsel-in-and-out-of-court-duties-of-counsel/> accessed 22 March 2022.
[252] Ibid.
[253] Roger C. Cramptom, 'On Giving Meaning to "Professionalism"' (Raising the Bar: A Bench-Bar Symposium on Professionalism, Middleton, 2018) <https://www.ctbar.org/docs/default-source/education/materials/2018-2019-cle-materials/epc181102-benchbar-final-materials.pdf> 22 June 2022.
[254] n/a, 'Karpal arrested for arsenic accusation' *Malaysiakini* (Petaling Jaya, 11 April 2001) <https://www.malaysiakini.com/news/1729> accessed 21 March 2022.

dangerously high levels of arsenic.[255] "It could well be that someone out there wants to get rid of him … even to the extent of murder…I suspect people in high places are responsible for this situation," he told the court, alluding to a government conspiracy to kill or injure Dato Seri Anwar.[256] The government was not too happy with what it saw as a smear on its reputation and charged Karpal with sedition. He faced up to three years in prison if found guilty of sedition. The case received widespread coverage in international media and was met with a chorus of disapproval by the international legal community. Lawyers Rights Watch Canada (LRWC), which describes itself as a 'committee of Canadian lawyers who promote human rights and the rule of law by providing support internationally to human rights defenders in danger', called the sedition charges against Karpal Singh by the Malaysian government as 'the only known charge of sedition ever in the Commonwealth brought against a lawyer for remarks made in open court in the defence of a client.'[257] The brouhaha caused the government to make an about-turn. The sedition charge was withdrawn by Malaysia's newly appointed Attorney General Datuk Gani Patail on 14 January 2002.[258] The case is a textbook application of the need to 'fearlessly uphold the interest of a client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.'[259] It also brings to mind the famous quote by Lord Brougham when defending Queen Caroline of England against accusations of adultery by her husband King George IV, in a case regarded as the one of the most famous divorce trials in history.[260] Despite the objections of many urging him not to pursue with the defence, he nonetheless persisted by alluding to the duty of an advocate:

> "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[261]

Lord Brougham's statement has been widely cited and pointed out as an affirmation of a 'lawyer's duty of zealous representation of a client'[262] and 'representing the "traditional view of the

[255] Thomas Fuller, 'Malaysian Ex-Minister Alleges Poisoning: Anwar Is Hospitalized After Test for Arsenic' *New York Times* (Kuala Lumpur, 11 September 1999) <https://www.nytimes.com/1999/09/11/news/malaysian-exminister-alleges-poisoning-anwar-is-hospitalized-after-test.html> accessed 21 March 2022.
[256] n/a, 'Karpal Singh' (*Lawyers' Rights Watch Canada*, 26 March 2012) <https://www.lrwc.org/karpal-singh/> accessed 21 March 2022.
[257] (n 86).
[258] (n 86).
[259] Legal Profession (Practice and Etiquette) Rules 1978 Rule 16.
[260] Gerald F Uelmen, 'Lord Brougham's Bromide: Good Lawyers as Bad Citizens' (1996) 30 Loy L Rev 119, 120.
[261] Ibid.
[262] Michael S Ariens, 'Brougham's Ghost' (2015) 35 N Ill U L Rev 263.

lawyer's role"',[263] and today can be found in various manifestations in the legal profession Canons of Ethics in most jurisdictions.

Kugan, then 22-years-old, died in police custody on 20 January 2009.[264] He had been detained by the police at the USJ Taipan police station for questioning in relation to a luxury car theft.[265] When the family came to claim the body of the deceased, they found 'extensive marks of beating and other severe physical trauma.'[266] An autopsy conducted by Serdang Hospital pathologist Dr. Abdul found '22 categories of external wounds' and attributed the death of the deceased to pulmonary edema. The family of the deceased then approached Dr. Prashant N Samberkar of Pusat Perubatan Universiti Malaya (PPUM) to conduct a second autopsy. The second autopsy found '45 categories of external injuries' on the body of the deceased with substantial internal injuries.[267] The cause of death of the deceased was 'acute renal failure due to rhabdomyolysis due to blunt trauma to skeletal muscles'.[268] Constable V. Navindran was found guilty of causing hurt to Kugan and sentenced to three years' jail.[269] Kugan's family filed a civil suit against then-Selangor police chief Tan Sri Khalid Abu Bakar and were awarded RM751,700 in damages and RM50,000 in costs.[270] When delivering judgement in the civil suit, High Court judge Justice V.T. Singham commended N. Surendran for persevering with the matter in getting a second postmortem which showed the true extent of the deceased's injuries.[271] "If not for him, this matter would have been swept under the carpet," he said.[272] The case was also notable for holding that then Selangor police chief Tan Sri Khalid Abu Bakar, had committed misfeasance in public office, a first in the country.[273]

7. The Way Forward

One important caveat needs to be added. While adherence to professional rules of responsibility will ensure compliance with ethical standards of the profession, this by itself is insufficient. The

[263] Ibid.
[264] *N. Indra Nallathamby v Dato Seri Khalid Abu Bakar & Ors* [2013] 6 CLJ 272.
[265] Ibid.
[266] Ibid.
[267] *Indra* (n 264).
[268] Ibid.
[269] n/a, 'Ex-cop in Kugan custodial death jailed three years' *Malay Mail* (Kuala Lumpur, 23 May 2015) <https://www.malaymail.com/news/malaysia/2015/05/23/ex-cop-in-kugan-custodial-death-jailed-three-years/902179> accessed 21 March 2022.
[270] Ibid.
[271] n/a, ' IGP responsible for Kugan's death in police custody, court rules' (*Lawyers For Liberty*, 26 June 2013) <https://www.lawyersforliberty.org/2013/06/26/igp-responsible-for-kugans-death-in-police-custody-court-rules/> accessed 21 March 2022> accessed 21 March 2022.
[272] Ibid.
[273] *Indra* (n 264).

lawyers who drafted the complex financial instruments for subprime mortgages knew of the risks posed yet 'treated it at face value.'[274] Further, their conduct was in accordance with their professional standards. What this proves is that while professional rules of conduct do play a role and they do keep lawyers within safe confines, if not mitigate the damage, something more is needed. But what exactly, is a question which legal scholars are still grappling with. However, for a start, some measures can be adopted.

In Malaysia, the Bar Council had been cognizant of these falling standards for some time. In 1994, then President of the Bar Council, Zainur Zakaria, admitted that 'there are problems' and that there was a need to " … instil a greater sense of professionalism and ethics in the profession."[275] It prompted the Bar Council to set up a legal education reform committee.[276] As a result, various measures were put in place. In 1990, the Bar Council introduced the ethics course with a strong focus on etiquette and decorum.[277] This currently combines a workshop with a compulsory written examination and is a prerequisite for every pupil aspiring to be admitted to the Malaysian Bar.[278] In 2011, a mandatory Continuing Professional Development (CPD) scheme was introduced for lawyers who were admitted to the Malaysian Bar from 1 July 2011, and pupils in chambers who have commenced their pupillage from 1 July 2016, aimed at continually improving their skills and knowledge of the law. [279] The disciplinary process was also further strengthened by setting up an independent Disciplinary Board to deal more firmly with errant lawyers.[280]

However, further initiatives are needed. In this regard, the law school can play an important role in inculcating ethical values in aspiring lawyers by placing greater emphasis on ethics education as undertaken in the United States by ABA after the Watergate scandal.[281] There have been calls for '… greater prominence for ethics in legal training both on university law courses and on

[274] Alex Aldridge, ' How do you get lawyers to do what is 'right'?' (*The Guardian*, 5 April 2012) <https://www.theguardian.com/law/2012/apr/05/lawyers-do-what-right-ethics> accessed 22 March 2022.
[275] Joceline Tan, 'All's not well with legal profession' *New Straits Times* (Kuala Lumpur, 27 April 1994) 12.
[276] Ibid.
[277] Carolyn Hong, 'Ethics course for budding lawyers' *New Sunday Times* (Kuala Lumpur, 2 July 2000) 31.
[278] Julian R Francis, 'Bar Council Ethics & Professional Standards Course for Pupils 18 and 19 Nov 2009' (*Malaysian Bar*, 9 December 2009) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/bar_council_ethics_professional_standards_course_for_pupils_18_and_19_nov_2009.html> accessed 11 August 2017.
[279] Boo Su-Lyn, 'Bar Council moots fines for lawyers who don't complete training' *Malay Mail Online* (Kuala Lumpur, 15 March 2016) <https://www.malaymail.com/news/malaysia/2016/03/15/bar-council-moots-fines-for-lawyers-who-dont-complete-training/1079713> accessed 25 July 2017.
[280] Ambiga Sreenevasan, 'The role of lawyers in the administration of justice' (*Malaysian Bar*, 5 November 2008) <http://www.malaysianbar.org.my/members_opinions_and_comments/the_role_of_lawyers_in_the_administration_of_justice.html> accessed 25 July 2017.
[281] Tom Goldstein, 'Watergate Stirs New Look at Lawyers' Self-Policing' (*The New York Times*, 29 May 1974) <http://www.nytimes.com/1974/05/29/archives/watergate-stirs-new-look-at-lawyers-selfpolicing-watergate-is.html> accessed 10 August 2017.

professional legal training courses.'[282] The President of the U.K. Supreme Court, Lord Neuberger, further stated that:[283]

> "[T]he earlier and more effectively we train and encourage potential professional lawyers and advocates to appreciate and understand the importance and nature of their ethical duties, the stronger a legal profession we will have, and the stronger the rule of law will be."

In Malaysia, there has been a recognition of the need for instruction in matters pertaining to ethics. The *Report on Future Directions of Legal Education in Malaysia*[284] noted the delivery of courses such as Professional Practice in public universities, which among others, provided instruction in legal ethics. For example - Universiti Sains Islam Malaysia (USIM) provides instruction in Solicitors Accounts and Management of Law Firm; Universiti Teknologi MARA (UiTM) provides instruction in ethics of the legal profession and Universiti Kebangsaan Malaysia (UKM) provides Legal Ethics. As for private universities, HELP University offers components on Legal Skills which involve resolving ethical and legal dilemmas in case study.[285]

But merely learning rules of professional conduct is not enough. There is a need to move away from the traditional approach which consists of learning the *Rules of Professional Conduct* and then applying them to fictitious scenarios in examinations.[286] This has been regarded as 'unsatisfactory for both teachers and students and as inadequate preparation for practice.'[287] Law schools need to devise innovative strategies to more effectively inculcate ethical values in law students. One strategy which has found favour is the use of 'the pervasive method'.[288] This method aims to ensure that every student is exposed to ethical and professionalism issues in all substantive areas of law practice by.[289] For example, with regard to the law of evidence, in a discussion about the lawyer's duty of confidentiality, perhaps this can be related to the Codes of

[282] Lord Neuberger, 'Ethics and advocacy in the twenty-first century' (Speech delivered at the Lord Slynn Memorial Lecture, 15 June 2016) <https://www.supremecourt.uk/docs/speech-160615.pdf>accessed 27 July 2017.
[283] Ibid.
[284] Faridah Jalil, *A Report on Future Directions of Legal Education in Malaysia* (2013) 21.
[285] Department of Law (*HELP University*, 2016) <https://help.edu.my/programmes/department-of-law/> accessed 26 November 2016.
[286] William M Sullivan and others, *Educating Lawyers: Preparation for the Profession of Law* (2007) (Carnegie Report).
[287] Clark D Cunningham, 'Learning Professional Responsibility for the Practice of Law: The Way Forward' (2016) Georgia State University College of Law Legal Studies Research Paper No. 2016-31, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881654> citing Bruce Green, 'Less is More: Teaching Legal Ethics in Context' (1998) 39 Wm & Mary L Rev 357.
[288] Deborah L Rhode, 'Ethics by the Pervasive Method' (1991) 42 J Legal Educ 31, 41.
[289] Jeffrey A Maine, 'Importance of ethics and morality in today's world' (2000) Stetson Law Review 1075, 1084 citing ABA Section of Legal Education and Admissions to the Bar, *Report of the Professionalism Committee: Teaching and Learning Professionalism* (1996).

Professional responsibility. With regard to Tort law, in a discussion pertaining to negligence, this can be related to the lawyers duty to clients. Such an approach is '…intended to demonstrate to students that issues in legal ethics pervade all areas of the law and do not arise merely in discrete courses on legal ethics.'[290] This can also help develop a 'since[*sic*] of "propriety"' in these future lawyers which will assist them in doing 'the proper thing at the right.'[291] In addition to this, future lawyers must 'work towards developing "virtue" within themselves' so that they can 'make ethical decisions when difficult issues and dilemmas arise.'[292] In a way, this is already exemplified in practice as chambering students are required to furnish a Certificate of Good Character in order to be admitted to the Bar.

But there are limits to the education and training law schools can provide. This is because the legal role is complex and challenging. In this regard the Bar 'must continue to play a role in bridging the gap between law school and formal licensing of lawyers.'[293] By formal licensing, perhaps the Bar can play a more vigilant role to ensure that only those with good character are admitted to the Bar.

Finally, lawyers should also be reminded of the consequences awaiting them when they breach rules of professional conduct.[294] Such a lawyer 'faces unofficial but nonetheless powerful interdictions',[295] which include 'negative publicity and other expressions of peer disapproval' and 'the cutting off of valuable practice opportunities.'[296] This can be seen in the remorse expressed by lawyers when faced with the reality of these consequences. During his sentencing, Michael Avenatti pleaded with the judge for a lighter sentence. 'I betrayed my own values, my friends, my family and myself. I betrayed my profession. I became driven by the things that don't matter in life,' he told the judge.[297] He further added that 'all the fame, notoriety and money in the world is meaningless'[298] and blamed himself for having destroyed his career, relationships and life.[299] And in Malaysia, lawyer Nik Abdul Rahman Nik Mat, who was convicted to four years in jail after the court found him guilty of committing criminal breach, told the court how he had lost everything. 'I have lost everything, Your Honour. I lost my properties and reputation,' he pleaded

[290] Susan Burns, 'Teaching Legal Ethics' [1993] 4(1) Leg Ed Rev 141.
[291] David Malcolm Brown, 'The Ethical Lawyer - Contradiction in Terms or Reality?' (1990) 16(5) William Mitchell Law Review 1293.
[292] Ibid.
[293] Federation of Law Societies of Canada Task Force on the Common Law Degree, Common Law Degree Report (2009).
[294] Maynard E Pirsig, 'Modern Legal Ethics, by Charles W. Wolfram' (1987) 13(2) William Mitchell Law Review 439.
[295] Ibid.
[296] Ibid.
[297] Draper (n 223).
[298] Ibid.
[299] Ibid.

with the court during mitigation.[300] All these are reminders of how fallible and how illusory fame and money can be in the legal profession. One is reminded of the Malay proverb, '*sepandai-pandai tupai melompat, akhirnya jatuh ke tanah juga*' (meaning, no matter how smart a person thinks of himself, there will come a time when he will face reality).

8. Conclusion

One of the most fundamental purposes of ethical standards is to maintain the reputation of the profession, 'as one in which every member, of whatever standard, may be trusted to the end of the earth'.[301] This is because 'the legal profession has a unique position in the community' since only it, among the professions, protects 'the personal and property rights of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state.'[302] According to the Law Society of Alberta, 'the protection of rights has been an historic function of the law and it is the responsibility of lawyers to carry out that function.'[303]

At the very heart of this function is the maintenance of the integrity of the profession. Norman Birkett QC, observes the uniqueness of the legal profession in the sense that:

> [n]o profession calls for a higher standard of honour and uprightness and no profession perhaps offers greater temptation to forsake them, but whatever gifts an advocate may possess, be they never so dazzling, without the supreme qualification of an inner integrity he will fall short of the highest standard.[304]

The supreme qualification of an internal integrity can be achieved if lawyers remind themselves of the ideals of their profession. Roscoe Pound hailed the hallmark of a profession as one 'practised in a spirit of public service.'[305] One reason why nurses and medical personnel such as doctors are highly regarded is because theirs is a profession which still strongly subscribes to the ideals of public service.[306] Unfortunately, in the case of the legal profession, the ideals of public service have given way to financial gains at all costs a long time ago.

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[300] n/a, 'I regretted committing CBT, says lawyer' (*Malaysian Bar*, 11 February 2012) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/i-regretted-committing-cbt-says-lawyer> accessed 21 March 2022.

[301] *Bolton v The Law Society* [1994] 1 WLR 512, [1993] EWCA Civ 32, [1994] 2 All ER 486, [1994] COD 295 (Sir Thomas Bingham).

[302] Paul Jonathan Saguil, 'Ethical Lawyering Across Canada's Legal Traditions' (2010) 9 Indigenous Law Journal 167.

[303] Ibid.

[304] *The Middle Templar* (The Honourable Society of the Middle Temple, 2012) 5.

[305] Pound (n 183) 203.

[306] Reinhart (n 229).

Coming back to our question - Is the ethical lawyer a myth? Yes, and no. As in all professions, there are bound to be delinquent members, but as long as professional standards continue to be upheld and attempts are made to inculcate ethical values and remind all and sundry about the ideals of the legal profession, then the legal profession remains in good stead to fulfil its obligations to all stakeholders.

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The Impact of the Standard of Care on Medical Negligence in Nigeria and Malaysia

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Abstract

The aim of the medical negligence system, particularly to deter negligent behaviour, has created challenges for both patients and medical practitioners who are major stakeholders in health care. Using the breach of duty requirement, its impact on health delivery can be evaluated using the Nigerian and Malaysian health system. In Nigeria, the patients are seen to be impacted more by medical negligence as the *Bolam's principle* presents the medical expert witness challenge which adds up to the existing challenges of ignorance and poverty. They are then deterred from reporting the negligent act which could go on with indifferent doctors. Also, in Malaysia, medical doctors are more impacted by medical negligence as the *Rogers/Montgomery principle* exposes them to possible litigation which creates fear and causes defensive medicine. This act of defensive medicine deters good health practices. Therefore, these effects on both patients and medical doctors put the health system at risk. Mediation has been seen to be a more feasible option to the medical negligence system as it promotes the doctor-patient relationship which is the basis for healthcare. While Court-annexed mediation is preferred in Nigeria, both private mediation and court-annexed mediation exist side by side in Malaysia. However, there is a need to consider the practice of mediation on a federal level in Nigeria and there should be a

standardised practice for all mediation forms in Malaysia.

Keywords: breach of duty, healthcare, mediation, medical negligence, standard of care

1. Introduction

Nigeria and Malaysia rely extensively on common law. Standard of care forms the bedrock of the tort system in determining a breach of duty. This standard has been criticised to be favourable to the medical practitioners with the *Bolam's* principle[307] and favourable to the patients with the *Rogers/Montgomery test*.[308] Therefore, it could be argued that patients are discouraged from initiating legal action against negligent doctors and medical practitioners tend to act defensively. This has consequently affected both patients and medical practitioners who are an important unit in the health system.

2. Patient's Perspective

In proving breach of duty to treat and diagnose, the *Bolam's principle* is usually the traditional test applied in both Nigeria and Malaysia to determine the acceptable standard. However, *Bolam* has been criticised to provide a cloak of protection around medical practitioners as patients are faced with an insurmountable challenge to show that no responsible body of professional opinion exists that would advocate the course of conduct under question.[309] Although the *Bolam principle* recognizes that medical practitioners keep up with the latest development in their medical specialties,[310] doctors still feel reluctant to officially opine that the conduct of a colleague was actually below the levels that should be expected.[311] This could allow for practices that are detrimental to the health of the patient to continue. It could also hinder medical practitioners from adopting the latest developments and improving themselves as their current conduct is seen as acceptable. This exposes patients to potential substandard health care. The *Bolitho* test which was set to curb the doctor-centric effect still requires some medical knowledge that judges

[307] Vivienne Harpwood, *Modern Tort Law* (Psychology Press, 2005).
[308] Felicity Mills and Miran Epstein, 'Risk disclosure after Montgomery: Where are we going?' (2018) 21 Case Rep Women's Health.
[309] All Answers ltd, 'Is it time to say bye-bye Bolam in medical law?' (UKEssays.com, November 2018) <https://www.ukessays.com/essays/law/is-it-time-to-say-bye-bye-bolam-in-medical-law.php?vref=1> accessed 8 May 2021.
[310] Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia* (ILBS 2003).
[311] All Answers ltd, 'Is it time to say bye-bye Bolam in medical law?' (n 309).

do not have.[312] Therefore, it will be difficult to say a medical expert's testimony is illogical as the medical opinion provided by the expert might still be regarded as an acceptable standard.

In Nigeria where *Bolam-Bolitho* has been predominantly applied for treatment, diagnosis, and disclosure of information, negligence is still on the rise. 61.69% of Nigerian patients feel that doctors are arrogant and care less about their condition and 33.3% of Nigerian patients indicated that their doctors' treatment had caused them extra injury beyond the ones that required them to go to the hospital.[313] Patients are exposed to risks with the high prevalence of late detection of ailments, the mistaken identity of patients, improper and lack of consent to treatment, etc.[314] With all of these, health care providers have been seen to be indifferent.[315] Ignorance and poverty of the Nigerian populace have been majorly attributed to this attitude among health care providers.[316] However, it is suggested that even if these cases go on to the court, the chances of them being seen as negligent are not certain as they could be supported by medical opinion. Therefore, patients are deterred from reporting negligent acts and this could further encourage the indifferent attitude seen among doctors. Subsequently, patients suffer from the negligent acts in silence and eventually lose trust in the care provided.[317] Trust plays a significant role in healthcare as it is central to clinical practice and important for effective treatment.[318] With the negligent incidents commonly experienced in Nigerian public hospitals due to less motivated doctors and limited health resources,[319] patients have lost their trust in the public health system.[320] Private hospitals, although expensive, have now become preferred as they can be trusted with more hospitable treatment and better-motivated doctors.[321] This attracts more health costs for the patients and defeats the affordability factor that quality health care demands.[322]

[312] *Bolitho v City and Hackney Health Authority* [1998] AC 232, 778.
[313] Uwakwe Abugu and Dike C Obalum, 'An Agenda for Improving Legal Claims for Medical Malpractice in Nigeria' (2018) 14(5) Asian Social Science 118.
[314] Ibid.
[315] Felix Chukwuneke, 'Medical Incidents in Developing Countries: A Few Case Studies from Nigeria' (2015) 18 Nigerian Journal of Clinical Practice S20.
[316] Ibid.
[317] Felix Chukwuneke (n 315).
[318] Johanna Birkhauer et al, 'Trust in the Healthcare professional and health outcome: A meta-analysis' (2017) 12(2) PLoS One 1.
[319] I Omoleke and Bisiriyu Taleat 'Contemporary Issues and Challenges of Health Sector in Nigeria' (2018) 5(4) Research Journal of Health Sciences 210.
[320] Felix Chukwuneke (n 315).
[321] Ibid.
[322] Valerie Shelly, Susann Roth and Kirthi Ramesh, 'Universal Health Coverage Must Be High Quality to Improve Patients' Health Outcome' (Asian Development Blog, 11 March 2020). <https://blogs.adb.org/blog/health-care-must-be-affordable-and-accessible-also-high-quality> accessed 10 May 2021.

Similarly in Malaysia, the *Bolam-Bolitho* test being applied to determine the standard for treatment and diagnosis exposes patients to similar risks associated with the 'conspiracy of silence' seen amongst medical practitioners. The Malaysian Medical Council (MMC) has reported that its integrity is in crisis[323] as its members are always looking to protect each other. Even though this was reported in the context of complaints brought before the MMC it can be inferred that this same attitude will be seen among practitioners when acting as medical expert witnesses. Statistics from the MMC and data from the Health Ministry have shown that with 3,500 cases being reported to the Ministry involving wrongful surgery and other medical errors at both public and private hospitals, only about 150 annually make their way to an investigation panel. In 14 years, only 14 doctors have been struck off, 39 suspended and 73 reprimanded. Almost 90 percent are not investigated by the MMC, and disciplinary action is taken in less than one percent.[324] This shows the effect of doctors covering up for each other. Negligence cases are on the rise with the number of incidents between 2016 and 2018 involving wrong surgery, unintended retention of foreign objects (URFOs), transfusion and medication errors and patient falls nearly doubling up in both public and private hospitals.[325] With the failure to hold errant doctors to account, there is a possibility that negligence cases will keep rising and there will be a decline in the standard of healthcare provided. This also raises concerns about trust being lost in the healthcare system.[326]

Societies are now shifting towards being rights-based and promoting an individual's right to fair and just treatment. This has necessitated the public to increasingly expect a consistent and proper method of redress and regulation when systems are shown to have failed them.[327] However, with the breach of duty requirement being insurmountable,[328] it is difficult to show that the healthcare system has failed in order to get the necessary redress. This deprives patients' right to health, which according to the WHO Constitution is attaining the highest standard of health.

Although the *Rogers/Montgomery* tests have been hailed to be patient-centric as it respects patients' autonomy, it is still far from being so. A lot remains in the hands of doctors.[329] The therapeutic exception has been accepted in common law as an exception to the rule requiring the doctor to provide relevant information about treatments to competent patients which is

[323] Murray Hunter, 'Patients Betrayed: Malaysian Medical Council Protects its Own' *Asia Sentinel* (Malaysia, 6 February 2020) <https://www.asiasentinel.com/p/patients-betrayed-malaysian-medical-e17> accessed 15 March 2021.
[324] Ibid.
[325] Murray Hunter (n 323).
[326] Ibid.
[327] All Answers ltd (n 309).
[328] Ibid.
[329] Felicity Mills and Miran Epstein (n 308).

necessary for the consent process.[330] This means a doctor can decide to withhold information if he believes such information will cause the patient serious physical or mental harm.[331] Again doctors can still retain their power and this exemption presents a chance for the negligent act to continue which defeats the patient-centric healthcare the *Rogers/Montgomery* test was set to achieve.

In the recent Singaporean case of *Hii Chii Kok v Ooi Peng Jin London Lucien*,[332] the court extended the scope of the exception in providing relevant information to a patient. The Court commented that the therapeutic exception could be exercised on patients who "though not strictly lacking mental capacity, nonetheless suffered from such an impairment of his decision-making abilities that the doctor would be entitled to withhold the information".[333] This was subject to three conditions - "the benefit of the treatment to the patient, the relatively low risk presented and the probability that even with suitable assistance the patient would likely refuse such treatment owing to some misapprehension of the information stemming from the impairment". The Court exemplified this with "certain geriatric patients" who may be "easily frightened out of having even relatively safe treatments that can drastically improve their quality of life, and whose state of mind, intellectual abilities or education may make it impossible or extremely difficult to explain the true reality to them".[334] The development of this therapeutic exception by the Singaporean Court creates a concern for the patients whose decisional abilities are impaired. According to the conditions, doctors are expected to weigh the probability of informational and other decisional assistance failing before deciding whether to withhold it from the patient. This suggests that doctors do not even have to try providing such assistance if they believe it is unlikely to work.[335] This then contradicts the principle in the Singaporean Mental Capacity Act, 2010,[336] which is similar to that of England and Wales, Malaysia and Nigeria that explains that a person is not to be treated as unable to decide unless all practicable steps to help him to do so have been taken without success.[337] Evidence has shown that patients may have difficulty understanding health information with medical care becoming more complex and driven by technological advancements.[338] This means according to the development in the law, a substantial number of patients could fall into the category of having impaired decisional abilities and they could be

[330] Sumytra Meon et al, 'How the 'privilege' in therapeutic privilege should be conceived when considering the decision-making process for patients with borderline capacity?' (2021) 47(1) Journal of Medical Ethics 47.
[331] Ibid.
[332] [2017] SGCA 38; [2017] 2 SLR 492.
[333] Ibid.
[334] Hii Chii Kok (n 332) 152.
[335] Sumytra Meon et al (n 330).
[336] Mental Capacity Act, 2010, CAP 177A.
[337] Ibid, section 5; Mental Capacity Act 2005 (UK), section 3.
[338] Sumytra Meon et al (n 330).

excluded from making decisions on their treatment thereby trumping their autonomy.[339] With Singapore being a common law jurisdiction as well, chances are that Nigerian and Malaysian courts could adopt this development. Considering the concerns around it, patients could be deprived of good health care.

3. Medical Practitioner's Perspective

The *Bolam-Bolitho* test afforded medical practitioners protection. However, with the development of the law in the *Rogers/Montgomery* test, this protection was removed in regards to the doctor's duty to inform. This has made it more likely for patients to commence litigation either rightly or wrongly believing they have more chances to win.[340]

The reasonable-patient standard which was developed from *Rogers v Whitaker*[341] and the most recent *Montgomery*[342] case expects a doctor to take reasonable care in ensuring that a patient is aware of any material risks involved in any recommended treatment as well as reasonable alternative treatments. The risks were held to be material if 'a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it'.[343] Informing a patient of the associated risks of treatment requires that the patient should be informed of the benefits as well. Emphasis has been placed on the need to discuss reasonable alternative treatments with patients; however, what makes for 'reasonable' alternatives is far from clear and not much guidance has been provided by the courts.[344] Expecting that every conceivable alternative treatment must be discussed in detail with patients can be argued to be beyond the concept of reasonableness.[345] Proper communication and documentation takes time. Doctors are faced with balancing their various roles as clinicians, educators, scientists, and administrators while also trying to meet the fast patient turn-over and diligent clinical care.[346] In societies like Malaysia where the Health Ministry has been said to be understaffed[347] and Nigeria where there

[339] Ibid.
[340] Ming W Tan, 'Ill Advice or Ill- Advised? Negligent Medical Advice and the Modified Montgomery Test' (2016/2017) 8 Singapore Law Review 1.
[341] (1992) 175 CLR 479.
[342] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[343] Ibid, 87-88.
[344] Sarah Devaney et al. 'The Far- Reaching Implications of Montgomery for Risk Disclosure in Practice (2019) 24(1) Journal of Patient Safety and Risk Management 25.
[345] Ibid.
[346] Han Y Neo, 'From Bolam-Bolitho to Modified Montgomery- A Paradigm Shift in the Legal Standard of Determining Medical Negligence in Singapore' (2017) 46 Ann Acad Med Singapore 347.
[347] Sira Habibu, 'Health D-G: Public health care system needs funding boosting' *The Star* (Petaling Jaya, 17 July 2019) <https://www.themalaysianinsight.com/s/231194> accessed 26 October 2020.

are major shortages in human resources because of the ”brain drain” of doctors and nurses,[348] this puts an extra burden on the medical practitioners. Therefore, placing a duty on doctors to disclose the ‘uncertainties’ associated with a range of medical treatments, leaves the precise scope of the legal duty arguably poorly defined and exposes practitioners to potential legal suits.[349]

Additionally, it is expected that family doctors would play an important role in determining what might be considered material information to a patient as they spend more time with the patient.[350] However, it would neither be fair nor feasible to expect clinicians who have not been attending to a patient for a substantial period to be able to predict the patient’s concerns and worries in determining what could be material information.[351] Doctors, particularly surgeons, would often be uncertain as they do not spend substantial time with a patient to be able to know which clinical risks should be disclosed and discussed. This could lead to the surgeon underestimating the implications of a small set of risks on a patient and potential litigation could be impending as there is an avenue for a patient to claim for a breach of duty to inform.[352]

The fear of these potential litigations due to the stigmatisation, loss of confidence, and a possible personal financial toll[353] lead to the practice of defensive medicine among medical practitioners. Even though it might be argued that medical practitioners have the therapeutic exception (TE) as an available defence, TE is vague and poorly articulated, making its application rare and constrained. It has been suggested instead that the vagueness of TE will make it difficult for clinicians to predict whether the Court will consider their decision not to disclose a risk as unreasonable.[354] Therefore, doctors do all they can to avoid a possible legal complication with the practice of defensive medicine.

[348] Komolafe Akinlabi Richard Obafemi, ‘Medical Negligence Litigation in Nigeria: Identifying the Challenges and Proposing a Model Law Reform Act’ (Dphil thesis, Trinity College 2017) <http://www.tara.tcd.ie/bitstream/handle/2262/81835/Download File.pdf?sequence=1&isAllowed=y > accessed 24 October 2020.

[349] Ibid.

[350] Albert Lee, ‘‘Bolam’ to ‘Montgomery’ is result of evolutionary change of medical practice towards ‘patient-centred care’’ (2017) 93 (1095) Post graduate Medical Journal 46.

[351] Ibid.

[352] Ibid.

[353] Adam C Schaffer and Allen Kachalia, ‘Medical Malpractice and the Hospitalist: Reasons for Optimism’ (The Hospitalist, 9 November 2017) <https://www.the-hospitalist.org/hospitalist/article/151624/medical-malpractice-and-hospitalist-reasons-optimism> accessed 11 May 021.

[354] Emma Cave, ‘The Ill-informed: Consent to Medical Treatment and the Therapeutic Exception’ (2017) 46(2) Common Law World Review 140.

Defensive medicine is loosely defined as medical practice based primarily on the fear of litigation rather than on the expected patient outcomes.[355] The cost of defensive medicine is lower than the cost of facing a lawsuit.[356]

Positive defensive medicine involves doctors providing expensive treatments which are non-productive and cause uncalled risks.[357] Specifically, in the duty to inform, the doctor not having a clear understanding of who a reasonable patient might be or what to disclose could over disclose information.[358] Loads of information are provided to the patient in the hope that everything is covered. This practice can potentially result in heightened levels of confusion and anxiety for the patient.[359] Negative defensive medicine on the other hand is when a doctor refuses to treat a patient who has previous complications, patients in critical conditions, and patients who have previously filed a claim against a medical practitioner.[360]

In Malaysia, due to the high litigation rate[361] and obstetrics being a highly litigious specialisation,[362] it has become an avoided area among medical practitioners, especially in the private sector as they have to deal with the high protection coverage on their own.[363] This has led to a rise in workload in government hospitals. For a health system that has been described to be 'understaffed and overworked',[364] more workload could lead to an increased risk of sub-standard maternity care.

In Nigeria, even with the low awareness of patients to institute legal action, doctors still practice an avoidance form of defensive medicine. The Compulsory Treatment and Care for Victims of Gunshot Act 2017 was created to provide that compulsory treatment and care should be given to gunshot victims by hospitals in Nigeria.[365] However, medical practitioners are still refusing to treat gunshot victims in the country because they have been arrested and kept behind bars due

[355] Eric D. Katz, 'Defensive Medicine: A Case and Review of Its Status and Possible Solutions' (2019) 3(4) Clin Pract Cases Emerg Med 329.
[356] Rozlinda M. Fadzil, Asma H. Abd Halim and Ain A. Ariffin, 'Defensive Medicine as a result of Medical Negligence: A Brief Overview' (2018) 2(1) UNTAG Law Review 70.
[357] Ibid.
[358] Barry G. Main, et al, 'Informed Consent and the Reasonable-Patient Standard' (2016) 316(9) Jama 992.
[359] Ibid.
[360] Rozlinda M. Fadzil, Asma H. Abd Halim and Ain A. Ariffin (n 356).
[361] According to the MOH 2019 Report, total cases increased from 93 in 2015 to 106 in 2019.
[362] n/a, 'Obstetricians in Malaysia are quitting' *Asiaone* (Petaling Jaya, 27 July 2015) <https://www.asiaone.com/malaysia/obstetricians-malaysia-are-quitting> accessed 16 December 2020.
[363] Ibid.
[364] Sira Habibu (n 347).
[365] Ebuka Obidigwe 'An Appraisal of the Compulsory Treatment and Care for Victims of Gunshot Act, 2017: Late Precious Owolabi' (*Mondaq*, 08 August 2019) <https://www.mondaq.com/nigeria/constitutional-administrative-law/835070/an-appraisal-of-the-compulsory-treatment-and-care-for-victims-of-gunshot-act-2017-late-precious-owolabi> accessed 22 January 2021.

to mundane things that are within the purview of medical management.[366] This refusal has led to the loss of lives that could have easily been saved. An instance of this was seen in 2019 when a young man during his service as a youth corps member was shot while reporting a clash. He was taken to various hospitals which rejected him and he eventually met his untimely death.[367] One can imagine how much more defensive the medical practitioners will get when they are faced with possible litigation. This could worsen the below-par health system the country is trying to mend.[368]

Therefore, what defensive medicine does is make medical practitioners more motivated by legal risk instead of the medical outcome.[369] This contravenes the doctor's ethical obligation to 'do no harm'.[370] Providing the patient with information or treatment that is of no benefit to him/her or withholding or avoiding care that would potentially benefit the patient is ethically wrong as it goes against non-maleficence.[371] Focusing on litigations clouds the doctor's best judgment and this is not in the patient's best interest.[372]

4. Impact on the Healthcare System

It is usually expected that a health system should be able to provide timely access to high-quality and affordable care and one that also promotes innovation of new tests and treatments.[373] Health care exists to serve patients. Clinicians are therefore obligated to use their skills to advance the health-related interests of patients rather than promoting self-interest.[374] However, the requirements of breach of duty have promoted the self-interest of medical practitioners as there is protection with the *Bolam's principle* and defensive medicine is being practised due to the *Rogers/Montgomery* which puts the patient at risk.

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[366] Kanayo Umeh and Nkechi Onyedika-Ugwueze, 'Police Insist Hospitals Can Treat Gunshot, Stab Victims Without Report' *The Guardian* (Abuja, 14 December 2019) <https://guardian.ng/news/police-insist-hospitals-can-treat-gunshot-stab-victims-without-report/>accessed 22 January 2021.

[367] Ebuka Obidigwe (n 365).

[368] Oscar Lopez, 'Nigeria's Health care System on the Mend' *U.S News & World Report* (19 September 2019) <https://www.usnews.com/news/best-countries/articles/2019-09-19/nigeria-slowly-improving-its-health-care-system> accessed 19 February 2021.

[369] Eric D. Katz (n 355).

[370] Johan C. Bester, 'Defensive Practice Is Indefensible: How Defensive Medicine Runs Counter To The Ethical And Professional Obligations Of Clinician' (2020) Springer Nature 1.

[371] Ibid.

[372] Vera L Raposo, 'Defensive Medicine and the Imposition of a More Demanding Standard of Care' (2019) 39(4) Journal of Legal Medicine 401.

[373] n/a, 'Judging Health Systems: Focusing on what Matters' (Harvard T.H Chan School of Public Health, 18 September 2017) <https://blogs.sph.harvard.edu/ashish-jha/2017/09/18/judging-health-systems-focusing-on-what-matters/> accessed 8 May 2021.

[374] Rozlinda M. Fadzil, Asma H. Abd Halim and Ain A. Ariffin (n 356).

Proper treatment has become difficult to access as there is a chance that a breach cannot be proven and the negligent act continues. Defensive medicine which involves unnecessary tests/ information brings about wastage of time, depleting resources, and mismanagement of hospital facilities.[375] This results in health care services being faced with a downward spiral and patients are denied access to quality health care.[376] In certain situations, it could lead to loss of lives that the healthcare system aims to preserve. The journal of the American Medical Association released a statement that annually, almost 12,000 patients die from surgeries that were not needed.[377] Additionally, the ethical principle of justice is violated as time, money, and resources are spent where it is not needed which strains the availability of resources where it is needed. The unnecessary or negligent care provided drives more spending by patients which increases societal healthcare costs.[378]

The prudent patient test which was set to promote the autonomy of patients and encourage shared decision making is now practised over zealously out of fear of litigation, thereby defeating its purpose. Consent forms are now made more intricate and detailed, with every possible risk and alternative listed on the form. This poses the danger of consent not being viewed as a shared decision-making process, in which the patient should be encouraged to participate. The dialogue between doctor and patient which should help build trust is missing which makes the patient reluctant to provide important information that could help facilitate treatment.[379] Therefore, best practices are not being carried out as intended and this does not encourage more innovation. The healthcare system is then exposed to less development, thereby affecting its effectiveness and efficiency.[380]

Additionally, doctors refusing to treat a patient out of fear of litigation prevents the patient from benefiting from healthcare.[381] It also creates more workload for the existing health system which could affect the provision of the health needs of patients.[382]

The breach of duty requirement creates an opportunity for more negligent acts to continue and negatively impacts the accessibility, affordability, and availability of quality healthcare available

[375] Ibid.
[376] Rozlinda M. Fadzil, Asma H. Abd Halim and Ain A. Ariffin (n 356).
[377] Ibid.
[378] Johan C. Bester (n 370).
[379] Sarah Devaney, et al (n 344).
[380] Leighann Kimble and Rashad M. Massoud, 'What Do We Mean by Innovation in Healthcare?' (2017) 1(1) EMJ Innov 89.
[381] Ebuka Obidigwe (n 365).
[382] n/a (n 362).

for patients in both Nigeria and Malaysia. Patients' outcomes are diminished, and the aim of a good healthcare system is not achieved.

5. Conclusion

Law creates an opportunity to improve health care by regulating the standard of care provided. However, it does not seem to achieve this purpose. The fault-based system puts the burden on the patient to prove that the care provided was below the acceptable standard. The requirement to prove this presents overwhelming challenges which have made substandard health care remain unreported and patients continue to suffer in silence.[383] This hinders the accessibility to quality health care. On the other hand, an increase in litigation does not improve the standard either, instead, defensive medicine has become the result. This has led to medical practitioners avoiding certain treatments and patients, or carrying out unnecessary tests at the expense of the patient's safety. Patients' outcomes are then diminished, and the aim of a good healthcare system is not achieved. Considering this, it is logical to consider alternative mechanisms.

It is recommended that more attention be given to the mediation system in both Nigeria and Malaysia. To achieve this, it involves the major stakeholders being adequately equipped with the essential knowledge and resources.

In Nigeria, seeing the need to empower patients on their medical rights, a court-annexed mediation system is recommended. However, a federal approach is essential in adopting the system. Mediation laws, rules, and guidelines should be enacted and enforced nationally to promote uniformity in the process. Lagos state mediation laws and rules can be used as a basis for the creation of these national rules and laws. It is expected that this will attach more seriousness to the mediation process. Mediators' accreditation which focuses on essential mediation skills should be standardised and continuing professional development should be made mandatory.

In Malaysia, it is recommended that both private mediation and court-annexed mediation should be made available as a choice. It is expected that while private mediation creates a safe environment for doctors, the court-annexed mediation could also instil fear when needed. To carry out both mediation forms, a standardisation of the laws, rules, and guidelines is also necessary. The Mediation Act 2012 which is already in practice for the private mediation process should also be applicable for the court-annexed mediation. Also, the code of conduct issued by the Malaysian Bar for private mediation could be used as a basis to create a standard that will be

[383] Felix Chukwuneke (n 315).

required of all mediators in Malaysia. Also, the accreditation of judicial officers and judges should be made more formal as seen with private mediators to allow for consistency with the practice in both forms of mediation.

Additionally, the medicolegal curricula in both law and medical schools in Nigeria and Malaysia should focus more on the process of mediation instead of the malpractice system. It is expected this will adequately equip both lawyers and doctors with the comprehensive knowledge needed to be involved in a mediation process for the promotion of the doctor-patient relationship.

Also, educating patients is still needed to make sure they are aware of the benefits that mediation brings in promoting their medical rights and improving their access to quality health care. This education should also clearly include the differences between the court system and court-annexed mediation.

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