



SUARA PEGUAM

***EMBRACING THE EVOLUTION OF
THE LEGAL SYSTEM***



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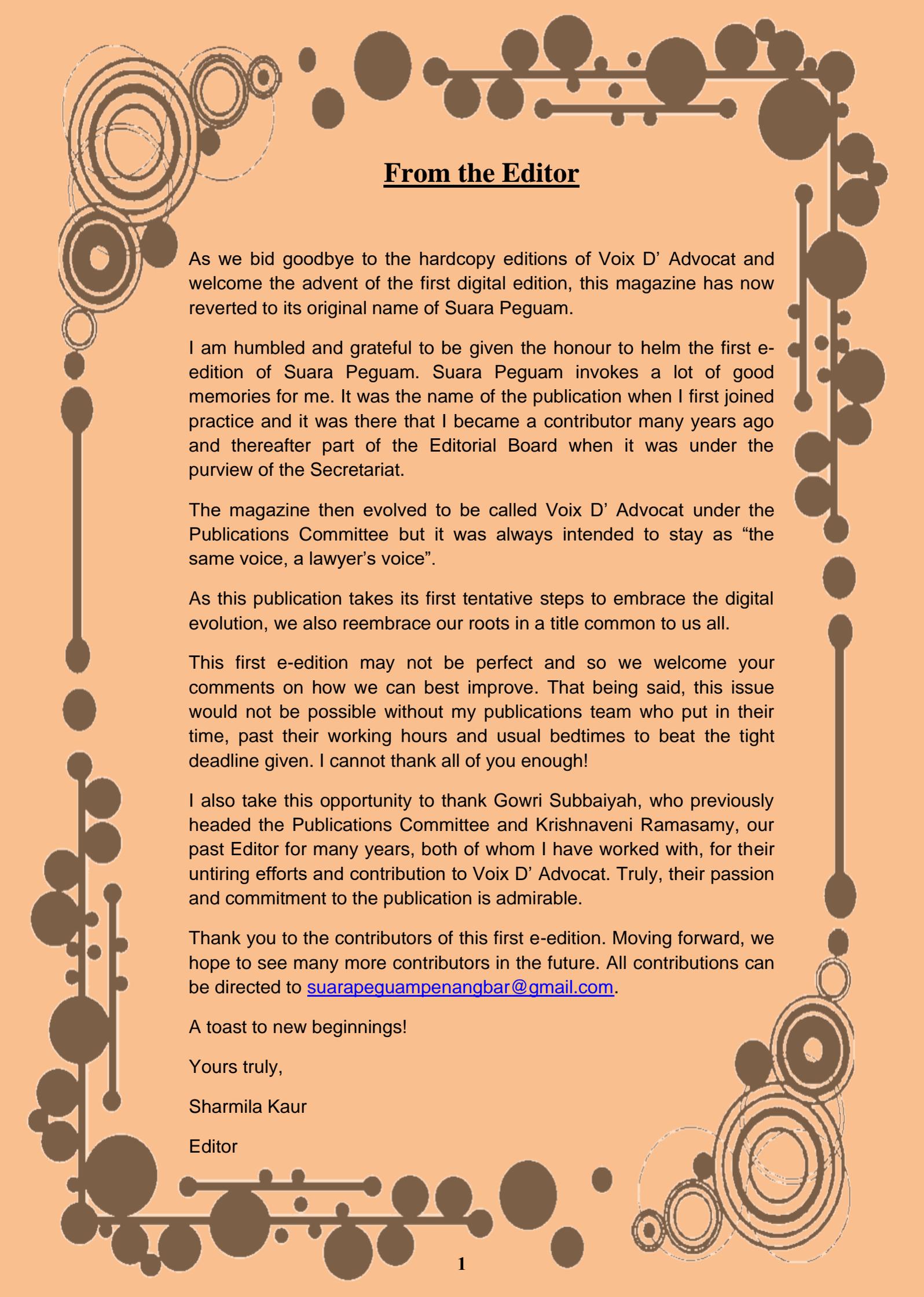
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From the Editor

As we bid goodbye to the hardcopy editions of Voix D' Advocat and welcome the advent of the first digital edition, this magazine has now reverted to its original name of Suara Peguam.

I am humbled and grateful to be given the honour to helm the first e-edition of Suara Peguam. Suara Peguam invokes a lot of good memories for me. It was the name of the publication when I first joined practice and it was there that I became a contributor many years ago and thereafter part of the Editorial Board when it was under the purview of the Secretariat.

The magazine then evolved to be called Voix D' Advocat under the Publications Committee but it was always intended to stay as "the same voice, a lawyer's voice".

As this publication takes its first tentative steps to embrace the digital evolution, we also reembrace our roots in a title common to us all.

This first e-edition may not be perfect and so we welcome your comments on how we can best improve. That being said, this issue would not be possible without my publications team who put in their time, past their working hours and usual bedtimes to beat the tight deadline given. I cannot thank all of you enough!

I also take this opportunity to thank Gowri Subbaiyah, who previously headed the Publications Committee and Krishnaveni Ramasamy, our past Editor for many years, both of whom I have worked with, for their untiring efforts and contribution to Voix D' Advocat. Truly, their passion and commitment to the publication is admirable.

Thank you to the contributors of this first e-edition. Moving forward, we hope to see many more contributors in the future. All contributions can be directed to suarapeguampenangbar@gmail.com.

A toast to new beginnings!

Yours truly,

Sharmila Kaur

Editor

LAWS AGAINST ELDER ABUSE AND NEGLECT

By: Carolyn Oh Li Lin



As the year draws to a close, habitually we reflect on the events passed which, sadly, includes lives lost. If any form of regret factors then it is telling that one might not have done enough or said enough before the person passed away. This article focuses on our elderly which will describe all of us one day.

Aging population by 2030 – is Malaysia ready?

An aging population is defined as one where 15% or more of its total population are aged 65 years and above. According to a statement by Malaysia's Chief Statistician in July 2019, the 15% threshold will be crossed in 2030.

In a survey on aging, Malaysians have responded with concern about the oncoming silver years. Besides the lack of social services such as affordable care and housing as well as professionally trained caregivers, the family to whom the elderly traditionally rely upon are either absent, oblivious or goes through the motions without real care.

EAN – elder abuse & neglect

Some may think that the abuse and neglect of the elderly are an exaggeration. However, according to the World Health Organisation (WHO)'s statistical research records, 15.7% of the elderly are abused.

That translates to 1 out of 7. So much so that there is now an acronym describing this terrible global phenomenon: EAN.

WHO defines "elder abuse" as a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.

Abuse can be physical, psychological, emotional, financial, or sexual and neglect is the ugly inverse, varied only by whether it was unintentional or intentional.

Financial Abuse

In property transactions, alarmingly, there are too many cases where financial abuse is apparent, ranging from the forging of the elderly's signature, to coercion of the elder to sign over title rights and to duping the elder to give powers or rights allowing the abuser to manipulate the elder's assets and monies.

In *Lim Kim Hua v Ho Chui Lan & anor* [1996], an illiterate old lady who had poor memory was reliant on the defendant (granddaughter) for food, accommodation and management of her affairs.

It was found that her granddaughter abused this relationship of reliance and exerted undue influence, causing the old lady to transfer part of her shophouse in her favour. The transfer was adjudged null and void.

> Laws against Elder Abuse and Neglect (LEAN)

In Malaysia, it is encouraging to see that a large number of academicians, social activists, medical personnel and lawyers are actively trying to engage the powers that be to champion the need for specific laws to prevent elder abuse and neglect.

However, they know that to form a LEAN action group to combat the EAN epidemic will take collaboration and concerted effort. The responsible authorities must realise that the abuse and neglect of our elders not only lead to their demise but it is also a shocking reflection of the dilapidation of our society's basic filial responsibilities.

It was not that long ago when we leaned on our elders. So, it is really not too much to ask when they need to lean back on us.

What we have or, rather, what we lack.

The fact is that we do not have specific laws which govern the rights of the elderly so as to prevent abuse and neglect.

Currently, we have the Care Centres Act, 1993 (Act 506) and the Private Aged Healthcare Facilities & Services Act, 2018 (Act 802).

However, the former Act focuses on care centres per se which range from child care, to rehabilitative care to homes for the aged.

The latter Act is meant to regularise standards of healthcare services that are administered by professionals in private institutions relating to the elderly.

Then, there are the Domestic Violence Act, 1994 (Act 521) and the Penal Code of Malaysia (Act 574). However, none of these Acts focuses on the elderly themselves and what they want.

Until we are LEAN-ing the right way, amongst the many good advices, it is important to highlight three:

- > plan ahead to protect your assets and to ensure your wishes are followed
- > carefully choose trustworthy person(s) to help and act for you when you are incapable
- > always feel free to say “no” for, after all, it is your money.

What we need - Capacity to Dictate

Besides laws which will curtail the ongoing abuse and neglect of our elderly, on the subject of “planning ahead” as canvassed in the previous articles, a form of Mental Capacity Act for Malaysia (MCAM) is required. Our MCAM can be fashioned after UK’s Mental Capacity Act 2005 and Singapore’s Mental Capacity Act 2008 both of which enable one to draw up Lasting Powers of Attorney which can dictate matters relating to:

- > property and financial affairs; and/or
- > healthcare and personal affairs.

Conclusion

Whilst it is a hopeful mantra that blood is thicker than water, that is not always the case. As we strive for independence throughout our lives, similarly we should keep in our grasp this power of independence which can only come from planning ahead. Even if we inevitably have to lean on another, it would be best to do so on our terms. Laws must be crafted to enable us to plan ahead for our later years.

This article was first published in The Star Online on 2.12.2019 and is reproduced with the permission of the author, our current Penang Bar Chairman.

Snapshots in Time

Syariah Subcommittee Event

Iftar Ukhuwwah 7 : Buka Puasa & Distribution of Food

Date: 07/04/2023

Venue: Masjid Melayu Lebuh Acheh





Sports Subcommittee Event: Penang Bar Sports & Games Fiesta 2023

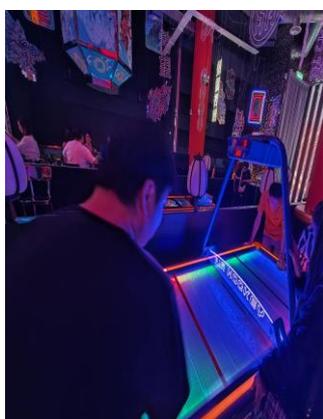


Fun Run
Date:06/05/2023
Venue: Straits Quay





Badminton
Date:06/05/2023
Venue: Penang
Badminton Academy



Darts, Pool & Arcade
Date:06/05/2023
Venue: Stag Bar

Courtesy Calls by Pupils on the Chairman and Secretary of Penang Bar



LEGAL AID:

OUTREACH PROGRAMME – Program Kerjasama Antara Jabatan Bantuan Guaman dengan Yayasan Bantuan Guaman Kebangsaan

*By: Ann Beatrice De Almeida **

Date : 15/03/2023
Time : 8.00 am – 1.00 pm
Venue : Dewan LPPKN, Bertam Kepala Batas
Pupils : 1. Nur Shahidatul Binti Ahmad Zaini (Zaid Ibrahim & Co.)
2. Nur Shafiqah Binti Zainudin (The Chambers of Mohd Izad Buqhary)
3. Wong Zhi Shuen (Allen Chee Ram)

On 15.3.2023, we arrived at the Dewan LPPKN, Bertam, Kepala Batas at 8.00 am for registration and we were all provided with breakfast. The exhibition started at 8.00 am where we proceeded to visit many booths from various agencies such as Jabatan Bantuan Guaman (JBG), Agensi Antidadah Kebangsaan (AADK), Women's Centre for Change (WCC), Polis Diraja Malaysia (PDRM) and Jabatan Penjara Malaysia.

The programme started at 9.00 am with the recitation of the *doa* followed by a short interesting talk by Puan Wan Nur Azlina Binti Wan Abdul Rahman, Family Coach at LPPKN Pulau Pinang on the topic of "*Lukisan Rasa*". The talk focused more on the importance of communication and tolerance between family members. During the talk, we were all instructed to draw a picture based on the instructions given in which the drawings turned out to be different from the actual instructions. The lesson behind this drawing activity was to always ask questions to the instructor in order to get clear instructions with regards to the task, which many people failed to do. We also learned that there are four keys in effective communication, that is; Listen, Observe, Validate and Empathize.



Puan Wan Nur Azlina Binti Wan Abdul Rahman, Family Coach at LPPKN Pulau Pinang speaking on the topic of “*Lukisan Rasa*”.

The first forum session started at 10.00 am on the topic of “*Jenayah Seksual Terhadap Kanak-Kanak: Caknakah Kita?*” The panels involved were Dr. Sumayyah Binti Syed Ibrahim, (Pakar Perubatan Kecemasan, Hospital Seberang Jaya), Tuan Nuraswan Bin Aminuddin (Pengarah Bahagian Peguam Panel dan Pendamping Guaman), ASP Puan Nur Syafawati Binti Abu Bakar (Pemangku Pegawai Turus D11) and Encik Mohd Noor Bin Ahmad (Penolong Pegawai Pembangunan Masyarakat Kanan, Pejabat Kebajikan Masyarakat Daerah Timur Laut). The forum concentrated on the role of the respective bodies in sexual offenses against children cases starting from the victim/child lodging a police report till the accused is charged in court for the offense.

After the victim has lodged a police report, the police will conduct the investigation by interviewing the victim and his/her guardian with regards to the facts of the case. Once the interview is concluded, the victim will be brought by the police to the One Stop Crisis Centre (OSCC) for further examination by the doctor in which every single injury and mark on the victim’s body will be recorded by the doctor for the purpose of the case investigation. The victim/child will also be referred to the psychiatrist or counselor as the child may suffer from depression or having suicidal thoughts as a result of the sexual assault committed against him/her.

Jabatan Kebajikan Masyarakat (JKM) may issue the Emergency Protection Order (EPO) in cases where the victim/child came straight to the JKM without first lodging a police report. The EPO will prohibit the perpetrator from using domestic violence

against the survivor, inciting any other person to commit domestic violence against the survivor or entering the survivor’s safe place, shelter, place of residence, shared residence or alternative residence. The EPO is valid for 7 days. In cases where the victim/child has lodged a police report, the Magistrate Court will issue an Interim Protection Order (IPO) that is valid throughout the police investigation and before the accused is charged in court.



Panelists for the 1st forum in regards to the topic of “Jenayah Seksual Terhadap Kanak-Kanak: Caknakah Kita?”.

The second forum started at 11.30 am on the topic of “Bantuan Guaman: Kemana Hendak Ku Tuju?” The panelists involved were a former judge who is currently working in Jabatan Bantuan Guaman and a panel lawyer who works in Yayasan Bantuan Guaman Kebangsaan. They shared their experience working in this field and encouraged the public to spread legal awareness among our family and friends. Further, they reminded us that everyone has the right to access legal services despite their financial status which is in line with the principle laid under our Federal Constitution i.e. that everyone has the right to be heard and to be represented by legal counsel in court proceedings. They also encouraged young lawyers to participate in legal aid as a way of serving the community and society as a whole.



Panelists for the 2nd forum in regards to the topic of “*Bantuan Guaman: Kemana Hendak Ku Tuju?*”.

From attending these 2 forums, we had the opportunity to enhance our knowledge about the ways to handle and to assist the public in the event sexual assault is committed against young children. It is saddening that a victim of sexual assault has to go through such a comprehensive investigation process which may cause them to be further traumatized. Therefore, this forum was a good exposure for us to learn how to help these victims better. Further, we are glad to know that our government has established the Jabatan Bantuan Guaman and Yayasan Bantuan Guaman Kebangsaan to help the poor. In short, it was a fruitful experience for all of us and we are grateful to be part of it.



* *The author is the Executive Officer of the Penang Legal Aid Centre.*

**THE JUDICIAL CONTROL OVER
CONTRACTUAL UNFAIRNESS ARISING OUT
OF EXCLUSION CLAUSES IN MALAYSIA:
CASE STUDY OF CIMB BANK BERHAD
V. ANTHONY LAWRENCE BOURKE**

[2019] 2 MLJ 1 (FC)

PART 2*

By: Piriya A/P Subramaniam

3. Impact of the Judgement

It is important to note how this judgement affects the validity or the enforceability of various exclusion clauses in contracts and the impact of this landmark decision.

(i) Public policy taken into consideration

In this instance, the Federal Court emphasised that in today's commercial world, consumers are frequently forced to accept the terms and conditions of a standard contract prepared by institutions with a stronger bargaining position. Hence, customers with unequal bargaining power compared to financial institutions are ordinary people who may not even be aware or understand the terms and conditions provided in the agreement and are in an unenviable position of taking it or leaving it. In order to address the Bank's unconscionability and abuse of freedom of contract by hiding behind such terms, the Federal Court found that Clause 12's patent unfairness and injustice precludes the appellant's claims or the right to sue the respondent in this instance (Ping 2019). Therefore, absolute exemption clauses in contracts are completely unfair and unjust, and such clauses warrant public policy considerations as well as the intervention of the court. Contracts that aim to oust the court's jurisdiction have been declared invalid. The Federal Court in this case further emphasised that a remedy or redress is ancillary to and indivisible from the right to commence legal proceedings.

(ii) Duty of care and duty in disbursing a loan

The bank also relied on a clause in the loan agreement that allowed it to decide how the loan would be disbursed to the Developer. This issue was raised before the Court of Appeal, where the clause granting the bank complete discretion over loan disbursements did not allow the bank to withhold the disbursement fully. When a bank disburses a loan based on the relevant sales and purchase agreement or for the benefit of its customers, it owes a duty of care and skill to the customer, and therefore when the bank fails to make the progressive payments, the developer then terminates the sale and purchase agreement. The bank is then deemed to have breached the loan agreement and is to be found negligent (Koo and Yow 2019).

(iii) The duty imposed on banking institutions to revise the clauses in housing loan agreements

Following the decision of the Federal Court in this case, banks are taking steps to improve the fairness and openness of terms and conditions in contracts with borrowers. This decision has given the Central Bank of Malaysia (BNM) a significant boost in its efforts to ensure financial services providers (FSP) provide fair and equal treatment to financial consumers. In line with this landmark decision, BNM reviewed the terms and conditions of 14 Malaysian financial institutions' loan agreements from January to July 2018 and issued a memorandum to all financial institutions on February 28, 2019, giving them six months to revise their loan agreements to remove the component of unfair treatment.

BNM was able to identify the terms and conditions that were excessively skewed in favour of banking institutions and detrimental to borrowers during a systematic evaluation undertaken by banks on home loans and financial contracts. **BNM issued a Policy Document titled "Fair Treatment of Financial Consumers"** on November 6, 2019, which took effect in May 2020. The Policy Document effectively mandates FSPs to build and support a culture in which financial consumers' interests are an inherent element of their business, strategy, and operations, while taking into account six principles and the important principle

that an FSP must ensure that financial consumers receive fair contract conditions (YEE 2020).

The Policy Document provided guidelines in governing certain aspects of the agreements such as (i) on **clauses in a loan agreement that inserts absolute exclusions or limitations of the banking institution's liabilities and obligations**, (ii) **putting undue reliance on signed agreements to establish that the customers have read and understood the contract completely**, and (iii), the **use of unnecessary complex words by using technical and excessive legal jargon** that does not help customers to clearly understand the terms and conditions of the agreement. As a consequence, by the end of 2019, banking institutions had to update terms and conditions and use simple language to enhance the functionality and understanding of both new and current housing loan and financing contracts (Market Conduct and Consumer 2018).

4. Recommendations for legislative/judicial control in Malaysia

There are two avenues for dealing with the issue of exclusion clauses. The first is for Parliament to take steps to pass specific legislation dealing with exclusion clauses, particularly in consumer transactions, and the second is for consumers to be educated about exclusion clauses and their implications in contracts.

(a) The legislative approach In Malaysia and Comparison with other jurisdictions

There are still some laws in Malaysia that are unfavourable to consumers. The Consumer Protection Act itself does not provide complete consumer protection. There are certain unjust contract provisions that are still not covered by the Act. Although the introduction of Part IIIA in the Consumer Protection Act is a significant step forward in providing stronger consumer protection in Malaysia, the situation is far from ideal. Since there is a lack of regulations regulating unfair terms in contracts in Malaysia, the courts should apply stricter interpretation of the exclusion clause and safeguard consumers from oppressive terms. The inequality in bargaining powers should be recognised by the courts in Malaysia. The court

should play a more active judicial role and defend the weaker party to prove that the notion of freedom of contract on their own terms in a consumer transaction is not a mere myth (Yusoff, Isa and Aziz 2012). However, judicial activism cannot be a permanent solution to tackle this issue in the long term. This is because different judges may have different approaches in interpreting the law and contract provisions. In the long term, this may lead to inconsistencies in Malaysian legal precedents on contractual unfairness stemming from exclusion provisions.

For a long-term solution, Parliament should take the lead in enacting special legislation to oversee unjust contract conditions, similar to what other jurisdictions such as the United Kingdom, Singapore and Australia have done. **The Uniform Commercial Code (UCC)** ensures that all commercial transactions in the United States are governed by a comprehensive set of laws. **The Competition and Consumer Act 2010** is a national legislation that governs fair trading in Australia and regulates how business transactions and fair trading in Australia must engage with their consumers, competitors and suppliers. The Australian Act encourages fair trading among businesses while also guaranteeing that consumers are properly treated and justice is served. In the United Kingdom, the **Unfair Contract Terms Act 1977 (UCTA)** limits the extent to which contractual provisions such as exclusion clauses can be used to escape liability for breach of contract, negligence, or other breaches of duty (Yee and Razak 2019).

When comparing Malaysian laws governing consumer protection with the above-mentioned legislations, some deficiencies in Malaysian law regarding contract terms can be seen. The most obvious deficiency is the lack of detailed explanation on unfair contract terms and illustrations which can cause ambiguity and also makes it harder for the courts to interpret the law. In contrast, the '**reasonableness test**' approach that has been set out in the **UCTA** of United Kingdom sets out a standard test to analyse if a particular term in the contract is unreasonable and if it is so, then the term would be ineffective. The UCTA provides for the court to consider certain factors in determining the reasonableness of a particular term such as (i) if the customer purchased the goods in a special order; (ii) the parties' relative bargaining power in the contractual transaction; (iii) the degree of understanding of

the customer on the contractual terms in the standard form; (iv) whether the consumers freely consented or were induced to enter into the agreement; and (v) if the contract limits liability in the event a specific condition is not met, whether it was reasonable and practicable at the time of contract, to expect compliance with that specific condition. As compared to the Malaysian position, our legislation has no such 'reasonableness test.'

Section 27 of **the Competition and Consumer Act 2010** of Australia provides that **if one of the parties is unable to negotiate the contract in its standard form, then the contract is not in standard form.** It provides customers a chance to voice their dissatisfaction with any contract term. Our laws are also silent on this point.

The **Unfair Contract Term Act** in Singapore places a reasonable limit on exception clauses, ensuring that the seller does not profit from the innocent customer as per their wish. It is also a provision that Malaysia does not have. Finally, all business contracts in Singapore are subject to the statute prohibiting unfair contract conditions. As a result, their law may provide enough protection to a customer in any situation.

Based on the analysis above, **we can establish that despite the addition of Part IIIA to CPA 1999, the law still has a lot of potential for enhancement.** It would be preferable if our country could pass specific legislation to regulate unfair contract terms. It is also preferable that we use those countries as a model for enhancing our law on unfair contract terms in order to protect consumers from being exploited by these terms. The United Kingdom version can serve as an example for us in terms of updating our law on unfair contract terms (Manaf and Amiruddin 2018).

(b) Consumer Education: The awareness of consumers about 'Exclusion Clauses' and 'Unfair Contract Terms'

Under common law, the courts would assess whether the unjust contract provisions are properly incorporated into the contract, and if such incorporation is dependent on the customers' knowledge of the clause's existence. In Malaysia, the Contracts Act 1950 requires the parties to the contract to be competent in terms of age and soundness of mind, and that they have given free consent to enter into

the contract. On the other hand, the Consumer Protection Act nullifies the exclusion clauses on the ground of procedural and substantive unfairness. This proves that in Malaysia, lack of importance is being given to analyse if the parties to the contract are really aware and understand the importance of each terms and clauses stipulated in standard contracts.

A survey had been conducted on the awareness and practices of consumers towards the unfair contract terms in standard contracts in Klang Valley. Although the analysis of the said data collection can never be sufficient to represent the entire consumer base in Malaysia, the study gives a general idea about the level of awareness among consumers and their knowledge about exclusion clauses. According to the findings of this study, only 41.8 percent of respondents were aware that such clauses existed in their contacts with sellers. When questioned if they grasped the legal implications of having such an unfair contract term in the agreement, 50.8 percent said they did not. This means that most consumers are ignorant about exclusion clauses (Bakar and Amin 2017).

The findings of this survey shows that the awareness of Malaysian consumers on the existence of unfair contract terms in standard contracts are at an alarming level and they do not have knowledge on the legal impact of having such terms in their contracts. The consumers are being deprived of their basic and main consumer rights provided by the Organization of Consumer Unions (OCU) which is the right to be informed, the right to redress and the right to consumer education.

Consumer education is very vital for the consumers to be aware of their rights as consumers so that they acquire the right knowledge and skills for taking action against the parties concerned. Signing commercial transactions and agreements without being aware of the unfair contract terms in the agreements derogates their rights voluntarily to the sellers or the other party to the contract. Therefore, formal consumer education in educational institutions and consumer education campaigns should be organised by the Ministry of Domestic Trade and Consumer Affairs or non-governmental bodies such as Federation of Malaysian Consumers Association (FOMCA) or Consumer Association of Penang (CAP) to make consumers aware of unfair contract terms and their legal implications. Such

initiatives are an example on how consumer education can help overcome the issue of lack of awareness of consumers on unfair contract terms.

5. Conclusion

The idea of freedom of contract is based on respecting people's free will, yet exclusion clauses appear to limit the free will of the contracting parties, particularly those with weaker negotiating powers. Despite the Federal Court's decision in the CIMB case, exclusion clauses in Malaysian contracts are still valid and enforceable as long as they do not violate **Section 29 of the Contracts Act 1950**, or in other words, as long as they do not constitute an absolute restriction that exempts a party from any liability or damages. It is important to note that the law does not operate in isolation. Therefore, in order to correct any imbalance in negotiating powers, corporate accountability and integrity must be seen to work hand in side with legal advancements (Abdullah, Consumer Protection on Unfair Contract Terms: Legal Analysis of Exemption Clauses in B2C Transactions in Malaysia 2018). In a number of cases in Malaysia, the courts have shown increasing concerns about the embedded exclusion clauses in standard form type in many consumer contracts, where court action appears to vary based on different ideologies (Abdullah, Chin, et al. 2019).

Since 1999, important legislative reforms and advancements that materialised in Malaysia to improve consumer protection have been in line with the National Consumer Policy, which aims to strengthen the institutional legal framework for consumer protection in Malaysia and keep up with the demand of globalization. According to the results of the earlier mentioned survey, the majority of respondents have not thoroughly studied the terms of their contracts. The worst thing is that even though they were informed of the unfair terms, the consumers claimed that they would still sign the document since they were not aware of the legal impacts of having such terms.

While **Part IIIA of the CPA** provides for unfair contract conditions, it does not address all issues because its applicability is fraught with uncertainty. Therefore it is hoped that Parliament would take efforts to enact specific legislation

addressing standard form contracts and exclusion provisions. Standard form contracts and exclusion provisions require special attention because they have become commonplace in all industries.

** Part 1 of this article was published in the last edition of Voix D' Advocat. This article is in continuation of the previous article.*

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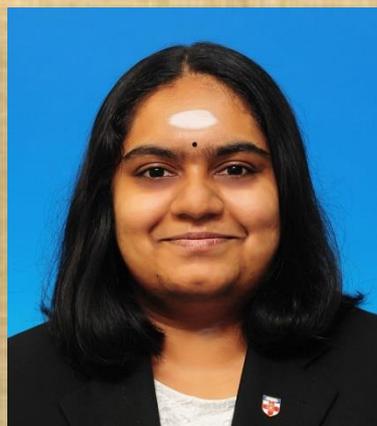
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