ACCESS TO JUSTICE IN THE TIME OF COVID-19 PANDEMIC FROM THE JUDICIARY'S PERSPECTIVE

Thank you very much for the kind introduction. I am grateful to the ASEAN Senior Law Officials Meeting (ASLOM) Malaysia (Attorney-General's Chambers Malaysia) and the ASEAN Secretariat for hosting this event on 'Access to Justice during Pandemics' today. It is particularly gratifying to acknowledge the spirit of collaboration that is reflected by speakers and participants from the various parts of our justice system and the region of ASEAN as a whole.

In my allotted time, I propose to consider three different aspects of this topic in this jurisdiction:

(i)First, access to justice per se, and how such access is affected by this pandemic;
(ii)Second, how the Judiciary dealt, and continues to deal with, access to justice up to the present;
(iii)Third, how the justice system may well or should evolve, and its impact on access to justice.

(i)Access to Justice In the Times of the Covid-19 Pandemic

The starting point in Malaysia is that the courts have recognized the right of access to justice as a fundamental right under **Article 5 of the Federal Constitution**[1], i.e. the right to life.

In order to comprehend how access to justice has been affected during the pandemic, it is important to first appreciate the reality of access to justice during pre-pandemic times.

[1] Public Prosecutor v Gan Boon Aun [2017] 4 CLJ 41 at paragraph 13

Defining access to justice in its simplest terms, I understand it to mean that:

A person who is suffering hardship in one form or another:

(a) Firstly, recognizes that a legal issue is involved, or has access to someone who can identify, for his benefit, that a legal issue is involved;
(b) Secondly, is able to obtain timely and affordable access to the level of legal help required, to put forward his case correctly and adequately;
(c) Thirdly, gets a fair hearing before an impartial and educated adjudicator, so as to obtain a fair result and remedy to his problem;
(d) Fourthly is able to make the result and remedy a reality, which means the ability to enforce or obtain the benefit of the remedy in a timely manner.

With that definition, it is a harsh truth that large segments of our population, as is the case in many other countries, do not enjoy ready access to justice. 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 simply insufficient to meet the needs of the population, as the thresholds for eligibility are at very low levels, such that persons who are just on the poverty line, and those in the lower middle class and middle class, do not qualify. And these latter groups cannot afford private legal representation.

Even if you manage to get to the courts, there is the issue of the complexity of adjudication and the length of legal proceedings, in both the civil and the criminal justice system. The issues are even more acute in the latter. These include matters such as the role of prosecutors, how they perceive their objective and purpose, and the ability to procure

adequate representation for the accused. There are also the problems of adequacy of sentencing, the need for prison reform and the rehabilitation of such persons back into society.

Now given that that is normality, you have to then extrapolate this base level to a pandemic scenario, where this level of access to justice is diminished significantly. And continues to be so.

The reality of this pandemic, as we have seen with schemes such as the White Flag campaign is, as **Pablo Nerudo** put it so eloquently: ***"For Now, I ask no more than the Justice of Eating".***

All of us are well aware of the immediate consequences of the pandemic - the loss of lives, loss of employment, increase in suicides, mental health problems, domestic violence, child abuse, the problems faced by illegal immigrants – and it goes on. Many of these issues require access to justice.

So against this backdrop, a common scenario in many jurisdictions, how did the Judiciary deal with the access to justice during the pandemic?

Essentially, we turned to technology which proved to be pivotal and crucial to enable access to justice.

Measures taken by the Judiciary

The onset of the pandemic for us commenced in **March 2020** – the Government of Malaysia acted under the **Prevention of Infectious Diseases Act 1988** to put in place protective measures. We were fortunate that we already had in place digitalization of court proceedings to some extent. Technology has been introduced to the Malaysian Judiciary since **2009 onwards**.

March 2020- May 2020 ('the first phase')

(i)The first phase was the **Movement Control Order** which took effect from **18 March 2020 to 3 May 2020**. It was a complete lockdown and the courts were not at that juncture listed as an 'essential service'. The court buildings were closed, but the Honourable Chief Justice, being acutely aware of the need for access to justice, ensured that avenues for redress in urgent matters remained available. Comprehensive Standard Operating Procedures for the courts were issued in the form of guidelines, which dealt with both the form and substance of the administration of justice.

On the **civil front**, matters of urgency such as injunctions, and warrants of arrest in admiralty matters continued to be issued. These matters were dealt with by way of remote hearings. By remote, I refer to:
(a) audio which means telephone;
(b) visual – which means video conferencing; and
(c) paper hearings which encompasses email exchanges and entire proceedings in writing.

In **criminal matters**, remand applications, which comprise an 'essential service' continued to be heard by magistrates. These young adjudicators physically travelled to remand centres and prisons to carry out their duties, to their great credit.

The Judiciary also recommended amendments to relevant laws to allow for direct legislative sanction for online hearings without having to base it on the consent of parties to facilitate. Such legislation was however, only came into effect in October 2020. So in the interval, and even now, we had to contend with considerable reluctance, unwillingness and averseness to this different mode of conducting proceedings from the other stakeholders.

Notwithstanding this, 23 April 2020 was historic, as it the date was the Court of Appeal held its first online appeal which was live-streamed and viewed nationwide. This marked the beginning of appellate hearings online.

4 May 2020 to 9 June 2020 ('the second phase')

The Conditional Movement Control Order phase took effect from **4 May 2020 to 9 June 2020**, marking the second phase. Restrictions were relaxed, the courts re-opened partially and resumed operations throughout the country in several stages. The requisite safeguards of social distancing, temperature measures, sanitizing, staggered time for physical hearings and a reduction in the number of cases per day etc were all put in force. However, those not physically in court continued to rely on technology and worked from home, online.

10 June 2020 to 31 March 2021 ('the third phase')

The third phase, the Recovery Movement Control Order phase, began on 10 June 2020, with the anticipation that we would achieve normality in due course. During this phase the Chief Justice announced that all courts resume full operations with effect from 1 July 2020 but again, subject to strict standard operating procedures.

11 January 2021 to 31 May 2021 ('the fourth phase')

Unfortunately, the Recovery Movement Control Order had to be suspended and we reverted back to the Phase Two Conditional Movement Control Order from January 2021, due to the surge in Covid cases in Selangor, Sabah and the Federal Territories. This surge has since extended to the rest of the country. The courts continued with their restricted physical operations and emphasis was placed on online hearings.

1 June 2021 to 28 June 2021 and the National Recovery Plan until 31 December 2021 ('the fifth phase')

In view of the exponential rise in cases, we have been moving spasmodically between phases. We are currently at peak levels.
This has meant that **we are almost wholly reliant on technology for most areas of work, save for criminal matters. All of us, including judges at all levels work from home, save for judges on the criminal circuit who operate from the courts.**

The greatest advance made during this difficult time has been the ability to transition from **physical court trials to online trials**. You will recall that interlocutory matters and appellate matters were not a problem even from the onset by reason of the limited number of persons involved in the process. Trials are completely different. The need to incorporate witnesses, interpreters and a series of other actors multiplies the need to plan and strategise the logistics for a trial. However, we are succeeding to a considerable extent and although it is not an answer to all trials, some of which may still need to be conducted physically, we have come very far indeed in implementing online trials. I can speak in particular of the commercial courts in Kuala Lumpur where most of the judges carry out their work almost completely online.

Statistics

To give you an idea of how we have fared during this difficult period, it would be instructive to look at two sets of figures:

(i) First a comparison of our performance prior to the pandemic compared with our performance now; and

(ii) Second, a rough assessment of the degree to which we have moved from physical to online disposal from the number of matters disposed online during the pandemic.

(i)Disposals During the Pandemic
Between 2019 and 2020

In terms of disposal between 2019 and 2020 – the appellate courts saw no discernible effects from the pandemic as the Federal Court improved its performance and the Court of Appeal saw only a 2% difference in disposals in both civil and criminal cases.

The High Court saw a slightly more appreciable difference of 5% reduction in civil matters and 10% criminal matters. The Subordinate Courts which deal with the bulk of the matters in the country however saw a distinct reduction in disposal rates as figures fell by about 50%.

Between 2020 to date in 2021

The number of cases disposed of this year are still being computed. But given the length of the very restricted movement orders we have experienced in view of the huge increase in the spread of the disease, our disposal rates did decrease fairly substantially. As we transition into more online disposal, it remains to be seen if the backlog particularly in relation to criminal matters will indeed decrease.

(ii)Approximate percentage of cases disposed online

Between March 2021 to June 2021 when we were far more in lockdown the performance of the Federal Court moved further into an online mode – **29% of the civil matters were heard physically while 38% or more were dealt with online. At present we are completely online for all civil cases. Only criminal matters are heard physically. Our backlog lies there.**

The Court of Appeal shows a similar move although civil matters are evenly balanced, while many more criminal matters have moved onto an online mode of hearing.

The High Court throughout the country has not shown such a great transition percentage wise, but this can be attributed to the fact that it is only recently that the courts have begun to conduct online trials. That has required a great deal more work than appellate work as one has to deal with numerous third parties, particularly witnesses. We were particularly challenged by the movement control orders which at the early stages precluded even lawyers from operating from their offices. That has now changed and we hope to see a transition there too. However, the bulk of cases there have been physically disposed of.

Perhaps the exception is in Kuala Lumpur particularly the Commercial Division which traditionally leads the way. As of this year, virtually all hearings were conducted online entirely, both interlocutory hearings, appeals and now even trials. This establishes that the use of digital technology and virtual courts has been essential for access to justice.

In **Sabah and Sarawak** the percentage of civil disposals during 2021 when all cases were dealt with online, amount to 48% and 22% respectively. It is clear that Sabah is well on its way to transitioning to virtual hearings and courts. The figures are considerably lower for criminal matters – 28% in Sabah and 9.4% in Sarawak as physical presence is preferred for these matters.

The Subordinate Courts

The lower courts have seen a greater transition, the sessions court numbers indicating an even spread between physical and online hearings while the number of online hearings is increasing. The Magistrate's court also shows a clear transition towards online hearings. So the trend is clear.

Now is that a good thing or not?

(iii)Delivering Justice During the Pandemic and the Future Use of Technology – Its Impact on Access to Justice

The speed at which the Covid-19 virus mutates and adapts itself to survive, notwithstanding vaccines designed to defeat it, provides a foretaste of the manner and speed at which the courts and judicial systems need to adapt in order to remain relevant in a fast digitalizing and pandemic driven world. 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, even as the pandemic rages and wanes spasmodically, to reflect on and perhaps accept that this medium of court hearings, namely remote or virtual hearings, are here to stay.

As Albert Einstein famously said – *"The measure of intelligence is the ability to change".*

However, the manner in which most courts across jurisdictions have approached the need for technology during the pandemic has been to adapt such technology to meet the traditional manner in which we conduct litigation in our courts. What we have not done is to adapt the adjectival or procedural aspects of the judicial process as they currently exist (and have done since time immemorial), to meet the needs of the digitalized world as it has evolved and now subsists.
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 these matters constitute the essential elements of justice, the administration of justice or access to justice.

Are the requirements of a physical building, the physical presence of the actors, namely the judges sitting at their elevated Benches, lawyers submitting below from the Bar, witnesses being physically present in the witness box and litigants physically observing the proceedings, so essential to the administration of justice, that justice is somehow endangered without these physical elements? In other words, is the traditional mode of conduct of dispute resolution the only acceptable means of achieving justice?

The Rule of Law and Virtual Courts

Surely not. To my mind, **the test to be adopted in ascertaining whether justice is jeopardized is analyzing 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, meaning for example, that the rules of natural justice are complied with and the essentials of a fair trial are complied with. This is guaranteed under our Federal Constitution and is sufficient to instill 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 in the context of a virtual medium:**

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

(b) **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[2];

(c) **Compliance with the rules of natural justic**e, meaning that parties have, for example, access to legal advice and evidence, records and documents utilized throughout the court process;

(d) **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;

(e) **An independent judiciary** which is also conversant with functioning in a paperless virtual medium;

Given these indicia, it follows that the use of remote technology **<u>does</u>** accord the opportunity to litigants and their counsel to procure the

[2] The Courts, the Remote Hearing and the Pandemic: From Action to Reflection by Michael Legg and Anthony Song UNSW Law Journal Volume 44(1) 126

attendance and examination as well as cross-examination of witnesses in conditions that are equivalent for all the parties to the dispute. And it is that which comprises 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 counsel and their clients resulted in reports that virtual hearings amounted to an effectively second-rate experience. These matters constitute a summary of common initial reactions. 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:

(a) 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;

(b) The use of good quality technology eases a great many of the initial complaints –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;

(c) "Tricks" such as breakdowns disrupting an important point in cross-examination are recognized as attempts to avoid a question;

(d) 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.

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 adaptation to the new medium become inevitable. When one speaks of innovation i.e. creation and adaptation –one has to envisage and consider new methods of working so as to resolve perennial problems, like access to justice.

Allow me to project on an idealistic basis to the future of a technologically driven environment which facilitates access to justice: Today, more people have access to a smart phone than ever before – be it in remote or urban areas. If a person with a grievance is able to communicate his problem by use of technology i.e. a smartphone, to a central body in his village, district etc which has been set up as the first stage of government assisted legal aid (whether by the use of AI or otherwise) and can have his problem navigated to the correct channels, then he will be heard and

will be told if it is indeed a problem that requires resolution legally. Adequate legal aid centers placed strategically to deal with such problems should be provided to enable and facilitate the lodging or filing of cases at the correct tribunals to enable the aggrieved person to take his complaint to the correct adjudicator.

In a simple case, eventually AI may even assist the aggrieved person as to what his legal complaint is, where it is to be taken, the prospects of success and assistance to effect such a claim. Alternatively, mediation may be suggested and that avenue pursued. This is for the future, but perhaps not as far away as we think.

We should recognize that the single most important feature of technology in jurisdictions such as ours is that it affords a basis to facilitate those large segments of the population who have no access to justice presently, to be afforded an opportunity to be heard and to procure a remedy for their particular grievance, simply by using technology available to them.

Conclusion

In conclusion, coming back to the present, it appears to be inevitable that remote or virtual hearings have been reasonably successful in coping with the pandemic. The pandemic however does not seem to be going away for good and it cannot confidently be assumed that normality as we knew it in 2019 will be restored.

There is no reason why the optimal aspects of technology should not continue beyond the pandemic. While there are serious concerns with regards to the potential for unfairness to prevail in certain types of cases, these concerns can be addressed for the larger range of complaints and claims within the community. As such the best approach at this juncture, would be to learn, innovate and evolve on a daily basis, while monitoring

virtual proceedings to ensure that the fundamentals of the Rule of Law are maintained.

What is needed from all stakeholders in their quest for an ideal system of access to justice is to comprehend and accept that technology provides us a new and exciting way in which to facilitate access to justice. This will require us to adopt a case specific approach and practice which draws on judicial wisdom and discretion to innovate practical solutions which are not readily found in a textbook, and which provide that all important fundamental, access to justice.

After all, as stakeholders in the justice system/lawyers, in one form or another, we have a duty, both professional and honourable (a most unfashionable word these days) to serve the needs of all segments of our society, the poor, the rich, the under-represented, the popular, the unpopular, the wronged and those who wrong, without discrimination but in accordance with our code of ethics, to ensure that all of society enjoys equal access to justice, not just a favoured few.

Nallini Pathmanathan
Judge of the Federal Court
17 August 2021