CHAPTER I

INTRODUCTION

Today's modern society with its manifold complexity demands that the legal profession play a major role in providing practical guidance to the public. The variety of transactions and services rendered by the lawyers in doing so extends beyond the field of strict law. It includes the giving of practical advice which closely affects life, property and other rights, which may not necessarily fall within the sphere of strict law. As such, an impact of law as an active and permanent element in society has been greatly felt, especially in a developing country like Malaysia. The versatile personalities of lawyers is therefore a result of their close interaction with the public.

Consequently, in the light of such social background the law has become such a great institution that greatly affects the daily life of the public. It has now become a pre-requisite that there should be a maintenance of a high and rigid standard of professional discipline and etiquette. The need for regulating the conduct and discipline of the members of the legal profession cannot be ignored. It is of utmost importance to enforce on all members a high standard of conduct and duty to safeguard the public from any means of exploitation. Any deviation from the prescribed conduct will tend to erode public confidence in the profession, which in turn, will undermine the entire legal system and eventually weaken the administration of justice.

It is, therefore, greatly desired that there should be some means as how the legal profession should be effectively regulated in its practices

for the profession is not without its black sheep among them. The members of the legal profession are in a special position in society as a fiduciary and there is an expectation that certain ethical rules are to be observed that would demand a restrained and honourable deportment. It is lamentable to note that there are practitioners who do not consistently adhere to the professional duties and rules in the codes of legal ethics.

"Discipline in the Legal Profession" is therefore an attempt to examine the existing disciplinary machinery of the legal profession. It is a study of the various kinds of misconduct which give rise to disciplinary action and its repercussions on the public. In studying the discipline of the legal profession, reference was made only to offences which are peculiar to the profession but not including misbehaviour in court. It was originally intended that the scope of this paper was merely to examine the integrity and ethics of the Malaysian legal profession, the crux of which would be the malpractices committed by lawyers. However, it was distressing to note that the scope of study has been substantially reduced due to restrictions and difficulties encountered along the way in obtaining statistics and information as well as conducting the survey. It is to be stressed at the outset that there had been a lack of systematic information regarding disciplinary action. This has deprived the writer of valuable information, and, instead, she had to rely primarily on broad opinions through interviews rather than having statistically reliable evidence. The limited information so far collected makes it impossible

to produce a complete work and it would appear to be a superficial piece of scholarship. Therefore, this dissertation makes no claim to be comprehensive.

The writer wishes to stress that this subject was written primarily for academic purposes. It was not her intention to magnify the imperfections and inadequacies of the legal profession or to throw doubts in the honour and integrity of the profession. It is inevitable that the shortcomings of the profession is exposed and the questions arose as to whether publicity of such findings would tend to lower the reputation of the entire profession generally. This leads to the problem of how to strike the balance between public interest and guarding the interests of the profession. The people concerned were very adament of guarding their professional interests and it had been the writer's discouraging and frustrating experience in finding so. The writer is aware that disciplinary action taken at the investigating level is of a confidential nature and it is quite understandable that the authorities would wish it to remain that way. What the writer did not understand was why she was denied of any access to the necessary information for the tabulation of statistics and the classification of the nature of offences. This was certainly the writer's biggest problem in conducting the legal research.

As the situation stands today, the legal profession in Malaysia is regionally divided, with different governing statutes being applicable. In West Malaysia, the statute that is currently in force is the Advocates and Solicitors Ordinance 1947. In Sabah and Sarawak, the governing statutes are the Advocates Ordinance 1953 (Cap. 2) and Advocates Ordinance 1953 (Cap.110) of each state respectively. As a result of constitutional provisions, there had come into existence two separate High Courts, i.e.,

the West Malaysian and East Malaysian High Courts, each with separate jurisdictions. The separate jurisdictions is especially felt in the admission of advocates and solicitors. Each High Court has discretion to admit qualified persons as advocates and solicitors of their respective High Courts and yet, each statute has their own definition of qualified persons. The situation reached a ridiculous extreme when the first batch of law students graduated from the University of Malaya and they were not recognised as qualified persons in Sabah and Sarawak, as there were no provisions to that effect. It is appalling to note that a qualification obtained within a country is not recognised within the country itself. It is, however, heartening to note that the provision of the East Malaysian statutes had been amended to allow the recognition of local qualifications.[1]

In the light of such inconsistencies, the birth of the Legal Profession Act, 1976 is a welcoming gesture. It is an Act to consolidate the law governing the legal profession in Malaysia and it is hoped that with the implementation of the new Act, there will be one common statute governing the legal profession in this country. However, there are still certain lacum that had been left unfilled. In the new Act, there is no definition of High Court and S.3 of the Act defines "court" to mean the High Court or a Judge thereof when sitting in open court and "Judge" means a Judge of the High Court sitting in chambers. As there are two High Courts in existence, the Act has failed to specify the particular High Court. Similarly, in the appointment of dates for the coming into operation of the Act by a Minister, it was not specifically defined which

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1. Straits Times, 20th July, 1976 p.6.

Minister and it was only presumed that it is the Minister of Law and Attorney-General.

The Legal Profession Act, 1976, had been passed by Parliament, received the Royal Assent on 6th March, 1976 but until today have not yet ~~so~~ become law, as required under S.1. It seeks to amend and consolidate the law relating to the legal profession in Malaysia and has introduced new provision which would have far reaching consequences on the development of the legal profession in Malaysia. As the Minister has not yet announced the date of it coming into force, the Act is still in its transitional stage whereby its legal status has yet to be determined. But since the Act had been passed by Parliament, it would only be a matter of time before it comes into force.

The growth of the legal profession in this country had been remarkable. An insight reveals that there were 302 legal practitioners in 1947, 486 practitioners in 1957, 962 practitioners in 1967, and todate, 1706 practitioners. By 1977, there should be about 2,000 legal practitioners in the country.[2] However, only 997 members of the profession are in active practice throughout the country.[3] It is worthwhile to note that the above statistics do not cover practitioners that had graduated from Australia and New Zealand. As the situation now stands, only East Malaysia recognises qualifications from those two countries. It is also not provided in the new Act and S.3 states that "qualified persons" mean any person who has passed the final examination leading to the degree of Bachelor of Laws of the University of Singapore or of the University of Malaya, is a barrister of England or is in possession of such other qualifications as may by

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2. Dewan Negara - Datuk Athi Mahappan's speech on the Legal Profession Bill, 1975 on 12.1.76.

3. Bar Council statistics as found in the Law List.

notification in the Gazette be declared by the Bar Council on the advice of the Board to be sufficient to make a person a qualified person for the purposes of this Act. Graduates from Australia and New Zealand could therefore still be recognised under the Act if they fall under this last limb of the provision.

The marked increase in the population of lawyers understandably explains the need to regulate its professional activities. When more and more lawyers compete in the market, the tendencies of defection become more acute. More often than not, in the pursuit of success and monetary benefits, values tend to get diluted, and when that happens, competency and integrity would suffer. Where the foundation of the profession is based on private practice, it is a common occurrence that there would be some members who would take advantage of the situation to make fast gains for themselves. Every profession is capable of exploiting the public. Its members had on occasions done so, and the lawyers' opportunities lie in its immmerable relationship with individuals.

In regulating the conduct and discipline of its ever increasing members, it had found to be desirable that there should be statutes that should govern the profession. A number of statutes had been passed which govern the various aspects of the practices of the practitioners. One of the earliest statutes were the Advocates and Solicitors Enactment 1914, of the Federated Malay States, subsequently amended by Advocates and Solicitors Enactment, 1940. The Advocates and Solicitors Ordinance, 1947 was essentially based on the earlier enactments, a consolidation of the different enactments of the Federated Malay States, the Straits Settlement and Johore. The legal profession in Peninsular Malaysia is currently governed by the Advocates and Solicitors Ordinance, 1947. Apart from these

statutory provisions, the power to make rules are also entrusted in the hands of the disciplinary body, the Bar Council. The Rules of Practice and Etiquette 1948 is one of its kind. The Solicitors Accounts Rules 1974 is another of those rules made under the enabling powers vested in the Bar Council. Together with it, is the Accountant Certificate Rules 1974. These rules were made in pursuant of the powers conferred by the 1947 Ordinance which have the force of law. They are also governed by the Second Schedule, Part I (Order XXXVII Rule 2) of the Subordinate Courts Rules, 1950, which governs solicitors' costs.

Lately, there had been a growing need and awareness of the necessity to update the existing law governing the legal profession. Situations have vastly changed and within this almost thirty years, the 1947 provisions had not been able to keep pace with the passage of time. Modifications and innovations are necessary to suit the present day need of changes and greater protection of the public would be also desired. The central aim of the Act is to foster and sustain the high standard of the legal profession and to regulate the conduct of its ever increasing members. Some of the old provisions had been amended to suit the modern trends and there were also some commendable new provisions which were aimed to protect the public. One of them is the Compensations Fund introduced to serve as a security against loss to a client due to the dishonesty of a practitioner. Another worthy provisions is the provision that prevents a practitioner from acting both for vendor and purchaser but this is limited to transactions relating to real property only. As this would result in the oppression of the public, such new provisions had become necessary in the light of the present day dealings in the legal profession, as the public, being vulnerable to get

exploited, would inevitably become victims of such exploitation by the unscrupulous members of the profession. The additional provisions mean additional usefulness for a lawyer as a public man and further provide better protection for the public.

The Legal Profession Act, 1976 is the most important piece of legislation introduced for the legal profession and the writer has concentrated mainly on the provisions of this new Act for authority and reference as it is felt that the new Act is of more relevance and more suited to today's modern needs and conditions.

The organisations of the chapters are relatively simple as it revolves around the category of offences committed, followed by the machinery of disciplinary control and finally, the recommendations for public protection. The writer has included the subject of professional negligence under the chapter on disciplinary action although it does not really fall under such a chapter as professional negligence is not a misconduct that comes within the jurisdiction of the Bar Council, as a disciplinary body, but falls within the purview of the civil law of negligence. The topic was attached to the chapter as it is felt that by such arrangement, misconduct and professional negligence would be more distinguishable. Professional negligence is tied with the question of a fused profession which is still an unanswered question in the Malaysian legal system. In treating the subject of public protection, the writer had dealt it by combining the provisions of the Legal Profession Act, 1976 which are curative in nature (like that of the Compensation Fund) and the writer's own views as to what recommendations are to be suggested. The writer's views are mainly preventive in nature, in the sense that there

should be an awareness of the impending mischief and steps should be taken before the injury. The provision of the Act is mainly to cure an existing defect and to a certain extent, the damage had already been done, and the provisions are meant to remedy the defects.