

OPENING OF THE LEGAL YEAR 2022

ADDRESS BY ANTONIO SIM PEAK KHIONG

PRESIDENT OF THE ADVOCATES ASSOCIATION OF SARAWAK

21st JANUARY 2022 @ KOTA KINABALU

MAY IT PLEASE:

- 1) The Right Honourable Tun Tengku Maimun Binti Tuan Mat, Chief Justice of Malaysia;
- 2) The Right Honourable Tan Sri Rohana Binti Yusuf, President of the Court of Appeal;
- 3) The Right Honourable Tan Sri Dato' Sri Azahar Bin Mohamed, Chief Judge of Malaya;
- 4) The Right Honourable Tan Sri Dato' Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak;
- 5) The Honourable Tan Sri Idrus bin Harun, Attorney General of Malaysia;
- 6) Honourable Members of the Judicial Appointments Commission;
- 7) Honourable Judges of the High Court and Judicial Commissioners;
- 8) The Honourable Chief Registrar of the Federal Court;
- 9) The Honourable Tan Sri Datuk Seri Panglima David Wong Dak Wah, former Chief Judge of Sabah and Sarawak;
- 10) The Honourable Datuk Seri Panglima Sr. Haji Safar bin Untong, Sabah State Secretary;
- 11) Registrars of the Court of Appeal, High Court in Malaya, High Court in Sabah and Sarawak and Subordinate Court of Sabah and Sarawak;

- 12) The Honourable State Attorney General of Sabah, Datuk Nor Asiah binti Mohd Yusof and Deputy State Attorney General of Sarawak, Tuan Saferi bin Ali;
- 13) Head and Representatives of the Federal and State Government Agencies;
- 14) President of the Sabah Law Society and President of the Bar Council;
- 15) Judicial and Legal Officers, Distinguished guests, Members of the Bar, members of the media, ladies and gentlemen.

My Lady and My Lord

1. It is my profound pleasure and honour to be upstanding here today to address Your Ladyship and Your Lordship on behalf of the Advocates Association of Sarawak (“**AAS**”) on the occasion of the Opening of Legal Year 2022 although in a scaled down version compared to previous opening of legal years. I do believe that most of us in attendance today have fond memories of the pomp and splendor of the past Openings of Legal Year, which was organized in various cities/towns in Sabah & Sarawak, thereby enabling us all an opportunity to see and experience the local specialties these beautiful Borneo States have to offer.
2. While we direct our attention towards the future that lies ahead of us, we must first recognize the past that we have endured, and a reference to the past 2 years cannot be spoken without highlighting the Covid-19 pandemic. The pandemic has raised its ugly head in a few waves and this has curbed many of our usual activities. Needless to say that we are now living in an environment of “new norms” where our movements are guided by the SOP issued and amended by the government from time to time. For our guests attending this event from Peninsula Malaysia, you would have realized that we have our own set of SOP’s for each Borneo State – to which you must have further noted, differs from the SOP’s issued by the Federal Authorities.

This is of course a result of the special position Sabah and Sarawak enjoys as provided in the Malaysia Agreement 1963.

3. At this juncture, I must record our Association's pleasure in noting the long awaited steps taken by the Federal government to restore the special position of Sabah and Sarawak in Malaysia. 14th December 2021 was a historic day when the Dewan Rakyat gave recognition to the Malaysia Agreement 1963 (MA63) under the definition of "**the Federation**" by amending the Federal Constitution, placing the Malaysia Agreement 1963 at equal footing with Federation of Malaya Agreement 1957. Upon the passage of the bill, Articles 1(2) and Article 160(2) of the Federal Constitution gave recognition to the Malaysia Agreement 1963 in the Federal Constitution where previously there was no reference made to the same.

We look forward to seeing more constitutional reforms or recognitions being made in the near future in line with the assurances, undertakings and recommendations contained in Chapter 3 of the Inter-Governmental Committee (IGC) Report 1962 read together with Article 8 of the Malaysia Agreement 1963, of particular interest to the AAS is the restoration of the rights of Sabah and Sarawak to have its own Judicial Commission. To this end, our Association has been in communication with the Honourable Minister Datuk Seri Penglima Dr. Maximus Johnity Ongkili, Minister in the Prime Minister Department (Sabah and Sarawak Affairs) requesting that the AAS be included in the committee on Judicial Issues in particular relating to Malaysia Agreement 1963.

Our Association will also engage with the Minister in the Prime Minister Department (Parliament and Law) Datuk Seri Wan Junaidi Tuanku Jaafar to advance the position of the Advocates Association of Sarawak concerning MA63 – in that all the special constitutional rights as spelt out in the "18 points memorandum" ought be restored to Sarawak. At this juncture, the Advocates Association of Sarawak wishes to convey our heartfelt kudos to Datuk Seri Wan Junaidi Tuanku Jaafar and his team in pushing through the necessary

amendments to the Federal Constitution despite only being in office for a mere 4 months prior.

Our Association welcomes such amendments and fervently look forward to the changes that are to come. Lest we forget the sage words of Tun Datuk Patinggi Temenggong Jugah anak Barieng, who represented Sarawak in signing the Malaysia Agreement on 9th July 1963 who said:-

“Anang Malaysia sebaka tebu, manis di pohon, tawal di hujung.”

(Translated it means: Malaysia should not be like the sugar cane, sweet at the start but the sweetness diminishes towards the end.)

4. While we are on the topic of reforms, allow me to take this opportunity to highlight other significant amendments which the Advocates Association of Sarawak finds is necessary in light of the recent amendments to the Federal Constitution. In as far as the Court of Judicature Act 1964 is concerned, the Advocates Association of Sarawak’s stand is it should be amended to reflect the position, that there should be a Judge with Bornean judicial experiences sitting on the appellate panel hearing appeals which originate from Sabah and Sarawak. This is in line with the InterGovernmental Committee (IGC) Report 1962 (para 26(4), Ch 3, 1962 read together Article 8 of MA63). We are fortunate and grateful that Your Ladyship had seen fit to continue the previous practice in requiring the presence of a Judge with Bornean Judicial experience in an appellate panel hearing appeals which originate from Sabah and Sarawak. The Advocates Association of Sarawak opine that this is the appropriate time that such practices to be made law and reflected in the Court of Judicature Act 1964. With much caution, I note that the Inter-Governmental Committee (IGC) Report 1962’s recommendation was not practised in previous landmark cases, for example in the 2016 Federal Court’s decision in the case of involving Sarawak Native Customary Rights in Director of Forest, Sarawak & Anor v TR Sandah Tabau & Ors [2017] 3 CLJ 1.

We are also of the view that for the Bornean states, appointment and promotion of officers and judges ought to be considered only within the context of judges and officers of the Borneo States. Such appointments and

promotions ought not be pooled together with the judges and officers for Peninsula Malaysia.

We look forward to the amendments to the required law in tandem with the recent amendments to the Federal Constitution.

My Lady and My Lord

Access to Justice & the New Normal

5. Coming back to the theme of the Opening of the Legal Year 2022, “Access to Justice and the New Normal”. Upon the Covid-19 pandemic, the legal fraternity was bombarded with inquiries which center around one point – How will we continue with legal practice under such disabling restrictions? At this juncture, the AAS wishes to record its commendations towards the Judiciary in firstly identifying the constraints, in engaging with the stakeholders which include the AAS, in adapting/improvising to the challenges, and finally, in overcoming the challenges set by the on-going Covid-19 restrictions.

It is opportune to remember that **“the judicial wheel is rounded with equality, oiled with honour and functions smoothly with honesty – principally when both members of the Bench and Bar shoulder their responsibilities seriously.”** - Pt. Kanhaiya Lal Misra.

It is with such wisdom that the Judiciary and the legal fraternity had bound together to overcome the challenges faced by both the Judiciary and the legal fraternity in continuing legal practice in a safe environment taking into account of the on-going pandemic, whilst at all times ensuring that the rights of accused and litigants are not impaired. We must record that the feedback received from the digital transformation of legal practice has been positive, and has definitely improved access to justice for all, regardless of the locality of the accused or litigant.

6. We in Sabah and Sarawak, to a large extent have had the roots of remote hearings firmly planted in our legal practice ever since 2007 upon the

introduction of the Video Conferencing system. Thereafter, the Integrated Court Solutions (ICS) and the Case Management System (CMS) were introduced in Sabah and Sarawak in 2009. With this digital platform, we have had the opportunity in attending to cases 'remotely' using the Video-Conferencing platform – where advocates based in a division of Sarawak eg. Miri could attend to their cases in Kuching without having to step foot out of Miri. For over a decade now, Advocates in Sarawak were also attending to filing of documents and attending to review/case management by electronic means. Between January to December 2020, the video conferencing platform was used by Advocates in Sarawak to attend to over 7,000 Mentions/Case Managements/Hearings in the High Court. Between January to December 2021, the High Courts in Sarawak had disposed off almost 1500 cases using online platform. This statistics shows that the digital platform has been well adopted and embraced in Sarawak.

It is worth noting that the practice of law in Sarawak, being the largest state in Malaysia, is stretched between 124,450 km² and we have active legal practitioners all the way up north, in Lawas to the south in Kuching.

Therefore, having access to the digital platform had truly enhanced legal practice in Sabah and Sarawak in the last decade.

At this juncture, it would be remiss of me if I did not highlight that the ICS, CMS and Video-Conferencing systems were the brainchild of none other than Tun Richard Malanjum, the then Chief Judge of Sabah and Sarawak. The platform was further enhanced under Tan Sri Datuk Seri Panglima David Wong Dak Wah during his tenure as Chief Judge of Sabah and Sarawak.

And now, under our current Chief Judge of Sabah and Sarawak, Tan Sri Dato' Abang Iskandar bin Abang Hashim, we have a further enhanced system with the implementation of the e-Kehakiman Sabah and Sarawak (eKSS) Project for Video Conferencing Module called V-COSS. The current system has important enhancements which allow other government agencies to access to the system, where now, hearings can be conducted without having to transfer the accused to the relevant court house as the prison

department also has access to the V-COSS system. We have been made to understand that the system is being enhanced further to allow access to advocates from the comfort of their own chambers, thus, we look forward to such implementations.

Acting upon a request from the Judiciary, the AAS had also sponsored HP Notebooks with accessories needed to conduct virtual hearings for a pilot project at the Tabuan Jaya and Siburan police stations in Kuching, Sarawak to facilitate the V-COSS system. With these hardware, we have assisted to create a smoother and safer operation of the criminal justice hearing system and at the same time to curb the spread of Covid-19 cases through virtual hearing of cases.

7. On the front of access to justice, I am pleased to update that the AAS through its members have been playing an active role in fulfilling its social responsibility in providing access to legal representation to the part of the society which requires assistance. In this regards, I note as follows:

i). YBGK

The AAS have been actively conducting YBGK training sessions to equip advocates with the necessary skills required to providing legal representation under YBGK to the suspects. In fact, our Sarawak Advocates were appearing before the courts even during the MCO periods attending to cases involving breach of the Movement Control Orders and attending to revisions before the courts.

We have also noted that there has been an increase in advocates taking up YBGK cases throughout Sarawak, and we look forward to equip more advocates to take up trials and appeals in the near future.

ii). Assigned Counsel Cases

The AAS under each of its four branches have been working together with local courts to set up a list of advocates whom are qualified to take up assign counsel cases in the High Court.

I am pleased to note that our members have taken up all requests for assigned counsel and there are no accused persons being unrepresented under capital punishment cases in Sarawak.

iii) Pusat Mediasi Covid-19 (PMC-19)

PMC-19 is a Government led mediation centre under Bahagian Hal Ehwal Undang-undang (BHEUU) set up by the Government pursuant to Section 9 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (Act 829).

The operation of PMC-19 has since been extended to 22.10.2022 and our Association having been appointed as a Mediation Service Provider will continue to collaborate with BHEUU to provide this service to the public.

iv) Outreach programs

The AAS have been actively involved together with the Sarawak Judiciary in organizing community outreach programs to reach out to longhouse folks of Sarawak. For the AAS, our primary goal is to empower children of the interior schools and longhouses with the knowledge of their rights, and in specific to instill early awareness of Sexual Offences Against Children, and to this end, we are grateful to have the tremendous support of the CRIB Foundation. Our secondary goal is to ensure that the children and the longhouse community are documented and issued with their personal Malaysian Identity Cards. Our programs was also to provide the children with some basic needs which include school bags, books/reading materials, personal hygiene and sanitary items.

Our first foray into the interior community outreach was the 2018 project in Long Lellang, jointly organized with the Sarawak Judiciary. This program entailed a Sexual Awareness Talk and Environment Talk held at the SK Long Lellang School, including a host of events for

children and its residents including Malaysia Identity Card registrations.

Our second program was the SK Batu Bungan – 2019 project, also jointly organized with the Sarawak Judiciary. Together with the Sexual Awareness and Environment Talk held at SK Batu Bungan, this program also included a medical mission for the residents wherein the AAS, with the assistance of Doctors, Dental Surgeons and eye specialist from the Miri Hospital, had conducted Dental, Eyes and General Health Screening.

The third interior outreach program was also in late 2019 at the Rh Laso, Nanga Antawau, Baleh Kapit. This program was organized by the Sarawak Judiciary and the AAS participated in the program by setting up a booth to provide legal advice to the 160 *pintu* longhouse community in Baleh. The AAS also participated in community engagements activities during this program. The AAS wishes to record our sincere appreciation to Yang Arif Tuan Dean Wayne Daly for spearheading the three outreach programs.

The byproduct of these programs is the opportunity created for the interior folks to have access to justice through obtaining legal representation/advice. The AAS shall continue its efforts on this front and have scheduled an outreach program in Bario sometime in May-June 2022 subject of course to the existing SOP. We look forward to having Your Ladyship and Your Lordship to join us during the next outreach program in Bario.

8. While we are on the topic of access to justice, allow me to share the position of the AAS concerning the proposed amendments to Section 68(1)(a) of the Courts of Judicature Act 1964, wherein it has been proposed for the threshold value to be increased from RM250,000.00 to RM1 Million. It is the position of the AAS that by such an amendment, we would be creating unnecessary additional hurdles on litigants. Such hurdles include legal costs, time and uncertainty over the position of appeals. It is our humble position that it would be most unnecessary to impose such hurdles upon litigants which perhaps

has the effect of impeding the public's access to legal recourse. Such actions appears to go against the principles of 'access to justice'.

My Lady and My Lord

Social Responsibility Programs

9. Although we recognize that the AAS is a professional legal body which was set up to govern its members, our branch members refused to sit idle knowing that certain members of the community are more adversely affected as compared to others. The AAS through its Miri Branch, under the leadership of Gurvir Singh Sandhu had collaborated with reputable Non-Government Organizations (NGOs) to raise funds through sponsorships and carried a number of social responsibility programs during the Pandemic which I note as follows:-

- i) Extension of the Molecular Lab at Miri General Hospital to alleviate the congestions and delays in processing of PCR Swab Tests whereby the capacity of testing had been increased from 800 tests to 1400 tests per day and the waiting period for the tests result had been reduced from 72 hours to 24 hours.
- ii) Drive-Thru Pharmacy at Miri General Hospital and Tudan Polyclinic to enable patients to obtain their medications at the Drive-Thru Pharmacy to reduce the patients' exposure to the Covid-19. Both Drive-Thru Pharmacies cater to about 350 patients per day.
- iii) Drive-Thru PCR Swab Testing and Vaccination Facility at Miri Indoor Stadium to alleviate the congestion at the Miri Indoor Stadium. The said facility had been successfully set up and handed over to the Ministry of Health.
- iv) Enhancing the Vaccine Delivery Facility at Datuk Lee Teck Fook Hall at Riam Secondary School, Miri.

- v) Food Baskets and Contributions to the Public affected by the Covid-19 pandemic including but not limited to:
- (a) Weekly relief of fresh fruits and food essentials to the Covid-19 patients in Miri General Hospital Quarantine Centre, the Petronas Games Village and Pujut Quarantine Centre.
 - (b) Provision of food, hygiene and sanitary items to Miri Prison for about 454 prisoners and 135 guards. This was done in response to the spike in cases affecting Miri Prison.
 - (c) Delivery of Food Basket to Rh Angan in Batu Niah – This project was as result of a call for assistance received from KKM, as this longhouse had 330 occupants and was placed under EMCO.
 - (d) Contribution of food essential twice weekly to YB Datuk Sebastian Ting's food bank.
 - (e) Purchase of personal protective equipment (PPE) for Miri Hospital. This was an answer to a call made by the director of the Miri Hospital for the urgent purchase of PPE for the use of doctors and nurses in the Covid-19 ward.

The AAS Miri Branch had raised the total sum of RM1,068,700.00 to implement these projects.

- vi) The AAS through its Sibul Branch had together with Judiciary in Sibul collectively raised a sum of RM45,000.00 as donations and distributed food supplies to 500 needy families comprising of single mother, rural folk and the unemployed during the peak period of the pandemic. To this end, we wish to record our sincere appreciation towards Yang Arif Tuan Christopher Chin Soo Yin, the Judicial Commissioner in Sibul for spearheading this effort.

My Lady and My Lord

Vaccination of Advocates

10. AAS through its Kuching, Sibul, Miri and Bintulu Branches had engaged with relevant authorities to enable Advocates to receive their vaccination at relevant vaccination delivery facilities. Through these engagements, Advocates were allocated and received their vaccination which enabled them to continue their duty to the public during the Movement Control Orders. The first batch of advocates in Miri received their first vaccine dose on 15th June 2021. All advocates (including pupil in chambers) under the vaccination list received their first dose by 27th June 2021 and almost all advocates in Sarawak had their 1st dose of vaccination by the 3rd quarter of 2021.

My Lady and My Lord

Inquiry Committee

11. From 2019 to 2021, there were 63 cases that had been lodged to the Inquiry Committee of Sarawak on disciplinary issues against Advocates. Under the Chairmanship of Mr. John Ko Wai Seng, the Inquiry Committee had deliberated and heard most of these complaints and numerous decided cases had been forwarded to AAS Central to have the matters referred to the High Court for further action. Members of the Inquiry Committee are in the process of discussing some proposals to enact the Advocates (Disciplinary Proceedings) Rules and some amendments to empower the Inquiry Committee with disciplinary powers.

My Lady and My Lord

Independence of Judiciary

12. Allow me to begin by sharing a quote from the previous Lord Chief Justice of England and Wales, Lord Philips of Worth Matravers:-

“A judge should value his independence above gold. Not for his or her own benefit, but because it is of the essence of the rule of law, and a judge should care passionately for the rule of law. It is the satisfaction

of reaching decisions without fear or favour, affection or ill-will that makes being a judge a vocation that has no equal.”

As of late, the Judiciary have been encumbered with a number of high-profile cases involving senior government officials and politicians. We must commend the conduct of the Judges in the handling of such cases without fear or favour.

Allow me now to share the sage words of My Lady during the recent Induction Programme For Judicial Commissioners held on 29 March 2021:-

“[10] Hence, it is paramount that you do not destroy the foundation of the judiciary by paying scant regard to the concept of judicial power. The trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the judiciary. You should remain independent and decide cases without fear or favour and without any pressure from any quarters, whether internal or external. You should always act with dignity and perform your duties to the highest standards to uphold and maintain the integrity of your office. You have to decide a matter before you impartially by giving all parties an opportunity to be heard and by treating them fairly.

May such advice be a timely reminder to all on the independence of the judiciary.

Further reference have to be made to the recent allegations made by the former Prime Minister, Tan Sri Dato’ Muhyiddin Yassin in the media concerning alleged appeals made to him from individuals to interfere in court matters. AAS is of the view that a police report should be lodged and relevant authority should and must investigate such allegations. We urge the former prime minister to lodge a police report over what had allegedly transpired so that the relevant authorities can investigate the matter as they are serious allegations that goes to the very root of the administration of Justice and the independence of the Judiciary.

We are pleased to note the My Lady had address these allegations during the press conference held after the Opening of the Legal Year at the Palace of Justice on 14th January 2022 informing the public that My Lady and none of the Judges had been approached.

13. The AAS takes the position in tandem with the then Lord Chief Justice of England and Wales, Lord Philips of Worth Matravers, shared during the Commonwealth Law Conference 2007 in Nairobi, Kenya, wherein His Lordship shared his view on what creates an environment of Judicial Independence. Of significance, among others, is a position which I believe most if not all judges would agree with – and that is, Judges and Judicial Officers ought to be sufficiently paid. The merits to this argument should be apparent to all.

Another significant point is that Judges ought to have security of tenure. His Lordship shared the following opinion:-

“What is essential is that the judge should not have to depend upon the decision of the executive either to obtain or to keep his office, for such dependence might incline him to favour the interests of the executive when performing his duties”

The AAS shares this opinion and urges the government to consider a more conducive environment to allow judges to continue dispensing justice without fear or favour.

The AAS also shares the view that in order for the Judiciary to be truly independent, ‘judicial services’ must be separated from ‘legal services’. Under the present system pursuant to Article 138 of the Federal Constitution, both the judicial officers and the legal officers are all deemed as being under one service and are inter-changeable in terms of postings, and are all placed under a single service commission, namely, the Judicial and Legal Service Commission. Also, under the existing system, the Attorney General dictates administrative control over Judicial Officers. The AAS is of the view that this present system is most unsuitable, and perhaps the most appropriate system would be one where the administrative control over Judicial Officers be placed

under the Chief Registrar of the Federal Court, and headed by the Chief Justice as the head of the Judiciary.

It is our sincere hope that the government would work towards this end to implement these institutional reforms without delay to further preserve the independence of the Judiciary.

My Lady and My Lord

Moving forward

14. The AAS welcomes the position of the Judiciary in its commitment of continuing with the use of virtual hearings. The AAS fully support My Ladyship's statement in the Opening of Legal Year 2022 speech in the Palace of Justice where we are delighted to note that online hearing will be a permanent feature of our justice system and there is no question of 'reverting' back to the 'old norm'. However, we note that advocates have been recently informed that the Court of Appeal sitting in Sarawak have been scheduled for hearings before the open court, we are of the view that since we have taken large strides in setting up a fully functioning system, litigants ought to be given the option of proceeding with hearings in virtual mode. This is further considering that we are still hovering between a 'pandemic' and 'endemic' stage.

In regards to conducting trials with the virtual platform, we have received numerous feedback that the existing system in place have to be further tweaked to cater for document heavy contentious matters. We look forward in engaging the Judiciary further in this regards.

15. The pandemic has affected everyone in very different ways. We hope the Courts would be more receptive toward indulging requests made by advocates for adjournment or certain applications made by counsels in the course of trials. We understand that there still exists a number of travel restrictions and the country is still in the pandemic stage. We had been made to understand that there are a number of advocates facing difficulties in

producing witnesses and serving subpoenas. It is our sincere hope that the Courts will be indulgent towards the Advocates' requests.

16. The AAS takes the same stance as the Sabah Law Society that practice directions should be translated to English language when the notification copies are sent to Sarawak as our State official language is English language.

Conclusion

17. On behalf of the Advocates Association of Sarawak, we extend to Your Ladyships and Your Lordships, and members of the Judiciary, the respective State Attorney General's of Sabah and Sarawak, the Federal Attorney General and our learned friends in the Sabah Law Society and Bar Council, the Sarawak Bar's warm wishes and prayers for good health, continuing wisdom, strength and fortitude for the year ahead and stay safe.

My Ladyship and my Lordship, I am much obliged.

Antonio Sim Peak Khiong

President of the Advocates Association of Sarawak